

**THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

In re:

ISR GROUP, INCORPORATED,

Debtor.

**Case No. 14-11077-JLC
Chapter 11**

**DEBTOR'S MOTION FOR INTERIM AND FINAL ORDERS, PURSUANT
TO SECTIONS 105, 361, 362, 363, 364 AND 507 OF THE BANKRUPTCY
CODE, (1) APPROVING POSTPETITION FINANCING, (2) AUTHORIZING
USE OF CASH COLLATERAL, (3) GRANTING LIENS AND PROVIDING
SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS, (4) GRANTING
ADEQUATE PROTECTION, (5) MODIFYING AUTOMATIC STAY,
AND (6) SCHEDULING A FINAL HEARING**

ISR Group, Incorporated (the “Debtor”) hereby submits this motion (the “Motion”) for the entry of interim and final orders, pursuant to sections 105, 361, 363, 364 and 507 of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the “Bankruptcy Code”): (i) authorizing the Debtor to obtain postpetition financing; (ii) authorizing the use of cash collateral; (iii) granting liens and superpriority claims; (iv) granting adequate protection to the Lender;¹ (v) modifying the automatic stay; and (vi) scheduling a final hearing on this Motion to incur such financing on a permanent basis pursuant to Rules 4001(b) and (c) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). The facts and circumstances supporting this Motion are set forth in the concurrently filed Declaration of John Stuecheli in Support of Chapter 11 Petition and First Day Pleadings (the “First Day Declaration”). In further support of this Motion, the Debtor respectfully represents as follows:

I. JURISDICTION AND VENUE

¹ Capitalized terms used but not yet defined herein shall have the meanings ascribed to them below.

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and the Court may enter a final order consistent with Article III of the United States Constitution. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory and legal predicates for the relief sought herein are sections 105, 361, 362, 363 and 364 of the Bankruptcy Code and Bankruptcy Rule 4001(b) and (c).

II. BACKGROUND

A. General

2. On April 29, 2014 (the “**Petition Date**”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtor has also filed certain other motions and applications seeking certain “first day” relief.

3. The Debtor has continued in possession of its property and has continued to operate and maintain its business as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. No request has been made for the appointment of a trustee or examiner and no official committee has been established in this chapter 11 case.

5. Additional information about the Debtor’s business and the events leading up to the Petition Date can be found in the First Day Declaration, which is incorporated herein by reference.

B. Prepetition Debt Structure

6. The Debtor and its parent corporation, ISR Group Holdings, Inc. (“**ISR Holdings**”), entered into that certain Loan Agreement dated March 28, 2012 by the Debtor, ISR

Holdings², and PNC Bank, National Association (“PNC”) (as the same has heretofore been amended, supplemented, modified, extended, renewed, restated and/or replaced at any time prior to the Petition Date, the “Existing Credit Agreement,” a copy of which is attached hereto as Exhibit A).³ The Existing Credit Agreement provided for a \$22.5 million term loan and \$5 million line of credit. The obligations of the Debtor and ISR Holdings under the Existing Credit Agreement: (i) are secured by substantially all of their assets (the “Prepetition Collateral”); (ii) are evidenced by an Amended and Restated Term Note in the amount of the aggregate outstanding principal amount of each advance, together with accrued but unpaid interest on the principal amount of each such advance (the line of credit having been previously terminated by PNC); and (iii) mature on March 31, 2017 (the “Maturity Date”).

7. Prior to the Petition Date, PNC made loans, advances and provided other financial accommodations to the Debtor and ISR Holdings pursuant to the terms and conditions set forth in (1) the Existing Credit Agreement, and (2) all other agreements, documents and instruments executed and/or delivered with, to, or in favor of PNC, including, without limitation, ISDA Master Agreement (with associated schedule and confirmation), all security agreements, notes, guarantees, mortgages, Uniform Commercial Code financing statements and all other related agreements, documents and instruments executed and/or delivered in connection therewith or related thereto (all of the foregoing, together with the Existing Credit Agreement, as all of the same have heretofore been amended, supplemented, modified, extended, renewed, restated and/or replaced at any time prior to the Petition Date, collectively, the “Existing Credit Documents”).

² ISR Holdings’ primary asset was its ownership of the stock in the Debtor. ISR Holdings entered into a Pledge Agreement with PNC in connection with the execution of the Loan Agreement in which ISR Holdings pledged all its stock in the Debtor to PNC.

³ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Credit Agreement and the Interim Order, as applicable.

8. As of the Petition Date, the aggregate amount of all obligations owing by the Debtor and ISR Holdings to Lender under and in connection with the Existing Credit Documents was not less than not less than \$17,444,444.04, plus interest accrued and accruing thereon, together with all costs, fees, expenses (including attorneys' fees and legal expenses) and other charges accrued, accruing or chargeable with respect thereto (collectively, and as such term is more fully defined in the Amendment, the "**Prepetition Obligations**").

9. Prior to the Petition Date, certain Events of Default (as defined in the Existing Credit Documents) occurred, and PNC accelerated the Prepetition Obligations of the Debtor and ISR Holdings as a result.

10. By virtue of the issuance of the establishment of the Existing Credit Agreement, each of ISR Holdings and the Debtor is jointly and severally liable and obligated for the repayment of all obligations under the Existing Credit Agreement and substantially all of their respective assets constitute collateral therefor.

11. Pursuant to the Loan Sale Agreement (the "**Assignment**") dated as of April 22, 2014, by and among PNC and Lender, PNC assigned, sold and delegated all of its rights and obligations under the Existing Credit Documents to Lender. Since the execution of the Assignment, there have been no further advances under the Existing Credit Agreement.

C. Debtor's Need For Postpetition Financing and Use of the Cash Collateral

12. The Debtor is restarting its business operations and as a result, needs financing to pay its postpetition obligations, including employee wages, vendors providing postpetition goods and services, as well as the administrative expenses of the Debtor's Chapter 11 proceeding, including U.S. Trustee fees and professional fees and expenses, as well as any postpetition taxes or government fees. In addition, the Debtor's prior business operations require on-going compliance with certain Department of Defense regulations which mandate high-level,

sophisticated security systems to protect top secret information and technology in the Debtor's as a result of its work for various branches of the armed services.

13. As set forth above, the Prepetition Obligations are secured by prepetition liens on substantially all of the Debtor's and ISR Holdings' assets and as set forth more fully in the First Day Declaration, absent additional financing the Debtor does not have sufficient liquidity to restart its business operations or comply with applicable government regulations. In order to preserve and maximize the value of the Debtor's estate, the Debtor needs to take all necessary steps to be in a position to restart its business and to protect its current assets. Ultimately, the Debtor intends to file a plan of reorganization that provides creditors with their best chance of a recovery on their claims. As part of that process, the Debtor intends to market its assets for sale. However, while the Lender is willing to fund a sale process and various expenses required to maximize the value of the Debtor's assets, the Lender is not willing to provide additional funding outside of chapter 11, or on terms other than those set forth in this Motion and the Credit Documents, and no other sources of liquidity are available to the Debtor. Accordingly, the Debtor commenced this chapter 11 case on the Petition Date in order to obtain the financing necessary to restart its business operations, to implement an orderly sale process, and to ultimately confirm a plan of reorganization. To achieve those goals, the Debtor requests authority to enter into a secured debtor-in-possession financing facility (the "**DIP Facility**") with the Lender that would be established pursuant to the terms and conditions of: (i) the proposed interim order for this Motion attached hereto as Exhibit C (the "**Interim Order**"); (ii) the Existing Credit Agreement, as ratified and amended by the Debtor in Possession Financing Amendment and First Amendment to Loan Agreement (the "**Amendment**," a copy of which is

attached hereto as Exhibit B); and (iii) the other Existing Credit Documents (as defined herein), as ratified and amended by the Amendment.⁴

14. The proceeds of the DIP Facility will be used to fund certain necessary expenditures permitted under the Interim Order, the Credit Documents, and the budget to be provided at or prior to any hearing on this Motion (the “Budget”). Those expenses include complying with all applicable government regulations and preparing the Debtor to restart its business operations and to begin marketing its assets. Upon entry of an order granting the relief requested in this Motion on a final basis (a “Final Order”), the Debtor will continue to use additional funds under the DIP Facility to meet these obligations to comply with applicable government regulations and to take all necessary steps to maximize creditor recoveries.

III. THE DIP FACILITY

15. Pursuant to Bankruptcy Rule 4001, the Debtor sets forth the significant elements of the DIP Facility, as follows:⁵

<i>Entities with an Interest in the Cash Collateral</i>	Lender, as lender under the Existing Credit Documents
<i>Amount of DIP Facility See Amendment § 2(b) (definition of “Postpetition Commitment”)</i>	Interim maximum amount of \$500,000; and final maximum amount of \$1,000,000 (which may be increased to \$2,000,000 at the discretion of the Lender)
<i>DIP Facility Fee</i>	Debtor shall pay to Lender a debtor-in-possession financing facility fee, in the amount of \$30,000 (the “ DIP Facility Fee ”), on account of

⁴ The Existing Credit Agreement as ratified and amended by the Amendment is referred to herein as the “Credit Agreement”. The Interim Order, the Credit Agreement, and the other Existing Credit Documents (as ratified and amended by the Amendment) are referred to herein, collectively, as the “Credit Documents”.

⁵ The terms and conditions of the DIP Facility set forth in this Motion are intended solely for informational purposes to provide the Court and interested parties with a brief overview of the significant terms thereof and should only be relied upon as such. For a complete description of the terms and conditions of the DIP Facility, reference should be made to the Credit Documents, including the Interim Order. The summary herein is qualified in its entirety by reference to such documents and such order. Interested parties are strongly encouraged to read the Credit Documents. In the event there is a conflict or inconsistency between this Motion and the Credit Documents, the Credit Documents shall control in all respects.

See Amendment § 2(e)	the financing provided by the Lender to the Borrower. The DIP Facility Fee will be refunded to the Borrower upon the entry by the Court of the Final Order and such order is final and non-appealable.
Commitment Fee See Amendment § 2(e)	Debtor shall pay to Lender a commitment fee of 2.5% on the average daily amount of the unused amount of the Postpetition Commitment (as defined in the Amendment) during the period from and including the Petition Date to but excluding the Postpetition Termination Date (as defined in the Amendment).
Use of Proceeds See Amendment § 2(e); Interim Order, ¶ 1.2	<p>The Borrower shall apply the proceeds of the Postpetition Loan only to Budgeted Expenses. The proposed use of the proceeds of any Postpetition Loan must be for Budgeted Expenses in compliance with the Budget.</p> <p>Budgeted Expenses means expenses permitted to be paid by the Debtor for the purposes set forth in the Budget.</p> <p>Budget means the 10-week cash budget detailing the Borrower's anticipated cash receipts and expenditures from the week ending May 9, 2014, until August 1, 2014 as amended or supplemented from time to time, which budget (and any amendments thereto) shall be in form and substance acceptable to the Lender and shall be incorporated into the Financing Order and attached to the Amendment as <u>Exhibit D</u>. Changes to the Budget are subject to the prior written approval of the Lender in its sole and absolute discretion.</p>
Interest Rate See Amendment § 2(e)	LIBOR plus 12% or LIBOR plus 16% after a Postpetition Default (as defined in the Amendment)
Postpetition Lien Granting; Avoidance Actions See Interim Order ¶ 2.1	Pursuant to the Interim Order, to secure the prompt payment and performance of any and all Postpetition Obligations (and upon entry of a Final Order providing for such relief any and all Obligations, ⁶ including, without limitation, all Prepetition Obligations and Postpetition Obligations) of the Debtor to the Lender of whatever kind, nature or description, absolute or contingent, now existing or hereafter arising, pursuant to sections 364(c)(2), 364(c)(3) and 364(d) of the Bankruptcy Code, the Lender shall have and is granted, effective as of the Petition Date, continuing valid, binding, enforceable, non-avoidable and automatically and properly perfected postpetition security interests and liens, superior to all other liens, claims or security interests that any creditor of the Debtor's estate may have (but subject to certain claims entitled to priority, including the Permitted Liens and Claims, as and to the extent expressly provided in Paragraph 2.1.2 of the Interim Order), in and upon all of the Debtor's Prepetition Collateral and the DIP Collateral (as defined in the Amendment).

⁶ "Obligations" is defined in the Credit Agreement and includes the Prepetition Obligations and Postpetition Obligations.

<p><i>Superpriority Claim</i> See Interim Order, ¶ 2.2</p>	<p>Pursuant to the Interim Order, for all Postpetition Obligations authorized under the Interim Order (and, upon entry of a Final Order, for all Postpetition Obligations) now existing or hereafter arising pursuant to the Interim Order, the Credit Documents or otherwise, the Lender is granted an allowed superpriority administrative claim pursuant to section 364(c)(1) of the Bankruptcy Code, having priority in right of payment over any and all other obligations, liabilities and indebtedness of the Debtor, whether now in existence or hereafter incurred by the Debtor, and over any and all administrative expenses or priority claims of the kind specified in, or ordered pursuant to sections 105, 326, 328, 330, 331, 503(b), 506(c) (subject to entry of a Final Order), 507(a), 507(b), 364(c)(1), 546(c), 726 or 1114 of the Bankruptcy Code (the “Superpriority Claim”), <u>provided, however,</u> the Superpriority Claim shall be subject only to the Permitted Liens and Claims as and to the extent expressly set forth in the Interim Order.</p>
<p><i>Termination Date</i> (Term of DIP Facility) See Amendment § 2(b) (definition of “Postpetition Termination Date”)</p>	<p>The earliest of (a) the one hundredth (100th) day after the Petition Date, (b) the date the Debtor terminates the commitment of the Lender to make the Postpetition Loans, (c) the date the Lender terminates its commitment to make the Postpetition Loans upon the occurrence of a Postpetition Default, (d) the effective date of a confirmed plan of reorganization for the Debtor, (e) the date on which any agreement for the sale of substantially all of the Debtor’s assets closes, (f) the date on which the Bankruptcy Court approves the extension of any other credit facilities to the Debtor, or (g) the last termination date set forth in the Interim Financing Order, unless the Final Financing Order has been entered prior to such date, and in such event, then the last termination date set forth in the Final Financing Order.</p>
<p><i>Carve-Out Expenses</i> See Interim Order, ¶ 2.3.1</p>	<p>Pursuant to the Interim Order, upon the declaration by the Lender of the occurrence of an Event of Default, which is not waived or cured, the Lender’s liens, claims and security interests in the Collateral and the Superpriority Claim shall be subject only to the right of payment of the following expenses (collectively, the “Carve-Out Expenses”):</p> <ol style="list-style-type: none"> 1. statutory fees payable to the U.S. Trustee pursuant to 28 U.S.C. § 1930(a)(6); 2. fees payable to the Clerk of the Court; and 3. subject to the terms and conditions of the Interim Order, the unpaid, budgeted and outstanding reasonable fees and expenses actually incurred on or after the Petition Date through the occurrence of an Event of Default, and approved or permitted by an order of the Court pursuant to sections 326, 328, 330, or 331 of the Bankruptcy Code (collectively, the “Allowed Professional Fees”), by attorneys, accountants and other professionals retained by the Debtor (collectively, the “Debtor’s Professionals”), plus an aggregate sum

	not to exceed \$50,000 subsequent to the occurrence of an Event of Default (the “ Professional Fee Carve Out ”). The Professional Fee Carve Out shall also apply to the professionals employed by any Committee.
Conditions Precedent See Amendment § 3	Section 3 of the Amendment contains various conditions precedent, many or all of which are customary for debtor-in-possession credit facilities of this nature and some of which are customized to the facts and circumstances of this chapter 11 case. Among other things, pursuant to Section 3(l) and Section 3(m) of the Amendment, the Court shall have entered (i) the Interim Order within thirteen (13) days after the Petition Date and the Final Order no later than thirty (30) days after the entry of the Interim Order. In addition, pursuant to Section 3(a)(iii), the Debtor shall have executed a release in favor of PNC.
Covenants See Amendment § 2	Section 4 and Section 5 of the Credit Agreement (as amended by the Amendment) contain various affirmative and negative covenants, many or all of which are customary for debtor-in-possession credit facilities of this nature and some of which are customized to the facts and circumstances of this chapter 11 case. As set forth more fully therein, Section 4.15 of the Credit Agreement (as amended by the Amendment) of the Amendment requires compliance with the Budget.
Events of Default See Amendment § 2(b) (definition of “Postpetition Default”); Interim Order ¶ 3.1	The Amendment contains various “Events of Default,” many or all of which are customary for debtor-in-possession credit facilities of this nature. They include, among several others: The Debtor shall fail to pay any amount with respect to the Postpetition Loans when the same becomes due and payable; The Debtor shall fail to obtain the Final Order from the Bankruptcy Court within thirty (30) days of the entry of the Interim Financing Order; The Case shall be dismissed or converted to a case under Chapter 7 of the Bankruptcy Code; or a Chapter 11 trustee shall be appointed in the Case without the express written consent of the Lender; Any security interest, lien, claim or encumbrance, excluding the Liens permitted pursuant to <u>Section 5.2</u> thereof, shall be granted in any of the DIP Collateral which is <i>pari passu</i> with or senior to the claims of the Lender therein, including any surcharge of the DIP Collateral pursuant to Bankruptcy Code §506(c) or otherwise without the express written consent of the Lender; Any provision of the documents relating to the Postpetition Loans shall cease to be valid and binding on the Debtor, or the Debtor shall

	<p>so assert in any pleading filed in any court; or</p> <p>The Debtor shall for any reason fail to remit to the Lender all net proceeds from the sale, disposition, collection, or other realization upon the Collateral or the DIP Collateral for application in accordance with this Agreement;</p> <p>Actual performance shall at any time adversely deviate from the Budget by more than ten percent (10%) calculated on a line item by line item basis and measured weekly on a rolling 2 week basis from the Petition Date;</p> <p>The failure to confirm a Plan of Reorganization in the Case prior to the one hundred twentieth (120th) day following the Petition Date;</p> <p>The failure to obtain the Lender's consent to the Plan of Reorganization and any amendment thereto but only if a Plan of Reorganization in the Case is confirmed prior to the consummation of a sale of substantially all of the Debtor's assets;</p> <p>If a Plan of Reorganization in the Case is confirmed after the consummation of a sale of substantially all of the Debtor's assets to Lender, which Plan of Reorganization does not provide for a cash payment of \$300,000 to be used exclusively for payments to creditors with unsecured priority claims under Sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code who agree to work for Group on terms satisfactory to Lender.</p> <p>An Event of Default shall occur under the Credit Agreement, the First Amendment or any other Loan Document;</p> <p>A sale of substantially all of the Debtor's assets is not consummated (i) on or before the seventy-fifth day (75th) day following the Petition Date; (ii) in cash; and (iii) otherwise on terms and conditions reasonably acceptable to the Lender.</p> <p>In addition, Paragraph 3.1 of the Interim Order provides that the Debtor's failure to comply with the terms, conditions, or provisions of the Interim Order shall constitute an "Event of Default" under the Interim Order, and any "Event of Default" under the Credit Agreement or any of the Credit Documents shall also constitute an "Event of Default" under the Interim Order.</p>
<p>Section 506(c) waiver; marshalling waiver</p> <p>See Interim Order, ¶¶ 4.3 and 5.9</p>	Pursuant to the Interim Order, upon entry of a Final Order providing for such relief: (i) no costs or expenses of administration which have or may be incurred in this chapter 11 case shall be charged against the Lender, their respective claims or the Collateral pursuant to section 506(c) of the Bankruptcy Code without the prior written consent of the Lender, and no such consent shall be implied from any other

	<p>action, inaction or acquiescence by the Lender; and (ii) in no event shall the Lender be subject to the equitable doctrine of “marshalling” or any similar doctrine with respect to the Collateral.</p>
<p><i>Modification of Automatic Stay</i> See Interim Order, ¶ 3.4</p>	<p>Pursuant to the Interim Order, the automatic stay provisions of section 362 of the Bankruptcy Code and any other restriction imposed by an order of the Court or applicable law are modified and vacated without further notice, application or order of the Court to the extent necessary to permit the Lender to perform any act authorized or permitted under or by virtue of the Interim Order or the Credit Documents, including, without limitation, upon the occurrence of an Event of Default and after providing five (5) business days prior written notice to counsel for the Debtor, counsel for any Official Committee of Unsecured Creditors (a “Committee”), and the United States Trustee for the Western District of Tennessee (the “U.S. Trustee”), to take any action and exercise all rights and remedies provided to it by the Interim Order, the Credit Documents or applicable law as the Lender may deem appropriate in its sole discretion to, among other things, proceed against and realize upon the Collateral or any other assets or properties of the Debtor’s estate upon which the Lender has been or may hereafter be granted liens or security interests to obtain the full and indefeasible repayment of all Obligations.</p>
<p><i>Adequate Protection for the Benefit of the Lender</i> See Interim Order, ¶¶ 2.6.2-2.6.4</p>	<p>Pursuant to the Interim Order, as adequate protection for the diminution in value of its interests in the Prepetition Collateral on account of the Debtor’s use of such Prepetition Collateral, the imposition of the automatic stay and the subordination to the Carve-Out Expenses, the Lender is:</p> <ol style="list-style-type: none"> 1. granted pursuant to sections 361 and 363 of the Bankruptcy Code, valid, binding, enforceable and perfected replacement liens upon and security interests in all Collateral (the “Replacement Lien”). The Replacement Lien shall be junior and subordinate only to the Permitted Liens and Claims and the liens and security interests granted to the Lender in the Collateral securing the Postpetition Obligations and shall otherwise be senior to all other security interests in, liens on, or claims against any of the Collateral; and 2. granted as and to the extent provided by section 507(b) of the Bankruptcy Code an allowed superpriority administrative expense claim in this chapter 11 case and any conversion thereof to a case under chapter 7 to the extent of such diminution in value (the “Adequate Protection Superpriority Claim”), that shall be junior only to the Carve-Out Expenses and shall otherwise have priority over all administrative expense claims under sections 503(b), 506(c) (upon entry of a Final Order providing for such relief, as set forth in Paragraph 4.3 of the Interim Order), and 507(b) and unsecured claims against the Debtor and its estate now existing or hereafter arising, and

	<p>will attach to proceeds of Avoidance Actions upon the entry of a Final Order providing for such relief.</p> <p>In addition, the Debtor is authorized to provide adequate protection to the Lender in the form of: (i) payment of fees and other amounts due under the Existing Credit Documents, at the times specified therein, to the Lender; and (ii) ongoing payment of interest on the DIP Facility and the fees, costs and expenses, including, without limitation, reasonable legal and other professionals' fees and expenses, of the Lender as required under the Existing Credit Documents.</p>
<p><i>Releases</i></p> <p><i>See Amendment § 13; Interim Order, ¶ 4.5</i></p>	<p>Pursuant to the Amendment and subject to the terms of any Financing Order, upon the earlier of (i) the entry of the Final Order or (ii) the entry of an order extending the term of the Interim Order beyond thirty (30) days after the date of the Interim Order, and in consideration of the agreements of Lender contained therein and the making of any Loan by Lender, the Debtor, on behalf of itself and its respective successors, assigns, and other legal representatives, absolutely, unconditionally and irrevocably releases, remises and forever discharges Lender, and its respective successors and assigns, and Lender's agents, officers, directors, members, shareholders, affiliates, employees, attorneys and professionals (Lender and all such other parties being hereinafter referred to collectively as the "<u>Releasees</u>" and individually as a "<u>Releasee</u>"), of and from all demands, actions, causes of action, suits, covenants, contracts, controversies, agreements, promises, sums of money, accounts, bills, reckonings, damages and any and all other claims, counterclaims, defenses, rights of set-off, demands and liabilities whatsoever (individually, a "<u>Prepetition Released Claim</u>" and collectively, "<u>Prepetition Released Claims</u>") of every name and nature, known or unknown, suspected or unsuspected, both at law and in equity, which the Debtor or any of its successors, assigns, or other legal representatives may now or hereafter own, hold, have or claim to have against the Releasees or any of them for, upon, or by reason of any nature, cause or thing whatsoever which arises at any time on or prior to the day and date of this Agreement, including, without limitation, for or on account of, or in relation to, or in any way in connection with (i) the Credit Agreement, as amended and supplemented through the date of the First Amendment, (ii) the other Loan Documents, and (iii) actions or inactions as an equity owner of the Debtor; <u>provided</u>, that such release does not apply in cases of fraud, gross negligence or willful misconduct of any Releasee.</p>
<p><i>Post-financing Milestones</i></p> <p><i>See Amendment, § 4; Interim Order, ¶ 1.7</i></p>	<p>Pursuant to Section 4 of the Amendment and Paragraph 1.7 of the Interim Order:</p> <ol style="list-style-type: none"> 1. Not later than thirty (30) days after the Petition Date, an order in form and substance satisfactory to the Lender (the "<u>Bidding Procedures Order</u>") shall have been entered by the Court authorizing

	<p>and approving an auction and auction procedures for a sale of the Debtor's assets to the highest and best bidder, on terms and conditions reasonably acceptable to the Lender (a "<u>Sale</u>"), including, among other terms, selection of Lender as the stalking horse bidder and approval of Lender's credit bid as a valid and qualified bid.</p> <p>2. Not later than thirty (30) days after the date the Court enters the Bidding Procedures Order, an order in form and substance reasonably satisfactory to the Lender shall have been entered by the Court approving a Sale.</p>
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IV. AUTHORIZATION TO USE CASH COLLATERAL

16. Given the dormant state of the Debtor's business operations, however, the Debtor does not anticipate generating any significant amount of cash collateral within the meaning of Section 363(a) prior to late August or early September 2014. However, the Lender has agreed to allow the Debtor the use of any Cash Collateral it generates on the terms set forth in this Motion. Accordingly, the Interim Order (as well as the Final Order) both provide for use of Cash Collateral. As discussed below, to the extent it uses any Cash Collateral the Debtor will provide adequate protection to the Lender in the form of the Replacement Lien provided under the Interim Order and an administrative claim under section 507(b) of the Bankruptcy Code, which provides any secured creditor with an administrative claim to the extent the adequate protection provided by a debtor proves inadequate.

V. THE LENDER'S ADEQUATE PROTECTION

17. To the extent that its interests in the Prepetition Collateral constitute valid and perfected security interests and liens as of the Petition Date, the Lender is entitled to adequate protection of its interest pursuant to sections 361, 363(e) and 364(d)(1) of the Bankruptcy Code. Accordingly, the Debtor has agreed, subject to the Court's entry of the Interim Order, to provide the Lender with certain adequate protection (as set forth more fully in the Interim Order, the "Adequate Protection") on account of the Debtor's use of the Prepetition Collateral, the

imposition of the automatic stay and the subordination to the Carve-Out Expenses, and in return for the Lender's agreement to permit the priming of its prepetition liens by the postpetition liens described herein.

18. The Adequate Protection consists of, among other things, the following:

- A. the Lender is granted the Replacement Lien, which shall be junior and subordinate only to the Permitted Liens and Claims and the liens and security interests granted to the Lender in the Collateral securing the Postpetition Obligations and shall otherwise be senior to all other security interests in, liens on, or claims against any of the Collateral;
- B. the Lender is granted the Adequate Protection Superpriority Claim as and to the extent provided by Section 507(b) of the Bankruptcy Code that (i) shall be junior only to the Carve-Out Expenses and shall otherwise have priority over all administrative expense claims under sections 503(b), 506(c) (upon entry of a Final Order providing for such relief, as set forth in Paragraph 4.3 of the Interim Order), and 507(b) of the Bankruptcy Code and unsecured claims against the Debtor and its estate now existing or hereafter arising, and (ii) will attach to proceeds of Avoidance Actions upon the entry of a Final Order providing for such relief.
- C. the Debtor is authorized to provide adequate protection to the Lender in the form of (i) payment of fees and other amounts due under the Existing Credit Documents, at the times specified therein, to the Lender, and (ii) ongoing payment of interest on the DIP Facility and the fees, costs and expenses, including, without limitation, reasonable legal and other professionals' fees and expenses, of the Lender as required under the Existing Credit Documents.

VI. RELIEF REQUESTED

19. By this Motion, the Debtor requests entry of the Interim Order and a Final Order authorizing:

- A. in the case of the Interim Order, the Debtor to borrow up to an aggregate principal amount of \$500,000 or, in the case of a Final Order, the Debtor to borrow the full amount of the DIP Facility up to an aggregate principal amount of \$1 million;
- B. the Debtor to execute and enter into the Amendment and to perform such other and further acts as may be required by the Credit Documents in connection therewith;

- C. effective as of the Petition Date, the granting to the Lender of continuing valid, binding, enforceable, non-avoidable and automatically and properly perfected postpetition security interests and liens, superior to all other liens, claims or security interests that any creditor of the Debtor's estate may have, as and to the extent expressly provided in Paragraph 2.1.2 of the Interim Order, in and upon all of the Collateral, to secure the prompt payment and performance of any and all Postpetition Obligations (and upon entry of a Final Order providing for such relief any and all Obligations, including, without limitation, all Prepetition Obligations and Postpetition Obligations) of the Debtor to the Lender of whatever kind, nature or description, absolute or contingent, now existing or hereafter arising, pursuant to sections 364(c)(2), 364(c)(3) and 364(d) of the Bankruptcy Code (provided, however, the Lender's liens on and security interests in the Collateral shall be subject to certain claims entitled to priority, including the Permitted Liens and Claims;
- D. the granting of the Superpriority Claim in favor of the Lender for all Postpetition Obligations authorized under the Interim Order (and, upon entry of a Final Order, for all Postpetition Obligations) now existing or hereafter arising pursuant to the Interim Order, the Credit Documents or otherwise (provided, however, the Superpriority Claim shall be subject to the Permitted Liens and Claims as and to the extent expressly set forth in the Interim Order;
- E. the Debtor, pursuant to sections 361 and 363(c) and (e) of the Bankruptcy Code, to use the Collateral, including the Cash Collateral, to the extent Cash Collateral is available;
- F. the Debtor to provide the Adequate Protection in favor of the Lender, as adequate protection for the diminution in value of the Lender's interests in the Prepetition Collateral on account of the Debtor's use of such Prepetition Collateral, the imposition of the automatic stay and the subordination to the Carve-Out Expenses;
- G. pursuant to Bankruptcy Rule 4001, an interim hearing (the "Interim Hearing") to be held on this Motion to consider entry of the Interim Order;
- H. the scheduling of a final hearing (the "Final Hearing") to be held on this Motion to consider entry of a Final Order; and
- I. in the case of a Final Order, the 506(c) Waiver, and the Releases.

VII. BASIS FOR RELIEF

A. The Debtor Should Be Authorized to Enter into the DIP Facility

20. The Debtor proposes to obtain postpetition financing under the DIP Facility by providing security interests and other liens, as described herein and provided for in the Credit Documents, pursuant to Sections 364(c) and (d) of the Bankruptcy Code. The statutory requirement for obtaining postpetition credit under Section 364(c) is a finding, made after notice and hearing, that the debtor is “unable to obtain unsecured credit allowable under section 503(b)(1) of the [the Bankruptcy Code].” 11 U.S.C. § 364(c); *In re Ellingsen MacLean Oil Co., Inc.*, 834 F.2d 599, 301 (6th Cir. 1987). Thus, postpetition financing is appropriate under Section 364(c) when the debtor is unable to obtain unsecured credit allowable as an ordinary administrative claim. *See, e.g., In re Ames Dep’t Stores. Inc.*, 115 B.R. 34, 37-39 (Bankr. S.D.N.Y. 1990) (debtor must show that it has made a reasonable effort to seek other sources of financing under Sections 364(a) and (b) of the Bankruptcy Code); *In re Crouse Grp., Inc.*, 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987) (secured credit under Section 364(e)(2) of the Bankruptcy Code is authorized, after notice and hearing, upon showing that unsecured credit cannot be obtained).

21. In determining whether to approve a debtor’s request under Section 364, courts examine whether the relief requested is an appropriate exercise of the debtor’s business judgment. *In re AMR Corp.*, 485 B.R. 279, 284 (Bankr. S.D.N.Y. 2013); *Ames Dep’t Stores*, 115 B.R. at 40. If a debtor’s business judgment does not run afoul of the provisions of, and policies underlying, the Bankruptcy Code, courts grant a debtor considerable deference in acting in accordance therewith. *See, e.g., Bray v. Shenandoah Fed. Sav. & Loan Ass’n (In re Snowshoe Co.)*, 789 F.2d 1085, 1088 (4th Cir. 1986); *In re YL West 87th Holdings I LLC*, 423 B.R. 421, 441 (Bankr. S.D.N.Y. 2010); *Ames Dep’t Stores*, 115 B.R. at 40.

22. Courts have articulated a three-part test to determine whether a debtor is entitled to financing under Section 364(c) of the Bankruptcy Code. Specifically, courts look to whether:

- a. the debtor is unable to obtain unsecured credit under Section 364(b), *i.e.*, by allowing a lender only an administrative claim;
- b. the credit transaction is necessary to preserve the assets of the estate; and
- c. the terms of the transaction are fair, reasonable, and adequate, given the circumstances of the debtor-borrower and the proposed lender.

Ames Dep't Stores, 115 B.R. at 37-39; *In re Gen. Growth Props., Inc.*, 412 B.R. 122, 125-26 (Bankr. S.D.N.Y. 2009) (granting motion for postpetition financing upon finding that (a) “no comparable credit [was] available on more favorable terms”; (b) that the debtors needed postpetition financing “to preserve [their] assets and continue their operations”; and (c) that the terms and conditions of the DIP Documents had been negotiated in good faith).

23. Prior to the Petition Date, the Debtor endeavored to identify potential sources of postpetition financing. However, substantially all of the Debtor’s assets are subject to the liens asserted by the Lender and, because of the substantial amount of the Prepetition Obligations and the shutdown of the Debtor’s business operations in December 2013, the Debtor was unable to obtain the necessary financing as unsecured debt under Section 503(b)(1), as an administrative expense under Section 364(a) or (b), or as debt secured by liens junior to the liens of the Lender. The Debtor has not been able to obtain postpetition financing or other financial accommodations from any alternative prospective lender or group of lenders on more favorable terms or conditions than those set forth in this Motion.

24. Without postpetition financing, the Debtor will be unable to fulfill its obligation to comply with applicable government safety and security regulations or to take the steps necessary to protect and preserve its assets such as purchasing and maintaining insurance coverage for the Debtor’s assets. The Debtor’s failure to secure postpetition financing would put the Debtor’s assets at risk, impair the value of the Debtor’s estate, and significantly impair any

creditor recoveries. Conversely, by obtaining the financing proposed herein, the Debtor will be in a position to preserve, if not increase, the value of its assets for the benefit of all creditors.

25. The terms of the proposed DIP Facility were negotiated in good faith and are fair, reasonable, and adequate under the circumstances. The Debtor and its proposed bankruptcy counsel carefully evaluated the proposed financing offered by the Lender, and engaged in extensive arms' length negotiations with the Lender and its professionals regarding the proposed terms and conditions of the DIP Facility. Eventually, the Debtor, in its sound business judgment, agreed to the DIP Facility as the proposal best suited to the Debtor's needs.⁷ Accordingly, the terms of the DIP Facility are fair, reasonable and appropriate, and the Lender should be accorded the benefits of section 364(e) of the Bankruptcy Code in respect of the DIP Facility.

B. The Court Should Approve The Priming Liens Providing As Adequate Protection

26. If a debtor is unable to obtain credit under the provisions of Section 364(c) of the Bankruptcy Code, the debtor may obtain credit secured by a senior or equal lien on property of the estate that is already subject to a lien, commonly referred to as a "priming lien." 11 U.S.C. § 364(d). Section 364(d)(1) of the Bankruptcy Code, which governs the incurrence of postpetition debt secured by senior or "priming" liens, provides that the court may, after notice and a hearing, authorize a debtor to obtain credit or incur debt secured by a senior or equal lien on property of the estate that is subject to a lien, only if:

- (A) the trustee is unable to obtain credit otherwise; and
- (B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

⁷ To further illustrate that the terms are fair, reasonable and adequate, the proposed DIP Facility and the Interim Order provides that the security interests and administrative expense claims granted to the Lender are subject to the Carve-Out Expenses. In *In re Ames Dep't Stores*, 115 B.R. 34 (Bankr. S.D.N.Y 1990), the court found that such "carve-outs" are not only reasonable, but are necessary to ensure that official committees and the debtor's estate will be assured of the assistance of counsel. *Id.* at 40; *accord In re Gen. Growth Props., Inc.*, 412 B.R. at 125.

11 U.S.C. § 364(d); *Tully Construction co. v. Cannonsburg Environmental Associates, Ltd. (In re Cannonsburg Environmental Associates, Ltd.)*, 72 F.3d 1260, 1267 (6th Cir. 1996). A debtor has the burden of establishing that the holder of a lien to be subordinated, or whose cash collateral will be used, has adequate protection. *In re W & W Protection Agency, Inc.*, 200 B.R. 615, 623 (Bankr. S.D. Ohio 1996).

27. A “priming” lien may be granted under Section 364(d) with the consent of the secured creditors whose lien will be primed. See *In re El Paso Refinery, L P.*, 171 F.3d 249, 252 (5th Cir. 1999); *In re Outboard Marine Corp.*, 2002 WL 571661, at *1 (Bankr. N.D.Ill Jan. 9, 2002), aff'd, *Bank of Am., N.A. v. Moglia*, 330 F.3d 942 (7th Cir. 2003); *In re Sun Healthcare Grp., Inc.*, 245 B.R. 779, 782 n.5 (Bankr. D. Del. 2000). The Lender has consented to the priming of its liens in favor of the DIP Facility provided that the relief requested herein is granted, including the grant of the Adequate Protection provided for in the Interim Order. Accordingly, the Court should authorize the Debtor to grant priming liens to the Lender to secure the Debtor's obligations under the DIP Facility.

C. Interim Approval of the DIP Facility Should Be Granted

28. Bankruptcy Rules 4001(b) and (c)(2) provide that a final hearing on a motion to obtain credit pursuant to Section 364 of the Bankruptcy Code may not be commenced earlier than fifteen days after the service of such motion. Upon request, however, a bankruptcy court is empowered to conduct a preliminary expedited hearing on the motion and authorize the obtaining of credit to the extent necessary to avoid immediate and irreparable harm to the Debtor's estate. See Fed. R. Bankr. P. 4001(c)(2).

29. The Debtor requests that the Court authorize the Debtor, on an interim basis pending the Final Hearing, to borrow under the DIP Facility in an aggregate amount up to \$\$500,000. This relief will enable the Debtor to operate its business in a manner that will permit

it to preserve and maximize value, and avoid immediate and irreparable harm and prejudice to its estate and all parties in interest, pending the Final Hearing. Absent the Court's entry of the Interim Order, the Debtor could not comply with applicable government safety and security regulations. Without the current efforts to preserve the Debtor's assets and restart its business operations, creditors, including former employees with unpaid wage claims, would receive little or nothing from the Debtor's bankruptcy estate. As a result of approving the financing, the Debtor will be able to revive a dormant business and potentially be in a position to pay its unsecured creditors a substantial recovery under a plan of reorganization. In addition, reviving the Debtor as a viable going concern will benefit not only Hardin County (where the Debtor is located) but the entire region.

30. Therefore, the Debtor seeks approval of interim borrowing under the DIP Facility in the aggregate amount of up to \$500,000 on an interim basis and up to \$1 million on a final basis.

D. The Debtor Should Be Authorized To Use Cash Collateral

31. A trustee or debtor-in-possession may use, sell, or lease "cash collateral" if (i) each entity that has an interest in such collateral consents or (ii) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with Section 363(e).⁸ 11 U.S.C. § 363(c)(2); *In re Village Green I, GP*, 435 B.R. 525, 530 (Bankr. W.D. Tenn. 2010). In this case, the Lender has consented to the Debtor's use of Cash Collateral in return for the Adequate Protection measures proposed in this Motion. As adequate protection under Sections 361 and

⁸ Section 363(e) provides that:

Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used ... by the [debtor-in-possession], the court, with or without a hearing, shall prohibit or condition such use ... as is necessary to provide adequate protection of such interest.

363(e), the Debtor has agreed to provide the Lender with a Replacement Lien and the Adequate Protection Superpriority Claim under section 507(b) of the Bankruptcy Code to the extent adequate protection provided by the Debtor fails. Both the Replacement Lien and the Adequate Protection Superpriority Claim under 507(b) are standard mechanisms for providing a lender with adequate protection. 11 U.S.C. § 361; *In re Scopac*, 624 F.3d 274, 282 (5th Cir. 2010); *In re SK Foods, L.P.*, 2011 WL 2709648, at *2 n.8 (E.D. Cal. Jul. 11, 2011); *In re McTyre Grading & Pipe, Inc.*, 180 B.R. 308, 310 (Bankr. N.D. Ga. 1995). Therefore, the Debtor requests that the Court authorize it to use any and all Cash Collateral it generates during the Chapter 11 proceeding and to approve the Adequate Protection on the terms set forth in this Motion.

VIII. FINAL HEARING

32. The Debtor further respectfully requests that the Court set a date and time for the Final Hearing to consider the entry of a Final Order approving the relief sought in this Motion no later than thirty (30) days after the date of the Court's entry of the Interim Order (the "Interim Order Date").

IX. NOTICE

33. Notice of this Motion has been provided to: (i) the U.S. Trustee; (ii) the United States Securities and Exchange Commission; (iii) the Office of the United States Attorney for the Western District of Tennessee; (iv) the Internal Revenue Service; (v) the Debtor's twenty (20) largest unsecured creditors; and (vi) counsel to the Lender. Notice of this Motion and any order entered hereon will be served in accordance with applicable Local Rules. In light of the nature of the relief requested herein, the Debtor submits that no other or further notice is necessary.

X. NO PRIOR REQUEST

See 11 U.S.C. § 363(e).

34. The Debtor has not previously sought the relief requested herein from this or any other Court.

XII. CONCLUSION

For the reasons set forth above, the Debtor requests entry of the Interim Order and, after the Final Hearing, a Final Order, granting the relief requested herein and such other and further relief as is just and proper.

Dated: May 5, 2014

Respectfully submitted,

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EXHIBIT A

Existing Credit Agreement

EXHIBIT B

Amendment

EXHIBIT C
Interim Order

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of May, 2014, a copy of the foregoing electronically filed Motion was served on the parties listed below by first-class mail, postage prepaid, unless said party is a registered CM/ECF participant who has consented to electronic notice, and the Notice of Electronic Filing indicates that Notice was electronically mailed to said party:

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