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*Proposed Attorneys for Yoga Smoga, Inc.,
Debtor in Possession*

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

YOGA SMOGA, INC.,

Debtor.

Chapter 11

Case No. 16- 13538 (MEW)

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**DEBTOR'S MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS
(I) AUTHORIZING DEBTOR TO OBTAIN POST-PETITION SECURED,
SUPERPRIORITY FINANCING PURSUANT TO
11 U.S.C. §§ 105, 361, 362, 363, AND 364 AND (II) SCHEDULING A
FINAL HEARING PURSUANT TO BANKRUPTCY RULE 4001(C)**

Yoga Smoga, Inc. (the "**Debtor**"), debtor and debtor-in-possession in the above-captioned chapter 11 case (the "**Chapter 11 Case**"), hereby submits this motion for the entry of an interim order (the "**Interim Order**") and a final order (the "**Final Order**," and together with the Interim Order, the "**Financing Orders**") and other related relief (the "**Motion**"). In support of this Motion, the Debtor respectfully represents as follows:

SUMMARY OF RELIEF REQUESTED

1. The Debtor has an immediate need for post-petition financing to continue its operations and to maintain its properties, while it implements its business plan, which is designed to maximize value for all of its stakeholders. Tapasya Bali ("**Tapasya**") and Rishi Bali

(collectively, the “**DIP Lender**”) and the Debtor have negotiated the terms of a financing arrangement that is set forth in the DIP Note (defined below) and for which this Motion seeks approval.

2. As set forth in greater detail below and in the DIP Note, the DIP Note provides that the DIP Lender will make an initial loan commitment of \$50,000 on an interim basis (the “**Interim Loan Commitment**”) and an aggregate loan commitment on a final basis of \$350,000 (the “**Final Loan Commitment**,” and together with the Interim Loan Commitment, the “**Loan Commitment**”). In consideration for the Loan Commitment and to secure advances made under it, the Debtor proposes to grant the DIP Lender a superpriority administrative expense claim and a first priority lien on all the Debtor’s assets except for assets that are subject to certain prepetition valid and perfected liens (set forth in the DIP Note as the “Permitted Encumbrances”), as to which the DIP Lender would receive a junior lien, and the Carve-Out (defined below).

3. The Loan Commitment is expected to provide the financing the Debtor requires for up to an approximately nine month period following the Petition Date (defined below) with a maturity date of September 30, 2017. The Debtor believes that confirmation of a chapter 11 plan within this timeframe is feasible. The Debtor further believes that entry of the Financing Orders is in the best interest of the Debtor, its estate and creditors.

RELIEF REQUESTED

4. By this Motion, the Debtor seeks entry of the Financing Orders, pursuant to Sections 105(a), 361, 362, 363 and 364(c) of Title 11, United States Code (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 of the United States Bankruptcy Court for the Southern District of New York (the “**Local Rules**”):

- (a) authorizing the Debtor to obtain secured postpetition superpriority financing (“**DIP Facility**”) on an interim basis pursuant to the terms and conditions of that certain “Debtor-in-Possession Promissory Note” dated as of December 28, 2016, by and between the Debtor and the DIP Lender attached hereto as **Exhibit A** (as amended, supplemented, restated or otherwise modified from time to time in accordance therewith, the “**DIP Note**”);¹
- (b) authorizing the Debtor to execute the DIP Note, and to perform such other acts as may be necessary or desirable in connection therewith;
- (c) granting to the DIP Lender first priority security interests in and liens on all of the DIP Collateral (as defined below), subject only to Permitted Encumbrances and the Carve-Out, to secure the DIP Facility and all obligations owing and outstanding thereunder and under the DIP Note, and this Interim Order and Final Order, as applicable (collectively, the “**DIP Loan Obligations**”);
- (d) granting allowed superpriority administrative expense claims to the DIP Lender for the DIP Loan Obligations;
- (e) scheduling a hearing (the “**Final Hearing**”), pursuant to Rule 4001(c)(2) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), to consider entry of a final order (the “**Final Order**”), *inter alia*, approving and authorizing the DIP Facility on a final basis.

5. In support of the Motion, the Debtor relies upon and fully incorporates by reference the Declaration of Tapasya Bali, the Debtor’s Chief Executive Officer Pursuant to Rule 1007-2 of the Local Bankruptcy Rules for the Southern District of New York and in Support of the Debtor’s Chapter 11 Petition and First Day Motions, dated December 21, 2016 (the “**Rule 1007 Declaration**”) [Dkt. No. 9] and the Declaration of Tapasya Bali in Support of Debtor’s Motion for Entry of Interim and Final Orders, Inter Alia, Authorizing and Approving Debtor in

¹ Unless otherwise defined, capitalized terms used herein shall have the meanings ascribed to them in the DIP Note.

Possession Financing being filed contemporaneously with the Motion (the “Tapasya Financing Declaration”).

JURISDICTION AND VENUE

6. This Court has jurisdiction over the subject matter of this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding under 28 U.S.C. §157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The predicates for relief requested herein are Sections 105, 361, 362, 363 and 364 of the Bankruptcy Code and Rules 2002, 4001 and 9014 of the Bankruptcy Rules.

BACKGROUND

7. On December 19, 2016 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.²

8. The Debtor continues to manage its property as a debtor in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

9. No trustee, examiner or official committee has been appointed in this Chapter 11 Case.³

PROPOSED DIP LOAN FACILITY

A. The Need for Postpetition DIP Financing.

10. As described in greater detail in the First Day Declaration, the Debtor intends to reorganize its operations during the course of the Chapter 11 Case (or otherwise reorganize its

² On November 14, 2016, an involuntary petition under Chapter 7 of the Bankruptcy Code was filed against the Debtor in this Court under case number 16-13159 (MEW) (the “Chapter 7 Case”). To date, no order for relief has been entered in the Chapter 7 Case.

³ Durga Capital LLC, a petitioning creditor in the Chapter 7 Case, had filed a motion for the appointment of an interim trustee, which was vigorously opposed by the Debtor. Durga Capital LLC has filed a motion to convert the Chapter 11 case to one under Chapter 7. A hearing on that motion is scheduled for January 13, 2016 at 10:00 a.m.

operations and debt under the terms of a confirmed plan). The Debtor intends to do so by paring down its operations to one retail store and on-line sales through its website and other e-commerce sales channels. Absent the DIP Facility, the Debtor may not have sufficient working capital to fund the Debtor's accounts payable as they come due, especially in the early stages of this case.

11. The financing provided under the DIP Note is intended to address two concerns. First, the financing is intended to address cash flow shortfalls that may arise from a mismatch in timing between sales revenue and payroll and rent due dates. The Debtor's on-going monthly payroll and rent obligations are expected to be approximately \$38,000 and \$16,780, respectively. The dates on which the Debtor must fund payroll and rent are inflexible. In contrast, sales revenue varies from date to date. Accordingly, although the Debtor believes that sales revenue will cover monthly operating costs (expected to be less than \$100,000 per month in the aggregate), sales revenues may not be available each month in time for the Debtor to fund payroll and other expenses as they come due.

12. Second, the proceeds from the DIP Note may also be needed in the early stages of this case to fund inventory production. The Debtor does not have inventory sufficient to meet customer demand. In that regard, the Debtor's inventory is almost six months old and the Debtor is low on popular sizes. The Debtor owns fabric (approximately \$800,000 in cost) that could be turned into inventory with a suggested retail price in excess of \$6 million. Historically, the Debtor's primary manufacturer has been willing to produce inventory for the Debtor in relatively small quantities, thus minimizing the Debtor's cash outlays. The Debtor believes this arrangement will continue, and, if that is the case, the Debtor's operating revenue should be sufficient to fund inventory production. However, January and February tend to be slow months

in the retail clothing industry. Accordingly, the Debtor may need to borrow under the DIP Facility to fund the conversion of its existing raw materials to valuable inventory. The Debtor believes that the sale of new inventory should be sufficient to fund operations and pay expenses as they come due.

13. On a more urgent basis, the Debtor believes it may need to borrow money under the DIP Facility in the next two weeks if sales revenue is insufficient to pay operating expenses as they come due. As set forth on the cash flow projection attached to the Tapasya Financing Declaration as Exhibit A, significant expenses, including rent, payroll, and sales tax will come due from December 30, 2016 through January 13, 2017. Those expenses are approximately \$67,000 in the aggregate. As explained in the Tapasya Financing Declaration, although operating revenue for the full month of January may be sufficient to pay such expenses, that operating revenue is not expected to be collected in full by the Debtor until the end of January.

14. This temporary cash shortfall is due, in part, to the requirement under California law for the Debtor to pay employees all wages and unpaid vacation days on the date that such employees are terminated. The Debtor is terminating many employees effective December 30, 2016. As a result, the Debtor will need to fund a partial payroll on December 30, 2016. Absent that requirement, the Debtor would not be required to fund payroll until its regularly scheduled payroll funding date of January 11, 2017 (with payroll to be paid on January 15, 2017). Accordingly, the Debtor is seeking authority to borrow up to \$50,000 on an interim basis pending approval of the DIP Facility on a final basis.

15. Given the Debtor's financial condition, the Debtor is unable to obtain unsecured credit allowable under Section 503(b)(1) of the Bankruptcy Code as an administrative expense.

As detailed more fully below, financing on a postpetition unsecured or solely on a superpriority basis is also not available.

16. The DIP Lender is willing to provide the DIP Facility pursuant to Section 364(c)(1) of the Bankruptcy Code, provided that the DIP Lender has priority over any and all administrative expenses of the kinds specified in Sections 503(b) and 507(b) of the Bankruptcy Code and such indebtedness and obligations are secured by first priority liens upon all of the Debtor's assets pursuant to Section 364(c) of the Bankruptcy Code, other than Avoidance Actions (defined below) and their proceeds, and subject only to Permitted Encumbrances and the Carve-Out (as described below). As set forth more fully in the Tapasya Financing Declaration, the Debtor is unable to obtain the postpetition financing that it needs from another lender on terms more favorable in the aggregate than those offered by the DIP Lender through the DIP Facility.

**B. The Economic Terms of the Postpetition Financing;
DIP Liens and Superpriority Claim**

17. Under the proposed DIP Facility, the DIP Lender will make cash advances as requested from time to time by the Debtor in a maximum principal amount not to exceed the Loan Commitment.

18. The proceeds of the DIP Facility will be used by the Debtor for: (i) general working capital purposes and general corporate purposes relating to postpetition operations; and (ii) the costs and expenses associated with this Chapter 11 Case, including the fees, costs, expenses and disbursements of professionals retained by the Debtor and any statutory committee appointed in this Chapter 11 Case (the "Committee"), and other bankruptcy-related costs as

allowed by the Court, including amounts payable pursuant to 28 U.S.C. § 1930(a)(6) and any fees payable to the Clerk of the Bankruptcy Court.

19. If approved by the Court, the proposed DIP Facility will operate in two stages. First, under the proposed Interim Order, the initial loans and advances of up to the Interim Loan Commitment of \$50,000 will be used to pay for the Debtor's working capital needs and operating requirements prior to the entry of the Final Order for the urgent purposes described above. Upon approval at the Final Hearing and subject to and upon entry of the Final Order, the Debtor will obtain loans on a final basis up to the final Loan Commitment of \$350,000. The advances will be made on a line of credit basis, meaning the Debtor may repay advances and reborrow within the limit of the Loan Commitment, and interest will be payable only for amounts outstanding from time to time.

20. Some significant terms of the DIP Facility and DIP Note include the following:

(a) DIP Facility Commitments: Interim Loan Commitment of \$50,000 and final Loan Commitment of \$350,000.

(b) Interest: Interest on the unpaid principal amount shall accrue at a rate equal to 9%. Following an Event of Default, the interest rate shall increase by 2%.

(c) Collateral for the DIP Facility: To secure the DIP Loan Obligations, the DIP Lender is granted, pursuant to Sections 364(c)(2) and 364(c)(3), and subject to the terms and conditions of the DIP Note, valid, enforceable and fully perfected, first priority liens on and senior security interests in and on (collectively, the "DIP Liens") all of the property, assets or interests in property or assets of the Debtor, of any kind or nature whatsoever, now existing or hereafter acquired or created, of the Debtor, and all Accounts, Inventory, goods, contract rights, instruments, documents, chattel paper, intellectual property, including without limitation, social media, web domains, patents, trademarks, copyrights and licenses therefor, general intangibles, payment intangibles, letters of credit, letter-of-credit rights, supporting obligations, machinery and equipment, real property, fixtures, leases, money, investment property, deposit accounts, all commercial tort claims and all causes of action arising under the Bankruptcy Code or otherwise and the proceeds thereof (excluding all avoidance actions under chapter 5 of the Bankruptcy Code ("Avoidance Actions") and the proceeds thereof) and all cash and non-cash proceeds, rents, products and profits of any of

the collateral described above (collectively, the “**DIP Collateral**”), subject only to (A) the Permitted Encumbrances, and (B) the Carve-Out.

(d) Superpriority Administrative Expense Claim: The DIP Lender is granted an allowed superpriority administrative expense claim (the “**DIP Superpriority Claim**”) pursuant to Section 364(c)(1) of the Bankruptcy Code in the Debtor’s Chapter 11 Case and in any successor case under the Bankruptcy Code (including any case under chapter 7 of the Bankruptcy Code, the “**Successor Case**”) for all DIP Loan Obligations, having priority over any and all other claims against the Debtor, now existing or hereafter arising, of any kind whatsoever, including, without limitation, all administrative expenses of the kinds specified in or arising or ordered under Sections 105(a), 326, 328, 330, 331, 503(a), 503(b), 506(c), 507(a), 507(b), 546(c), 546(d), 726, 1113, and 1114 and any other provision of the Bankruptcy Code or otherwise, whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment, which allowed DIP Superpriority Claim shall be payable from and have recourse to all pre- and postpetition property of the Debtor and all proceeds thereof, excluding only any proceeds or property recovered in connection with the pursuit of Avoidance Actions. The DIP Superpriority Claim shall be subject and subordinate in priority of payment only to payment of the Carve-Out. No other superpriority claims shall be granted or allowed in this Chapter 11 Case or in any Successor Case. The DIP Superpriority Claim shall be senior in all respects to any superpriority claims granted in this Chapter 11 Case including, without limitation, on account of any break-up fee or expense reimbursement that may be granted by the Court in connection with the sale of the Debtor’s assets, unless expressly agreed to in writing by the DIP Lender.

(e) Events of Default: Each of the following shall constitute a Default (an “**Event of Default**”) under the DIP Note: (A) the Debtor shall fail to make any payment of principal or interest, in respect of the Loan or any of the other Obligations when due and payable; (B) the Debtor shall fail or neglect to perform, keep or observe any other provision of the DIP Note and such failure shall remain uncured for a period of three (3) Business Days after the earlier of the date a senior officer of the Debtor becomes aware of such failure and the date written notice of such default shall have been given by the DIP Lender to the Debtor; (C) any representation or warranty in the DIP Note or in any written statement, report, financial statement or certificate made or delivered to the DIP Lender by the Debtor is untrue or incorrect in any material respect as of the date when made or deemed made; (D) the occurrence of any postpetition judgments, liabilities or events that remain unabated and, individually or in the aggregate, could reasonably be expected to have a Material Adverse Effect; (E) any provision of the DIP Note shall for any reason cease to be valid, binding and enforceable in accordance with its terms (or the Debtor shall challenge the enforceability of the DIP Note or shall assert in writing, or engage in any action or inaction based on any such assertion, that any provision of the DIP Note has ceased to be or otherwise is not valid, binding and enforceable in accordance with its terms), or any Lien created or

contemplated by the DIP Note or the Interim Order or Final Order (as applicable) shall cease to be a valid and perfected first priority Lien (except as otherwise permitted herein or therein) in any of the DIP Collateral purported to be covered thereby; (F) there shall be a material adverse change in the business, assets, operations or financial condition of the Debtor, taken as a whole, other than those customarily caused by the filing of a chapter 11 case; (G) the Interim Order Entry Date does not occur before January 6, 2017; (H) the Final Order Entry Date does not occur on or before January 27, 2017; (I) the Interim Order or the Final Order shall have been stayed, vacated, reversed, modified or amended without the DIP Lender's consent; (J) a Termination Event shall occur; (K) an order with respect to the Chapter 11 Case or any Successor Case shall have been entered by the Bankruptcy Court converting the Chapter 11 Case or such Successor Case to a case under chapter 7 of the Bankruptcy Code; (L) an order with respect to the Chapter 11 Case or any Successor Case shall have been entered by the Bankruptcy Court dismissing or suspending the Chapter 11 Case or such Successor Case, which does not contain a provision for termination of the Loan Commitment, and the payment in full in cash of all Obligations of the Debtor under the DIP Note upon entry thereof; (M) an order with respect to the Chapter 11 Case or any Successor Case shall have been entered by the Bankruptcy Court appointing, or the Debtor filing an application for an order with respect to the Chapter 11 Case seeking the appointment of, (i) a trustee under Section 1104 of the Bankruptcy Code or (ii) an examiner with enlarged powers relating to the operation of the business (powers beyond those set forth in Section 1106(a)(3) and (4) of the Bankruptcy Code) under Section 1106(b) of the Bankruptcy Code; and (N) any adversary proceeding and/or a contested matter shall have been commenced by any Person in the Chapter 11 Case or any Successor Case challenging under any applicable law the amount, extent, validity, binding effect, enforceability, perfection and/or priority of the security interests, Liens and/or claims of the DIP Lender in and to the DIP Collateral.

(f) Rights and Remedies on Default. If any Event of Default shall have occurred and be continuing, then the DIP Lender may, upon written notice to the Debtor: (i) terminate or reduce the Loan Commitment, whereupon such Loan Commitment shall immediately be so terminated or reduced, (ii) terminate the DIP Note and the DIP Facility contemplated thereby with respect to further Loans, (iii) declare all or any portion of the Obligations, including without limitation, all or any portion of any Loan to be forthwith due and payable and (iv) exercise any rights and remedies under the DIP Note, the Interim Order or the Final Order (as applicable) or at law or in equity.

(g) Relief from Automatic Stay. Subject to paragraph 11 of the Interim Order, the automatic stay provisions of Section 362 of the Bankruptcy Code are vacated and modified without the need for further Court order to: permit the DIP Lender, upon the occurrence of a Termination Event, and without any interference from the Debtor or any other party in interest but subject to seven (7) business days' prior written notice (which may be delivered by electronic mail) (the "**Remedies**

Notice Period”) to the Debtor, its counsel, counsel to any Creditors’ Committee and counsel to the U.S. Trustee, to exercise all rights and remedies provided for in the DIP Note, the Financing Orders or under other applicable bankruptcy and non-bankruptcy law including, without limitation, the right to (i) cease making loans under the DIP Facility and/or suspend or terminate the commitments under the DIP Note; (ii) declare all DIP Loan Obligations immediately due and payable; (iii) take any actions reasonably calculated to preserve or safeguard the DIP Collateral or to prepare the DIP Collateral for sale; (iv) foreclose or otherwise enforce its DIP Lien on any or all of the DIP Collateral; and (v) exercise any other default-related rights and remedies under the under the DIP Note or the Financing Orders.

(h) **Prepayments and Application of Proceeds**. Pursuant to paragraph 11 of the DIP Note, the Debtor has agreed to prepay the Loans immediately upon the receipt of the cash proceeds of any out of the ordinary course sale or other disposition of the DIP Collateral.

(i) **Credit Bid**. Pursuant to paragraph 11 of the DIP Note, the DIP Lender shall have the right to “credit bid” its post-petition secured claim during any sale of all or any portion of the Collateral, or any deposit in connection with such sale, including, without limitation, any sales occurring pursuant to Section 363 of the Bankruptcy Code or included as part of any liquidation plan subject to confirmation under Section 1129(b)(2)(A)(iii) of the Bankruptcy Code, and shall be deemed a “qualified bidder” with respect to such collateral for such purposes. The DIP Lender shall have the absolute right to assign, sell, or otherwise dispose of its respective right to credit bid in connection with any credit bid.

C. **Carve-Out**

21. Notwithstanding the granting of the DIP Liens and the DIP Superpriority Claims, the Carve-Out shall have priority in payment over the claims of the DIP Lender, such that all DIP Collateral proceeds shall be subject to the prior payment of the Carve-Out.

22. The Carve-Out consists of: (i) fees payable to the U.S. Trustee pursuant to 28 U.S.C. § 1930(a)(6) or to the Clerk of the Bankruptcy Court (the “**Case Administration Fees**”), plus (ii) unpaid professional fees and expenses (“**Professional Fees**”) payable to each legal or financial advisor retained by the Debtor and the Creditors’ Committee that are incurred or accrued prior to the date of the occurrence of a Termination Event (as defined below); plus (iii) all unpaid Professional Fees payable to each legal or financial advisor retained by the Debtor and

the Creditors' Committee that are incurred or accrued after the date of the occurrence of a Termination Event, but in all events in an amount not to exceed the following aggregate amount(s) \$75,000 for the Debtor's professionals and \$25,000 for the Creditors' Committee's professionals, and ultimately allowed by the Court pursuant to sections 330, 331 and 503 of the Bankruptcy Code or any order of the Court, plus (iv) \$5,000 (earmarked for use by a chapter 7 trustee).

D. Disclosures Pursuant to Bankruptcy Rule 4001(c) and Local Rule 4001-2

23. The provisions described in Bankruptcy Rule 4001(c)(1)(B)(i)-(xi) are set forth at the following sections of the Interim Order and/or DIP Note, as applicable:

- (a) Grant of priority or a lien on property of the estate: Interim Order ¶ 6.
- (b) Waiver or modification of the automatic stay: Interim Order ¶11.
- (c) Waiver of right to request authority to obtain certain other credit: Interim Order ¶ D (ii) and (iii) and 6 (b).
- (d) Waiver of applicability of nonbankruptcy law relating to the perfection of a lien on property of the estate: Interim Order ¶ 6 (c).
- (e) Waiver of any right under § 506(c): Interim Order ¶ D (iii), 7 and 12.

24. Moreover, Rule 4001-2(a) of the Local Bankruptcy Rules for the Southern District of New York (the "Local Rules") requires that certain additional provisions contained in a proposed financing be highlighted and that the Debtor provide justification for the inclusion of such highlighted provisions. To the extent Local Rule 4001-2(a) is applicable, the Debtor discloses the following:

- (a) Carve-Out: ¶ 9 of the Interim Order contains a reasonable carve-out from the lien rights granted to the DIP Lender, as also described in section 21 of this Motion.
- (b) Default provision relating to the making of a motion by a party in interest seeking relief: DIP Note ¶ M makes it an Event of Default if the Debtor (but no

other party in interest) files an application seeking the appointment of a trustee or examiner with expanded powers.

25. The foregoing provisions are appropriate under the circumstances. These provisions that enhance the DIP Lender's rights are typical for debtor in possession financings and are reasonably designed to protect the DIP Lender's bargain without tying the hands of the Debtor, creditors, the U.S. Trustee or the Court, including granting of a non-priming lien, waiver of the automatic stay subject to certain estate and creditor protections, inability of the Debtor to obtain liens that prime or otherwise dilute the DIP Lender's liens, automatic perfection and waiver of estate rights to surcharge the DIP Lender's liens. The Interim Order also provides for a reasonable Carve-Out for the professionals of the Debtor and a Creditors' Committee, in the amounts which reflect the Debtor's estimate of anticipated fees for each of the Debtor's and a potential Creditors' Committee's professionals. To the extent that Rule 4001-2(a) is implicated by this treatment, the Debtor submits that such estimates are reasonable based on the professionals' respective anticipated tasks and overall role in this Chapter 11 Case.

26. Local Rule 4001-2(b) requires disclosure in general terms of the efforts of the Debtor to obtain financing and the basis on which the Debtor determined that the proposed financing is on the best terms available, and material facts bearing on the issue of whether the extension of credit is being extended in good faith. Such disclosure is set forth in the Tapasya Financing Declaration at ¶ 9-11.

27. Therefore, the Debtor asserts that such provisions are justified and necessary in the context and circumstances of this case.

BASIS FOR RELIEF REQUESTED

28. Section 364 of the Bankruptcy Code distinguishes among (a) obtaining unsecured credit in the ordinary course of business, (b) obtaining unsecured credit out of the ordinary course of business, and (c) obtaining credit with specialized priority or security. If a debtor in possession cannot obtain postpetition credit on an unsecured basis, the court may authorize the debtor to obtain credit or incur debt, repayment of which is entitled to superpriority administrative expense status or is secured by a lien on unencumbered property, a junior lien on encumbered property, or a combination of these protections. 11 U.S.C. § 364(c).

A. The DIP Facility Should be Approved Under Section 364 of the Bankruptcy Code

29. 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, e.g., 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.)

30. 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. Sav. & 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) and 364(d). *See, e.g., 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), *aff' d sub nom, Anchor Sav. Bank FSB v. Sky Valley, Inc.*, 99 B.R. 117,120 n.4 (N.D. Ga. 1989).

31. The Debtor has concluded after appropriate analysis that the DIP Lender's proposal was the best and only viable alternative available to it for postpetition financing required in relation to Chapter 11 Case. Postpetition financing cannot realistically be procured on an unsecured basis. Negotiations with the DIP Lender have been and conducted on a good faith basis. The DIP Lender has informed the Debtor it is willing to extend postpetition financing only on the terms outlined above, including the additional protections of liens on the DIP Collateral subject only to Permitted Encumbrances and the Carve-Out.

32. Given the immediacy of the Debtor's financing needs , the Debtor was required to move quickly and in a targeted manner to ensure that the Debtor would be able to negotiate a financing facility to preserve and maximize value. There is no reason to believe that a different postpetition lender offering terms more favorable than the DIP Lender could have been located, and certainly not before all of the Debtor's limited resources were depleted.

33. As set forth in the Tapasya Financing Declaration and above, no alternative lender was willing to provide the necessary postpetition financing. The Debtor submits that its decision to proceed with the proposed DIP Facility with the DIP Lender was a reasonable exercise of business judgment.

B. The DIP Facility is Necessary to Preserve the Assets of the Debtor's Estate

34. The Debtor's need for immediate access to working capital is apparent. As described above and in the Tapasya Financing Declaration, the immediate access to credit is necessary to meet the day-to-day operating needs associated with the Debtor's operations while

it “down sizes” its business and otherwise reorganizes. In the absence of immediate access to cash and credit, the Debtor may not have cash sufficient to pay rent and make payroll when due.

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

35. In the Debtor’s business judgment, the terms of the DIP Facility were negotiated in good faith and are fair, reasonable, and adequate in that the terms do not unduly prejudice the powers and rights that the Bankruptcy Code confers for the benefit of all creditors, and they do not abridge the rights of other parties in interest. As contemplated by the policies underlying the Bankruptcy Code, the purpose of the DIP Facility is to enable the Debtor to maintain and maximize the value of its estate while formulating a confirmable plan under Chapter 11 of the Bankruptcy Code. *See generally, In re First S. Sav. Assn*, 820 F.2d 700, 710-15 (5th Cir. 1987).

36. Bankruptcy courts routinely defer to the debtor’s business judgment on most business decisions, including the decision to borrow money. *In re Lifeguard Indus., Inc.*, 37 B.R. 3, 17 (Banr. S.D. Ohio 1983) (Business judgments should be left to the board room and not to this Court.). *See also, In re Curlew Valley Assocs.*, 14 B.R. 506, 511-14 (Bankr. D. Utah 1981) (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).

37. The Debtor submits that it has exercised its sound business judgment in determining the merits and necessity of the DIP Facility and has aptly demonstrated that its terms

are fair and reasonable and are in the best interests of the Debtor's estate. Accordingly, the Debtor should be granted the requested relief to borrow funds from the DIP Lender on a secured and superpriority basis, pursuant to Sections 364(c) of the Bankruptcy Code.

D. Modification of the Automatic Stay is Warranted

38. As set forth more specifically in the proposed Interim Order, the proposed DIP Facility contemplates a modification of the automatic stay pursuant to Section 362 of the Bankruptcy Code to permit the DIP Lender, in its sole discretion, (a) to file financing statements or other similar documents to evidence their respective security interests under the DIP Facility, the Interim Order and the Final Order, (b) subject to a seven (7) days' notice requirement, to execute upon such security interests or exercise other remedies under the DIP Note following an Event of Default under, or other termination of, the DIP Facility, and (c) to take other actions required or permitted by the DIP Note.

E. The Debtor's Request for Interim Relief is Appropriate

39. Pending the Final Hearing, the Debtor requires immediate financing for, among other things, the funding of payroll obligations, maintenance of the Debtor's property, and other working capital needs. The Debtor's interim request represents the minimum amount of cash necessary to operate during the period prior to the Final Hearing. It is essential that the Debtor maintain stability and continue paying ordinary operating expenses postpetition to facilitate the sale process, and maximize the value of its assets.

40. Absent immediate financing for its continuing operations, the Debtor may have insufficient funding to pay expenses as they come due. Consequently, if the interim relief sought herein is not obtained, the Debtor's attempt to continue operations and ultimately realize the

maximum value for its assets will likely be immediately, if not irreparably, jeopardized, to the detriment of its estate, its creditors and other parties in interest.

41. Accordingly, the Debtor requests that, pending the Final Hearing, the Court conduct an interim hearing (the “**Interim Hearing**”) as soon as practicable to consider the Debtor’s request for authorization to obtain the DIP Facility in accordance with and pursuant to the terms and conditions contained in the DIP Note and the Interim Order.

42. Bankruptcy Rule 4001 (c) permits a court to approve a debtor’s request to incur postpetition financing during the 14-day period following the filing of a motion requesting such authorization to the extent “necessary to avoid immediate and irreparable harm to the estate pending a final hearing.” Fed. R. Bankr. P. 4001 (c)(2). In examining requests for interim relief under this rule, courts apply the same business judgment standard applicable to other business decisions. *See, e.g., In re Simasko Prod. Co.*, 47 B.R. 444, 449 (Bankr. D. Colo. 1985). After the 14-day period, a debtor is entitled to borrow those amounts that it believes prudent in the operation of its business. *See, e.g., Simasko*, 47 B.R. at 449. Under this standard, as described herein and in the Tapasya Financing Declaration, the Debtor’s request for entry of the Interim Order and Final Order, in the time periods and for the financing amounts requested herein, is appropriate.

NOTICE

43. As of the filing of this Motion, no trustee, examiner or creditors’ committee has been appointed in this Chapter 11 Case. Notice of this Motion will be given to (a) United States Trustee; (b) the holders of the Debtor’s twenty-five (25) largest unsecured claims; (c) all known holders of liens upon the Debtor’s assets; (d) the following taxing and regulatory authorities: (i) the United States Attorney for the Southern District of New York, (ii) the Attorney General of

the State of New York, (iii) the Internal Revenue Service, and (iv) the New York State Department of Taxation and Finance; and (e) all other parties requesting notice pursuant to Bankruptcy Rule 2002. The Debtor submits that no other notice need be given.

NO PRIOR APPLICATION

44. No previous application for the relief sought herein has been made to this or to any other court.

WHEREFORE, the Debtor respectfully request that the Court (a) enter an Interim Order substantially in the form annexed hereto as **Exhibit B** and a Final Order after an Interim Hearing and Final Hearing, respectively, (i) authorizing the Debtor to obtain the financing requested in this Motion, (ii) granting Liens and Superpriority Claims, and (iii) modifying the automatic stay to allow certain actions with respect to the Debtor's postpetition indebtedness, and (b) grant such other and further relief as the Court may deem just and proper.

Dated: Garden City, New York
December 28, 2016

MEYER, SUOZZI, ENGLISH & KLEIN, P.C.

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