

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

IN RE:	)	
	)	
WK CAPITAL ENTERPRISES, INC.,	)	Case No. 17-10073
	)	Chapter 11
Debtor	)	
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IN RE:	)	
	)	
CAPITAL PIZZA HUTS, INC.	)	Case No. 17-10074
	)	Chapter 11
Debtor	)	
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IN RE:	)	
	)	
CAPITAL PIZZA HUTS OF VERMONT, INC.	)	Case No. 17-10075
	)	Chapter 11
Debtor	)	
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IN RE:	)	
	)	
CAPITAL PIZZA OF NEW HAMPSHIRE, INC.	)	Case No. 17-10076
	)	Chapter 11
Debtor	)	
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**EMERGENCY MOTION FOR ENTRY OF ORDER  
(I) AUTHORIZING POST-PETITION FINANCING; (II) AUTHORIZING THE USE OF  
CASH COLLATERAL; (III) GRANTING SECURITY INTEREST AND  
SUPERPRIORITY CLAIMS; (IV) GRANTING ADEQUATE PROTECTION; (V)  
MODIFYING AUTOMATIC STAY; AND  
(VI) SCHEDULING A FINAL HEARING ON THE MOTION**

WK Capital Enterprises, Inc., Capital Pizza Huts, Inc., Capital Pizza Huts of Vermont, Inc. and Capital Pizza of New Hampshire, Inc., as debtors and debtors-in-possession (collectively referred to herein as the “Debtors”), by and through their undersigned attorney, hereby moves this Court for entry of an Order pursuant to Sections 105, 361, 362, 363 and 364 of Title 11 of the United States Code (11 U.S.C. §§ 101 *et seq.*, as amended, the “Bankruptcy Code”) and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”): (1) authorizing the Debtors to enter into post-petition financing; (2) authorizing the use of cash collateral; (3) granting securing interest and superpriority claims; (4)

granting adequate protection; (5) modifying the automatic stay; (6) scheduling and approving the form and method of notice of the final hearing on the Motion; and (7) for other related relief as necessary.

In further support of this Motion, the Debtors and INTRUST BANK, N.A. respectfully state as follows:

### **JURISDICTION**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334. Venue is proper pursuant to 28 U.S.C. §§1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. §157(b).

2. The statutory basis for the relief requested herein is Section 105, 361, 362, 363 and 364 of the Bankruptcy Code and Rules 2002, 4001 and 9014 of the Bankruptcy Rules.

### **FACTUAL AND PROCEDURAL BACKGROUND**

3. On January 23, 2017, (the "Petition Date"), the Debtors each filed for relief under Chapter 11 of the Bankruptcy Code, (the "Chapter 11 Cases"). The Debtors intend to continue to operate their businesses and manage their properties as debtors in possession, pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

4. The Debtors requested that the Court enter an Order directing the Debtors' Chapter 11 cases be jointly administered and consolidated for procedural purposes only.

### BACKGROUND

5. The Debtors are four related entities: WK Capital Enterprises, Inc. (“WK”), the 100% owner of three operating Pizza Hut entities, Capital Pizza Huts, Inc. (“CPH”), Capital Pizza Huts of Vermont, Inc. (“CPHV”) and Capital Pizza of New Hampshire, Inc. (“CPNH”) (collectively, CPH, CPHV and CPNH are the “Operating Entities”).

6. CPHV and CPNH operate all of the Pizza Huts located in their respective states. CPH operates selective Pizza Huts restaurant locations in Tennessee, Virginia, Maine and North Carolina.

7. CPHV also owns a closed Pizza Hut building and related real estate in Gorham, New Hampshire. It has been de-identified as a Pizza Hut restaurant to comply with franchisor requirements.

8. Although the Debtors operate fifty-six (56) Pizza Hut restaurants in six (6) states, the central business office location for the operation of the fifty-six (56) restaurants is at 3445 North Webb Road, Wichita, Kansas 67226. The President of the Debtors, Kenneth J. Wagon, maintains his office and conducts business in Wichita, Kansas.

9. Virtually all of the business records of the Debtors are located in Wichita, Kansas. The Operating Entities' contracts for administrative services, which are performed in Wichita, Kansas, are with WK.

10. The Debtors also have contracts with Infosync Services, LLC (“Infosync”) located in Wichita, Kansas for the performance of accounting, benefits administration, payroll,

payables and cash management. Infosync is compensated approximately \$32,000 a month for all services. Significant business activity, thus, takes place in Kansas.

11. The Operating Entities collectively operate fifty-six (56) Pizza Hut stores. Three of the fifty-six (56) operating stores are held in fee title by their respective entities. The remainder of the stores are leased from various lessors, plus the closed Gorham, New Hampshire location.

12. The Operating Entities are delinquent in the payment of January, 2017, rent, but have paid all rent due prior to January 1, 2017, with one exception.

13. The Debtors have approximately 1,400 employees (56 stores x 25 employees).

14. The CPH recently completed a sale pre-petition of sixteen (16) restaurants located in the state of New Jersey.

15. This bankruptcy was caused, in part, by declining gross sales and increasing food costs. The Operating Entities attempted to sell their stores prior to the filing of the bankruptcy to a third party purchaser. That sale fell through when the buyer withdrew from the sale, necessitating the filing of the bankruptcy. After the sale fell through, the Debtors' principal secured lender, INTRUST Bank, N.A. ("INTRUST Bank") began returning checks from the Debtors' bank accounts due to the accounts being overdrawn.

16. The funds of the Operating Entities have been maintained in a concentration account at INTRUST Bank titled in the name of the parent company, WK. There are various sub-accounts at INTRUST Bank held by WK for payroll and other operating expenses, as well as

a reserve account maintained pursuant to the terms of a pre-petition cash management agreement.

17. In addition, each Pizza Hut restaurant (except to the extent that more than one restaurant deposits in a single local account) maintains a “field account” at its location, from which funds are transferred via ACH to the WK consolidation account at INTRUST Bank.

**PRE-PETITION DEBT**

18. As of the Petition Date, the Debtors, Capital Pizza of New Hampshire, Inc., a New Hampshire corporation, Capital Pizza Huts, Inc., a Colorado corporation, Capital Pizza Huts of Vermont, Inc., a Vermont corporation, WK Capital Enterprises, Inc., a Vermont corporation and INTRUST Bank, as lender and as agent, were parties to a Second Amended and Restated Loan Agreement dated January 28, 2015, related to (i) Bank Loan No. \*\*224, dated January 28, 2015, in the principal amount of \$7,500,000; (ii) Bank Loan No. \*\*199, dated January 28, 2015, in the principal amount of \$2,586,793.87; (iii) Bank Loan No. \*\*225, dated January 28, 2015, in the principal amount of \$16,624,793.28; and (iv) Bank Loan No. \*\*448, dated February 12, 2015, in the principal amount of \$2,000,000. These debts renewed, restated or otherwise amended existing indebtedness and were supported by guarantees by and amongst Kenneth J. Wagon, the individual, the 2008 Kenneth J. Wagon Single Purpose PH Trust, the Kenneth J. Wagon Revocable Trust, the 2014 Kenneth J. Wagon Irrevocable PH Trust, the 2007 Wagon Family Irrevocable Trust, and the 2007 Kenneth J. Wagon Irrevocable Trust, together with various security agreements and mortgages as amended, modified and supplemented.

In the United States Bankruptcy Court for the District of Kansas

IN RE: WK Capital Enterprises, Inc., Capital Pizza Huts, Inc., Capital Pizza Huts of Vermont, Inc., Capital Pizza of New Hampshire, Inc.

Bankruptcy Case No. 11-10285-11

Emergency Motion for Entry of Order (I) Authorizing Post-Petition Financing; (II) Authorizing the Use of Cash Collateral; (III) Granting Security Interest and Superpriority Claims; (IV) Granting Adequate Protection; (V) Modifying Automatic Stay; and (VI) Scheduling a Final Hearing on the Motion

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19. The Second Amended and Restated Loan agreement, together with the promissory notes, various security agreements and mortgages and related documents, as amended, modified and supplemented are hereinafter referred to as the “Loan Documents.” Copies of the Loan Documents and notes are filed of record with the Clerk of the United States Bankruptcy Court.

20. In addition, a letter of credit has been issued by INTRUST Bank on behalf of the Debtors in the sum of \$2,100,000.

21. A sum of approximately \$20,000,000 is due and owing under the Loan Documents and the letter of credit.

22. INTRUST perfected its security interest in its pre-petition collateral by filing UCC -1 Financing Statements, copies of which are filed with the Clerk of the United States Bankruptcy Court.

### **RELIEF REQUESTED**

23. By this Motion, the Debtors are seeking an order from this Court approving this Motion – with such order in effect from the period commencing with the Petition Date through and including the earlier to occur of March 31, 2017, or the effective date of any plan of reorganization of the Debtors (the “Expiration Date”). By this Motion the Debtors are seeking the authority to: (i) to obtain loans, advances and/or other financial accommodations from INTRUST; (ii) use the Pre-Petition Cash Collateral, Cash Collateral and the proceeds and

products thereof, pursuant to the terms and conditions of the DIP Financing Documents<sup>1</sup>, for the payment of expenses: (a) to the extent set forth in the Budget and incurred by the Debtors prior to the earlier to occur of the giving of a Default Notice (as defined herein) or occurrence of the Expiration Date; and (b) that are subject to the Carve-Out (as described herein) subject to the terms and conditions thereof (collectively the “Permitted Expenses”); and (iii) grant liens, administrative claims, and other adequate protection to INTRUST on all post-petition assets of the Debtors, including claims or recovery under Chapter 5 of the Bankruptcy Code as more particularly set forth herein and as set forth in the proposed interim order. The Debtors seek that the foregoing authorization be deemed effective as of the Petition Date of the Debtors’ Chapter 11.

**A. Terms of the Order**

24. Accordingly, the Debtors request entry of an order:

- a. Authorizing the Debtors, pursuant to Sections 364(b), 364(c), and 364(d) of the Bankruptcy Code, to enter into the DIP Financing Agreement in the amount of \$400,000 on the terms set forth in the Term Sheet attached hereto as **Exhibit A**;
- b. Authorizing the Debtors to use Cash Collateral and proceeds of the DIP Loan for the purposes set forth in the DIP Financing Agreement and the budget attached as **Exhibit B**, including and subject to the limitations set forth in the DIP Order, for working capital, general corporate purposes, and payment of bankruptcy related expenses;
- c. Authorizing as adequate protection for any post-petition diminution in value of INTRUST’s interest in the Pre-Petition Collateral, including without limitation that caused by the Debtors’ use of Cash Collateral, including without limitation for purposes of the Carve-Out, a post-petition

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<sup>1</sup> Terms not specifically defined herein shall have the meanings subscribed to them in the DIP Loan Term Sheet attached hereto as **Exhibit A**.

claim (the “Adequate Protection Claim”) jointly and severally against the Debtors’ estates;

- d. Authorizing pursuant to Bankruptcy Code Sections 363 and 364(c), the Adequate Protection Claim and any and all post-petition Obligations, as such term is defined in the Loan Agreement, of the Debtors to INTRUST pursuant to the DIP Financing Documents (collectively, the “Post-Petition Claim”) shall be allowed administrative expenses of the Debtors’ estates, jointly and severally, which shall have priority in payment over any other indebtedness and/or obligations of INTRUST now in existence or incurred hereafter by the Debtors and over all administrative expenses or charges against property arising in the Debtors’ Chapter 11 cases or any superseding Chapter 7 cases, including without limitation those specified in Bankruptcy Code §§105, 326, 328, 330, 331, 503(b), 507(a), 507(b), 726, 1113 or 1114, subject only to the Carve-Out. Notwithstanding the super-priority status afforded to the Post-Petition Claim pursuant to this Order, Permitted Expenses paid by or on behalf of the Debtors are deemed paid from the Collateral and shall not be subject to recovery or disgorgement by INTRUST or by any Chapter 11 or Chapter 7 trustee, on the grounds that the Post-Petition Claim, the Pre-Petition Obligations and/or any other super-priority or administrative claim against the Debtors’ estates shall not be indefeasibly satisfied in full in the Debtors’ bankruptcy cases (whether Chapter 11 or subsequent Chapter 7);
- e. Pursuant to Bankruptcy Code Sections 363 and 364(c), as security for the Post-Petition Claim, the Operating Entities are hereby authorized to and are hereby deemed to grant to INTRUST a valid, binding and enforceable lien, mortgage and/or security interest (a “Lien”, and as so granted to INTRUST, the “Post-Petition Lien”) in all of the Operating Entities’ presently owned or hereafter acquired property and assets, including Chapter 5 causes of action, whether such property and assets were acquired before or after the Petition Date, of any kind or nature, whether real or personal, tangible or intangible, wherever located, and the proceeds and products thereof (collectively, the “Collateral”, and to the extent created, acquired or arising after the Petition Date, the “Post-Petition Collateral”). Such Post-Petition Liens shall be cross-collateralized between the respective Debtors and Operating Entities;
- f. Authorizing the Post-Petition Lien to have the following priority with respect to the Collateral:



- (a) pursuant to Bankruptcy Code §364(c)(2), first priority as to: (i) all Pre-Petition Collateral that as of the Petition Date was not subject to: (A) valid, perfected and unavoidable Liens; or (B) valid and unavoidable Liens that are perfected after the Petition Date with a priority that relates back to a date prior to the Petition Date as permitted by Bankruptcy Code § 546(b); and (ii) all Post-Petition Collateral;
- (b) pursuant to Bankruptcy Code §364(c)(3), junior priority as to all Pre-Petition Collateral that as of the Petition Date was subject to: (i) valid, perfected and unavoidable Liens; or (ii) valid and unavoidable Liens that are perfected after the Petition Date with a priority that relates back to a date prior to the Petition Date as permitted by Bankruptcy Code § 546(b);
- (c) notwithstanding the foregoing, the Post-Petition Lien shall not be subject to any Lien which is avoided and which would otherwise be preserved for the benefit of the Debtors' estates under Bankruptcy Code §551; and
- (d) INTRUST shall not be subject to the equitable doctrines of "marshaling" or any similar claim or doctrine with respect to any collateral.
- g. Modifying the automatic stay provisions of Bankruptcy Code Section 362 to permit: (a) the Debtors to implement and perform the terms of the DIP Financing Documents; and (b) the Debtors to create, and INTRUST to perfect, any and all Liens granted.
- h. Scheduling a final hearing (the "Final Hearing") to consider entry of the Final Order, pursuant to Bankruptcy Rule 4001.
- i. Approving certain notice procedures for the interim and final hearings.

**B. Terms of the DIP Financing**

**1. Carve-Out**

25. Notwithstanding INTRUST's pre-petition and post-petition claims and Liens, the Debtors may use the Collateral to pay (the following subparagraphs, collectively, the "Carve-Out"):

- a. the statutory fees of the United States Trustee pursuant to 28 U.S.C. §1930(a), any unpaid fees due and owing to the Clerk of the Court, and interest due thereon (collectively, the "Statutory Fees"), whether incurred or payable before or after the giving of a Default Notice or the occurrence of the Expiration Date;
- b. the allowed fees and expenses of the professionals retained by the Debtors whose retentions are approved pursuant to Final Orders of the Court (the "Debtors' Professionals") in aggregate amount not to exceed \$130,000 for Hinkle Law Firm LLC and Forker Suter, LLC as counsel and co-counsel, incurred during the pendency of the case, either on an interim basis, or from the sale of assets assessed under 11 U.S.C. §506(c) or at the Expiration Date, subject to the limitations on the use of such funds set forth in the Final Order approving this Motion;
- c. the allowed fees and expenses of the professionals retained by the Official Committee of Unsecured Creditors (the "Committee") whose retentions are approved pursuant to Final Orders of the Court (the "Committee's Professionals"), and the reasonable expenses of members of the Committee (other than the fees and expenses of professionals employed by members of the Committee), in aggregate amount not to exceed \$25,000, incurred during the pendency of the case, either on an interim basis, or from the sale of assets under 11 U.S.C. §506(c) or at the occurrence of the Expiration Date, subject to the limitations on the use of such funds set forth in the Final Order approving this Motion;
- d. the fees and expenses of the Debtors' Professionals and the Committee's Professionals, whether allowed on an interim or final basis pursuant to Bankruptcy Code §§330 and 331, incurred prior to the earlier to occur of the giving of a Default Notice or the occurrence of the Expiration Date, to the extent set forth in the Budget, without such payments and reimbursements reducing the Carve-Out amounts set forth in

subparagraphs “(b)” through “(e)” immediately above, notwithstanding the payment of same after the giving of a Default Notice or the occurrence of the Expiration Date; and

- f. any amounts paid from the Collateral or the proceeds thereof, or funded by INTRUST, with respect to the Carve-Out shall be post-petition Obligations of the Debtors to INTRUST afforded Post-Petition Claim status and shall be secured by the Post-Petition Lien.

## 2. Waiver of Rights and Claims Against Collateral

26. Effective, as of the time of commencement of the Chapter 11 Cases, upon the entry of the Final Order containing such provision:

- a. the Debtors waive irrevocably all claims and rights, if any, they might otherwise assert against the Collateral pursuant to Bankruptcy Code §§506(c) or 552(b), except as it may pertain to the Debtors’ Professional fees;
- b. except from and pursuant to the terms of the Carve-Out, no entity in the course of the Debtors’ bankruptcy cases (whether Chapter 11 or subsequent Chapter 7), shall be permitted to recover from the Collateral (whether directly or through grant of derivative and/or equitable standing in the name of the Debtors and/or the Debtors’ estates) any cost or expense of preservation or disposition of the Collateral, including, without limitation, expenses and charges as provided in Bankruptcy Code §§506(c) or 552(b) without the prior written consent of INTRUST; and
- c. no entity shall be permitted to recover from the Collateral, or assert against INTRUST, any claim with respect to any unpaid administrative expense of the Debtors’ bankruptcy cases, whether or not the Debtors’ payment of such administrative claim was contemplated by or included in the Budget.

## 3. Use of Cash Collateral and Payment Post-Petition Claims of INTRUST

27. So long as there are any Pre-Petition Obligations or Post-Petition Claim outstanding to INTRUST (collectively, the “Obligations”), unless INTRUST shall have given its prior written consent, or the Court enters an order, upon proper notice to INTRUST and after a

hearing, requiring that all of the Obligations be immediately satisfied in full, there shall not at any time be entered in the Debtors' Chapter 11 cases any further orders which modify: (a) under Bankruptcy Code §363, the use of Cash Collateral in which INTRUST has an interest, or the sale, use, or lease, other than a sale under the provisions of 11 U.S.C. §363 or the terms in the ordinary course of business, of property of the Debtors in which INTRUST has an interest; or (b) the obtaining of credit or the incurring of indebtedness pursuant to Bankruptcy Code §§364(c) or 364(d), or any other grant of rights against the Debtors and/or their estates, secured by a Lien in the Collateral or entitled to priority administrative status which is equal or superior to that granted to the Post-Petition Claim other than to extend the terms of the Order.

28. In addition to the fees, costs, charges and expenses authorized under the Loan Documents, the Debtors shall pay in accordance with the procedures set forth in the following sentences, as allowed post-petition Obligations of the Debtors to INTRUST afforded Post-Petition Claim status secured by the Post-Petition Lien, all of INTRUST's reasonable attorneys' and other professionals' fees and reimbursable expenses arising from or related to: (a) this Order, including without limitation the negotiating, closing, documenting and obtaining of Court approval thereof; (b) all proceedings in connection with any Disposition (as such term is defined below); (c) all proceedings in connection with the interpretation, amendment, modification, enforcement, enforceability, validity or implementation of the DIP Financing Documents; (d) defending any Challenge (as such term is defined below) and/or responding to any Bankruptcy Rule 2004 discovery or other investigation brought with respect to any prospective Challenge; (e) all other matters and proceedings arising in or related to the Debtors' bankruptcy case; and (f)

all reasonable expenses, costs and charges in any way or respect arising in connection with the foregoing (collectively, the “INTRUST Expenses”). INTRUST may seek payment of any INTRUST Expenses by written request to the Debtors, the Committee’s and the U.S. Trustee’s respective counsel (the “Noticed Parties”), accompanied by copies of appropriate invoices for such INTRUST Expenses (subject to redaction against disclosure of privileged and/or confidential information) (the “Fee Request”). The Noticed Parties shall have five (5) days from the date of the Fee Request to file with the Court and serve upon INTRUST appropriate pleadings objecting to the payment of any amount set forth in a Fee Request. Any amount set forth in a Fee Request not timely objected to shall be paid by the Debtor, or in INTRUST’s discretion charged to the Debtors’ account under the Loan Agreement, within ten (10) days after the date of the Fee Request. Any amount set forth in a Fee Request timely objected to shall be paid by the Debtors, or in INTRUST’s discretion charged to the Debtors’ account under the Loan Agreement, as and when such objection is determined by the Court or otherwise agreed to by the parties.

#### 4. Events of Default

29. Each of the following shall constitute an “Event of Default”:

- a. the Court enters an Order granting relief from the automatic stay to a third party with respect to material assets of the Operating Entities;
- b. the Operating Entities cease operations of their present businesses or take any material action for the purpose of effecting the foregoing subparagraph a. above without the prior written consent of INTRUST, except to the extent contemplated by the Budget;
- c. the Operating Entities are either dismissed or converted to Chapter 7 cases pursuant to an order of the Court, the effect of which has not been stayed;

- d. a Chapter 11 trustee, or an examiner with materially expanded powers beyond those set forth in Bankruptcy Code §§1106(a)(3) and 1106(a)(4), or any other responsible person or officer of the Court with similar powers is appointed by Order of the Court, the effect of which has not been stayed, in the Debtors' Chapter 11 cases;
- e. the Final Order approving this Motion is reversed, vacated, stayed, amended, supplemented or otherwise modified in a manner which shall, in the sole opinion of INTRUST, materially and adversely affect the rights of INTRUST hereunder or shall materially and adversely affect the priority of any or all of the Obligations and/or INTRUST's Liens;
- f. the occurrence subsequent to the Petition Date of an Event of Default under the Loan Agreement as amended, modified and/or supplemented by the Amendment, other than any Event of Default occurring and/or existing solely because of: (i) the commencement of the Debtors' bankruptcy cases on the Petition Date and/or the continuance of the automatic stay to the extent not vacated by the Final Order; or (ii) the breach of any financial covenant set forth in the Loan Agreement;
- g. the Operating Entities have not, on or before February 6, 2017, filed appropriate pleadings with the Court seeking the sale, pursuant to Bankruptcy Code §363(b) free and clear of claims, Liens and interests, whether on a going concern, auction or other basis, of all or substantially all operating and associated assets, on terms and conditions acceptable to INTRUST in its sole and absolute discretion, or have not closed such sale pursuant to order of the Court on or before forty-five (45) days after filing the appropriate sale pleadings with the Court;
- h. (1) the Debtors expend any funds or monies for any purpose other than Permitted Expenses; (2) the Debtors expend any funds or monies with respect to Permitted Expenses in excess of the amounts authorized therefore, provided that: (A) for the cumulative Budget periods which have occurred the Debtors' actual cash disbursements may be up to ten percent (10%) more than the cumulative Budgeted amount for cash disbursements through the conclusion of such Budget periods without such expenditures constituting an Event of Default; and (B) amounts authorized in the Budget for payment during any Budget period that are not timely paid may be paid in any subsequent Budget period; (3) the Debtor fails to achieve revenues within at least ten percent (10%) of the revenue projections set forth in the Budget for the cumulative Budget

periods which have occurred, tested weekly thereafter on a four week trailing basis;

- i. the occurrence of a material adverse change, including without limitation any such occurrence resulting from the entry of any order of the Court, in each case as determined by INTRUST in its sole and absolute discretion, in: (1) the condition (financial or otherwise), operations, assets, business or business prospects of the Debtors; (2) the Debtors' ability to repay the Obligations; (3) the value of the Collateral and/or (4) an overdraft of any bank account of the Debtors maintained at INTRUST during the term of the Order;
- j. any material and/or intentional misrepresentation by the Debtors in any financial reporting or certifications to be provided by the Debtors to INTRUST; and
- k. non-compliance or default by the Debtors with any of the terms and provisions of the Final Order; provided, however, that said non-compliance or default shall not be deemed an Event of Default if curable and cured by the Debtor within three (3) business days after notice of such non-compliance or default is given to the Debtor by INTRUST.

30. Upon the occurrence of an Event of Default and the giving of written notice thereof by INTRUST to the Noticed Parties (which notice may be given facsimile or e-mail transmission, the automatic stay being deemed lifted for such purpose) (the "Default Notice"), or upon the occurrence of the Expiration Date, unless an express written waiver of an Event of Default is given by INTRUST, the following remedies are available:

- a. INTRUST shall have the right, free of the restrictions of Bankruptcy Code §362 or under any other section of the Bankruptcy Code or applicable law or rule, to take immediate reasonable action to protect the Collateral from harm, theft and/or dissipation;
- b. INTRUST shall have no obligation to make any further loans, advances and/or other financial accommodations to the Debtors;
- c. with respect to an Event of Default as to which a Default Notice has been given, the Noticed Parties shall have seven days from the receipt of the

Default Notice (the “Remedy Notice Period”) to obtain an order of the Court on notice to INTRUST enjoining or restraining INTRUST from exercising rights and remedies based upon the Event of Default specified in the Default Notice (“Restraint on Remedies”), provided that a Restraint on Remedies may be sought solely on grounds of the non-occurrence or timely cure of the Event of Default specified in the Default Notice; and

- d. (i) with respect to an Event of Default as to which a Default Notice has been given, immediately upon expiration of the Remedy Notice Period, unless a Restraint on Remedies has timely been obtained from the Court; or (ii) immediately upon the occurrence of the Expiration Date, but in either case subject in all respects to the Carve-Out: (A) the payment of any and all Obligations of the Debtors to INTRUST shall be due and payable; (B) the Debtors’ use of the Collateral (including without limitation Cash Collateral) pursuant to this Order and the Budget shall cease; (C) INTRUST shall have the right, free of the restrictions of Bankruptcy Code §362 or under any other section of the Bankruptcy Code, to exercise contractual, legal and equitable rights and remedies as to all or such part of the Collateral as INTRUST shall elect; (D) INTRUST, should it so elect in its sole and absolute discretion as exercised by the filing of an appropriate statement with the Court, shall be deemed to have been granted “peaceful possession” of, and right of access to, all or any portion of the Collateral, by the Debtors; and (E) INTRUST shall have the right, free of the restrictions of Bankruptcy Code §362 or any other section of the Bankruptcy Code, to impose an “administrative freeze” with respect to, and thereafter set off, the Debtors’ cash on deposit at or within their control.

## 5. Insurance Obligations

31. The Debtors, at their expense, shall continue to keep the Collateral fully insured as set forth in the Loan Documents. The Debtors shall provide INTRUST with proof of the foregoing within three (3) business days of written demand and will give INTRUST reasonable access to their records in this regard.



## **6. Reporting Requirements and Information Availability**

32. The Debtors shall provide INTRUST with such written reports as are required under the Loan Documents and as required by the guidelines or the directive of the United States Trustee's Office.

## **7. Access to Debtors' Books and Records**

33. INTRUST shall have the right, upon one (1) business day telephone or facsimile-transmitted written notice to the Debtors, at any time during the Debtors' normal business hours, to inspect, audit, examine, check, make copies of or extracts from the books, accounts, checks, orders, invoices, contracts, correspondence and other records of the Debtors, and to inspect, audit and monitor all or any part of the Collateral, and the Debtors shall make all of same available to INTRUST and its representatives, for such purposes. INTRUST and its representatives may, without INTRUST being deemed to be in control of, or a fiduciary for, the Debtors, and without obtaining prior consent from the Debtors: (1) discuss the Debtors' books and records, the Collateral, the Budget and/or the Debtors' business operations with the Debtors' directors, officers, retained professionals (including without limitation attorneys, accountants, investment bankers and financial, restructuring and/or workout advisors and consultants) or employees; and (2) make observations and recommendations regarding the Debtors' books and records, the Collateral, the Budget and/or the Debtors' business operations, to the Debtors' directors, officers, retained professionals (including without limitation attorneys, accountants, investment bankers and financial, restructuring and/or workout advisors and consultants) or employees.

## **8. Proceeds and Account Management**

34. For purposes of this Motion and any Final Order: (a) “Proceeds” shall mean any and all payments, proceeds or other consideration realized upon the sale, liquidation, realization, collection or other manner of disposition of the Collateral, whether in the ordinary course of the Debtors’ businesses (including without limitation accounts and other proceeds arising from the Debtor’s sales of goods and/or performance of services) or other than in the ordinary course of the Debtors’ businesses; and (b) “Disposition” shall mean any sale, liquidation, realization, collection or other manner of disposition of Collateral other than in the ordinary course of the Debtors’ businesses, including without limitation any sale or other disposition authorized pursuant to Bankruptcy Code Section 363 and/or any plan of reorganization.

35. From and after the Petition Date, the Debtors shall maintain in full force and effect the pre-petition clearing, concentration and similar accounts maintained by or on behalf of the Debtors pursuant to the Loan Documents for the collection of Proceeds obtained in the ordinary course of the Debtors’ businesses (the “Collection Accounts”), and the payment procedures under which such accounts are administered (the “Collection Procedures”), unless otherwise directed by INTRUST. Without limitation of the foregoing, from and after the date of this Order, the Debtors shall continue to remit to INTRUST such cash, cash equivalents and checks as are Proceeds obtained in the ordinary course of the Debtors’ businesses to INTRUST, and/or shall cause customers and account debtors of the Debtors to remit to INTRUST such cash, cash equivalents and checks as are such Proceeds to the Collection Accounts in accordance with the Collection Procedures. To the extent that as of the date of this Order, the Debtors maintain

In the United States Bankruptcy Court for the District of Kansas

IN RE: WK Capital Enterprises, Inc., Capital Pizza Huts, Inc., Capital Pizza Huts of Vermont, Inc., Capital Pizza of New Hampshire, Inc.

Bankruptcy Case No. 11-10285-11

Emergency Motion for Entry of Order (I) Authorizing Post-Petition Financing; (II) Authorizing the Use of Cash Collateral; (III) Granting Security Interest and Superpriority Claims; (IV) Granting Adequate Protection; (V) Modifying Automatic Stay; and (VI) Scheduling a Final Hearing on the Motion

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custody and/or control of any cash, cash equivalents or checks that is Cash Collateral, whether in their possession, in bank accounts, in lockbox accounts or otherwise, other than in the Collection Accounts and in contravention of the Collection Procedures, then upon entry of this Order the Debtors shall deliver such cash, cash equivalents or checks, and the proceeds thereof, to INTRUST.

36. The Debtors and any successors to the Debtors, including without limitation any successor trustee or trustees, shall assign or direct to INTRUST any and all Proceeds realized in any Disposition, and immediately deliver any and all such Proceeds which come into their possession to INTRUST in the form received. No further order of the Court shall adversely affect the rights of INTRUST to receive the Proceeds of any Disposition in accordance with the provisions of this paragraph or as otherwise agreed to by INTRUST. In furtherance of the foregoing, neither the Debtors nor any Committee shall seek to cause the escrow of, enjoin INTRUST's receipt of, or otherwise withhold from INTRUST any Proceeds of any Disposition. INTRUST is hereby authorized to credit-bid all or any portion of the Obligations at any Disposition.

37. INTRUST is authorized, notwithstanding the provisions of Bankruptcy Code Section 362, to retain and apply all Proceeds obtained or received pursuant to the preceding two paragraphs of this Order, as follows: (a) the Proceeds of the Post-Petition Collateral shall be applied first to the repayment of the Post-Petition Claim, including without limitation interest accrued with respect thereto, and thereafter to the repayment of the Pre-Petition Obligations; and (b) the Proceeds of the Pre-Petition Collateral shall be applied to the repayment of the Pre-

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Petition Obligations, in accordance with the priority of the Post-Petition Lien set forth above and without prejudice to the rights of any third party with respect to the allocated Proceeds of any Disposition of Collateral encumbered by a Lien granted to or in favor of such third party. Such applications of Proceeds shall be free and clear of any claim, charge, assessment or other liability including, without limitation, any such claim or charge arising out of or based on, directly or indirectly, Bankruptcy Code Sections 506(c) or 552(b).

**9. Admissions by the Debtors and Right to Challenge by the Committee**

38. Any Committee shall have sixty (60) days (or such longer period as the Committee may obtain for cause shown before the expiration of such period) from the date of the Final Order to commence an adversary proceeding against any of INTRUST Parties for the purpose (collectively, a “Challenge”) of (1) challenging the amount, characterization, validity, extent, priority, perfection, enforceability and non-avoidability of INTRUST’s pre-petition claims against the Debtors and/or pre-petition Liens; and (2) seeking to avoid, recover or challenge (whether pursuant to Chapter 5 of the Bankruptcy Code or otherwise) any transfer made by or on behalf of the Debtors to or for the benefit of INTRUST prior to the Petition Date. All other claims against INTRUST other than Challenges, seeking damages or equitable relief against INTRUST arising from or related to the pre-petition business relationship among the Debtors and INTRUST, including, without limitation, equitable subordination, lender liability, and/or deepening insolvency claims and causes of action, are expressly waived and barred upon entry of a final order hereon. The Committee is granted standing to commence any and all Challenges. Any other party in interest shall have sixty (60) days (or a longer period for cause

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shown before the expiration of such period) from the date of entry of the Final Order to move this Court for an order granting it standing to commence a Challenge. All parties in interest, including without limitation the Committee, that fail to act in accordance with the time periods set forth in the preceding sentences of this paragraph shall be, and hereby are, barred forever from commencing a Challenge. The foregoing is without prejudice to any and all of INTRUST Parties' legal and equitable claims, counterclaims, defenses and/or rights of offset and setoff in response to any such Challenge, all of which are reserved, and the foregoing shall in no event revive, renew or reinstate any applicable statute of limitations which may have expired prior to the date of initiation of such Challenge. Despite the commencement of a Challenge, INTRUST's pre-petition claims and Liens shall be deemed valid, binding, properly perfected, enforceable, non-avoidable, not subject to disallowance under Bankruptcy Code Section 502(d) and not subject to subordination under Bankruptcy Code Section 510 until such time as a final and non-appealable judgment order and judgment entered sustaining such Challenge in favor of the plaintiffs therein. Nothing contained herein shall limit the Court's ability to fashion an appropriate remedy should the Court determine, by entry of a final and non-appealable order and judgment, a Challenge in favor of the plaintiffs therein. INTRUST shall have no Carve-Out obligations to any person or entity (including without limitation the Committee) or to any Professional of such person or entity with respect to any pending or commenced Challenge, but the Carve-Out may be used by the Committee to investigate any matter for which a Challenge may be properly commenced.

## GROUNDS FOR RELIEF

### **A. Interim Relief**

39. The Debtors bring the part of this Motion seeking the use of Cash Collateral, the borrowing of funds post petition and the granting of liens and adequate protection in connection therewith on an expedited basis to avoid the immediate and irreparable harm that the Debtors will suffer if they do not obtain the necessary liquidity to sustain the business as a going concern. The Debtors need immediate access to cash collateral and will need post-petition financing in the near future.

40. Bankruptcy Rule 4001(b) and (c) provides that a final hearing on a cash collateral motion or a motion to obtain credit may not be commenced earlier than fifteen (15) days after service of such motion. Upon request, this Court is empowered to conduct an interim expedited hearing on such motions at which time this Court may authorize the Debtors to use Cash Collateral and obtain credit to the extent necessary to avoid immediate and irreparable harm to their bankruptcy estates. Pursuant to Bankruptcy Rule 4001(b) and (c) and for all reasons set forth herein, the Debtors request that this Court conduct an expedited interim hearing as soon after the Petition Date as this Court's schedule permits.

41. The credit and financial accommodations to be extended under the DIP Financing Documents are being extended by INTRUST in good faith, and INTRUST is entitled to the protection of Bankruptcy Code Section 364(e). The Debtors have determined that they have an immediate and critical need for the use of Cash Collateral. With respect to the proposed DIP Financing Agreement, the Debtors have further determined that they will not be able to obtain

alternative financing on terms superior to the terms of the DIP Financing Agreement, and such terms are market terms that represent the best terms reasonably available to the Debtors.

**B. Legal Standards**

*Use of Cash Collateral*

42. Section 363(c)(2) of the Bankruptcy Code provides that a debtor may not use, sell, or release cash collateral unless (a) each entity that has an interest in such cash collateral consents or (b) the Court, after notice and hearing, authorizes such use, sale, or lease.<sup>2</sup>

43. Pending a final hearing on the Motion, this Court may authorize the use of Cash Collateral if: (a) such relief is necessary to avoid immediate or irreparable harm, including the threatened loss of business; and (b) the Debtors establish a reasonable likelihood of proving that the affected interest will be protected adequately.<sup>3</sup>

44. If no diminution of value of the secured creditor's collateral through the date of the final hearing will occur and the debtor can operate profitably post-petition, the secured creditor is adequately protected against the use of its cash collateral by the debtor.<sup>4</sup>

*Approval of Post-Petition Financing*

45. Section 364(d) of the Bankruptcy Code provides that if a debtor-in-possession is unable to obtain credit otherwise, and its pre-petition secured creditors are adequately protected, then a court may authorize post-petition financing supported by a superpriority lien:

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<sup>2</sup> 11 U.S.C. § 363(c).

<sup>3</sup> See, e.g., *In re Ames Dep't Stores*, 115 B.R. 34, 36 n.2 (Bankr. S.D.N.Y. 1990).

<sup>4</sup> See *In re Pursuit Athletic Foot Wear, Inc.*, 193 B.R. 713, 716 (Bankr. D. Del. 1996) (citations omitted).

(d) (1) The court, after notice and hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if—

(A) the trustee is unable to obtain such credit otherwise; and

(B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is purposed to be granted.<sup>5</sup>

### *Adequate Protection*

46. The purpose of adequate protection is to ensure that a secured party's economic position is not worsened by the filing a bankruptcy case.<sup>6</sup> A debtor has the burden to establish that the holder of a lien to be subordinated, or whose cash collateral will be used, has adequate protection.<sup>7</sup> Adequate protection must be determined on a case-by-case basis, permitting a debtor maximum flexibility in structuring its adequate protection proposal.<sup>8</sup> Where a debtor's purposed use of cash collateral augments the value of the secured creditor's collateral, adequate protection exist.<sup>9</sup>

47. Activities of a debtor can enhance collateral value and thereby provide adequate protection. Among the ways a debtor may demonstrate the existence of adequate protection is by

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<sup>5</sup> 11 U.S.C. § 364(d).

<sup>6</sup> *In re DeSardi*, 340 B.R. 790, 204 (Bankr. S.D. Tex. 2006).

<sup>7</sup> *See In re Swedeland Dev. Co. Inc.*, 16 at 3d 552, 564 (3d Cir. 1994) (citations omitted).

<sup>8</sup> *Id.*; *Martin v. United States Commodity Credit Corp. (In re Martin)*, 762 F.2d 472, 474 (8th Cir. 1985).

<sup>9</sup> *See, e.g., Reconstruction Fin. Corp. v. Kaplan (In re Waltham Watch Co.)*, 185 F.2d 791, 797 (1st Cir. 1950) (use of cash collateral authorized under prior Bankruptcy Act to allow debtor to assemble watches out of tens of thousands of watch part were such increase the overall value of the debtor's assets); *In re Ledgemere Land Corp.*, 125 B.R. 58, 62 (Bankr. D. Mass. 1991) (cash collateral use authorized where debtor's marketing efforts adequately protected creditor's interest and collateral through realization of fair market value rather than liquidation value); *In re Pine Lake Village Apt.*, 19 B.R. 819, 826 (Bankr S.D.N.Y. 1982) (creditor had adequate protection where debtor used cash collateral to maintain and preserve the value of the collateral).



supplying the pre-petition lender with additional or substitute collateral sufficient to compensate a secured creditor for a loss of value caused by the superpriority given to a post-petition loan.<sup>10</sup>

### *Availability of Post-Petition Financing*

48. Generally, Bankruptcy Code Sections 364(c) and (d) require a debtor to demonstrate the alternative sources of post-petition credit are not available. Where few lenders, however, are likely able or willing to extend the credit required, “it would be unrealistic and unnecessary to require [the debtor] to conduct an exhaustive search for financing.”<sup>11</sup>

### **C. Need for Post-Petition Financing**

49. The Debtors will need financing to continue operations to maintain the going concern value of their business. The number of lenders who could commit to meet the Debtors’ post-petition financing requirements is extremely limited and the Debtors’ attempts to obtain alternative financing were unsuccessful or such efforts would be fruitless. Given the Debtors’ financial condition and existing financing arrangements, the Debtors have determined that they would be unable to obtain unsecured credit or other financial accommodations allowable as an administrative expense under Section 503(b)(1). As such, since no acceptable financing on more favorable terms is available, the only financing available and fair is the DIP Loan reached with INTRUST. In other words, DIP financing is not otherwise available to the Debtors without the protections afforded: (a) pursuant to Section 364(c) and subject to the Carve-Out granting superpriority status to those kinds of claims specified in Sections 503(b) and 507(b); and (b)

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<sup>10</sup> See *Swedeland*, 16 F.3d at 564 (citations omitted).

<sup>11</sup> *In re Sky Valley, Inc.*, 100 B.R.107, 113 (Bankr. N.D. Ga. 1998), *aff’d sub nom.*, *Anchor Savings Bank FSB v. Sky Valley, Inc.*, 99B.R.117, 120 n.4 (N.D. Ga. 1989).

pursuant to Sections 364(c) and 364(d), securing such obligations with security interest and liens on all of the Debtors' assets.

50. In the exercise of their business judgment, the Debtors have determined that the terms of financing proposed by INTRUST are the most favorable available under the circumstances. This fact is particularly true given (a) the nature of the Debtors' business, which will be adversely impacted by any prolonged stay in Chapter 11; (b) reduced liquidity in the financial markets; (c) the delay and cost attendant to soliciting proposals from new lenders, which would require additional due diligence and related fees; (d) the unsuccessful attempts at securing alternative financing from other sources; (e) that the Debtors cannot survive through the use of unencumbered property (as none exists) or the use of cash collateral; and (f) that any effort to bring in alternative debtor-in-possession financing will entail a "priming fight" that would be expensive, a distraction for the Debtors' management, and involve litigation risk. Further, the knowledge the INTRUST possesses about the business and Debtors has permitted an abbreviated due diligence period.

51. The Debtors have further determined that, in the exercise of their business judgment, they are negotiating the best financing arrangement that they can reasonably expect under the circumstances. The fees are customary and reasonable, and courts routinely authorize similar lender incentives beyond the explicit liens and rights specified in Section 364.<sup>12</sup> Moreover, the alternatives are dire; without additional liquidity, the Debtors cannot continue operations and will be forced to dismiss these cases or convert to Chapter 7.

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<sup>12</sup> See *In re Defender Drug Stores, Inc.*, 145 B.R.312, 316 (9th Cir. BAP 1992).

52. Under the circumstances, the Debtors' exercise of business judgment is entitled to deference by this Court.<sup>13</sup> Based on the foregoing, the Debtors request that at a final hearing on this Motion this Court approve the DIP Loan.

**D. Need for Cash Collateral**

53. In addition to the need for debtor-in-possession financing, the Debtors' immediate pressing concern is the need for use of INTRUST's cash collateral. The Debtors require the use of Cash Collateral to be able to pay their normal, general and administrative expenses, satisfy payroll and employee benefits, pay taxes, and pay vendors to ensure a continued supply of services and material essential to the debtors continued viability. The use of Cash Collateral will be made in accordance to the Budget.

**E. Adequate Protection**

54. The Debtors' only creditor with an interest in Cash Collateral is INTRUST, who is also the DIP Lender. Debtors' propose as adequate protection for INTRUST, pursuant to Section 361 and 363(e) of the Bankruptcy Code, for adequate protection of its interests in the Prepetition Collateral on account of the Debtors' use of the Cash Collateral, including without limitation for purposes of the Carve-Out, to the extent it results in a decrease in value of such interests (the "Diminution in Value"). As adequate protection to INTRUST for the aggregate Diminution in Value, INTRUST, shall be and hereby is granted (effective upon the Petition Date and without the necessity of the execution or filing by the Debtors or INTRUST of mortgages,

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<sup>13</sup> *In re Ames Dep't Stores*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) (noting that under Bankruptcy Code § 364, courts have considerable discretion to permit Debtors to exercise reasonable business judgment provided of the terms of the financing do not "leverage the bankruptcy process and powers" and that the purpose of the financing is primarily to benefit the estate).

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security agreements, pledge agreements, financing statements, or otherwise), the Adequate Protection Claim. INTRUST shall be allowed administrative expenses of the Debtors' estates, jointly and severally, which shall have priority in payment over any Adequate Protection Liens. To the extent of Diminution in Value, to the same extent and in the same priority as may be validly held by INTRUST as of the Petition Date, INTRUST shall have and is hereby granted (effective as of the Petition Date), valid and automatically perfected replacement security interests and liens (the "Replacement Liens") in and upon all of the property and assets that are included within the definition of their Prepetition Collateral, as may be created, acquired received, and/or obtained post-petition, each such liens having the same validity and priority, and being of the same extent with respect to all such property as existed on the Petition Date. To the extent of Diminution in Value, INTRUST shall have an allowed superpriority administrative expense claim in the amount of such insufficiency as provided in and to the full extent allowed by Sections 503(b) and 507(b) of the Bankruptcy Code (the "Cash Collateral Superpriority Claims"); including a lien upon all claims for recovery or proceeds from Chapter 5 causes of action. The Superpriority Claims shall be allowed claims against each Debtor (jointly and severally).

55. Notwithstanding, as adequate protection to any other secured creditor of the estates that may exist (including the Internal Revenue Service, the State of Kansas and the States of Vermont, New Hampshire, Maine, Virginia, North Carolina and Tennessee, or any creditor asserting mechanics', materialmen's, mineral or other statutory liens) for any diminution in value that may result from the Debtors' use of their respective Cash Collateral if any (and only to the

extent such secured creditor holds a valid and perfected, non-avoidable lien and security interest in Cash Collateral as of the Petition Date), such secured creditor is granted (effective upon the Petition Date and without the necessity of the execution or filing of mortgages, security agreements, pledge agreements, financing statements, or otherwise), a replacement security interest and lien in the applicable Debtor's post-petition assets that are subject to their existing, prepetition liens and security interests with the same description, scope, validity, and priority as such prepetition liens and security interest held by such secured creditor on the Petition Date. The Debtors (and INTRUST) reserve all rights to contest the validity, amount and priority of any and all claims, liens and security interests asserted by such secured creditors.<sup>14</sup>

56. The Debtors will provide INTRUST with ample information relating to projected revenues and expenses, actual revenues and expenses, and variances from the budget. This information will enable INTRUST to monitor its interest in the Collateral and Cash Collateral. Reporting of financial information can also be sufficient form of adequate protection.<sup>15</sup>

57. The Debtors propose to adequately protect INTRUST with the maintenance and potential increase in value of the Pre-Petition Collateral. The Debtors intend to use Cash Collateral and the DIP Loan proceeds to maintain INTRUST's Collateral. Because adequate protection is "broad and flexible," it can be satisfied by improvements to collateral.<sup>16</sup>

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<sup>14</sup> Further, INTRUST reserves all rights to contest the validity, amount and priority of any and all claims, liens and security interests asserted by creditors.

<sup>15</sup> *In re Mutual Benefit Life Ins. Co. v. Stanley Station Assocs., L.P. (In re Stanley Station Assocs., L.P.)*, 140 B.R. 806, 809 (D. Kan. 1992); *Sumitomo Trust & Banking Co. v. Holly's, Inc. (In re Holly's Inc.)*, 140 B.R. 643, 706 (Bankr. W.D. Mich. 1992).

<sup>16</sup> *In re 495 Central Park Ave. Corp.*, 136 B.R. 626, 631-32 (Bankr. S.D.N.Y. 1992).

**F. Approval of the Waiver of Automatic Stay**

58. Section 362 provides for an automatic stay upon the filing of a bankruptcy petition. The DIP Loan contemplates that the DIP Lender shall have a first priority lien on all of the Debtors' assets. To the extent necessary, the DIP Lender should be granted relief from the automatic stay to perfect such interest.

59. Stay modification provisions of this kind are ordinary and standard features of post-petition, debtor-in-possession financing facilities and, and in the Debtors' business judgment, are reasonable under the present circumstances. Accordingly, the Debtors respectfully request that this Court authorize the modification of the automatic stay in accordance with the terms set forth in the Interim DIP Order and Final Order.

**G. Ratification of Payment**

60. The Debtors herein seek ratification and approval by the Court for all items or checks paid, presented or irrevocably committed to payment by INTRUST on the Petition Date, but prior to the actual time of filing and notice of filing to INTRUST.

**H. Good Faith**

61. The Debtors shall, as an expression of good faith to INTRUST:

- a. inform INTRUST of the filing of a bankruptcy;
- b. inform INTRUST of any material deviation or departure from the terms of the Order immediately upon knowledge or recognition by the Debtors.

62. The terms and conditions of the DIP Agreement are fair and reasonable. The Debtors and the DIP Lender negotiated in good faith and at arms length at all times regarding

such terms and conditions. The parties engaged in extensive negotiations concerning the DIP Loan. Also negotiated were the parameters of the budget and the terms of the current First Day Motions that will require the use of cash collateral.

63. In light of the foregoing, the DIP Lender should be accorded the benefits and protections of Section 364(e) with respect to the DIP Loan. Specifically, any loans, advances or other financial accommodations that the DIP Lender makes are costs to be paid from time-to-time to the Debtors on the terms and conditions set forth in the DIP Agreement, should be deemed to have been made and provided in “good faith” as the term is used in Section 364(e), and shall be entitled to the full protection of the Bankruptcy Code in the event that the orders or any provisions are hereafter modified, vacated, amended or stayed by subsequent order of this Court or any other court without the express consent of the DIP Lender.

#### **Final Hearing Date**

64. The Court will set a final hearing on a request for authority to use Cash Collateral or and/or a request for approval of post-petition financing.

#### **Notice**

65. Notice of this Motion has been given to: (a) the Office of the United States Trustee for the District of Kansas; (b) William B. Sorensen, Jr., counsel for INTRUST Bank, N.A.; (c) Internal Revenue Service; (d) Office of United States Attorney; (e) Kansas Department of Revenue; (f) Debtors’ top twenty creditors as filed with the Petitions; (g) all parties who request notices pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure; (h) the Vermont, New Hampshire, Maine, Tennessee, Virginia and North Carolina Departments of

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Revenue (respectively); and (i) Counsel for McLane Foodservice, Inc., Pizza Hut, Inc. and Star  
Management, LLC. In light of the nature of the relief requested, the Debtors submit that no  
further notice is required.

**PRAYER**

**WHEREFORE**, the Debtors request entry of an order granting the requested relief  
herein and such other and further relief as this Court may deem proper, both at law and in equity.

RESPECTFULLY SUBMITTED:

HINKLE LAW FIRM LLC

/s/ Edward J. Nazar  
Edward J. Nazar, #09845  
301 North Main, Suite 2000  
Wichita, KS 67202-4820  
316.267.2000 / 316.264.1518 fax  
[enazar@hinklaw.com](mailto:enazar@hinklaw.com)

and

FORKER SUTER, LLC

/s/ Dan W. Forker, Jr.  
Dan W. Forker, Jr., #06442  
PO Box 1868  
Hutchinson, KS 67504-1868  
620.663.7131 / 620.669.0714 fax  
[dforker@forkersuter.com](mailto:dforker@forkersuter.com)  
*Attorneys for Debtors*



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MORRIS LAING EVANS BROCK & KENNEDY, CHTD.

/s/ William B. Sorensen, Jr.

William B. Sorensen, Jr. #10010

300 North Mead, Suite 200

Wichita, KS 67202

316.262.5991 / 316.262.6226

wsorensen@morrislaing.com

*Attorneys for INTRUST Bank, N.A.*

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**EXHIBIT A**

**DIP LOAN TERM SHEET**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

IN RE:	)	
	)	
WK CAPITAL ENTERPRISES, INC.,	)	Case No.
	)	Chapter 11
Debtor	)	
_____	)	
IN RE:	)	
	)	
CAPITAL PIZZA HUTS, INC.	)	Case No.
	)	Chapter 11
Debtor	)	
_____	)	
IN RE:	)	
	)	
CAPITAL PIZZA HUTS OF VERMONT, INC.	)	Case No.
	)	Chapter 11
Debtor	)	
_____	)	
IN RE:	)	
	)	
CAPITAL PIZZA OF NEW HAMPSHIRE, INC.	)	Case No.
	)	Chapter 11
Debtor	)	
_____	)	

**DIP LOAN TERM SHEET**

**Co-Borrowers:** Capital Pizza of New Hampshire, Inc.  
 Capital Pizza Huts, Inc.  
 Capital Pizza Huts of Vermont, Inc.  
 WK Capital Enterprises, Inc.  
 (Jointly and Severally, the "Borrower")

**Guarantors:** Kenneth J. Wagon  
 2008 Kenneth J. Wagon Single Purpose PH Trust  
 Kenneth J. Wagon Revocable Trust  
 2014 Kenneth J. Wagon Irrevocable PH Trust  
 2007 Wagon Family Irrevocable Trust  
 2007 Kenneth J. Wagon Irrevocable Trust  
 (Jointly and Severally, the "Guarantor")

**Lender:** INTRUST Bank, N.A.

Lender hereby agrees to provide the following credit facility (the "DIP Facility") to Borrower according to the terms and conditions described herein.

**Revolving Line of Credit:**

**Amount:** Not to Exceed \$400,000.00

**Purpose:** To fund working capital, expenses of the above captioned Bankruptcy cases (the "Bankruptcy Cases") and other payments set forth in the Emergency Motion for Entry of Order Authorizing Post-Petition Financing (the "Motion").

**Advances:** As requested by any Borrower, subject to Borrower's consolidated budget as filed in the Bankruptcy Cases. Advances will be made by Lender into existing deposit accounts / treasury management with Lender, unless other advance methods are requested by Borrower and expressly approved by Lender.

**Preconditions:** Borrower will obtain orders acceptable to Lender approving the DIP Facility and use of existing cash management systems and existing bank accounts with Lender.

**Events of Default:** Standard events of default set forth in the Additional Loan Documents, or default under Cash Collateral Order entered in these cases

**Maturity:** On the earlier of (i) the date that all or substantially all of Borrower's assets are sold; or (ii) March 31, 2017. Borrowers may request, but Lender has no obligation to grant, an extension of the maturity.

**Interest:** Fixed interest rate of 7.00% per annum. Interest will be calculated based upon a year consisting of 360 days.

**Payments:** Lender shall be entitled to sweep a payment from Borrower's existing deposit accounts at any time when the funds in the deposit accounts exceeds the amount necessary to pay items presenting. All amounts outstanding under the DIP Facility will be due and payable upon an Event of Default or Maturity.

**Collateral:** Valid and enforceable lien, mortgage and/or security interest (the "Post-Petition Lien") in all of the Borrower's presently owned or hereafter acquired property and assets, whether such property and assets were acquired before or after the Petition Date, of any kind or nature, whether real or personal, tangible or intangible, wherever located, and the proceeds and products thereof (collectively, the "Collateral", and to the extent created, acquired or arising after the Petition Date, the "Post-Petition Collateral"). Such Post-Petition Liens shall be cross-collateralized

between the respective Debtors and Operating Entities and will have the priority described in the Motion and resulting order.

Guaranties: The DIP Facility shall be guaranteed by continuing, unlimited, joint and several guaranties from Guarantors, on Lender's form.

Documents: Promissory Note, Security Agreements, Mortgages and other collateral documents, Guaranty agreements from each Guarantor, and other documents as may be required by Lender or Court Order (collectively, the "Additional Loan Documents").

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## **EXHIBIT B**

### **BUDGET**

Consolidated Periods 10 - 13, 2016

	#1 Act- (Note #1) P10 (9/7-10/4)	#2 Act- (Note #1) P11 (10/5-11/1)	#3 Act- (Note #1) P12 (11/2-11/29)	#4 Act- (Note #1) P13 (11/30-12/27)	#5 Average	#6 Post -11 P1 (12/28-1/24) ( 000s)	#7 Post -11 P2 (1/25-2/21) ( 000s)	#8 Post -11 P3 (2/22-3/31) ( 000s)	#9 Post -11 P4 (3/22-4/18) ( 000s)
Gross Sales	4,146,468	4,314,496	4,132,982	4,014,181	4,152,032	4,015	4,015	4,015	4,015
Promo & allowances	(923,105)	(957,774)	(942,961)	(896,296)	(930,034)	(986)	(986)	(941)	(896)
Net Sales	3,223,363	3,356,722	3,190,021	3,117,885	3,221,998	3,029	3,029	3,074	3,119
Vending Revenue	2,156	2,332	1,967	1,538	1,998	2	2	2	2
Net Revenues	3,225,519	3,359,054	3,191,988	3,119,423	3,223,996	3,031	3,031	3,076	3,121
Cost of Sales	(911,983)	(918,206)	(861,693)	(878,289)	(892,543)	(878)	(878)	(878)	(878)
Gross Profit	2,313,536	2,440,848	2,330,295	2,241,134	2,331,453	2,153	2,153	2,198	2,243
	-28.29%	-27.35%	-27.01%	-28.17%	-27.70%	-28.98%	-28.98%	-28.56%	-28.15%
Labor									
Unit Labor	(786,064)	(802,160)	(791,426)	(795,900)	(793,888)	(794)	(794)	(794)	(794)
Personal Days	(11,733)	(8,036)	(8,777)	(10,462)	(9,752)	(10)	(10)	(10)	(10)
Employee Benefits	(19,781)	(13,380)	(23,063)	(17,127)	(18,338)	(18)	(18)	(18)	(18)
Manager labor	(182,241)	(186,565)	(182,861)	(183,822)	(183,872)	(184)	(184)	(184)	(184)
Manager Bonus	(9,886)	(7,438)	(5,529)	(5,713)	(5,713)	(6)	(6)	(6)	(6)
Total Labor	(1,009,705)	(1,017,579)	(1,011,656)	(1,007,311)	(1,011,563)	(1,012)	(1,012)	(1,012)	(1,012)
Advertising									
Coop Advertising	(57,404)	(59,763)	(56,767)	(55,530)	(57,366)				(55)
IPHFHA Advertising	(82,005)	(85,377)	(81,096)	(79,329)	(81,952)				(79)
LSM Activities	(41,003)	(42,688)	(8,167)	(12,828)	(26,172)	(2)	(2)	(2)	(2)
Total Advertising	(180,412)	(187,828)	(146,030)	(147,687)	(165,489)	(2)	(2)	(2)	(136)
Semivariables									
Cash over (short)	(1,870)	(2,260)	(2,513)	(2,211)	(2,214)	(2)	(2)	(2)	(2)
NSF checks & chargebacks	(606)	(74)	(357)	(1,041)	(520)	(1)	(1)	(1)	(1)
CR Card/Gift Card Fees	(45,409)	(46,938)	(46,818)	(44,697)	(45,966)	(45)	(45)	(45)	(45)
Cleaning & Laundry	(15,790)	(12,952)	(13,581)	(12,251)	(13,644)	(13)	(13)	(13)	(13)
Uniforms	(7,861)	(5,663)	(4,536)	(2,812)	(5,218)	(4)	(4)	(4)	(4)
Paper Products	(10,475)	(11,472)	(10,275)	(8,682)	(10,226)	(9)	(9)	(9)	(9)
Operating Supplies	(40,880)	(41,908)	(38,364)	(60,905)	(45,514)	(46)	(46)	(46)	(46)
Maintenance - Bldg & Equip	(92,494)	(105,399)	(105,226)	(154,751)	(114,468)	(110)	(110)	(110)	(110)
Delivery Vehicle Maint Exp	28,973	29,596	27,307	28,956	28,708	29	29	29	29

Utilities	(202,083)	(166,404)	(125,495)	(158,680)	(163,166)	(160)	(160)	(160)	(140)
Trash Removal	(13,410)	(12,868)	(10,759)	(10,837)	(11,969)	(10)	(10)	(10)	(10)
Telephone	(31,667)	(40,094)	(31,875)	(34,497)	(34,533)	(35)	(35)	(35)	(35)
Security Services	(131)	(131)	(206)	(266)	(184)				
Sales Tax Adjustments		44			11				
Postage	(800)	(690)	(651)	(669)	(703)	(1)	(1)	(1)	(1)
Travel & Lodging					-				
Recruiting Expense	(5,012)	(1,752)	(823)	59	(1,882)	(2)	(2)	(2)	(2)
Training Exp & Store Travel	(212)	(280)		(511)	(251)				
Training Exp - Meals					-				
Freight & Delivery	(778)	(2,444)	(1,083)	(3,704)	(2,002)	(2)	(2)	(2)	(2)
Miscellaneous	(145)	(417)	(702)	(623)	(472)	(1)			
<b>Total Semivariables</b>	<b>(440,650)</b>	<b>(422,106)</b>	<b>(365,957)</b>	<b>(468,122)</b>	<b>(424,209)</b>	<b>(412)</b>	<b>(411)</b>	<b>(411)</b>	<b>(391)</b>
Operating Profit after Semis	682,769	813,335	806,652	618,014	730,193	727	728	773	704
Work Comp claims	(3,618)	(10,107)	(151,828)		(41,388)	(5)	(5)	(5)	(5)
<b>Operating Profit after controllables</b>	<b>679,151</b>	<b>803,228</b>	<b>654,824</b>	<b>618,014</b>	<b>688,804</b>	<b>722</b>	<b>723</b>	<b>768</b>	<b>699</b>
<b>Store Admin</b>									
Licenses/Fees/Other Taxes	(870)	(507)	(5,795)	(1,120)	(2,073)	(2)	(2)	(2)	(2)
Professional Fees	(905)	(2,614)	(2,814)	(838)	(1,793)	(2)	(2)	(2)	(2)
Insurance - non WC	(41,860)	(42,087)	(41,873)	(42,059)	(41,970)	(42)	(42)	(42)	(42)
Insurance - WC					-				
Uninsured Losses		(12,650)			(3,163)	(4)	(4)	(4)	(4)
Bank Charges	(1,830)	(1,929)	(1,479)	(1,380)	(1,655)	(2)	(2)	(2)	(2)
Start-up cost amortization					-				
Franchise Fees	(142,227)	(148,112)	(140,627)	(137,673)	(142,160)				(137)
Fee - Nontraditional Sales								45	
<b>Total Store admin</b>	<b>(187,692)</b>	<b>(207,899)</b>	<b>(192,588)</b>	<b>(183,070)</b>	<b>(192,812)</b>	<b>(52)</b>	<b>(52)</b>	<b>(7)</b>	<b>(189)</b>
<b>Profit after Admin</b>	<b>491,459</b>	<b>595,329</b>	<b>462,236</b>	<b>434,944</b>	<b>495,992</b>	<b>670</b>	<b>671</b>	<b>761</b>	<b>510</b>
<b>Other income &amp; expense</b>									
Store Closing Costs	(55)		(129)	(482)	(167)				
Gain/Loss - Fixed Asset Retirements					-				
New Product Rollout Costs					-				
Miscellaneous Income	(10,265)	5,018	2,162	2,674	(103)	3	3	3	3



Total other income/expense	(10,320)	5,018	2,033	2,192	(269)	3	3	3	3
Profit after other income/expense	481,139	600,347	464,269	437,136	495,723	673	674	764	513
Occupancy & Fixed Costs									
Rent	(278,174)	(279,549)	(279,359)	(279,549)	(279,158)				(225)
Common Area Maintenance	(5,432)	(5,432)	(561)	(9,334)	(5,190)				(5)
Real Estate Tax	(61,770)	(63,937)	(61,833)	(61,978)	(62,380)	(62)	(62)	(62)	(62)
Personal Property Tax									
Equipment Rental									
Depreciation - Bldgs	(938)	(938)	(938)	(938)	(938)	(1)	(1)	(1)	(1)
Amortization - Leaseholds	(20,019)	(20,019)	(20,019)	(20,019)	(20,019)	(20)	(20)	(20)	(20)
Depreciation - Equipment	(26,384)	(26,384)	(26,384)	(26,384)	(26,384)	(26)	(26)	(26)	(26)
Amortization Expense	(5,464)	(5,464)	(5,464)	(5,464)	(5,464)	(5)	(5)	(5)	(5)
Total Occupancy & fixed Costs	(398,181)	(401,723)	(394,558)	(403,666)	(399,532)	(114)	(114)	(114)	(344)
Store contribution	82,958	198,624	69,711	33,470	96,191	559	560	650	169
Above store costs									
DM costs (9/11)	(69,583)	(69,583)	(69,583)	(69,583)	(69,583)	(70)	(70)	(70)	(70)
VP of Ops Expenses (2/3)	(24,973)	(24,973)	(24,973)	(24,973)	(24,973)	(25)	(25)	(25)	(25)
Safety manager	(6,147)	(6,147)	(6,147)	(6,147)	(6,147)	(6)	(6)	(6)	(6)
CEI payroll & mgmt +Infosync						(150)	(115)	(115)	(115)
Add back depr/amortization	52,805	52,805	52,805	52,805	52,805	52	52	52	52
Gain/loss									
depr-VPS/DMS		327		327	164				
EBITDA	35,060	151,053	21,813	(14,101)	48,456	360	396	486	5
Cumulative EBITDA						360	757	1,243	1,248
Extraordinary Expenses									
Utilities - 2 week deposit required						(102)			
Trustee Fees						(15)			
Atty Fees						(42)	(42)	(42)	
1/2 Month rent & CAM+						(145)		(710)	
Total Extraordinary						(304)	(42)	(752)	
Net after Extraordinary						56	354	(266)	5
Cumulative after Extraordinary						56	411	145	150

## Notes

### P&L Actual & Projections

- 1) Columns 1-4 Periods 10-13 are actual through Store contribution.
- 2) Column 5 - the average of actual for Pd 10 – Pd 13.
- 3) Columns 6-8 are actual average (000s) except:
  - a. Sales lowered to \$4,015,000 (same as Pd13)
  - b. Cost of Sales @ 22% of gross sales (same as Pd13)
  - c. Co-op Advertising – average \$57,366 is reduced to -0-.
  - d. IPHFHA Advertising – average \$81,952 is reduced to -0-.
  - e. LSM Activities – average \$26,172 reduced to \$2,000.
  - f. Franchise Fees – average \$142,160 reduced to -0-.
  - g. Rent – average \$279,158 – reduced to -0-.
  - h. Common Area Maintenance – average \$5,190 – reduced to -0-.
  - i. \$115,000 added expense to cover CEI payroll and InfoSync expense, plus ½ mo. payroll (pre-filing) in Pd 1 (35,000) = \$150,000. (Formerly paid with a 5% of Sales Management fee to CEI which was approximately \$200,000 per period.)
    - (1) Service Bureau to do accounting at \$30,000/Period.
    - (2) Payroll for CEI employees at \$80,000/Period + \$5,000 other.

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### Rent Reductions Goal (000s)

	<u>Period</u>		
	<u>Original</u>	<u>New</u>	<u>Save</u>
Tilton (#672)	15.5	13.0	2.5
8 Leases (1)	69.5	59.1	10.4
42 Leases (2)	170.0	153.0	17.0
Reject 2 (3)	<u>25.0</u>	<u>-0-</u>	<u>25.0</u>
	280.0	225.1	54.9

- (1) 8 Leases with rent >\$7,500/Pd. Total rent 69.5 – Achieve 15% reduction - 10.4/Pd.
- (2) 42 Leases with rent <\$7,500/Pd. Total rent 170 – Achieve 10% reduction – 17.0/Pd.
- (3) Reject 2 leases – Total rent 25/Pd.

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### Cash Flow – Post 11 (000s) – Net After Extraordinary

<u>Period</u>	<u>Cash Flow</u>	<u>Cumulative</u>
1 (12/28-1/24)	56	56
2 (1/25-2/21)	354	411
3 (2/22-3/21)	(266)	145
4 (3/22-4/18)	5	150

**Unpaid Rent & CAM (000s)**

Period 1-3 @	285/Pd = 855
Less:	
½ mo. paid in Pd1	(145)
2 ½ mo. paid in Pd3	<u>(710)</u>
Balance unpaid Rent @	
end of Pd3 (3/21/17)	-0-

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**Period 3**

All unpaid rent (\$710,000) paid – cash balance at end of Pd3 (3/21/17) is \$145,000.

**Period 4**

All expenses paid – cash balance at end of Pd4 (4/18/17) is \$150,000.