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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re: Chapter 11 Case

CONGREGATION ACHPRETVIA TAL CHAIM SHAR HAYUSHOR, INC., Case No.: 16-10092 (MEW)

Debtor.

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MOTION OF DEBTOR FOR INTERIM AND FINAL AUTHORITY TO (A) OBTAIN POSTPETITION UNSECURED FINANCING ON A SUPER-PRIORITY BASIS PURSUANT TO 11 U.S.C. §§ 105, 364(c) AND 364(e), (B) GRANT RELATED RELIEF, AND (C) SCHEDULE A FINAL HEARING PURSUANT TO FED. R. BANKR. P. 4001

TO THE HONORABLE MICHAEL E WILES,
UNITED STATES BANRUPTCY JUDGE:

CONGREGATION ACHPRETVIA TAL CHAIM SHAR HAYUSHOR, INC., the debtor and the debtor in possession herein (the "Debtor" of "Congregation"), by its attorneys, Robinson Brog Leinwand Greene Genovese & Gluck P.C. ("Robinson Brog"), seeks the entry of an order (i) pursuant to section 364(c)(1) of title 11 of the United States Code (as amended, the "Bankruptcy Code") and Rule 4001(c) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") authorizing the Debtor to obtain unsecured financing on a super-priority unsecured administrative basis from 163 E 69 DIP Lender, LLC (the "Lender") in the amount of up to $3,575,000 and granting related relief and (ii) scheduling a final hearing pursuant to Bankruptcy Rule 4001(c). In support thereof, the Debtor respectfully represents as follows:

JURISDICTION AND VENUE

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

2. The statutory basis for the relief requested herein are Bankruptcy Code sections 105, 364(c)(1) and 364(e), Bankruptcy Rules 2002, 4001 and 9014, and Rule 4001-2 of the Local Bankruptcy Rules for the Southern District of New York (the "Local Rules").

BACKGROUND

3. On January 15, 2016, (the "Petition Date") the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

4. No trustee, examiner or creditors committee has been appointed in this case.

5. The Debtor is in possession of its assets and is continuing to manage its property in accordance with sections 1107 and 1108 of the Bankruptcy Code.

6. The Debtor owns the real property and improvements located at 163 East 69th Street, New York, New York (the "Property"). The Property is improved by a four (4) story brownstone townhouse which was previously used by the Congregation as its synagogue. The Property is currently subject to a contract to sell for $9.75 million to 163 East 69 Realty LLC ("East 69 Realty"), although that contract is the subject of ongoing litigation to determine its enforceability.

7. The facts and circumstances surrounding the parties' contentions related to the litigation regarding the enforceability of the contract of sale are well known to this court. Parties in interest are referred to *Motion of 163 East 69 Realty LLC to Dismiss Chapter Case, or , In the Alternative, to Abstain from Hearing Action Removed from State Court and to Remand that*

Action Back to State Court (ECF Doc No. 21) and *Debtor's Response to Motion of 1634 East 69 Realty, LLC to Dismiss Chapter 11 Case, or, In the Alternative, to Abstain From Hearing Removed Action and Remand that Action Back to State Court* (ECF Doc No. 37) for the background related to the dispute.

8. Notwithstanding the need for the dispute between East 69 Realty and the Debtor to be resolved, the Debtor still requires funds to (i) administer its chapter 11 case, (ii) issue and maintain its real property, and (iii) have a source of funds to demonstrate feasibility of its plan of reorganization which allows it to emerge from chapter 11.

9. Accordingly, the Debtor has made inquiries to numerous potential lenders to find one who was willing to advance sufficient funds to allow the Debtor to fund a plan to emerge from chapter 11 while it litigates the dispute regarding its Property in state court. Regardless of the outcome of the litigation, the Debtor will unfortunately not continue to use the Property subsequent to its emergence from chapter 11. The only issues for the Debtor will be (i) the identity of the purchaser of the property, (ii) whether the property will be sold for $9.75 million under the existing contract of sale or (iii) whether the Debtor will be able to sell the property for its fair market value which the Debtor believes is more than $9.75 million. In any case, the sale will generate sufficient funds to satisfy the proposed DIP Financing to be provided by the Lender (or its assigns), described below, which financing is subject to this Court's approval.

<u>The Debtor's Current Debt Structure</u>

10. As of the Petition Date, the Debtor had only one consensual secured obligation, a mortgage held by Mautner-Glick Profit Sharing Trust, which filed a proof of claim in the amount of $396,950.00. The Debtor has not acknowledged the validity of the Mautner-Glick Profit

Sharing Trust Claim and believes it may have defenses and offsets to such claim, which it will raise at the appropriate time.

11. The other secured claim against the Property is real property taxes. On April 13, 2016, the New York City Department of Finance filed a claim in the amount of $142,769.20. As of the date hereof, prepetition and postpetition real estate taxes and other municipal liens total approximately $311,709. Real estate taxes continue to accrue.

12. Due to the ownership of the Property by the Congregation, a not for profit entity, and its use as a religious facility, the Debtor believes that the claim filed by the City of New York for real property taxes may be subject to reduction or elimination. Thus, the Debtor has reserved all of its rights to object to both the Mautner-Glick claim and the City's claims for real property taxes.

CONCISE SUMMARY OF THE TERMS OF THE DIP TERM FACILITY

13. In accordance with Bankruptcy Rules 4001(c) and 4001(d) and Local Rule 4001-2(a), the charts below summarize the significant terms of the Interim Order and the DIP Loan Documents (defined below). The Debtor believes that the following provisions of the DIP Loan Documents and the Interim Order are justified and necessary in the context and circumstances of this case:

MATERIAL TERMS OF THE UNSECURED TERM DIP FACILITY[1]	
Borrower Bankruptcy Rule 4001(c)(1)(B)	CONGREGATION ACHPRETVIA TAL CHAIM SHAR HAYUSHOR, INC.(the "Borrower") ***See*** **DIP Loan Agreement, Page 1; Interim Order Recital**
DIP Lender Bankruptcy Rule 4001(c)(1)(B)	163 E 69 DIP Lender, LLC or its assigns (the "Lender") ***See*** **DIP Loan Agreement, Page 1; Interim Order Page 2 ¶D.**
Multi-Draw Unsecured Term DIP Facility Bankruptcy Rule 4001(c)(1)(B); Local Rule 4001-2(a)(2)	The DIP Facility shall be in the maximum principal amount of $3,575,000.00 (the "Maximum Commitment"). The Maximum Commitment would be available as a multi-draw term credit facility (the "DIP Facility") to be used for the benefit of the Debtor. Of the Maximum Commitment, $536,250 will not be available to be borrowed by the Debtor, but as an interest reserve for the Lender. ***See*** **DIP Loan Agreement, Page 3, Page 5 ¶2.1(a); Page 6 ¶2.1(g); See Budget**
Use of DIP Proceeds Bankruptcy Rule 4001(c)(1)(B); Local Bankruptcy Rule 4001-2(a)(6)-(a)(7)	Proceeds to be used by estate for funding the administrative expenses of the estate, including payment of obligations under a plan of reorganization or liquidation, payment of closing costs, insurance, US Trustee fees, taxes and funding of building and property repair and renovation work pursuant to sources and uses previously provided by Borrower to Lender ***See*** **Budget; Interim Order Page 3, ¶D, Page 5-6, ¶2(c);**
Interest Rates Bankruptcy Rule 4001(c)(1)(B)	Base Rate: 15.0% Default Interest Rate: 18% **DIP Loan Agreement, Page 6, ¶2.1(g); Page 9 ¶2.9.**

[1] Annexed hereto as Exhibit A is the DIP Loan Agreement which has been extensively negotiated by the parties.

Expenses and Fees Local Rule 4001-2(a)(3)	Points: 3.0% of the original principal amount of the DIP Loan (the "Points"). The Points shall be paid in full, nonrefundable, be due and payable on the Closing Date and be deducted from the loan. **DIP Loan Agreement at Page 7-8 ¶2.4.** Borrower will be responsible for all costs and expenses of Lender making the loan including, but not limited to, all legal fees and expenses of Lender's attorney in connection with the negotiation, preparation, administration, amendment, modification, or enforcement of the DIP Loan Agreement and the documents related to this transaction, fees, and out of pocket expenses up to a maximum of $20,000. The $20,000 shall be paid to Lender at Closing from the proceeds of the loan. **DIP Loan Agreement at Pages 4 (Definition of "Obligations"), Page 17, ¶7.4**
Maturity Date Bankruptcy Rule 4001(c)(1)(B); Local Rule 4001-2(a)(10)	Twelve (12) months from the Closing Date. The DIP Facility may not be prepaid during the first one hundred eighty (180) days subsequent to the Closing Date of the DIP Facility. ***See* DIP Loan Agreement at Page 7, ¶2.2, Page 8, ¶ 2.5; Interim Order at Page 7 ¶3**
Collateral and Priority Bankruptcy Rule 4001(c)(1)(B)(i); Local Rule 4001-2(a)(4)	The DIP Obligations shall be unsecured. Lender is granted a superpriority administrative expense claim pursuant to section 364(c)(1) of the Bankruptcy Code. Lender will be entitled to the full protections of section 364(e) of the Bankruptcy Code with respect to debts, obligations, and other rights created or authorized under the DIP Facility and Financing Orders. **DIP Loan Agreement at Page 8,¶2.7(a); Interim Order at Page 3,¶G; Page 6,¶2(f); Page 10, ¶12**
Carve-Out Local **Rule** 4001-2(a)(5)	United States Trustees Quarterly Fees; Interim and Final Fees and Expenses of the Debtor's professionals **See DIP Loan Agreement Page 9, ¶2.7(c); Interim Order at Page 6-7,¶2(f).**

Conditions to Closing Bankruptcy Rule 4001(c)(1)(B);Local Rule 4001-2(a)(2)	Customary borrowing conditions, including, among other things: • Execution of the DIP Loan Documents • Receipt by Lender of requested information • Paid taxes or escrow proceeds for taxes from loan proceeds at closing • Establishment of escrow 3 months of future taxes • Establishment of insurance escrow • Establishment of escrow for existing mortgage on property • Insurance policy naming lender as additional insured and loss payee • Receipt by Lender of copies of applications and approvals of work permits **See DIP Loan Agreement Pages 6-7,¶2.1(j)**
Automatic Stay Bankruptcy Rule 4001(c)(1)(B)(iv); Local Rule 4001-2(c)	Upon the occurrence of an Event of Default, and after giving10 days notice and/or opportunity to cure, Lender may settle an order that: (a) the automatic stay under section 362(a) of the Bankruptcy Code shall be deemed lifted, vacated, modified and terminated with respect to Lender; and (b) Lender shall be entitled to exercise its rights and remedies in accordance with the DIP Financing Documents (unless within such ten (10) day period the Court determines that no default has occurred and is continuing), including, without limitation, terminating any obligations of Lender under the DIP Financing Documents. **Interim Order Page 9, ¶11.** **Loan Agreement Page 14, ¶¶ 6.2,6.3**

Events of Default Bankruptcy Rule 4001(c)(1)(B); Local Rule 4001-2(10)	Events of Default. • Failure to pay any amount in full when due under the DIP Facility; • Failure to comply with covenants contained in the Loan Documents or DIP Financing Orders, subject to applicable cure periods; • violation of any material term of the Interim Financing Order; • Termination or non-renewal of Loan Documents • Failure to obtain final order within 60 days of execution of Loan Documents • Conversion or dismissal of the Debtor's case; • the entry of any order modifying, reversing, revoking, staying, rescinding, vacating, or amending the Interim Financing Order (and thereafter, the Final Financing Order); • the filing (and confirmation) of a plan by the Debtor (or any other party) that is inconsistent with the terms of the DIP Facility, Interim Financing Order (and thereafter, the Final Financing Order); • Filing by the Debtor of (i) any motion or document in connection with the Debtor's bankruptcy case that is not consistent in any material respect with the terms of the DIP Facility, the Interim Financing Order (or later, the Final Financing Order); • Entry of any order which provides relief from the automatic stay otherwise imposed pursuant to section 362 of the Bankruptcy Code, which order permits any creditor, other than the Lender, to realize upon, or to exercise any right or remedy with respect to, any asset of the Debtor (except if Lender gets paid out of sale proceeds if East 69 Realty prevails in the litigation); • Filing by any party in interest of a motion, complaint or other proceeding seeking to challenge the validity, enforceability, of the DIP Facility in favor of the Lender (not an automatic event of default if challenges was by party other than Debtor); • Loan Documents declared invalid, avoidable or unenforceable; • False warranties or breaches of representations • Final Judgment entered in excess of $1.5 million or injunctive or declaratory relief granted having a material adverse effect on Debtor • Debtor has suffered a Material Adverse Change **See DIP Loan Agreement, Pages 11-13, ¶¶5.1-5.17**

RELIEF REQUESTED

14. By this Motion, the Debtor requests entry of an interim order, substantially in the form attached hereto as Exhibit B (the "Interim Order"), and final order (the "Final Order,"[2] and, together with the Interim Order, the "DIP Orders") granting, among other things, the following relief:

(a) authority for the Debtor to borrow (in such capacity, the "Borrower") under the Multi-Draw Term Loan DIP Facility in the aggregate maximum amount of $3,575,000 (the "DIP Facility");

(b) authority for the Borrower to execute and enter into the DIP Loan Agreement (and, together with any exhibits attached thereto and other agreements related thereto, including, without limitation, all related or ancillary documents and agreements, the "DIP Loan Documents"), and to perform all such other and further acts as may be necessary or appropriate in connection with the DIP Loan Documents;

(c) authority for the Borrowers to make an initial draw under the DIP Facility in the aggregate amount of up to $85,000[3] (which includes $22,744.50 for the Lender's actual out of pocket costs);

(d) authority for the Debtor to grant superpriority administrative claims to the Lender with respect to the DIP Facility in the order of priority and as provided in the DIP Order and the DIP Loan Documents;

(e) modification of the automatic stay set forth in section 362 of the Bankruptcy Code on the terms and conditions set forth herein to the extent necessary to implement and effectuate the terms of the DIP Loan Documents and the Interim Order;

(f) waiver of any applicable stay with respect to the effectiveness and enforceability of the Interim Order (including under Bankruptcy Rule 6004); and

(h) scheduling of a final hearing (the "Final Hearing"), pursuant to Bankruptcy Rule 4001 and Local Rule 4001-2 to consider entry of an order granting the relief requested in the Motion on a final basis.

[2] A copy of the proposed Final Order is attached as Exhibit C

[3] Because the Lender administers the loan in $5,000 advances, the $84,774.50 requested became $85,000.

The Debtor's Need for DIP Financing

15. While the Debtor's estate is begin administered in this Court, the State Court litigation regarding the contract of sale is being resolved and the Debtor has ongoing administrative obligations, including to maintain and repair the Property, to fund legal expenses in connection with its litigation regarding the contract with East 69 Realty, to pay insurance for the Property, US Trustee fees, salaries and associated taxes, as well as needing to fund the payment of claims under a plan in order to emerge from chapter 11. In addition, because the Debtor will ultimately be disposing of its property on East 69th Street, whether under the pending contract for $9.75 million or to an alternative purchaser subsequent to the conclusion of the pending litigation, it needs to take steps to prepare for the investment of the remaining equity from the sale of its Property in new not for profit endeavors. This requires that the directors of the Congregation take steps now to investigate what is necessary to establish new not for profit foundations with the funds its anticipates receiving from the sale of the property.

16. The Debtor's directors and its counsel have extensively investigated the availability of funding for the Debtor. With the exception of 163 E 69 DIP Lender, LLC, all of the potential funders who were willing to make an advance to the Debtor were willing to do so only on a secured basis. In addition to the delay that would have been caused by obtaining the approvals of an additional mortgage on the Debtor's property, there would have been additional legal fees as approval if a mortgage would have required approval by the State Supreme Court and/or the Attorney General's office. In addition, to the extent that such financing would have primed an existing mortgage, the Debtor's estate would have borne the costs of fighting for approval of priming financing, the costs of updating its appraisal and additional legal fees.

17. Accordingly, after intense investigation and due diligence, the Debtor has selected 163 E 69 DIP Lender, LLC as its proposed DIP Funder. The Lender has agreed to make available up to $3,575,000 to the Debtor on an unsecured basis pursuant to a multi-draw term loan facility. The Lender has also requested that it be granted a super-priority administrative expense with priority over all other administrative expenses of the Debtor's estate other than the legal fees and expenses owing to Debtor's professionals and the Office of the United States Trustee.

The Debtor has provided the Lender with proposed Sources and Uses for the funds for the DIP Facility, which is the budget attached hereto as Exhibit "D." The sources and uses have been approved by the Lender. The sources of the funds are 100% from the loan proceeds. The uses are as follows:

Item	Amount
Directors' Salaries from August 2016 through anticipated Confirmation Date (April 2017) plus associated taxes ($10,986)	$141,586
Property Insurance (Jan 2017 – Jan 2018)	$19,501
Property repairs (including $9500 for sidewalk repairs)	$94,500
US Trustee Fees (through second quarter of 2017) (est)	$7,475
All Professional Fees and Expenses (through April 2017) (est)	$1,100,000
Replacement of Computer/Telephone/Internet/Admin not-for Profit costs	$2,500
Real Estate Taxes (reserve right to dispute) (est as of 7/1/17)	$385,000
Appraisal Fee (Balance Due)	$5,000
69th Street Capital loan (principal and Interest (Due 12/16)	$275,000
Secured Claim (including 6% interest to April 2017) (reserve right to dispute)	$426,710
Claims (Other than 69th Street Capital Loan)(reserve right to dispute certain of the claims)	$198,690
Misc admin expenses / Post Confirmation Expenses (including salary through May 2018 and events)	$254,143
Interest Reserve on $ 3,575,000 million loan	$536,250
Interim Closing Costs (Including a One Month Interest Reserve)	$22,457.50
Final Closing Costs (Excluding Interest Reserve)	$107,250
Total	$3,575,000

18. Of this $3.575 million loan, the following expenses are sought as part of the interim fee order: (i) $19,501 to pay for property insurance, (ii) $33,286 for director's fees arrears for two months and associated taxes and (iii) $9,500 for sidewalk repair expense for a total request of $62,287.

19. The closing costs to be paid to Lender as part of the Interim Order are as follows: (i) legal fees in the amount of $17,500, (ii) underwriting in the amount of $3,500, (iii) one month of interest prepayment in the amount of $1,062.50, (iv) title search in the amount of $395 for a total amount of $22,457.50. These are the expenses the Lender will incur upon funding the Interim Loan. Thus, the total amount sought is $84,744.50. However, because the Lender administers the loan in increments of $5,000, the amount to be borrowed as part of the Interim Order will be $85,000.

Basis for Relief

20. Pursuant to section 364 of the Bankruptcy Code, a debtor is authorized to obtain secured or superpriority financing under certain circumstances. The Debtor, with the assistance of its counsel, carefully reviewed the various DIP financing options presented to it by potential DIP lenders and the Lender. The Debtor carefully contemplated the advantages and disadvantages of the DIP financing proposals submitted for its consideration and ultimately selected the proposal that is in the best interests of the Debtor, its estate and its creditors. The multi-draw unsecured term DIP facility is tailored to the Debtor's circumstances and will effectively facilitate its strategy to promptly emerge from chapter 11 and fund its valid obligations under a plan. It allows the Debtor to borrow the amounts on an as and when needed basis so that it only incurs interest cost on the funds it is using and not for the availability of a line of credit or other costs.

21. Prior to selecting the Lender as the provider of its DIP Financing, the Debtor approached six (6) possible DIP lending sources (including the Lender). The first lender the Debtor approached was David Warren of the Battery Group Funding in Brooklyn, New York. While The Battery Group negotiated with the Debtor at arm's-length, it was unwilling to lend on an unsecured basis or based solely on an administrative claim. The Battery Group was willing to lend up to $2,000,000.00, but only if the Debtor was able to deliver a first priority lien position to it which would have required the Debtor to seek to prime the existing first mortgage or obtain its consent in addition to obtaining approval of the Attorney General or the Supreme Court. In addition, the terms offered by The Battery Group were less attractive than those offered by the Lender. While their interest rate was 12%, the Battery Group also wanted a $50,000 origination fee payable at closing, a $25,000 correspondence fee, a prepayment fee during the first 6 months of the loan, personal guarantees from the directors, escrow of 100% of the interest payments for the first year (totaling $300,000) and for the Debtor to fund the costs of a survey and current appraisal. Finally, a $20,000 deposit was required to sign the commitment. Simply put, The Battery Group's terms were not suitable to the Debtor's needs.

22. The Debtor also consulted with Lane Capital, another lender that was willing to lend the Debtor up to $2,300,000 but only if it was able to be provided with a senior lien and super priority administrative expense claim against the Debtor's property. While Lane Capital also negotiated with the Debtor at arm's-length and in good faith and was willing to fund a DIP Facility but only on a priming basis much like The Battery Group. Lane Capital also required a one (1) year interest reserve and was subject to the payment of one (1) point at closing. It was willing to advance up to $2,000,000 at a 12% interest rate with one (1) point payable at closing. The proposed facility was for a one year term with the right to extend for 90 days upon payment

of a one (1%) percent extension fee. The Lane Capital financing would require Attorney General and Bankruptcy Court approval as well as priming of existing secured debt.

23. The Debtor also consulted with L&L Capital Partners regarding a DIP credit facility. L&L's offer was to advance up to $2,800,000 at an interest rate of 12%. While L&L also negotiated in good faith with the Debtor and at arm's-length, and was willing to extend the loan for two (2) years, longer than any other proposal, it came with some of the highest fees of any of the proposals. L&L wanted a five (5%) percent origination fee, eight (8) months worth of interest as an exit fee if the loan was repaid within eight months of closing (and $1500 if repaid thereafter). A $12,000 non-refundable deposit was required to proceed with the loan plus a $1500 application fee. The L&L Capital Partners loan was also contingent upon the lender receiving a first priority mortgage on the property.[4]

24. Fort Amsterdam Capital LLC also provided the Debtor with a term sheet for a $2,000,000, twelve month loan with one six month extension at an interest rate of ten (10%) percent. The Fort Amsterdam loan required a six (6) month interest reserve, a two (2%) percent origination fee and six months of interest payments in event of a prepayment of the loan. The Fort Amsterdam proposed loan was also contingent on a first priority lien on the Debtor's real property, a payment guaranty and a $20,000 deposit to be applied against all of the Lender's fees and expenses which the Debtor would be responsible to pay.

25. The final proposal was an expression of interest from a fifth lender Revere Capital ("Revere"), which proposed essential terms of a proposed DIP Facility and indicated it would provide the Debtor with a term sheet if the Debtor had an interest in pursuing a transaction with

[4] Although there were subsequent discussions with L&L, in a subsequent draft term sheet, L&L still required a senior secured, superpriority debtor in possession credit facility. This would still require a priming fight and AG approval.

Revere. Revere indicated it would provide a secured loan of between $1,500,000 and $1,750,000 for a twelve (12) month term (plus extensions), subject to personal guarantees, at an interest rate of ten (10%) percent per annum with a five (5) point origination fee. In addition, Revere was the only lender to propose a "success fee" of $150,000 if the property was sold for less than $13,999,999 and $300,000 if the property was sold for more than $13,999,999. The Debtor was not interested in pursuing a transaction with Revere and thus did not request a term sheet and did not engage in further negotiation with this proposed lender.

26. Based upon a side-by-side comparison, and after having considered numerous different term sheets, the terms offered by the Lender for an **unsecured** loan were superior to the terms offered by the other potential lenders the Debtor approached. Its willingness to do an unsecured term loan would allow the Debtor to avoid the issues and expenses of having to prime the existing first mortgage and having to seek authorizations from the Attorney General and/or the New York State Supreme Court. Finally, the Lender's willingness to do a multi-draw term loan will allow the Debtor to save money on interest costs by only borrowing funds when needed and not all at closing. This is not an insignificant feature of the financing arrangement.

27. For the foregoing reasons and those discussed further below, the Debtor satisfies the necessary conditions under section 364(c) for authority to enter into the DIP Facility.

i. Entry into the DIP Facility is a Proper Exercise of the Debtors' Sound Business Judgment

28. Provided that an agreement to obtain credit does not run afoul of the provisions of, and policies underlying, the Bankruptcy Code, courts grant a debtor considerable deference in acting in accordance with its sound business judgment in obtaining such credit. *See, e.g.*,

In re Barbara K. Enters., Inc., Case No. 08-11474, 2008 WL 2439649, at*14 (Bankr. S.D.N.Y. June 16, 2008) (explaining that courts defer to a debtor's business judgment "so long as a request for financing does not 'leverage the bankruptcy process' and unfairly cede control of the reorganization to one party in interest."); *In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) ("[C]ases consistently reflect that the court's discretion under section 364 [of the Bankruptcy Code] is to be utilized on grounds that permit [a debtor's] reasonable business judgment to be exercised so long as the financing agreement does not contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit a party-in-interest."); *In re Farmland Indus., Inc.*, 294 B.R.855, 881 (Bankr. W.D. Mo. 2003) (noting that approval of postpetition financing requires, *inter alia*, an exercise of "sound and reasonable business judgment.").

29. In determining whether the Debtor has exercised sound business judgment in selecting the DIP Facility, the Court should consider the economic terms of the DIP Facility in light of current market conditions. *In re Lyondell Chem. Co.*, Case No. 09-10023 (Bankr. S.D.N.Y. March 5, 2009) (recognizing "the terms that are now available for DIP Financing in the current economic environment aren't as desirable" as in the past). Moreover, the Court may appropriately take into consideration non- economic benefits to the Debtor offered by a proposed postpetition facility. For example, in *In re ION Media Networks, Inc.*, the Bankruptcy Court for the Southern District of New York held that:

> Although all parties, including the Debtors and the Committee, are naturally motivated to obtain financing on the best possible terms, a business decision to obtain credit from a particular lender is almost never based purely on economic terms. Relevant features of the financing must be evaluated, including non-economic elements such as the timing and certainty of closing, the impact on creditor constituencies and the likelihood

> of a successful reorganization. This is particularly true in a bankruptcy setting where cooperation and established allegiances with creditor groups can be a vital part of building support for a restructuring that ultimately may lead to a confirmable reorganization plan. That which helps foster consensus may be preferable to a notionally better transaction that carries the risk of promoting unwanted conflict.

Case No. 09–13125, 2009 WL 2902568, at *4 (Bankr. S.D.N.Y. July 6, 2009).

30. The Debtor's determination to secure DIP Financing was a business decision guided by the Debtor's financial and restructuring needs. Specifically, the Debtor and its advisors determined that the Debtor requires additional liquidity to fund and implement its proposed chapter 11 plan. To support these anticipated costs, the Lender has fully committed to fund the DIP Facility as an integral part of implementing the strategy to achieve sorely needed liquidity to pay the Debtor's administrative expenses and fund its plan. Bankruptcy courts generally will not second-guess a debtor's business decisions when those decisions involve "a business judgment made in good faith, upon a reasonable basis, and within the scope of [its] authority under the [Bankruptcy] Code." *Id*. at 513-14 (footnote omitted). To determine whether the business judgment test is met, "the court 'is required to examine whether a reasonable business person would make a similar decision under similar circumstances.'" *In re Dura Auto. Sys. Inc*., Case No. 06-11202 (KJC), 2007 Bankr. LEXIS 2764, at *272 (Bankr. D. Del. Aug. 15, 2007) (citation omitted).

31. A fullsome effort was undertaken and the available DIP Financing options were carefully evaluated by the Debtor's board of directors. The Debtor selected the proposed DIP Facility only after engaging in a negotiation designed to provide them with the best options available. Among the Debtor's considerations was the fact that by choosing it's the Lender's

unsecured DIP Facility, it would forego a valuation battle and the time and costs which would be incurred if the Debtor attempted to bring in a new secured lender and prime its current Lender.

ii. The Debtor should be authorized to Obtain Postpetition Financing on a Superpriority Basis

32. The Debtor satisfied the requirements for relief under section 364 of the Bankruptcy Code, which authorizes a debtor to obtain superpriority financing under certain circumstances. Specifically, section 364(c) of the Bankruptcy Code provides that:

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

11 U.S.C. § 364(c).

33. To satisfy the requirements of section 364(c) of the Bankruptcy Code, a debtor need only demonstrate "by a good faith effort that credit was not available" to the debtor on an unsecured or administrative expense basis. *Bray v. Shenandoah Fed. Savs. & Loan Ass'n* (*In re Snowshoe Co.*), 789 F.2d 1085, 1088 (4th Cir. 1986). "The statute imposes no duty to seek credit from every possible lender before concluding that such credit is unavailable." *Id.*; *see also Pearl-Phil GMT (Far East) Ltd. v. Caldor Corp.*, 266 B.R. 575, 584 (S.D.N.Y. 2001) (superpriority administrative expenses authorized where debtor could not obtain credit as an administrative expense). When few lenders are likely to be able and willing to extend the necessary credit to a

debtor, "it would be unrealistic and unnecessary to require [the debtor] to conduct such an exhaustive search for financing." *In re Sky Valley, Inc.*, 100 B.R. 107, 113 (Bankr. N.D. Ga. 1988), *aff'd sub nom.*, Anchor Savs. Bank FSB v. Sky Valley, Inc., 99 B.R. 117, 120 n. 4 (N.D. Ga. 1989); *see also Ames Dep't Stores*, 115 B.R. at 40 (approving financing facility and holding that the debtor made reasonable efforts to satisfy the standards of section 364(c) where it approached four lending institutions, was rejected by two, and selected the most favorable of the two offers it received).

34. Despite its efforts and a competitive financing process with several potential financing sources, the Debtor was unable to obtain unsecured without also offering a super-priority administrative expense to the Lender. The Debtor contacted a number of potential lenders in an effort to acquire DIP Financing. However, the Debtor was precluded from securing financing on terms other than on a superpriority basis because it would be time consuming and costly to prime the existing lender. The Debtor believes that the DIP Financing being offered by the Lender is the best facility available to it. The Court should, therefore, authorize the Debtor to provide the Lender a superpriority administrative expense status for any obligations arising under its DIP Loan Documents as provided for in section 364(c)(1) of the Bankruptcy Code.

iii. The Lender Should be Deemed a Good Faith Lender under Section 364(e)

35. Section 364(e) of the Bankruptcy Code protects a good faith lender's right to collect on loans extended to a debtor, even if the authority of the debtor to obtain such loans is later reversed or modified on appeal. Section 364(e) provides that:

> The reversal or modification on appeal of an authorization under this section [364 of the Bankruptcy Code] to obtain credit or incur debt, or of a grant under this section of a priority … does not affect the validity of any debt so incurred, or any priority … so granted, to an entity that extended such

> credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority … were stayed pending appeal.
>
> 11 U.S.C. § 364(e).

36. As explained in detail herein, the DIP Loan Documents are the result of the Debtor's reasonable and informed determination that the DIP Lender offered the most favorable terms on which to obtain needed postpetition financing and of extended arms' length, good faith negotiations between the Debtor and the Lender. The terms and conditions of the DIP Loan Documents are fair and reasonable, and the proceeds of the DIP Facility will be used only for purposes that are permissible under the Bankruptcy Code. Further, no consideration is being provided to any party to the DIP Loan Documents other than as described herein. Accordingly, the Court should find that the DIP Lender is a "good faith" lender within the meaning of section 364(e) of the Bankruptcy Code, and is entitled to all of the protections afforded by that section.

iv. Modification of the Automatic Stay is Warranted

37. The relief requested herein contemplates a modification of the automatic stay (to the extent applicable) to permit the Debtor to: (i) grant the superpriority claims described above with respect to the DIP Lender, (ii) permit the DIP Lender to exercise, upon the occurrence and during the continuance of an Event of Default (as defined in the DIP Loan Documents), after the expiration of the applicable grace period, if any, or the occurrence of the Maturity Date, as applicable, (a) certain immediate remedies, as further detailed in the Interim Order, with respect to the loans issued under the DIP Financing, and (b) certain other remedies

under the DIP Loan Documents at any time ten (10) days' after giving notice; and (iii) implement the terms of the proposed DIP Orders.

38. Stay modifications of this kind are ordinary and standard features of postpetition debtor financing facilities and, in the Debtor's business judgment, are appropriate under the present circumstances. *See, e.g., In re Chassix Holdings, Inc.*, Case No. 15-10578 (MW) (Bankr. S.D.N.Y. Mar. 13, 2015) [Docket No. 67]; *In re The Great Atlantic & Pacific Tea Company, Inc.*, Case No. 10-24549 (RDD) (Bankr. S.D.N.Y. Jan. 13, 2010) [Docket No. 43]; *In re The Reader's Digest Assoc.*, Case No. 09-23529 (RDD) (Bankr. S.D.N.Y. Aug. 26, 2009) [Docket No. 26]; *In re Lear Corp.*, Case No. 09-14326 (ALG) (Bankr. S.D.N.Y. July 7, 2009) [Docket No. 59].

V. The scope of the carve out is appropriate

39. The proposed DIP Loan Documents and DIP Orders subject the Lender's security interests and administrative expense claims to a carve out in favor of Debtor's professionals for its interim and final compensation and reimbursement of expenses and the United States Trustee with respect to its quarterly fees under 28 U.S.C. §1930 (collectively, the "Carve Out.") The Carve Out is similar to other terms created for professional fees that have been found to be reasonable and necessary to ensure that a debtor's estate can retain assistance from counsel. *See Ames*, 115 B.R. at 40.

40. Without the Carve Out, the Debtor's estate may be deprived of possible rights and powers because the services for which professional persons may be paid in the Chapter 11 Case is restricted. *Id.* at 38 (observing that courts insist on carve-outs for professionals representing parties-in-interest because "[a]bsent such protection, the collective rights and expectations of all parties-in-interest are sorely prejudiced"). Additionally, the Carve Out protects against

administrative insolvency during the course of the case by ensuring that assets remain available for the payment of U.S. Trustee fees and professional fees of the Debtor notwithstanding the grant of superpriority and administrative liens and claims under the DIP Facility.

vi. The Debtors Require Immediate Access to its DIP Financing

41. The Court may grant interim relief in respect of a motion filed pursuant to section 364 of the Bankruptcy Code where, as here, interim relief is "necessary to avoid immediate and irreparable harm to the estate pending a final hearing." FED. R. BANKR. P. 4001(c)(2). In examining requests for interim relief under this rule, courts in this jurisdiction generally apply the same business judgment standard applicable to other business decisions. *See Ames Dep't Stores*, 115 B.R. at 36.

42. The Debtor and its estate will suffer immediate and irreparable harm if the interim relief under the DIP financing is not granted promptly after the filing of this motion. The Debtor has no cash on hand to fund its administrative expenses, including insurance (which expires on January 26, 2017), and building and sidewalk repairs, without the ability to immediately draw down on the DIP Financing from the Lender. The Interim Financing is required because, after January 26, 2017, the debtor will not have insurance coverage on the Property. Accordingly, the Debtor has an immediate need for the financing to, among other things, purchase insurance and continue to repair the sidewalk in front of the Property for the benefit of the Debtor, its creditors and parties in interest. The Debtor also has a need for the DIP Financing to (i) administer it s Chapter 11 case, (ii) repair and maintain its real property and (iii) have a source of funds to demonstrate feasibility of its plan of reorganization, which allows it to emerge from Chapter 11.

43. The importance of a debtor's ability to secure postpetition financing to prevent immediate and irreparable harm to its estate has been repeatedly recognized in this district in

similar circumstances. *See, e.g., In re Eastman Kodak Co.*, Case No. 12-10202 (MEW) (Bankr. S.D.N.Y. Jan. 20, 2012) (order approving postpetition financing on an interim basis) [Docket No. 54]; *In re The Great Atl. & Pac. Tea Co.*, Case No. 10-24549 (RDD) (Bankr. S.D.N.Y. Dec. 13, 2010) (same) [Docket No. 43]; *In re The Reader's Digest Assoc.*, Case No. 09-23529 (RDD) (Bankr. S.D.N.Y. Aug. 26, 2009) (same) [Docket No. 26]; *In re Tronox Inc.*, Case No. 09-10156 (MEW) (Bankr. S.D.N.Y. Jan. 13, 2009) (same) [Docket No. 46]; *In re Lyondell Chem. Co.*, No. 09-10023 (REG) (Bankr. S.D.N.Y. Jan. 8, 2009) (same) [Docket No. 79]; *In re Frontier Airlines Holdings, Inc.*, Case No. 08-11298 (RDD) (Bankr. S.D.N.Y. Aug. 5, 2008) (same) [Docket No. 433]. Accordingly, for the reasons set forth above, prompt entry of the Interim Order is necessary to avert immediate and irreparable harm to the Debtor's estate and is consistent with, and warranted under, Bankruptcy Rules 4001(c)(2).

REQUEST FOR FINAL HEARING

44. Pursuant to Bankruptcy Rule 4001(c)(2), the Debtor requests that the Court set a date that is no later than 14 days after entry of the Interim Order as a final hearing for consideration of entry of the Final Order.

45. The Debtor requests that it be authorized to serve a copy of the signed Interim Order, which fixes the time and date for the filing of objections, if any, by first class mail upon the Notice Parties listed below. The Debtor further requests that the Court consider such notice of the Final Hearing to be sufficient notice under Bankruptcy Rule 4001(c)(2).

Waiver of Bankruptcy Rules 6004(a) and (h)

46. To implement the foregoing successfully, the Debtor seeks a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the fourteen (14) day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h).

NOTICE

47. Notice of this Motion has been provided to (i) the Office of the United States Trustee for Region 2; (ii) Counsel for the Lender (iii) the holders of the twenty (20) largest unsecured claims against the Debtor; (iv) the Internal Revenue Service; (v) the Attorney General for the State of New York; (vi) the Office of the Corporation Counsel of the City of New York and (vii) all parties who have filed appearances in this case and requests for notices. The Debtor submits that, in view of the facts and circumstances, such notice is sufficient and no other or further notice need be provided.

48. No previous request for the relief sought herein has been made by the Debtor to this or any other Court.

WHEREFORE the Debtor respectfully request entry of an order granting the relief requested herein and such other and further relief as is just.

Dated: New York, New York
January 13, 2017

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