

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

Pegasus Rural Broadband, LLC, *et al.*,¹

Debtors.

Chapter 11

Case No. 11-11772 (PJW)

(Jointly Administered)

Hearing Date: March 9, 2012 at 9:30 a.m. (ET)

Objection Deadline: March 2, 2012 at 4:00 p.m. (ET)

DEBTORS' MOTION FOR ENTRY OF FINAL ORDER PURSUANT TO 11 U.S.C. §§ 105(a), 361, 362, 363, 364 AND 507 OF THE BANKRUPTCY CODE AND FED. R. BANKR. P. 2002, 4001 AND 9014 (I) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION FINANCING PURSUANT TO SECTION 364 OF THE BANKRUPTCY CODE, (II) AUTHORIZING USE OF CASH COLLATERAL PURSUANT TO SECTION 363 OF THE BANKRUPTCY CODE, (III) GRANTING LIENS AND SUPER-PRIORITY CLAIMS, AND (IV) GRANTING ADEQUATE PROTECTION TO THE PREPETITION SECURED PARTIES

The above-captioned debtors and debtors-in possession (collectively, “the Debtors”) hereby move (the “Motion”)² this Court for entry of a final order (respectively, the “Final Order”) authorizing the Debtors to, *inter alia*, (i) obtain post-petition financing pursuant to sections 105, 361, 362, 363, 364 and 507 of title 11 of the United States Code (the “Bankruptcy Code”) and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure in an amount not to exceed, in the aggregate, \$3,000,000 (the “Final DIP Facility”),³ by modifying the revolving credit agreement (the

¹ The Debtors are Xanadoo Spectrum, LLC, a Delaware limited liability company; Xanadoo Holdings, Inc., a Delaware corporation; Xanadoo, LLC, a Delaware limited liability company; Pegasus Guard Band, LLC, a Delaware limited liability company; and Pegasus Rural Broadband, LLC, a Delaware limited liability company. Xanadoo Holdings, Inc. is the sole member of Xanadoo, LLC, Pegasus Guard Band, LLC, and Pegasus Rural Broadband, LLC. Xanadoo Holdings, Inc. is a wholly owned subsidiary of Xanadoo Spectrum, LLC.

² Capitalized terms used but not defined in this Motion shall have the meaning set forth in the Final Order or, if not defined therein, the DIP Facility Agreement.

³ The DIP Facility approved under the First Interim DIP Order (defined below) provided for financing up to \$1,600,000. The DIP Facility under the Second Interim DIP Order (defined below) provided for an additional supplement of \$900,000, for a maximum total of \$2,500,000 in the aggregate. The DIP Facility under the Third Interim DIP Order (defined below) provided for an additional supplement of \$500,000, for a maximum total of \$3,000,000 in the aggregate. As the Debtors have taken great care in the operations of their business, the submitted

“DIP Facility Agreement or DIP Note”), by and among Debtors (each, individually a “Borrower” and, collectively, “Borrowers”) and Xanadoo Company, a Delaware corporation (“Lender”), (ii) use cash collateral pursuant to Section 363 of the Bankruptcy Code, and (iii) grant DIP Facility Liens and a DIP Facility Superior Claim to the Lender as security and adequate protection for the repayment of the DIP Obligations. In support of this Motion, the Debtors rely on the *Declaration of Howard Verlin in Support of Chapter 11 Petitions and First Day Orders and Related Relief* (the “Verlin Declaration”) filed on June 13, 2011 (Docket No. 14), and further respectfully state as follows:

BANKRUPTCY RULE 4001 CONCISE STATEMENT

1. Material provisions of the DIP Facility Agreement,⁴ attached hereto as **Exhibit A**, as modified by the proposed Final Order, are set forth in the following sections of the DIP Facility Agreement and/or the Final Order:⁵

(a) **Borrowers:** Borrowers are Pegasus Rural Broadband, LLC; Pegasus Guard Band, LLC; Xanadoo Spectrum, LLC; Xanadoo Holdings, Inc.; Xanadoo, LLC. *See* DIP Note at Section 19 and Recitals.

(b) **Lender:** Lender is Xanadoo Company. *See* DIP Note at Section 19 and Recitals.

(c) **Fees:** Revolving Loan Agreement with commitment and maximum amount of \$3,000,000, in the aggregate, available by advances on demand. Borrowers may borrow, repay and reborrow for the purposes of paying professional fees and Bankruptcy Court costs set forth in the Final Approved Budget, for all items other than professional fees and Bankruptcy Court costs, to borrow once every week; provided, further, that the Lender may in its sole discretion lend more often than once every week. DIP Note at Section 1. DIP Agreement at Section 1. Borrowers shall pay to the Lender a nonrefundable financing fee (the “Facility Fee”) equal to 4% of the Maximum Amount payable on the Maturity Date. *See* DIP Note at Section 8.

Final Approved Budget, attached hereto as **Exhibit B**, calls for no additional supplement to sustain operating and administrative expenses for an additional six months through and including August 31, 2012.

⁴ Unless otherwise noted, all references to the DIP Facility Agreement or DIP Note shall refer to the DIP Facility Agreement or DIP Note as modified by this Motion and the proposed Final Order.

⁵ The summaries and descriptions of the terms and conditions of the DIP Facility Agreement and the Final Order as set forth in this Motion are intended for informational purposes only to provide the Court and parties in interest with an overview of the significant terms and conditions contained therein and should only be relied upon for such purposes. The summaries and descriptions contained herein are qualified in their entirety by the DIP Facility Agreement and the Final Order. To the extent that a conflict exists between this Motion and the DIP Facility Agreement or Final Order, the DIP Facility Agreement or Final Order shall control in all respects.

(d): **Interest Rate:** The Interest Rate is Twelve and a half percent (12.5%). DIP Note at Section 19. Upon the occurrence and continuance of an event of default, the Interest Rate will increase by two percent (2%) per annum. *See Id.* at Section 4.

(e) **Maturity Date:** The Maturity Date is December 11, 2012 or upon termination by default if no third-party final DIP financing is procured. *See* DIP Note at Section 19.

(f) **Liens on Collateral:** The Final Order would grant Lender Postpetition Liens in the DIP Collateral and a DIP Superpriority Claim, junior and subordinate in all rights and respects to the Prepetition Indebtedness owed to the Prepetition Secured Parties (as those terms are defined in ¶ F of the Final DIP Order), by authorizing the Borrowers to use cash collateral and grant adequate protection to the Prepetition Senior Secured Lenders and (b) incur post-petition secured indebtedness, (ii) granting security interest and super-priority claims pursuant to 11 U.S.C. Sections 364(c) and (d), and (iii) granting adequate protection pursuant to U.S.C. 361 and 363. *See* Final Order at Section 8(a).

(g) **Carve-Out:** Professional fees would require a carve-out for the Final Period (defined below) in the amount of \$721,000 to satisfy the Final Approved Budget,⁶ comprised of the following: \$500,000 for Bankruptcy counsel;⁷ \$0 for DIP counsel;⁸ \$126,000 for financial advisors and investment bankers;⁹ \$0 for Committee professionals;¹⁰ \$75,000 for the Debtors' claims and noticing agent;¹¹; \$20,000 for U.S. Trustee fees; and \$0 for counsel to the Prepetition Lenders.¹² *See* DIP Note at Section 1 and Final Approved Budget.

⁶ The total budgeted carve-out for professional fees for the First Interim Period (defined below) through the Final Period (defined below) is \$3,108,500.

⁷ The total budgeted carve-out for bankruptcy counsel for the First Interim Period through the Final Period is \$1,665,000.

⁸ The total budgeted carve-out for DIP counsel for the First Interim Period through the Third Interim DIP was \$177,500, which amount is included in the aggregate carve-out amount in footnote 6, *supra*. No further amount is budgeted for the Final Period.

⁹ The total budgeted carve-out for financial advisors and investment bankers for the First Interim Period through the Final Period is \$736,000.

¹⁰ No committee has been appointed in these cases. The Debtors' first and second approved budgets had an aggregate carve-out of \$260,000 for the First Interim Period through the Second Interim Period, which amount is included in the aggregate carve-out amount in footnote 6, *supra*.

¹¹ The total aggregate carve-out for the Debtors' claims and noticing agent for the First Interim Period through the Final Period is \$170,000.

JURISDICTION

2. This 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). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

3. On June 10, 2011 (the “Petition Date”), the Debtors filed voluntary petitions for relief under the Bankruptcy Code. The Debtors have continued in the management of their businesses and property as debtors-in-possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code.

4. No committee or trustee has been appointed in these cases.

5. On July 6, 2011, this Court entered the *Order Authorizing the Employment and Retention of NHB Advisors, Inc. as Financial Advisors to the Debtors and Debtors-In-Possession Nunc Pro Tunc to June 10, 2011* (Docket No. 93). Accordingly, since the Petition Date, NHB Advisors, Inc. (“NHB”) has been acting as the Debtors’ financial advisor.

The First Interim DIP

6. On June 20, 2011, this Court entered the *Interim DIP Order (I) Authorizing Debtors to Obtain Postpetition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3) and 364(e) and (B) to Utilize Cash Collateral Pursuant to 11 U.S.C. § 363, (II) Granting Adequate Protection to Prepetition Secured Parties Pursuant to 11 U.S.C. 361, 362, 363 and 364, and (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(b) and (c)* (Docket No. 34) (the “First Interim DIP Order”).

7. Due to the emergency nature of the bankruptcy filings, the Debtors required immediate financing, and had little if any opportunity to seek outside financing. Accordingly,

¹² The approved budget for the Second Interim Period (defined below) contained a carve-out of \$80,000 for counsel to the Prepetition Lender, which amount is included in the aggregate carve-out amount in footnote 6, *supra*, and no

Xanadoo Company, the ultimate parent company of the Debtors provided the interim financing under the First Interim DIP Order. The First Interim DIP Order provided for debtor-in-possession financing up to \$1,600,000 for a period of 13 weeks.

8. Accordingly, pursuant to the First Interim DIP Order, the interim period for use of the DIP Facility, as that term is defined in the First Interim DIP Order, expired on September 9, 2011.

The Second Interim DIP

9. On September 9, 2011, this Court entered the *Second Interim Order (I) Authorizing the Debtors (A) to Obtain Postpetition Financing Pursuant to 11 U.S.C §§ 105(a), 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), and 364(e) and (B) to Utilize Cash Collateral Pursuant to Section 363 of the Bankruptcy Code, (II) Granting Adequate Protection to the Pre-Petition Secured Parties Pursuant to 11 U.S.C §§ 361, 362, 363, and 364, and (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(b) and (c)* (Docket No. 212) (the “Second Interim DIP Order”).

10. The Second Interim DIP Order provided for debtor-in-possession financing for a period of 13 weeks from September 10, 2011 to December 9, 2011 (the “Second Interim Period”). Pursuant to the Second Interim DIP Order, the interim period for use of the DIP Facility, as that term is defined in the Second Interim DIP Order, expires on December 9, 2011. The Second Interim DIP Order provided for an additional \$900,000 for the Second Interim DIP Period, for an aggregate amount of up to \$2,500,000.00 in financing.

The Third Interim DIP

11. On December 8, 2011, this Court entered the *Third Interim Order (I) Authorizing the Debtors (A) to Obtain Postpetition Financing Pursuant to 11 U.S.C §§ 105(a), 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), and 364(e) and (B) to Utilize Cash Collateral Pursuant to Section 363 of the Bankruptcy Code, (II) Granting Adequate Protection to the Pre-Petition Secured*

further amount is budgeted for the Final Period.

Parties Pursuant to 11 U.S.C §§ 361, 362, 363, and 364, and (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(b) and (c) (Docket No. 363) (the “Third Interim DIP Order”).

12. The Third Interim DIP Order provided for debtor-in-possession financing for a period of 13 weeks from December 10, 2011 to March 9, 2012 (the “Third Interim Period”). Pursuant to the Third Interim DIP Order, the interim period for use of the DIP Facility, as that term is defined in the Second Interim DIP Order, expires on March 9, 2012. The Third Interim DIP Order provided for an additional \$500,000 for the Second Interim DIP Period, for an aggregate amount of up to \$3,000,000.00 in financing

The Debtors’ Prepetition Lender

13. XHI entered into a Securities Purchase Agreement (the “SPA”) with Post Advisory Group, LLC (now, BPC, and formerly Beach Point Capital Management LP, as successor to Post Advisory Group, LLC) (collectively, “Beach Point” or the “Prepetition Lenders”) as Collateral Agent for a principal amount of \$30,000,000 in exchange for the issuance of 12.5% Senior Secured Promissory Notes with a maturity date of May 17, 2011 (the “Notes”) to various funds for which Beach Point acted as managing member, general partner, or authorized agent. Interest on the Notes is payable semi-annually and, at the option of XHI, may be paid in certain circumstances through the issuance of additional Notes. On May 17, 2007, as part of the financing, warrants to purchase common stock of XHI were issued to the purchasers of the Notes.

14. The warrants entitle the holders to acquire 17% of the stock of XHI at an aggregate exercise price of approximately \$19.7 million and are puttable by the holders, in certain circumstances, for a payment of \$7 million. Certain funds or accounts managed or advised by the collateral agent are the largest holder of shares of perpetual preferred stock of Xanadoo Company. Shares held by these funds and accounts were purchased in the open market.

15. The Debtors' obligations under the SPA are secured by liens on substantially all of the Debtor's assets and the equity interests in XHI and its subsidiaries, except for FCC licenses, which cannot be directly pledged.

16. The Notes bear interest at 12.5% per annum, payable semi-annually in arrears, or 14.5% if the Notes are in default. XHI is subject to certain financial and operational covenants measured on a quarterly and annual basis. Beginning March 31, 2008, XHI failed to comply with certain of these financial and financial statement related covenants. On November 25, 2008, an amendment to the SPA was entered into that provided for an additional \$1.1 million in Notes to be issued in return for the receipt of additional cash.

17. During the three year period in which the Notes were in default, XHI and its subsidiaries implemented many measures to preserve cash and reduce its expenditures including multiple layoffs, the shutting down of retail stores, and the renegotiation of certain payment obligations while engaged in discussions with the collateral agent to resolve the defaults and restructure the Notes.

18. Soon after the May 17, 2011 Notes maturity date, XHI received a Notice of Maturity.

19. On June 9, 2011, XHI received a letter captioned "Exercise of Remedies under Parent Pledge Agreement".

20. The Debtors filed for bankruptcy on June 10, 2011 when it felt sufficiently threatened by actions to be taken by Beach Point and realized that consensual restructuring discussions had become fruitless.

21. As of the Petition Date, holders of the Notes were entitled to receive a payment of approximately \$52 million representing repayment of notes and accrued interest and if the put right is deemed exercisable and is exercised, an additional \$7 million payment with respect to the XHI warrants.

The Marketing Efforts and Proposed Reorganization

22. On September 9, 2011, this Court entered an order approving Cantor Fitzgerald & Company (“Cantor Fitzgerald”) as the Debtors’ investment advisor (Docket No. 208).

23. Cantor Fitzgerald is currently marketing the Debtors’ assets to potential purchasers and investors as the Debtors explore solutions to exit from bankruptcy. Cantor Fitzgerald has solicited interest from a myriad of entities and has received various expressions of interest in the Debtors’ assets, as well as potential exit financing.

24. Pursuant to the Second Interim DIP Order, the Debtors provided Beach Point a detailed summary of the terms of any expressions of interest on December 2, 2011 with respect to certain potential exit solutions. Subsequently, the Debtors have received additional expressions of interest, which expressions the Debtors’ have proposed to be filed under seal. *See* Docket No. 466.

25. On February 7, 2012, the Debtors filed a Joint Plan of Reorganization (Docket No. 467) (the “Plan”). Pursuant to the Plan, the Debtors contemplate obtaining exit financing, or selling the Debtors 700 MHz assets, by a date certain and for an amount sufficient to pay in full, among other things, all allowed prepetition secured claims and all allowed general unsecured claims. Alternatively, if the Debtors are unable to obtain exit financing or sell the 700 MHz assets for an amount exceeding its obligations to its prepetition secured creditors by the date certain, the Plan provides that the Debtors’ 700 MHz assets be turned over to its prepetition secured creditors.

26. Specifically, the Plan provides that the Debtors will file a *Motion to Approve Debtors’ Disclosure Statement and Solicitation Procedures Order* by March 30, 2012, pursuant to the Exit Credit Facility or a sale of the 700 MHz Assets pursuant to a Qualified Bona Fide Third Party Offer, as those terms are defined in the Plan. In the Plan, the Debtors also propose setting a Confirmation Hearing 30 to 45 days following the entry of an Order Approving Debtors’ Disclosure Statement and Solicitation Procedures. If the Debtors fail to file a Motion to Approve Debtors’

Disclosure Statement and Solicitation Procedures Order by March 30, 2012, the Plan provides that the 700MHz Assets shall be auctioned as soon as practicable, but no later than June 1, 2012, with proceeds from such auction to be distributed in accordance with the distribution priorities set forth in the Bankruptcy Code.

The Debtors' Bankruptcy Financing Efforts

27. The Debtors do not have sufficient cash flow to fund their businesses as going concerns on a stand alone basis and, therefore require post-petition financing to achieve a successful exit from bankruptcy.

28. Since the Petition Date, the Debtors have focused on obtaining permanent financing to replace the Parent as the DIP Lender and, potentially, to satisfy any obligations owed to Beach Point.

29. Subsequent to the entry of the Second Interim DIP Order and prior to the filing of this Motion, the Debtors, through NHB, explored alternatives for potential debtor in possession financing from entities other than the Parent. During that period, NHB contacted over twenty potential lenders.

30. Despite these efforts, the Debtors have not found any lender, other than the Parent, willing to lend on terms junior to Beach Point. Nor were the Debtors able to find a lender willing to provide an interest rate better than that offered by the Parent.

31. Indeed, most of the potential lenders contacted did not indicate any interest in providing the Debtors with debtor-in-possession financing. One entity did indicate a the possibility of providing an interest rate of 11.5%, but priming Beach Point and only if it could be the plan proponent and a substantial equity position in any reorganization. Nevertheless, even that potential lender specifically cited the nature of the relationship between Beach Point and the Debtors as the basis for its unwillingness to consummate *any* debtor-in-possession financing transaction with the Debtors at this time.

32. Extension of the Debtors' current DIP Note and DIP Facility on a final basis and for approximately an additional six months will provide the Debtors with the extra time needed to solicit and execute their proposed plan of reorganization.

RELIEF REQUESTED

33. The Debtors make this Motion for an order¹³ on a final basis seeking:

- a. authorization for the Debtors to obtain secured postpetition financing (the "DIP Financing") of up to \$3,000,000 in the aggregate through the Final Period, pursuant to the terms and conditions set forth in the Final Order and the DIP Note, as modified by the Final Order;
- b. authorization for the Debtors to modify the DIP Note, as provided herein, and to perform such other acts as may be necessary or desirable in connection with the DIP Financing;
- c. authorization for the Debtors to grant to the DIP Lender first priority liens upon and security interests in substantially all of the Debtors' assets and secure all obligations owing under the DIP Note;
- d. authorization to grant allowed superpriority administrative expense claims to the DIP Lenders;
- e. authorization for the Debtors to use Cash Collateral;
- f. acknowledgment that the Prepetition Lender is adequately protected; and
- g. Granting the Debtors such other and further relief as the Court may deem just and proper.

34. The Debtors have attempted to find interim and final financing on the open market, but despite interest from certain potential lenders, no agreement has yet been reached. To the

¹³ To the extent any terms of this Motion and any subsequent order on this Motion conflict, the terms of the order shall govern.

extent the Debtors are unable to find postpetition financing on terms as good as or better than the DIP Facility Agreement, the Lender has committed to providing postpetition financing for the full additional six months as reflected in the budget. To that end, the DIP Note does not mature until a full year-and-a-half after the loan closing date. Under these circumstances, Debtors submit that the DIP Facility Agreement is fair and reasonable, and should be approved.

Extension of the DIP Facility On a Final Basis Should be Authorized

35. Approval of the extension of DIP Facility on a final basis will provide the Debtors with continued and ongoing access to borrowing availability to pay their current and ongoing operating expenses, including post-petition wages and salaries, as well as utility and critical vendor costs. Unless these expenses are paid, the Debtors will be forced to cease operations, which would likely (i) result in irreparable harm to their business, (ii) deplete going concern value, and (iii) jeopardize the Debtors' ability to maximize value. The credit provided under the DIP Facility Agreement and the use of Cash Collateral will enable the Debtors to continue to satisfy their vendors, service their customers, pay their employees, and operate their businesses in the ordinary course and in an orderly and reasonable manner to preserve and enhance the value of their estates for the benefit of all stakeholders. The availability of credit under the DIP Facility Agreement will provide confidence to the Debtors' creditors that will enable them and encourage them to continue their relationships with the Debtors. Finally, the implementation of the DIP Facility Agreement will be viewed favorably by the Debtors' vendors, employees, and customers, thereby promoting a successful resolution of these Chapter 11 cases. Accordingly, the timely approval of the relief requested herein is imperative.

36. Section 364(c) of the Bankruptcy Code provides, among other things, that if a debtor is unable to obtain unsecured credit allowable as an administrative expense under section 503(b)(1) of the Bankruptcy Code, the court may authorize the debtors to obtain credit or incur debt (a) with priority over any and all administrative expense, as specified in section 503(b) or 507(b) of

the Bankruptcy Code, (b) secured by a lien on property of the estate that is not otherwise subject to a lien, or (c) secured by a junior lien on property of the estate that is subject to a lien. 11 U.S.C. § 364. The Debtors propose to obtain the financing set forth in the DIP Facility Agreement by providing, *inter alia*, superpriority claims, security interests, and liens pursuant to section 364(c)(1), (2), (3) and section 364(d) of the Bankruptcy Code.

37. The Debtors' liquidity needs can be satisfied only if the Debtors are authorized to borrow under the DIP Facility and to use such proceeds to fund their operations. As discussed above, the Debtors have been unable to procure sufficient financing in the form of unsecured credit allowable under section 503(b)(1), as an administrative expense under section 364(a) or (b), or in exchange for the grant of a superpriority administrative expense claim pursuant to section 364(c)(1). Despite their best efforts, the Debtors have not been able to obtain post-petition financing or other financial accommodations from any alternative lender or group of lenders. The rate of interest and the default rate are equal to that of the prepetition financing. The note requires no origination fee and charges no service fees apart from a 4% facility fee that does not become payable until maturity or termination.

38. Bankruptcy courts grant a debtor considerable deference in acting in accordance with its business judgment. 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 Ames Dep't Stores, Inc., 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) ("cases consistently reflect that the court's discretion under section 364 is to be utilized on grounds that permit reasonable business judgment to be exercised so long as the financing agreement does not contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit parties in interest"); see also In re Funding Sys. Asset Mgmt Corp., 72 B.R. 87 (Bankr. W.D. Pa. 1987); In re Curlew Valley Assocs., 14 B.R. 506, 513-514 (Bankr. D. Utah 1981); In re Simasko Prod. Co., 47 B.R. 444, 449 (D. Colo. 1985).

39. Furthermore, section 364(d) does not require that a debtor seek alternative financing from every possible lender; rather, the debtor simply must demonstrate sufficient efforts to obtain financing without the need to grant a senior lien. See In re Snowshoe Co., 789 F.2d at 1088 (demonstrating that credit was unavailable absent the senior lien by establishment of unsuccessful contact with other financial institutions in the geographic area); Ames., 115 B.R. at 37-39 (debtor must show it has made a reasonable effort to seek other sources of financing); In re Aqua Assocs., 123 B.R. 192, 196 (Bankr. E.D. Pa. 1991) (debtor adequately establishing that some degree of priming of loan was necessary if debtor were to obtain funding).

40. Substantially all of the Debtors' assets are encumbered and the Debtors have been unable to procure the required funding absent granting the proposed superpriority claims and liens. Despite their inability to find a suitable alternative lender to the Lender, the DIP Facility Agreement contemplates the DIP Facility Agreement be supplanted while the Debtors continue their efforts to find a non-insider lender willing to provide funding to the Debtors for the pendency of these Chapter 11 bankruptcy cases.

41. The Debtors believe that the DIP Facility Agreement provides the best terms that could be obtained in this current market.

42. The Prepetition Lenders' claim as of the Petition Date is approximately \$52 million, representing repayment of notes and accrued interest and, if the put right is deemed exercisable and is exercised, an additional \$7 million payment with respect to the XHI Warrants. This claim is secured by first priority liens on substantially all of the Debtors' interests in property and any proceeds therefrom. As described in the Verlin Declaration, the Debtors' assets currently have a total market value in excess of \$200,000,000.00. As of the filing of this Motion, the Debtors estimate that the total current liabilities on the Prepetition Lender's claim is \$57,462,612, plus an additional \$7 million if the put right with respect to the XHI Warrants is deemed exercisable and is exercised.

43. The DIP Facility approved under the Third Interim DIP Order provided for financing up to \$3,000,000. The submitted Final Approved Budget calls for no additional supplement to sustain operating and administrative expenses for an additional six months from March 10, 2012 through and including August 31, 2012 (the “Final Period”), at terms no more onerous than those of the Prepetition Lenders’. Thus, even with the extension of the term of the DIP Facility, the Prepetition Lenders continue to be substantially oversecured and are not in need of additional assurances.

44. The Debtors submit that the circumstances of this case require the Debtors to obtain financing pursuant to section 364(c) and section 364(d) of the Bankruptcy Code and, accordingly, the DIP Facility Agreement reflects the exercise of their sound business judgment.

45. The terms and conditions of the DIP Facility Agreement are fair and reasonable, and were negotiated in good faith and at arm’s length with the advice of separate counsel for the Lender and the Debtors. Accordingly, the Lender and all obligations incurred under the DIP Facility Agreement should be accorded the benefits of section 364(e) of the Bankruptcy Code.

The Use of Cash Collateral Should Be Approved

46. Under section 363(c)(2) of the Bankruptcy Code, a debtor in possession may not use cash collateral unless “(a) each entity that has an interest in such cash collateral consents; or (b) the court, after notice and a hearing, authorizes such use ... in accordance with the provisions of this section.” 11 U.S.C. § 363(c)(2). The Debtors require the use of Cash Collateral to fund their day-to-day operations. Indeed, absent such relief, the Debtors’ business will be brought to an immediate halt, with damaging consequences for the Debtors and their estates and creditors. The interests of the Prepetition Lenders in the Cash Collateral will be protected by the adequate protection set forth above. Accordingly, the Debtors’ request to use Cash Collateral should be approved.

The Proposed Adequate Protection Should Be Authorized

47. Section 363(e) of the Bankruptcy Code provides that, “on request of an entity that has an interest in property being used ... or proposed to be used ... by [a 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.” 11 U.S.C. § 363(e). 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 In re O’Connor, 808 F.2d 1393, 1396 (10th Cir. 1987); In re Martin, 761 F.2d 472 (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. Group, Inc., 16 F.3d 552, 564 (3rd 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 citation omitted).

48. The enormous security and equity cushions that exist here based upon asset value demonstrate that the Prepetition Lender is adequately protected. See In re Continental Airlines, 146 B.R. 536, 539 (Del. Bankr. 1992) (“If the creditor is oversecured many courts hold that the equity cushion alone satisfies the adequate protection requirement of section 362(d)(1). See, e.g., In re Senior Care Properties, 137 Bankr. 527, 529 (Bankr. N.D. Fla. 1992); In re Lane, 108 Bankr. 6, 8 (Bankr. D. Mass. 1989)”; see also Shaw Indus. v. First Nat’l Bank (In re Shaw Indus.), 300 B.R. 861, 865-66 (W.D. Pa. 2003).

49. The Prepetition Lender is not being primed. The Debtors are, in essence, providing the Prepetition Lender with all of its rights under the SPA and its accompanying documents until the Debtors’ obligations to the Prepetition Lender are paid in full pursuant to the Plan. Additionally, the Debtors’ burn rate as reflected in the proposed budget is modest, even when

considering administrative expenses. Thus, operational losses do not threaten to negatively impact the Prepetition Lender's recovery through the Chapter 11 process. *Id.*

50. Accordingly, the replacement liens granted to the Prepetition Lender in the Final Order provide sufficient adequate protection. *See, e.g. In re WorldSpace, Inc.*, 2008 WL 8153638, at *12 (Bankr. D. Del. Nov. 10, 2008) (finding continuing valid, binding, enforceable and perfected postpetition security interests in and liens on the collateral, including rights under and proceeds of FCC licenses (to the extent permitted by law) to constitute adequate protection). The adequate protection proposed herein to protect the Prepetition Lenders' interest in the Prepetition Collateral is fair and reasonable and sufficient to satisfy the requirements of sections 363(c)(2) and (e) of the Bankruptcy Code.

The Automatic Stay Should Be Modified on a Limited Basis

51. The relief requested herein contemplates a modification of the automatic stay (to the extent applicable) to permit the Debtors to (i) grant the security interests, liens, and superpriority claims described above with respect to the Lender and the Prepetition Lenders, as the case may be, and to perform such acts as may be requested to assure the perfection and priority of such security interests and liens; (ii) permit the Lender to exercise, upon the occurrence of and during the continuance of an event of default, all rights and remedies under the DIP Facility Agreement; and (iii) implement the terms of the proposed DIP Orders.

52. Stay modifications of this kind are ordinary and standard features of post-petition debtor financing facilities and, in the Debtors' business judgment, are reasonable and fair under the present circumstances.

Final Approval Should Be Granted

53. The Debtors have a continuing need for cash to continue to operate. Without an extension of the DIP Facility, the Debtors will not have sufficient funds with which to operate their business on an ongoing basis. Absent authorization from the Court to obtain secured credit, as

requested, on a final basis, the Debtors will be immediately and irreparably harmed. The availability of loans under the DIP Facility will provide necessary assurance to the Debtors' vendors, employees, and customers of their ability to meet their obligations during the pendency of these chapter 11 cases. Failure to meet these obligations and to provide these assurances likely would have a long-term negative impact on the value of the Debtors' business, to the detriment of all parties in interest. Accordingly, the relief requested herein is critical to preserving and maintaining the going concern value of the Debtors.

54. Additionally, this Order will give the Debtors and other interested parties time to effectuate the Debtors' plan of reorganization.

Notice

55. No trustee, examiner or creditors' committee has been appointed in the Chapter 11 Cases. Notice of this Motion has been provided to: (a) the Office of the United States Trustee for the District of Delaware; (b) the Debtors' pre-petition and post-petition secured lenders; (c) the creditors holding the 30 largest unsecured claims against each of the Debtors' estates, as identified in the Debtors' Chapter 11 petitions; (d) all parties asserting a lien against the Prepetition Collateral; and (e) all parties that have timely filed appearances pursuant to Bankruptcy Rule 2002. In light of the relief requested, the Debtors respectfully submit that no further notice of this Motion is required.

[intentionally left blank]

WHEREFORE, the Debtors respectfully request entry of the Final DIP Order attached hereto as

Exhibit D¹⁴ granting the relief requested herein and such other and further relief as is just and proper.

Dated: February 14, 2012
Wilmington, DE

ELLIOTT GREENLEAF

/s/ Rafael X. Zahralddin-Aravena

Rafael X. Zahralddin-Aravena (DE No. 4166)

Shelley A. Kinsella (DE No. 4023)

Jonathan M. Stemerman (DE No. 4510)

1105 N. Market Street, Ste 1700

Wilmington, DE 19801

Telephone: (302) 384-9400

Facsimile: (302) 384-9399

Email: rxza@elliottgreenleaf.com

Email: sak@elliottgreenleaf.com

Email: jms@elliottgreenleaf.com

Counsel to Debtors and Debtors in Possession

¹⁴ A blackline of the Final DIP Order showing the changes from the Third Interim DIP Order is attached hereto as **Exhibit C**.