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9 **UNITED STATES BANKRUPTCY COURT**
10 **DISTRICT OF NEVADA**

11 In re
12 AVERY LAND GROUP, LLC, a Nevada
limited liability company,
13
14 Debtor.
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Case Nos. BK-S-16-14995-abl
Chapter 11
**MOTION FOR FINAL ORDER
PURSUANT TO 11 U.S.C. §§ 105, 364,
FED R. BANKR. P. RULE 4001(C) AND
L.R. 4001(B) AND (C): (I)
AUTHORIZING DEBTOR TO OBTAIN
POST-PETITION FINANCING; (II)
GRANTING RELATED RELIEF**
Hearing Date: December 7, 2016
Hearing Time: 1:30 p.m.
Estimated Time for Hearing: 15 minutes

21 Avery Land Group, LLC, debtor and debtor in possession in the above-captioned chapter 11
22 case, (“Debtor” or “Borrower”) hereby files this motion for entry of a final order (the “Final DIP
23 Order”) pursuant to sections 105(a) and 364 of title 11 of the United States Code, 11 U.S.C. §§ 101-
24 1532 (as amended, the “Bankruptcy Code”), Rule 4001(c) of the Federal Rules of Bankruptcy
25 Procedure (the “Bankruptcy Rules”) and Rules 4001(b) and (c) of the Local Rules for the U.S.
26 Bankruptcy Court, District of Nevada (“Local Rules”): (i) authorizing and approving, among other
27 things, Debtor’s obtaining post-petition financing (the “Post-Petition Financing”) from BDH Gypsum
28 (the “Lender”), on a Section 364(c) (2) and (3) secured basis.

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1 Debtor's ability to obtain the Post-Petition Financing is critical to Debtor's ability to continue as
 2 a going concern during the course of this Debtor's chapter 11 bankruptcy case (the "Chapter 11 Case").
 3 The proceeds of the Post-Petition Financing will be used to fund costs of administering Debtor's estate,
 4 including without limitation, wages, payroll, insurance, fuel, utilities, repairs, property taxes, fees
 5 assessed by the Office of the United States Trustee (the "US Trustee Fees") and the fees of the Clerk of
 6 Court ("Court Fees") and allowed fees and expenses of professionals of the estate, as approved by the
 7 Bankruptcy Court ("Professional Fees").

8 Pursuant to Bankruptcy Rule 4001(c), the principal provisions of the Final DIP Order, a
 9 proposed copy of which is attached as **Exhibit "A"** hereto, are as follows (capitalized terms used but
 10 not immediately defined herein shall have the meanings ascribed to them later in this Motion or in the
 11 Credit Agreement, as the case may be):

- 12 (a) **Nature and Amount of Financing**. Pursuant to a credit agreement, substantially in the
 13 form of **Exhibit B** attached to this Motion (the "Credit Agreement" and, collectively with
 14 any other Loan Documents executed by Borrower or any other persons in connection with
 15 the Credit Agreement, the "Loan Documents"), Lender will lend to Debtor up to \$500,000
 cash on a secured basis under §§ 364(c)(2) and (3) of the Bankruptcy Code. (Final DIP
Order ¶ 2, 7, Credit Agreement §2.1, 2.10).
- 16 (b) **Borrowing Limits**. Borrowings under the Post-Petition Financing cannot exceed Loans in
 17 aggregate principal amount of \$500,000, exclusive of interest and Other Loan Related
 18 Claims that are capitalized and added to the principal balance of the Revolving Loans
 pursuant to the terms of the Credit Agreement. (Credit Agreement § 2.9).
- 19 (c) **Borrowing Conditions**. Borrowing(s) under the Post-Petition Financing is conditioned
 20 upon (i) entry of the Final DIP Order authorizing the financing, (ii) Lender's receipt of
 21 Borrower's executed Credit Agreement and related loan documents upon entry of the Final
 22 DIP Order; (iii) no Material Adverse Effect shall have occurred with respect to Borrower,
 23 and (iv) no litigation shall have been commenced or be pending which has not been stayed
 by the commencement of the Chapter 11 Case and which, if successful, would have a
 24 Material Adverse Effect on Borrower taken as a whole, its business or ability to repay the
 Revolving Loans or which would challenge the Credit Agreement, Final DIP Order or the
 transactions contemplated thereby. (Credit Agreement § 4.1).
- 25 (d) **Interest Rate and Origination Fee**. Interest accrues at a fixed rate per annum of 10% shall
 26 accrue upon the entry of the Final DIP Order. There are no origination or other fees.
 27 Accrued Interest is due and payable on the Maturity Date. Accrued interest on the
 Revolving Loans not paid on the Maturity Date will be capitalized and added to the
 28 outstanding principal balance of the Revolving Loans. In the event an Event of Default has
 occurred and is continuing, interest at a rate *per annum* equal to the rate set forth above plus

5.0% (“Default Interest”) from the date of occurrence of such Event of Default until the date such Event of Default is cured or waived. (Credit Agreement § 2.5).

(e) **Maturity Date.** Earlier of December 9, 2021, or the Effective Date of a confirmed Reorganization Plan (Credit Agreement § 1.1 and 2.2).

(f) **Certain Events of Default.** Among other Events of Default under the Credit Agreement, an Event of Default occurs if (i) Borrower fail to timely pay Post-Petition Financing obligations, (ii) proceeds of any Revolving Loan are used to make a payment that is not in strict compliance with Section 2.8 of the Credit Agreement, unless agreed to by Lender, (iii) Borrower materially violates or breaches the Final DIP Order or files any pleadings seeking, joining in, or otherwise consenting to any material violation or breach of the Final DIP Order, (iv) a chapter 11 trustee or examiner with expanded powers is appointed in the Chapter 11 Case, (v) the Chapter 11 Case is converted to a case under chapter 7, or (vi) the Final DIP Order is revoked, reversed, stayed, modified, supplemented or amended without the consent of Lender, (vi) commencement of any suit against Lender that would in any way reduce, set off, or subordinate the Obligations under the Credit Agreement, (vii) the entry of an order in the Chapter 11 Case confirming a plan or plans of reorganization that is not a Lender Approved Reorganization Plan, (viii) the entry of an order in the Chapter 11 Case granting any other Lien equal or superior to that granted to Lender , (ix) orders granting relief from or modifying the automatic stay to permit one or more creditors to execute upon, enforce or perfect a lien on any material asset of the Borrower. (Credit Agreement § 8.1).

(g) **Liens.** Upon the date of entry of Final DIP Order, the Obligations of the Borrower under the Loan Documents shall be secured by a first priority Lien on all unencumbered assets and property of the Borrower (including Avoidance Actions) and a junior Lien on all assets and property of the Borrower that are encumbered by Liens as of the date of the Final DIP Order. (Credit Agreement §§ 2.10(b), (c)).

In accordance with Fed. R. Bankr. P. 4001 and LR 4001, Debtor has identified below, by page and paragraph number, the location of each of the following provisions:

Provision	Contained in Credit Agreement or Proposed Order	Location in Credit Agreement or Proposed Order	Location in Motion
(1) A grant of priority or a lien on property of the estate under § 364(c) or (d).	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Credit Agreement §§ 2.1 (c); Proposed Order, ¶ H, Article VII	p. 7, ¶¶ 8-9; p. 8, line 22 to p. 10, line 14; page 16, lines 20-23
(2) The providing of adequate protection or priority for a claim that arose before the commencement of the case, including the granting of a lien on property of the estate to secure the claim, or the use of property of the estate or credit obtained under § 364 to make cash payments on account of the claim.	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		

Provision	Contained in Credit Agreement or Proposed Order	Location in Credit Agreement or Proposed Order	Location in Motion
(3) A determination of the validity, enforceability, priority, or amount of a claim that arose before the commencement of the case, or of any lien securing the claim.	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
(4) A waiver or modification of Code provisions or applicable rules relating to the automatic stay.	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Credit Agreement § 8.2; Proposed Order, Article X	p. 17, lines 1-3
(5) A waiver or modification of any entity's authority or right to file a plan, seek an extension of time in which the Debtor has the exclusive right to file a plan, request the use of cash collateral under § 363(c), or request authority to obtain credit under § 364.	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
(6) The establishment of deadlines for filing a plan of reorganization, for approval of a disclosure statement, for a hearing on confirmation, or for entry of a confirmation order.	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
(7) A waiver or modification of the applicability of no bankruptcy law relating to the perfection of a lien on property of the estate, or on the foreclosure or other enforcement of the lien.	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
(8) A release, waiver, or limitation on any claim or other cause of action belonging to the estate or the trustee, including any modification of the statute of limitations or other deadline to commence an action.	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
(9) The indemnification of any entity.	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
(10) A release, waiver, or limitation of any right under § 506(c).	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
(11) The granting of a lien on any claim or cause of action arising under §§ 544, 545, 547, 548, 549, 553(b), 723(a), or 724(a).	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Credit Agreement (definition of Collateral) Order, VII	p.3, lines 14-16

In addition to the foregoing relief, Debtor requests that the Court approve Debtor's notice procedures with respect to the Hearing.

1 In further support of this Motion, Debtor relies upon and incorporates by reference the
2 Declaration of James M. Rhodes (the “Rhodes Declaration”) filed concurrently herewith. In further
3 support of this Motion, Debtor submits the following Memorandum of Points and Authorities.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I.**

6 **JURISDICTION AND VENUE**

7 This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334.
8 Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding
9 pursuant to 28 U.S.C. § 157(b). The statutory predicates for the relief sought herein are Bankruptcy
10 Code §§ 105(a) and 364, Bankruptcy Rule 4001 and Local Rule 4001.

11 **II.**

12 **BACKGROUND**

13 1. On September 9, 2016, Debtor commenced its bankruptcy case by filing a voluntary
14 petition for relief under Chapter 11 of the Bankruptcy Code.

15 2. Debtor is operating its business and managing its affairs as Debtor-in-possession
16 pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner, or statutory
17 committee has been appointed in this case.

18 3. Debtor has been in business since 2013 in the development of agricultural land including
19 farming activities. See Rhodes Declaration ¶4.

20 4. Debtor seeks Post-Petition Financing to fund Debtor’s chapter 11 administration general
21 and administrative including, without limitation, wages and expenses for US Trustee Fees, Court Fees
22 and Professional Fees of professionals whose services are required to move this case towards
23 confirmation of a plan of reorganization. These actions will maintain the value of Debtor’s assets, and
24 is in the best interests of Debtor and its creditors. See Rhodes Declaration ¶5.

25 5. If Debtor is unable to obtain Post-Petition Financing, it will be unable to fund the chapter
26 11 administration expenses and reorganize, and thus the value of its estate will be adversely affected.
27 By obtaining Post-Petition Financing, Debtor will be able to funds the necessary costs and expenses to
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1 reorganize which will increase the value of its estate, the Prepetition Lender’s collateral and maximize
2 payments to creditors. See Rhodes Declaration ¶6.

3 6. Lender is an entity related to the Debtor by common ownership. See Rhodes Declaration
4 ¶7.

5 7. In light of the foregoing, Lender is willing to provide such financing on a secured basis
6 pursuant to Bankruptcy Code Section 364(c)(2) and (3). Lender requires a lien on all of Debtor’s
7 unencumbered property and assets (including Avoidance Actions) to secure the financing and a junior
8 lien on all assets and properties of Debtor that are encumbered by liens as of the date of the Final DIP
9 Order. See Rhodes Declaration ¶8.

10 8. Specifically, Lender’ claims under the Credit Agreement and any order approving the
11 Motion shall NOT constitute a superpriority administrative expense pursuant to 11 U.S.C. § 364(c) (1)
12 and 503(b)(1).

13 9. In addition, the other key terms of the proposed Post-Petition Financing are as follows:

14 (a) That there is no Material Adverse Effect and Debtor executes the
15 Credit Agreement and related loan documents, then, Lender will disburse
the Post-Petition Financing to Debtor.

16 (b) If Debtor does not pay interest on the Maturity Date, then such
17 interest will be capitalized and added to the principal of the Revolving
18 Loans. If a Reorganization Plan is confirmed, then the Post-Petition
19 Financing will be paid and satisfied in cash (immediately available funds)
20 on the Effective Date of such confirmed Reorganization Plan.

21 **III.**

22 **LEGAL ARGUMENT**

23 **Debtor Has Satisfied the Legal Requirements for Approval of the DIP Credit Facility.**

24 **1. Debtor Cannot Obtain Financing on Terms More Favorable than Those of the DIP Credit
25 Facility.**

26 Bankruptcy Code section 364 states that a Debtor in possession that is authorized to operate its
27 business may obtain financing either in the ordinary course of business or outside the ordinary course of
28 business. First, Bankruptcy Code section 364(a) allows the Debtor to obtain unsecured credit and to

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1 incur unsecured debt in the ordinary course of business. 11 U.S.C. § 364(a). Second, after notice and a
2 hearing, the Court may authorize a Debtor in possession to obtain unsecured credit or incur unsecured
3 debt outside the ordinary course of business allowable as an administration expense under Bankruptcy
4 Code section 503(b)(1). 11 U.S.C. § 364(b).

5 If the Debtor in possession is unable to obtain unsecured credit on this basis, Bankruptcy Code
6 section 364(c) allows the Court, after notice and a hearing, to authorize the Debtor in possession to
7 obtain credit or to incur debt that has priority over administrative expenses under Bankruptcy Code
8 section 503(b)(1), that is secured by a lien on unencumbered estate property, or that is secured by a
9 junior lien on encumbered estate property. 11 U.S.C. §§ 364(c)(1),(2) and (3).

10 Other than the requirement of notice and a hearing, the only statutory prerequisite under
11 Bankruptcy Code section 364(c) for obtaining credit on a secured basis is that the Debtor in possession
12 must be unable to obtain unsecured credit allowable as an administrative expense under section
13 503(b)(1). 11 U.S.C. § 364(c)(2); see also, In re Garland Corp., 6 B.R. 456, 461 n. 11 (B.A.P. 1st Cir.
14 1980) (secured credit under section 364(c)(2) is authorized, after notice and a hearing, upon showing
15 that unsecured credit cannot be obtained); In re Ames Dept. Stores, Inc., 115 B.R. 34, 37-39 (Bankr.
16 S.D.N.Y. 1990) (Debtor must show that it has made a reasonable effort to seek other sources of
17 financing under sections 364(a) and (b) of the Bankruptcy Code).

18 The Bankruptcy Code offers a Debtor-in-possession additional flexibility to the extent that it
19 needs to borrow additional funds. Bankruptcy Code Section 364 provides a progression of various
20 protections to induce a post-petition lender to extend credit to a Debtor-in-possession. In re Sun Runner
21 Marine, Inc., 945 F.2d. 1089, 1092-93 (9th Cir. 1991). These include administrative priority, super-
22 priority and secured status. 11 U.S.C. § 364.

23 In addition, parties who extend credit are protected under § 364(e) from the effects of a reversal
24 on appeal of the authorization to incur debt as long as they have acted in good faith.

25 To demonstrate that the requisite credit is not obtainable on an unsecured basis, the Debtor need
26 only demonstrate “by good faith effort that credit was not available” without the protections afforded to
27 potential Lender by section 364(c) of the Bankruptcy Code. Bray v. Shenandoah Fed. Save. & Loan
28 Assn (In re Snowshoe Co.), 789 Ph.D. 1085, 1088 (4th Cir. 1986). Thus, “[t]he statute imposes no duty

1 to seek credit from every possible lender before concluding that such credit is unavailable.” Id. at 1088;
2 see also In re Ames, 115 B.R. at 40 (holding that Debtor made a reasonable effort to secure financing
3 when it selected the least onerous financing option from the two remaining Lenders); In re Reading
4 Tube Indus., 72 B.R. 329, 332 (Bankr. END. Pa. 1987) (“Given the ‘time is of the essence’ nature of
5 this type of financing, we would not require this or any Debtor to contact a seemingly infinite number
6 of possible Lender.”). Where few Lenders are likely to be able and willing to extend the necessary
7 credit to a Debtor, “it would be unrealistic and unnecessary to require [the Debtor] to conduct such an
8 exhaustive search for financing.” In re Sky Valley, Inc., 100 B.R. 107, 113 (Bankr. N.D. Ga. 1988),
9 aff’d sub nom., Anchor Savings Bank FSB v. Sky Valley, Inc., 99 B.R. 117, 120 n. 4 (N.D. Ga. 1989).

10 Most of Debtor’s assets are encumbered by Liens and the Debtor does not project material
11 operating revenue but rather primarily looks to proceeds from equipment sales and the proceeds
12 available under the Post Petition Financing to fund the general and administrative expenses of the
13 Chapter 11 Case. Accordingly, there are no abundant currently available funds from which the
14 presently unknown extent of chapter 11 general and administrative could readily be paid much less
15 much less post-petition financing serviced. See Rhodes Declaration. The Lender defers principal and
16 interest payments to the Maturity Date. See Rhodes Declaration ¶9.

17 Subsequently in its chapter 11 case the Debtor contemplates being able to negotiate settlements
18 with those of its account debtors who are cash poor but own real estate to settle with the account by
19 conveying real estate to the Debtor. After those settlements are approved by the Bankruptcy Court, it
20 would be the intention of the Debtor to sell such real estate to fund its chapter 11 plan of reorganization
21 and repay the Post-Petition Financing. Under such circumstances, stand-alone post-petition financing on
22 an unsecured administrative basis simply to fund chapter 11 administrative expenses during the case
23 would be virtually impossible to obtain other than in a relative small amount such as the payroll that had
24 to be funded on October 27, 2016 that Lender funded on a section 364(b) basis given the dire
25 consequences that might ensue if payroll was missed. See Rhodes Declaration ¶10. It is highly unlikely
26 that an unaffiliated lender would make a loan for which no debt service payments can be made during
27 the case.

28

1 As set forth in the Rhodes Declaration, unsuccessful negotiations to obtain section 364(b)
 2 financing were engaged in with Lever Capital Partners, Summit Investment Management and TPG
 3 Special Situations. None of those entities offered section 364(c)(1) or (2) or (3) financing either. See
 4 Rhodes Declaration ¶10.

5 **B. Debtor’s Decision to Enter into the DIP Credit Facility Is Supported by Sound Business
 6 Judgment.**

7 Courts generally give broad deference to the business decisions of a Debtor. See, e.g., Stephens
 8 Indus., Inc. v. McClung, 789 F.2d 386, 390 (6th Cir. 1986); In re Continental Air Lines, Inc., 780 F.2d
 9 1223, 1226 (5th Cir. 1986); In re Lionel Corporation, 722 F.2d 1063, 1070 (2d Cir. 1983); Walter v.
 10 Sunwest Bank (In re Walter), 83 B.R. 14, 19-20 (B.A.P. 9th Cir. 1987). In particular, a bankruptcy
 11 court should defer to a Debtor’s reasonable business judgment regarding the need for funds, so long as
 12 the proposed financing agreement does not contain terms that either leverage the bankruptcy process or
 13 that benefit a third party rather than the bankruptcy estate. See, e.g., In re Trans World Airlines, Inc.,
 14 163 B.R. 964, 974 (Bankr. D. Del. 1994) (noting that an interim loan, receivables facility and asset-
 15 based facility were approved because they “reflect[ed] sound and prudent business judgment ..., [were]
 16 reasonable under the circumstances and in the best interest of [the Debtor] and its creditors”). This was
 17 explained by the bankruptcy court in In re Ames Department Stores, Inc., 115 B.R. 34 (Bankr. S.D.N.Y.
 18 1990):

19 [A] court’s discretion under section 364 is to be utilized on grounds that permit
 20 reasonable business judgment to be exercised so long as the financing agreement
 21 does not contain terms that leverage the bankruptcy process and powers or its
 22 purpose is not so much to benefit the estate as it is to benefit a party-in-interest.

23 Id. at 40.

24 Here, Debtor’s decision to enter into the Post-Petition Financing represents a reasonable
 25 exercise of business judgment. There is an extensive amount of work to be performed by Debtor’s
 26 professionals which must commence immediately in order pursue confirmation of a plan of
 27 reorganization and Debtor does not have sufficient cash to assure those professionals of payment during
 28 the Chapter 11 Case. Thus, absent the financing to be provided under the DIP Credit Facility, Debtor
 will not be able to meet its chapter 11 administrative obligations. Put another way, Debtor would be
 forced to cease operations and abandon the chance to reorganize and successfully emerge from Chapter

1 11 unless it has the funds to pay the costs which must be incurred immediately. The success of this
2 Chapter 11 Case therefore turns on Debtor's ability continue operations and implement its long-term
3 strategy of restructuring. The Post-Petition Financing will permit Debtor to accomplish these goals, and
4 achieve its stated objective of maximizing value for all constituencies.

5 **C. The Terms of the DIP Credit Facility Are Reasonable Under The Circumstances And
6 Should Be Approved.**

7 The terms of the DIP Credit Facility are reasonable under all of the circumstances. See, e.g., In
8 re Ellingsen MacLean Oil Co., 65 B.R. 358, 365 (Bankr. W.D. Mich. 1986), aff'd, 834 F.2d 599 (6th
9 Cir. 1987) (chapter 11 post-petition financing is "fraught with dangers for creditors . . ."). Accordingly,
10 courts recognize that a Debtor may need to "enter into a hard bargain with a creditor in order to acquire
11 the needed funds to complete reorganization." Id. at 365. Here, however, no extremely hard bargain is
12 present undoubtedly because of the affiliation of the Lender and Debtor. For example, payment of
13 principal and interest are deferred to the Maturity Date and while Liens are being taken under sections
14 364(2) and (3), including Liens in Avoidance Actions, no super-priority status is being sought for
15 Lender's claims.

16 **D. Only Final Hearing On This Motion Pursuant To Bankruptcy Rule 4001(c)(2) is
17 Requested.**

18 Bankruptcy Rule 4001(c)(2) provides that a final hearing on a motion to obtain credit pursuant
19 to Bankruptcy Code Section 364 may be commenced not earlier than fourteen (14) days after service of
20 the motion and Local Rule 4001(b)(2) requires that a final hearing may not take place on less than
21 twenty one days' notice. Upon request, however, the Bankruptcy Court is empowered to conduct an
22 expedited hearing on the motion and authorize the obtaining of credit to the extent necessary to avoid
23 immediate and irreparable harm to a Debtor's estate.

24 Pursuant to Bankruptcy Rule 4001(c)(2), Debtor does not request the Court conduct an
25 expedited interim hearing on the Motion since it is not likely that US Trustee Fees and Professional
26 Fees will need to be funded during the first sixty (60) days of this case. Therefore Debtor seeks only for
27 the entry of the Final DIP Order, to allow Debtor to borrow under the Post-Petition Financing on a final
28 basis.

1 Debtor respectfully submits that, notice as contemplated by Bankruptcy Rule 4001 is sufficient
 2 to permit this Court to approve Debtor's request for approval of Post-Petition Financing. Debtor will
 3 provide notice by electronic mail, U.S. mail or the Court's ECF noticing of the Final Hearing to: the
 4 Office of the United States Trustee for the District of Nevada, counsel for any Committee, and if no
 5 such committee was appointed, then to the parties listed on the List of Creditors Holding the 20 Largest
 6 Unsecured Claims, all secured creditors, and all other parties requesting notice pursuant to Bankruptcy
 7 Rule 2002.

8 In light of the foregoing, and pursuant to Bankruptcy Rule 4001(c)(2), Debtor request that the
 9 Court schedule the Final Hearing on this Motion as soon as the Court has available hearing time
 10 therefor, and that the Court authorize Debtor to enter into the Post-Petition Financing on a final basis at
 11 such hearing.

12 **V.**

13 **CONCLUSION**

14 Based upon all the foregoing, as set forth in this Memorandum, the Motion, the Rhodes
 15 Declaration and all other papers, documents, or other evidence submitted in support of the Motion,
 16 Debtor respectfully request that the Court grant the Motion in its entirety and: (1) approve the Post-
 17 Petition Financing on a final basis; (2) enter the Final DIP Order, in substantially the form attached
 18 hereto as Exhibit A; (3) authorize Debtor to execute the Credit Agreement and other Loan Documents
 19 and, pursuant thereto, borrow on a final basis under the terms of the Loan Documents and the Final DIP
 20 Order, (4) grant Lender the Liens and section 364(e) status as provided for under the Final DIP Order;
 21 and (5) grant to Debtor such other relief as the Court deems necessary and appropriate.

22 Dated this 31st day of October, 2016.

23 **FOX ROTHSCHILD LLP**

24 By /s/Brett A. Axelrod

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[Proposed] Counsel for Avery Land Group, LLC

EXHIBIT A

PROPOSED ORDER

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In re

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Case Nos. BK-S-16-14995-abl

Chapter 11

**ORDER PURSUANT TO 11 U.S.C.
§§ 105, 364, FED R. BANKR. P. RULE
4001(C) AND L.R. 4001(B) AND (C): (I)
AUTHORIZING DEBTOR TO OBTAIN
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1 The motion of the debtor and debtor-in-possession (the “Debtor” or “Borrower”) in the above-
2 captioned chapter 11 case (the “Chapter 11 Case”), dated October 31, 2016 [Docket No. ____] (the
3 “Motion”), requesting the entry of a final order pursuant to sections 105, 361, 362, 363(c), 364(c)(2),
4 364(c)(3), and 364(e) of title 11 of the United States Code, 11 U.S.C. § 101, et seq. (the “Bankruptcy
5 Code”), and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the
6 “Bankruptcy Rules”), seeks, among other things¹:

7 (a) authorization for the Debtor to obtain secured post-petition financing in an aggregate
8 principal amount of up to \$500,000 (the “Post-Petition Financing”), pursuant to section 364 of the
9 Bankruptcy Code, from BDH Gypsum (“Lender”), pursuant to the terms of this Final DIP Order and
10 that certain Debtor in Possession Revolving Credit Agreement by and among the Borrower, and the
11 Lender, in substantially the form attached to the Motion as Exhibit A (as the same may be amended,
12 restated, supplemented or otherwise modified from time to time, collectively, the “Credit Agreement”),
13 and any related documents required to be delivered by or in connection with the Credit Agreement
14 (together with the Credit Agreement, collectively, the “Loan Documents”);

15 (b) authorization for the Borrower to execute and enter into the Loan Documents and to perform
16 such other and further acts as may be required in connection with the Loan Documents;

17 (c) the grant of security interests and liens pursuant to section 364(c)(2) and (3) of the
18 Bankruptcy Code to the Lender to secure all obligations of the Borrower under and with respect to the
19 Post-Petition Financing as well as section 364(e) status;

20 (d) the modification of the automatic stay imposed under section 362 of the Bankruptcy Code to
21 the extent necessary to permit the Borrower and the Lender to implement the terms of this Final DIP
22 Order.

23 A final hearing on the Motion was held by this Court on December 17, 2016 (“Final Hearing”).
24 The Court read and considered the Motion, and all pleadings related thereto including all objections to
25

26 _____
27 ¹ Capitalized terms used, but not defined herein, shall have the meanings ascribed to such terms
28 in the Credit Agreement and capitalized terms used but not immediately defined in Order shall have the
meanings ascribed to them later in this Order.

1 the Motion, as well as the record made by the Debtor and other parties at the Final Hearing, and after
2 due deliberation and consideration, and good and sufficient cause appearing therefor:

3 **THE COURT HEREBY FINDS AND CONCLUDES AS FOLLOWS:**

4 **I. Background, Jurisdiction and Notice.**

5 A. On September 9, 2016 (the "Petition Date"), Debtor commenced its bankruptcy case by
6 filing a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor is
7 continuing to operate its business and manage its property as debtor-in-possession pursuant to sections
8 1107(a) and 1108 of the Bankruptcy Code. No statutory committee of unsecured creditors
9 ("Committee"), trustee, or examiner has been appointed in this case.

10 B. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(b) and 1334. This
11 is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court pursuant to 28
12 U.S.C. §§ 1408 and 1409.

13 C. The Debtor has complied with Bankruptcy Rule 4001(c) and (d), LR 4001(b) and LR 9006
14 to hold the Final Hearing by serving the Motion and providing notice of the Final Hearing to the Office
15 of the United States Trustee for the District of Nevada, counsel for any Committee, and if no such
16 committee was appointed, then to the parties listed on the List of Creditors Holding the 20 Largest
17 Unsecured Claims, all secured creditors, and all other parties requesting notice pursuant to Bankruptcy
18 Rule 2002. Given the nature of the relief sought in the Motion, the Court concludes that the foregoing
19 notice was sufficient and adequate under the circumstances and complies with Bankruptcy Rule 4001 in
20 all respects.

21 **II. Findings Regarding the Post-Petition Financing Based on the Record at the Final Hearing.**

22 D. The Debtor has critical need to obtain the Post-Petition Financing. Debtor's ability to
23 obtain the Post-Petition Financing is critical to Debtor's ability to continue as a going concern during
24 the course of this Chapter 11 Case. The proceeds of the Post-Petition Financing will be used to fund the
25 costs of administering Debtor's estate, including, without limitation, fees ("US Trustee Fees") assessed
26 by the Office of the United States Trustee ("US Trustee"), fees of the Clerk of Court ("Court Fees"),
27 and fees and expenses ("Professional Fees") of (i) professionals employed pursuant to Bankruptcy court
28 Order in accordance with Bankruptcy Code sections 327 or 1103 to be compensated for services

1 rendered pursuant to Bankruptcy Code sections 327, 328, 329, 330 or 331. The Borrower's access to
2 sufficient liquidity through the incurrence of the Post-Petition Financing under the terms of this Final
3 DIP Order are vital to the preservation and maintenance of the going concern value of the Borrower's
4 estate and to the Borrower's successful reorganization. Consequently, without access to the Post-
5 Petition Financing, to the extent authorized pursuant to this Final DIP Order, the Borrower and its estate
6 would suffer immediate and irreparable harm.

7 E. The Borrower is unable to obtain adequate unsecured credit allowable under sections 364(b)
8 and 503(b)(1) of the Bankruptcy Code. The only sufficient source of credit available to the Borrower is
9 the Post-Petition Financing. The Borrower requires the Post-Petition Financing, in addition to the use
10 of cash collateral under the terms of orders entered by this Court authorizing the Debtor's use of the
11 cash collateral of Pre-Petition Lender holding Liens on Debtor's assets ("Cash Collateral Orders"), to
12 satisfy its post-petition liquidity needs.

13 F. The Lender has indicated a willingness to provide the Borrower with certain financing, but
14 solely on the terms and conditions set forth in this Final DIP Order and in the Loan Documents. After
15 considering all of its alternatives, the Borrower has concluded, in an exercise of its sound business
16 judgment, that the financing to be provided by the Lender pursuant to the terms of this Final DIP Order
17 and the Loan Documents represents the best financing presently available to the Borrower.

18 G. The Lender is related to the Debtor by common ownership.

19 J. The security interests and liens granted pursuant to this Final DIP Order to the Lender, are
20 appropriate under section 364(c)(2) and (c)(3) of the Bankruptcy Code because, among other things,
21 such security interests and liens do not impair the interests of any holder of a valid, binding, continuing,
22 enforceable and fully-perfected prepetition security interest or lien in the property of the Borrower and
23 its Estate.

24 K. Good cause has been shown for immediate entry of this Final DIP Order pursuant to
25 Bankruptcy Rules 4001 (c)(2), and, to the extent it applies, Bankruptcy Rule 6003, as the Court finds
26 that entry of this Final DIP Order is necessary to avoid immediate and irreparable harm to the Borrower
27 and their estates. To the extent the Borrower has not complied with Rule 4001(c)(2), the Court finds
28 good cause to waive that requirement. In particular, the authorization granted herein for the Borrower to

1 execute the Loan Documents, to obtain financing on a final basis, is necessary to avoid immediate and
2 irreparable harm to the Borrower and its Estate. Entry of this Order is in the best interest of the
3 Borrower, its Estate and creditors. The terms of the Loan Documents are fair and reasonable under the
4 circumstances, reflect the Borrower’s exercise of prudent business judgment consistent with its
5 fiduciary duties, and are supported by reasonably equivalent value and fair consideration.

6 L. Although the Borrower and Lender are related to each other (each having common
7 ownership), the terms and conditions of the Loan Documents and this Final DIP Order, which are
8 reflective of good faith arm’s length negotiations between the Lender and the unrelated person which
9 made a loan to Lender in order to provide the Lender with the funds to loan to the Debtor, are in good
10 faith, and any credit extended and loans made to the Borrower pursuant to this Final DIP Order shall be,
11 and hereby are, deemed to have been extended, issued or made, as the case may be, in “good faith”
12 within the meaning of section 364(e) of the Bankruptcy Code.

13 M. Based on the foregoing, and upon the record made before this Court at the Final
14 Hearing and good and sufficient cause appearing therefor;

15 **III. Disposition**

16 1. The Motion is approved on a final basis on the terms and conditions set forth in this Final
17 DIP Order. This Final DIP Order shall become effective immediately upon its entry. To the extent the
18 terms of the Loan Documents differ in any material respect from the terms of this Final DIP Order, this
19 Final DIP Order shall control.

20 **IV. Authorization of the Post-Petition Financing and Entry Into the Loan Documents**

21 2. The terms and conditions of the Credit Agreement are hereby approved. The Borrower is
22 hereby authorized to enter into the Credit Agreement and other Loan Documents (as more particularly
23 set forth and defined in the Credit Agreement). Upon entry of this Final DIP Order, the Borrower is
24 hereby authorized to borrow in accordance with this Final DIP Order, the Credit Agreement, and the
25 other Loan Documents.

26 3. The Borrower is hereby authorized to incur the Obligations solely in accordance with the
27 terms and conditions set forth in the Credit Agreement, other Loan Documents and this Final DIP
28 Order.

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V. Loan Obligations

4. Upon execution and delivery of the Loan Documents, the Loan Documents shall constitute valid, binding and continuing obligations of the Borrower, enforceable against Borrower in accordance with the terms thereof. No obligation, payment, transfer or grant of security under the Loan Documents or this Final DIP Order shall be stayed, restrained, voided, voidable, or recoverable under the Bankruptcy Code or under any applicable non-bankruptcy law, or subject to any defense, reduction, setoff, recoupment or counterclaim.

5. All Loans made to or for the benefit of the Borrower on or after the Petition Date under the Loan Documents (collectively, the “Loans”), all interest thereon, and all Other Loan Related Claims owing by the Borrower to the Lender under the Loan Documents and this Final DIP Order shall hereinafter be referred to as the “Obligations.” The Loans: (i) shall bear interest payable at the rates set forth in the Credit Agreement; (ii) shall be secured in the manner specified in Paragraph 7 below; (iii) shall be payable in accordance with the terms of the Loan Documents; and (iv) shall otherwise be governed by the terms set forth herein and in the Loan Documents.

VI. Use of Loan Proceeds

6. The Borrower shall utilize the proceeds of the Revolving Loans to pay general and administrative expense of the Chapter 11 Case. Borrower shall not be permitted to use the proceeds of the Loans: (i) to finance in any way any action, suit, arbitration, proceeding, application, motion or other litigation of any type adverse to the interests of Lender or its rights and remedies under this Agreement, the other Loan Documents, or the Final DIP Order, (ii) to finance the payment of, or application for authority to pay, any Prepetition Claim, without the Lender’s prior written consent, and (iii) to make any payment in settlement of any Claim, action or proceeding, before any court, arbitrator or other governmental body.

VII. Grant of Liens.

7. As security for the full and timely payment of the Obligations, the Lender is hereby granted:
(a) pursuant to section 364(c)(2) of the Bankruptcy Code, a valid, binding, continuing, enforceable and fully-perfected first priority security interest in and Lien

1 on all assets and property of the Borrower and its Estate that is not otherwise subject to a Lien as of
2 the date of entry of this Final DIP Order, which shall include all tangible and intangible property of
3 the Borrower, including Avoidance Actions,

4 (b) pursuant to section 364(c)(3) of the Bankruptcy Code, a valid, binding, continuing,
5 enforceable and fully-perfected security interest in and Lien upon all assets and property of the
6 Borrower junior to all Liens encumbering such assets and property as of the date of this Final DIP
7 Order, including Avoidance Actions.

8 Hereinafter all assets and property of the Borrower and its Estate upon which the Lender has
9 been granted Liens pursuant to this Final DIP Order shall be referred to as the “Collateral”.

10 8. The liens and security interests granted pursuant to this Final DIP Order (“Liens”) shall not be
11 subject to challenge and shall attach and become valid, binding, continuing, enforceable, fully-perfected
12 and non-avoidable by operation of law as of the Petition Date without any further action by the
13 Borrower, the Lender, or any other person, and without the necessity of execution by the Borrower, or
14 the filing or recordation, of any financing statements, security agreements, vehicle lien applications,
15 mortgages, deeds of trust, assignment of rents, filings with the U.S. Patent and Trademark Office, or
16 other documents. All Collateral shall be free and clear of other Liens, claims and encumbrances, except
17 for Liens and security interests in existence as of the date of this Final DIP Order. The Borrower, upon
18 the request of the Lender (i) shall enter into separate instruments in recordable form on terms
19 reasonably satisfactory to the Lender with respect to any Collateral identified by Lender, (ii) shall
20 authorize the Lender to file and record such financing statements and fixture filings with respect to any
21 Collateral identified by Lender, and (iii) shall take any such other action as required by Lender with
22 respect to Collateral identified by Lender in order to perfect the Liens granted herein. The Lender is
23 authorized to file or record such documents in its discretion, in which event all such documents shall be
24 deemed to have been filed or recorded at the time and on the date of entry of this Final DIP Order.

25 **VIII. Restrictions on Additional Claims or Liens**

26 10. Except for the liens existing as of the date of this Final DIP Order, no lien having a priority
27 superior to or *pari passu* with those granted pursuant to this Final DIP Order shall be granted, in the
28 Borrower’s Chapter 11 Case while any portion of the Post-Petition Financing (or any refinancing

1 thereof), or the Obligations remain outstanding. Except as expressly permitted by the Credit Agreement,
2 other Loan Documents and this Final DIP Order, the Borrower shall not grant mortgages, deeds of trust,
3 security interests, or liens in the Collateral to any parties pursuant to section 364(d) of the Bankruptcy
4 Code or otherwise.

5 **IX. 11 U.S.C. § 364(e) Protections**

6 11. If any or all of the provisions of this Final DIP Order are hereafter reversed, modified,
7 vacated or stayed, such reversal, modification, vacation or stay shall not affect (i) the validity of any
8 Obligations incurred pursuant this Final DIP Order or the Loan Documents, or (ii) the validity or
9 enforceability of any claim, lien, security interest or priority authorized or created hereby or pursuant to
10 the Loan Documents with respect to any Obligations. Notwithstanding any such reversal, modification,
11 vacation or stay, any incurrence of Obligations by the Borrower shall be governed in all respects by the
12 provisions of this Final DIP Order and the Loan Documents, and the Lender shall be entitled to all of
13 the rights, remedies, protections and benefits granted under section 364(e) of the Bankruptcy Code, this
14 Final DIP Order, and the Loan Documents with respect to all incurrences of the Obligations by the
15 Borrower.

16 **X. Vacation of the Automatic Stay**

17 12. Notwithstanding section 362 of the Bankruptcy Code, the automatic stay is hereby
18 vacated and modified to the extent necessary to permit the Lender to exercise, upon the occurrence and
19 during the continuation of any Event of Default, upon three (3) Business Days' written notice to
20 Borrower's counsel, counsel for any Committee (or the Committee if the Committee does not have
21 counsel) and the U.S. Trustee, all rights and remedies provided for in this Final DIP Order, the Loan
22 Documents or applicable law, including, without limitation, taking one or more of the following actions,
23 at the same or different times:

24 (a) reduce the amount of any outstanding Revolving Loan Commitment or suspend
25 or terminate any outstanding Revolving Loan Commitment;

26 (b) charge the Default Interest on the Post-Petition Financing;

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1 (c) declare all or any portion of the Obligations, including all or any portion of any Loan,
2 to be forthwith due and payable, all without presentment, demand, protest or further notice of any kind,
3 all of which are expressly waived by Borrower;

4 (d) realize on any or all of the Collateral and exercise any and all remedies under the
5 Loan Documents, and applicable law, and

6 (e) exercise any rights and remedies under the Loan Documents and applicable law,
7 including all remedies provided under the Bankruptcy Code, available to the Lender. The rights and
8 remedies of the Lender specified in this Final DIP Order are cumulative and not exclusive of any rights
9 or remedies that the Lender may have under the Loan Documents or otherwise.

10 **XI. Miscellaneous Provisions**

11 13. The provisions of this Final DIP Order shall be binding upon and inure to the benefit of the
12 Lender, the Borrower, and their respective successors and assigns. The provisions of this Final DIP
13 Order and any actions taken pursuant thereto (a) shall survive the entry of any order: (i) confirming any
14 plan of reorganization in any of the Chapter 11 Case that is not a Lender Approved Reorganization
15 Plan; (ii) converting the Chapter 11 Case to a case under chapter 7 of the Bankruptcy Code; or (iii)
16 dismissing the Chapter 11 Case; and (b) shall continue in full force and effect notwithstanding the entry
17 of any such order, and the claims, liens, and security interests granted pursuant to this Final DIP Order
18 shall maintain their priority as provided by this Final DIP Order until all of the Obligations are
19 indefeasibly paid in full and discharged in accordance with the terms of this Final DIP Order and the
20 Credit Agreement.

21 14. The Borrower is hereby authorized, without further order of this Court, to enter into
22 agreements with the Lender providing for (a) non-material modifications to the Credit Agreement and
23 other Loan Documents, or (b) any other modifications to the Credit Agreement and other Loan
24 Documents necessary to conform the Credit Agreement and other Loan Documents to this Final DIP
25 Order.

26 15. To the extent applicable, this Final DIP Order is not subject to the 14-day stay provision of
27 Rule 4001(a)(3) of the Bankruptcy Rules.

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XII. NOTICE OF FINAL ORDER

16. Service of Notice. Debtor shall cause a copy of this Final DIP Order to be served within three (3) Business Days of its entry, by first class mail, on the (a) Office of the United States Trustee for the District of Nevada, counsel for any Committee, and if no such committee was appointed, then to the parties listed on the List of Creditors Holding the 20 Largest Unsecured Claims; (d) all other secured creditors, and (e) all other parties requesting notice pursuant to Bankruptcy Rule 2002.

DATED: October ____, 2016.

Prepared and respectfully submitted by:

FOX ROTHSCHILD LLP

By _____

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EXHIBIT B

DEBTOR-IN-POSSESSION REVOLVING CREDIT AGREEMENT

AGREEMENT, dated as of October __, 2016, between AVERY LAND GROUP, LLC, a Nevada Limited Liability Company (“Borrower” or “Debtor”), debtor-in-possession in a case pending under Chapter 11 of the Bankruptcy Code (the “Chapter 11 Case”); and BDH Gypsum, a Nevada limited liability company (the “Lender” and, together with the Borrower, collectively referred to as the “Parties”). Capitalized terms used, but not immediately defined, in this Agreement shall have the meanings ascribed to such terms later or elsewhere in this Agreement.

RECITALS

WHEREAS, on September 9, 2016 (“Petition Date”), Borrower filed a voluntary petition with the Bankruptcy Court initiating the Chapter 11 Case and has continued in the possession of its assets and in the management of its business pursuant to Bankruptcy Code Sections 1107 and 1108;

WHEREAS, an on-going need exists for the Borrower to obtain funds in order to continue the operation of its business as debtor-in-possession under Chapter 11 of the Bankruptcy Code and, accordingly, the Borrower has requested that the Lender extend post-petition financing to the Borrower;

WHEREAS, the Lender is willing to make the Loans to the Borrower upon the terms and conditions set forth herein;

WHEREAS, all exhibits hereto or expressly identified in this Agreement, are incorporated herein by reference, and taken together, shall constitute a single agreement.

NOW, THEREFORE, in consideration of the mutual covenants hereinafter contained, and for other good and valuable consideration, the parties hereto agree as follows:

ARTICLE I

DEFINITIONS

1.1 Defined Terms.

Capitalized terms used in this Agreement and the other Loan Documents shall have (unless otherwise provided elsewhere in the Loan Documents) the following respective meanings and all section references in the following definitions shall refer to Sections of the Agreement:

“Affiliate” shall mean, as to any Person, any other Person which, directly or indirectly, is in control of, is controlled by, or is under common control with, such Person. For purposes of this definition, “control” of a Person shall mean the power, directly or indirectly, either (a) to vote a majority of the outstanding equity securities having ordinary voting power for the election of directors of such Person or (b) to direct or cause the direction of the management and policies of such Person, whether by contract or otherwise.

“Agreement” shall mean this Debtor-in-Possession Credit Agreement, as the same may from time to time be amended, modified or supplemented.

“Administrative Claim” shall mean a Claim for costs and expenses of administration of the Chapter 11 Case pursuant to Bankruptcy Code sections 503(b), 507(a)(2) or 507(b), including: (a) the actual and necessary costs and expenses incurred after the Petition Date and through the effective date of a confirmed Reorganization Plan of preserving the Borrower’s Estate and operating the Borrower’s business (such as wages, salaries, or commissions for services, and payments for goods and services); (b) compensation and reimbursement of expenses for legal, financial advisory, accounting, and other services, including but not limited to, Professional Fees allowed pursuant to sections 328, 330(a), or 331 of the Bankruptcy Code or otherwise for the period commencing on the Petition Date and ending on the effective date of a

confirmed Reorganization Plan; (c) all fees and charges assessed against the Estate pursuant to chapter 123 of the Judicial Code and 28 U.S.C. §1930; and (d) all Bankruptcy Court approved requests for compensation or expense reimbursement for making a substantial contribution in the Chapter 11 Case pursuant to Bankruptcy Code §§ 503(b)(3), (4), and (5).

“Advance” shall mean the Lender’s disbursement of proceeds of a Loan to Borrower in accordance with this Agreement.

“Avoidance Actions” shall mean any actions commenced, or that may be commenced before or after the Effective Date, pursuant to section 544, 545, 547, 548, 550 or 551 of the Bankruptcy Code.

“Bankruptcy Code” shall mean 11 U.S.C. §§ 101, et seq., as amended.

“Bankruptcy Court” shall mean the United States Bankruptcy Court for the District of Nevada.

“Bankruptcy Rules” shall mean the Federal Rules of Bankruptcy Procedure, as the same may from time to time be in effect and applicable to the Chapter 11 Case.

“Borrower” shall have the meaning ascribed thereto in the Preamble.

“Borrowing Availability” means, at any time, (a) the aggregate amount of the Maximum Commitment Amount at such time, *less* (b) the Total Utilization of Loan Commitments.

“Business Day” shall mean a day other than a Saturday, Sunday or other day on which commercial banks in Nevada are authorized or required by law to close.

“Cash Collateral Order” shall mean an order entered by the Bankruptcy Court

“Chapter 11 Case” shall have the meaning ascribed thereto in the Preamble.

“Claim” has the meaning set forth in section 101(5) of the Bankruptcy Code.

“Closing Date” shall mean the date of entry of the Final DIP Order by the Bankruptcy Court and execution by all Parties of this Agreement and all other Loan Documents (other than Notes to be executed with respect to Loans to be made after Closing Date).

“Code” shall mean the Internal Revenue Code of 1986, as amended from time to time, and the regulations promulgated and rulings issued thereunder.

“Collateral” shall mean all assets and properties of any kind and nature of the Borrower and the Estate, including without limitation, real property and personal property, all deposit accounts and securities accounts, cash, accounts receivable, chattel paper, inventory, equipment, rolling stock and general intangibles pursuant to Section 364(c) and (d) of the Bankruptcy Code including Avoidance Actions..

“Commitment Termination Date” shall mean the earliest of (a) the Maturity Date, (b) the date of substantial consummation (as defined in section 1101 of the Bankruptcy Code and which, for purposes of this Agreement, shall be no later than the effective date of a confirmed Reorganization Plan), and (c) the acceleration of the Loans and the termination of the Loan Commitments in accordance with the terms hereof.

“Court Fees” shall mean fees payable to the Clerk of the Bankruptcy Court.

“Confirmation Order” shall mean the Final Order entered by the Bankruptcy Court (unless the requirement of a Final Order has been waived pursuant to applicable terms and conditions), together with all extensions, modifications and amendments thereto, confirming a Reorganization Plan

“Default” shall mean any of the events specified herein, whether or not any requirement for the giving of notice, the lapse of time, or both, or any other condition, has been satisfied.

“Dollars” or “\$” shall mean lawful currency of the United States of America.

“Effective Date” shall mean the date any Reorganization Plan, which has been confirmed pursuant to the Bankruptcy Court Order, becomes effective in accordance with its terms, or the occurrence of the “Effective Date” as defined in any Reorganization Plan which has been confirmed by the Bankruptcy Court Order.

“Estate” shall mean the estate of Debtor that was created by the commencement of the Chapter 11 Case pursuant to Bankruptcy Code §541, and shall be deemed to include any and all privileges and incorporeal hereditaments of Debtor and any and all interests in property, whether real, personal or mixed, rights, causes of action, avoidance powers or extensions of time that Debtor or the Estate shall have had effective as of the Petition Date or thereafter, whether by virtue of Bankruptcy Code §§ 544, 545, 546, 547, 548, 549 or 550 or otherwise.

“Event of Default” shall have the meaning ascribed thereto hereinafter.

“Final DIP Order” means the Final Order of the Bankruptcy Court entered after a final hearing, upon an application of the Borrower reasonably satisfactory in form and substance to the Lender, under Bankruptcy Rule 4001(c), or such other procedures as approved by the Bankruptcy Court, and assuming satisfaction of the standards prescribed in section 364 of the Bankruptcy Code, together with all extensions, modifications and amendments thereto, which order shall be satisfactory in form and substance to Lender, which, among other matters but not by way of limitation, (i) approves, on a final basis, the transactions contemplated in this Agreement, (ii) authorizes, on a final basis, the Borrower to enter this Agreement and obtain credit, incur indebtedness, provide Lender with the Liens to secure payment of the Obligations in accordance herewith, and (iii) includes a finding that the Lender is extending credit to Borrower in good faith within the meaning of Bankruptcy Code § 364(e).

“Final Order” means an order or judgment entered by the Bankruptcy Court: (a) that has not been reversed, stayed, modified, amended, revoked, varied or set aside, and as to which (i) any right to appeal or seek certiorari, review, reargument, stay or rehearing has been waived or (ii) the time to appeal or seek certiorari, review, reargument, stay or rehearing has expired and no appeal or petition for certiorari, review, reargument, stay or rehearing is pending; or (b) as to which an appeal has been taken or petition for certiorari, review, reargument, stay or rehearing has been filed and (i) such appeal or petition for certiorari, review, reargument, stay or rehearing has been resolved by the highest court to which the order or judgment was appealed or from which certiorari, review, reargument, stay or rehearing was sought and (ii) the time to appeal further or seek certiorari, review, reargument, stay or rehearing has been waived or expired and no such further appeal or petition for certiorari, review, reargument, stay or rehearing is pending, provided, however, that no order or judgment shall fail to be a “Final Order” hereunder solely because of the possibility that a motion pursuant to section 502(j) or 1144 of the Bankruptcy Code, Rule 59 or 60 of the Federal Rules of Civil Procedure or Bankruptcy Rule 9024 may be Filed with respect to such order or judgment.

“General Unsecured Claims” shall mean all the Claims against the Debtor, including any deficiency or other unsecured Claims of Prepetition Lender and Claims resulting from rejection of executory contracts and unexpired leases, that are not secured Claims, Administrative Claims, or Priority Claims, and that are not subject to subordination by agreement or otherwise.

“Lender” shall have the meaning ascribed thereto in the Preamble.

“Lender Approved Reorganization Plan” shall mean a Reorganization Plan, as the same may from time to time be amended, restated, modified or supplemented by mutual agreement of

the Parties that is otherwise acceptable in form and substance to Lender in its sole and absolute discretion.

“Lender Approved Plan’s Effective Date” shall mean the date a Lender Approved Reorganization Plan, which has been confirmed pursuant to the Plan Confirmation Order, becomes effective in accordance with its terms, or the occurrence of the “Effective Date” as defined in a Lender Approved Reorganization Plan which has been confirmed by the Plan Confirmation Order.

“Lien” shall mean a charge against or interest in property to secure payment of a debt or performance of an obligation, including (a) any mortgage, deed of trust, pledge, statutory deemed trust, hypothecation, assignment, deposit arrangement, encumbrance, lien (statutory or other), charge or other security interest or any preference, priority or other security agreement or preferential arrangement of any kind or nature whatsoever (including, without limitation, any conditional sale or other title retention agreement and any financing lease having substantially the same economic effect as any of the foregoing and the filing of any financing statement under the Uniform Commercial Code (other than the filing of any such financing statement which states therein that such filing is a precautionary filing only and is filed in connection with “true leases” only) or comparable law of any jurisdiction), (b) any arrangement or agreement which prohibits Borrower from creating any mortgage, pledge, hypothecation, deposit arrangement, encumbrance, lien, charge or other security interest, or from entering into any agreement or arrangement described in clause (a) of this definition or (c) the sale, assignment, pledge or transfer for security of any accounts, general intangibles or chattel paper of Borrower with or without recourse.

“Litigation” shall have the meaning ascribed thereto hereinafter.

“Loans” shall mean the loans made pursuant to this Agreement.

“Loan Documents” shall mean this Agreement, and such additional documents, instruments, and agreements as required under this Agreement and/or as may be reasonably required by the Lender to implement the terms or effectuate the purposes of this Agreement and the Final DIP Order, including, without limitation, the Notes, security agreement, deed of trust, assignment of rents and all other agreements, instruments, documents and certificates executed and delivered to, or in favor of, Lender and including all other pledges, powers of attorney, consents, assignments, contracts, notices, and all other written matter whether heretofore, now or hereafter executed by or on behalf of Borrower in connection with the Agreement or the transactions contemplated hereby. Any reference in this Agreement or any other Loan Document to a Loan Document shall include all exhibits thereto, and all amendments, restatements, supplements or other modifications thereto, and shall refer to this Agreement as the same may be in effect at any and all times such reference becomes operative.

“Material Adverse Effect” shall mean a material adverse effect on (a) the business, operations, property or condition (financial or otherwise) of the Borrower, (b) the ability of the Borrower to fully and timely perform its Obligations or (c) the validity, priority or enforceability of this Agreement, any of the Revolving Notes or any of the other Loan Documents, or the rights or remedies of the Lender hereunder or thereunder.

“Maturity Date” shall mean the earlier of (a) December 9, 2021, or (b) the Effective Date of confirmed Reorganization Plan.

“Maximum Commitment Amount” shall mean the sum of up to \$500,000 excluding interest and Other Loan Related Claims that are capitalized and added to the principal balance of the Loans pursuant to the terms of this Agreement.

“Notes” shall mean the Notes issued pursuant to this Agreement.

“Notice of Loan” shall have the meaning ascribed thereto hereinafter.

“Obligations” shall mean the unpaid principal of and interest (including, without limitation, interest accruing after the maturity of the Loans) on the Notes and pursuant to this Agreement, and any Lender Costs.

“Other Loan Related Claims” shall mean any reimbursement obligations, commitment or other fees, indemnities, costs, expenses or other claims to which the Lender is entitled under this Agreement, Notes or any other Loan Documents.

“Plan Confirmation Order” shall mean the Final Order entered by the Bankruptcy Court (unless Lender waives the requirement of a Final Order), satisfactory in form and substance to Lender, together with all extensions, modifications and amendments thereto confirming a Lender Approved Reorganization Plan.

“Person” shall mean an individual, partnership, corporation, limited liability company, business trust, joint stock company, trust, unincorporated association, joint venture, governmental authority or other entity of whatever nature.

“Petition Date” shall have the meaning ascribed thereto in the Recitals.

“Pre-Petition” means anytime or date prior to the Petition Date.

“Priority Claim” shall mean a Claim entitled to priority under sections 507(a)(2) through (8) of the Bankruptcy Code.

“Professional” shall mean any Person or Entity: (a) employed pursuant to a Bankruptcy Court order in accordance with sections 327 or 1103 of the Bankruptcy Code and to be compensated for services rendered prior to or on the Effective Date, pursuant to sections 327,

328, 329, 330, or 331 of the Bankruptcy Code; or (b) awarded compensation and reimbursement by the Bankruptcy Court pursuant to section 503(b)(4) of the Bankruptcy Code.

“Professional Fees” shall mean all reasonable fees and expenses incurred by Professionals and allowed by the Bankruptcy Court.

“Professional Fee Claims” shall mean any Claim for compensation or reimbursement of fees and expenses as may be requested by a Professional to the extent such Professional is required to apply to the Bankruptcy Court for payment of such Claim pursuant to sections 326, 328, 330 or 331 of the Bankruptcy Code or as otherwise provided in a Reorganization Plan.

“Reorganized Debtor” shall mean on or after the Effective Date, the Debtor, as a reorganized debtor.

“Reorganization Plan” shall mean a plan of reorganization or liquidation filed by the Debtor, any creditor(s), a trustee or any other party in interest in the Chapter 11 Case.

“Requirement of Law” as to any Person shall mean the certificate of incorporation and bylaws or other organizational or governing documents of such Person, and any law, treaty, rule or regulation or determination of an arbitrator or a court or other governmental authority, in each case, applicable to or binding upon such Person or any of its property or to which such Person or any of its property is subject.

“Subsidiary” or “Subsidiaries” of a Person shall mean a corporation, partnership or other entity of which shares of stock or other ownership interests having ordinary voting power (other than stock or such other ownership interests having such power only by reason of the occurrence of a contingency) to elect a majority of the board of directors or other managers of such corporation, partnership or other entity are at the time owned, or the management of which is

otherwise controlled, directly or indirectly through one or more intermediaries, or both, by such Person. Unless otherwise indicated, all references to Subsidiaries are to the Subsidiaries of Borro

“Total Utilization of Loan Commitments” means, as of any date of determination, the sum of the aggregate principal amount of all outstanding Loans excluding interest and Other Loan Related Claims that are capitalized and added to the principal balance of the Loans pursuant to the terms of this Agreement.

“US Trustee” shall mean the United States Trustee for the District of Nevada.

“US Trustee Fees” shall mean fees payable to the US Trustee pursuant to 28 U.S.C. § 1930.

1.2 Other Definitional Provisions.

(a) Unless otherwise specified therein, all terms defined in this Agreement shall have their respective defined meanings when used in the Notes or other document made or delivered pursuant hereto.

(b) As used herein, in the Notes or any other Loan Document made or delivered pursuant to this Agreement, accounting terms relating to Borrower and accounting terms partly defined in Section 1.1, to the extent not defined, shall have the respective meanings given to them under normal and customary use.

(c) The words “hereof”, “herein” and “hereunder” and words of similar import when used in this Agreement shall refer to this Agreement as a whole, including all Exhibits, as the same may from time to time be amended, restated, modified or supplemented, and not to any particular section, subsection or clause contained in this Agreement or any such Exhibit. The meanings given to terms defined herein shall be equally applicable to both the singular and plural forms of such terms.

(d) Unless the context otherwise requires, each reference herein to any agreement, document or instrument (including the Loan Documents) shall be deemed a reference to such agreement, document or instrument as amended, restated, supplemented or otherwise modified from time to time.

(e) The term “includes” and “including” shall not be construed to imply any limitation.

(f) In this Agreement, in the computation of periods of time from a specified date to a later specified date, the word “from” means “from and including” and the words “to” and “until” each mean “to but excluding.” Periods of days referred to in this Agreement shall be counted in calendar days unless Business Days are expressly prescribed. Any period determined hereunder by reference to a month or months or year or years shall end on the day in the relevant calendar month in the relevant year, if applicable, immediately preceding the date numerically corresponding to the first day of such period, provided that if such period commences on the last day of a calendar month (or on a day for which there is no numerically corresponding day in the calendar month during which such period is to end), such period shall, unless otherwise expressly required by the other provisions of this Agreement, end on the last day of the calendar month.

1.3 Payment Terms; References to Money.

Except as expressly set forth herein to the contrary, (a) all payments made by the Borrower shall be made in Dollars in respect of principal and interest on the Loans, and (b) to the extent not otherwise indicated, all amounts of money referenced herein shall mean and be references to amounts of money denominated in Dollars.

ARTICLE II

AMOUNT AND TERMS OF LOANS

2.1 Loan Commitments.

Subject to the terms and conditions in this Agreement, from and after the Closing Date, Lender agrees to make Loans to Borrower from time to time secured by the Collateral until the Commitment Termination Date in an aggregate principal amount at any one time outstanding not to exceed the Borrowing Availability; provided that Lender shall not be permitted or required to make any Loan if, after giving effect thereto, the aggregate outstanding principal amount of all Loans outstanding (exclusive of interest and Other Loan Related Claims that are capitalized and added to the principal balance of the Loans pursuant to the terms of this Agreement) would exceed the Borrowing Availability.

2.2 Notes.

Each Loan made by Lender shall be evidenced by a promissory note issued by the Borrower made payable to the order of Lender substantially in the form of **Exhibit A** (a “Note”), with appropriate insertions as to date and principal amount and in a principal amount equal to the lesser of (a) the amount of the Loan Commitment and (b) the aggregate unpaid principal amount of all Loans made by Lender, exclusive of interest and Other Loan Related Claims that are capitalized and added to the principal balance of the Loans pursuant to the terms of this Agreement. Each Note shall (i) be dated as of its date of issuance, (ii) be stated to mature on the Maturity Date or such earlier date the Loans shall be due and payable in full, whether by acceleration or otherwise, pursuant to the terms of this Agreement and (iii) provide for the payment of all principal, accrued interest and any Other Loan Related Claims.

2.3 Procedure for Loans and Payments.

(a) Until the Commitment Termination Date, the Borrower may borrow under the Loan Commitments on any Business Day. Prior to 2:00 p.m. Nevada time on the Borrowing Date requested by the Borrower, Lender will make the amount of the Loan available to the account of the Borrower.

(b) The Loans (including all interest and Other Loan Related Claims, capitalized and added to the principal balance of the Loans) shall be paid in full on or prior to the Commitment Termination Date, pursuant to the terms herein. Lender's obligation to make Loans shall terminate at the close of business on the Business Day immediately preceding the Maturity Date, unless sooner terminated in accordance with the terms hereof.

2.4 Permanent Reduction of Revolving Loan Commitment.

The Borrower shall have the right, upon not less than five Business Days' notice, to terminate the Loan Commitment or, from time to time, to reduce permanently the amount of the Maximum Commitment Amount in whole or in part. Such reduction of the Maximum Commitment Amount shall be accompanied by payment in full of all outstanding principal and accrued interest thereon, to and including the date of such prepayment, together with any Other Loan Related Claims due and owing such that after such payment, the total amount outstanding on all Loans shall not exceed the Maximum Commitment Amount as reduced hereby.

2.5 Interest Rates, Commitment Fees and Payment Dates.

(a) Each Loan (and all amounts capitalized and added to the principal balance of the Revolving Loans) shall bear interest at a rate *per annum* of fifteen per cent (15%).

(b) There shall be no commitment fee for the Loans provided under this Agreement.

(c) Notwithstanding the foregoing, in the event any Event of Default has occurred and is continuing, the Loan shall bear interest at a rate *per annum* equal to the rate set forth above plus 5.0% (“Default Interest”) from the date of occurrence of such Event of Default until the date such Event of Default is cured or waived (after as well as before judgment). In addition, should any interest on any Loan or any other obligations payable hereunder not be paid when due (whether at the stated maturity, by acceleration or otherwise), such overdue amount shall bear interest (to the extent permitted by law in the case of interest on interest) at a rate *per annum* equal to rate set forth above plus 5.0%, in each case, from the date of such non-payment until such amount is paid in full (after as well as before judgment).

(d) Accrued Interest is due and payable on each Interest Payment Date. Accrued interest on the Loans not paid on the Interest Payment Date will be capitalized and added to the outstanding principal balance of the Loans as of each Interest Payment Date.

(e) Other Loan Related Claims will be capitalized and added to the outstanding principal balance of the Loans as of the date such Other Loan Related Claims becomes due.

2.6 Computation of Interest.

(a) Interest shall be calculated for the actual number of days elapsed on the basis of a hypothetical year of 365 days.

(b) Each determination of an interest rate pursuant to any provision of this Agreement shall be conclusive and binding on the Borrower and the Lender in the absence of manifest error. Any payment of interest on any Loan shall be subject to any applicable withholding taxes and any amount withheld shall be treated as having been paid by the Borrower to the Lender.

2.7 Prepayments.

(a) **Optional Prepayments.** Borrower may, at any time and from time to time prepay the Loans, in whole or in part, without premium or penalty, upon irrevocable written notice to the Lender by 11:00 a.m. (Nevada time) on such date of prepayment, in each case specifying the date and amount of prepayment. If any such notice is given, the amount specified in such notice shall be due and payable on the date specified therein, together with any amounts payable, accrued interest to such date on the amount prepaid and any outstanding fees and expenses then due and owing. Any prepayment shall be applied in the following order of priority (a) first, to the payment of all Other Loan Related Claims due and payable to the Lender on such date under and in respect of the Loans; and (b) second, to the payment of the outstanding principal amount of all of the Notes that are due and payable to the Lender on such date, together with all accrued and unpaid interest thereon.

(b) **Mandatory Prepayments.** If at any time the Total Utilization of the Loan Commitments exceeds the Maximum Commitment Amount, Borrower shall repay the aggregate outstanding Loan to the extent required to eliminate such excess.

2.8 Use of Proceeds.

The Borrower shall utilize the proceeds of the Loans solely to pay general and administrative expenses including, without limitation, payroll, fuel costs, Professional Fees and US Trustee Fees, all consistent with the Final DIP Order. Borrower shall not be permitted to use the proceeds of the Loans: (i) to finance in any way any action, suit, arbitration, proceeding, application, motion or other litigation of any type adverse to the interests of Lender or its rights and remedies under this Agreement, the other Loan Documents, or the Final DIP Order, (ii) to finance the payment of, or application for authority to pay, any Prepetition Claim, without the

Lender's prior written consent, and (iii) to make any payment in settlement of any Claim, action or proceeding, before any court, arbitrator or other governmental body.

2.9 Separate Loans Not To Exceed Commitment.

All Loans to the Borrower and all of the other Obligations of Borrower arising under this Agreement and the other Loan Documents shall constitute separate loans to the Borrower, evidenced by a separate promissory note executed by the Borrower; provided, however, that the total outstanding balance of all Loans by Borrower (exclusive of interest and Other Loan Related Claims capitalized and added to the principal balance of the Revolving Loans pursuant to the terms of this Agreement) shall not exceed the Maximum Commitment Amount as in effect from time to time under this Agreement.

2.10 [intentional left blank]

2.11 Payment of Obligations.

Upon the maturity (whether by acceleration or otherwise) of any of the Obligations under this Agreement or any of the other Loan Documents, the Lender shall be entitled to immediate payment of such Obligations without further application to or order of the Bankruptcy Court.

2.12 No Discharge; Survival of Claims.

Borrower agrees that to the extent the Obligations hereunder are not satisfied in full, (i) its Obligations arising hereunder shall not be discharged by the entry of an order confirming a Reorganization Plan (and the Borrower, pursuant to Section 1141(d)(4) of the Bankruptcy Code, hereby waives any such discharge).

ARTICLE III

REPRESENTATIONS AND WARRANTIES

To induce Lender to make the Loans, the Borrower, makes the following representations and warranties to Lender with respect to Borrower, as of the date of the entry of Final DIP Order which shall survive the execution and delivery of this Agreement.

3.1 Corporate Existence; Compliance with Law.

Borrower (a) is duly organized, validly existing and in good standing under the laws of Nevada; (b) is duly qualified as a foreign corporation or limited liability company, as the case may be, and is in good standing under the laws of each jurisdiction where its ownership or lease of property or the conduct of its business requires such qualification, except where the failure to be so qualified could not reasonably be expected to have a Material Adverse Effect; (c) subject to the entry of the Final DIP Order by the Bankruptcy Court, has the requisite corporate power and authority and the legal right to effect the transactions contemplated hereby and by the other Loan Documents to which it is a party; (d) subject to the entry of the Final DIP Order by the Bankruptcy Court, has the requisite corporate power and authority and the legal right to including, without limitation, to own, pledge, mortgage or otherwise encumber and operate its properties, to lease the property it operates under lease and to conduct its business as now, heretofore and proposed to be conducted; and (e) is in compliance with all Requirements of Law except to the extent that the failure to comply therewith could not reasonably be expected to have a Material Adverse Effect.

3.2 Corporate Power, Authorization, Enforceable Obligations.

Upon, and subject to, entry of the Final DIP Order, (a) Borrower has the corporate power and authority, and the legal right, to make, deliver and perform the Loan Documents to which it

is a party and to authorize the execution, delivery and performance of the Loan Documents to which it is a party, (b) Borrower has the appropriate power and authority to borrow hereunder and has taken all necessary corporate action to authorize the borrowings on the terms and conditions set forth in this Agreement and in the Notes, (c) the Agreement, and each other Loan Document to which it is a party will be, duly executed and delivered on behalf of Borrower, and (d) this Agreement, and each other Loan Document to which Borrower is a party when executed and delivered, will constitute, a legal, valid and binding obligation of the Borrower, enforceable against the Borrower in accordance with its terms, (whether enforcement is sought by proceedings in equity or at law).

3.3 No Legal Bar.

Except for the effect of the filing of the Chapter 11 Case, and subject to the entry of the Final DIP Order, the execution, delivery and performance of the Loan Documents to which Borrower is a party, the borrowings by the Borrower hereunder and the use of the proceeds of the Loans (a) will not violate any Requirement of Law or material contractual obligation of Borrower, (b) will not accelerate or result in the acceleration of any payment obligations of Borrower, and (c) will not result in, or require, the creation or imposition of any Lien on any of the respective properties or revenues of the Borrower pursuant to any such Requirement of Law or material contractual obligation.

3.4 No Material Litigation.

Other than for any litigation, investigation or proceeding before the Bankruptcy Court in the Chapter 11 Case, no litigation, investigation or proceeding of or before any arbitrator or governmental authority (collectively, "Litigation") is pending or, to the knowledge of Borrower, threatened by or against Borrower (a) with respect to any of the Loan Documents or any of the

transactions contemplated hereby or thereby, or (b) which could reasonably be expected to have a Material Adverse Effect.

3.5 No Default.

Borrower is not in default under, or with respect to, any of its material contractual obligations arising after the Petition Date in any respect which could reasonably be expected to have a Material Adverse Effect. Immediately after giving effect to this Agreement, no post-petition Default or Event of Default has occurred and is continuing.

3.6 Taxes.

Borrower has filed or caused to be filed all tax returns which, to the knowledge of the Borrower are required to be filed. Borrower has paid all taxes shown to be due and payable on said returns or on any assessments made against it or any of its property and all other taxes, fees or other charges imposed on it or any of its property by any governmental authority (other than any tax, fee or other charge the amount or validity of which is currently being contested in good faith by appropriate proceedings and with respect to which reserves in conformity with customary usage has been provided on the books of Borrower or which accrued or became payable prior to the Petition Date); and, no tax Lien has been filed, and, to the knowledge of Borrower, no claim is being asserted, with respect to any such tax, fee or other charge.

3.7 Purpose of Loans.

The Borrower shall not use the proceeds of any Loan hereunder other than in accordance with this Agreement.

3.8 Accuracy and Completeness of Information.

All information, reports and other papers and data with respect to the Borrower (other than projections) furnished to the Lender by or on behalf of Borrower, were, at the time furnished, complete and correct in all material respects, or have been subsequently supplemented by other information, reports or other papers or data, to the extent necessary to give the Lender a true and accurate knowledge of the subject matter in all material respects other than as set forth in this Agreement, there is no fact known to Borrower which has, or could reasonably be expected to have, a Material Adverse Effect.

3.9 The Required Orders.

On or prior to the date of the making of any Loan hereunder, the Final DIP Order shall have been entered and shall not have been stayed, amended (without the Lender's prior written consent), vacated, reversed, rescinded or otherwise modified in any respect. Upon the maturity (whether by the acceleration or otherwise) of any of the Obligations of the Borrower hereunder and under the other Loan Documents, the Lender shall be entitled to immediate payment of such Obligations, and to enforce the remedies provided for hereunder, without further application to or order by the Bankruptcy Court.

3.10 [intentionally left blank]

3.11 Reorganization Matters.

(a) The Chapter 11 Case was commenced on the Petition Date in accordance with applicable law and proper notice thereof and the proper notice for the hearing for the approval of the Final DIP Order has been given.

(b) The Final DIP Order is in full force and effect has not been reversed, stayed, modified or amended.

(c) Notwithstanding the provisions of Section 362 of the Bankruptcy Code, upon the maturity (whether by acceleration or otherwise) of any of the Obligations, Lender shall be entitled to immediate payment of such Obligations and to enforce the remedies provided for hereunder, without further application to or order by the Bankruptcy Court.

ARTICLE IV

CONDITIONS PRECEDENT

4.1 Loans Conditioned Upon Entry of the Final DIP Order.

The obligations of the Lender to make each Loan on and after the Closing Date, or to take, fulfill, or perform any other action hereunder is subject to the satisfaction of the following conditions precedent:

(a) Bankruptcy Court Orders. Either an interim or the Final DIP Order shall have been entered by the Bankruptcy Court, shall be in full force and effect and shall not have been stayed, reversed, vacated or rescinded or, without the written consent of the Lender, conditional or delayed, modified or amended in any respect and, if is the subject of a pending appeal in any respect, neither the making of such Loans nor the performance by the Borrower of any of its Obligations hereunder or under the Loan Documents or under any other instrument or agreement referred to herein shall be the subject of a presently effective stay pending appeal

(b) Loan Documents. The Lender shall have received this Agreement, the Note and all other Loan Documents, each other agreement, documents and instruments relating to the loan and other credit transactions contemplated by this Agreement, each duly executed where appropriate and in form and substance satisfactory to the Lender.

(c) No Material Adverse Effect. No Material Adverse Effect shall have occurred with respect to Borrower between the Petition Date and the date of making the initial Loan and each Loan thereafter, other than those which customarily occur as a result of the pendency of the Chapter 11 Case.

(d) Litigation. No litigation shall have been commenced or be pending which has not been stayed by the commencement of the Chapter 11 Case and which, if successful, would have a Material Adverse Effect on Borrower, its business or ability to repay the Loans or which would challenge this Agreement, Final DIP Order or the transactions contemplated thereby.

ARTICLE V

NEGATIVE COVENANTS

From the date hereof and for so long as the Loan Commitments remain in effect, any Note(s) remain outstanding and unpaid or any Obligation is owing to the Lender hereunder, Borrower hereby agrees that it will not, (and will not seek, unless in connection with an amendment to the Agreement that is reasonably likely to be approved by the Lender), Bankruptcy Court authority to:

5.1 Limitation on Indebtedness.

Create, incur, assume or permit to exist any indebtedness, or enter into any agreement or binding commitment to create, incur, assume or suffer to exist any indebtedness, except the Loans and the other Obligations created under this Agreement;

5.2 Limitation on Liens.

Create, incur, assume or permit to exist any Lien any of its properties, assets or revenues, (whether now owned or hereafter acquired), except for inchoate Liens for taxes, assessments or

governmental charges or levies or Liens for taxes, assessments, governmental charges or levies not yet due or which are being contested in good faith by appropriate proceedings; *provided* that adequate reserves with respect thereto are maintained on the books of the Borrower;

5.3 Limitation on Sale of Assets.

(a) Convey, sell, lease, assign, transfer or otherwise dispose of any of its property, business or assets (including, without limitation, any capital stock of Borrower, receivables and fee or leasehold interests), whether now owned or hereafter acquired, in each case, in one transaction or a series of transactions to any Person, except:

(i) as otherwise approved in writing prior to the consummation thereof by Lender; and

(ii) the sale of equipment or other disposition of obsolete or worn out property in the ordinary course of business and having a book value not exceeding \$_____ in the aggregate in any Fiscal Year, provided that the net proceeds of each transaction (if any) are applied in prepayment of the Loans;

(b) Incur, create, assume, suffer to exist or permit any other Lien which is *pari passu* with or senior to the claims of the Lender granted pursuant to this Agreement and the Final DIP Order.

5.4 Plan of Reorganization.

Propose, file, solicit votes for, support, consent to or prosecute a Reorganization Plan or disclosure statement attendant thereto for the Borrower that is not a Lender Approved Reorganization Plan or otherwise acceptable to Lender, in form and substance.

ARTICLE VI

AFFIRMATIVE COVENANTS

From the date hereof and for so long as the Loan Commitments remain in effect, any Note remains outstanding and unpaid or any Obligation is owing to the Lender hereunder, Borrower shall perform or be subject to the following:

6.1 Monthly Operating Reports. Each month Borrower shall provide Lender with a copy of the Monthly Operating Reports prepared by Borrower and filed with the Bankruptcy Court in accordance with US Trustee guidelines, contemporaneously with such reports filing with the Bankruptcy Court.

6.2 Other US Trustee Reports. Borrower shall provide Lender with a copy of the any other reports or information mandated or requested by the U.S. Trustee in accordance with US Trustee guidelines, contemporaneously with the Borrower providing such reports to the US Trustee.

6.3 [INTENTIONALLY LEFT BLANK]

6.4 Other Requirements. Borrower will:

(a) deliver to the Lender all financial statements and other reporting reasonably requested by the Lender;

(b) promptly provide written notice to the Lender of the receipt of any notice of

(i) the commencement of any material litigation against or involving the Borrower (including any insolvency, administration, liquidation, or similar proceeding relating to the Borrower) other than with respect to proceedings brought in the Chapter 11 Case or in any adversary proceeding related to the Chapter 11 Case,

(ii) termination of or default under any material contract, and

(iii) noncompliance with any rule, statute, law, permit or license that could reasonably be expected to have a Material Adverse Effect;

(c) maintain adequate insurance; and

(v) provide the Lender, and its advisors, with reasonable access to all of the Borrower's facilities and offices for the purposes of reviewing the business operations and assets of the Borrower.

ARTICLE VII

TERMINATION

7.1 Termination.

(a) The financing arrangements contemplated hereby shall be in effect until the Commitment Termination Date, and the Loans and all other Obligations shall be automatically due and payable in full on such date.

(b) Borrower shall pay the entire Obligations owing to the Lender under this Agreement and other Loan Documents, on the Effective Date of any confirmed Reorganization Plan in cash (immediately available funds).

(c) In the event that a Reorganization Plan is not confirmed and/or the Chapter 11 Case is converted to a case under Chapter 7 of the Bankruptcy Code, or dismissed, then the entire Obligations owing to Lender under this Agreement and other Loan Documents shall be fully paid to Lender in cash (immediately available funds) upon the entry of any order (i) converting this Chapter 11 Case to a case under chapter 7 of the Bankruptcy Code or (ii) dismissing this Chapter 11 Case.

7.2 Survival of Obligations Upon Termination of Financing Arrangements.

Except as otherwise expressly provided for in the Loan Documents, no termination or cancellation (regardless of cause or procedure) of any financing arrangement under this Agreement shall in any way affect or impair the obligations, duties and liabilities of the Borrower or the rights of Lender relating to any unpaid portion of the Loans or any other Obligations, due or not due, liquidated, contingent or unliquidated or any transaction or event occurring prior to such termination, or any transaction or event, the performance of which is required after the Commitment Termination Date. Except as otherwise expressly provided herein or in any other Loan Document, all undertakings, agreements, covenants, warranties and representations of or binding upon the Borrower, and all rights of Lender, all as contained in the Loan Documents, shall not terminate or expire, but rather shall survive any such termination or cancellation and shall continue in full force and effect after the Commitment Termination Date.

ARTICLE VIII

EVENTS OF DEFAULT; RIGHTS AND REMEDIES

8.1 Events of Default.

Notwithstanding the provisions of section 362 of the Bankruptcy Code and without application or motion to the Bankruptcy Court or any notice to Borrower, and subject to Section 8.2, the occurrence of any one or more of the following events (regardless of the reason therefor) shall constitute an “Event of Default” hereunder:

(a) (i) Borrower shall fail to pay any principal of any Note when due in accordance with the terms thereof or hereof, (ii) Borrower shall fail to pay any interest on any Note, any other Obligation or any other amount payable hereunder, within three (3) Business Days after any such interest or other amount becomes due in accordance with the terms thereof or hereof, or (iii)

Borrower fails to perform any of the terms and provisions of this Agreement or of any other Loan Document; or

(b) One or more judgments or decrees shall be entered after the Petition Date against the Borrower involving in the aggregate a liability (to the extent not covered by third party insurance as to which the insurer has acknowledged coverage) of \$_____ or more, net of insurance proceeds, and all such judgments or decrees shall not have been vacated, discharged, stayed or bonded pending appeal within thirty (30) days from the entry thereof; or

(c) Proceeds of any Loan made hereunder are used to make a payment that is not in strict compliance with this Agreement, unless agreed to in writing by the Lender; or

(d) The occurrence of any additional "Event of Default" identified in any of the Loan Documents or the Final DIP Order not identified herein; or

(e) The occurrence of any of the following in the Chapter 11 Case:

(i) the dismissal of the Chapter 11 Case, or the conversion of the Chapter 11 Case from one under Chapter 11 to one under Chapter 7 of the Bankruptcy Code, or Borrower shall file a motion or other pleading seeking the dismissal of the Chapter 11 Case under section 1112 of the Bankruptcy Code or otherwise;

(ii) the appointment of a trustee in the Chapter 11 Case or the appointment of an examiner with expanded powers (powers beyond those set forth under sections 1106(a)(3) and (4) of the Bankruptcy Code) to operate, oversee or manage the financial affairs, the business, or reorganization of the Borrower under Bankruptcy Code section 1106(b);

(iii) the entry of an order of competent jurisdiction (1) reversing, staying, vacating or rescinding the Final DIP Order or it otherwise ceases to be in full force and effect or (2) amending, supplementing or otherwise modifying the Final DIP Order without the written

consent of the Lender or the filing of a motion for reconsideration (x) in respect of the total Revolving Loan Commitments, without Lender' consent;

(iv) Borrower materially violates or breaches the Final DIP Order or files any pleadings seeking, joining in, or otherwise consenting to any material violation or breach of the Final DIP Order;

(v) the bringing of a motion or taking of any action by Borrower: (1) to obtain additional financing under section 364(c) or (d) of the Bankruptcy Code not otherwise permitted pursuant to this Agreement; (2) to grant any Lien other than as set forth at Section 5.2 of this Agreement upon or affecting any Collateral; (3) to file, seek or consent to confirmation of a Reorganization Plan or disclosure statement attendant thereto which is not a Lender Approved Reorganization Plan; or (4) which is adverse to Lender' rights, interests and/or remedies hereunder;

(vi) the entry of an order in the Chapter 11 Case granting any other Lien equal or superior to that granted to the Lender;

(vii) the entry of an order in the Chapter 11 Case avoiding or requiring repayment or return of any portion of the payments made on account of the Obligations owing under this Agreement;

(viii) the entry of an order in the Chapter 11 Case confirming a Reorganization Plan(s) that is not a Lender Approved Reorganization Plan;

(ix) the Bankruptcy Court shall enter an order or orders granting relief from or modifying the automatic stay applicable under Section 362 of the Bankruptcy Code to permit one or more creditors to execute upon, enforce or perfect a Lien on any material asset of the

Borrower or that otherwise could reasonably be expected to have a Material Adverse Effect on the Borrower' business;

(xi) commencement of any suit against the Lender that would in any way reduce, set off, or subordinate the Obligations under this Agreement; or any such suit that is commenced by any party other than the Borrower, and in the reasonable judgment of the Lender, such suit has a reasonable possibility of success, and if successful, would be reasonably likely to have a Material Adverse Effect;

(xii) the payment of, or application for authority to pay, any prepetition Claim other than pursuant to a Lender Approved Reorganization Plan, without the Lender' prior written consent, or pursuant to an order of the Bankruptcy Court after notice and hearing unless otherwise permitted under this Agreement.

8.2 Remedies.

Upon the occurrence and during the continuance of an Event of Default, and without further order of or application to the Bankruptcy Court, the Lender shall, by three (3) Business Days' prior written notice to the Borrower (with a copy to the US Trustee, counsel for any Committee(s) and counsel for the Prepetition Lender), take one or more of the following actions, at the same or different times:

(i) terminate forthwith the Loan Commitments;

(ii) declare the Loans or any portion thereof then outstanding to be forthwith due and payable, whereupon the principal of such Loans together with accrued interest thereon and any Other Loan Related Claims and all other liabilities of the Borrower accrued hereunder and under any other Loan Document, shall become forthwith due and payable, without presentment, demand, protest or any other notice of any kind, all of which are hereby expressly waived by the

Borrower, anything contained herein or in any other Loan Document to the contrary notwithstanding; and

(iii) take any other action or exercise any and all other rights or remedies under the Loan Documents, and under applicable law available to the Lender. For purposes of the Lender's exercise of any and all of its remedial rights upon the occurrence and during the continuation of an Event of Default, the automatic stay imposed by Section 362(a) of the Bankruptcy Code shall be automatically vacated and modified following three (3) Business Days' prior written notice to Borrower, US Trustee, counsel for any Committee(s) and counsel for the Prepetition Lender.

ARTICLE IX

MISCELLANEOUS

9.1 Amendments and Waivers.

Neither this Agreement, nor any Note or any other Loan Document, nor any terms hereof or thereof may be amended, restated, supplemented or modified except in writing signed by each of the Parties hereto

9.2 No Waiver; Cumulative Remedies.

No failure to exercise and no delay in exercising, on the part of Lender, any right, remedy, power or privilege hereunder or under the other Loan Documents shall operate as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege. The rights, remedies, powers and privileges herein provided are cumulative and not exclusive of any rights, remedies, powers and privileges provided by law.

9.3 Survival of Representations and Warranties.

All representations and warranties made hereunder, in the other Loan Documents and in any document, certificate or statement delivered pursuant hereto or in connection herewith shall survive the execution and delivery of this Agreement and the Notes and the making of the Loans hereunder.

9.4 Successors and Assigns; Participations and Assignments.

(a) This Agreement shall be binding upon and inure to the benefit of the Borrower and the Lender and their respective successors and assigns, including any trustee appointed in this Chapter 11 Case, or upon conversion of this case to a case under chapter 7, a trustee appointed or elected therein.

(b) Lender may sell any participation interest in or otherwise assign its rights under this Agreement or any Obligations of Borrower hereunder without prior written consent of Borrower.

(c) The Borrower authorizes Lender to disclose to any permitted Assignee (each, a "Transferee") any and all financial information in Lender's possession concerning the Borrower which has been delivered to Lender.

9.5 Counterparts.

This Agreement may be executed by one or more of the Parties on any number of separate counterparts (including by telecopy or email), and all said counterparts taken together shall be deemed to constitute one and the same instrument. A set of the copies of this Agreement signed by all the parties shall be lodged with the Borrower and the Lender.

9.6 Severability.

Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

9.7 Governing Law.

THIS AGREEMENT AND THE REVOLVING NOTES AND THE RIGHTS AND OBLIGATIONS OF THE PARTIES UNDER THIS AGREEMENT AND THE REVOLVING NOTES SHALL BE GOVERNED BY, AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEVADA WITHOUT REGARD TO THE PRINCIPLES OF CONFLICT OF LAWS THEREOF OTHER THAN SECTION 5-1401 OF THE GENERAL OBLIGATIONS LAW OF THE STATE OF NEVADA.

Submission To Jurisdiction; Waivers. Borrower and Lender hereby irrevocably and unconditionally: (a) submit for themselves and their property in any legal action or proceeding relating to this Agreement and the other Loan Documents to which it is a party, or for recognition and enforcement of any judgment in respect thereof, to the jurisdiction of the Bankruptcy Court; (b) consent that any such action or proceeding may be brought in the Bankruptcy Court and waive any objection that they may now or hereafter have to the venue of any such action or proceeding in any such court or that such action or proceeding was brought in an inconvenient court and agree not to plead or claim the same; (c) agree that nothing contained herein shall affect the right to effect service of process in any other manner permitted by law or shall limit the right to sue in any other jurisdiction; and (d) waive, to the maximum extent not

prohibited by law, any right they may have to claim or recover in any legal action or proceeding referred to in this Section any special, exemplary, punitive or consequential damages.

9.8 No Waiver.

No failure on the part of Lender to exercise, and no delay in exercising, any right, power or remedy hereunder or any of the other Loan Documents shall operate as a waiver thereof, nor shall any single or partial exercise of any such right, power or remedy preclude any other or further exercise thereof or the exercise of any other right, power or remedy. All remedies hereunder are cumulative and are not exclusive of any other remedies provided by law.

[SIGNATURES FOLLOW ON NEXT PAGE]

IN WITNESS WHEREOF, the parties hereto has caused this Agreement to be duly executed and delivered by their proper and duly authorized officers as of the day and year first above written.

AVERY LAND GROUP LLC

BDH GYPSUM

By: _____

By: _____

Name:

Name:

Title:

Title:

EXHIBIT A

[FORM OF]

NOTE

CREDIT NOTE

\$500,000

October __, 2016

FOR VALUE RECEIVED, the undersigned, **AVERY LAND GROUP, LLC**, a Nevada limited liability company, (the “Borrower”), promises to pay to the order of **GYPSUM RESOURCES, LLC**, a Nevada limited liability company (the “Lender”), on the Maturity Date, if not sooner paid, the lesser of (i) the principal sum of **FIVE-HUNDRED THOUSAND DOLLARS (\$500,000)**, or (ii) the aggregate unpaid principal amount of all credit loans and extensions of credit made by the Lender to the Borrowers pursuant to that certain Debtor-in-Possession Credit Agreement between the Borrower and the Lender dated as of _____, as such agreement may be amended, modified or supplemented from time to time (the “**Loan Agreement**”). The Borrower further promises to pay to the order of the Lender interest on the unpaid principal amount of this Note from time to time outstanding at the rate or rates per annum determined or as otherwise provided in, the Loan Agreement, and with such amounts being payable on the dates set forth in the Loan Agreement.

All payments and prepayments to be made in respect of principal, interest or other amounts due from the Borrower under this Note shall be payable at 12:00 noon Las Vegas time, on the day when due. The Borrower expressly waives presentment, demand, notice, protest and all other demands and notices in connection with the delivery, acceptance, performance, default or enforcement of this Note, and an action for any amounts due and unpaid shall therefore accrue immediately.

This Note is the “Note” referred to in, and is entitled to the benefits of, the Loan Agreement. This Note is secured by, and is entitled to the benefits of, certain other Loan Documents, as each of them may be amended, modified or supplemented from time to time. Capitalized terms used in this Note that are defined in the Loan Agreement have the meanings assigned to them in the Loan Agreement unless otherwise expressly defined in this Note.

This Note is governed by, and will be construed and enforced in accordance with, the laws of the State of Nevada. The Borrower consents to the exclusive jurisdiction and venue of the United States Bankruptcy Court for the District of Nevada located in Las Vegas, Nevada with respect to any suit arising out of, relating to, or mentioning this Note.

IN WITNESS WHEREOF, and intending to be legally bound, the Borrower has executed, issued and delivered this Note as of October __, 2016.

AVERY LAND GROUP, LLC

By: _____
Name:
Title: