

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
Carl's Patio, Inc., <u>et al.</u> , ¹	:	Case No. 13-10102 (KG)
Debtors.	:	(Joint Administration Requested)
	:	Re: D.I. 14, 34 + 37

FINAL ORDER (A) AUTHORIZING DEBTORS TO OBTAIN POSTPETITION FINANCING AND GRANT SECURITY INTERESTS AND SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS PURSUANT TO 11 U.S.C. §§ 105 AND 364; (B) MODIFYING THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362; AND (C) AUTHORIZING DEBTORS TO ENTER INTO AGREEMENTS WITH FIFTH THIRD BANK

Upon the motion (the "Motion"), dated January 21, 2013, of Carl's Patio Inc., Terrace 436, Inc., and Carl's Patio West, Inc. (each a "Debtor" and collectively, "Borrowers" or "Debtors"), in the above-captioned Chapter 11 cases (collectively, the "Cases"), pursuant to Sections 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), and 364(d) of Title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the "Bankruptcy Code") and Rules 2002, 4001(c), and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), seeking, among other things:

- (1) authorization for Borrowers to obtain postpetition loans, advances and other financial accommodations from Fifth Third Bank ("Lender") in accordance with all of the lending formulae, sublimits, terms and conditions set forth in the Existing Credit Agreement, as amended and ratified by the Ratification Agreement (each as defined below), and in accordance with this Order, secured by security interests

¹ The Debtors and the last four digits of their respective tax identification numbers are: Carls Patio, Inc. (XX-XXX3884), Carls Patio West, Inc. (XX-XXX5145), and Terrace 436, Inc. (XX-XXX1263). The address of the Debtors' corporate headquarters is 301 Camino Gardens Blvd., # 101, Boca Raton, Florida 33432.

in and liens upon all of the Collateral (as defined below) pursuant to Sections 364(c)(2), 364(c)(3), and 364(d) of the Bankruptcy Code;

(2) authorization for Debtors to enter into the Ratification and Amendment Agreement, dated January 18, 2013, by and among Debtors and Lender (the "**Ratification Agreement**," a copy of which is annexed hereto as Exhibit A and is incorporated herein), which ratifies, extends, adopts and amends the Existing Credit Agreement and the other Prepetition Loan Documents (as defined below);

(3) modification of the automatic stay to the extent hereinafter set forth;

(4) the grant to Lender of superpriority administrative claim status pursuant to Section 364(c)(1) of the Bankruptcy Code in respect of all Obligations (as defined in the Ratification Agreement);

(5) the grant to Lender of priming liens pursuant to Section 364(d) of the Bankruptcy Code in respect of the post-petition advances;

(6) the grant of adequate protection to Lender on account of its liens on the Pre-Petition Collateral in accordance with the terms of this Order; and

(7) the setting of a final hearing on the Motion.

The initial hearing on the Motion having been held by this Court on January 23, 2013 (the "**Interim Hearing**").

It appearing that due and appropriate notice of the Motion, the relief requested therein, and the Interim and Final Hearings (the "**Notice**") having been served by the Debtors in accordance with Rule 4001(c) on (i) counsel to Lender, (ii) the United States Trustee for the District of Delaware (the "**U.S. Trustee**"), (iii) the entities listed on the Consolidated List of Creditors Holding the 20 Largest Unsecured Claims filed by the Debtors on the Petition Date (the "**20 Largest Unsecured Creditors**"), (iv) all appropriate state taxing authorities, (v) all landlords, owners, and/or operators of premises at which any of the Debtors' inventory and/or equipment is located, and (vi)

certain other parties identified in the certificate of service filed with the Court, including, without limitation, all creditors who have filed or recorded prepetition liens or security interests against any of the Debtors' assets (collectively, the "**Noticed Parties**").

Upon the record of the Interim Hearing and the Final Hearing, including the Motion, and the filings and pleadings in the Cases, and good and sufficient cause appearing therefor;

BASED ON THE RECORD ESTABLISHED AT THE INTERIM AND FINAL HEARINGS, THE COURT HEREBY MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

A. Petition. On January 21, 2013 (the "**Petition Date**"), each Debtor filed a voluntary petition (the "**Petition**") under Chapter 11 of the Bankruptcy Code. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

B. Jurisdiction and Venue. The Court has jurisdiction of this proceeding and the parties and property affected hereby pursuant to 28 U.S.C. §§ 157(b) and 1334. The Motion is a "core" proceeding as defined in 28 U.S.C. §§ 157(b)(2)(A), (D) and (M). Venue of the Cases and the Motion in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

C. Notice. Under the circumstances, the Notice given by the Debtors of the Motion, the Interim Hearing, the Final Hearing, and the relief granted under this Order constitutes due and sufficient notice thereof and complies with Bankruptcy Rule 4001(c).

D. Debtors' Acknowledgments and Agreements. Subject to the rights of a Committee (as defined below) or other parties in interest as set forth in Sections 4.1 and 4.2 of this Order, the Debtors admit, stipulate, acknowledge and agree that:

(i) *Prepetition Loan Documents*. Prior to the commencement of the Cases, Lender made loans, advances and provided other financial accommodations

to Borrowers pursuant to the terms and conditions set forth in: (1) the Credit Agreement, dated as of October 25, 2011, by and among Lender and Debtors together with the First Amendment to Credit Agreement, dated as of April 26, 2012 (as the same has heretofore been amended, supplemented, modified, extended, renewed, restated and/or replaced at any time prior to the Petition Date, the “**Existing Credit Agreement**,” a copy of which, excluding exhibits and schedules was attached to the Motion as Exhibit B, and as ratified and amended by the Ratification Agreement, the “**DIP Credit Agreement**”) and (2) all other agreements, documents and instruments executed and/or delivered with, to, or in favor of Lender, including, without limitation, all security agreements, notes, guarantees, mortgages, Uniform Commercial Code financing statements and all other related agreements, documents and instruments executed and/or delivered in connection therewith or related thereto (all of the foregoing, together with the Existing Credit Agreement, as all of the same have heretofore been amended, supplemented, modified, extended, renewed, restated and/or replaced at any time prior to the Petition Date, collectively, the “**Prepetition Loan Documents**”). Copies of the operative Prepetition Loan Documents are on file with counsel to Lender and are available upon reasonable request.

(ii) *Pre-Petition Obligations Amount.* As of the Petition Date, the aggregate principle amount of all Obligations (as such term is defined in the Existing Credit Agreement) and other amounts and obligations owing by Debtors to Lender under and in connection with the Prepetition Loan Documents was not less than \$5,211,595.57, plus interest accrued and accruing thereon, together with all costs, fees, expenses (including attorneys’ fees and legal expenses) and other charges accrued, accruing or chargeable with respect thereto (collectively, and as such term is defined in the Ratification Agreement, the “**Pre-Petition Obligations**”). The Pre-Petition Obligations constitute allowed, legal, valid, binding, enforceable and non-avoidable obligations of Debtors, and are not subject to any offset, defense, counterclaim, avoidance,

recharacterization or subordination pursuant to the Bankruptcy Code or any other applicable law, and Debtors do not possess and shall not assert any claim, counterclaim, setoff or defense of any kind, nature or description which would in any way affect the validity, enforceability and non-avoidability of any of the Pre-Petition Obligations.

(iii) *Pre-Petition Collateral.* As of the Petition Date, the Pre-Petition Obligations were fully secured pursuant to the Prepetition Loan Documents by valid, perfected, enforceable and non-avoidable first priority security interests and liens granted by Debtors to Lender upon all of the Pre-Petition Collateral, subject only to the liens specifically permitted under Section 3.9 of the Existing Credit Agreement to the extent that such security interests, liens or encumbrances are (a) valid, perfected and non-avoidable security interests, liens or encumbrances existing as of the Petition Date, and (b) senior to and have not been or are not subject to being subordinated to Lender's liens on and security interests in the Pre-Petition Collateral or otherwise avoided, and, in each instance, only for so long as and to the extent that such encumbrances are and remain senior and outstanding (hereinafter referred to as the "**Permitted Encumbrances**"). The Debtors do not possess and will not assert any claim, counterclaim, setoff or defense of any kind, nature or description which would in any way affect the validity, enforceability and non-avoidability of any of Lender's liens, claims or security interests in the Pre-Petition Collateral.

(iv) *Proof of Claim.* The acknowledgment by Debtors of the Pre-Petition Obligations and the liens, rights, priorities and protections granted to or in favor of Lender as set forth herein and in the Prepetition Loan Documents shall be deemed a timely filed proof of claim on behalf of Lender in these Cases.

E. Findings Regarding the Postpetition Financing.

(i) *Postpetition Financing.* The Debtors have requested from Lender and Lender is willing to extend, certain loans, advances and other financial

accommodations on the terms and conditions set forth, in this Order and the Loan Documents (as defined below).

(ii) *Need for Postpetition Financing.* Absent the relief requested in the Motion, Debtors will not have sufficient available sources of working capital, including Cash Collateral, to operate their businesses as contemplated by the Budget (as defined below). The Debtors' ability to maintain business relationships with their vendors, suppliers and customers, to pay their employees, and to otherwise fund their operations is essential as the Debtors seek to maximize the value of the assets of the Estates (as defined below) for the benefit of all creditors of the Debtors. The ability of the Debtors to obtain sufficient working capital and liquidity through the proposed postpetition financing arrangements with Lender as set forth in this Order and the Loan Documents is vital to the preservation and maintenance of the value of the Debtors' assets. Accordingly, the Debtors have an immediate need to obtain the postpetition financing in order to, among other things, permit the orderly continuation of the operation of their businesses, minimize the disruption to their business operations as a result of the commencement of these cases, and preserve and maximize the value of the assets of the Debtors' bankruptcy estates (as defined under Section 541 of the Bankruptcy Code, the "Estates") in order to maximize the recovery to all creditors of the Estates.

(iii) *No Credit Available on More Favorable Terms.* The Debtors are unable to procure financing in the form of unsecured credit allowable under Section 503(b)(1) of the Bankruptcy Code, as an administrative expense under Section 364(a) or (b) of the Bankruptcy Code, or in exchange for the grant of an administrative expense priority pursuant to Section 364(c)(1) of the Bankruptcy Code, without the grant of liens on assets. The Debtors have been unable to procure the necessary financing on terms more favorable than the financing offered by Lender pursuant to the Loan Documents.

(iv) *No Credit Available Without Liens.* The Debtors are unable to procure financing without granting a superpriority lien on assets that are subject to a lien. The Debtors have been unable to procure the necessary financing on terms more favorable than the financing offered by Lender pursuant to the Lien Documents.

(v) *Budget.* The Debtors have prepared and delivered to Lender an initial Budget (as defined in the Ratification Agreement), which has been thoroughly reviewed by the Debtors and their management. The Debtors represent that the Budget is achievable in accordance with the terms of the Loan Documents. Lender is relying upon the Debtors' compliance with the Budget in accordance with Section 5.3 of the Ratification Agreement, the other Loan Documents and this Order in determining to enter into the postpetition financing arrangements provided for herein.

(vi) *Business Judgment and Good Faith Pursuant to Section 364(e).* The terms of the Loan Documents and this Order are fair, just and reasonable under the circumstances, are ordinary and appropriate for secured financing to debtors-in-possession, reflect the Debtors' exercise of their prudent business judgment consistent with their fiduciary duties, and are supported by reasonably equivalent value and fair consideration. The terms and conditions of the Loan Documents and this Order have been negotiated in good faith and at arms' length by and among the Debtors, on one hand, and Lender, on the other hand, with all parties being represented by counsel. Any credit extended under the terms of this Order shall be deemed to have been extended in good faith by Lender as that term is used in Section 364(e) of the Bankruptcy Code.

(vii) *Good Cause.* The relief requested in the Motion is necessary, essential and appropriate, and is in the best interest of and will benefit the Debtors, their creditors and their Estates, as its implementation will, among other things, provide the Debtors with the necessary liquidity to (a) minimize disruption to the Debtors' businesses and ongoing operations, (b) preserve and maximize the value of the Debtors' Estates for the benefit of all the Debtors' creditors, and (c) avoid immediate and

irreparable harm to the Debtors, their creditors, their businesses, their employees, and their assets.

(viii) *Entry*. No party appearing in the Cases has filed or made an objection to the relief sought in the Motion or the entry of this Order, or any objections that were made (to the extent such objections have not been withdrawn) are hereby overruled.

Based upon the foregoing, and after due consideration and good cause appearing therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that:

Section 1. Authorization and Conditions to Financing.

1.1 Motion Granted. The Motion is granted on a final basis in accordance with Bankruptcy Rule 4001(c)(2) to the extent provided in this Order (hereinafter referred to as the "**Final Order**").

1.2 Authorization to Borrow and Use Loan Proceeds.

1.2.1 Authorization to Borrow and Use Loan Proceeds.

Borrowers are hereby authorized and empowered to borrow and obtain advances or credit accommodations and to incur indebtedness and obligations owing to Lender pursuant to the terms and conditions of the Interim Order, this Final Order, the Ratification Agreement, the Existing Credit Agreement, the DIP Credit Agreement, and any other Prepetition Loan Documents (such agreements, collectively, the "**Loan Documents**," as such term is more fully defined in the Ratification Agreement), in such amounts as may be made available to Borrowers by Lender in accordance with the Budget. Subject to the terms and conditions contained in the Interim Order, this Final Order and the Loan Documents, Borrowers shall use the proceeds of the advances or other credit accommodations provided to Borrowers pursuant to this Final Order and the Loan Documents solely for the payment of the expense items specified in the Budget and the

costs and expenses of Lender as provided under the Loan Documents and this Final Order.

1.3 Loan Documents

1.3.1 Authorization. Debtors are hereby authorized and empowered to enter into, execute, deliver, perform, and comply with all of the terms, conditions and covenants of the DIP Credit Agreement, the other Loan Documents and all other agreements, documents and instruments executed or delivered in connection with or related to the DIP Credit Agreement, the other Loan Documents or this Final Order, including, without limitation, the Ratification Agreement, pursuant to which, inter alia, each Debtor ratifies, reaffirms, extends, assumes, adopts, amends, and restates the Existing Credit Agreement and the other Prepetition Loan Documents to which it is a party.

1.3.2 Approval. The Loan Documents (including, without limitation, the Ratification Agreement) and each term set forth therein are approved to the extent necessary to implement the terms and provisions of this Final Order. All of such terms, conditions and covenants shall be sufficient and conclusive evidence of the borrowing arrangements by and among Debtors and Lender, and of Debtors' assumption and adoption of all of the terms, conditions, and covenants of the Ratification Agreement and the other Loan Documents for all purposes, including, without limitation, to the extent applicable, the payment of all Obligations arising thereunder, including, without limitation, all principal, interest, commissions, fees and expenses, including, without limitation, all of Lender's reasonable consultant fees, professional fees, attorney fees and expenses, as more fully set forth in the Loan Documents.

1.3.3 Amendment. Subject to the terms and conditions of the DIP Credit Agreement and the other Loan Documents, Lender may amend, modify, supplement or waive any provision of the Loan Documents (an "Amendment") without further approval or order of the Court so long as (i) such Amendment is not material (for

purposes hereof, a “material” Amendment shall mean, any Amendment that operates to increase the interest rate other than as currently provided in the Loan Documents, increase the Supplemental Loan Limit (as defined in the Ratification Agreement), add specific new events of default or enlarge the nature and extent of default remedies available to Lender following an event of default, or otherwise modify any terms and conditions in any Loan Document in a manner materially less favorable to Debtors) and is undertaken in good faith by Lender and Debtors; (ii) the Debtors provide prior written notice of the Amendment (the “**Amendment Notice**”) to (x) the U.S. Trustee and (y) counsel to any official committee appointed in the Cases under Section 1102 of the Bankruptcy Code (collectively, the “**Committee(s)**”), or in the event no such Committee is appointed at the time of such Amendment, the 20 Largest Unsecured Creditors; (iii) the Debtors file the Amendment Notice with the Court; and (iv) no objection to the Amendment is filed with the Court within three (3) business days of the date of service of the Amendment Notice in accordance with this Section. Any material Amendment to the Loan Documents must be approved by the Court to be effective.

1.4 **Payment of Prepetition Debt.** The Debtors are authorized to pay Lender in respect of all Pre-Petition Obligations in accordance with the Loan Documents and Sections 1.5 and 1.6 of this Final Order.

1.5 **Payments and Application of Payments.** The Debtors shall make all payments and transfers of Estate property to Lender as provided, permitted and/or required under the DIP Credit Agreement and the other Loan Documents, which payments and transfers, subject to Section 4.1 herein, shall not be avoidable or recoverable from Lender under Section 547, 548, 550, 553 or any other Section of the Bankruptcy Code, or any other claim, charge, assessment, or other liability, whether by application of the Bankruptcy Code, other law or otherwise. All proceeds of the Collateral received by Lender, and any other amounts or payments received by Lender in respect of the Obligations, shall be applied or deemed to be applied by Lender in

accordance with the DIP Credit Agreement, the other Loan Documents and this Final Order first to the Pre-Petition Obligations arising from the Term Loan (as defined in the Ratification Agreement), second, in respect of any Pre-Petition Obligations in respect of any Revolving Loans (as defined in the Ratification Agreement), until such Pre-Petition Obligations are indefeasibly paid in full and completely satisfied, and then to the Post-Petition Obligations (as defined in the Ratification Agreement). Without limiting the generality of the foregoing, upon ten days' notice to the U.S. Trustee and counsel for the Committee, the Debtors are authorized, without further order of this Court, to pay or reimburse Lender for all present and future costs and expenses, including, without limitation, all reasonable professional fees, consultant fees and legal fees and expenses paid or incurred by Lender as provided in the Interim Order, this Final Order, and the Loan Documents, all of which shall be and are included as part of the principal amount of the Obligations and secured by the Collateral.

1.6 Continuation of Prepetition Procedures. All prepetition practices and procedures for the payment and collection of proceeds of the Collateral, the turnover of cash, the delivery of property to Lender and the funding pursuant to the Loan Documents, including any blocked, lockbox or depository account arrangements of Debtors, are hereby approved and may continue without interruption after the commencement of the Cases.

Section 2. Postpetition Lien; Superpriority Administrative Claim Status.

2.1 Postpetition Lien.

2.1.1 Postpetition Lien Granting. To secure the prompt payment and performance of any and all Obligations (including, without limitation, all Pre-Petition Obligations and Post-Petition Obligations) of Debtors to Lender of whatever kind, nature or description, absolute or contingent, now existing or hereafter arising, Lender, shall have and is hereby granted, effective as of the Petition Date, valid and perfected first priority security interests and liens, superior to all other liens, claims or security interests

that any creditor of the Debtors' Estates may have (but subject to certain claims entitled to priority, including the Permitted Liens and Claims defined below as and to the extent expressly provided in Section 2.1.2 below), in and upon all of the Pre-Petition Collateral and the Post-Petition Collateral (as defined in the Ratification Agreement, but excluding claims of Debtors under Chapter 5 of the Bankruptcy Code). The Pre-Petition Collateral and the Post-Petition Collateral are collectively referred to herein as the "**Collateral**." In accordance with Sections 552(b) and 361 of the Bankruptcy Code, the value, if any, in any of the Collateral, in excess of the amount of Obligations secured by such Collateral after satisfaction of the Pre-Petition Obligations of Debtors to Lender, shall constitute additional security for the repayment of the Post-Petition Obligations and adequate protection for the use by Debtors, and the diminution in the value, of the Collateral existing on the Petition Date.

2.1.2 Lien Priority. The prepetition and postpetition liens and security interests of Lender granted under the Loan Documents, the Interim Order, and this Final Order in the Collateral shall be and shall continue to be first and senior in priority to all other interests and liens of every kind, nature and description, whether created consensually, by an order of the Court or otherwise, including, without limitation, liens or interests granted in favor of third parties in conjunction with Section 363, 364 or any other Section of the Bankruptcy Code or other applicable law; provided, however, that Lender's liens on and security interests in the Collateral shall be subject only to (i) the Permitted Liens (as defined in the Existing Credit Agreement), (ii) the Carve Out Expenses (as defined below) solely to the extent provided for in Sections 2.3, 2.4 and 2.5 of this Final Order, and (iii) other valid, enforceable, non-avoidable liens and security interests that are senior to the pre-petition liens of Lender perfected prior to the Petition Date (the foregoing clauses (i), (ii) and (iii) are collectively referred to herein as the "**Permitted Liens and Claims**").

2.1.3 Postpetition Lien Perfection. This Final Order shall be sufficient and conclusive evidence of the priority, perfection and validity of the postpetition liens and security interests granted herein, effective as of the Petition Date, without any further act and without regard to any other federal, state or local requirements or law requiring notice, filing, registration, recording or possession of the Collateral, or other act to validate or perfect such security interest or lien, including without limitation, with respect to any blocked, lockbox or depository account consisting of Collateral (a "**Perfection Act**"). Notwithstanding the foregoing, if Lender shall, in its sole discretion, elect for any reason to file, record or otherwise effectuate any Perfection Act, Lender is authorized to perform such act, and the Debtors are authorized to perform such act to the extent necessary or required by Lender, which act or acts shall be deemed to have been accomplished as of the date and time of entry of the Interim Order notwithstanding the date and time actually accomplished, and in such event, the subject filing or recording office is authorized to accept, file or record any document in regard to such act in accordance with applicable law. Lender may choose to file, record or present a certified copy of this Final Order in the same manner as a Perfection Act, which shall be tantamount to a Perfection Act, and, in such event, the subject filing or recording office is authorized to accept, file or record such certified copy of this Final Order in accordance with applicable law. Should Lender so choose and attempt to file, record or perform a Perfection Act, no defect or failure in connection with such attempt shall in any way limit, waive or alter the validity, enforceability, attachment, or perfection of the postpetition liens and security interests granted herein by virtue of the entry of this Final Order.

2.1.4 Nullifying Prepetition Restrictions to Postpetition Financing. Notwithstanding anything to the contrary contained in any prepetition agreement, contract, lease, document, note or instrument to which any Debtor is a party or under which any Debtor is obligated, except as otherwise permitted under the Loan

Documents, any provision that restricts, limits or impairs in any way any Debtor from granting Lender security interests in or liens upon any of the Debtors' assets or properties (including, among other things, any anti-lien granting or anti-assignment clauses in any leases or other contractual arrangements to which any Debtor is a party) under the DIP Credit Agreement, the other Loan Documents or this Final Order, or otherwise entering into and complying with all of the terms, conditions and provisions hereof or the Loan Documents shall not (i) be effective and/or enforceable against any such Debtor(s) or Lender, or (ii) adversely affect the validity, priority or enforceability of the liens, security interests, claims, rights, priorities and/or protections granted to Lender pursuant to the Interim Order, this Final Order, or the Loan Documents to the maximum extent permitted under the Bankruptcy Code and other applicable law.

2.2 Superpriority Administrative Expense. For all Obligations (including, without limitation, all Pre-Petition Obligations and all Post-Petition Obligations) now existing or hereafter arising pursuant to the Interim Order, this Final Order, the Loan Documents or otherwise, Lender is granted an allowed superpriority administrative claim pursuant to Section 364(c)(1) of the Bankruptcy Code, having priority in right of payment over any and all other obligations, liabilities and indebtedness of Debtors, whether now in existence or hereafter incurred by Debtors, and over any and all administrative expenses or priority claims of the kind specified in, or ordered pursuant to, *inter alia*, Bankruptcy Code Sections 105, 326, 328, 330, 331, 503(b), 506(c), 507(a), 507(b), 364(c)(1), 546(c), 726 or 1114 (the "**Superpriority Claim**"), provided, however, the Superpriority Claim shall be subject only to the Permitted Liens and Claims as and to the extent expressly set forth in this Final Order.

2.3 Carve Out Expenses.

2.3.1 Carve Out Expenses. Upon the declaration by Lender of the occurrence of an Event of Default or upon the Termination Date (as defined in the Ratification Agreement), (a) Lender's liens, claims and security interests in the Collateral

and proceeds thereof, and (b) the Superpriority Claim shall be subject only to the Lender's obligation to pay the following expenses (the "**Carve Out Expenses**"):

a. statutory fees payable to the U.S. Trustee pursuant to 28 U.S.C. § 1930(a)(6) as determined by agreement of the U.S. Trustee or by final order of the Court;

b. fees payable to the Clerk of this Court; and

c. subject to the terms and conditions of this Final Order, the unpaid and outstanding reasonable fees and expenses actually incurred on or after the Petition Date and prior to or on the date of an Event of Default or the Termination Date, but only to the extent such unpaid fees and expenses are (i) set forth in the Budget and (ii) (y) approved by a final order of the Court pursuant to Sections 326, 328, 330, 331 of the Bankruptcy Code (collectively, the "**Allowed Professional Fees**") by attorneys, accountants and other professionals retained by the Debtors and any Committee(s) under Section 327 or 1103(a) of the Bankruptcy Code (collectively, the "**Professionals**"), or (z) for payment of the Debtors' claims and noticing agent, in a cumulative, aggregate sum not to exceed \$490,000 (the "**Professional Fee Carve Out**"). Nothing contained herein is intended to constitute, nor should be construed as consent to, the allowance of any Professional's fees, costs, or expenses by any party and shall not affect the rights of Debtors, Lender, the Committee, the U.S. Trustee, or any other party-in-interest to object to the allowance or payment of any amounts incurred or requested.

2.3.2 **Excluded Professional Fees**. Notwithstanding anything to the contrary in this Final Order, neither the Professional Fee Carve Out nor the proceeds of any Loans or Collateral shall be used to pay any Allowed Professional Fees or any other fees or expenses incurred by any Professional in connection with any of the following: (a) an assertion or joinder in (but excluding any investigation into) any claim, counter-claim, action, proceeding, application, motion, objection, defense or other contested matter seeking any order, judgment, determination or similar relief:

(i) challenging the legality, validity, priority, perfection, or enforceability of the Obligations or Lender's liens on and security interests in the Collateral, (ii) invalidating, setting aside, avoiding or subordinating, in whole or in part, the Obligations or Lender's liens on and security interests in the Collateral, or (iii) preventing, hindering or delaying Lender's assertion or enforcement of any lien, claim, right or security interest or realization upon any Collateral in accordance with the terms and conditions of this Final Order; (b) a request to use the Cash Collateral (as such term is defined in Section 363 of the Bankruptcy Code) without the prior written consent of Lender in accordance with the terms and conditions of this Final Order; (c) a request for authorization to obtain debtor-in-possession financing or other financial accommodations pursuant to Section 364(c) or Section 364(d) of the Bankruptcy Code, other than from Lender, without the prior written consent of Lender; (d) the commencement or prosecution of any action or proceeding of any claims, causes of action or defenses against Lender any of its officers, directors, employees, agents, attorneys, affiliates, successors or assigns, including, without limitation, any attempt to recover or avoid any claim or interest from Lender under Chapter 5 of the Bankruptcy Code; or (e) any act which has or could have the effect of materially and adversely modifying or compromising the rights and remedies of Lender, or which is contrary, in a manner that is material and adverse to Lender, to any term or condition set forth in or acknowledged by the Loan Documents or this Final Order and which results in the occurrence of an Event of Default under the Loan Documents or this Final Order; provided, however, that subject to Section 4.1 below and the Budget, the Professional Fee Carve Out and the proceeds of any Loans or Collateral may be used for allowed fees and expenses, in an amount not to exceed \$15,000 in the aggregate, incurred solely by the Committee (if appointed), in investigating the validity, enforceability, perfection or priority of Lender's liens under the Existing Loan Documents.

2.4 Carve Out Reserve. At Lender's sole discretion, Lender may, at any time and in any increment in accordance with the Loan Documents, establish a

reserve against the amount of advances or other credit accommodations that would otherwise be made available to Debtors pursuant to the lending formulae contained in the DIP Credit Agreement in respect of the Professional Fee Carve Out, the other Carve Out Expenses and the professional fees and expenses set forth in the Budget in accordance with Section 5.3 of the DIP Credit Agreement.

2.5 Payment of Carve Out Expenses.

2.5.1 Debtors shall be permitted to pay Allowed Professional Fees of the Professionals accrued prior to an Event of Default or the Termination Date in accordance with the Budget. Payment of any such Allowed Professional Fees accrued prior to an Event of Default or the Termination Date shall permanently reduce the Professional Fee Carve-Out on a dollar-for-dollar basis. In accordance with and as set forth in the Budget, Lender will wire the portion of funds to be loaned by Lender to Borrowers in accordance with the terms and conditions set forth in the Loan Documents into an escrow account for the benefit of the Professionals (the “**Professional Fee Escrow Account**”), the projected Professional Fees for the weeks set forth in the Budget and solely to the extent provided in the Budget. All fees and expenses of the Professionals that become Allowed Professional Fees shall be paid with the funds in the Professional Fee Escrow Account, which shall be deemed to include any and all retainers held by any Professional. All funds deposited into the Professional Fee Escrow Account in accordance with this paragraph shall be available only to pay such Allowed Professional Fees incurred by the Professionals during the Debtors’ chapter 11 cases. If any funds remain in the Professional Fee Escrow Account after (a) the application of all Professionals’ retainers and (b) any remaining Allowed Professional Fees have been paid as ordered by this Court from the Professional Fee Escrow Account, the remaining balance of the Professional Fee Escrow Account shall be remitted to Lender for application against the Obligations. Nothing in this section 2.5, this Final Order, or

otherwise shall or shall be construed to obligate Lender to pay any Allowed Professional Fees in excess of the amounts set forth in the Budget.

2.5.2 Any payment or reimbursement made either directly or indirectly by Lender at any time, from the Professional Fee Escrow Account or otherwise, or by or on behalf of the Debtors in respect of any Allowed Professional Fees accrued after the occurrence of an Event of Default or the Termination Date (exclusive of the application of any retainers by any of the Professionals) or any other Carve Out Expenses accrued after the occurrence of an Event of Default, shall, in either case, permanently reduce the Professional Fee Carve Out on a dollar-for-dollar basis. Lender's obligation to fund or otherwise pay the Professional Fee Carve Out and the other Carve Out Expenses shall be added to and made a part of the Obligations, secured by the Collateral, and entitle Lender to all of the rights, claims, liens, priorities and protections under the Interim Order, this Final Order, the Loan Documents, the Bankruptcy Code or applicable law. Payment of any Carve Out Expenses, whether by or on behalf of Lender, shall not and shall not be deemed to reduce the Obligations, and shall not and shall not be deemed to subordinate any of Lender's liens and security interests in the Collateral or their Superpriority Claim to any junior pre- or postpetition lien, interest or claim in favor of any other party. Except as otherwise provided herein with respect to the Professional Fee Carve Out and the other Carve Out Expenses, Lender shall not, under any circumstance, be responsible for the direct payment or reimbursement of any fees or disbursements of any Professionals incurred in connection with the Cases under any chapter of the Bankruptcy Code, and nothing in Section 2.3, 2.4 or 2.5 of this Final Order shall be construed to obligate Lender in any way to pay compensation to or to reimburse expenses of any Professional, or to ensure that the Debtors have sufficient funds to pay such compensation or reimbursement.

2.6 Use of Cash Collateral; Adequate Protection.

2.6.1 Authorization to Use Cash Collateral. Subject to the terms and conditions of the Interim Order, this Final Order, the DIP Credit Agreement and the other Loan Documents, and in accordance with the Budget, Debtors shall be and are hereby authorized to use, until the expiration of Lender's commitment to lend under the DIP Credit Agreement and the other Loan Documents or an Event of Default, the Cash Collateral (as defined in Section 363 of the Bankruptcy Code). Nothing in this Final Order shall authorize the disposition of any assets of the Debtors or their Estates outside the ordinary course of business, or any Debtors' use of Cash Collateral or other proceeds resulting therefrom, except as permitted in this Final Order, the DIP Credit Agreement, the other Loan Documents and in accordance with the Budget.

2.6.2 Replacement Liens. As adequate protection for the diminution in value of its interests in the Pre-Petition Collateral, including Cash Collateral, on account of the Debtors' use of such Pre-Petition Collateral (including Cash Collateral), the imposition of the automatic stay and the subordination to the Carve Out-Expenses, Lender is hereby granted pursuant to Sections 361 and 363 of the Bankruptcy Code, valid, binding, enforceable and perfected replacement liens upon and security interests in all Collateral (the "**Replacement Lien**"). The Replacement Lien shall (i) be junior and subordinate only to the Carve-Out Expenses and the liens and security interests granted to Lender in the Collateral securing the Post-Petition Obligations and (ii) otherwise be senior to all other security interests in, liens on, or claims against any of the Collateral.

2.6.3 Section 507(b) Priority Claims. As adequate protection for the diminution in value of its interests in the Pre-Petition Collateral (including Cash Collateral) on account of the Debtors' use of such Pre-Petition Collateral (including Cash Collateral), the imposition of the automatic stay and the subordination to the Carve-Out-Expenses, Lender is hereby granted as and to the extent provided by Section 507(b) of the Bankruptcy Code an allowed superpriority administrative expense claim in each of the

Cases and any successor case (the “**Adequate Protection Superpriority Claim**”). The Adequate Protection Superpriority Claim shall be junior only to the Superpriority Claim and the Carve-Out Expenses and shall otherwise have priority over all administrative expense claims and unsecured claims against Debtors and their Estates now existing or hereafter arising, of any kind or nature whatsoever.

2.6.4 Other Adequate Protection. As further adequate protection for any diminution in the value of the Pre-Petition Collateral, Debtors are hereby authorized to provide adequate protection to Lender in the form of: (a) payment of interest, fees and other amounts due under the Prepetition Loan Documents, at the times specified therein, to Lender to the extent permissible under the Bankruptcy Code, and (b) ongoing payment of the fees, costs and expenses, including, without limitation, reasonable legal and other professionals’ fees and expenses, of Lender as required under the Prepetition Loan Documents.

Section 3. Default; Rights and Remedies; Relief from Stay.

3.1 Events of Default. The occurrence of any of the following events shall constitute an “**Event of Default**” under this Final Order:

- a. Debtors’ failure to perform, in any respect, any of the terms, conditions or covenants, or their obligations, under this Final Order; or
- b. An “Event of Default” under the DIP Credit Agreement or any of the other Loan Documents.

3.2 Rights and Remedies Upon Event of Default. Upon the occurrence of and during the continuance of an Event of Default, (i) the Debtors shall be bound by all restrictions, prohibitions and other terms as provided in the Interim Order, this Final Order, the DIP Credit Agreement and the other Loan Documents, and (ii) Lender shall be entitled to take any act or exercise any right or remedy (subject to Section 3.4 below) as provided in the Interim Order, this Final Order, or any Loan Document, including, without limitation, declaring all Obligations immediately due and payable,

accelerating the Obligations, ceasing to extend advances or financing accommodations on behalf of Debtors, setting off any Obligations with Collateral or proceeds in Lender's possession, and enforcing any and all rights with respect to the Collateral. Lender shall have no obligation to lend or advance any additional funds to or on behalf of Debtors, or provide any other financial accommodations to Debtors, immediately upon or after the occurrence of an Event of Default or upon the occurrence of any act, event, or condition that, with the giving of notice or the passage of time, or both, would constitute an Event of Default.

3.3 Expiration of Commitment. Upon the earlier of (i) the Termination Date; or (ii) the expiration of Borrowers' authority to borrow and obtain other credit accommodations from Lender pursuant to the terms of this Final Order and the Loan Documents (except if such authority shall be extended with the prior written consent of Lender, which consent shall not be implied or construed from any action, inaction or acquiescence by Lender), and unless an Event of Default set forth in Section 3.1 above occurs sooner and the automatic stay has been lifted or modified pursuant to Section 3.4 of this Final Order, all of the Obligations shall immediately become due and payable and Lender shall be automatically and completely relieved from the effect of any stay under Section 362 of the Bankruptcy Code, any other restriction on the enforcement of its liens upon and security interests in the Collateral or any other rights granted to Lender pursuant to the terms and conditions of the Loan Documents, the Interim Order, or this Final Order, and Lender shall be and is hereby authorized, in its sole discretion, to take any and all actions and remedies provided to it in the Interim Order, this Final Order, the Loan Documents or applicable law which Lender may deem appropriate and to proceed against and realize upon the Collateral or any other property of the Debtors' Estates.

3.4 Relief from Automatic Stay. The automatic stay provisions of Section 362 of the Bankruptcy Code and any other restriction imposed by an order of the

Court or applicable law are hereby modified and vacated without further notice, application or order of the Court to the extent necessary to permit Lender to perform any act authorized or permitted under or by virtue of this Final Order or the Loan Documents, including, without limitation, (a) to implement the postpetition financing arrangements authorized by this Final Order and pursuant to the terms of the Loan Documents, (b) to take any act to create, validate, evidence, attach or perfect any lien, security interest, right or claim in the Collateral, and (c) to assess, charge, collect, advance, deduct and receive payments with respect to the Obligations, including, without limitation, all interests, fees, costs and expenses permitted under the Loan Documents, and apply such payments to the Obligations pursuant to the Loan Documents and this Final Order. In addition, and without limiting the foregoing, upon the occurrence of an Event of Default and after providing three (3) business days prior written notice (the "**Enforcement Notice**") to counsel for the Debtors, counsel for the Committee (if appointed), the U.S. Trustee, and all creditors who have served Lender with written notice of a filed or recorded prepetition lien or security interest against any of the Debtors' assets in their favor, Lender, shall be entitled to take any action and exercise all rights and remedies provided to it by the Interim Order, this Final Order, the Loan Documents or applicable law as Lender may deem appropriate in its sole discretion to, among other things, proceed against and realize upon the Collateral or any other assets or properties of Debtors' Estates upon which Lender has been or may hereafter be granted liens or security interests to obtain the full and indefeasible repayment of all Obligations.

Section 4. Representations; Covenants; and Waivers.

4.1 Objections to Pre-Petition Obligations. Any action, claim or defense (hereinafter, an "**Objection**") that seeks to object to, challenge, contest or otherwise invalidate or reduce, whether by setoff, recoupment, counterclaim, deduction, disgorgement or claim of any kind: (a) the existence, validity or amount of the Pre-Petition Obligations, (b) the extent, legality, validity, perfection or enforceability of

Lender's prepetition liens and security interests in the Pre-Petition Collateral, or (c) Lender's right to apply proceeds of Post-Petition Collateral against Pre-Petition Obligations in satisfaction of Lender's prepetition liens as provided for in this Final Order, shall be filed with the Court (x) by any Committee, and no other party, within sixty (60) calendar days from the date of appointment of the Committee by the U.S. Trustee, or (y) by any party in interest with requisite standing within seventy-five (75) calendar days from the date of entry of the Interim Order; provided, that in the event these cases are converted to Chapter 7 prior to the expiration of this period, a Chapter 7 trustee shall have the portion of the seventy-five (75) day period that did not pass prior to conversion in which to file an Objection. If any such Objection is timely filed and successfully pursued, nothing in this Final Order shall prevent the Court from granting appropriate relief with respect to the Pre-Petition Obligations or Lender's liens on the Pre-Petition Collateral. If no Objection is timely filed, or if an Objection is timely filed but denied, (a) the Pre-Petition Obligations shall be deemed allowed in full, shall not be subject to any setoff, recoupment, counterclaim, deduction or claim of any kind, and shall not be subject to any further objection or challenge by any party at any time, and Lender's prepetition liens on and security interest in the Pre-Petition Collateral shall be deemed legal, valid, perfected, enforceable, and non-avoidable for all purposes and of first and senior priority, subject to only the Permitted Liens and Claims, and (b) Lender and its agents, officers, directors, employees, attorneys, professionals, successors, and assigns (each in their capacity as such) shall be deemed released and discharged from any and all claims and causes of action related to or arising out of the Prepetition Loan Documents and shall not be subject to any further objection or challenge by any party at any time. Nothing contained in this Section 4.1 or otherwise shall or shall be deemed or construed to impair, prejudice or waive any rights, claims or protections afforded to Lender in connection with all postpetition advances and other financial accommodations provided by Lender to Debtors in reliance on Section 364(e) of the Bankruptcy Code and

in accordance with the terms and provisions of the Interim Order, this Final Order, and the Loan Documents.

4.2 Debtors' Waivers. At all times during the Cases, and whether or not an Event of Default has occurred, subject to Section 4.1, the Debtors irrevocably waive any right that they may have to seek authority (i) to use Cash Collateral of Lender under Section 363 of the Bankruptcy Code, (ii) to obtain postpetition loans or other financial accommodations pursuant to Section 364(c) or 364(d) of the Bankruptcy Code, other than from Lender or as may be otherwise expressly permitted pursuant to the DIP Credit Agreement, (iii) to challenge the application of any payments authorized by the Interim Order or this Final Order as pursuant to Section 506(b) of the Bankruptcy Code, (iv) to propose, support or have a plan of reorganization or liquidation that does not provide for the indefeasible payment in cash in full and satisfaction of all Obligations on the effective date of such plan in accordance with the terms and conditions set forth in the Ratification Agreement, or (v) to seek relief under the Bankruptcy Code, including without limitation, under Section 105 of the Bankruptcy Code, to the extent any such relief would in any way restrict or impair the rights and remedies of Lender as provided in the Interim Order, this Final Order, and the Loan Documents or Lender's exercise of such rights or remedies; provided, however, that Lender may otherwise consent in writing, but no such consent shall be implied from any other action, inaction, or acquiescence by Lender.

4.3 Section 506(c) Claims. No costs or expenses of administration which have or may be incurred in the Cases at any time shall be charged against Lender, its claims or the Collateral pursuant to Section 506(c) of the Bankruptcy Code without the prior written consent of Lender, and no such consent shall be implied from any other action, inaction or acquiescence by Lender.

4.4 Collateral Rights. Until all of the Obligations shall have been indefeasibly paid and satisfied in full:

4.4.1 no other party shall foreclose or otherwise seek to enforce any junior lien or claim in any Collateral; and

4.4.2 upon and after the earlier of the occurrence of an Event of Default or the Termination Date (as defined in the Ratification Agreement), and subject to Lender obtaining relief from the automatic stay as provided for herein, in connection with a liquidation of any of the Collateral, Lender (or any of its employees, agents, consultants, contractors or other professionals) shall have the right, at the sole cost and expense of Debtors, to: (i) enter upon, occupy and use any real or personal property, fixtures, equipment, leasehold interests or warehouse arrangements owned or leased by Debtors; (ii) use any and all trademarks, tradenames, copyrights, licenses, patents or any other similar assets of Debtors, which are owned by or subject to a lien of any third party and which are used by Debtors in their businesses; and (iii) receive and apply any tax refunds against the Pre-Petition Obligations or Post-Petition Obligations. Lender will be responsible for the payment of any applicable fees, rentals, royalties or other amounts due such lessor, licensor or owner of such property for the period of time that Lender actually uses the equipment or the intellectual property (but in no event for any accrued and unpaid fees, rentals or other amounts due for any period prior to the date that Lender actually occupies or uses such assets or properties).

4.5 Release and Indemnification.

4.5.1 Subject to Section 4.1 above, in consideration of Lender making postpetition loans, advances and providing other credit and financial accommodations to the Debtors pursuant to the provisions of the Loan Documents, the Interim Order and this Final Order, each Debtor, on behalf of itself, its successors and assigns, and its estate (collectively, the "**Releasors**"), shall forever release, discharge and acquit Lender and its successors and assigns, and its present and former shareholders, affiliates, subsidiaries, divisions, predecessors, directors, officers, attorneys, employees and other representatives (collectively and each in their capacity as such, the

“**Releasees**”) of and from any and all claims, demands, liabilities, responsibilities, disputes, remedies, causes of action, indebtedness and obligations, of every kind, nature and description, including, without limitation, any so-called “lender liability” claims or defenses, that Releasors had, have or hereafter can or may have against Releasees as of the date hereof, in respect of events that occurred on or prior to the date hereof with respect to the Debtors, the Obligations, the Loan Documents and any advances or other financial accommodations made by Lender to Debtors pursuant to the Loan Documents. In addition, upon the repayment of all Obligations owed to Lender by Debtors and termination of the rights and obligations arising under the Loan Documents and this Final Order, as the case may be (which payment and termination shall be in accordance with the Loan Documents or otherwise on terms and conditions acceptable to Lender), Lender shall be released from any and all obligations, liabilities, actions, duties, responsibilities and causes of action arising or occurring in connection with or related to the Loan Documents, the Interim Order or this Final Order, on terms and conditions acceptable to Lender; provided, however, nothing herein shall release the Lender from any obligation or responsibility to pay or otherwise fund the Carve Out Expenses in accordance with the terms of this Order, the Budget, and the Ratification Agreement.

4.5.2 Indemnification by Debtors of Lender. The Debtors’ indemnification obligations to Lender (the “**Indemnification Obligations**”) provided for in the Loan Documents are approved and such Indemnification Obligations shall be deemed to be Post-Petition Obligations.

Section 5. Other Rights and Obligations.

5.1 No Modification or Stay of This Final Order. Notwithstanding (i) any stay, modification, amendment, supplement, vacating, revocation or reversal of this Final Order, the Loan Documents or any term hereunder or thereunder, (ii) the dismissal or conversion of one or more of the Cases, or (iii) any order entered at any time in one or more of the Cases containing terms inconsistent with the terms and conditions contained

in this Final Order (each, a “**Subject Event**”), (x) the acts taken by Lender in accordance with the Interim Order and this Final Order, and (y) the Post-Petition Obligations incurred or arising prior to Lender’s actual receipt of written notice from Debtors expressly describing the occurrence of such Subject Event shall, in each instance, be governed in all respects by the original provisions of the Interim Order, this Final Order, and the acts taken by Lender in accordance with this Final Order, and the liens granted to Lender in the Collateral, and all other rights, remedies, privileges, and benefits in favor of Lender pursuant to the Interim Order, this Final Order, and the Loan Documents shall remain valid and in full force and effect pursuant to Section 364(e) of the Bankruptcy Code. For purposes of this Final Order, the term “appeal,” as used in Section 364(e) of the Bankruptcy Code, shall be construed to mean any proceeding for reconsideration, amending, rehearing, or re-evaluating this Final Order by this Court or any other tribunal.

5.2 Power to Waive Rights; Duties to Third Parties. Lender shall have the right to waive any of the terms, rights and remedies provided or acknowledged in the Interim Order and this Final Order in respect of Lender (the “**Lender Rights**”), and shall have no obligation or duty to any other party with respect to the exercise or enforcement, or failure to exercise or enforce, any Lender Right(s). Any waiver by Lender of any Lender Rights shall not be or constitute a continuing waiver. Any delay in or failure to exercise or enforce any Lender Right shall neither constitute a waiver of such Lender Right, subject Lender to any liability to any other party, nor cause or enable any other party to rely upon or in any way seek to assert as a defense to any obligation owed by Debtors to Lender.

5.3 Disposition of Collateral. Debtors shall not sell, transfer, lease, encumber or otherwise dispose of any portion of the Collateral in anyway inconsistent with the terms and conditions of the DIP Credit Agreement or the other Loan Documents without the prior written consent of Lender (and no such consent shall be implied, from any other action, inaction or acquiescence by Lender) and an order of this Court, except

for sales of Debtors' inventory in the ordinary course of their business. Until all Obligations are indefeasibly paid and satisfied in full in cash in accordance with the terms of the Loan Documents, the Interim Order or this Final Order on terms and conditions acceptable to Lender, Debtors and any estate fiduciary appointed in these cases shall remit to Lender, or cause to be remitted to Lender, all proceeds of the Collateral, including any tax refunds, for application by Lender to the Obligations, in such order and manner as Lender may determine in its discretion, in accordance with the terms of this Final Order, the Credit Agreement and the other Loan Documents.

5.4 Inventory. Debtors shall not, without the consent of Lender, (a) enter into any agreement to return any inventory to any of their creditors for application against any prepetition indebtedness under any applicable provision of Section 546 of the Bankruptcy Code, or (b) consent to any creditor taking any setoff against any of its prepetition indebtedness based upon any such return pursuant to Section 553(b)(1) of the Bankruptcy Code or otherwise.

5.5 Reservation of Rights. The terms, conditions and provisions of the Interim Order and this Final Order are in addition to and without prejudice to the rights of Lender to pursue any and all rights and remedies under the Bankruptcy Code, the Loan Documents or any other applicable agreement or law, including, without limitation, rights to seek adequate protection and/or additional or different adequate protection, to seek relief from the automatic stay, to seek an injunction, to oppose any request for use of cash collateral or granting of any interest in the Collateral or priority in favor of any other party, to object to any sale of assets, and to object to applications for allowance and/or payment of compensation of Professionals or other parties seeking compensation or reimbursement from the Estates.

5.6 Binding Effect.

5.6.1 The provisions of this Final Order and the Loan Documents, the Post-Petition Obligations, the Superpriority Claim and any and all rights,

remedies, privileges and benefits in favor of Lender provided or acknowledged in this Final Order, and any actions taken pursuant thereto, shall be effective immediately upon entry of this Final Order pursuant to Bankruptcy Rules 6004(g) and 7062, shall continue in full force and effect, and shall survive entry of any such other order, including without limitation any order which may be entered confirming any plan of reorganization, converting one or more of the Cases to any other chapter under the Bankruptcy Code, or dismissing one or more of the Case.

5.6.2 Any order dismissing one or more of the Cases under Section 1112 or otherwise shall be deemed to provide (in accordance with Sections 105 and 349 of the Bankruptcy Code) that (a) the Superpriority Claim and Lender's liens on and security interests in the Collateral shall continue in full force and effect notwithstanding such dismissal until the Obligations are indefeasibly paid and satisfied in full, and (b) this Court shall retain jurisdiction, notwithstanding such dismissal, for the purposes of enforcing the Superpriority Claim and liens in the Collateral to the extent provided under applicable law.

5.6.3 In the event this Court modifies any of the provisions of this Final Order or the Loan Documents following a Final Hearing, (a) such modifications shall not affect the rights or priorities of Lender pursuant to this Final Order with respect to the Collateral or any portion of the Obligations which arises or is incurred or is advanced prior to such modifications, and (b) this Final Order shall remain in full force and effect.

5.6.4 This Final Order shall be binding upon Debtors, all parties in interest in the Cases and their respective successors and assigns, including any trustee or other fiduciary appointed in the Cases or any subsequently converted bankruptcy case(s) of any Debtor. This Final Order shall also inure to the benefit of Lender, Debtors and their respective successors and assigns.

5.7 Restrictions on Cash Collateral Use, Additional Financing, Plan Treatment. All postpetition advances and other financial accommodations under the DIP Credit Agreement and the other Loan Documents are made in reliance on the Interim Order and this Final Order and there shall not at any time be entered in the Cases, or in any subsequently converted case under Chapter 7 of the Bankruptcy Code, any order which (a) authorizes the use of cash collateral of Debtors in which Lender has an interest, or the sale, lease, or other disposition of property of any Debtors' Estate in which Lender has a lien or security interest, except as expressly permitted hereunder or in the Loan Documents, or (b) authorizes under Section 364 of the Bankruptcy Code the obtaining of credit or the incurring of indebtedness secured by a lien or security interest which is equal or senior to a lien or security interest in property in which Lender holds a lien or security interest, or which is entitled to priority administrative claim status which is equal or superior to that granted to the Lender; unless, in each instance (i) Lender shall have given its express prior written consent with respect thereto, no such consent being implied from any other action, inaction or acquiescence by Lender, or (ii) such other order requires that all Obligations shall first be indefeasibly paid and satisfied in full in accordance with the terms of the DIP Credit Agreement and the other Loan Documents, including, without limitation, all debts and obligations of Debtors to Lender which arise or result from the obligations, loans, security interests and liens authorized herein, on terms and conditions acceptable to Lender. The security interests and liens granted to or for the benefit of Lender hereunder and the rights of Lender pursuant to the Interim Order, this Final Order, and the Loan Documents with respect to the Obligations and the Collateral are cumulative and shall not be altered, modified, extended, impaired, or affected by any plan of reorganization or liquidation of Debtors and, if Lender shall expressly consent in writing that the Obligations shall not be repaid in full upon confirmation thereof, shall continue after confirmation and consummation of any such plan.

5.8 No Owner/Operator Liability. In determining to make any loan under the DIP Credit Agreement or any Financing Order, or in exercising any rights or remedies as and when permitted pursuant to the DIP Credit Agreement or any Financing Order, Lender shall not, solely by virtue thereof, be deemed to be in control of the operations of the Debtors or to be acting as a “responsible person” or “owner or operator” with respect to the operation or management of the Debtors (as such terms, or any similar terms, are used in the United States Comprehensive Environmental Response, Compensation and Liability Act, 29 U.S.C. §§ 9601 et seq., as amended, or any similar federal or state statute).

5.9 Marshalling. In no event shall Lender be subject to the equitable doctrine of “marshalling” or any similar doctrine with respect to the Collateral. Lender shall be entitled to all of the rights and benefits of Section 552(b) of the Bankruptcy Code, and the “equities of the case” exception under Section 552(b) of the Bankruptcy Code shall not apply to Lender with respect to proceeds, products, offspring or profits of any of the Collateral.

5.10 Right to Credit Bid. Lender shall have the right to “credit bid” the amount of its claims during any sale of all or substantially all of the Debtors’ assets, including without limitation, sales occurring pursuant to section 363 of the Bankruptcy Code or included as part of any restructuring plan subject to confirmation under section 1129(b)(2)(A)(ii)-(iii) of the Bankruptcy Code.


5.11 Term; Termination. Notwithstanding any provision of this Final Order to the contrary, the term of the financing arrangements among Debtors and Lender authorized by this Final Order may be terminated by Lender to the extent provided for by the terms of the DIP Credit Agreement and the other Loan Documents.

5.12 Limited Effect. Unless the Final Order specifically provides otherwise, in the event of a conflict between the terms and provisions of any of the Loan Documents and this Final Order, the terms and provisions of this Final Order shall

govern, interpreted as most consistent with the terms and provisions of the Loan Documents.

5.13 Objections Overruled. All objections to the entry of this Final Order are, to the extent not withdrawn, hereby overruled.

Dated: FEBRUARY 5, 2013



THE HONORABLE KEVIN GROSS
CHIEF UNITED STATES BANKRUPTCY JUDGE