IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
INSIGHTRA MEDICAL, INC., et al.[1]	:	Case No. 17-10179 (KG)
Debtors.	:	(Joint Administration Pending)

MOTION OF THE DEBTORS FOR INTERIM AND FINAL ORDERS PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 363, 364 AND 507 (I) AUTHORIZING THE DEBTORS TO (A) OBTAIN POSTPETITION FINANCING, AND (B) UTILIZE CASH COLLATERAL; (II) GRANTING ADEQUATE PROTECTION; (III) SCHEDULING A FINAL HEARING PURSUANT TO BANKRUPTCY RULES 4001(b) AND (c); AND (IV) GRANTING RELATED RELIEF

Insightra Medical, Inc. ("Insightra") and Modulare, Inc. ("Modulare" and collectively, the "Debtors"), hereby move the Court (the "Motion"), pursuant to sections 105, 361, 362, 363, 364(c), and 507 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (as amended, the "Bankruptcy Code"), Rules 2002, 4001, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 4001-2 of the Local Rules for the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), for entry of an interim order in the form attached hereto as Exhibit A (the "Interim Order") and, subsequently, entry of a final order (the "Final Order," together with the Interim Order, the "DIP Orders"), authorizing the Debtors to:

(i) obtain a secured post-petition financing facility (the "DIP Facility"), in an aggregate amount of up to $750,000 (plus interest, costs, fees and other expenses and amounts provided for in the DIP Term Sheet, as defined herein) pursuant to the terms and

[1] The Debtors in these chapter 11 cases are Insightra Medical, Inc. and Modulare, Inc. The last four digits of Insightra's taxpayer identification number are (8576). Modulare does not have a taxpayer identification number. The Debtors' business address is 9891 Irvine Center Drive, Suite 222, Irvine, CA 92618.

conditions set forth in that certain DIP Term Sheet attached as Exhibit B hereto (the "DIP Term Sheet"),[2] by and between the Debtors and GPB Life Science Holdings, LLC ("GPB," the "Prepetition Lender", or the "DIP Lender");

(ii) execute, deliver and perform such other and further acts as may be required in furtherance of the DIP Facility and the DIP Term Sheet;

(iii) draw on the DIP Facility, as needed on an interim basis up to $125,000 and as needed on a final basis up to $750,000, subject to the conditions precedent set forth in the DIP Term Sheet, and to use proceeds of the DIP Facility to pay for the Debtors' working capital needs and other administrative expenses necessary for the administration of these chapter 11 cases;

(iv) grant to the DIP Lender automatically perfected first-priority security interests in and liens on all of the Collateral (as defined below) to secure the DIP Facility and all obligations arising thereunder (collectively, the "DIP Obligations");

(v) modify the automatic stay imposed by section 362 of the Bankruptcy Code solely to the extent necessary to provide the DIP Lender with the relief necessary to implement and effectuate the terms and provisions of the DIP Term Sheet;

(vi) use the cash collateral pursuant to the agreed upon budget (the "Budget") with the DIP Lender;

(vii) grant adequate protection in the form of (a) the Replacement Liens (defined below) pursuant to sections 361 and 363(e) of the Bankruptcy Code and (b) superpriority claims under section 507(b) of the Bankruptcy Code;

[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the DIP Term Sheet.

(viii) pursuant to Bankruptcy Rule 4001, hold an interim hearing on this DIP Motion (the "Interim Hearing") before this Court to consider entry of the Interim Order; and

(ix) schedule a final hearing (the "Final Hearing") on or before February 21, 2017, to consider entry of the Final Order authorizing the balance of the credit available under the DIP Facility and any requested relief not granted under the Interim Order on a final basis, all as set forth in this Motion and to be set forth in the Final DIP Order.

JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the District of Delaware (the "Court") has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware,* dated February 29, 2012. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b).

2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory bases for the relief requested herein are sections 105(a), 361, 362, 363, 364 and 507 of the Bankruptcy Code.

BACKGROUND

A. The Case

3. On January 27, 2017 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Concurrently herewith, the Debtors have filed a motion with this Court requesting joint administration of the Debtors' chapter 11 cases for procedural purposes only. The Debtors continue to operate their businesses as debtors and debtors in possession pursuant to sections 1107(a)

and 1108 of the Bankruptcy Code. No party has requested the appointment of a trustee or examiner and no committee has been appointed or designated in these chapter 11 cases.

4. The factual background regarding the Debtors, including their current and historical business operations and the events precipitating their chapter 11 filings, is set forth in detail, in the *Declaration of Oliver Pokk in Support of Chapter 11 Petitions and First Day Pleadings of Insightra Medical, Inc. and Modulare, Inc.* (the "First Day Declaration"), filed concurrently herewith and fully incorporated herein by reference.

B. Description of Prepetition Debt

5. Insightra and GPB are parties to that certain 13% Senior Secured Promissory Note in the principal sum of $5,000,000 (the "Promissory Note"). Additionally, Insightra, GPB, Minos Medical, Inc. ("Minos") and Modulare are party to that certain Security Agreement, dated as of November 4, 2015 (the "Security Agreement"), to secure the prompt payment, performance and discharge in full of all of Insightra's obligations under the Promissory Note. Further, GPB and Insightra Medical India Private Limited, an LLC under Indian law ("Insightra India") are party to that certain Guaranty Agreement, dated November 4, 2015 (the "Guaranty Agreement") whereby Insightra India guaranteed all of Insightra's obligations arising under, among other things, the Promissory Note. Lastly, the Debtors and certain non-debtor affiliates are party to two forbearance agreements, dated October 4, 2016 and December 22, 2016, respectively, where GPB lent an additional $225,000 to the Debtors for operating expenses and professional fees (the "Forbearance Agreements" and together with the Promissory Note, Security Agreement, Guaranty Agreement and all related documents and amendments, the "Prepetition Loan Documents"). Collectively, the Prepetition Loan

Documents granted GPB as the Prepetition Lender a first priority lien (the "Prepetition Lien") in all tangible and intangible assets of the Debtors (the "Prepetition Collateral").

6. In addition to its obligations under the Promissory Note, Insightra is a party to an unsecured bridge loan, entered into in April 2016, with various equity holders pursuant to which Insightra issued those holders unsecured promissory notes in the aggregate principal amount of $1.5 million. The Debtors also have unsecured trade debt in the approximate amount of $2.8 million. Finally, as of the Petition Date, Insightra had outstanding: (i) 5,683,443 shares of Series A Preferred Stock, (ii) 10,000,000 shares of Series B Preferred Stock, (iii) 44,885,424 shares of Series C Preferred Stock, (iv) 33,352,593 shares of Series C-2 Preferred Stock, (v) 18,264,271 shares of common stock, and (vi) various warrants to purchase common stock and certain preferred stock.

C. The Debtors' Need for Financing

7. Without the proposed financing set forth in the DIP Term Sheet, the Debtors would not have sufficient funds to preserve the Debtors' assets and would be forced to relinquish their interests therein. The Debtors' ability to continue their operations depends on obtaining immediate access to the DIP Facility. The access to sufficient working capital to fund the Debtors' assets during these chapter 11 cases is vital for preserving and maintaining the value of the Debtors' assets and maximizing value for all. Failure to obtain the relief requested in this Motion will immediately and irreparably harm the Debtors, their estates, creditors and equity holders.

8. The DIP Facility is being offered by GPB in connection with the *Debtors' Joint Prepackaged Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* (the "Prepackaged Plan"), which is being filed contemporaneously herewith and which

contemplates the reorganization and survival of the Debtors as a post-emergence entity. As further described in the Disclosure Statement attendant to the Prepackaged Plan, the Debtors have searched for strategic alternatives in various forms since 2014. The Debtors believe that, with the assistance of their advisors (current and former), they exhausted the search for value maximizing transactions and that the Prepackaged Plan represents the only available path forward that doesn't culminate in a wholesale liquidation of the Debtors' business.

9. Given the unsuccessful prepetition search for alternatives, the Debtors do not believe they are able to obtain financing to fund and preserve their assets on terms more favorable than those offered by the DIP Lender under the DIP Facility and that they are (and have been) unable to obtain unsecured credit allowable under Section 503(b)(1) of the Bankruptcy Code as an administrative expense. The Debtors also do not believe they are likely to obtain secured credit under section 364(c) of the Bankruptcy Code on equal or more favorable terms than those offered by the DIP Lender under the DIP Facility. Indeed, even with respect to the DIP Lender (a party already in the Debtors' capital structure), the DIP Facility is available only with the Debtors' agreement to grant the DIP Lender (a) subject to the Carve-Out (as defined below), the DIP Liens (as defined below) and (b) the other protections set forth in the DIP Orders.

10. As a condition to the extension of credit under the DIP Facility, the DIP Lender and the Debtors have agreed that proceeds of any advance made under the DIP Facility shall be used exclusively in a manner consistent with an agreed upon Budget that may only be modified with the written consent of GPB. No portion of the proceeds of any advance under the DIP Facility shall be used, directly or indirectly, to make any

payment or prepayment that is prohibited under the DIP Term Sheet. A copy of the Budget is annexed to the proposed Interim Order attached hereto as Exhibit A.

D. Concise Statement Pursuant To Bankruptcy Rule 4001 and Local Rule 4001-2

11. The Debtors submit this concise statement listing certain material terms set forth in the DIP Term Sheet and the proposed Interim Order. Specifically, the Debtors believe that the following financing terms are required to be identified pursuant to Bankruptcy Rules 4001(b) and (c) and Local Rule 4001-2 and, as discussed in detail herein, are necessary and justified in the context of, and under the circumstances relating to, these chapter 11 cases.[3]

Provision	Summary Description
Borrower:	Insightra Medical, Inc. ("Insightra Medical"). (DIP Term Sheet, pg. 1; Interim Order, preamble).
Guarantor:	Modulare, Inc. ("Modulare" and together with Insightra Medical, the "Debtors"). (DIP Term Sheet, pg. 1; Interim Order, preamble).
DIP Lender:	GPB Life Science Holdings, LLC ("DIP Lender"). (DIP Term Sheet, pg. 1; Interim Order, preamble)
Proceeds and Use of Facility:	$750,000 ($125,000 on an interim basis) for the costs, including operating expenses and professional fees, of the Debtors' chapter 11 cases and prosecution and confirmation of the Prepackaged Plan. (DIP Term Sheet, pg 1; Interim Order, ¶ 3).
Interest Rates:	PIK Interim Rate: 13% per annum, paid in kind at Maturity Default Interest Rat: plus additional 4% per annum, paid-in-kind (DIP Term Sheet, pg. 1)
Maturity Date:	Earlier of (i) three (3) months of the date of the Interim order, (ii) the

[3] The terms and conditions set forth in the Motion are qualified in their entirety by reference to the provisions of the DIP Term Sheet, and the DIP Orders. The descriptions of the terms of the DIP Term Sheet, and the DIP Orders set forth in this Motion are provided for the convenience of the Court and the parties in interest. In the event of any inconsistency between the description of the terms of the DIP Term Sheet, and the DIP Orders contained in this Motion and the actual terms of the DIP Term Sheet, or DIP Orders, the terms of the DIP Term Sheet or the DIP Orders, as applicable, shall govern.

	effective date of a chapter 11 plan, (iii) the consummation of any sale of substantially all of the Debtors' assets, and (iv) the termination date pursuant to an event of default. (DIP Term Sheet, pg. 1; Interim Order ¶ 13).
Liens on Property of the Estate under 364(c) or (d):	All obligations under the DIP Facility shall be: (A) pursuant to section 364(c)(2) of the Bankruptcy Code, secured by a valid, enforceable and fully perfected first-priority lien in all of Insightra's assets, including the proceeds of any chapter 5 causes of action ultimately asserted by the Debtors' estate (subject to a final order) (collectively, the "Collateral"), subject to payment of the Carve-Out (defined below), to the extent that such Collateral is not subject to valid, perfected, and non-avoidable liens as of the commencement of the Chapter 11 Cases; and (B) pursuant to section 364(c)(3) of the Bankruptcy Code, secured by a perfected lien on all Collateral, subject only to (i) the payment of the Carve-Out (defined below), (ii) valid, perfected and non-avoidable liens and in favor of third parties and in existence as of the commencement of the Chapter 11 Cases, and (iii) valid and non-avoidable liens in favor of third parties and in existence at the time of such commencement that are subsequently perfected as permitted by section 546(b) of the Bankruptcy Code (together, the "DIP Liens"). (DIP Term Sheet, pg. 2; Interim Order, ¶ 10).
Adequate Protection:	GPB is both the Prepetition Lender and the DIP Lender. GPB, in its capacity as the Prepetition Lender, shall receive as adequate protection: (1) to the extent there is a diminution in the value of the cash collateral from and after the Petition Date, junior liens on and security interests in the Prepetition Collateral and the Collateral, and (ii) as and to the extent provided by section 507(b) of the Bankruptcy Code, an allowed superpriority administrative expense claim. (Interim Order, ¶ 8).
Validity of Prepetition Lien:	The Debtors have stipulated to the validity of the Prepetition Lien, provided however, that all other parties shall have until the later of (1) 75-days from the date of the Interim Order and (2) 60-days from the appointment of a creditors committee, to challenge the Prepetition Lien. (Interim Order, ¶¶ F(ii) and 30).

Waiver of Automatic Stay:	The automatic stay will be modified solely (i) to the extent necessary to authorize the Debtors to pay, and DIP Lender to retain and apply payments made, in accordance with the terms of the DIP Term Sheet and (ii) upon the occurrence of an Event of Default and following five (5) business days' notice to the Debtors and the U.S. Trustee of the occurrence of such Event of Default, to permit the DIP Lender to take any and all actions and remedies to proceed against, take possession of, protect and realize upon the Collateral and any other property of the estates of the Debtors upon which the DIP Lender has been granted liens and security interests to obtain repayment of the DIP Obligations; provided, however, that such notice by the DIP Lender shall not prejudice the rights of the Debtors to file a motion with the Court opposing the termination of the automatic stay on the sole basis that an Event of Default has not in fact occurred and is continuing; provided, further, that upon the filing of such motion the DIP Lender shall be stayed from taking any actions or remedies against the Collateral until the Court hears and disposes of such motion. (Interim Order, ¶ 21).
Milestones:	The DIP Lender's obligations under the DIP Facility shall be subject to the Debtors' compliance with the following milestones: • On or before January 31, 2017, an order approving the DIP Facility on an interim basis shall have been entered by the Bankruptcy Court; • On or before February 21, 2017, entry of an order approving the DIP Facility on a final basis; • On or before February 21, 2017, the Court shall have conditionally approved the Debtors' disclosure statement for its Prepackaged Plan; • On or before April 24, 2017, an order confirming the Plan shall have been entered; and • On or before April 26, 2017, the effective date of the Plan shall have occurred. (DIP Term Sheet, pg. 3; Interim Order ¶ 14).

Section 506(c); Section 552(b); Waivers; Marshalling:	Subject to entry of the Final Order, GPB as the Prepetition Lender and as the DIP Lender shall be entitled to (i) a waiver of the provisions of Section 506(c) of the Bankruptcy Code, and (ii) a waiver of any "equities of the case" claims under section 552(b) of the Bankruptcy Code. Also subject to entry of the Final Order, GPB shall not be subject to the equitable doctrine of "marshaling" or any other similar doctrine with respect to any of the Collateral. Without limiting the generality of the immediately preceding sentence, no party shall be entitled, directly or indirectly, to direct the exercise of remedies or seek (whether by order of the Court or otherwise) to marshal or otherwise control the disposition of the Collateral after an Event of Default under the DIP Term Sheet. (DIP Term Sheet, pg.4; Interim Order, ¶ 31).
Chapter 5 Causes of Actions	As noted above, the DIP Liens shall attach, subject to entry of the Final Order, the proceeds of any chapter 5 causes of action ultimately asserted by the Debtors' estates. (DIP Term Sheet, pg. 2; Interim Order, ¶ 10(a)).
Carve-Out	The DIP Liens, the Replacement Liens, the Adequate Protection Claims and the Prepetition Liens shall be subject and subordinate only to prior payment of the "Carve-Out", which consists of: (i) fees payable to the United States Trustee pursuant to 28 U.S.C. § 1930(a)(6) or to the Clerk of the Bankruptcy Court, (ii) professional fees payable to estate professionals, that are incurred or accrued prior to the date on which the DIP Lender provides written notice to the Debtors and any creditors' committee of the occurrence of an Event of Default under the DIP Term Sheet but solely if, as and to the extent such professional fees are or have been provided for in, and are consistent with, the Budget and are ultimately allowed by the Court pursuant to Section 330 of the Bankruptcy Code; and (iii) professional fees of estate professionals incurred after an Event of Default up to $50,000. (DIP Term Sheet, pg. 2; Interim Order, ¶ 12).

BASIS FOR RELIEF REQUESTED

A. Financing Under Section 364 of the Bankruptcy Code

12. The statutory requirement for obtaining postpetition credit under section 364(c) is a finding, made after notice and a hearing, that the debtor in possession is "unable to obtain unsecured credit allowable under Section 503(b)(1) of [the Bankruptcy Code] as an administrative expense." 11 U.S.C. § 364(c); see also In re Ames Dep't Stores, Inc., 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) (a 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); Sapir v. CPQ Colorchrome Corp. (In re Photo Promotion Assocs.), 89 B.R. 328, 333 (Bankr. S.D.N.Y. 1988) (Section 364(c) financing is appropriate when the debtor in possession is unable to obtain unsecured credit allowable as an ordinary administrative claim).

13. Courts have articulated a three-part test to determine whether a debtor may obtain financing under section 364(c) of the Bankruptcy Code:

i. The debtor is unable to obtain unsecure credit under section 364(b) (i.e., by granting a lender administrative expense priority);

ii. the credit transaction is necessary to preserve the assets of the estate; and

iii. the terms of the transaction are fair, reasonable and adequate, given the circumstances of the debtor-borrower and the proposed lender.

See In re Aqua Assocs., 123 B.R. 192, 195-96 (Bankr. E.D. Pa. 1991) (applying the above test and finding that "[o]btaining credit should be permitted not only because it is not available elsewhere, which could suggest the unsoundness of the basis for use of the funds generated by credit, but also because the credit acquired is of significant benefit to the debtor's estate and that the terms of the proposed loan are within the bounds of reason, irrespective of the inability of the debtor to obtain comparable credit elsewhere").

i. Credit Was Not Obtainable on Better Terms

14. In these circumstances, "[t]he statute imposes no duty to seek credit from every possible lender before concluding that such credit is unavailable." Bray v. Shenandoah Fed. Say. & Loan Assn. (In re Snowshoe Co.), 789 F.2d 1085, 1088 (4th Cir. 1986); see also In re 495 Cent. Park Ave. Corp., 136 B.R. 626, 630 (Bankr. S.D.N.Y. 1992). A debtor need only demonstrate "a good faith effort that credit was not available without" the protections of section 364(c). In re Snowshoe, 789 F.2d. at

1088. When there are few lenders likely, able, or willing to extend the necessary credit to the 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), affir. sub nom., Anchor Say. Bank FSB v. Sky Valley, Inc., 99 B.R. 117,120 n.4 (N.D. Ga. 1989).

15. The Debtors' board of directors firmly believes that no other lender would provide financing to the Debtors on more favorable terms. The Debtors have searched for strategic alternatives to improve its balance sheet for years. Starting in October 2015, the Debtors spent a significant amount of time and resources to raise additional funds to finance the Company's activities. Other than the $1.5 million unsecured note provided by certain equity holders in the spring of 2016, no third party was willing to make funds to available to the Debtors. Only the DIP Lender, who had already previously lent significant sums to the Debtors under the Prepetition Loan Documents, has expressed any interest to fund Insightra and its subsidiaries. The Debtors' decision to move forward with the DIP Facility, especially in light of prior fundraising efforts, was made pursuant to the Debtors' sound business judgment.

ii. The DIP Facility is Necessary to Preserve the Assets of the Debtors' Estates

16. As described above, postpetition credit is necessary for the administration of the chapter 11 cases and, therefore, will benefit all creditors, secured and unsecured, as well as other parties in interest. It is essential that the Debtors obtain the financing required to continue, among other things, the orderly operation and maintenance of the Debtors' business to preserve the going concern value while the Debtors prosecute the Prepackaged Plan. The DIP Facility will provide the Debtors' various stakeholders with

confidence in the Debtors' ability to emerge as a viable entity as contemplated by the Prepackaged Plan, which those same stakeholders (including general unsecured creditors) overwhelmingly voted to accept. The DIP Facility is necessary because it acts as a bridge to get the Debtors and their various stakeholders to the point of realizing the benefit of the Prepackaged Plan. Finally, the Debtors believe that the funds made available through the DIP Facility will be adequate to pay all administrative expenses due and payable during the postpetition period.

iii. The Terms of the DIP Facility Are Fair, Reasonable, and Appropriate and Represent the Sound Exercise of Business Judgment

17. As discussed above, the Debtors have concluded that the DIP Lender's proposal is the best alternative available for postpetition financing and that credit cannot be obtained from a third party on more favorable terms. The proposed terms of the DIP Facility are also fair, reasonable, and adequate under the circumstances. The interest rates and other covenants negotiated with the DIP Lender are reasonable, and the terms of the DIP Facility were highly negotiated in the context of the overall restructuring transactions contemplated by the Prepackaged Plan. As contemplated by the policies underlying the Bankruptcy Code, the purpose of the DIP Facility is to enable the Debtors to maximize the value of their estates while providing them with the resources necessary to formulate a confirmable plan. See generally In re First S. Say. Ass'n, 820 F.2d 700, 710-15 (5th Cir. 1987).

18. As security for the DIP Obligations, the Debtors propose to provide GPB (in its capacity as the DIP Lender) with the following security interests and liens (the "DIP Liens"): (1) pursuant to section 364(c)(2) of the Bankruptcy Code, a valid, enforceable and fully perfected first-priority lien in all of the Debtors' assets, including

the proceeds of any chapter 5 causes of action ultimately asserted by the Debtors' estates (the "Collateral"), subject to the Carve-Out (as defined below), to the extent that such Collateral is not already subject to valid, perfected, and non-avoidable liens as of the commencement of the Chapter 11 Cases; and (2) pursuant to section 364(c)(3) of the Bankruptcy Code, a valid, enforceable and fully perfected lien on all Collateral, subject only to (i) the Carve-Out (as defined below), (ii) valid, perfected and non-avoidable liens and in favor of third parties and in existence as of the commencement of these cases, or (iii) valid and non-avoidable liens in favor of third parties and in existence at the time of such commencement that are subsequently perfected as permitted by section 546(b) of the Bankruptcy Code.

19. Bankruptcy courts routinely defer to the debtor's business judgment on most business decisions, including the decision to borrow money. See Trans World Airlines, Inc. v. Travelers Int'l AG (In re Trans World Airlines, Inc.), 163 B.R. 964, 974 (Bankr. D. Del. 1994) (noting that approval of interim loan, receivables facility, and asset-based facility "reflect[ed] sound and prudent business judgment ... [was] reasonable under the circumstances and in the best interest of [the debtor] and its creditors"); In re After Six, Inc., 154 B.R. 876, 882 (Bankr. E.D. Pa. 1993) (debtor "is entitled to some free reign in fulfilling its perceived mission of ... keeping an ongoing business afloat"). Indeed, "[m]ore exacting scrutiny [of the debtor's business decisions] would slow the administration of the debtors' estate and increase its cost, interfere with the Bankruptcy Code's provision for private control of administration of the estate and threaten the court's ability to control a case impartially." Richmond Leasing Co. v. Capital Bank, N.A., *762* F.2d 1303,1311 (5th Cir. 1985); In re Lifeguard Indus., Inc., 37 B.R. 3, 17 (Bankr. S.D.

Ohio 1983) ("[B]usiness judgments should be left to the boardroom and not to this Court"); see also In re Curlew Valley Assocs., 14 B.R. 506, 511-14 (Bankr. D. Utah 1981) (holding that, in general, a bankruptcy court should defer to a debtor-in-possession's business judgment regarding the need for and proposed use of funds, unless such decision is arbitrary and capricious). Courts generally will not second-guess a debtor in possession's business decisions when those decisions involve "a business judgment made in good faith, upon a reasonable basis, and within the scope of his authority under the Code." Curlew Valley, 14 B.R. at 513-14 (footnotes omitted).

20. The Debtors submit that they have exercised sound and prudent business judgment in determining the merits and necessity of the DIP Facility in light of the Prepackaged Plan and have further satisfied the legal prerequisites for incurring debt. Accordingly, the Debtors should be granted the requested relief to borrow funds from the DIP Lender on a secured basis, pursuant to sections 364(c) of the Bankruptcy Code.

B. Use of Cash Collateral and Proposed Adequate Protection is Appropriate

21. Section 363(c)(2) and 363(e) of the Bankruptcy Code provide that a debtor is not authorized to use Cash Collateral without the consent of the pre-petition secured lender unless such lender is provided adequate protection of its interest in the Cash Collateral.

22. Here, GPB is both the Prepetition Lender and the DIP Lender. GPB (in its capacity as the Prepetition Lender) has consented to the Debtors' use of Cash Collateral pursuant to the agreed upon Budget annexed to the Interim Order. Further, as additional adequate protection, the Debtors propose to provide GPB (in its capacity as the Prepetition Lender) with (i) to the extent there is a diminution in the value of the cash

collateral from and after the Petition Date, junior liens on and security interests in the Prepetition Collateral and the Collateral (the "Replacement Liens"), and (ii) as and to the extent provided by section 507(b) of the Bankruptcy Code, an allowed superpriority administrative expense claim (together with the Replacement Liens, the "Adequate Protection Claim"). Accordingly, the Debtors have provided the DIP Lender with adequate protection and the Debtors' use of the DIP Lender's cash collateral satisfies sections 361 and 363(c)(2) of the Bankruptcy Code.

23. Section 361 of the Bankruptcy Code delineates the forms of adequate protection, which include periodic cash payments, additional liens, replacement liens and other forms of relief. 11 U.S.C. § 361. What constitutes adequate protection must be decided on a case-by-case basis. See MNBank Da11., N.A. v. O'Connor (In re O'Connor), 808 F.2d 1393, 1396-97 (10th Cir. 1987); Martin v. U.S. (In re Martin), 761 F.2d 472, 474 (8th Cir. 1985); In re Shaw Indus., Inc., 300 B.R. 861, 865 (Bankr. W.D. Pa. 2003). The focus of the requirement is to protect a secured creditor from diminution in the value of its interest in the particular collateral during the period of use. See In re Swedeland Dev. Grp., Inc., 16 F.3d 552, 564 (3d Cir. 1994) ("The whole purpose of adequate protection for a creditor is to insure that the creditor receives the value for which he bargained prebankruptcy.") (internal citations omitted). As noted above, the Debtors propose to provide the DIP Lender with the DIP Liens. Without access to the proposed DIP Financing and use of cash collateral, the Debtors' liquidity will quickly dry up and the Debtors will be forced to cease operations immediately, destroying any remaining value of these estates to the detriment of all creditors and rendering impossible the consummation of the

Prepackaged Plan. In contrast, the value of the interest of the DIP Lender in their collateral will be preserved, if not increased by the access to the DIP Facility to implement a restructuring. See generally In re Pine Lake Village Apartment, 19 B.R. 819, 826 (Bankr. S.D.N.Y 1982) (creditor had adequate protection where the debtor used cash collateral to maintain and preserve the value of the collateral).

24. The adequate protection offered to the DIP Lender described above will, taken together, sufficiently protect their interest in the Collateral. Accordingly, the adequate protection proposed here is fair and reasonable and sufficient to satisfy the requirements of sections 363(c)(2) and (e) of the Bankruptcy Code.

C. The DIP Facility Was Negotiated in Good Faith and Should Be Afforded the Protection of Section 364(e) of the Bankruptcy Code

25. Pursuant to section 364(e) of the Bankruptcy Code, any reversal or modification on appeal of an authorization to obtain credit or incur debt or a grant of priority or a lien under section 364 of the Bankruptcy Code shall not affect the validity of the debt incurred or priority of the lien granted as long as the entity that extended credit "extended such credit in good faith." *See* 11 U.S.C. § 364(e).

26. Courts generally hold that "good faith" in the context of postpetition financing means, consistent with the Uniform Commercial Code, honesty in fact in the conduct or transaction concerned. See Unsecured Creditors' Comm. v. First Nat'l Bank & Trust Co. (In re Ellingsen MacLean Oil Co.), 834 F.2d 599, 605 (6th Cir. 1987) (citing U.C.C. § 1-201(19)).

27. Here, the terms of the DIP Facility were negotiated in good faith and at arm's length by separate representatives of, and counsel for, the Debtors and the DIP Lender, and reflect the most advantageous terms (including availability, pricing, and fees)

available to the Debtors in light of their financial circumstances and need to move quickly in connection with the contemplated Prepackaged Plan. All of the DIP Obligations will be extended by the DIP Lender in good faith (as such term is used in section 364(e) of the Bankruptcy Code). No consideration is being provided to any party to, or guarantor of, obligations arising under the Term Sheet and in the Interim Order other than as set forth herein. Moreover, the DIP Facility has been extended in express reliance upon the protections offered by section 364(e) of the Bankruptcy Code and the DIP Lender is entitled to the full protection of section 364(e) of the Bankruptcy Code in the event that the Interim Order or any provision thereof is vacated, reversed, or modified on appeal or otherwise.

D. Approval of the DIP Facility on an Interim Basis Is Necessary to Prevent Immediate and Irreparable Harm

28. Bankruptcy Rule 4001(c)(2) governs the procedures for obtaining authorization to incur postpetition debt and provides, in relevant part:

> The court may commence a final hearing on a motion for authority to obtain credit no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a hearing before such 14 day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

FED. R. BANKR. P. 4001(C)(2).

29. Generally, courts find "immediate and irreparable harm" exists where loss of business threatens a debtor's ability to reorganize. See In re Ames Dep't Stores, Inc., 115 B.R. 34, 36 n.2 (Bankr. S.D.N.Y. 1990). Approval of a DIP facility on an interim basis under Rule 4001(c)(2) is left to the discretion of the court as informed by the facts of each case. See In re Pan Am Corp., 1992 WL 154200, at *6 (S.D.N.Y. June 18, 1992).

There is no limit to the amount of funding that the court can approve on an interim basis. *Id.* After the 14-day period, the request for financing is not limited to those amounts necessary to prevent the destruction of the debtor's business, and the debtor is entitled to borrow those amounts that it believes are prudent to the operation of its business. Ames Dept. Stores, 115 B.R. at 36.

30. Immediate and irreparable harm would result if the relief requested herein is not granted on an interim basis. The Debtors need to obtain immediate access to the DIP Facility for the necessary liquidity in order to implement and ensure the success the Debtors reorganization efforts. *See* First Day Declaration, ¶ 47. Providing the Debtors with immediate access to the DIP Facility is, therefore, necessary to avoid immediate and irreparable harm to the Debtors' estates.

31. Accordingly, the Debtors believe that, under the circumstances, entry of the Interim Order is necessary to prevent immediate and irreparable harm to their estates and, therefore, that the requirements of Bankruptcy Rule 4001(c)(2) are satisfied.

E. Modification of the Automatic Stay is Appropriate Under the Circumstances

32. The proposed Interim Order provides that the Automatic Stay will be lifted to the extent contemplated by the provisions of the DIP Agreement and the DIP Term Sheet, as described above. Stay modification provisions of this sort are ordinary and usual features of debtor in possession financing facilities and are reasonable under the present circumstances. Accordingly, the Court should modify the automatic stay to the extent contemplated under the DIP Agreement, the DIP Term Sheet and the proposed DIP Orders.

F. Request for a Final Hearing

33. 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 Order, to hold a hearing to consider entry of the Final 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 Order, which fixes the time and date for the filing of objections, if any, to the relief requested in the Final 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 Order under Bankruptcy Rule 4001(c)(2).

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

34. Given the nature of the relief requested herein, the Debtors respectfully request a waiver of the notice requirements under Bankruptcy Rule 6004(a), and the 14-day stay under Bankruptcy Rule 6004(h). As set forth above, the DIP Facility is essential to prevent irreparable damage to the Debtors' prospects for reorganization. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the 14-day stay imposed by Bankruptcy Rule 6004(h).

No Prior Request

35. No prior motion for the relief requested herein has been made to this or any other Court.

Notice

36. The Debtors will provide notice of this Motion to the following parties, or their counsel, if known: (a) Office of the United States Trustee; (b) the Debtors' twenty (20) largest unsecured creditors on a consolidated basis; (c) the prepetition and postpetition lenders; (d) any party that has requested notice pursuant to Bankruptcy Rule 2002; and (e) the Securities and Exchange Commission. As the Motion is seeking "first day" relief, within two business days of the hearing on the Motion, the Debtors will serve copies of the Motion and any order entered respecting the Motion as required by Local Rule 9013-1(m). The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, for the reasons set forth herein, the Debtors respectfully request that this Court enter an order, substantially in the form attached hereto as Exhibit A (i) authorizing the Debtors' entry into the DIP Facility, (ii) scheduling the Final Hearing; and (iii) granting such other and further relief as may be appropriate.

Dated: January 27, 2017
Wilmington, Delaware

BAYARD, P.A.

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