

**Hearing Date: January 31, 2017 at 12:00 p.m. (Prevailing Eastern Time)**  
**Objection Deadline: January 30, 2017 at 1:00 p.m. (Prevailing Eastern Time)**

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

In re:

GRACIOUS HOME LLC, *et al.*,

Debtors.<sup>1</sup>

Chapter 11

Case No. 16-13500 (MKV)

(Jointly Administered)

**DEBTORS' MOTION FOR ENTRY OF INTERIM AND  
FINAL ORDERS (I) AUTHORIZING THE DEBTORS TO OBTAIN  
POSTPETITION FINANCING AND GRANT SECURITY INTERESTS AND  
SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS; (II) MODIFYING THE  
AUTOMATIC STAY; (III) AUTHORIZING THE DEBTORS TO ENTER INTO  
AGREEMENTS WITH GRACIOUS HOME LENDING LLC; (IV) SCHEDULING A  
FINAL HEARING; AND (V) GRANTING RELATED RELIEF**

<sup>1</sup> The Debtors in these chapter 11 cases and the last four digits of their tax identification numbers are: Gracious Home Holdings LLC (3251); Gracious Home Payroll LLC (3681), Gracious Home LLC (3251); GH East Side LLC (3251); GH West Side LLC (3251); GH Chelsea LLC (3251) and Gracious (IP) LLC (3251). The latter five entities are disregarded for tax purposes and do not have their own tax identification numbers, but use that of Gracious Home Holdings LLC. The address of the Debtors' corporate headquarters is 1210 Third Avenue, New York, New York 10021.

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) in these chapter 11 bankruptcy cases (the “Chapter 11 Cases”) file this motion (the “Motion”) for entry of (a) an interim order, substantially in the form attached hereto as **Exhibit A** (the “Interim DIP Order”), (i) authorizing the Debtors, on an interim basis, to obtain post-petition financing from Gracious Home Lending LLC (“DIP Lender”)<sup>2</sup> on a senior secured, superpriority basis, and granting DIP Lender a superpriority administrative claim in the Chapter 11 Cases; (ii) scheduling a hearing to consider entry of a final order (the “Final DIP Order” and together with the Interim DIP Order, the “DIP Orders”), and (iii) granting related relief; and (b) the Final DIP Order, authorizing the relief granted in the Interim DIP Order on a permanent basis as described in this Motion, and in support, state as follows:

#### **Jurisdiction and Venue**

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

2. The statutory bases for the relief requested herein are sections 105, 361, 362, 363, 364(c)(1), and 364(c)(2) of title 11 of the United States Code (the “Bankruptcy Code”), Rules 2002, 4001, and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rules 4001-2 and 9013-1(a) of the Local Bankruptcy Rules for the Southern District of New York (the “Local Bankruptcy Rules”).

#### **Procedural Background**

3. The Debtors filed their chapter 11 petitions on December 14, 2016 (the “Petition Date”). The Debtors are operating their businesses and managing their properties as debtors in

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<sup>2</sup> Pursuant to the terms of the Proposed Loan Documents, the DIP Lender will actually be an agent under the credit agreement for a group of lenders. For ease of reading, however, this Motion is drafted as if the DIP Lender is the only lender.

possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in these chapter 11 cases. A statutory committee of unsecured creditors in these cases (the “Committee”) was appointed on January 6, 2017.

**Relief Requested**

4. By this Motion, the Debtors request entry of the DIP Orders, which, collectively, will provide the Debtors with critical and necessary access to the \$3,000,000 DIP Facility (as further defined below). The proceeds of the DIP Facility will be used to satisfy the prepetition secured claim of Signature Bank’s assignee, and to provide the Debtors with needed working capital.

5. The Debtors have obtained a commitment letter from the DIP Lender, which provides a detailed summary of the terms of the proposed loan documents (the “Commitment Letter”). A copy of the Commitment Letter is annexed to the accompanying Rosen Declaration as **Exhibit 1**. Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Commitment Letter. The Debtors will supplement this Motion with the proposed form of DIP Loan Documents prior to the hearing on the Interim DIP Order.

**Concise Statement Pursuant to Local Bankruptcy Rule 4001-2<sup>3</sup>**

<b>Borrowers:</b>	All of the Debtors, jointly and severally.
<b>DIP Facility</b> <b>(p. 2 of Commitment Letter)</b> <b>(§ 1 of Interim DIP Order)</b>	A term loan (the “ <u>DIP Facility</u> ”) made available to the Borrowers in a principal amount of up to \$3,000,000 (\$1 million upon entry of Interim DIP Order and the remainder upon entry of Final DIP Order), and amounts advanced by the DIP Lender (as defined below) under the DIP Facility (the “ <u>DIP Loan</u> ”) pursuant to the Budget (as defined below). The DIP Facility will be documented under a Debtor-in-Possession Loan and Security Agreement in form and substance acceptable to the DIP Lender and the Debtors (the “ <u>DIP</u> ”).

<sup>3</sup> To the extent the summary of terms and conditions set forth in this Motion is inconsistent with or in conflict with the terms and conditions of the DIP Facility, the terms and conditions of the DIP Facility shall control and govern.

	<u>Credit Agreement</u> ”).
<p><b>DIP Collateral:</b> <b>(p. 2 of Commitment Letter)</b> <b>(§ 9 of Interim DIP Order)</b></p>	<p>The DIP Liens include (I) first priority liens upon and security interests in (a) all Accounts and payment intangibles, (b) Inventory and Documents for any Inventory, and (c) all Intellectual Property and related assets and (II) first priority liens upon and security interests in (i) all of those other items and types of collateral in which security interests may be created under Article 9 of the Uniform Commercial Code, (ii) all of those other items and types of collateral not governed by Article 9 of the Uniform Commercial Code, including, without limitation, to the extent not permitted by applicable nonbankruptcy law, licenses issued by any federal or state regulatory authority, any leasehold or other real property interests, and commercial tort claims of the Debtors, (iii) any and all other DIP Collateral of any nature or form, and (iv) the products, rents, offspring, profits, and proceeds of any of the foregoing.</p> <p>None of the DIP Obligations, DIP Liens or DIP Superpriority Claims (as defined below) shall (a) be subject to or <i>pari passu</i> with any lien or security interest that is avoided and preserved for the benefit of the Estates under section 551 of the Bankruptcy Code, (b) be subject to or <i>pari passu</i> with any inter-company claim, whether secured or unsecured, of any Debtor or any domestic or foreign subsidiary or affiliate of any Debtor, (c) be subject to sections 510, 549, or 550 of the Bankruptcy Code, or (d) hereafter be subordinated to or made <i>pari passu</i> with any other lien or security interest under sections 361, 363 or 364 of the Bankruptcy Code or otherwise, except as expressly provided in the Interim or Final Order (as defined below).</p> <p>Security deposits in the possession of the Debtors’ former or current landlords will <u>not</u> be included in the DIP Collateral.</p>
<p><b>DIP Liens and Claims:</b> <b>(p. 3 of Commitment Letter)</b> <b>(§§ 8-9 of Interim DIP Order)</b></p>	<p>The DIP Lender will be granted the following liens and claims:</p> <ol style="list-style-type: none"> <li>a. Superpriority administrative expense claims pursuant to Bankruptcy Code section 364(c)(1) with priority over all other administrative expenses pursuant to the Bankruptcy Code (including the kinds specified in or arising or ordered pursuant to Bankruptcy Code sections 326, 330, 331, 503(b), 506(b) and (c), 507(a), 507(b), and 726 thereof or otherwise, whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment), which superpriority expenses of the DIP Lender and DIP Lenders shall be subject and subordinate only to the Carve-Out (the “<u>DIP Superpriority Claims</u>”);</li> <li>b. A first priority security interest and lien pursuant to Bankruptcy Code section 364(c)(2) (the “<u>Section 364(c)(2) Liens</u>”) on (a) all Accounts and payment intangibles, (b) Inventory and Documents for any Inventory, and (C) all Intellectual Property and related assets, and (II) on all assets of the Debtors and their Estates (the “<u>DIP Collateral</u>”) of any nature whatsoever and wherever located, whether first arising prior to or following the Petition Date, now owned or hereafter acquired, including all accounts, all chattel paper, all commercial tort claims, all deposit accounts, <u>all Avoidance Actions (defined below)</u> and the proceeds thereof, all documents, all equipment, all general intangibles, all goods, all</li> </ol>

	<p>instruments, all inventory, all investment property, all letter-of-credit rights, all books and records, and all proceeds, rents, profits, and offspring of the foregoing (including Cash Collateral), which Section 364(c)(2) Liens shall subordinate only to the Carve-Out.</p> <p>Security deposits in the possession of the Debtors' former or current landlords will <u>not</u> be subject to the DIP Liens.</p>
<p><b>DIP Facility Availability:</b> <b>(p. 4 of Commitment Letter)</b></p>	<p>In the period between entry of the Interim DIP Order and Final DIP Order (the "<u>Interim Period</u>"), \$1,000,000 of the DIP Facility shall be available to the Borrowers, subject to (i) delivery by the Borrowers of a Budget in form and substance reasonably acceptable to the DIP Lenders and (ii) compliance with the terms, conditions and covenants in the DIP Credit Agreement.</p> <p>Upon the Bankruptcy Court's entry of the Final Order, the full remaining amount of the DIP Facility shall be available to the Borrowers, subject to compliance with the terms, conditions and covenants described in the DIP Credit Agreement.</p>
<p><b>Budget:</b> <b>(p. 4 of Commitment Letter)</b> <b>(§ 5 of Interim DIP Order)</b></p>	<p>"<u>Budget</u>" means in the case of the initial Budget (delivered at the time of execution of the DIP Credit Agreement), a 13-week statement of sources and uses of the Borrowers broken down by week, including the anticipated uses of the DIP Facility for such period. The Budget shall provide, among other things, for the payment of fees and expenses relating to the DIP Facility, ordinary course administrative expenses, bankruptcy-related expenses and professional fees, working capital expenditures, and other general corporate needs.</p> <p>No less frequently than every two weeks commencing on February 3, 2017, the Debtors shall deliver an updated budget (each, a "<u>Proposed Budget</u>") to the DIP Lender, which Proposed Budget, upon written approval of the DIP Lender, shall become the DIP Budget effective as of the first Monday following such written approval; <u>provided, however</u>, that unless and until the DIP Lender shall have approved in writing any Proposed Budget or any other proposed modification to the DIP Budget then in effect, the Debtors shall still be subject to and be governed by the terms of such Budget then in effect in accordance with the terms of the Interim Order.</p> <p>Commencing on the first Wednesday following entry of the Interim Order (or the next business day if such day is not a business day), and continuing every week thereafter, the Debtors shall be required to deliver to the DIP Lender a weekly variance report from the previous week comparing the actual receipts and disbursements of the Debtors with the receipts and disbursements in the Budget (the "<u>Budget Variance Report</u>"). The Debtors shall be permitted a ten percent (10%) variance on disbursements tested on a cumulative basis ("<u>Permitted Variances</u>").</p>
<p><b>Maturity:</b> <b>(p. 4 of Commitment Letter)</b></p>	<p>The maturity date of the DIP Facility will be (and all loans and obligations under the DIP Facility shall be repaid in full in cash on) the earliest of: (i) stated maturity, which shall be December 31, 2017, (ii) the effective date of any Chapter 11 plan of the Borrowers that is reasonably acceptable to the DIP Lenders, (iii) the date that is 30 days after the Interim Order Entry Date if the Final Order shall not have been entered by such date and (iv) the acceleration</p>

	<p>of the loans or termination of the commitments under the DIP Facility, including, without limitation, as a result of the occurrence of an Event of Default (as defined below) (any such occurrence, the “<u>Maturity Date</u>”).</p> <p>Any confirmation order entered in the Chapter 11 Cases shall be reasonably acceptable to the DIP Lender and shall not discharge or otherwise affect in any way any of the joint and several obligations of the Borrowers to the DIP Lender under the DIP Facility and DIP Credit Agreement, other than after the indefeasible payment in full in cash of such obligations unless the DIP Lender affirmatively agrees to different treatment.</p>
<p><b>Interest Rate and Fees:</b> <b>(p. 5 of Commitment Letter)</b> <b>(§ 6 of Interim DIP Order)</b></p>	<p>The DIP Loans shall bear interest on the unpaid principal amount thereof plus all obligations owing to, and rights of, the DIP Lenders pursuant to the DIP Credit Agreement, including without limitation, all interest, fees, and costs accruing thereon (collectively, the “<u>Obligations</u>”) from the date of the DIP Credit Agreement (the “<u>Effective Date</u>”) to and including the Maturity Date, at an annual rate of 15%. The DIP Loan Documents will also provide for a 2% commitment fee and a 2% facility fee, payable as part of the first advance. There is also an exit fee of 5%, payable upon the Maturity Date or prepayment of the DIP Facility. Borrowers are also responsible for DIP Lender’s expenses, as well as a non-refundable work fee of \$100,000 to DIP Lender’s attorney upon entry of the Interim Order.</p>
<p><b>Voluntary Prepayment:</b> <b>(p. 5 of Commitment Letter)</b></p>	<p>The DIP Loans may be prepaid in whole or in part at any time subject to the Exit Fee of 5% stated above. To the extent the Debtors sell all or substantially all of their assets prior to Maturity, the DIP Lender will be entitled a payment equal (i) fifteen percent (15%) of amounts to be distributed to creditors or interest holders pursuant to the priorities set forth in the Bankruptcy Code to compensate the DIP Lender for losses incurred as a result of payment of the DIP Loan prior to Maturity or (ii) any break-up fee or expense reimbursement awarded to the DIP Lenders should such lenders serve as a stalking horse bidder in a sale process. The DIP Lender may apply any such prepayments and any payments made thereunder in any order of priority determined by the DIP Lender in its exclusive judgment.</p>
<p><b>Adequate Protection:</b> <b>(p. 6 of Commitment Letter)</b></p>	<p>Pursuant to sections 361, 363(e) and 364(d)(1) of the Bankruptcy Code, the DIP Lender, for the benefit of itself and the DIP Lenders, shall be granted the following adequate protection (collectively, the “<u>Adequate Protection</u>”) of its security interests for, and equal in amount to, the diminution in the value (each such diminution, a “<u>Diminution in Value</u>”) of the security interests calculated in accordance with section 506(a) of the Bankruptcy Code, whether or not such Diminution in Value results from the sale, lease or use by the Borrowers of the Collateral or the stay of enforcement of any prepetition security interest arising from section 362 of the Bankruptcy Code, or otherwise, subject and subordinate to the Carve-Out, the DIP Liens and Super-Priority Claims:</p> <p>a. <u>Adequate Protection Liens</u>. As security for and solely to the extent of any Diminution in Value, the DIP Lender will be hereby granted, additional valid, binding, enforceable non-avoidable, and automatically perfected postpetition security interests in and liens (the “<u>Adequate Protection Liens</u>”), on all property, whether now owned or hereafter acquired or existing and wherever located, of each Debtor and each Debtor’s “estate” (as created pursuant to section 541(a) of the Bankruptcy Code), of any kind or nature whatsoever, real or personal, tangible or intangible, and now</p>

	<p>existing or hereafter acquired or created (<u>including any causes of action under sections 544, 545, 547, 548 and 550 of the Bankruptcy Code and any other avoidance actions under the Bankruptcy Code (collectively, the "Avoidance Actions")</u>), all products, proceeds and supporting obligations of the foregoing, whether in existence on the Petition Date or thereafter created, acquired, or arising and wherever located (collectively, the "<u>Adequate Protection Collateral</u>"). Subject to the terms of the Interim Order, the Adequate Protection Liens shall be subordinate only to the Carve-Out and the DIP Claims. The Adequate Protection Liens shall otherwise be senior to all other security interests in, liens on, or claims against any of the Adequate Protection Collateral (including any lien or security interest that is avoided and preserved for the benefit of the Debtors and their estates under section 551 of the Bankruptcy Code).</p> <p>b. <u>Fees and Expenses</u>. As further adequate protection, the Debtors will pay the reasonable and documented fees and expenses (the "<u>Adequate Protection Fees</u>"), incurred after the Petition Date, of the DIP Lenders or its counsel, Arent Fox LLP.</p>
<p><b>Affirmative Covenants:</b> <b>(p. 6 of Commitment Letter)</b></p>	<p>The DIP Loan Documents will contain numerous affirmative covenants that the Debtors must comply with during the pendency of the DIP Facility.</p>
<p><b>Events of Default:</b> <b>(p. 8 of Commitment Letter)</b></p>	<p>The DIP Loan Documents will contain a series of Events of Default, including both payment defaults and covenant defaults. These events of default include, among others, the failure to file a plan of reorganization by June 30, 2017, and the failure to obtain the DIP Lender's approval before filing a disclosure statement or plan of reorganization.</p>
<p><b>Indemnity; Expenses:</b> <b>(p. 10 of Commitment Letter)</b> <b>(§ 7 of Interim DIP Order)</b></p>	<p>The DIP Loan Documents will provide for the Debtors to indemnify the DIP Lender in specified circumstances.</p>
<p><b>Carve-Out:</b> <b>(p. 10 of Commitment Letter)</b> <b>(§ 10 of Interim DIP Order)</b></p>	<p>"<u>Carve-Out</u>" shall mean the sum of: (i) all fees required to be paid to the Clerk of the Court and to the Office of the United States Trustee under 28 U.S.C. § 1930(a); (ii) fees and expenses up to \$25,000 incurred by a trustee under Bankruptcy Code section 726(b); (iii) all accrued but unpaid costs, fees, and expenses (the "<u>Professional Fees</u>") incurred by persons or firms retained by the Debtors pursuant to sections 327, 328, or 363 of the Bankruptcy Code (collectively, the "<u>Debtor Professionals</u>") and any official committee appointed in these Cases, including the Creditors' Committee (the "<u>Committee Professionals</u>" and the Debtor Professionals, collectively, the "<u>Professional Persons</u>") at any time before or on the first business day following delivery by the DIP Lender of a Carve-Out Trigger Notice, to the extent allowed at any time whether allowed by interim order, procedural order, or otherwise (the "<u>Pre-Termination Amount</u>"); and (iv) after the first business day following delivery by the DIP Lender of the Carve-Out Trigger Notice, to the extent allowed at any time, whether by interim order, procedural order, or otherwise, the payment of Professional Fees of Professional Persons in an aggregate amount not to exceed \$175,000 for both the Debtor Professionals and the Committee Professionals (collectively, the "<u>Post-Termination Amount</u>," and</p>

	<p>together with the Pre-Termination Amount, the “<u>Professional Fees Amount</u>”); <u>provided</u> that nothing herein shall be construed to impair the ability of any party to object to the fees, expenses, reimbursement, or compensation described in preceding clauses (iii) and (iv).</p> <p>For purposes of the foregoing, “<u>Carve-Out Trigger Notice</u>” shall mean a written notice delivered by the DIP Lender to the Debtors and their lead counsel, the U.S. Trustee, and lead counsel to the Creditors’ Committee, if any, providing notice that the Termination Date has occurred. On the day on which a Carve-Out Trigger Notice is given to the Debtors, such Carve-Out Trigger Notice shall constitute a demand to the Debtors to utilize all cash on hand as of such date and any available cash thereafter held by any Debtor to fund a reserve in an aggregate amount equal to (A) the Pre-Termination Amount <i>plus</i> (B) the Post- Termination Amount, and the Debtors shall deposit and hold any such amounts in a segregated account in trust for the Professional Persons (the “<u>Professional Fees Reserve</u>”) (it being understood that the Prepetition Secured Parties shall have a lien and security interest in any residual amount of such segregated account).</p> <p>For the avoidance of doubt, so long as the Carve-Out Trigger Notice shall not have been delivered, the Carve-Out shall not be reduced by the payment of Professional Fees allowed at any time by the Bankruptcy Court. For the avoidance of doubt the Carve-Out shall be senior to all liens and claims securing the DIP Loan Documents and the Adequate Protection Superpriority Claims.</p>
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### **Background**

6. The Debtors’ liquidity issues, exasperated by the reserves imposed and cash sweeps undertaken by the Debtors’ pre-petition lender, Signature Bank, are what drove them to seek bankruptcy protection before this Court.<sup>4</sup> These liquidity issues continue, and as a result, the Debtors have spent the first six weeks of the case right-sizing themselves by, among other things, rejecting leases, consolidating their assets, and terminating the services of numerous employees. The Debtors have been unable to purchase inventory, due to the liquidity issues as well as constraints placed on them by Signature Bank under the two interim orders approving use of cash collateral. In order to keep the doors open, the Debtors are selling their remaining

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<sup>4</sup> For a full background of the Debtors and the events that led to these Chapter 11 Cases, the Debtors incorporate by reference herein the *Affidavit of Robert Morrison Pursuant to Bankruptcy Rule 1007-2 of the Local Bankruptcy Rules for the Southern District of New York* (ECF No. 3).

inventory as well as merchandise consigned to them and allowing a third-party vendor to open a “shop in shop.”

7. At the same time, the Debtors have been working on a merchandizing plan appropriate for one brick and mortar store and an on-line presence. In order to consummate this plan, the Debtors require financing. Indeed, without the financing, the Debtors’ options with respect to their Chapter 11 Cases narrow drastically. Accordingly, as set forth in the declaration of Adam Rosen submitted herewith (the “Rosen Declaration”), the Debtors directed their restructuring advisor, B. Riley & Co. (“BRC”) to canvass the market in order to secure the most optimal financing package. BRC identified and contacted approximately 30 third parties as potential sources of financing, whether on an unsecured or a secured basis. Rosen Declaration at ¶ 4. The third parties solicited by BRC included sophisticated financial institutions, hedge funds, and lower-middle-market business lenders active in the debtor-in-possession financing market, which BRC had identified based on a number of factors, including their ability to quickly complete due diligence. BRC was not able to obtain any offers to provide financing to the Debtors on an unsecured basis, and the DIP Lender was the only party to offer to provide financing on a secured basis. *Id.*, ¶ 6.

### **Basis for Relief**

#### **I. The Debtors Should Be Authorized to Obtain Post-Petition Financing Through the DIP Loan Documents.**

##### **A. Entering into the DIP Loan Documents Is an Exercise of the Debtors’ Sound Business Judgment.**

8. For the reasons set forth in greater detail below, the Court should authorize the Debtors to enter into the DIP Loan Documents, and obtain access to the DIP Facility, as an exercise of the Debtors’ sound business judgment.

9. Section 364 of the Bankruptcy Code authorizes a debtor to obtain secured or superpriority financing under certain circumstances as described in greater detail below. Provided that an agreement to obtain secured credit does not run afoul of the provisions of, and policies underlying, the Bankruptcy Code, courts grant debtors considerable deference in acting in accordance with its sound business judgment in obtaining such credit. See In re Barbara K. Enters., Inc., No. 08-11474 (MG), 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) (“[T]he applicable factors [include] [t]hat the proposed financing is an exercise of sound and reasonable business judgment. . .”).

10. Furthermore, in determining whether the Debtors have exercised sound business judgment in deciding to enter into the DIP Loan Documents, the Court should consider the economic terms of the DIP Facility in light of current market conditions. See, e.g., Transcript of Record at 734-35:24-1, In re Lyondell Chem. Co., No. 09-10023 (Bankr. S.D.N.Y. Mar. 5, 2009) (recognizing that “the terms that are now available for DIP facilities 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 Debtors offered by a proposed post-petition 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 establishing 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.

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

11. The Debtors' execution of the DIP Loan Documents is an exercise of their sound business judgment that warrants approval by the Court. The Debtors negotiated the Commitment Letter with the DIP Lender in good faith, at arm's-length, and with the assistance of outside advisors, in order to obtain the required post-petition financing on terms favorable to the Debtors. Based on the advice of its financial professionals, and the Debtors' own analysis, the Debtors have determined in their sound business judgment that the DIP Loan Documents will provide financing to the Debtors in a way more beneficial than any of the available alternatives.

**B. The Debtors Should Be Authorized to Obtain Post-Petition Financing on a Senior Secured and Superpriority Basis.**

12. Section 364 of the Bankruptcy Code authorizes a debtor to obtain, in certain circumstances, post-petition financing on a secured or superpriority basis, or both. Specifically, section 364(c) of the Bankruptcy Code provides, in pertinent part, that the Court, after notice and a hearing, may authorize a debtor that is unable to obtain credit allowable as an administrative expense under section 503(b)(1) of the Bankruptcy Code to obtain credit or incur debt:

- (a) with priority over any or all administrative expenses of the kind specified in § 503(b) or 507(b) of [the Bankruptcy Code];
- (b) secured by a lien on property of the estate that is not otherwise subject to a lien; or
- (c) secured by a junior lien on property of the estate that is subject to a lien.

11 U.S.C. § 364(c).

13. In order 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 § 364(c) where it approached four lending institutions, was rejected by two, and selected the most favorable of the two offers it received).

14. As described above, BRC identified and solicited offers from multiple potential post-petition lenders. Notwithstanding these efforts, the Debtors were unable to obtain any post-petition financing in the form of unsecured credit or as an administrative expense. The

Debtors' secured debt (relative to their assets) precludes them from obtaining post-petition financing in the amount they require on terms other than on a secured and superpriority basis. The Court should therefore (i) authorize the Debtors to provide the DIP Lender senior liens on the Debtors' property as provided in section 364(c)(2) of the Bankruptcy Code, and (ii) grant the Debtors' repayment obligations under the DIP Loan Documents superpriority administrative expense status as provided for in section 364(c)(1) of the Bankruptcy Code.

**II. The Fee Provisions of the DIP Financing Agreements Are Appropriate.**

15. As described above, the Debtors have agreed, subject to Court approval, to pay to the DIP Lender, in exchange for it providing the DIP Facility, a \$60,000 commitment fee (constituting 2% of the loan amount), a \$60,000 funding fee (constituting 2% of the loan amount), and a \$100,000 work fee to the DIP Lender's counsel, each of which is payable upon entry of the Interim DIP Order (these amounts will be payable from proceeds of the DIP Facility). These fees will not be refunded in the event that the Final DIP Order is not entered. Additionally, the Proposed Loan Documents will provide for a \$150,000 exit fee (constituting 5% of the loan amount) to be paid upon the Maturity Date or repayment of the DIP Facility, and a prepayment fee payable in the event of a sale of the Debtors' assets equal to 15% of any distributions to unsecured creditors or interest holders pursuant to the priorities set forth in the Code. These fees, together with the other provisions of the DIP Loan Documents, represent the most favorable terms to the Debtors on which the DIP Lender would agree to make the DIP Facility available. The Debtors considered the fees described above when determining in their sound business judgment that the DIP Loan Documents constituted the best terms on which the Debtors could obtain the post-petition financing necessary to continue their operations and prosecute their Chapter 11 Cases, and paying the fees in order to obtain the DIP Facility is in the best interests of the Debtors' estates, creditors, and other parties in interest.

16. Courts routinely authorize debtors to pay fees similar to those the Debtors propose to pay, where the associated financing is, in the debtors' business judgment, beneficial to the debtors' estates. See, e.g., In re Insight Health Services Holdings Corp., No. 10-16564 (AJG) (Bankr. S.D.N.Y. Jan. 4, 2011) (approving 2.0% DIP closing fee); In re NR Liquidation III Co. (f/k/a Neff Corp.), No. 10-12610 (SCC) (Bankr. S.D.N.Y. June 30, 2010) (approving 3.1% DIP and exit facility fee); In re The Reader's Digest Ass'n, No. 09-23529 (RDD) (Bankr. S.D.N.Y. Oct. 6, 2009) (approving 3% exit fee), In re Lear Corp., No. 14326 (ALG) (Bankr. S.D.N.Y. Aug. 4, 2009) (approving 5.0% up-front fee and a 1.0% exit/conversion fee); In re Gen. Growth Prop., Inc., No. 09-11977 (Bankr. S.D.N.Y. May 14, 2009) (approving 3.75% exit fee); In re Aleris Int'l. Inc., No. 09-10478 (Bankr. D. Del. Mar. 18, 2009) (approving 3.5% exit fee and 3.5% front-end net adjustment against each lender's initial commitment); In re Tronox Inc., No. 09-10156 (Bankr. S.D.N.Y. Jan. 13, 2009) (approving an up-front 3% facility fee); In re Lyondell Chem. Co., No. 09-10023 (Bankr. S.D.N.Y. Jan. 8, 2009) (approving exit fee of 3%); In re DJK Residential, No. 08-10375 (Bankr. S.D.N.Y. Feb. 29, 2008) (approving 3% fee in connection with post-petition financing).<sup>5</sup> Accordingly, the Court should authorize the Debtors to pay the fees provided under the DIP Loan Documents in connection with entering into those agreements.

17. The terms of the DIP Loan Documents, including the key provisions described above, constitute, on the whole, the most favorable terms on which the Debtors could obtain needed post-petition financing.

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<sup>5</sup> Because of the voluminous nature of the orders cited herein, such orders have not been attached to the Motion. Copies of these orders are available upon request to the Debtors' proposed counsel.

**III. The Scope of the Carve-Out Is Appropriate.**

18. The proposed DIP Facility subjects the security interests and administrative expense claims of the DIP Lender to the Carve-Out. Such carve outs for professional fees have been found to be reasonable and necessary to ensure that a debtor's estate and any statutory committee can retain assistance from counsel. See, e.g., Ames Dep't Stores, 115 B.R. at 40. The DIP Facility does not directly or indirectly deprive the Debtors' estates or other parties in interest of possible rights and powers by restricting the services for which professionals may be paid in these cases. See id. at 38 (observing that courts insist on carve outs for professionals representing parties-in-interest because "[a]bsent such protection, the collective rights and expectations of all parties-in-interest are sorely prejudiced."). In addition, the carve-out ensures that proceeds of the DIP Facility may be used for the payment of U.S. Trustee fees and professional fees of the Debtors and the Committee notwithstanding the grant of superpriority and administrative liens and claims under the DIP Facility.

**IV. The DIP Lender Should Be Deemed a Good Faith Lender Under § 364(e).**

19. Section 364(e) of the Bankruptcy Code protects a good faith lender's right to collect on loans extended to a debtor, and its right in any lien securing those loans, even if the authority of the debtor to obtain such loans or grant such liens is later reversed or modified on appeal. Specifically, 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 or a lien, does not affect the validity of any debt so incurred, or any priority or lien 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 or lien, were stayed pending appeal.

11 U.S.C. § 364(e).

20. As explained herein and in the Rosen Declaration, the DIP Loan Documents are the result of the Debtors' reasonable and informed determination that the DIP Lender offered the most favorable terms on which to obtain needed post-petition financing, and of extended arm's-length, good faith negotiations between the Debtors and the DIP Lender. The terms and conditions of the DIP Loan Documents are fair and reasonable, and the proceeds under 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.

**V. Modification of the Automatic Stay Is Warranted.**

21. The DIP Loan Documents and the proposed Interim DIP Order contemplate that the automatic stay arising under section 362 of the Bankruptcy Code shall be vacated or modified to the extent necessary to permit the DIP Lender to exercise, upon the occurrence and during the continuation of any Event of Default (as such term is defined in the DIP Credit Agreement), all rights and remedies provided for in the DIP Credit Agreement, and to take various other actions without further order of or application to the Court. The DIP Loan Documents provide, however, that the DIP Lender must provide the Debtors, the United States Trustee for the Bankruptcy Court for the Southern District of New York and counsel to the Committee with seven (7) days' prior written notice before exercising any enforcement rights or remedies against the Collateral, which will allow the Debtors and other interested parties to seek an expedited hearing before the Court for the purpose of determining whether, in fact, an Event of Default has occurred and is continuing.

22. Stay modification provisions of this sort are ordinary features of debtor in possession financing facilities and, in the Debtors' business judgment, are reasonable under the circumstances. See, e.g., In re Hawker Beechcraft, Inc., No. 12-11873 (SMB) (Bankr. S.D.N.Y. June 1, 2012); In re Velo Holdings Inc., No. 12-11384 (MG) (Bankr. S.D.N.Y. Apr. 23, 2012); In re United Retail Grp., Inc., No. 12-10405 (SMB) (Bankr. S.D.N.Y. Feb. 23, 2012); In re Hostess Brands, Inc., No. 12-22052 (RDD) (Bankr. S.D.N.Y. Feb. 3, 2012); In re Insight Health Servs. Holdings Corp., No. 10-16564 (AJG) (Bankr. S.D.N.Y. Jan. 4, 2011); In re NR Liquidation III Co. (f/k/a Neff Corp.), No. 10-12610 (SCC) (Bankr. S.D.N.Y. June 30, 2010); In re The Reader's Digest Ass'n, No. 09-23529 (RDD) (Bankr. S.D.N.Y. Oct. 6, 2009); In re Lear Corp., No. 14326 (ALG) (Bankr. S.D.N.Y. Aug. 4, 2009); In re Gen. Growth Prop. Inc., No. 09-11977 (Bankr. S.D.N.Y. May 14, 2009); In re Tronox Inc., No. 09-10156 (Bankr. S.D.N.Y. Feb. 6, 2009); In re Chemtura Corp., No. 09-11233 (Bankr. S.D.N.Y. Apr. 23, 2009); In re Wellman, Inc., No. 0810595 (Bankr. S.D.N.Y. Apr. 7, 2008); In re Musicland Holding Corp., No. 06-10064 (Bankr. S.D.N.Y. Feb. 21, 2006).

**VI. The Debtors Require Immediate Access to the DIP Facility.**

23. The Court may grant interim relief in respect of a motion filed pursuant to section 363(c) or 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(b)(2) and (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, e.g., Ames Dep't Stores, 115 B.R. at 36.

24. The Debtors have an immediate need for access to liquidity to, among other things, continue the operation of their business, maintain important relationships with customers and landlords, meet payroll, procure goods and services from vendors and suppliers and

otherwise satisfy their working capital and operational needs, all of which are required to preserve and maintain the Debtors' going concern value for the benefit of all parties in interest.

25. The importance of a debtor's ability to secure post-petition 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 United Retail Grp., Inc., No. 12-10405 (SMB) (Bankr. S.D.N.Y. Feb. 2, 2012) (same); In re Sbarro, Inc., No. 11-11527 (SCC) (Bankr. S.D.N.Y. Apr. 5, 2011) (same); In re MSR Resort Golf Course LLC, No. 11-10372 (SHL) (Bankr. S.D.N.Y. Mar. 16, 2011) (same); In re Insight Health Servs. Holdings Corp., No. 10-16564 (AJG) (Bankr. S.D.N.Y. Jan. 4, 2011); In re Great Atl. & Pac. Tea Co., No. 10-24549 (RDD) (Bankr. S.D.N.Y. Dec. 13, 2010) (same); In re The Reader's Digest Assoc., No. 09-23529 (RDD) (Bankr. S.D.N.Y. Aug. 26, 2009) (same); In re Tronox Inc., No. 09-10156 (ALG) (Bankr. S.D.N.Y. Jan. 13, 2009) (same); In re Lyondell Chem. Co., No. 09-10023 (REG) (Bankr. S.D.N.Y. Jan. 8, 2009) (same); In re Lenox Sales, Inc., No. 08-14679 (ALG) (S.D.N.Y. Nov. 25, 2008) (same); In re Wellman, Inc., No. 08-10595 (SMB) (S.D.N.Y. Feb. 27, 2008) (same). Accordingly, for all of the reasons set forth above, prompt entry of the Interim DIP Order is necessary to avert immediate and irreparable harm to the Debtors' estates and is consistent with, and warranted under, Bankruptcy Rules 4001(b)(2) and (c)(2).

#### **Request for a Final Hearing**

26. Pursuant to Bankruptcy Rules 4001(b)(2) and 4001(c)(2), the Debtors request that the Court set a date, which is no sooner than 14 days after the date of this Motion and no later than 30 days after the entry of the Interim DIP Order, to hold a hearing to consider entry of the Final DIP Order and the permanent approval of the relief requested in this Motion. The Debtors also request authority to serve a copy of the signed Interim DIP Order, which fixes the time and date for the filing of objections, if any, to entry of the Final DIP Order, by first-class

mail upon the notice parties listed below, and further request that the Court deem service thereof sufficient notice of the hearing on the Final DIP Order under Bankruptcy Rule 4001(c)(2).

**Reservation of Rights**

27. Nothing contained in this Motion is intended or should be construed as an admission as to the validity of any claim against the Debtors, a waiver of the Debtors' rights to dispute any claim, or an approval or assumption of any agreement, contract, or lease under section 365 of the Bankruptcy Code. The Debtors expressly reserve their right to contest any claim related to the relief sought herein. Likewise, if the Court grants the relief sought herein, any payment made pursuant to an order of the Court is not intended to be nor should it be construed as an admission as to the validity of any claim or a waiver of the Debtors' rights to subsequently dispute such claim.

**Notice**

28. The Debtors have provided notice of this Motion to: (a) the Office of the United States Trustee for the Southern District of New York (United States Trustee's Office Region 2, U.S. Federal Office Building, 201 Varick Street, Suite 1006, New York, New York 10014); (b) counsel for the Committee; (c) counsel for secured creditor GH N, LLC; (d) all parties known to the Debtors who hold any liens or security interest in the Debtors' assets who have filed UCC-1 Financing Statements against any of the Debtors, or who, to any Debtor's knowledge, have asserted any liens on any of such Debtor's assets; and (e) all parties who have requested notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the Debtors respectfully submit that no other or further notice is necessary.

**No Prior Request**

29. No prior request for the relief sought in this Motion has been made to this or any other Court.

WHEREFORE, the Debtors respectfully request entry of an interim order, substantially in the form attached hereto as **Exhibit A**, (i) granting the relief requested herein and (ii) granting such other relief as is just and proper.

Dated: New York, New York  
January 25, 2017

Respectfully submitted,

**TRENK, DiPASQUALE,  
DELLA FERA & SODONO, P.C.**

By: /s/ Joseph J. DiPasquale  
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*Counsel for Debtors and  
Debtors in Possession*

**EXHIBIT A**

**Proposed Interim DIP Order**

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

In re:

GRACIOUS HOME LLC, *et al.*,

Debtors.<sup>1</sup>

Chapter 11

Case No. 16-13500 (MKV)

(Jointly Administered)

**INTERIM ORDER (I) AUTHORIZING THE DEBTORS TO OBTAIN  
POSTPETITION FINANCING AND GRANT SECURITY INTERESTS AND  
SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS; (II) MODIFYING THE  
AUTOMATIC STAY; (III) AUTHORIZING THE DEBTORS TO ENTER INTO  
AGREEMENTS WITH GRACIOUS HOME LENDING LLC; (IV) SCHEDULING A  
FINAL HEARING; AND (V) GRANTING RELATED RELIEF**

Upon the motion (the “Motion”) of the above-captioned debtors (each a “Debtor” and collectively, the “Debtors”) for interim and final orders, under sections 105, 361, 362, 363, and 364, of chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”), Rules 2002 and 4001 of Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 4001-2 of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Southern District of New York (the “Local Bankruptcy Rules”) seeking, among other things:

i. authority, pursuant to Bankruptcy Code sections 363 and 364(c), for each of the Debtors, jointly and severally, to obtain the DIP Facility<sup>2</sup> pursuant to the DIP Financing Documents, this Interim Order, and the proposed Final DIP Order,

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<sup>1</sup> The Debtors in these chapter 11 cases and the last four digits of their tax identification numbers are: Gracious Home Holdings LLC (3251); Gracious Home Payroll LLC (3681), Gracious Home LLC (3251); GH East Side LLC (3251); GH West Side LLC (3251); GH Chelsea LLC (3251) and Gracious (IP) LLC (3251). The latter five entities are disregarded for tax purposes and do not have their own tax identification numbers, but use that of Gracious Home Holdings LLC. The address of the Debtors’ corporate headquarters is 1210 Third Avenue, New York, New York 10021.

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

ii. authority for the Debtors to enter into that certain Senior Secured Super-Priority Debtor-in-Possession Credit Agreement among the Borrowers, the Gracious Home Lending LLC (the “DIP Agent”) and the DIP Lender parties thereto (the “DIP Lenders,” together with the DIP Agent, the “DIP Parties”) (as amended, restated or otherwise modified from time to time in accordance with the terms thereof, the “DIP Credit Agreement,” together with all agreements, documents, and instruments delivered or executed in connection therewith, the “DIP Financing Documents”), which DIP Credit Agreement shall be substantially the same form as attached hereto as **Exhibit 1** and which shall be consistent in material terms with the Summary of Terms and Conditions of the \$3,000,000 Senior Secured Debtor-in-Possession Term Loan Facility (the “DIP Term Sheet”), which is attached hereto as **Exhibit 2**;

iii. authority for the Debtors to use the DIP Facility and the proceeds thereof to (a) to fund the working capital needs and chapter 11 administrative costs of the Borrowers during the pendency of the Chapter 11 Cases, (b) to pay fees, costs and expense of the DIP Facility on the terms and conditions described the DIP Facility Documents, including the DIP Term Sheet, (c) to provide adequate protection to the DIP Lenders, (d) to pay the valid, undisputed portion of the valid pre-petition secured obligations owed to Signature Bank or its assignee (“Signature”), and (v) to pay other amounts as specified in the Budget.

iv. the grant of valid, enforceable, non-avoidable and fully perfected first priority liens on and senior security interests in all of the property, assets and other interests in property and assets of the Debtors, whether such property is presently owned or after acquired, and all other “property of the estate” (within the meaning of the Bankruptcy Code) of the Debtors, of any kind or nature whatsoever, real or personal, tangible, intangible or mixed, now existing or hereafter acquired or created, whether existing prior to or arising after the Petition Date,

including, subject to entry of the Final Order (as defined below), proceeds of Avoidance Actions (as defined below), subject to the Carve-Out (as defined below).

v. the grant to the DIP Parties of superpriority administrative claims, pursuant to Bankruptcy Code sections 364(c)(1) and 507(b), against each of the Debtors' estates to the DIP Parties with respect to the DIP Obligations, subordinate to the payment of the Carve-Out, in accordance with the terms of this Order;

vi. the limitation of the Debtors' and estates' right to surcharge against the DIP Collateral (as defined below) pursuant to Bankruptcy Code section 506(c);

vii. that, pursuant to Bankruptcy Rule 4001, an interim hearing (the "Interim Hearing") on the Motion be held before this Court to consider entry of this order (this "Interim Order") that, among other things, authorizes the Borrowers, on an interim basis, to borrow from the DIP Lenders under the DIP Financing Documents up to an aggregate principal amount not to exceed \$1,000,000;

viii. that this Court schedule a final hearing (the "Final Hearing") to consider entry of a final order (the "Final Order") authorizing, among other things, the balance of the borrowing under the DIP Financing Documents on a final basis, as set forth in the Motion and DIP Financing Documents;

ix. modification of the automatic stay to the extent hereinafter set forth and waiving the 14-day stay provisions of Bankruptcy Rules 4001(a)(3) and 6004(h); and

x. granting related relief.

Notice of the Motion, the relief requested therein, and the Interim Hearing (as defined below) (the "Notice") having been served by the Debtors in accordance with Bankruptcy Rule 4001 on: (i) the counsel for the DIP Lender; (ii) the United States Trustee for the Southern

District of New York (the "U.S. Trustee"); (iii) counsel for the Statutory Committee of Unsecured Creditors (the "Committee"); (iv) all parties known to the Debtors who hold any liens or security interest in the Debtors' assets who have filed UCC-1 financing statements against any of the Debtors, or who, to any Debtor's knowledge, have asserted any liens on any of such Debtor's assets; and (v) all parties who have requested notice pursuant to Rule 2002.

Pursuant to Bankruptcy Rule 4001, this Court held an interim hearing with respect to the Motion on \_\_\_\_\_ (the "Interim Hearing").

After the Motion and the proceedings before this Court at the Interim Hearing; and all objections, if any, to the interim relief requested in the Motion having been withdrawn, resolved, or overruled by this Court as reflected on the record established by the Debtors at the Interim Hearing;

**THIS COURT HEREBY MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:<sup>3</sup>**

A. Petition Date. On December 14, 2016 (the "Petition Date"), the Debtors each commenced a case by filing a voluntary petition for relief under Chapter 11 of the Bankruptcy Code;<sup>4</sup>

B. Debtors in Possession. The Debtors continue to operate their businesses and manage their properties as debtors and debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108, and no trustee or examiner has been appointed;

C. Notice. In light of the circumstances, the Debtors gave due and sufficient notice of the Motion pursuant to the Bankruptcy Rules and Local Bankruptcy Rules;

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<sup>3</sup> To the extent, any findings of fact constitute conclusions of law, they are adopted as such, and vice versa, pursuant to Fed. R. Bankr. P. 7052.

<sup>4</sup> Unless otherwise noted, all statutory references are to the Bankruptcy Code.

D. Jurisdiction and Venue. This Court has core jurisdiction over the Debtors' bankruptcy cases, the Motion, and the parties and property affected by this Order pursuant to 28 U.S.C. §§ 157(b) and 1334, and venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409;

E. Inability to Obtain Unsecured Credit. The Debtors are unable to obtain sufficient levels of unsecured credit allowable under Bankruptcy Code section 503(b)(1) as an administrative expense necessary to maintain and conduct their businesses;

F. Inability to Obtain Alternate Secured Credit. The Debtors are unable to obtain secured credit on more favorable terms than under the terms and conditions provided in this Order and the other DIP Financing Documents;

G. Best Interests of Estates. It is in the best interest of Debtors' estates that the Debtors be allowed to enter into the DIP Facility to obtain postpetition secured financing from the DIP Lenders on an interim basis under the terms and conditions set forth herein and in the DIP Financing Documents, as such is necessary to avoid immediate and irreparable harm to the Debtors' estates pending the Final Hearing;

H. Good Faith. The extension of credit and financial accommodations under the DIP Financing Documents are fair, reasonable, in good faith, negotiated at arm's length, reflect the Debtors' exercise of prudent business judgment, and are supported by reasonably equivalent value and fair consideration and the DIP Lender is entitled to the protections of Bankruptcy Code section 364(e);

I. Immediate Need for DIP Facility. The Debtors require access to the funding available under the DIP Facility and the DIP Financing Documents to satisfy administrative expenses associated with the operation of their businesses as going concerns and other costs

relating to the administration of the Chapter 11 Cases, and to avoid immediate and irreparable harm to the Debtors' estates pending the Final Hearing;

J. Necessity of DIP Facility Terms. The terms of the DIP Financing Documents and this Order assuring that the liens and the various claims, superpriority claims, and other protections granted in this Order will not be affected by any subsequent reversal or modification of this Order or any other order, as provided in Bankruptcy Code section 364(e), which is applicable to the postpetition financing arrangement contemplated in the DIP Financing Documents, are necessary in order to induce the DIP Lender to provide postpetition financing to the Debtors; and

K. Good Cause for Entry to Avoid Immediate and Irreparable Harm. Good and sufficient cause has been shown for immediate entry of this Interim Order pursuant to Bankruptcy Rules 4001(b)(2) and 4001(c)(2). Absent granting the relief set forth in this Order, the Debtors and their estates will be immediately and irreparably harmed. Entry of this Order, consummation of the financing under the DIP Facility in accordance with this Order and the DIP Financing Documents are in the best interests of the Debtors, their estates and their creditors.

Based upon the foregoing, and after due consideration and good cause appearing therefor;

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:**

1. DIP Facility Approval. The Motion is granted on an interim basis effective as of the date hereof. Any objections to the interim relief requested in the Motion that have not been withdrawn, waived or settled, and all reservations of rights included therein, are hereby denied and overruled. The Debtors are authorized, pursuant to Bankruptcy Code section 364, to enter into and be a party to the DIP Facility pursuant to the DIP Financing Documents (with such changes, if any, as were authorized to be made as amendments to the DIP Financing Documents

in accordance with this Order), to execute the DIP Financing Documents and such other and additional documents necessary or desired to implement the DIP Facility or the DIP Financing Documents, to obtain postpetition secured financing from the DIP Lender, to avoid immediate and irreparable harm to the Debtors' estates pending the Final Hearing.

2. DIP Facility Obligations. The DIP Financing Documents shall constitute and evidence the valid and binding effect of the Debtors' obligations under the DIP Facility, which DIP Facility obligations shall be legal, valid, and binding obligations of the Debtor parties thereto and enforceable against the Debtors, their estates, and any successors thereto, including, without limitation, any trustee appointed in any of the Debtors' cases, or in any case under chapter 7 of the Bankruptcy Code upon the conversion of any such cases, or in any other proceedings superseding or related to any of the foregoing. The Debtors shall be jointly and severally liable for repayment of any funds advanced pursuant to the DIP Financing Documents, together with interest thereon, at the times and in the amounts set forth in the DIP Financing Documents. No obligation, payment, transfer or grant of security under the DIP Financing Documents or this Interim Order with respect to the DIP Facility shall be stayed, restrained, voided, voidable or recoverable under the Bankruptcy Code or under any applicable non-bankruptcy law, or subject to any defense, reduction, setoff, recoupment or counterclaim.

3. Authorization to Borrow. Until the Termination Date, the Debtors are hereby authorized, on an interim basis, to borrow from the DIP Lenders under the DIP Facility in an aggregate principal amount up to \$1,000,000, subject to the terms and conditions set forth in the DIP Financing Documents and this Interim Order.

4. Use of Proceeds. From and after the entry of this Interim Order, the Debtors shall use advances of credit under the DIP Facility only for the express purposes specifically set forth

in this Interim Order, the DIP Financing Documents and in compliance with the Budget attached hereto as **Exhibit 3** (the "Approved Budget"), subject to the permitted variances set forth in the DIP Credit Agreement. The Debtors are authorized to use the proceeds of the loans advanced under the DIP Credit Agreement (the "DIP Loans"), in part, to make certain adequate protection payments to the DIP Lender as well as pay any and all fees owed to the DIP Lenders pursuant to the DIP Financing Documents. In addition, the Debtors are authorized to the use the proceeds of the DIP Facility to satisfy, in full, the secured claims of Signature.

5. Approved Budget. Except as otherwise provided herein or approved by the DIP Agent, the proceeds of the DIP Facility shall be used only in compliance with the Approved Budget and in accordance with terms of the DIP Financing Documents.

6. Payment of DIP Fees and Expenses. The Commitment Fee, Funding Fee, Exit Fee and the work fee for DIP Lenders' counsel (each as defined and set forth in DIP Term Sheet) are each hereby approved in their respective entirety and the Debtors are hereby authorized and directed to pay such fees in upon entry of this Interim Order and in accordance with, and on the terms set forth in, the DIP Financing Documents. The Debtors are also hereby authorized and directed to pay upon demand all other fees, costs, expenses and other amounts payable under the terms of the DIP Financing Documents and all other reasonable fees and out-of-pocket costs and expenses of the DIP Parties in accordance with the terms of the DIP Financing Documents (including, without limitation, the reasonable postpetition fees and out-of-pocket costs and expenses of one lead counsel (which shall be Arent Fox LLP)), subject to receiving a written invoice therefor. None of such fees, costs, expenses or other amounts shall be subject to Court approval or U.S. Trustee guidelines, and no recipient of any such payment shall be required to file with respect thereto any interim or final fee application with this Court; provided, however,

that copies of any such invoices shall be provided contemporaneously to the U.S. Trustee and counsel to the Committee; provided further, however, that such invoices may be redacted to the extent necessary to delete any information subject to the attorney-client privilege, any information constituting attorney work product, or any other confidential information (the “Redactions”), and the provision of such invoices shall not constitute a waiver of the attorney-client privilege or any benefits of the attorney work product doctrine. If the Debtors, U.S. Trustee or counsel to the Committee object to the reasonableness of the fees and expenses of any DIP Party, and such objection cannot be resolved within ten (10) days of receipt of such invoices, the Debtors, the U.S. Trustee, or the Committee, as the case may be, shall file with the Court and serve on such DIP Party an objection limited to the reasonableness of such fees and expenses (each, a “Reasonableness Fee Objection”). Without limiting the foregoing, if the U.S. Trustee objects to the Redactions and such objection cannot be resolved within ten (10) days of receipt of such invoices, the DIP Lenders subject to such Redaction objection shall file with the Court and serve on the Debtors and the United States Trustee request for Court resolution of the disputes concerning the propriety of the disputed Redactions (each, a “Redaction Fee Objection,” and each Reasonableness Fee Objection and Redaction Fee Objection may be referred to herein generally as a “Fee Objection”). Any hearing on an objection or request, as applicable, regarding payment of any fees, costs, and expenses set forth in a professional fee invoice shall be limited to the propriety of the Redactions and the reasonableness of the particular items or categories of the fees, costs, and expenses, in each case which are the subject of such objection or request, as applicable. The Debtors shall pay, in accordance with the terms and conditions of this Interim Order, within fifteen (15) days after receipt of the applicable invoice (a) the full amount invoiced if no objection has been timely filed, and (b) the undisputed fees, costs, and expenses reflected

on any invoice to which an objection has been timely filed. All such unpaid fees, costs, expenses and other amounts owed or payable to the DIP Parties shall be secured by the DIP Collateral and afforded all of the priorities and protections afforded to the DIP Obligations under this Interim Order and the DIP Financing Documents.

7. Indemnification. The Debtors are hereby authorized, on an interim basis, to and hereby agree to indemnify and hold harmless the DIP Lenders and DIP Agent and their respective directors, officers, employees, agents, attorneys, or any other Person affiliated with or representing the DIP Agent or DIP Lenders (collectively, an "Indemnified Party") harmless against: (a) all obligations, demands, claims, and liabilities (collectively, "Indemnity Claims") asserted by any other party in connection with the transactions contemplated by the Loan Documents; and (b) all losses or expenses incurred, or paid by the DIP Agent or DIP Lenders from, following, or arising from the transactions contemplated by the DIP Financing Documents (including reasonable attorneys' fees and expenses), except for Indemnity Claims and/or losses directly caused by the DIP Lender's gross negligence or willful misconduct. No Indemnified Party shall have any liability (whether direct or indirect, in contract, tort or otherwise) to any Debtor or any of its subsidiaries or any shareholders or creditors of the foregoing for or in connection with the transactions contemplated hereby, except to the extent such liability is determined by a court of competent jurisdiction in a final non-appealable judgment or order to have resulted solely from such Indemnified Party's gross negligence or willful misconduct. In no event, however, shall any Indemnified Party be liable on any theory of liability for any special, indirect, consequential or punitive damages. All indemnities of the Indemnified Parties shall be secured by the DIP Collateral and afforded all of the priorities and protections afforded to the DIP Obligations under this Interim Order and the DIP Financing Documents.

8. DIP Superpriority Claims. In accordance with Bankruptcy Code section 364(c)(1), the DIP Obligations shall constitute senior administrative expense claims against each Debtor (the “DIP Superpriority Claims”) with priority in payment over any and all administrative expenses at any time existing or arising, of any kind or nature whatsoever, including, without limitation, the kinds specified or ordered pursuant to any provision of the Bankruptcy Code, including, but not limited to, Bankruptcy Code sections 105, 326, 328, 330, 331, 503(b), 506(c), 507(a), 507(b), 726, 1113 and 1114 or otherwise, including those resulting from the conversion of any of the Chapter 11 Cases pursuant to section 1112 of the Bankruptcy Code, whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment; provided, however, that the DIP Superpriority Claims shall be subject to and subordinate to the Carve-Out; provided, further that the DIP Superpriority Claims shall have recourse to and be payable from all pre-petition and post-petition property of the Debtors and their estates and all proceeds thereof, including Avoidance Actions and the proceeds thereof.

9. DIP Liens. As security for the DIP Obligations, the DIP Agent, for the benefit of the DIP Lenders, is hereby granted, on an interim basis (effective upon the date of this Interim Order, without the necessity of the execution by the Debtors or the filing or recordation of mortgages, security agreements, lockbox or control agreements, financing statements, or any other instrument or otherwise or the possession or control by the DIP Parties), as contemplated under the DIP Documents, valid, perfected, and unavoidable security interests in and liens upon (such security interests and liens, collectively, the “DIP Liens”) any and all present and after-acquired tangible and intangible property and assets of the Debtors and their estates, whether real or personal, of any nature whatsoever and wherever located, including, without limitation: (a) all accounts, chattel paper, deposit accounts, documents (as defined in the UCC), equipment,

general intangibles, instruments, inventory, and investment property and support obligations; (b) Intellectual Property and related assets; (c) Commercial Tort Claims; (d) all Avoidance Actions and proceeds thereof; (e) all books and records pertaining to the Debtors' operations; (f) all other goods (including but not limited to fixtures) and personal property of such Debtor, whether tangible or intangible and wherever located; and (g) to the extent not covered by the foregoing, all other assets or property of the Debtors, whether tangible, intangible, real, personal or mixed, and all proceeds and products of each of the foregoing and all accessions to, substitutions and replacements for, and rents, profits and products of, each of the foregoing, any and all proceeds of any insurance, indemnity, warranty or guaranty payable to such Debtor from time to time with respect to any of the foregoing, and in each case to the extent of any Debtor's respective interest therein; (all of which being hereinafter collectively referred to as the "DIP Collateral"; provided, however, that (i) the DIP Collateral shall not include any security deposits in the possession of former or current landlords for the Debtors' lease of non-residential real property, and (ii) the DIP Liens shall be subject to the payment in full in cash of the amounts due under the Carve-Out and otherwise have the priority as follows:

(a) pursuant to section 364(c)(2) of the Bankruptcy Code, valid, binding, continuing, enforceable, fully perfected liens upon and security interests in all of the Debtors' right, title and interest in, to and under all DIP Collateral that is not otherwise encumbered by a validly perfected unavoidable security interest or lien on the Petition Date (or perfected after the Petition Date to the extent permitted by section 546(b) of the Bankruptcy Code); and

(b) the DIP Liens shall not be subject or subordinate to (i) any lien or security interest that is avoided and preserved for the benefit of the Debtors and their estates under

Bankruptcy Code section 551, (ii) except as expressly set forth herein or in the DIP Financing Documents, any lien or security interest heretofore or hereinafter granted in the Chapter 11 Cases, including, without limitation, any liens or security interests granted in favor of any federal, state, municipal or other governmental unit, commission, board or court for any liability of the Debtors to the extent permitted by applicable non-bankruptcy law or (iii) any intercompany or affiliate liens of the Debtor. The DIP Liens shall not be subject to sections 506(b) and (c), 510, 549, 550 or 551 of the Bankruptcy Code.

10. Carve-Out.

(a) As used in this Interim Order, the term "Carve-Out" shall mean, to the extent unencumbered funds are not immediately available on the date of delivery of a Carve-Out Trigger Notice (as defined below) to pay administrative expenses in full, proceeds of DIP Collateral to pay the following expenses:

- (i) all fees required to be paid to the Clerk of the Bankruptcy Court and to the Office of the U.S. Trustee under 28 U.S.C. § 1930(a) plus interest pursuant to 31 U.S.C. § 3717;
- (ii) to the extent allowed by the Bankruptcy Court at any time, all accrued and unpaid fees, disbursements, costs and expenses incurred by professionals or professional firms retained by the Debtors or the Committee pursuant to sections 327, 328, 363 or 1103 of the Bankruptcy Code (other than ordinary course professionals) (collectively, the "Professionals") at any time before or on the date of the delivery by the DIP Agent of a Carve-Out Trigger Notice (as defined below), whether such amounts are allowed by the Bankruptcy Court prior to or after delivery of such Carve-Out Trigger Notice (and including amounts incurred but not invoiced prior to the delivery of the Carve-Out Trigger Notice); and
- (iii) all unpaid fees, disbursements, costs and expenses incurred by the Professionals on or after the day following the delivery by the DIP Agent of the Carve-Out Trigger Notice, to the extent allowed by the Bankruptcy Court at any time, in an aggregate amount not to exceed \$175,000 (such amount set forth in clause (iii), the "Post-Carve-Out Trigger Notice Cap", and, together with such amounts set forth in clauses (i) and (ii) above, the "Carve-Out").

(b) As used herein, the term “Carve-Out Trigger Notice” means a written notice provided by the DIP Agent to the Debtors, the U.S. Trustee and the Committee that the Carve-Out is invoked, which notice can be delivered only when the DIP Agent is entitled to exercise remedies under the DIP Facility due to the occurrence of an Event of Default (as defined in the DIP Credit Agreement) and the Termination Date has occurred. Notwithstanding anything to the contrary contained in this Final Order or in any DIP Documents, the liens and claims granted to any of the DIP Lenders (including, without limitation, the DIP Liens and DIP Superpriority Claims) under, pursuant to or in connection with the DIP Facility, any DIP Document, this Interim Order shall be subject to the payment in full in cash of the amounts due under the Carve-Out.

(c) After receipt of the Carve-Out Trigger Notice, the Debtors shall provide notice by email and facsimile to all Professionals, at the email addresses and facsimile numbers set forth in each Professional’s notice of appearance filed with the Bankruptcy Court (or, if there is no such notice of appearance, at such Professional’s last known email address and facsimile number) and by filing a notice thereof on the docket of the Bankruptcy Court within two (2) Business Days after the Debtors’ receipt of a Carve-Out Trigger Notice informing them that such Carve-Out Trigger Notice has been received and further advising them that the Debtors’ ability to pay such Professionals is subject to and limited by the Carve-Out.

(d) Notwithstanding the foregoing, so long as a Carve-Out Trigger Notice has not been delivered in accordance with this Interim Order: (i) the Debtors shall be permitted to pay administrative expenses of Professionals allowed and payable under sections 330 and 331 of the Bankruptcy Code, as the same may become due and payable, including on an

interim basis; and (ii) such payments shall not reduce, or be deemed to reduce, the Carve-Out.

(e) Nothing contained herein is intended to constitute, nor should be construed as consent to, the allowance of any Professional's fees, costs or expenses by any party and shall not affect the right of the Debtors, DIP Lenders, the DIP Agent, the Committee, U.S. Trustee, or any other party-in-interest to object to the allowance and payment or any amounts incurred or requested.

11. Bankruptcy Code Section 506(c) Waiver. Without limiting the Carve-Out, the Debtors shall irrevocably waive and shall be prohibited from asserting any surcharge claim, under Bankruptcy Code section 506(c) or otherwise, for any costs and expenses incurred in connection with the preservation, protection or enhancement of, or realization by the DIP Lenders upon the DIP Collateral and no costs or expenses of administration that have been or may be incurred in any of the Chapter 11 Cases at any time shall be charged against the DIP Agent, any of the DIP Lenders, or any of their respective claims or liens (including any claims or liens granted pursuant to this Final Order).

12. No Marshaling/Application of Proceeds. In no event shall the DIP Agent or DIP Lenders be subject to the equitable doctrine of "marshaling" or any other similar doctrine with respect to the DIP Collateral, and all proceeds thereof shall be received and used in accordance with this Interim Order.

13. Disposition of Collateral; Application of Proceeds. The Debtors shall not sell, transfer, lease, encumber or otherwise dispose of any portion of the DIP Collateral other than in the ordinary course of business without the prior written consent of the DIP Agent (and no such consent shall be implied from any other action, inaction or acquiescence by the DIP Agent or

from any order of this Court). Notwithstanding anything otherwise provided herein, and in addition to satisfying all amounts owed under the DIP Facility and DIP Financing Documents as required by the Bankruptcy Court and the DIP Financing Documents, upon the sale of any, all or substantially all of the Debtors' assets, the Debtors shall pay the DIP Lenders an amount equal to fifteen percent (15%) of amounts to be distributed to creditors or interest holders pursuant to the priorities set forth in the Bankruptcy Code and the Debtors are authorized and directed to make such payment without further order of the Court

14. Restrictions on Granting Postpetition Liens. Other than the Carve-Out or as otherwise provided in this Interim Order or the DIP Financing Documents, no claim or lien having a priority superior or *pari passu* with those granted by this Interim Order or the DIP Financing Documents to the DIP Parties shall be granted or permitted by any order of this Court heretofore or hereafter entered in the Chapter 11 Cases, and the Debtors will not grant any such mortgages, security interests or liens in the DIP Collateral (or any portion thereof) to any other parties pursuant to section 364(d) of the Bankruptcy Code or otherwise, while (i) any portion of the DIP Facility, any DIP Loans or any other DIP Obligations are outstanding or (ii) the DIP Lenders have any Commitment under the DIP Credit Agreement.

15. Automatic Effectiveness of Liens. The DIP Liens shall not be subject to a challenge and shall attach and become valid, perfected, binding, enforceable, non-avoidable and effective by operation of law as of the Petition Date without any further action by the Debtors, the DIP Parties, respectively, and without the necessity of execution by the Debtors, or the filing or recordation, of any financing statements, security agreements, vehicle lien applications, mortgages, filings with a governmental unit (including, without limitation, the U.S. Patent and Trademark Office or the Library of Congress), or other documents or the taking of any other

actions. All DIP Collateral shall be free and clear of other liens, claims and encumbrances, except as provided in the DIP Financing Documents and this Interim Order. If the DIP Agent hereafter requests that the Debtors execute and deliver to the DIP Agent, financing statements, security agreements, pledge agreements, control agreements, collateral assignments, mortgages, or other instruments and documents considered by the DIP Agent to be reasonably necessary or desirable to further evidence the perfection of the DIP Liens, the Debtors are hereby authorized and directed to execute and deliver such financing statements, security agreements, pledge agreements, control agreements, mortgages, collateral assignments, instruments, and documents, and the DIP Agent is hereby authorized to file or record such documents in its discretion without seeking modification of the automatic stay under Bankruptcy Code section 362, in which event all such documents shall be deemed to have been filed or recorded at the time and on the Petition Date; provided, however, no such filing or recordation shall be necessary or required in order to create or perfect the DIP Liens. The DIP Agent, in its sole discretion, may file a photocopy of this Interim Order as a financing statement with any filing or recording office or with any registry of deeds or similar office, in addition to, or in lieu of, such financing statements, notices of liens or similar statements.

16. Protection Under Section 364(e) of the Bankruptcy Code. The DIP Lenders have acted in good faith in connection with this Interim Order and their reliance on this Interim Order is in good faith. Based on the record of these Chapter 11 Cases, and in accordance with Bankruptcy Code section 364(e), if any or all of the provisions of this Interim Order are hereafter reversed, modified, vacated or stayed, such reversal, modification, vacation or stay shall not affect the (i) validity of any DIP Obligations owing to the DIP Lenders incurred prior to the actual receipt by the DIP Agent of written notice of the effective date of such reversal,

modification, vacation or stay, or (ii) validity or enforceability of any DIP Loans or other advances previously made or any claim, lien, security interest or priority authorized or created hereby or pursuant to the DIP Financing Documents with respect to any DIP Obligations. Notwithstanding any such reversal, modification, vacation or stay, the incurrence of DIP Obligations prior to the actual receipt by the DIP Agent of written notice of the effective date of such reversal, modification, vacation or stay, shall be governed in all respects by the provisions of this Interim Order, and the DIP Parties shall be entitled to all of the rights, remedies, protections and benefits granted under Bankruptcy Code section 364(e), this Interim Order, and the DIP Financing Documents with respect to the incurrence of DIP Obligations.

17. Reservation of Rights of the DIP Agent and DIP Lenders. Notwithstanding any other provision of this Interim Order to the contrary, the entry of this Interim Order is without prejudice to, and does not constitute a waiver of, expressly or implicitly, or otherwise impair: (a) any of the rights of the DIP Agent or the DIP Lenders under the Bankruptcy Code or under non-bankruptcy law, including, without limitation, the right of any of the DIP Agent or the DIP Lenders to (i) request modification of the automatic stay of Bankruptcy Code section 362, (ii) request dismissal of any of these cases, conversion of any of these cases to cases under Chapter 7, or appointment of a chapter 11 trustee or examiner with expanded powers in any of these cases, (iii) seek to propose, subject to the provisions of Bankruptcy Code section 1121, a chapter 11 plan or plans; or (c) any other rights, claims, or privileges (whether legal or equitable or otherwise) of any of the DIP Agent or the DIP Lenders. The delay in or failure of the DIP Agent or the DIP Lenders to seek relief or otherwise exercise their rights and remedies shall not constitute a waiver of any of the DIP Agent's or DIP Lenders' rights and remedies.

18. Termination Events. The occurrence of any of the following events, unless

waived in writing by the DIP Agent shall constitute a termination event (each a “Termination Event”) under the DIP Financing Documents and this Interim Order and with respect to the DIP Loans and the proceeds thereof:

- a. the Debtors shall fail to pay any DIP Obligations to the DIP Lenders as and when due, including, but not limited to, any adequate protection obligations;
- b. the Debtors fail to file a plan of reorganization and accompanying disclosure statement reasonably acceptable to the DIP Lenders by June 30, 2017;
- c. the Debtors shall fail to perform, or otherwise breach, any covenant or agreement of the Borrowers contained in the DIP Credit Agreement, which failure or breach shall continue for ten (10) days after the date upon which the Debtors have received a written notice of such failure or breach from the DIP Lenders or the DIP Agent;
- d. any representation or warranty made by a Debtor in the DIP Credit Agreement or by a Debtor (or any of its Officers) in any agreement, certificate, instrument or financial statement or other statement delivered to the DIP Agent pursuant to or in connection with the DIP Credit Agreement shall prove to have been incorrect in any material respect when made or deemed made;
- e. the rendering against a Debtor of a final non-appealable arbitration award, judgment, decree or order for the payment of money in excess of \$100,000 (excluding amounts covered by insurance to the extent the relevant

independent third-party insurer has not denied coverage therefor), and the same shall remain unsatisfied, unvacated and unstayed pending appeal for a period of thirty (30) consecutive days after the entry thereof;

- f. the Debtors (except following the DIP Agent's prior written request or with the DIP Agent's express prior written consent) shall file a motion with the Bankruptcy Court or any other court with jurisdiction in the matter seeking an order, or an order is otherwise entered, modifying, reversing, revoking, staying, rescinding, vacating, or amending this Interim Order or any of the DIP Financing Documents, without the DIP Lenders' express prior written consent (and no such consent shall be implied from any other action, inaction, or acquiescence of the Lender);
- g. the Debtors shall file, or any other person shall obtain Bankruptcy Court approval of a disclosure statement for a plan of reorganization which is not reasonably acceptable to the DIP Lenders;
- h. the Final Order has not been entered by the Bankruptcy Court on or before thirty (30) days after this Interim Order;
- i. the Debtors shall file any motion or application, or the Bankruptcy Court allows the motion or application of any other Person, which seeks approval for or allowance of any claim, lien, security interest ranking equal or senior in priority to the claims, liens and security interests granted to the DIP Lenders under this Interim Order or the DIP Financing Documents or any such equal or prior claim, lien, or security interest shall

- be established in any manner, except, in any case, as expressly permitted under this Interim Order;
- j. this Interim Order shall cease to be in full force and effect from and after the date of entry thereof by the Bankruptcy Court;
  - k. the occurrence of any default or event of default under this Interim Order;
  - l. the entry of an 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 DIP Agent, to realize upon, or to exercise any right or remedy with respect to, any asset of the Borrowers or to terminate any license, franchise, or similar agreement, where such termination would reasonably be expected to result in a material adverse change;
  - m. if any creditor of the Debtors receives any adequate protection payment which is not fully acceptable to the DIP Agent in its sole discretion, or any Lien is granted as adequate protection other than as set forth in the Financing Orders;
  - n. conversion of any of the Chapter 11 Cases to a Chapter 7 case under the Bankruptcy Code, or dismissal of any of the Chapter 11 Cases or any subsequent Chapter 7 case either voluntarily or involuntarily;
  - o. this Interim Order is modified, reversed, revoked, remanded, stayed, rescinded, vacated or amended on appeal or by the Bankruptcy Court without the prior written consent of DIP Agent (and no such consent shall be implied from any other authorization or acquiescence by DIP Lender);

- p. An examiner with special powers is appointed pursuant to Bankruptcy Code Section 1104(a); or
- q. non adherence with the Budget except to the extent of any Permitted Variance.

19. Remedies Upon a Termination Event; Notice of Termination Event. Upon prior written notice by the DIP Agent to counsel for the Debtors, the U.S. Trustee, and counsel for the Committee of the occurrence of a Termination Event (following the expiration of any applicable grace period), the DIP Agent may (i) declare the DIP Obligations to be immediately due and payable; (ii) terminate the Debtors' ability to access the DIP Loans; and/or (iii) exercise all default-related rights and remedies against the DIP Collateral, without further order of or application or motion to the Bankruptcy Court, and without restriction or restraint by any stay under Bankruptcy Code section 362 and 105 or otherwise.

20. Maturity. Unless earlier declared due and payable pursuant to paragraph 19 of this Interim Order, the DIP Obligations shall mature and be due and payable on the earliest to occur of (i) stated maturity, which shall be December 31, 2017, (ii) the effective date of any Chapter 11 plan of the Debtors that is reasonably acceptable to the DIP Lenders, (iii) the date that is 30 days after the date of this Interim Order if the Final Order shall not have been entered by such date and (iv) the acceleration of the loans or termination of the commitments under the DIP Facility, including, without limitation, as a result of the occurrence of an Event of Default (as defined in the DIP Credit Agreement) (any such occurrence, the "Maturity Date").

21. Prepayment. The DIP Loans may be prepaid in whole or in part at any time subject to the Exit Fee of 5%. To the extent the Debtors sell all or substantially all of their assets prior to Maturity, the DIP Lenders will be entitled a payment equal (i) fifteen percent (15%) of

amounts to be distributed to creditors or interest holders pursuant to the priorities set forth in the Bankruptcy Code to compensate the DIP Lenders for losses incurred as a result of payment of the DIP Loan prior to Maturity or (ii) any break-up fee or expense reimbursement awarded to the DIP Lenders should the DIP Lenders serve as a stalking horse bidder in a sale process. The DIP Lenders may apply any such prepayments and any payments made thereunder in any order of priority determined by the DIP Lenders in its exclusive judgment.

22. Credit Bidding. The DIP Agent shall have the right to credit bid up to the full amount of the DIP Obligations in any sale of any of the DIP Collateral as provided for and subject to Bankruptcy Code section 363(k), without the need for further Court order authorizing the same and whether any such sale is effectuated through Bankruptcy Code section 363(b) or 1129(b), by a chapter 7 trustee under Bankruptcy Code section 725, or otherwise.

23. Survival. The provisions of this Interim Order and any actions taken pursuant hereto shall survive the entry of any order: (i) confirming any plan of reorganization in any of the Chapter 11 Cases; (ii) converting any of the Chapter 11 Cases to a chapter 7 case; or (iii) dismissing any of the Chapter 11 Cases, and the terms and provisions of this Interim Order as well as the DIP Superpriority Claims and the DIP Liens in the DIP Collateral granted pursuant to this Final Order and the DIP Financing Documents shall continue in full force and effect notwithstanding the entry of any such order. Such claims and liens shall maintain their priority as provided by this Interim Order and the DIP Financing Documents, and to the maximum extent permitted by law, until all of the DIP Obligations are indefeasibly paid in full in cash and discharged or otherwise treated under a plan of reorganization, which is reasonably acceptable to the DIP Lenders. In no event shall any plan of reorganization be allowed to alter the terms of repayment of any of the DIP Obligations from those set forth in the DIP Financing Documents

unless agreed to by and among the Debtors and the DIP Lenders.

24. Modifications of DIP Documents. The Debtors and the DIP Lenders are hereby authorized, on an interim basis, to implement, in accordance with the terms of the DIP Financing Documents, any non-material modifications (including without limitation, any change in the number or composition of the DIP Lenders or the DIP Agent) of the DIP Financing Documents without further notice, motion or application to, order of or hearing before, this Court. Any material modification or amendment to the DIP Financing Documents shall only be permitted pursuant to an order of this Court, after being submitted to this Court upon notice to counsel for the Committee, and the U.S. Trustee; provided, that any forbearance from, or waiver of, (a) a breach by the Debtors of a covenant representation or any other agreement or (b) a default or an Event of Default, in each case under the DIP Financing Documents shall not require an order of this Court.

25. Insurance Policies. As of the date of entry of this Interim Order, on each insurance policy maintained by the Debtors which in any way relates to the DIP Collateral: (i) the DIP Agent and DIP Lenders shall be, and shall be deemed to be, without any further action or notice, named as additional insured for the benefit of the DIP Lenders on a first priority basis; and (ii) the DIP Agent and DIP Lenders shall be, and shall be deemed to be, without any further action or notice, named as a loss payee, for the benefit of the DIP Lenders on a first priority basis. The Debtors are authorized, on a final basis, and, upon the written request of the DIP Agent shall take all actions necessary to have each of them, as applicable, be added as an additional insured or loss payee, as applicable, on each such insurance policy maintained by the Debtors which in any way relates to the DIP Collateral.

26. Proofs of Claim. Notwithstanding any order entered by the Bankruptcy Court in

relation to the establishment of a bar date in the Chapter 11 Cases to the contrary, or otherwise, the DIP Agent and DIP Lenders shall not be required to file proofs of claim in the Chapter 11 Cases for any claim allowed herein.

27. Rights of Access and Information. The representatives, advisors, consultants, agents and/or employees of the DIP Agent shall be afforded reasonable access to the Debtors' premises, during normal business hours and without unreasonable interference with the proper operation of the Debtors' businesses, and their books and records in accordance with this Interim Order or the DIP Financing Documents and the Debtors shall reasonably cooperate, consult with, and provide to such persons all such information as may be reasonably requested with respect to the businesses, results of operations, and financial condition of any of the Debtors.

28. No Third Party Rights. Except as explicitly provided for herein, this Interim Order does not create any rights for the benefit of any third party, creditor, equity holder, or any direct, indirect, or incidental beneficiary other than the DIP Agent and the DIP Lenders.

29. Choice of Law; Jurisdiction. The DIP Facility and DIP Financing Documents (and the rights and obligations of the parties thereto) shall be governed by, and construed and interpreted in accordance with, the laws of the State of New York, including, without limitation, Sections 5-1401 and 5-1402 of the New York General Obligations Law, and, to the extent applicable, the Bankruptcy Code. The Bankruptcy Court shall have exclusive jurisdiction with respect to any and all disputes or matters under, or arising out of or in connection with, either the DIP Facility or DIP Financing Documents.

30. Immediate Effect of Order. The terms and conditions of this Order shall be effective and immediately enforceable upon its entry by the Clerk of the Court notwithstanding any potential application of Bankruptcy Rule 6004(h) or otherwise. Furthermore, to the extent

applicable, the notice requirements and/or stays imposed by Bankruptcy Rules 4001(a)(3), 6003(b), and 6004(a) are hereby waived for good and sufficient cause. The requirements of Bankruptcy Rules 4001, 6003, and 6004, in each case to the extent applicable, are satisfied by the contents of the Motion.

31. Final Hearing. A final hearing with respect to the Motion is scheduled for \_\_\_\_\_, 2016 at \_\_\_\_\_ .m. (Eastern Standard Time) (the "Final Hearing"). The Debtors shall promptly mail copies of this Order (which shall constitute adequate notice of the Final Hearing) to the parties having been given notice of the Interim Hearing and to any other party that has filed a Bankruptcy Rule 2002 request for service. Any party in interest objecting to the relief sought at the Final Hearing shall file written objections, and serve them on or before \_\_\_\_\_ at \_\_\_\_\_ .m. (Eastern Standard Time).

Dated: New York, New York  
January \_\_, 2017

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HONORABLE MARY KAY VYSKOCIL  
UNITED STATES BANKRUPTCY JUDGE

**EXHIBIT 1**

**DIP Credit Agreement  
(To Be Provided)**

**EXHIBIT 2**

**DIP Term Sheet**

**GRACIOUS HOME LENDING LLC**  
1999 AVENUE OF THE STARS  
SUITE 2040  
LOS ANGELES, CA 90067  
PHONE: (310) 286-2929 FAX: (310) 286-6662

January 23, 2017

Mr. Adam Rosen  
B. Riley & Co.  
420 Lexington Avenue, Suite 3001  
New York, New York 10022

Joseph J. DiPasquale, Esq.  
Trenk DiPasquale  
347 Mount Pleasant Avenue, Suite 300  
West Orange, NJ 07052

Re: Debtor-in-Possession Funding Commitment Letter

Dear Messrs.:

This Commitment Letter sets forth the definitive agreement for the provision of debtor-in-possession financing by Gracious Home Lending LLC (“Gracious Lending” or the “Lenders”) to Gracious Home LLC (together with its subsidiaries and affiliates, “Gracious Home”), each a debtor and debtor in possession, in the US Bankruptcy Court for the Southern District of New York, Case No. 16-13500 (the “Debtors”), with debtor-in-possession financing of up to \$3 million (the “DIP”). The terms and conditions of the DIP are outlined in the attached DIP Term Sheet.

This Commitment Letter and the attached DIP Term Sheet shall expire on January 31, 2017 at 5:00 pm (EST) unless the court enters an Interim Order approving the DIP.

Sincerely,

**GRACIOUS HOME LENDING LLC**



By: Vikas Tandon  
Title: Authorized Signatory

Attachment

cc: Robert M. Hirsh, Esq.

**Summary of Terms and Conditions of the \$3,000,000 Senior Secured Debtor-in-Possession Term Loan Facility**

<b>Borrowers:</b>	Gracious Home LLC and Gracious Home Holdings LLC, New York corporations (collectively " <u>Gracious Home</u> " or " <u>Debtor</u> ") and its affiliated debtors (collectively, the " <u>Debtors</u> " or the " <u>Borrowers</u> "), as debtors and debtors in possession in the cases (the " <u>Chapter 11 Cases</u> ") pending under chapter 11 of title 11 of the United States Code (the " <u>Bankruptcy Code</u> ") in the United States Bankruptcy Court for the Southern District of New York (the " <u>Bankruptcy Court</u> ") in the jointly administered cases under case number 16-13500 (MVK).
<b>DIP Agent and Lenders:</b>	Gracious Home Lending LLC (the " <u>DIP Agent</u> ") on behalf of the Lenders under the DIP Credit Agreement (the " <u>DIP Lenders</u> ").
<b>DIP Facility</b>	<p>A term loan (the "<u>DIP Facility</u>") made available to the Borrowers in a principal amount of up to \$3,000,000 (the "<u>Commitment</u>") and amounts advanced by the DIP Lender (as defined below) under the DIP Facility (the "<u>DIP Loan</u>") pursuant to the Budget (as defined below).</p> <p>The entire DIP Loan outstanding under the DIP Facility shall become due and payable on the Maturity Date.</p> <p>The DIP Facility will be documented under a Debtor-in-Possession Loan and Security Agreement in form and substance acceptable to the DIP Agent, the DIP Lender, and the Debtors (the "<u>DIP Credit Agreement</u>").</p>
<b>Purpose/Use of Proceeds:</b>	The proceeds of the DIP Loan will be used, in accordance with the terms of the Budget and DIP Orders (as defined below): (i) to fund the working capital needs and chapter 11 administrative costs of the Borrowers during the pendency of the Chapter 11 Cases, (ii) to pay fees, costs and expense of the DIP Facility on the terms and conditions described therein, (iii) to provide adequate protection to the DIP Lenders, (iv) to pay the valid, undisputed portion of the valid pre-petition secured obligations owed to Signature Bank or its assignee, and (v) to pay other amounts as specified in the Budget.
<b>DIP Collateral:</b>	<p>The DIP Liens include (I) first priority liens upon and security interests in (a) all Accounts and payment intangibles, (b) Inventory and Documents for any Inventory, and (c) all Intellectual Property and related assets and (II) first priority liens upon and security interests in (i) all of those other items and types of collateral in which security interests may be created under Article 9 of the Uniform Commercial Code, (ii) all of those other items and types of collateral not governed by Article 9 of the Uniform Commercial Code, including, without limitation, to the extent not permitted by applicable nonbankruptcy law, licenses issued by any federal or state regulatory authority, any leasehold or other real property interests, and commercial tort claims of the Debtors, (iii) any and all other DIP Collateral of any nature or form, and (iv) the products, rents, offspring, profits, and proceeds of any of the foregoing.</p> <p>None of the DIP Obligations, DIP Liens or DIP Superpriority Claims (as</p>

	<p>defined below) shall (a) be subject to or <i>pari passu</i> with any lien or security interest that is avoided and preserved for the benefit of the Estates under section 551 of the Bankruptcy Code, (b) be subject to or <i>pari passu</i> with any inter-company claim, whether secured or unsecured, of any Debtor or any domestic or foreign subsidiary or affiliate of any Debtor, (c) be subject to sections 510, 549, or 550 of the Bankruptcy Code, or (d) hereafter be subordinated to or made <i>pari passu</i> with any other lien or security interest under sections 361, 363 or 364 of the Bankruptcy Code or otherwise, except as expressly provided in the Interim or Final Order (as defined below).</p> <p>Security deposits with the current or former landlords will <u>not</u> be included in the DIP Collateral.</p>
<p><b>DIP Liens and Claims:</b></p>	<p>The DIP Agent will be granted, for itself and the ratable benefit of the DIP Lenders, the following liens and claims:</p> <ul style="list-style-type: none"> <li>a. Superpriority administrative expense claims pursuant to Bankruptcy Code section 364(c)(1) with priority over all other administrative expenses pursuant to the Bankruptcy Code (including the kinds specified in or arising or ordered pursuant to Bankruptcy Code sections 326, 330, 331, 503(b), 506(b) and (c), 507(a), 507(b), and 726 thereof or otherwise, whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment), which superpriority expenses of the DIP Agent and DIP Lenders shall be subject and subordinate only to the Carve-Out (the “<u>DIP Superpriority Claims</u>”);</li> <li>b. Pursuant to Bankruptcy Code section 364(d)(1) (the “<u>Section 364(d)(1) Liens</u>”), the DIP Liens include a (I) first priority liens upon and security interest in (a) all Accounts and payment intangibles, (b) Inventory and Documents for any Inventory, and (C) all Intellectual Property and related assets, and (II) on all assets of the Debtors and their Estates (the “<u>DIP Collateral</u>”) of any nature whatsoever and wherever located, whether first arising prior to or following the Petition Date, now owned or hereafter acquired, including all accounts, all chattel paper, all commercial tort claims, all deposit accounts, all Avoidance Actions (defined below) and the proceeds thereof, all documents, all equipment, all general intangibles, all goods, all instruments, all inventory, all investment property, all letter-of-credit rights, all books and records, and all proceeds, rents, profits, and offspring of the foregoing (including Cash Collateral), which Section 364(d)(1) Liens shall be senior to any existing liens or claims, subject and subordinate only to the Carve-Out.</li> <li>c. A first priority security interest and lien pursuant to Bankruptcy Code section 364(c)(2) on all unencumbered property of the Debtors and the Estates (the “<u>Section 364(c)(2) Liens</u>”), which Section 364(c)(2) Liens shall be subject and subordinate only to the Carve-Out.</li> </ul> <p><u>provided, however</u>, the DIP Superpriority Claims, the Section 364(d)(1) Liens and the Section 364(c)(2) Liens shall not attach to any security deposits held</p>

	<p>by the Debtors landlord that are specified in the terms of the Interim Order.</p>
<p><b>DIP Facility Availability:</b></p>	<p>During the period commencing on the date (the “<u>Interim Order Entry Date</u>”) of the Bankruptcy Court’s entry of an Interim Order approving the DIP Financing (the “<u>Interim Order</u>” and any final order, the “<u>Final Order</u>” and the Interim Order and the Final Order together “<u>Financing Orders</u>”) approving the DIP Facility, and ending on the date the Bankruptcy Court enters the Final Order (the “<u>Interim Period</u>”), \$1,000,000 of the DIP Facility shall be available to the Borrowers, subject to (i) delivery by the Borrowers of a Budget in form and substance reasonably acceptable to the DIP Lenders and (ii) compliance with the terms, conditions and covenants in the DIP Credit Agreement described in this Summary of Terms and Conditions (this “<u>Term Sheet</u>”).</p> <p>Upon the Bankruptcy Court’s entry of the Final Order, the full remaining amount of the Commitment shall be available to the Borrowers, subject to compliance with the terms, conditions and covenants described in the DIP Credit Agreement.</p>
<p><b>Budget:</b></p>	<p>As used in this Term Sheet “<u>Budget</u>” means in the case of the initial Budget (delivered at the time of execution of the DIP Credit Agreement), a 13-week statement of sources and uses of the Borrowers broken down by week, including the anticipated uses of the DIP Facility for such period. The Budget shall provide, among other things, for the payment of fees and expenses relating to the DIP Facility, ordinary course administrative expenses, bankruptcy-related expenses and professional fees, working capital expenditures, and other general corporate needs.</p> <p>No less frequently than every two weeks, or at such other regular intervals agreed to by the Debtors and the DIP Lenders, commencing on February 3, 2017, the Debtors shall deliver an updated budget (each, a “<u>Proposed Budget</u>”) to the DIP Agent, which Proposed Budget, upon written approval of the DIP Agent, shall become the DIP Budget effective as of the first Monday following such written approval; <u>provided, however</u>, that unless and until the DIP Agent shall have approved in writing any Proposed Budget or any other proposed modification to the DIP Budget then in effect, the Debtors shall still be subject to and be governed by the terms of such Budget then in effect in accordance with the terms of the Interim Order.</p> <p>Commencing on the first Wednesday following entry of the Interim Order (or the next business day if such day is not a business day), and continuing every week thereafter, the Debtors shall be required to deliver to the DIP Agent a weekly variance report from the previous week comparing the actual receipts and disbursements of the Debtors with the receipts and disbursements in the Budget (the “<u>Budget Variance Report</u>”). The Debtors shall be permitted a ten percent (10%) variance on disbursements tested on a cumulative basis (“<u>Permitted Variances</u>”).</p>
<p><b>Maturity:</b></p>	<p>The maturity date of the DIP Facility will be (and all loans and obligations under the DIP Facility shall be repaid in full in cash on) the earliest of: (i) stated maturity, which shall be December 31, 2017, (ii) the effective date of any Chapter 11 plan of the Borrowers that is reasonably acceptable to the DIP Lenders, (iii) the date that is 30 days after the Interim Order Entry Date if the Final Order shall not have been entered by such date and (iv) the acceleration of the loans or termination of the commitments under the DIP Facility,</p>

	<p>including, without limitation, as a result of the occurrence of an Event of Default (as defined below) (any such occurrence, the “<u>Maturity Date</u>”).</p> <p>Any confirmation order entered in the Chapter 11 Cases shall be reasonably acceptable to the DIP Lenders and shall not discharge or otherwise affect in any way any of the joint and several obligations of the Borrowers to the DIP Lenders under the DIP Facility and DIP Credit Agreement, other than after the indefeasible payment in full in cash of such obligations unless the DIP Lenders affirmatively agree to different treatment.</p>
<p><b>Interest Rate and Fees:</b></p>	<p>The DIP Loans shall bear interest on the unpaid principal amount thereof plus all obligations owing to, and rights of, the DIP Lenders pursuant to the DIP Credit Agreement, including without limitation, all interest, fees, and costs accruing thereon (collectively, the “<u>Obligations</u>”) from the date of the DIP Credit Agreement (the “<u>Effective Date</u>”) to and including the Maturity Date, at an annual interest rate of 15% to be paid monthly on the fifth (5<sup>th</sup>) business day of each month.</p> <p>Upon entry of the Interim Order, the Debtors shall be obligated to pay from the proceeds of the DIP Loan:</p> <ul style="list-style-type: none"> <li>• Commitment Fee of 2% of the DIP Facility amount, earned and payable in cash at time of commitment;</li> <li>• Funding Fee of 2% of the DIP Facility amount, earned and payable in cash at closing.</li> </ul> <p>In addition, the Debtors shall be obligated to pay an Exit Fee of 5% of the DIP Facility amount, earned and payable in cash upon the Maturity Date or upon the Pre-Payment of the DIP Loan.</p> <p>Borrowers shall pay or reimburse the DIP Lenders for all of its costs and expenses incurred in connection with the collection or enforcement of or preservation of any rights under the DIP Credit Agreement, including, without limitation, the fees and disbursements of counsel for the DIP Agent, including attorneys’ fees out of court, in trial, on appeal, in bankruptcy proceedings, or otherwise.</p> <p>In addition to any adequate protection afforded to the DIP Lenders, Borrowers shall pay a non-refundable work fee of \$100,000 to DIP Lender’s attorney upon entry of the Interim Order.</p>
<p><b>Currency:</b></p>	<p>The DIP Loans shall be made in U.S. Dollars. All payments under the DIP Facility will be made without setoff or counterclaim.</p>
<p><b>Voluntary Prepayment:</b></p>	<p>The DIP Loans may be prepaid in whole or in part at any time subject to the Exit Fee of 5% stated above. To the extent the Debtors sell all or substantially all of their assets prior to Maturity, the DIP Lenders will be entitled a payment equal (i) fifteen percent (15%) of amounts to be distributed to creditors or interest holders pursuant to the priorities set forth in the Bankruptcy Code to compensate the DIP Lenders for losses incurred as a result of payment of the DIP Loan prior to Maturity or (ii) any break-up fee or expense reimbursement awarded to the DIP Lenders should such lenders serve as a stalking horse bidder in a sale process. The DIP Lenders may apply any such prepayments</p>

	<p>and any payments made thereunder in any order of priority determined by the DIP Lenders in its exclusive judgment.</p>
<p><b>Adequate Protection:</b></p>	<p>Pursuant to sections 361, 363(e) and 364(d)(1) of the Bankruptcy Code, the DIP Agent, for the benefit of itself and the DIP Lenders, shall be granted the following adequate protection (collectively, the “<u>Adequate Protection</u>”) of its security interests for, and equal in amount to, the diminution in the value (each such diminution, a “<u>Diminution in Value</u>”) of the security interests calculated in accordance with section 506(a) of the Bankruptcy Code, whether or not such Diminution in Value results from the sale, lease or use by the Borrowers of the Collateral or the stay of enforcement of any prepetition security interest arising from section 362 of the Bankruptcy Code, or otherwise, subject and subordinate to the Carve-Out, the DIP Liens and Super-Priority Claims:</p> <p>a. <u>Adequate Protection Liens</u>. As security for and solely to the extent of any Diminution in Value, the DIP Agent and the DIP Lenders will be hereby granted, additional valid, binding, enforceable non-avoidable, and automatically perfected postpetition security interests in and liens (the “<u>Adequate Protection Liens</u>”), on all property, whether now owned or hereafter acquired or existing and wherever located, of each Debtor and each Debtor’s “estate” (as created pursuant to section 541(a) of the Bankruptcy Code), of any kind or nature whatsoever, real or personal, tangible or intangible, and now existing or hereafter acquired or created (including any causes of action under sections 544, 545, 547, 548 and 550 of the Bankruptcy Code and any other avoidance actions under the Bankruptcy Code (collectively, the “<u>Avoidance Actions</u>”)), all products, proceeds and supporting obligations of the foregoing, whether in existence on the Petition Date or thereafter created, acquired, or arising and wherever located (collectively, the “<u>Adequate Protection Collateral</u>”). Subject to the terms of the Interim Order, the Adequate Protection Liens shall be subordinate only to the Carve-Out and the DIP Claims. The Adequate Protection Liens shall otherwise be senior to all other security interests in, liens on, or claims against any of the Adequate Protection Collateral (including any lien or security interest that is avoided and preserved for the benefit of the Debtors and their estates under section 551 of the Bankruptcy Code).</p> <p>b. <u>Fees and Expenses</u>. As further adequate protection, the Debtors will pay the reasonable and documented fees and expenses (the “<u>Adequate Protection Fees</u>”), incurred after the Petition Date, of the DIP Lenders or its counsel, Arent Fox LLP.</p>
<p><b>Affirmative Covenants:</b></p>	<p>So long as the DIP Loans remain unpaid (other than contingent obligations for which no claim has been made), the Borrowers shall comply with each of the following covenants, unless the DIP Agent shall otherwise consent in writing</p> <p>a. <u>Government Compliance</u>. Except as permitted by the DIP Credit Agreement, each Borrower shall maintain its and all its Subsidiaries’ legal existence and good standing in their respective jurisdictions of formation and maintain qualification in each jurisdiction in which the failure to so qualify would reasonably be expected to result in a Material Adverse Change. The Borrowers shall comply, and have each of their Subsidiaries comply, with all laws, ordinances and</p>

	<p>regulations to which it is subject, the noncompliance with which would reasonably be expected to result in a Material Adverse Change.</p> <p>b. <u>Financial Statements, Reports, Certificates.</u> The Borrowers shall provide the DIP Lenders within two (2) Business Days after the end of each week, a reconciliation, in form and substance acceptable to the DIP Lenders and substantially consistent with the Budget, of the actual cash receipts and disbursements of the Borrowers under DIP Credit Agreement for such week to the budgeted line item amounts set forth in the Budget for such week. The Borrowers shall further provide prompt written notice of the occurrence of any Default or Event of Default and the action(s) the Borrowers propose to take to remedy such Default or Event of Default.</p> <p>c. <u>Compliance with Budget.</u> Borrower shall at all times comply with the Budget, subject to the variances permitted under the DIP Credit Agreement and Interim and Final Orders.</p> <p>d. <u>Taxes; Pensions.</u> The Borrowers shall make, and cause each of their Subsidiaries to make, timely payment of all material post-petition foreign, federal, state and local taxes or assessments (except as where the same are being contested in good faith by appropriate proceedings and for which Borrowers have set aside on its books adequate reserves in accordance with GAAP), and shall deliver to the DIP Agent, on demand, appropriate certificates attesting to such payments, and pay all amounts necessary to fund all present pension, profit sharing and deferred compensation plans in accordance with their terms.</p> <p>e. <u>Access to Collateral; Books and Records.</u> At all reasonable times the DIP Agent, or its agents, shall have the right to inspect the Collateral and the right to audit and copy Borrowers' Books.</p> <p>f. <u>Insurance.</u> Each Borrower shall keep its business and the Collateral insured for risks and in amounts standard for companies in such Borrower's industry and location. Insurance policies shall be in a form, with companies, and in amounts that are reasonably satisfactory to the DIP Agent, it being agreed that the insurance maintained by Borrowers as of the Effective Date is satisfactory. All property policies shall have a lender's loss payable endorsement. All policies (or the loss payable and additional insured endorsements) shall provide that the insurer must give the DIP Agent at least thirty (30) days' notice before canceling, amending, or declining to renew its policy. Notwithstanding the foregoing, (a) so long as no Event of Default has occurred and is continuing, the Borrowers shall have the option of applying the proceeds of any casualty policy toward the replacement or repair of destroyed or damaged property; <i>provided</i> that any such replaced or repaired property (i) shall be of equal or like value as the replaced or repaired Collateral and (ii) shall be deemed Collateral in which the DIP Agent has been granted a first priority security interest, and (b) after the occurrence and during the continuance of an Event of Default, all proceeds payable under such casualty policy shall, at the option of the DIP Agent, be payable to</p>
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	<p>DIP Agent on account of the Obligations.</p> <p>g. <u>Operating Accounts</u>. The Borrower's shall provide the DIP Agent ten (10) Business Days' prior written notice before establishing any Collateral Account. In addition, for each Collateral Account that a Borrower at any time maintains, such Borrower shall, if requested by the DIP Agent, cause the applicable bank or financial institution at or with which any Collateral Account is maintained to execute and deliver a Control Agreement or other appropriate instrument with respect to such Collateral Account to perfect the Lender's Lien in such Collateral Account in accordance with the terms hereunder. The provisions of the previous sentence shall not apply to deposit accounts that are fiduciary accounts or are exclusively used for sales tax, payroll, payroll taxes and other employee wage and benefit payments to or for the benefit of a Borrower's employees. Debtors shall maintain at all times a cash balance in their Collateral Account in an amount not less than the total amount of accrued and unpaid sales and payroll taxes and payroll related payments. For the avoidance of doubt, any cash earmarked for the payment of sales and payroll taxes and payroll related expenses shall not be used by Debtors for any other purpose other than making payment of the applicable sales and payroll taxes and payroll related payments as and when due.</p> <p>h. <u>Protection of Intellectual Property Rights</u>. Each Borrower shall use commercially reasonable efforts to: (a) protect, defend and maintain the validity and enforceability of its intellectual property material to its business; (b) promptly advise the DIP Agent in writing of material infringements of its intellectual property; and (c) not allow any intellectual property material to such Borrower's business to be abandoned, forfeited or dedicated to the public without the Lender's written consent, which consent shall not be unreasonably withheld or delayed.</p> <p>i. <u>Litigation Cooperation</u>. From entry of the Interim Order and continuing through the termination of this Agreement, the Borrowers shall make available to the DIP Agent during regular business hours and upon reasonable prior notice, without expense to the DIP Agent, the Borrowers and their officers, employees and agents and the Borrowers' books and records, to the extent that the DIP Agent may deem them reasonably necessary to prosecute or defend any third-party suit or proceeding instituted by or against the DIP Agent with respect to any Collateral or relating to the Borrowers.</p> <p>j. <u>Further Assurances</u>. The Borrowers shall execute any further instruments and take further action as the DIP Agent reasonably requests to perfect or continue DIP Lenders' security interest in the DIP Collateral or to effect the purposes of the DIP Credit Agreement</p>
<p><b>Events of Default:</b></p>	<p>Any one of the following shall constitute an event of default (an "<u>Event of Default</u>") under the DIP Credit Agreement:</p> <p>a. The Borrowers shall fail to pay any Obligations to the DIP Lenders as and when due, including, but not limited to, any</p>

	<p>adequate protection obligations;</p> <ul style="list-style-type: none"><li>b. The Borrowers fail to file a plan of reorganization and accompanying disclosure statement reasonably acceptable to the DIP Lenders by June 30, 2017;</li><li>c. The Borrowers shall fail to perform, or otherwise breach, any covenant or agreement of the Borrowers contained in the DIP Credit Agreement, which failure or breach shall continue for ten (10) days after the date upon which Borrowers have received a written notice of such failure or breach from the Lender;</li><li>d. Any representation or warranty made by a Borrower in the DIP Credit Agreement or by a Borrower (or any of its Officers) in any agreement, certificate, instrument or financial statement or other statement delivered to the DIP Agent pursuant to or in connection with the DIP Credit Agreement shall prove to have been incorrect in any material respect when made or deemed made;</li><li>e. The rendering against a Borrower of a final non-appealable arbitration award, judgment, decree or order for the payment of money in excess of \$100,000 (excluding amounts covered by insurance to the extent the relevant independent third-party insurer has not denied coverage therefor), and the same shall remain unsatisfied, unvacated and unstayed pending appeal for a period of thirty (30) consecutive days after the entry thereof;</li><li>f. The Borrowers (except following the DIP Agent's prior written request or with the DIP Agent's express prior written consent) shall file a motion with the Bankruptcy Court or any other court with jurisdiction in the matter seeking an order, or an order is otherwise entered, modifying, reversing, revoking, staying, rescinding, vacating, or amending the Financing Orders or any of the Loan Documents, without the DIP Lenders' express prior written consent (and no such consent shall be implied from any other action, inaction, or acquiescence of the Lender);</li><li>g. The Borrowers shall file, or any other person shall obtain Bankruptcy Court approval of a disclosure statement for a Plan of Reorganization which is not reasonably acceptable to the DIP Lenders;</li><li>h. The Final Order has not been entered by the Bankruptcy Court on or before thirty (30) days after the Interim Order;</li><li>i. The Borrower shall file any motion or application, or the Bankruptcy Court allows the motion or application of any other Person, which seeks approval for or allowance of any claim, lien, security interest ranking equal or senior in priority to the claims, liens and security interests granted to the DIP Lenders under the Financing Orders or the Loan Documents or any such equal or prior claim, lien, or security interest shall be established in any manner, except, in any case, as expressly permitted under the</li></ul>
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	<p>Financing Orders;</p> <ul style="list-style-type: none"> <li>j. The Financing Orders shall cease to be in full force and effect from and after the date of entry thereof by the Bankruptcy Court;</li> <li>k. The occurrence of any default or event of default under the Financing Orders;</li> <li>l. The entry of an 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 DIP Agent, to realize upon, or to exercise any right or remedy with respect to, any asset of the Borrowers or to terminate any license, franchise, or similar agreement, where such termination would reasonably be expected to result in a material adverse change;</li> <li>m. If any creditor of the Borrowers receives any adequate protection payment which is not fully acceptable to the DIP Agent in its sole discretion, or any Lien is granted as adequate protection other than as set forth in the Financing Orders;</li> <li>n. Conversion of the Chapter 11 Case to a Chapter 7 case under the Bankruptcy Code, or dismissal of the Chapter 11 Case or any subsequent Chapter 7 case either voluntarily or involuntarily;</li> <li>o. The Interim Order or Final Order are modified, reversed, revoked, remanded, stayed, rescinded, vacated or amended on appeal or by the Bankruptcy Court without the prior written consent of DIP Agent (and no such consent shall be implied from any other authorization or acquiescence by DIP Lender);</li> <li>p. An examiner with special powers is appointed pursuant to Section 1104(a) of the Bankruptcy Code; or</li> <li>q. non adherence with the Budget except to the extent of any Permitted Variance.</li> </ul>
<p><b>Indemnity; Expenses:</b></p>	<p>The Borrowers agree to indemnify, defend and hold the DIP Agent and the DIP Lenders, and their respective directors, officers, employees, agents, attorneys, or any other Person affiliated with or representing the DIP Agent or DIP Lenders harmless against: (a) all obligations, demands, claims, and liabilities (collectively, "<u>Claims</u>") asserted by any other party in connection with the transactions contemplated by the Loan Documents; and (b) all losses or expenses incurred, or paid by the DIP Agent or DIP Lenders from, following, or arising from the transactions contemplated by the DIP Credit Agreement (including reasonable attorneys' fees and expenses), except for Claims and/or losses directly caused by the Lender's gross negligence or willful misconduct.</p>
<p><b>Carve-Out:</b></p>	<p>"<u>Carve-Out</u>" shall mean the sum of: (i) all fees required to be paid to the Clerk of the Court and to the Office of the United States Trustee under 28 U.S.C. § 1930(a); (ii) fees and expenses up to \$25,000 incurred by a trustee under Bankruptcy Code section 726(b); (iii) all accrued but unpaid costs, fees, and expenses (the "<u>Professional Fees</u>") incurred by persons or firms retained by the</p>

	<p>Debtors pursuant to sections 327, 328, or 363 of the Bankruptcy Code (collectively, the "<u>Debtor Professionals</u>") and any official committee appointed in these Cases, including the Creditors' Committee (the "<u>Committee Professionals</u>" and the Debtor Professionals, collectively, the "<u>Professional Persons</u>") at any time before or on the first business day following delivery by the DIP Lender of a Carve-Out Trigger Notice, to the extent allowed at any time whether allowed by interim order, procedural order, or otherwise (the "<u>Pre-Termination Amount</u>"); and (iv) after the first business day following delivery by the DIP Lender of the Carve-Out Trigger Notice, to the extent allowed at any time, whether by interim order, procedural order, or otherwise, the payment of Professional Fees of Professional Persons in an aggregate amount not to exceed \$175,000 with respect to the Debtor Professionals and the Committee Professionals (the "<u>Post-Termination Amount</u>," and together with the Pre-Termination Amount, the "<u>Professional Fees Amount</u>"); <u>provided</u> that nothing herein shall be construed to impair the ability of any party to object to the fees, expenses, reimbursement, or compensation described in preceding clauses (iii) and (iv).</p> <p>For purposes of the foregoing, "<u>Carve-Out Trigger Notice</u>" shall mean a written notice delivered by the DIP Lender to the Debtors and their lead counsel, the U.S. Trustee, and lead counsel to the Creditors' Committee, if any, providing notice that the Termination Date has occurred. On the day on which a Carve-Out Trigger Notice is given to the Debtors, such Carve-Out Trigger Notice shall constitute a demand to the Debtors to utilize all cash on hand as of such date and any available cash thereafter held by any Debtor to fund a reserve in an aggregate amount equal to (A) the Pre-Termination Amount <i>plus</i> (B) the Post-Termination Amount, and the Debtors shall deposit and hold any such amounts in a segregated account in trust for the Professional Persons (the "<u>Professional Fees Reserve</u>") (it being understood that the Prepetition Secured Parties shall have a lien and security interest in any residual amount of such segregated account). For purposes of the foregoing, "Termination Date" shall mean the date on which the DIP Lenders or the DIP Agent, as applicable, have the right to terminate their obligations under the DIP Facility due to, among other things, an uncured Event of Default or Maturity of the DIP Loan.</p> <p>For the avoidance of doubt, so long as the Carve-Out Trigger Notice shall not have been delivered, the Carve-Out shall not be reduced by the payment of Professional Fees allowed at any time by the Bankruptcy Court. For the avoidance of doubt the Carve-Out shall be senior to all liens and claims securing the DIP Loan Documents and the Adequate Protection Superpriority Claims.</p>
<b>Governing Law and Jurisdiction:</b>	<p>The DIP Credit Agreement will provide that the Borrowers will submit to the exclusive jurisdiction and venue of the Bankruptcy Court, or in the event that the Bankruptcy Court does not have or does not exercise jurisdiction, then in any state or federal court of competent jurisdiction in the state, county and city of New York, borough of Manhattan; and shall waive any right to trial by jury. New York law shall govern the DIP Credit Agreement.</p>

**EXHIBIT 3**

**Budget  
(To Be Provided)**