



ORDERED in the Southern District of Florida on June 02, 2011.

A handwritten signature in black ink, appearing to read "Erik P. Kimball".

**Erik P. Kimball, Judge
United States Bankruptcy Court**

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
www.flsb.uscourts.gov**

In re:

HearUSA, Inc.,¹

Debtor.
_____ /

Chapter 11

Case No. 11-23341-BKC-EPK

**FINAL ORDER (1) AUTHORIZING POST PETITION FINANCING
PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3);
(2) AUTHORIZING THE USE OF CASH COLLATERAL; (3) GRANTING
SECURITY INTERESTS AND SUPERPRIORITY CLAIMS; (4) PROVIDING
ADEQUATE PROTECTION; AND (5) GRANTING RELATED RELIEF**

The *Debtor's Motion For Interim And Final Orders Under 11 U.S.C. §§ 361, 362, 363, and 364, Fed. R. Bankr. P. 4001(b) and (c), and Local Bankruptcy Rules 4001-2 and 4001-3, (A) Authorizing Debtor To Incur Post Petition Indebtedness, (B) Granting Security Interests and Superpriority Expense Claims, (C) Authorizing Use Of Cash Collateral, and (D) Granting Other Relief* [D.E. # 18] (the "Motion") filed by HearUSA, Inc., debtor and debtor in possession (the "Debtor") came on for final hearing on May 31, 2011 at 9:30 a.m. (the "Hearing"). Appearances

¹ The address of the Debtor is 1250 Northpoint Parkway, West Palm Beach, Florida 33407; and the last four digits of the taxpayer identification number of the Debtor are (8248).

were made as are noted in the record. Any objections to the relief sought in the Motion were either withdrawn or are hereby overruled.

Based on the record before this Court,

IT IS HEREBY FOUND:

A. On May 16, 2011 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Southern District of Florida (the “Court”), thereby commencing this chapter 11 case. Since the Petition Date, the Debtor has retained possession of its assets and has continued to operate its business as debtor in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. On May 25, 2011, the United States Trustee appointed an official committee of unsecured creditors in this case (the “Committee”).

B. By the Motion, the Debtor is seeking authorization to incur post-petition indebtedness (the “DIP Financing”), pursuant to the debtor-in-possession credit facility (the “DIP Facility”) under that certain “Credit and Security Agreement” dated May 16, 2011 by and among the Debtor, as the Borrower, and William Demant Holding A/S, as lender (the “DIP Lender”), attached hereto as Exhibit A (as it may be modified, supplemented or amended from time to time, the “DIP Credit Agreement”, and together with the other Loan Documents, as defined in the DIP Credit Agreement, the “DIP Loan Documents”),² and to grant liens, security interests and superpriority claims to the DIP Lender under the terms set forth in this Final Order. The Debtor has also requested authorization to use prepetition collateral under its prepetition debt facilities, including cash collateral, and provide adequate protection in respect of the interests of the lenders asserting interests in such collateral.

C. The Court has jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157(b) and 1334. This Final Order is entered in a “core” proceeding as defined in 28 U.S.C. §§ 157(b)(2)(D) and (M).

² Otherwise undefined capitalized terms in this Final Order have the meanings ascribed to them in the DIP Credit Agreement.

D. The Debtor is the obligor under that certain Second Amended and Restated Credit Agreement, dated as of December 30, 2006, among the Debtor, as borrower, and Siemens Hearing Instruments, Inc., as lender (the “Pre-Petition Lender”), as the same heretofore has been amended, amended and restated or otherwise modified (“Pre-Petition Credit Agreement”), as well as the “Loan Documents” as defined in the Pre-Petition Credit Agreement (as each of such agreements and other instruments shall have heretofore been amended, amended and restated or otherwise modified), which include all of the agreements granting security interests and liens in property and assets of the Debtor to the Pre-Petition Lender (collectively, the “Pre-Petition Loan Documents”). The Pre-Petition Credit Agreement and Pre-Petition Loan Documents are collectively referred to herein as “Existing Agreements.” For the avoidance of doubt, the Siemens Supply Agreement (as defined in the APA, which is defined in the DIP Loan Documents) is not included in the term “Existing Agreements.”

E. The Pre-Petition Lender claims that the Existing Agreements provide that (i) the Debtor is obligated under the Pre-Petition Credit Agreement and Pre-Petition Loan Documents for principal, accrued and unpaid interest (including default interest), fees, costs, expenses, indemnities, and other amounts arising under the Pre-Petition Credit Agreement (the “Pre-Petition Obligations”); and (ii) all of the Pre-Petition Obligations are secured by a first priority security interest in all collateral identified in the Pre-Petition Credit Agreement and all other security for the Pre-Petition Obligations as provided in the Existing Agreements immediately prior to the Petition Date (“Pre-Petition Collateral”), which collateral includes cash collateral within the meaning of Bankruptcy Code section 363(a) (the “Cash Collateral”).

F. The Debtor claims that as of the Petition Date, the outstanding Pre-Petition Obligations asserted under or in connection with the Pre-Petition Credit Agreement totaled approximately \$31.3 million. The Pre-Petition Lender asserts that the principal amount of the Pre-Petition Obligations exceeds such amount and, as of the Petition Date, the Pre-Petition Obligations also include additional amounts with respect to accrued interest, fees, costs, indemnities and other amounts arising under the Pre-Petition Loan Documents. The Pre-Petition Lender reserves all rights

with respect thereto and with respect to any and all amounts that continue to accrue or be payable in connection with the provisions of the Pre-Petition Loan Documents. The Debtor on behalf of itself, the estate, and any successor reserves all rights to object to all or any portion of the Pre-Petition Obligations and any additional amounts asserted with respect to accrued interest, fees, costs, indemnities and other amounts arising under the Existing Agreements or other claims the Pre-Petition Lender may assert against the Debtor's estate and to assert any affirmative causes of action or claims relating thereto.

G. The Pre-Petition Lender is entitled, pursuant to sections 361, 363 and 364 of the Bankruptcy Code, to adequate protection of its interests in the Pre-Petition Collateral, including the Cash Collateral. The Debtor asserts that the Pre-Petition Lender is adequately protected pursuant to the terms and conditions set forth in this Final Order.

H. The Debtor has an immediate need to obtain the DIP Financing in order to permit, among other things, the orderly continuation of the operation of its business, and to maintain business relationships with vendors and suppliers, and to satisfy other working capital needs. The ability of the Debtor to obtain sufficient working capital and liquidity through the incurrence of new indebtedness for borrowed money and other financial accommodations is vital to the preservation and maintenance of the going concern value of the Debtor and its successful reorganization.

I. The DIP Lender is willing to allow the Debtor to obtain financing under the DIP Facility only upon the following terms and conditions set forth in this Final Order which are acceptable to the DIP Lender and consistent with the DIP Facility.

J. The Debtor is unable to obtain adequate unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code or pursuant to sections 364(a) and 364(b) of the Bankruptcy Code. The Debtor is also unable to obtain secured credit allowable under section 364(c)(2) or 364(c)(3) of the Bankruptcy Code, except under the terms and conditions set forth in this Final Order.

K. The terms of the DIP Financing (a) have been negotiated in good faith and at arm's length and without collusion between the Debtor and the DIP Lender, and (b) are fair and reasonable

under the circumstances and enforceable against the Debtor and reflect the Debtor's exercise of prudent business judgment consistent with its fiduciary duty and are supported by reasonably equivalent value and fair consideration, (ii) the DIP Facility, including, without limitation, the DIP Credit Agreement, has been negotiated in good faith and at arm's length among the Debtor and the DIP Lender, and (iii) any credit extended, loans made and other financial accommodations extended or made to the Debtor by the DIP Lender has been extended, issued or made, as the case may be, in "good faith" within the meaning of section 364(e) of the Bankruptcy Code.

L. The relief requested in the Motion with respect to the DIP Financing is necessary, essential and appropriate for the continued operations of the Debtor's business and the management and preservation of its property. It is in the best interest of the Debtor's estates to be allowed to enter into, and perform under, the DIP Credit Agreement.

Notice

M. It appears that the Debtor has served the Motion and notice of the Hearing, in accordance with Federal Rule of Bankruptcy Procedure 4001 (a) - (d) and the applicable local rules of the Court, on the United States Trustee, the Pre-Petition Lenders, the DIP Lender, the twenty (20) largest unsecured creditors in the Debtor's case, other parties with liens or security interests of record, and any party having requested special notice in this Chapter 11 case.

BASED ON THE FOREGOING, IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. The Motion is hereby GRANTED on a final basis, subject to the terms and conditions set forth in this Final Order. Any objections that have not previously been withdrawn are hereby overruled on the merits.

DIP Financing

2. The Debtor is hereby authorized to immediately borrow, pursuant to the DIP Credit Agreement, an aggregate amount not to exceed the sum of \$10,000,000 (the "DIP Loan Amount"), provided that disbursements of such amounts shall not exceed the amounts permitted under the DIP Budget attached to this Final Order as Exhibit B. The DIP Lender consents to the borrowings of the DIP Loan Amount as necessary to fund all of the proposed disbursements under the DIP Budget,

including fees due the Clerk of the Court and the United States Trustee pursuant to 28 U.S.C. §1930. With respect to fees due the Clerk of the Court and the United States Trustee, the DIP Budget shall include, and provide for payment during the week of July 1, 2011, the estimated amount of such fees for the remainder of the Debtor's bankruptcy case through consummation of a plan, which fees shall be funded through the Reserve.

3. From and after the Petition Date, the Debtor shall use advances of credit under the DIP Facility only for the purposes specifically set forth in this Final Order and the DIP Credit Agreement, and in compliance with the Budget, including, without limitation, upon entry of this Final Order authorizing and directing the Debtor to pay and on a weekly basis fund the Reserve for fees and expenses of Professional Persons' accrued but not yet allowed by order of this Court. For the avoidance of doubt, no fees or expenses of Professional Persons shall be paid out of the Reserve absent any order of the Court allowing such fees and expenses and the payment thereof to Estate Professional Persons. The Debtor shall provide the same financial reports to the Pre-Petition Lender (in addition to those required to be provided under the Existing Agreements) as the Debtor is required to provide to the DIP Lender under the DIP Loan Documents.

4. Immediately prior to the Auction (as defined in the APA), the DIP Lender shall fund, and the Debtor shall borrow, the sum of the amount designated in the Budget as the amount needed to fund the wind down of the Debtor's Chapter 11 case (the "Wind Down Amount") and the Reserve. The Reserve constitutes funds placed in escrow with Debtor's counsel for the exclusive benefit of the payment of Professional Persons with the approval of the Court and fees due the Clerk of the Court and the United States Trustee. The Wind Down Amount and the Reserve (a) shall be retained by the Debtor (or Debtor's counsel, with respect to the Reserve), (b) shall be free and clear of all liens, claims and encumbrances in favor of any secured creditor, including the Pre-Petition Lender or the DIP Lender, and (c) shall not be sold and transferred to the Purchaser under the APA.

5. The terms and conditions of the DIP Financing and the DIP Loan Documents are hereby approved in all respects and made fully enforceable against the Debtor and the DIP Lender.

6. In furtherance of the foregoing, the Debtor is authorized and directed to do and perform all acts, and to make, execute and deliver all instruments and documents that may be reasonably required or necessary for the Debtor's performance under the DIP Credit Agreement, including, without limitation: the execution, delivery and performance of the DIP Loan Documents and any and all schedules attached thereto; the execution and delivery of one or more waivers, amendments, supplements or modification to the DIP Loan Documents, in each case in such form as the Debtor and the DIP Lender may agree (to the extent such waiver, amendment, supplement or modification is permitted under the terms of the Loan Documents and is not material in the good faith judgment of the Debtor and the DIP Lender, the Debtor and the DIP Lender may execute and deliver such instruments without further approval from the Court); and the nonrefundable payment to the DIP Lender of all fees referred to in the DIP Credit Agreement. Any amendment to the DIP Loan Agreements will be filed with the Court.

Priority and Liens.

7. Borrower (as debtor and as debtor in possession) hereby grants to DIP Lender a security interest in all presently existing and hereafter acquired or arising Collateral, including any prepetition accounts, in order to secure prompt repayment of the Obligations and in order to secure prompt performance by Borrower of each and all of its covenants and Obligations under the DIP Loan Documents and otherwise, junior to all validly existing prepetition liens and security interests in the Collateral.

8. Upon the entry of this Final Order, the Obligations: (a) shall at all times constitute a Super-Priority Administrative Expense having priority, pursuant to sections 364(c)(1) of the Bankruptcy Code, and (b) pursuant to sections 364(c)(2) and (3) and 364(d)(1) of the Bankruptcy Code, shall at all times be secured by a perfected lien (the "DIP Liens") in all of the Collateral³ and assets (excluding proceeds of Avoidance Actions and any proceeds therefrom), whether now owned

³ The definition of which is modified to exclude Avoidance Actions, and the proceeds therefrom, from the definition of Collateral in the Credit and Security Agreement attached to the Motion as Exhibit "A."

or hereafter acquired of Borrower and their estates, pursuant to the terms of the Loan Documents. The DIP Liens shall be junior to all valid, enforceable, nonavoidable, perfected security interests in existence as of the filing date of the Debtor's Chapter 11 case, including those of the Pre-Petition Lender.

9. 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 Debtor and its estate under section 551 of the Bankruptcy Code, or (ii) any liens arising after the Petition Date 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 Debtor, other than the Adequate Protection Liens (hereinafter defined).

Use of Pre-Petition Collateral; Adequate Protection

10. The Debtor hereby is authorized to use Pre-Petition Collateral, including Cash Collateral, but solely in accordance with the terms and conditions set forth in this Final Order.

11. Subject to the other provisions of this Final Order, the continued use of the Pre-Petition Collateral pursuant to this Final Order shall be conditioned upon the Debtor's compliance with the expense line items in the DIP Budget, including any permitted variances.

12. The Debtor may use Cash Collateral only to pay reasonable and necessary general operating expenses incurred by the Debtor in the ordinary course of operating its business.

13. The Pre-Petition Lender hereby is granted the following protections (collectively, the "Adequate Protection Obligations") for any and all decrease, diminution, or decline in the value of the Pre-Petition Collateral from and after the Petition Date caused by or resulting from (i) the use of the Cash Collateral, (ii) the use, sale, or lease of the portion of the Pre-Petition Collateral which does not constitute the Pre-Petition Cash Collateral (the "Pre-Petition Non-Cash Collateral"), (iii) the imposition of the automatic stay by section 362 of the Bankruptcy Code, and (iv) the granting of the Super-Priority Administrative Expense Claim:

a. Pursuant to sections 361 and 363(e) of the Bankruptcy Code, effective from the Petition Date, the Pre-Petition Lender shall have a continuing, perfected replacement lien

and security interest having the same priority, validity and extent as the Pre-Petition Lender's liens and security interests in the Pre-Petition Collateral (the "Adequate Protection Liens") upon (i) all assets of the Debtor's bankruptcy estate acquired after the Petition Date of the same type and description as the Pre-Petition Collateral (the "Post-Petition Like Kind Collateral") and (ii) all other property of the Debtor's bankruptcy estate that is not Pre-Petition Collateral or Post-Petition Like Kind Collateral (other than Avoidance Actions) (the "Additional Collateral" and, collectively with the Post-Petition Like Kind Collateral, the "Adequate Protection Collateral"). The Adequate Protection Liens on the Post-Petition Like Kind Collateral shall have the same priority, validity and extent as the Pre-Petition Lender's liens and security interests in the Pre-Petition Collateral. The Adequate Protection Liens on the Additional Collateral shall have the same priority, validity and extent as the Pre-Petition Lender's liens and security interests in the Pre-Petition Collateral and shall be valid only to the extent that the Pre-Petition Lenders' lien and/or security on the Pre-Petition Collateral is valid and enforceable and not subject to avoidance and shall only be valid to the extent that the Adequate Protection Liens on the Post-Petition Like Kind Collateral are insufficient to provide complete adequate protection to the Pre-Petition Lenders.

b. Additionally, the Debtor is authorized to use the Pre-Petition Lender's Cash Collateral derived from all prepetition receivables. As adequate protection with respect thereto, the Pre-Petition Lender is granted a replacement lien having the same priority, validity and extent as the Pre-Petition Lender's liens and security interests in the Pre-Petition Collateral on all post-petition receivables on dollar-for-dollar basis of the prepetition cash utilized until the Pre-Petition Obligations are paid in full.

c. The Debtor asserts that the Pre-Petition Lender is being provided further adequate protection through (i) provisions of a lien attaching to the proceeds of any sale in respect of obligations arising under and in relation to the Existing Agreement (including amounts sufficient to compensate the Pre-Petition Lenders for interest, fees, costs, indemnities and other amounts which continue to accrue) in the same order of priority, and

with the same validity, force and effect as prior to the sale; and (ii) the full amount of the obligations asserted as owing to the Pre-Petition Lender (including amounts sufficient to compensate the Pre-Petition Lender for interests, fees, costs, indemnities and other amounts which continue to accrue) arising under or in relation to the Existing Agreements being paid or escrowed (in an interest bearing account acceptable to the Pre-Petition Lender) at closing until all or any disputed portion of the Pre-Petition Obligations is allowed by Final Order. For the avoidance of doubt, the priority of the Pre-Petition Lender's interests will attach to the proceeds of the sale and, as such, repayment of the DIP Financing upon closing will be subordinated to payment or escrow of the Pre-Petition Obligations.

d. All rights and remedies granted hereby to the DIP Lender shall at all times be subject to and subordinate to the prior satisfaction of the Pre-Petition Lender's Obligations.

e. For the avoidance of doubt, and for all purposes contemplated by this Final Order, the Adequate Protection Liens shall be valid and enforceable only to the extent that the Pre-Petition Lender's liens and security interests were valid and enforceable and not subject to avoidance as of the Petition Date.

Perfection of Liens

14. Neither the DIP Lender nor the Pre-Petition Lender shall be required to file or record any financing statements, mortgages, notices of lien or similar instruments in any jurisdiction or take any other action in order to validate and perfect the respective security interests and liens granted to them pursuant to this Final Order. This Final Order shall be sufficient and conclusive evidence of the validity, perfection and priority of the DIP Liens and the Adequate Protection Liens. If the DIP Lenders or the Pre-Petition Lender chooses, in its sole discretion, to file a copy of this Final Order as a financing statement with any recording officer designated to file financing statements or with any registry of deeds or similar office in any jurisdiction, the applicable filing or recording official is authorized and directed to file or record this Final Order for such purpose.

15. No Advances made hereunder by the DIP Lender shall apply to or be available for any fees, disbursements, costs or expenses incurred by any party, including, without limitation, the

Debtor, the Committee, or any party-in-interest, in connection with the investigation (including discovery proceedings), the initiation or prosecution of any claims, causes of action, adversary proceedings or other litigation against the DIP Loan Amount, the DIP Lender, including challenging the amount, extent, validity, perfection, priority or enforceability of or asserting any defense, counterclaim or offset to, the DIP Credit Agreement, the Loan Documents, the Obligations, the Collateral, the DIP Liens or the DIP Facility Super-Priority Administrative Expense.

Events of Default

16. Unless the DIP Lender shall have provided its prior written consent or written waiver, or all DIP Obligations shall have been indefeasibly paid in full in cash and the commitments under the DIP Financing shall have been terminated in whole, each of the following, in addition to the applicable provisions in the DIP Loan Documents, shall constitute an “Event of Default”:

- a. the issuance of an order staying, reversing, modifying or vacating this Final Order;
- b. a plan of reorganization is proposed which does not provide for termination of the commitment under the DIP Facility and payment in full in cash of the Debtor’s obligations thereunder on the effective date of the plan;
- c. with respect to a sale of substantially all of the Debtor’s assets, (i) the Debtor’s failure to obtain entry of the Bid Procedures Order by June 6, 2011 in a manner reasonably acceptable to the DIP Lender, or (ii) the Debtor’s failure to obtain approval of an asset sale under Bankruptcy Code section 363 or an alternate transaction that pays off, in full, the DIP Financing in a manner reasonably acceptable to the DIP Lender;
- d. the entry of an order dismissing the Debtor’s Chapter 11 case, converting the case to chapter 7, or appointing a chapter 11 trustee or an examiner with expanded powers in the case, if such order does not provide for the termination of the DIP Facility and payment in full in cash of all obligations thereunder;
- e. any action by the Debtor, including the filing of an application, in support of any of the foregoing Events of Default, or the failure of the Debtor to contest in good faith any such application filed by a person other than the Debtor;

f. the breach by the Debtor or any party in interest of any term or provision of this Final Order, subject to written notice to the Debtor, the Committee, the United States Trustee, and, to the extent not one of the foregoing, the breaching party, and an opportunity to cure, in each case only to the extent such notice and opportunity to cure are provided for herein;

g. the acquisition by any post-petition lender to the Debtor of a post-petition security interest in or lien upon any property of the Debtor having parity with or priority over the security interest and liens in such property held by the DIP Lender (other than a statutory lien arising in the ordinary course of business);

h. the automatic stay is lifted with respect to any of the Collateral of the DIP Lender having an aggregate book value in excess of \$150,000; or

i. the entry of an order of any court that terminates the authority of the Debtor to conduct all or any material part of its business.

j. the filing by the Debtor, the Committee or any party in interest of any application, motion or adversary proceeding seeking to surcharge the Collateral pursuant to sections 105, 326, 327, 330, 331, 503(b), 506(c), 507(a) or the “equity exception” in section 552(b), section 726, or any other provision of the Bankruptcy Code, or otherwise (collectively, the “Potential Surcharge Sections”) for the surcharge of any such expenses arising or accruing prior to the final maturity date of the DIP Financing.

17. In the event the DIP Lender asserts the occurrence of an event of default under any provision of this Final Order, the DIP Credit Agreement, or the DIP Loan Documents, the DIP Lender shall file a motion to terminate the automatic stay which shall be served electronically, by hand delivery, facsimile or overnight mail on counsel to the Debtor, the Committee, the Pre-Petition Lender, and the Office of the United States Trustee, and the Court shall conduct a hearing on an expedited or emergency basis (but in no event later than three (3) business days after service of such notice) to consider terminating the automatic stay under § 362 of the Bankruptcy Code in favor of the DIP Lender for the purpose of allowing the DIP Lender to exercise all of its rights and remedies under the DIP Loan Documents, this Final Order or applicable law. The only issue that may be

raised or addressed by the Debtor at such hearing is whether an event of default has occurred. Upon an event of default, in the event that the DIP Lender seeks to take possession of any premises where collateral is located, the DIP Lender's rights and remedies shall be limited to (i) relief provided by further order of this Court, (ii) any written agreement with the applicable lease counterparty, and (iii) applicable non-bankruptcy law.

Preservation of Rights Granted Under This Final Order

18. Except as otherwise specifically provided in this Final Order, no claim having a priority superior to or *pari passu* with that granted by this Final Order to the DIP Lender shall be granted while any portion of the DIP Financing (or any refinancing thereof) or the commitment thereunder, remains outstanding. The security interest and liens granted to the DIP Lender hereunder shall not be subject or junior to any lien or security interest that is avoided and preserved for the benefit of the Debtor's estate under section 551 of the Bankruptcy Code.

19. If an order dismissing this Chapter 11 case is at any time entered, such order shall provide (in accordance with sections 105 and 349 of the Bankruptcy Code) that (i) the claims, liens and security interests granted to the DIP Lender pursuant to this Final Order and the DIP Loan Documents and the Adequate Protection Liens shall continue in full force and effect and shall maintain their priorities as provided in this Final Order until all obligations in respect thereof shall have been paid and satisfied in full (and that such claims, liens and security interests shall, notwithstanding such dismissal, remain binding on all parties in interest) and (ii) this Court shall retain jurisdiction, notwithstanding such dismissal, for the purposes of enforcing the claims, liens and security interests referred to in (i) above.

20. If any or all of the provisions of this Final Order are hereafter reversed, modified, vacated or stayed, such reversal, stay, modification or vacation shall not affect (i) the validity of (a) any obligation, indebtedness or liability incurred by the Debtor to the DIP Lenders prior to written notice to the DIP Lender of the effective date of such reversal, stay, modification or vacation or (b) the Adequate Protection Liens, or (ii) the validity and enforceability of (y) any lien or security interest, or priority authorized or created hereby with respect to any such obligation, indebtedness or

liability or (z) the Adequate Protection Liens. Notwithstanding any such reversal, stay, modification or vacation, any indebtedness, obligation or liability incurred by the Debtor to the DIP Lender prior to the actual receipt of written notice by the DIP Lender of the effective date of such reversal, stay, modification or vacation shall be governed in all respects by the original provisions of this Final Order, and the DIP Lender shall be entitled to all the rights, remedies, privileges and benefits granted in this Final Order and pursuant to the DIP Loan Documents with respect to all and such indebtedness, obligation or liability.

21. The obligations of the Debtor under this Final Order shall not be discharged by the entry of an order confirming a plan of reorganization in this Chapter 11 case, unless the DIP Obligations are unconditionally and indefeasibly repaid in full in cash as a condition of the effectiveness of any such plan.

No Consent to Surcharge on Collateral

22. Nothing contained in this Final Order shall be construed as an agreement or consent by (a) the DIP Lender or the Pre-Petition Lender to be surcharged for any of the Debtor's post-petition expenses pursuant to the Potential Surcharge Sections (as defined above), except as provided in this Final Order, (b) the DIP Lender or the Pre-Petition Lender to surcharge by a bankruptcy trustee in a successor case with respect to any period after the termination of the use of borrowings under the DIP Financing pursuant to this Final Order, and (c) the Debtor irrevocably waives and shall be prohibited from asserting any surcharge claim, under section 506(c) of the Bankruptcy Code, the enhancement of collateral provisions of section 552 of the Bankruptcy Code, or any other legal or equitable doctrine (including, without limitation, unjust enrichment), for any costs and expenses incurred in connection with the preservation, protection or enhancement of, or realization by the DIP Lender or its Collateral. In no event shall the DIP Lender be subject to (i) the "equities of the case" exception contained in section 552(b) of the Bankruptcy Code or (ii) the equitable doctrine of "marshaling" or any other similar doctrine with respect to the Collateral. Nothing herein shall waive any right of the Debtor to surcharge other parties in interest.

Miscellaneous

23. Nothing in this Final Order shall prejudice, impair or otherwise impact the rights of the DIP Lender or the Pre-Petition Lender to seek any other or supplemental relief consistent with the provisions of this Final Order.

24. If any provision of this Final Order is hereafter modified, vacated or stayed by a subsequent order of this or any other court for any reason, such modification, vacatur or stay shall not affect the validity of (a) any liability incurred pursuant to this Final Order prior to the effective date of such modification, vacatur or stay, or (b) the validity, priority, extent or enforceability of any lien or security interest granted hereunder.

25. The Debtor shall, from time to time, execute and deliver to the DIP Lender any statement, assignment, instrument, document, agreement or other paper and take any other action that the DIP Lender may reasonably request to implement the provisions of this Final Order.

26. Other than as expressly permitted hereunder, and subject to the terms of the DIP Facility, no claim having a priority superior to or *pari passu* with those granted by this Order to the DIP Lender shall be granted or permitted by any order of this Court heretofore or hereafter entered in this case, while (i) any amounts remain outstanding under either the DIP Facility (or refinancing thereof), or (ii) the DIP Lender has any commitment under the DIP Facility. Except as expressly permitted by the DIP Facility, the Debtor will not, at any time during this case, grant mortgages, security interests or liens in the Collateral (or any portion thereof) to any other parties pursuant to section 364(d) of the Bankruptcy Code or otherwise.

27. The liens granted to the DIP Lender and the Adequate Protection Liens shall not be subject to challenge and shall attach and become valid, perfected, enforceable, non-avoidable and effective by operation of law as of the Petition Date without any further action by the Debtor or any other party and without the necessity of execution by the Debtor, 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. The granting of the liens on the Collateral and the Adequate Protection Collateral shall be free and clear of other liens, claims and encumbrances, except as provided in the DIP Facility and this Order and except in respect of validly existing duly perfected liens as of the Petition Date. If the DIP Lender requests that the Debtor execute and deliver to the DIP Lender financing statements, security agreements, collateral assignments, mortgages, or other instruments and documents considered by the DIP Lender, in accordance with the terms of the DIP Facility, to be reasonably necessary or desirable to further evidence the perfection of the liens granted hereunder, the Debtor is hereby authorized and directed to execute and deliver such financing statements, security agreements, mortgages, collateral assignments, instruments, and documents, and the DIP Lender is hereby authorized to file or record such documents, without seeking modification of the automatic stay under section 362 of the Bankruptcy Code, in which event all such documents shall be deemed to have been filed or recorded at the time and on the date of entry of this Final Order.

28. Without in any way limiting the foregoing paragraph 26, a certified copy of this Final Order may, at the discretion of the DIP Lender, be filed with or recorded in filing or recording offices in addition to or in lieu of such financing statements, mortgages, notices of lien or similar instruments, and all filing offices are hereby authorized to accept such certified copy of the Final Order for filing and recording.

29. Any provision of any lease or other license, contract or other agreement that requires (1) the consent or approval of one or more landlords or other parties or (2) the payment of any fees or obligations to any governmental entity, in order for the Debtor to pledge, grant, sell, assign, or otherwise transfer any such leasehold interest, or the proceeds thereof, or other post petition Collateral related thereto, is hereby deemed to be inconsistent with the applicable provisions of the Bankruptcy Code. Any such provision shall have no force and effect with respect to the transactions granting post petition liens

in such leasehold interest, or the proceeds of any assignment and/or sale thereof by any Debtor, in favor of the DIP Lender.

30. Notwithstanding anything to the contrary in the Motion, this Final Order, (a) with respect to the liens and security interests granted under this Order, for any real property lease with the Debtor that contains a provision that expressly prohibits a leasehold mortgage or lien thereon, such lien or security interest shall be limited to and shall attach solely to the proceeds of such real property lease; and (b) the provisions of the preceding paragraph 29 shall not (1) render any real property lease unable to be assumed and/or assigned by any Debtor (or by the DIP Lender, as the Debtor's true and lawful agent and attorney-in-fact pursuant to the DIP Facility), or (2) impair, limit or waive the ability or right of (A) the Debtor (or the DIP Lender, as the Debtor's true and lawful agent and attorney-in-fact pursuant to the DIP Facility), to assume and/or assign any real property lease or (B) any lessor to object to such relief on any other grounds, including but not limited to sections 365(b)(3) or 1123 of the Bankruptcy Code.

31. Nothing contained herein with regard to the Wind Down Budget or Reserve or otherwise is intended to constitute, nor should be construed as consent to, the allowance of any Professional Person's fees, costs or expenses by any party and shall not affect the right of the Debtor and DIP Lender, the Committee, the U.S. Trustee, or any other party-in-interest to object to the allowance and payment or any amounts incurred or requested. Further, the DIP Lender shall not be responsible for the direct payment or reimbursement of any fees or disbursements of any Professional Persons' fees, costs or expenses in connection with the Chapter 11 case or any successor case and, except as provided in the Budget and nothing in this Final Order or otherwise shall be construed to obligate the DIP Lender, in any way, to pay compensation to or to reimburse expenses of any of the Professional Persons' fees, costs or expenses, or to guarantee that the Debtor has sufficient funds to pay such compensation or reimbursement; provided, however, the foregoing shall not excuse the obligation of the DIP Lender to

permit the Debtor to borrow funds allocated to the Reserve in accordance with the terms of the DIP Budget.

32. Section 6.8 of the DIP Credit Agreement shall be modified to read as follows: “**DIP Lender Expenses.** Borrower shall immediately and without demand reimburse DIP Lender for all reasonable DIP Lender Expenses and Borrower hereby authorizes the payment of such DIP Lender Expenses without the need for further approval of the Bankruptcy Court or any other court having jurisdiction over the Chapter 11 Case and/or the Borrower. In the event of a dispute over whether any DIP Lender Expense is reasonable that cannot be resolved by the parties, such unresolved dispute shall be brought before and subject to the jurisdiction of this Court.”

33. Nothing in this Final Order constitutes a finding by this Court or an admission by the Debtor regarding the validity, priority or extent of any lien that the Pre-Petition Lender may claim in and to any property of the Debtor or the allowability of all or any portion of the Pre-Petition Obligations or any other claim(s) the Pre-Petition Lender may assert against the Debtor’s estate.

34. Other than as expressly provided herein, nothing herein shall be deemed a waiver by the Debtor, the Committee, the DIP Lender or the Pre-Petition Lender of any claim, right or remedy it or they and/or the bankruptcy estate may have.

35. This Final Order shall take effect and be fully enforceable immediately upon the Court’s execution hereof.

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Submitted by:
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Copy furnished to:

Brian K. Gart, Esq.

(Attorney Gart is directed to serve a conformed copy of this Order upon all interested parties, and to file a Certificate of Service with the Court).