

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

In re:

AEROGROUP INTERNATIONAL,  
INC., *et al.*,

Debtors.<sup>1</sup>

Chapter 11

Case No. 17-11962 (KJC)

(Jointly Administered)

**Hearing Date: TBD**

**Objection Deadline: TBD**

**MOTION OF THE DEBTORS FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING THE DEBTORS TO OBTAIN POSTPETITION FINANCING AND GRANT SECURITY INTERESTS AND SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS WITH RESPECT TO THE DIP COLLATERAL; (II) GRANTING ADEQUATE PROTECTION TO THE PREPETITION SECURED CREDIT PARTIES; (III) MODIFYING THE AUTOMATIC STAY; (IV) AUTHORIZING THE DEBTORS TO ENTER INTO AGREEMENTS WITH POLK 33 LENDING, LLC; (V) AUTHORIZING USE OF CASH COLLATERAL; (VI) GRANTING RELATED RELIEF; AND (VII) SCHEDULING A FINAL HEARING**

Aerogroup International, Inc. ("Aerogroup International") and certain of its affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases (each, a "Debtor" and collectively, the "Debtors" or the "Company") submit this motion (the "Motion"), by and through their undersigned proposed counsel, for entry of an interim order substantially in the form attached hereto as **Exhibit A** (the "Interim Order") and a final order (the "Final Order," and together with the Interim Order, the "DIP Orders"), (i) authorizing the Debtors to obtain senior secured postpetition financing and grant security interests and superpriority administrative expense status with respect to the DIP Collateral (as defined below), (ii) authorizing and directing the Debtors to pay all outstanding Prepetition Revolver Obligations (as defined below)

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<sup>1</sup> The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Aerogroup International, Inc. (6119), AGI Holdco, Inc. (7087), Aerogroup International LLC (4658), Aerogroup International Holdings LLC (4312), Aerogroup Retail Holdings, Inc. (4650), and Aerogroup Gift Card Company, Inc. (7551). The mailing address for the Debtors, solely for purposes of notices and communications, is: 201 Meadow Road, Edison, New Jersey 08817.

in full, (iii) granting adequate protection to the Prepetition Term Loan Credit Parties and the Prepetition Secured Note Credit Parties (each, as defined below), (iv) modifying the automatic stay, (v) authorizing the Debtors to enter into the Loan Documents with the DIP Lender (each, as defined below), (vi) authorizing the use of cash collateral, (vii) granting related relief, and (viii) scheduling a final hearing. In support of the Motion, the Debtors rely upon and incorporate by reference the *Declaration of Mark Weinsten in Support of the Motion of the Debtors for Entry of Orders Authorizing the Debtors to Obtain Postpetition Financing* (the “Weinsten Declaration”) filed concurrently herewith and the *Declaration of Mark Weinsten in Support of Chapter 11 Petitions and First Day Motions* [D.I 3] (the “First Day Declaration”). In further support of the Motion, the Debtors respectfully represent as follows:

### **JURISDICTION**

1. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Court may enter a final order consistent with Article III of the United States Constitution. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. Pursuant to Local Rule 9013-(f), the Debtors consent to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

3. The statutory predicates for the relief requested are sections 105(a), 363, 365, 503 and 507 of chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) and Rules 2002, 6003, 6004, 6006 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Rules 2002-1, 6004-1 and 9006-1 of the Local Rules of Bankruptcy

Practice and Procedures for the United States Bankruptcy Court for the District of Delaware (the “Local Rules”).

### **BACKGROUND**

4. On September 15, 2017 (the “Petition Date”), the Debtors commenced these bankruptcy cases (the “Chapter 11 Cases”) by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to manage and operate their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

5. On September 26, 2017, Region 3 of the Office of the United States Trustee (the “U.S. Trustee”) appointed a five-member Official Committee of Unsecured Creditors (the “Committee”). No trustee or examiner has been appointed.

6. The factual background regarding the Debtors, including their business operations, their capital and debt structure, and the events leading up to the filing of these Chapter 11 Cases, as well as the facts and the circumstances supporting the relief requested herein is set forth in detail in the First Day Declaration filed on the Petition Date.

#### ***Summary Of The Material Terms Of The DIP Facility<sup>2</sup>***

7. The following chart contains a summary of the material terms of the DIP Credit Agreement and the Interim Order, in accordance with Bankruptcy Rule 4001(b)(1) and Local Rule 4001-2.<sup>3</sup>

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<sup>2</sup> The description of the terms of the DIP Credit Agreement and the proposed Interim Order provided in this Motion are intended only as summaries. In the event of any inconsistency between the descriptions set forth herein and the terms of the DIP Credit Agreement or the Interim Order, the terms of the DIP Credit Agreement and the Interim Order shall govern.

<sup>3</sup> Capitalized terms used but not otherwise defined in the chart have the meanings ascribed to them in the DIP Credit Agreement or the Interim Order, as applicable.

MATERIAL TERMS	SUMMARY DESCRIPTION
<b>Amount/Facility:</b>	\$25 million non-amortizing term loan debtor-in-possession credit facility. Any amounts borrowed under the DIP Facility may not be re-borrowed.
<b>Debtor/Borrower:</b>	Aerogroup International, Inc., Aerogroup International LLC, Aerogroup International Holdings LLC, Aerogroup Retail Holdings, Inc., and Aerogroup Gift Card Company, Inc.
<b>Guarantors:</b>	AGI Holdco, Inc.
<b>DIP Lender:</b>	Polk 33 Lending, LLC
<b>Agent:</b>	Wilmington Savings Fund Society
<b>Security:</b> <i>See DIP Credit Agreement § 7.14.</i>	Subject to the Carve-Out, the DIP Facility shall be accorded superpriority administrative expense claim status pursuant to section 364(c)(1) of the Bankruptcy Code and be secured by first priority senior priming liens on and security interests in all DIP Collateral, which liens shall be senior to the Prepetition Liens other than the THL First Priority Liens.
<b>Maturity Date:</b> <i>See DIP Credit Agreement § 1.1</i>	The earliest to occur of: (i) the Stated Maturity Date; (ii) the effective date of a Plan of Reorganization; (iii) if the Final Order has not been entered by the Bankruptcy Court, the date that is one day after the Final Hearing; (iv) the entry of an order converting any of the Chapter 11 Cases to a case under chapter 7 of the Bankruptcy Code or dismissing any of the Chapter 11 Cases; (v) the closing of a sale of substantially all of the Borrowers' assets; and (vi) the acceleration of the outstanding Obligations under the DIP Facility or termination of the DIP Lender's Commitment under the DIP Facility, including as a result of the occurrence of an Event of Default pursuant to Section <b>Error! Reference source not found.</b> of the DIP Credit Agreement.

MATERIAL TERMS	SUMMARY DESCRIPTION
<p><b>Availability/Use of Proceeds:</b>  <i>See</i> DIP Credit Agreement §§ 2.1, 6.11.</p>	<p>Up to \$21 million shall be available to the Debtors upon entry of the Interim Order. Additional amounts, up to the aggregate principal amount of \$25 million, shall be available to the Debtors upon entry of the Final Order.</p> <p>Proceeds of the DIP Facility shall be used by the Debtors in accordance with the Budget attached to the Interim Order as Exhibit 2, to, (a) fund the working capital needs and chapter 11 administrative costs of the Debtors during the pendency of the Chapter 11 Cases, (b) pay fees, costs and expenses of the DIP Facility on the terms and conditions described in the Loan Documents, (c) pay all outstanding Prepetition Revolver Obligations in full, (d) maintain the Prepetition Indemnity Account, and (e) pay other amounts as specified in the Budget.</p>
<p><b>Mandatory Prepayments:</b>  <i>See</i> DIP Credit Agreement § 2.3(d).</p>	<p>Customary for transactions of this type and including 100% of the net cash proceeds of any asset sales (not in the ordinary course) or debt issuance (without any reinvestment rights or de minimis dollar carve-outs).</p>
<p><b>Prepayment Premium:</b></p>	<p>None.</p>
<p><b>Interest Rate:</b>  <i>See</i> DIP Credit Agreement § 2.4.</p>	<p>11% per annum, payable in cash.</p>
<p><b>Default Rate:</b>  <i>See</i> DIP Credit Agreement § 2.4.</p>	<p>Additional 5% per annum, payable in cash.</p>
<p><b>Fees:</b>  <i>See</i> DIP Credit Agreement § 2.7.</p>	<p>Upon entry of the Interim Order, the Borrowers shall pay the DIP Lender (or the DIP Lender's counsel, Arent Fox LLP, at the direction of the DIP Lender) from the proceeds of the DIP Facility (i) amounts equal to the Commitment Fee and the Funding Fee as set forth in the DIP Credit Agreement and (ii) \$200,000 (the "<u>Work Fee</u>"), which shall serve as a retainer for accrued and outstanding and ongoing Lender Expenses.</p>

MATERIAL TERMS	SUMMARY DESCRIPTION
<p><b>Conditions Precedent to Initial Loan:</b>  <i>See DIP Credit Agreement § 3.1.</i></p>	<p>Customary for transactions of this type and otherwise satisfactory to the DIP Lender and to include: (i) negotiation of satisfactory loan documentation, (ii) delivery of the Budget, (iii) entry of the Interim Order and Final Order, as applicable, (iv) payment of legal fees and expenses of the DIP Lender as set forth above, and (v) accuracy of all representations and warranties and absence of any default.</p>
<p><b>Conditions Precedent to Subsequent Loans:</b>  <i>See DIP Credit Agreement § 3.2.</i></p>	<p>Customary for transactions of this type and including: (i) accuracy of all representations and warranties and absence of any default, (ii) the Debtors shall have fully and completely complied with all applicable Performance Covenants, and (iii) the Interim Order and, if applicable, the Final Order shall be in full force and effect and shall not have been vacated, reversed, modified, amended or stayed in any manner adverse to the DIP Lender.</p>
<p><b>Reporting:</b>  <i>See DIP Credit Agreement § 5.2.</i></p>	<p>Customary for transactions of this type and including providing the Weekly Budget Variance Report and monthly roll-forward of the Budget, and participating in weekly conference calls, if required.</p>
<p><b>Financial Covenants:</b>  <i>See DIP Credit Agreement § 7.1.</i></p>	<p>Customary for transactions of this type and including weekly compliance with the Budget, tested on an four week cumulative basis, starting after the fourth week, subject to a permitted variance of 10%.</p>
<p><b>Bankruptcy Covenants:</b>  <i>See DIP Credit Agreement §§ 6.13, 6.14.</i></p>	<p>Until the DIP Loan is indefeasibly repaid in full in cash, the Debtors shall not (a) seek, consent or suffer to exist (i) any modification, stay, vacation or amendment to the Interim Order or the Final Order, as applicable; (ii) in connection with the DIP Collateral, a priority claim for any administrative expense or unsecured claim against any Borrower (now existing or hereafter arising of any kind or nature whatsoever, including any administrative expense of any kind specified in section 503(b), 506(b) or (c) or 507(b) of the Bankruptcy Code) equal to or superior to the priority claim of the DIP Lender in respect to the DIP Collateral; and (iii) any Lien on the DIP Collateral having a priority equal or superior to the DIP Liens, or (b) propose and/or support any plan or reorganization that fails to indefeasibly and finally pay in full in cash all DIP Obligations on the effective date of said plan without the affirmative consent of the DIP Lender.</p>

MATERIAL TERMS	SUMMARY DESCRIPTION
<b>Events of Default:</b> <i>See</i> DIP Credit Agreement § 8.	The list of events, acts and omissions that constitute an “Event of Default” is lengthy, and summarizing them would result in this concise summary exceeding the five page limit. The Debtors submit that the Events of Default are customary for transactions of this type.
<b>Indemnity:</b> <i>See</i> DIP Credit Agreement § 10.3.	The Debtors are agreeing to indemnify the DIP Lender and the DIP Agent for any losses incurred and in any manner relating to the DIP Credit Agreement or certain environmental liability.
<b>Release, Waiver of Limitation of Any Right under Section 506(c)</b> <i>See</i> Interim Order at ¶ 15.	Subject to and only effective upon entry of the Final Order the Debtors waive all rights to surcharge against the DIP Collateral pursuant to section 506(c) of the Bankruptcy Code.

### *The Debtors’ Prepetition Capital Structure*

8. As of the Petition Date, the Debtors had approximately \$72.3 million of outstanding funded indebtedness, comprised of approximately:

- \$22.9 million outstanding under the Prepetition Revolver Facility;
- \$19.7 million outstanding under the Prepetition Term Loan Facility;
- \$19.1 million outstanding Prepetition Senior Notes;
- \$8.9 million outstanding Prepetition Subordinated Notes; and
- \$1.7 million outstanding under the Prepetition Subordinated Loan.

#### **A. *The Prepetition Revolver Facility***

9. Aerogroup International and the other Debtors (other than AGI Holdco, Inc. (“AGI Holdco”), who is a guarantor) are borrowers (collectively, the “Prepetition Revolver Loan Parties”) under that certain Credit Agreement<sup>4</sup> dated as of June 9, 2014 (as amended, supplemented, restated, or otherwise modified prior to the Petition Date, the “Prepetition Revolver Credit Agreement” and together with all related Loan Documents (as defined in the

<sup>4</sup> Any summary of an agreement in this Motion is qualified in its entirety by the terms of that agreement.

Prepetition Revolver Credit Agreement), the “Prepetition Revolver Credit Documents”) with Wells Fargo Bank, National Association (“Wells Fargo”), as administrative agent (in such capacity, the “Prepetition Revolver Agent”), the other lenders party thereto from time to time (the “Prepetition Revolver Lenders” and, together with the Prepetition Revolver Agent and the other “Credit Parties” (as defined in the Prepetition Revolver Credit Agreement), the “Prepetition Revolver Credit Parties”), and the other parties thereto.

10. The Prepetition Revolver Credit Agreement provides for among other things \$37,588,729 in aggregate maximum principal amount of revolving loan commitments, including letter of credit and swingline loan commitments, with a sublimit for letters of credit of \$5,000,000 (the “Prepetition Revolver Facility”). As of the Petition Date, the outstanding principal amount owed by the Prepetition Revolver Loan Parties under the Prepetition Revolver Facility was not less than \$22,454,455.69 and \$500,000 of issued and outstanding letters of credit (collectively, together with any amounts paid, incurred or accrued prior to or following the Petition Date in accordance with the Prepetition Revolver Credit Documents, unpaid principal, interest, fees, charges, expenses and disbursements (including, without limitation, attorneys’ fees and related expenses and disbursements), and other obligations owed to the Prepetition Revolver Agent and Prepetition Revolver Lenders, whether or not contingent, whenever arising, accrued, accruing, due, owing or chargeable in respect of any obligations under the Prepetition Revolver Credit Documents, including all “Obligations” as described in the Prepetition Revolver Credit Agreement, the “Prepetition Revolver Obligations”).

**B. *The Prepetition Term Loan Facility***

11. Aerogroup International as Lead Borrower and the Borrowers and Guarantors named therein (collectively the “Prepetition Term Loan Parties”, together with the Prepetition Revolver Loan Parties, the “Prepetition Loan Parties”) under that certain Term Loan Agreement



dated as of June 9, 2014 (as amended, supplemented, restated, or otherwise modified prior to the Petition Date, the “Prepetition Prepetition Term Loan Credit Agreement” and, together with all related Loan Documents (as defined in the Prepetition Term Loan Agreement), the “Prepetition Term Loan Credit Documents”) with THL Corporate Finance, Inc., as Administrative Agent and Collateral Agent (in such capacities, the “Prepetition Term Loan Agent” and together with the Prepetition Revolver Agent, the “Prepetition Agents”), the lenders party thereto from time to time (the “Prepetition Term Loan Lenders” and, together with the Prepetition Revolver Lenders, the “Prepetition Lenders” and, the Prepetition Term Loan Lenders collectively with the Prepetition Term Loan Agent and the other “Credit Parties” (as defined in the Prepetition Term Loan Agreement), the “Prepetition Term Loan Credit Parties” and, the Prepetition Term Loan Credit Parties, together with the Prepetition Revolver Credit Parties, the “Prepetition Senior Credit Parties”), and the other parties thereto.

12. The Prepetition Term Loan Credit Agreement provides for a \$20 million term loan with a maturity date of December 9, 2019 (the “Prepetition Term Loan Facility” and, together with the Prepetition Revolver Facility, the “Prepetition Senior Credit Facilities”). As of the Petition Date, the Prepetition Term Loan Parties were indebted under the Prepetition Term Loan Facility in the aggregate amount of not less than \$19,699,148.47 (collectively, together with any amounts paid, incurred or accrued prior to the Petition Date in accordance with the Prepetition Term Loan Credit Documents, unpaid principal, interest, fees, charges, expenses and disbursements (including, without limitation, attorneys’ fees and related expenses and disbursements) and other obligations owed to the Prepetition Term Loan Agent and the Prepetition Term Loan Lenders, whether contingent, whenever arising, accrued, accruing, due,

owing or chargeable, including all “Obligations” as described in the Prepetition Term Loan Credit Documents, the “Prepetition Term Loan Obligations”).

**C. *The Prepetition Subordinated Loan***

13. Prior to the commencement of the Chapter 11 Cases, the Equityholders (as defined in the Prepetition Subordinated Loan Agreement, the “Prepetition Subordinated Lenders”) became entitled to receive the Holdback Amount (as defined in the Prepetition Subordinated Loan Agreement) in the principal amount of \$7,500,000 and certain interest payments described therein (together with the Holdback Amount, the “Prepetition Subordinated Loan”) pursuant to that certain Agreement and Plan of Merger, dated as of April 18, 2014 (as amended, supplemented, restated, or otherwise modified prior to the Petition Date, the “Prepetition Subordinated Loan Agreement” and, together with all related documents, the “Prepetition Subordinated Loan Documents”) by and among, among others, AGI Holdco and Aerogroup International (collectively the “Prepetition Subordinated Loan Parties”) and Shareholder Representative Services LLC, as “Equityholders’ Representative.”

14. As of the Petition Date, the Prepetition Subordinated Loan Parties were indebted under the Prepetition Subordinated Loan in the aggregate amount of not less than \$1,687,249 (collectively, together with any amounts paid, incurred or accrued prior to the Petition Date in accordance with the Prepetition Subordinated Debt Documents, unpaid principal, interest, fees, charges, expenses and disbursements (including, without limitation, attorneys’ fees and related expenses and disbursements) and other obligations owed to the Prepetition Subordinated Lenders, whether contingent, whenever arising, accrued, accruing, due, owing or chargeable, the “Prepetition Subordinated Loan Obligations”).

**D. *The Prepetition Senior Notes***

15. Prior to the commencement of the Chapter 11 Cases, AGI Holdco and Aerogroup International (collectively the “Prepetition Senior Note Parties”) issued those certain Subordinated Convertible Notes due March 9, 2020 (as amended, supplemented, restated, or otherwise modified prior to the Petition Date, the “Prepetition Senior Notes”, together with all related Subordinated Debt Documents, the “Prepetition Senior Note Documents”) pursuant to that certain Purchase Agreement dated as of January 20, 2016, by and among the Prepetition Senior Note Parties, Palladin Partners, LP, as agent (in such capacity, the “Prepetition Senior Notes Agent”), and the Purchasers, as defined therein (the “Prepetition Senior Noteholders” and, together with the Prepetition Senior Notes Agent, the “Prepetition Senior Note Credit Parties”), on account of a loan provided by the Prepetition Senior Noteholders to the Prepetition Senior Note Parties in the principal amount of \$16,275,885.

16. As of the Petition Date, the Prepetition Senior Note Parties were indebted under the Prepetition Senior Notes in the aggregate amount of not less than \$19,052,301 (collectively, together with any amounts paid, incurred or accrued prior to the Petition Date in accordance with the Prepetition Senior Note Documents, unpaid principal, interest, fees, charges, expenses and disbursements (including, without limitation, attorneys’ fees and related expenses and disbursements) and other obligations owed to the Prepetition Senior Note Credit Parties, whether contingent, whenever arising, accrued, accruing, due, owing or chargeable, including all “Obligations” as described in the Prepetition Senior Note Documents, the “Prepetition Senior Note Obligations”).

**E. *The Prepetition Subordinated Notes***

17. Prior to the commencement of the Chapter 11 Cases, AGI Holdco (the “Prepetition Subordinated Note Party”, together with the Prepetition Subordinated Loan Parties,

the “Prepetition Subordinated Debt Parties”) issued those certain Subordinated Convertible Non-Transferrable Notes due March 9, 2020<sup>5</sup> (as amended, supplemented, restated, or otherwise modified prior to the Petition Date, the “Prepetition Subordinated Notes”, together with all related Subordinated Debt Documents, the “Prepetition Subordinated Note Documents”, and, together with the Prepetition Subordinated Loan Documents and the Prepetition Senior Note Documents, the “Prepetition Subordinated Debt Documents”), to the “Prepetition Subordinated Noteholders” (together with the Prepetition Senior Note Credit Parties, the “Prepetition Secured Note Credit Parties” and, the Prepetition Secured Note Credit Parties, together with the Prepetition Senior Credit Parties, the “Prepetition Secured Credit Parties”), on account of a loan provided by the Prepetition Subordinated Noteholders to the Prepetition Subordinated Note Party in the principal amount of \$7,000,000.

18. As of the Petition Date, the Prepetition Subordinated Note Party was indebted under the Prepetition Subordinated Notes in the aggregate amount of not less than \$8,856,163 (collectively, together with any amounts paid, incurred or accrued prior to the Petition Date in accordance with the Prepetition Subordinated Note Documents, unpaid principal, interest, fees, charges, expenses and disbursements (including, without limitation, attorneys’ fees and related expenses and disbursements) and other obligations owed to the Prepetition Subordinated Noteholders, whether contingent, whenever arising, accrued, accruing, due, owing or chargeable, including all “Obligations” as described in the Prepetition Subordinated Debt Documents, the “Prepetition Subordinated Note Obligations”, and, together with the Prepetition Revolver

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<sup>5</sup> AGI Holdco also issued a Subordinated Note due March 9, 2020 issued in the aggregate principal amount of \$2,088,729.76 on December 11, 2015 (the “Prepetition Non-convertible Subordinated Note”), evidencing a loan made by Palladin Partners, LP, as lender to AGI Holdco. However, as part of the issuance of the Prepetition Senior Notes (as defined below) Palladin Partners, LP received Prepetition Senior Notes of like principal amount in exchange for the cancellation of the Prepetition Non-convertible Subordinate Note.

Obligations, the Prepetition Term Loan Obligations, the Prepetition Senior Note Obligations, and the Prepetition Subordinated Loan Obligations, the “Prepetition Obligations”).

**F. *Prepetition Liens and Prepetition Collateral.***

19. As more fully set forth in the Prepetition Documents (defined below), prior to the Petition Date, the Prepetition Loan Parties, for the benefit of the Prepetition Secured Credit Parties, and the Prepetition Subordinated Debt Parties, for the benefit of the Prepetition Secured Note Credit Parties, granted security interests in and liens on, among other things, substantially all assets of the Prepetition Loan Parties and the Prepetition Subordinated Debt Parties (collectively, the “Prepetition Collateral”) to: (1) the Prepetition Revolver Agent (the “Prepetition Revolver Liens”); (2) the Prepetition Term Loan Agent (the “Prepetition Term Loan Liens”, together with the Prepetition Revolver Liens, the “Prepetition Senior Liens”); and (3) the Prepetition Secured Note Credit Parties (the “Prepetition Subordinated Liens”, and, together with the Prepetition Revolver Liens and the Prepetition Term Loan Liens, the “Prepetition Liens”). The priorities of the Prepetition Senior Liens in respect of the Prepetition Collateral are governed by that certain Intercreditor Agreement, dated as of June 9, 2014 (the “Intercreditor Agreement”), between the Prepetition Agents and acknowledged by certain Prepetition Loan Parties. The priority of the Prepetition Subordinated Liens in respect of the Prepetition Collateral is governed by (a) that certain Subordination Agreement, dated as of June 9, 2014 by and among, (i) the Shareholder Representative Services LLC, as “Equityholders’ Representative”, (ii) the Prepetition Agents, and (iii) AGI Holdco and Aerogroup International; (b) that certain Subordination and Intercreditor Agreement dated as of August 5, 2015 by and among (i) (A) Palladin Partners, LP, (B) THL Credit, Inc., and (C) the other Subordinated Creditors (as defined therein), (ii) the Prepetition Agents, and (iii) AGI Holdco and Aerogroup International; and (c) that certain Subordination and Intercreditor Agreement dated as of January

20, 2016 by and among (i) Palladin Partners, LP, as agent, (ii) the Prepetition Agents, and (iii) AGI Holdco and Aerogroup International (collectively, the “Subordination Agreements” and, together with the Prepetition Revolver Credit Documents, Prepetition Term Loan Credit Documents, Prepetition Subordinated Debt Documents, and the Intercreditor Agreement, collectively, the “Prepetition Documents”).

***The Debtors’ Immediate Need To Use Cash Collateral and Obtain Financing***

20. The Debtors have an immediate and critical need to obtain postpetition financing under the DIP Facility to pay, in accordance with the Budget, which is attached to the proposed Interim Order as **Exhibit 2**, various parties in the ordinary course of business and as authorized by the Court. The proposed DIP Facility will provide the Debtors with much needed liquidity to operate during these Chapter 11 Cases. The DIP Facility will provide cash with which the Debtors can continue operations and maintain the going concern value of the Company by continuing their valuable relationships with key vendors and suppliers and purchasing new inventory for purposes of the go-forward business lines. Given the seasonal nature of the retail business, maintaining these relationships and inventory reserves is absolutely critical to the preservation of the Debtors’ business and asset value. As further discussed below, a portion of the DIP Facility will also be used to repay in full the Debtors’ obligations under the Prepetition Revolver Facility.

21. The Debtors reasonably believe that the Budget will be adequate, considering all available assets, to pay all administrative expenses due or accruing during the period covered by the Budget. Since the Petition Date the Debtors have been operating through the consensual use of cash collateral pursuant to the *Interim Order Pursuant to 11 U.S.C. §§ 105, 361, 362, 363 and 507 (I) Authorizing Use of Cash Collateral, (II) Granting Adequate Protection, (III) Modifying Automatic Stay, and (IV) Scheduling a Final Hearing* [D.I. 63] (the “Interim Cash Collateral

Order”). However, the Debtors’ use of Cash Collateral alone is insufficient to meet the Debtors’ postpetition liquidity needs, particularly with respect to the purchase of new inventory for the go-forward business. Without access to the DIP Facility, in addition to the continued use of Cash Collateral, the Debtors would suffer immediate and irreparable harm and the entire bankruptcy proceedings and the Debtors’ reorganization will be jeopardized to the significant detriment of the Debtors’ estates and their creditors.

22. The Debtors have been unable to obtain unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense. The Debtors have also been unable to obtain credit (a) having priority over that of administrative expenses of the kind specified in sections 503(b), 507(a) and 507(b) of the Bankruptcy Code; (b) secured by a lien on property of the Debtors and their estates that is not otherwise subject to a lien; or (c) secured solely by a junior lien on property of the Debtors and their estates that is subject to a lien. The Debtors require both additional financing under the DIP Facility and the continued use of Cash Collateral in order to satisfy their postpetition liquidity needs. Financing on a postpetition basis is not otherwise available without granting the DIP Lender (i) perfected security interests in and liens on all of the Debtors’ existing and after acquired assets with the priorities set forth herein, (ii) superpriority claims, and (iii) the other protections set forth in the Interim Order.

23. The DIP Lender has indicated a willingness to provide the Debtors with certain financing commitments, but solely on the terms and conditions set forth in the Loan Documents and the Interim Order. After considering all of their alternatives, the Debtors have concluded, in an exercise of their sound business judgment, that the financing to be provided by the DIP Lender pursuant to the terms of the Loan Documents and the Interim Order represents the best

financing presently available to the Debtors. These funds will be used to maintain the Debtors' assets during an orderly sale process.

24. The Debtors have negotiated the DIP Facility and the Loan Documents in good faith and at arm's length with the DIP Lender and Prepetition Secured Credit Parties. The Debtors believe that the terms of the DIP Facility are fair and reasonable, reflect the Debtors' exercise of prudent business judgment consistent with their fiduciary duties, and are supported by reasonably equivalent value and fair consideration.

***Provisions To Be Highlighted Pursuant To Local Rule 4001-2(a)(1)***

25. The DIP Facility includes certain provisions the Debtors are required to highlight pursuant to Local Rule 4001-2(a)(i). As discussed in detail herein, the Debtors believe these provisions are reasonable in light of the facts and circumstances of this case and should be approved.

<p><b><u>Cross-Collateralization to Prepetition Secured Creditors:</u></b> <i>Local Rule 4001-2(a)(i)(B)</i></p>	<p>None.</p>
<p><b><u>Committee Challenge Period:</u></b> <i>Local Rule 4001-2(a)(i)(B)</i></p>	<p>Pursuant to paragraph 21 of the Interim Cash Collateral Order, if granted standing by the Court, the Committee must commence, any Challenge (as defined in the Interim Cash Collateral Order) no later than November 25, 2017 and any person or any party-in-interest other than the Committee must commence any Challenge no later than November 29, 2017. Paragraph 18 of the Interim Order provides for the substantially similar restrictions.</p>
<p><b><u>Waiver of Section 506(c) Claims:</u></b> <i>Local Rule 4001-2(a)(i)(C)</i></p>	<p>Subject to and only effective upon entry of the Final Order the Debtors waive all rights to surcharge against the DIP Collateral pursuant to section 506(c) of the Bankruptcy Code.</p>



<p><b><u>Liens on Avoidance Actions:</u></b> <i>Local Rule 4001-2(a)(i)(D)</i></p>	<p>The DIP Orders do not provide for liens on the Debtors' causes of action (or proceeds thereof) pursuant to chapter 5 of the Bankruptcy Code or any other avoidance actions of the Debtors under the Bankruptcy Code.</p>
<p><b><u>Use of Postpetition Debt from Prepetition Creditor to Pay Such Prepetition Creditors' Prepetition Debt</u></b> : <i>Local Rule 4001-2(a)(i)(E)</i></p>	<p>None.</p>
<p><b><u>Treatment of Committee Professionals:</u></b> <i>Local Rule 4001-2(a)(i)(F)</i></p>	<p>The Committee's professional fees are included in the amounts that are funded and set aside on a weekly basis for expenses as accrued in accordance with the Budget and that are excluded from the security interests and administrative expense claims of the DIP Lender under the DIP Facility.</p>
<p><b><u>Priming of Secured Liens:</u></b> <i>Local Rule 4001-2(a)(i)(G)</i></p>	<p>The DIP Lender is being granted first priority senior priming liens on and security interests in all DIP Collateral, which liens shall be senior to the Prepetition Liens other than the THL First Priority Liens.</p>
<p><b><u>Provisions Affecting Court's Power to Consider Equities of the Case:</u></b> <i>Local Rule 4001-2(a)(i)(H)</i></p>	<p>Subject to and only effective upon entry of the Final Order the Debtors waive any equities of the case exceptions under section 552(b) of the Bankruptcy Code.</p>

### **RELIEF REQUESTED**

26. The Debtors seek entry of the DIP Orders granting:

(a) authority, pursuant to sections 105, 363, 364(c) and 364(d)(1) of the Bankruptcy Code, for each of the Debtors, jointly and severally, to obtain senior secured prepetition financing in an aggregate principal amount of up to \$25 million (the "DIP Facility") pursuant to the Loan Documents and this Interim Order;

(b) authority for the Debtors to enter into that certain Senior Secured Super-Priority Debtor-in-Possession Credit Agreement, among Aerogroup International, Inc., Aerogroup International LLC, Aerogroup International Holdings LLC, Aerogroup Retail Holdings, Inc., and Aerogroup Gift Card Company, Inc., as Borrowers, AGI Holdco, Inc., as

Guarantor, Wilmington Savings Fund Society, as administrative agent and collateral agent (in such capacity, the “DIP Agent”), and Polk 33 Lending, LLC (the “DIP Lender” and, together with the DIP Agent, the “DIP Parties”), in substantially the same form as attached hereto as **Exhibit 1** (as amended, restated, supplemented or otherwise modified from time to time in accordance with the terms thereof, the “DIP Credit Agreement” and, together with the any ancillary, collateral or related documents and agreements, the “Loan Documents”);

(c) authority for the Debtors to use the DIP Facility and the proceeds thereof in accordance with the Budget attached hereto as **Exhibit 2** (the “Budget”) to (a) fund the working capital needs and chapter 11 administrative costs of the Debtors during the pendency of the Chapter 11 Cases, (b) pay fees, costs and expenses of the DIP Facility on the terms and conditions described in the Loan Documents, (c) pay all outstanding Prepetition Revolver Obligations in full, (d) maintain the Prepetition Indemnity Account (as defined in the Interim Cash Collateral Order), and (e) pay other amounts as specified in the Budget;

(d) authority for the Debtors to grant valid, enforceable, non-avoidable, automatically and fully perfected security interests, liens and superpriority claims, including allowed superpriority administrative expense claims pursuant to sections 364(c)(1) and 507(b) of the Bankruptcy Code and liens pursuant to sections 364(c)(2) and 364(c)(3) of the Bankruptcy Code and, solely as set forth herein, priming liens pursuant to section 364(d)(1) of the Bankruptcy Code, to the DIP Lender, in the DIP Collateral (and all proceeds thereof), including, without limitation, all property constituting “Cash Collateral,” as defined in section 363(a) of the Bankruptcy Code (“Cash Collateral”), to secure all DIP Obligations, as more fully set forth in this Interim Order, subject only to the Carve-Out (each as defined in the Interim Order);

(e) subject to and only effective upon entry of the Final Order granting such relief, waiver by the Debtors of all rights to surcharge against the collateral of the DIP Lender or the Prepetition Secured Credit Parties pursuant to section 506(c) of the Bankruptcy Code;

(f) subject to and only effective upon entry of the Final Order granting such relief, waiver of the equitable doctrine of marshaling or any other similar doctrine with respect to any collateral of the DIP Lender or the Prepetition Secured Credit Parties;

(g) providing adequate protection to the Prepetition Secured Credit Parties to the extent set forth herein;

(h) modification of the automatic stay to the extent hereinafter set forth and waiving the 14-day stay provisions of Bankruptcy Rules 4001(a)(3) and 6004(h);

(i) the scheduling of a final hearing (the “Final Hearing”) on the Motion for November 3, 2017 to consider entry of the Final Order, *inter alia*, authorizing the borrowings under the DIP Facility on a final basis and approval of notice procedures with respect thereto; and

(j) related relief.

#### **BASIS FOR RELIEF**

##### **A. ENTERING INTO THE DIP FACILITY IS AN EXERCISE OF THE DEBTORS’ SOUND AND REASONABLE BUSINESS JUDGMENT**

27. A debtor’s decision to enter into a postpetition financing facility under section 364 of the Bankruptcy Code is governed by the business judgment standard. *See, e.g., Trans World Airlines, Inc. v. Travelers Int’l AG (In re Trans World Airlines, Inc.)*, 163 B.R. 964, 974 (Bankr. D. Del. 1994) (noting that the court had approved the postpetition financing facility because such facility “reflect[ed] sound and prudent business judgment”); *In re Ames Dep’t*

*Stores*, 115 B.R. 34, 38–39 (Bankr. S.D.N.Y. 1990) (noting that financing decisions under section 364 must reflect a debtor’s business judgment). To determine whether the business judgment standard is met, a court is “required to examine whether a reasonable business person would make a similar decision under similar circumstances.” *In re Exide Techs.*, 340 B.R. 222, 239 (Bankr. D. Del. 2006); *see also In re Curlew Valley Assocs.*, 14 B.R. 506, 513-14 (Bankr. D. Utah 1981) (noting that courts should not second guess a debtor’s business decision reflecting “a business judgment made in good faith, upon a reasonable basis, and within the scope of [the debtor’s] authority under the [Bankruptcy] Code”); *In re Simasko Prod. Co.*, 47 B.R. 444, 449 (D. Colo. 1985). (“[D]iscretion to act with regard to business planning activities is at the heart of the debtor’s power.”) (citations omitted).

28. Moreover, in choosing between available financing options, a debtor may consider a variety of factors, including non-economic factors:

[A] business decision to obtain credit from a particular lender is almost never based purely on economic terms. ***Relevant features of the financing must be evaluated, including non-economic elements such as the timing and certainty of closing, the impact on creditor constituencies and the likelihood of a successful reorganization.*** This is particularly true in a bankruptcy setting where cooperation and establishing alliances with creditor groups can be a vital part of building support for a restructuring that ultimately may lead to a confirmable reorganization plan. That which helps to foster consensus may be preferable to a notionally better transaction that carries the risk of promoting unwanted conflict.

*In re ION Media Networks, Inc.*, No. 09-13125 (JMP), 2009 WL 2902568, at \*4 (Bankr. S.D.N.Y. July 6, 2009) (emphasis added).

29. Here, all factors support entry into the DIP Facility. The Debtors have an urgent need to obtain access to the DIP Facility to, among other things, continue operating their business in an orderly manner, maintain business relationships and assure the continuity of operations with, and ability to make payments to, vendors, suppliers, and employees and satisfy

other working capital and operational needs—each of which is vital to preserving and maintaining the value of the estate for the benefit of all stakeholders.

30. Additionally, the DIP Facility is critical to ensuring the Debtors' ability to conduct a fair and robust process for the sale of substantially all of their assets, which offers the Debtors the best path to a speedy and consensual exit from chapter 11 with a meaningful recovery for creditors. Absent the DIP Facility, the Debtors will not be able to continue operating, thereby resulting in lost opportunities, lost jobs and a destruction of going concern value, and will not be able to effect the sale process, thereby resulting in a significant loss of value for the Debtors' estate and their creditors.

31. Securing financing under the DIP Facility therefore is absolutely necessary to maximize the value of estate assets and is in the best interests of the Debtors' creditors and all parties in interest. Consequently, entry into the DIP Facility is an exercise of the Debtors' sound business judgment.

**B. THE DEBTORS SHOULD BE AUTHORIZED TO OBTAIN POSTPETITION FINANCING ON A SENIOR SECURED AND SUPERPRIORITY BASIS**

32. Pursuant to section 364(c) of the Bankruptcy Code, a court may authorize a debtor to incur debt that is: (a) entitled to superpriority administrative expense status; (b) secured by a lien on otherwise unencumbered property; or (c) secured by a junior lien on encumbered property, if the debtor cannot obtain postpetition credit on an unsecured basis, as an administrative expense priority or secured solely by junior liens on the debtor's assets. *See* 11 U.S.C. § 364(c);<sup>6</sup> *see also Pearl-Phil GMT (Far East) Ltd. v. Caldor Corp.*, 266 B.R. 575, 584

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<sup>6</sup> Specifically, section 364(c) of the Bankruptcy Code provides, in pertinent part:

If the trustee [or debtor in possession] is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt — (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title; (2) secured

(S.D.N.Y. 2001) (authorizing superpriority administrative expenses where debtor could not obtain credit as an administrative expense).

33. Courts in this jurisdiction and others have fashioned guidelines in applying these statutory requirements. Generally, courts advocate using a “holistic approach” to evaluate superpriority postpetition financing agreements, focusing on the transaction as a whole. As one court has noted:

Obtaining credit should be permitted not only because it is not available elsewhere, which could suggest the unsoundness of the basis for use of the funds generated by credit, but also because the credit acquired is of significant benefit to the debtor’s estate and . . . the terms of the proposed loan are within the bounds of reason, irrespective of the inability of the debtor to obtain comparable credit elsewhere.

*In re Aqua Assocs.*, 123 B.R. 192, 196 (Bankr. E.D. Pa. 1991).

34. More specifically, in evaluating a debtor’s proposed postpetition financing, courts consider whether the postpetition financing (a) is necessary to preserve the assets of the estate and is necessary, essential and appropriate for continued operation of the debtor’s business, (b) contains terms that are fair, reasonable and adequate given the circumstances of the debtor and the proposed postpetition lender, (c) was negotiated in good faith and at arm’s length between the debtor, on the one hand, and the agents and the lenders on the other, (d) is an exercise of a debtor’s sound and reasonable business judgment, and (e) is in the best interest of the debtor’s creditors and estates,. *See, e.g., In re SFX Entm’t, Inc.*, Case No. 16-10238 (MFW) [D.I. 203] (Bankr. D. Del. Mar. 8, 2016); *In re Hancock Fabrics, Inc.*, Case No. 16-10296 (BLS) [D.I. 273] (Bankr. D. Del. Mar. 2, 2016); *In re Quiksilver, Inc.*, Case No. 15-11880 (BLS)

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by a lien on property of the estate that is not otherwise subject to a lien; or (3) secured by a junior lien on property of the estate that is subject to a lien.  
11 U.S.C. § 364(c).

[D.I. 382] (Bankr. D. Del. Oct. 28, 2015); *In re Event Rentals, Inc.*, Case No. 14-10282 (PJW) [D.I. 277] (Bankr. D. Del. Apr. 1, 2014).

35. First, the Debtors and their advisors explored a variety of possible financing scenarios and ultimately determined that the DIP Lender offered the only viable option for obtaining the postpetition financing the Debtors require. The Debtors conducted arm's length negotiations with the DIP Lender regarding the terms of the Loan Documents, and those agreements reflect the most favorable terms on which the DIP Lender was willing to offer financing. No alternative financing is available to the Debtors, and the Debtors are not able to obtain financing from the DIP Lender other than financing secured by first priority priming liens that are senior to the Prepetition Liens other than the THL First Priority Liens (as defined in the DIP Credit Agreement).

36. Second, the Debtors need the funds to be provided under the DIP Facility to preserve the value of their estates for the benefit of all creditors and other parties in interest. Absent the DIP Facility and use of the Cash Collateral, the Debtors will be unable to continue operating their business as a going concern; instead, they may be required to immediately shut down their operations, which will greatly diminish the Debtors' value. Providing the Debtors with the liquidity necessary to preserve value through the pendency of the Debtors' sale process and these Chapter 11 Cases is in the best interest of all stakeholders.

37. Third, the DIP Facility will provide the Debtors with immediate access to up to \$25,000,000 in postpetition financing, which the Debtors and their advisors have independently determined is sufficient and, as discussed in greater detail below, necessary to allow the Debtors to maintain their operations and their relationships with key constituents during their sale

process. Further, the Loan Documents provide the Debtors with use of the Cash Collateral, which will maintain the Debtors' ability to access necessary liquidity.

38. Fourth, as described in greater detail above and the Weinstein Declaration, the Debtors and the DIP Lender negotiated the Loan Documents in good faith and at arm's length, and the Debtors' entry into the Loan Documents is an exercise of their sound business judgment and is in the best interests of their estates, creditors and other parties in interest.

39. Fifth, as described below, the Debtors will provide adequate protection for the Prepetition Secured Credit Parties' interest in the Prepetition Collateral.

**C. THE INTERESTS OF THE PREPETITION SECURED CREDIT PARTIES ARE ADEQUATELY PROTECTED**

40. A debtor may obtain postpetition credit "secured by a senior or equal lien on property of the estate that is subject to a lien only if" the debtor, among other things, provides "adequate protection" to those parties whose liens are primed. See 11 U.S.C. § 364(d)(1)(B). What constitutes adequate protection is decided on a case-by-case basis, and adequate protection may be provided in various forms, including payment of adequate protection fees, payment of interest or granting of replacement liens or administrative claims. *See, e.g., In re Martin*, 761 F.2d 472, 474 (8th Cir. 1985) ("Such matters 'are [to be] left to case-by-case interpretation and development.") (quoting H.R. Rep. No. 595, 95th Cong., 2d Sess. 339, reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6295); *In re Mosello*, 195 B.R. 277, 289 (Bankr. S.D.N.Y. 1996) ("the determination of adequate protection is a fact-specific inquiry . . . left to the vagaries of each case"); *In re Realty Sw. Assocs.*, 140 B.R. 360 (Bankr. S.D.N.Y. 1992); *In re Beker Indus. Corp.*, 58 B.R. 725, 736 (Bankr. S.D.N.Y. 1986) (the application of adequate protection "is left to the vagaries of each case, but its focus is protection of the secured creditor from diminution in the value of its collateral during the reorganization process") (citation omitted). The critical



purpose of adequate protection is to guard against the diminution of a secured creditor's collateral during the period when such collateral is being used by the debtor in possession. *See Martin*, 761 F.2d at 474; *In re Johnson*, 90 B.R. 973, 978 (Bankr. D. Minn. 1988) (holding that secured creditor is not impaired and is not entitled to receive adequate protection payments where value of collateral does not decline); *495 Cent. Park*, 136 B.R. at 631 (“The goal of adequate protection is to safeguard the secured creditor from diminution in the value of its interest during the chapter 11 reorganization.”); *In re Beker Indus. Corp.*, 58 B.R. at 736; *In re Hubbard Power & Light*, 202 B.R. 680, 685 (Bankr. E.D.N.Y. 1996).

41. The Prepetition Secured Credit Parties will be granted adequate protection through the provision of replacement liens, superpriority administrative claims, current cash payment of reasonable fees and expenses and, solely with respect to the Prepetition Revolver Facility, the repayment of the Prepetition Revolver Obligations consistent with the Loan Documents and the Interim Order. In addition, the adequate protection liens proposed to be granted are consistent with the priorities set forth in the Intercreditor Agreement and the Subordination Agreements.

42. By providing the above forms of adequate protection, the Debtors have satisfied their burden of demonstrating that the Prepetition Secured Credit Parties are adequately protected. In addition, the Prepetition Secured Credit Parties are adequately protected because the proceeds of the DIP Facility will be used to fund these Chapter 11 Cases and allow the Debtors to pursue their chapter 11 strategy of consummating a sale of their business as a going concern. Numerous courts have held that a secured creditor is adequately protected where the debtor reasonably anticipates that its secured creditors will receive more on account of their collateral taking into account the imposition of the priming lien than if the debtor were unable to

obtain the loan. *See 495 Cent. Park*, 136 B.R. at 631 ("[T]here is no question that the property would be improved by the proposed renovations and that an increase in value will result. In effect, a substitution occurs that the money spent for improvements will be transferred into value. This value will serve as adequate protection for the [prepetition secured lender]."); *In re Aeropostale, Inc.*, No. 16-11275 (SHL) (Bankr. S.D.N.Y. May 6, 2016), Tr. of Hr'g at 18:5-12 (finding that secured lenders were adequately protected during pendency of the interim DIP order where the debtors demonstrated that liquidity was anticipated to slightly increase during the interim period and would allow the debtors to implement their chapter 11 strategy, including pursuing a sale of their assets, as opposed to forcing an immediate liquidation); *In re Hudson*, No. 208-09480, 2011 WL 1004630, at \*9-10 (Bankr. M.D. Tex. Mar. 16, 2011) (approving debtor's financing to fund its construction of a shed that was required for it to continue operating under a valuable contract, which was projected to increase the value of the collateral far in excess of the amount of the postpetition loan); *In re Yellowstone Mountain Club, LLC*, No. 08-62570-11, 2008 WL 5875547, at \*17 (Bankr. D. Mont. Dec. 17, 2008) (finding that "there will be a net economic benefit to all parties stemming from the DIP Loan" because "the DIP Loan will serve to preserve the value of [the] collateral and in fact enhance it in an amount that exceeds the amount of the DIP Loan by multiples" where the DIP loan was used to finance operation of the debtor's ski club and resort rather than allowing it to "go dark" while it pursued a sale) (emphasis added); *In re Hubbard Power & Light*, 202 B.R. 680, 685 (Bankr. E.D.N.Y. 1996) (holding that county's lien on debtor's property was adequately protected where a substantial portion of the DIP loan would be used to clean up environmental damage on the debtor's property, which was worthless absent such remediation, and to fund operations, thereby increasing the value of such property in an amount in excess of the DIP loan).

43. Here, the DIP Facility will preserve the value of the Prepetition Collateral by enabling the Debtors to pursue a sale of their businesses as a going concern rather than having to immediately liquidate in a chapter 7. The Prepetition Term Loan Credit Parties and the Prepetition Secured Note Credit Parties will receive more on account of their collateral taking into account the imposition of the priming lien than if the debtor were unable to obtain the DIP Loan. Accordingly, the adequate protection provided to the Prepetition Secured Credit Parties is fair and reasonable, and satisfies the requirements of section 364 of the Bankruptcy Code.

**D. THE DEBTORS SHOULD BE AUTHORIZED TO USE CASH COLLATERAL**

44. Section 363(c)(2) of the Bankruptcy Code governs a debtor's use of a secured creditor's cash collateral. Specifically, that provision provides, in pertinent part, that:

The trustee may not use, sell, or lease cash collateral . . . unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section [363].

11 U.S.C. § 363(c)(2). Further, section 363(e) provides that “on request of an entity that has an interest in property . . . proposed to be used, sold or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.” 11 U.S.C. § 363(e).

45. The Debtors have satisfied the requirements of sections 363(c)(2) and 363 (e), and should be authorized to use the Cash Collateral. First, as discussed above, the requisite Prepetition Secured Credit Parties consent to the use of the Cash Collateral. Second, the Debtors are providing the Prepetition Secured Credit Parties with adequate protection in the form of replacement liens on the DIP Collateral, including Cash Collateral, as well as the other protections described above.

46. As described above, the Debtors have an urgent need for the immediate use of the Prepetition Collateral, including the Cash Collateral, to honor obligations critical to the success of their ongoing operations, including to employees, vendors, and customers. Absent access to Cash Collateral, the Debtors cannot continue to operate their business postpetition, diminishing the value of the Debtors' estates to the detriment of all stakeholders, including the Prepetition Secured Credit Parties.

47. Therefore, the Debtors submit that they should be authorized to use the Cash Collateral on the terms set forth in the Interim Order.

**E. THE DEBTORS SHOULD BE AUTHORIZED TO  
PAY THE FEES REQUIRED BY THE DIP LENDER**

48. As described above, the Debtors have agreed, subject to Court approval and the effectiveness of the Loan Documents, to pay certain fees to the DIP Agent and the DIP Lender in connection with the DIP Facility. Specifically, the Debtors will pay fees owed to the DIP Secured Parties following entry of the Interim Order. Altogether, the fees payable to the DIP Agent and the DIP Lender and other obligations under the Loan Documents are reasonable and appropriate and give the Debtors access to DIP financing on the most favorable terms on which the DIP Lender would agree to make the DIP Facility available. *See* Weinstein Decl. ¶ 17. The Debtors considered these fees when determining in the exercise of their sound business judgment that the DIP Facility constitutes the best terms on which the Debtors could obtain the postpetition financing necessary to continue their operations and conduct a fair, robust sale process. Consequently, paying these fees in order to obtain the DIP Facility is in the best interests of the Debtors' estates and creditors and other parties in interest.

**F. THE DIP LENDER SHOULD BE DEEMED A GOOD FAITH LENDER**

49. Section 364(e) of the Bankruptcy Code protects a good faith lender's right to collect on loans extended to a debtor, and its rights in any lien securing those loans, even if the authority of the debtor to obtain such loans or grant such liens is later reversed or modified on appeal. Section 364(e) of the Bankruptcy Code provides that:

The reversal or modification on appeal of an authorization under this section [364 of the Bankruptcy Code] to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

11 U.S.C. § 364(e).

50. As explained in detail herein and in the Weinsten Declaration, the DIP Facility offers the most favorable terms available to the Debtors for postpetition financing and are the result of arm's length, good faith negotiations between the Debtors and the DIP Lenders, among others. *See* Weinsten Decl. ¶ 17. The terms and conditions of the DIP Facility are fair and reasonable, and the proceeds of the DIP Facility will be used only for purposes that are permissible under the Bankruptcy Code. Further, no consideration is being provided to any party to the Loan Documents with respect thereto, other than as described herein. Accordingly, the Court should find that the DIP Lender is a "good faith" lender within the meaning of section 364(e) of the Bankruptcy Code and is entitled to all of the protections afforded by that section.

**G. THE SECTION 506(C) AND "EQUITIES OF THE CASE" WAIVERS ARE APPROPRIATE**

51. In connection with consenting to priming liens or the use of Cash Collateral, prepetition secured parties commonly request a waiver of (i) section 506(c) of the Bankruptcy Code, which permits the Debtors to surcharge collateral and (ii) the "equities of the case"

exception from the general rule of section 552 of the Bankruptcy Code that prepetition liens that attach to proceeds of collateral will continue to attach to postpetition proceeds. Here, as a material inducement to the DIP Parties to agree to provide the DIP Facility, and in exchange for (a) the DIP Parties' agreement to subordinate their liens and superpriority claims to the Carve-Out; and (b) the Prepetition Lenders' agreement to the use of the DIP Loans, the subordination of their Prepetition Liens and the consensual use of Cash Collateral in accordance with and subject to the Budget, the DIP Parties and the Prepetition Lenders require the Debtors to waive their rights under section 506(c) and the "equities of the case" exception under section 552(b) of the Bankruptcy Code, subject to and effective upon entry of the Final Order. In addition, as section 506(c) and "equities of the case" waivers would only be approved pursuant to the Final Order, parties in interest (including the Committee) have an opportunity to be heard in connection with the approval of such waiver. Nevertheless, the Debtors submit that the proposed section 506(c) and "equities of the case" waivers are appropriate.

**H. MODIFICATION OF THE AUTOMATIC STAY IS WARRANTED FOR THE DIP SECURED PARTIES**

52. The Loan Documents contemplate that the automatic stay arising under section 362 of the Bankruptcy Code shall be vacated or modified to the extent necessary to permit the DIP Agent to exercise, upon the occurrence and during the continuation of any Event of Default, but subject to any applicable motion requirements in the DIP Orders, all rights and remedies provided for in the Loan Documents, without further order of or application to the Court.

53. Stay modification provisions of this sort are ordinary features of debtor in possession financing and, in the Debtors' business judgment, are reasonable under the circumstances. *See, e.g., In American Apparel, Inc.*, Case No. 15-12055 (BLS) [D.I. 248] (Bankr. D. Del. Nov. 2, 2015) (authorizing stay modifications in order to permit DIP lenders to

exercise remedies upon an event of default); *In re Molycorp, Inc.*, Case No. 15-11357 (CSS) [D.I. 278] (Bankr. D. Del. July 24, 2015) (modifying automatic stay as necessary to effectuate the terms of the order); *In re Coldwater Creek, Inc.*, Case No. 14-10867 (BLS) [D.I. 576] (Bankr. D. Del. June 12, 2014) (modifying stay to authorize exercise of remedies upon default); *In re Broadway 401 LLC*, Case No. 10-10070 (KJC) [D.I. 55] (Bankr. D. Del. Feb. 16, 2010) (modifying the stay to the extent necessary to effectuate the order).

**I. THE DEBTORS REQUIRE IMMEDIATE ACCESS TO CASH COLLATERAL AND THE DIP FACILITY**

54. The Court may grant interim relief with respect to a motion filed pursuant to section 363(c) or section 364 of the Bankruptcy Code, where, as here, interim relief is “necessary to avoid immediate and irreparable harm to the estate pending a final hearing.” Fed. R. Bankr. P. 4001(b)(2) and (c)(2). In examining requests for interim relief under this rule, courts in this jurisdiction generally apply the same business judgment standard applicable to other business decisions. *See, e.g., Ames Dep’t Stores*, 115 B.R. at 36.

55. The Debtors and their estates will suffer immediate and irreparable harm if the interim relief requested herein, including authorizing the Debtors to use the cash collateral and to borrow up to \$21 million on an interim basis under the Loan Documents is not granted promptly. The DIP Facility will provide cash with which the Debtors can continue operations and maintain the going concern value of the Company by purchasing new inventory for purposes of the go-forward business lines. Replenishing inventory reserves and avoiding interruptions in the Company’s relationships with its inventory vendors is absolutely critical to the preservation of the Debtors’ business and asset value. This is particularly important with respect to the Debtors’ wholesale customers, who have previously reduced their orders based on supply chain disruptions. *See First Day Decl.*, ¶ 32. Accordingly, the Debtors have an immediate need for

access to liquidity to, among other things, continue the operation of their business, maintain their relationships with customers and inventory vendors, meet payroll, pay capital expenditures, procure goods and services from vendors and suppliers and otherwise satisfy their working capital and operational needs, all of which is required to preserve and maintain the value of the Debtors' assets for the benefit of all parties in interest. For all of the reasons set forth above, prompt entry of the Interim Order is necessary to avert immediate and irreparable harm to the Debtors' estates and is consistent with, and warranted under, Bankruptcy Rules 4001(b)(2) and (c)(2).

#### **REQUEST FOR A FINAL HEARING**

56. Pursuant to Bankruptcy Rules 4001(b)(2) and 4001(c)(2), the Debtors request that the Court hold a hearing to consider entry of the Final Order and the permanent approval of the relief requested in this Motion at the previously scheduled November 3, 2017 hearing. The Debtors also request authority to serve a copy of the signed Interim Order, which fixes the time and date for the filing of objections, if any, to entry of the Final Order, by first class mail upon the notice parties listed below, and further requests that the Court deem service thereof sufficient notice of the hearing on the Final Order under Bankruptcy Rule 4001(c)(2).

#### **WAIVER OF ANY APPLICABLE STAY**

57. The Debtors also request that the Court waive the stay imposed by Bankruptcy Rule 6004(h), which provides that “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” Fed. R. Bankr. P. 6004(h). As described above, the relief that the Debtors seek in this Motion is necessary for the Debtors to operate their businesses without interruption and to preserve value for their estates. Accordingly, the Debtors respectfully request



that the Court waive the fourteen-day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

### NOTICE

58. Notice of this Motion has been given to: (i) the Office of the United States Trustee for the District of Delaware; (ii) counsel to Wells Fargo Bank, NA, as the ABL Agent, Choate, Hall, & Stewart LLP, Two International Place, Boston, Massachusetts 02110 (Attn: Kevin J. Simard), ksimard@choate.com; (iii) counsel to THL Corporate Finance, Inc., as the Term Loan Agent, Paul Hastings LLP, 71 S. Wacker Drive, Forty-Fifth Floor, Chicago, Illinois 60606 (Attn: Matthew Murphy), mattmurphy@paulhastings.com; (iv) Palladin Consumer Retail Partners, Attn: John Lawrence, John Hancock Tower, 200 Clarendon Street, 26th Floor, Boston, MA 02116; (v) counsel to the Prepetition Senior Noteholders and the Prepetition Subordinated Noteholders, Weil Gotshal & Manges LLP, 767 Fifth Avenue, New York, New York 10153 (Attn: Jacqueline Marcus), jacqueline.marcus@weil.com; (vi) the Internal Revenue Service; (vii) the United States Attorney for the District of Delaware; (viii) the parties included on the Debtors' consolidated list of thirty (30) largest unsecured creditors; (ix) proposed counsel to the Committee; (x) the DIP Secured Parties, as defined herein; and (xi) those parties requesting notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested in this Motion, the Debtors respectfully submit that no further notice is necessary.

*[Remainder of this page intentionally left blank.]*

## CONCLUSION

WHEREFORE, for the reasons set forth above, the Debtors respectfully request that the Court (a) enter the Interim Order, substantially in the form attached hereto as Exhibit A, granting the relief requested herein and, after the Final Hearing, the Final Order, substantially in the form that shall be filed with the Court, and (b) such other and further relief as the Court may deem just and proper.

Dated: October 15, 2017  
Wilmington, Delaware

BAYARD, P.A.

/s/ Erin R. Fay  
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-and-

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**EXHIBIT A**

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

In re:

AEROGROUP INTERNATIONAL,  
INC., *et al.*,

Debtors.<sup>1</sup>

Chapter 11

Case No. 17-11962 (KJC)

(Jointly Administered)

Re: D.I. \_\_\_\_

**INTERIM ORDER (I) AUTHORIZING THE DEBTORS TO OBTAIN POSTPETITION FINANCING AND GRANT SECURITY INTERESTS AND SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS WITH RESPECT TO THE DIP COLLATERAL; (II) GRANTING ADEQUATE PROTECTION TO THE PREPETITION SECURED CREDIT PARTIES; (III) MODIFYING THE AUTOMATIC STAY; (IV) AUTHORIZING THE DEBTORS TO ENTER INTO AGREEMENTS WITH POLK 33 LENDING, LLC; (V) AUTHORIZING USE OF CASH COLLATERAL; (VI) GRANTING RELATED RELIEF; AND (VII) SCHEDULING A FINAL HEARING**

THIS MATTER having come before the Court upon the motion (the “**Motion**”)<sup>2</sup> of the above-captioned debtors (the “**Debtors**”) in the above-captioned chapter 11 cases (the “**Chapter 11 Cases**”), pursuant to sections 105, 361, 362, 363, and 364 of title 11 of the United States Code, (11 U.S.C. §§ 101 *et seq.*, as amended, the “**Bankruptcy Code**”), Rules 2002 and 4001 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), and Local Rules 2002-1 and 4001-2, seeking entry of an interim order (this “**Interim Order**”) granting *inter alia*:

i. authority, pursuant to sections 105, 363, 364(c) and 364(d)(1) of the Bankruptcy Code, for each of the Debtors, jointly and severally, to obtain senior secured postpetition

<sup>1</sup> The Debtors in these chapter 11 cases, together with the last four digits of each Debtor’s federal tax identification number, are as follows: Aerogroup International, Inc. (6119), AGI Holdco, Inc. (7087), Aerogroup International LLC (4658), Aerogroup International Holdings LLC (4312), Aerogroup Retail Holdings, Inc. (4650), and Aerogroup Gift Card Company, Inc. (7551). The mailing address for the Debtors, solely for purposes of notices and communications, is: 201 Meadow Road, Edison, New Jersey 08817.

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion or the DIP Credit Agreement (as defined below), as applicable.

financing in an aggregate principal amount of up to \$25 million (the “**DIP Facility**”) pursuant to the Loan Documents (as defined below) and this Interim Order;

ii. authority for the Debtors to enter into that certain Senior Secured Super-Priority Debtor-in-Possession Credit Agreement, among Aerogroup International, Inc., Aerogroup International LLC, Aerogroup International Holdings LLC, Aerogroup Retail Holdings, Inc., and Aerogroup Gift Card Company, Inc., as Borrowers, AGI Holdco, Inc., as Guarantor, Wilmington Savings Fund Society, as administrative agent and collateral agent (in such capacity, the “**DIP Agent**”), and Polk 33 Lending, LLC (the “**DIP Lender**” and, together with the DIP Agent, the “**DIP Parties**”), in substantially the same form as attached hereto as **Exhibit 1** (as amended, restated, supplemented or otherwise modified from time to time in accordance with the terms thereof, the “**DIP Credit Agreement**” and, together with the any ancillary, collateral or related documents and agreements, the “**Loan Documents**”);

iii. authority for the Debtors to use the DIP Facility and the proceeds thereof in accordance with the Budget attached hereto as **Exhibit 2** (the “**Budget**”) to (a) fund the working capital needs and chapter 11 administrative costs of the Debtors during the pendency of the Chapter 11 Cases, (b) pay fees, costs and expenses of the DIP Facility on the terms and conditions described in the Loan Documents, (c) pay all outstanding Prepetition Revolver Obligations (as defined below) in full, (d) maintain the Prepetition Indemnity Account (as defined below), and (e) pay other amounts as specified in the Budget;

iv. authority for the Debtors to grant valid, enforceable, non-avoidable, automatically and fully perfected security interests, liens and superpriority claims, including allowed superpriority administrative expense claims pursuant to sections 364(c)(1) and 507(b) of the Bankruptcy Code and liens pursuant to sections 364(c)(2) and 364(c)(3) of the Bankruptcy Code

and, solely as set forth herein, priming liens pursuant to section 364(d)(1) of the Bankruptcy Code, to the DIP Lender, in the DIP Collateral (as defined below) (and all proceeds thereof), including, without limitation, all property constituting “Cash Collateral,” as defined in section 363(a) of the Bankruptcy Code (“**Cash Collateral**”), to secure all DIP Obligations, as more fully set forth in this Interim Order, subject only to the Carve-Out (each as defined below);

v. subject to and only effective upon entry of the Final Order (as defined below) granting such relief, waiver by the Debtors of all rights to surcharge against the collateral of the DIP Lender or the Prepetition Secured Credit Parties pursuant to section 506(c) of the Bankruptcy Code;

vi. subject to and only effective upon entry of the Final Order granting such relief, waiver of the equitable doctrine of marshaling or any other similar doctrine with respect to any collateral of the DIP Lender or the Prepetition Secured Credit Parties;

vii. providing adequate protection to the Prepetition Secured Credit Parties to the extent set forth herein;

viii. modification of the automatic stay to the extent hereinafter set forth and waiving the 14-day stay provisions of Bankruptcy Rules 4001(a)(3) and 6004(h);

ix. the scheduling of a final hearing (the “**Final Hearing**”) on the Motion for November 3, 2017 to consider entry of a final order (the “**Final Order**”), *inter alia*, authorizing the borrowings under the DIP Facility on a final basis and approval of notice procedures with respect thereto; and

x. related relief.

The Court having considered the Weinsten Declaration, the Motion and the exhibits attached thereto, the evidence submitted or adduced and the arguments of counsel made at the

interim hearing held on October 18, 2017 (the “**Interim Hearing**”); and having found that due and proper notice (the “**Notice**”) of the Motion and the Interim Hearing having been served by the Debtors in accordance with Bankruptcy Rule 4001 and 9006 and Local Rule 2002-1; and it appearing that no other or further notice need be provided; and the Interim Hearing to consider the interim relief requested in the Motion having been held and concluded; and all objections, if any, to the interim relief requested in the Motion having been withdrawn, resolved or overruled by the Court; and it appearing to the Court that granting the interim relief requested is necessary to avoid immediate and irreparable harm to the Debtors and their estates pending the Final Hearing, and otherwise is fair and reasonable and in the best interests of the Debtors, their estates, and their creditors and equity holders, and is essential for the continued operation of the Debtors’ businesses; and after due deliberation and consideration, and for good and sufficient cause appearing therefor;

**THIS COURT HEREBY MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW BASED UPON THE MOTION, THE REPRESENTATIONS OF COUNSEL AND EVIDENCE SUBMITTED DURING THE INTERIM HEARING:**<sup>3</sup>

A. *Petition Date.* On September 15, 2017 (the “**Petition Date**”), the Debtors filed voluntary petitions under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the “**Court**”) commencing these Chapter 11 Cases.

B. *Debtors in Possession.* The Debtors are continuing in the management and operation of their businesses and properties as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these Chapter 11 Cases.

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<sup>3</sup> To the extent, any findings of fact constitute conclusions of law, they are adopted as such, and vice versa, pursuant to Fed. R. Bankr. P. 7052.

C. Notice. Notice of the Interim Hearing and the relief requested in the Motion has been provided by the Debtors in compliance with Bankruptcy Rule 4001(c), whether by facsimile, email, overnight courier, or hand delivery, to certain parties in interest, including: (i) the Office of the United States Trustee for the District of Delaware; (ii) the Securities and Exchange Commission; (iii) the Internal Revenue Service; (iv) the parties included on the Debtors' consolidated list of thirty (30) largest unsecured creditors; (v) counsel to the Prepetition Revolver Agent, Choate, Hall & Stewart LLP, Two International Place, Boston, Massachusetts 02110 (Attn: Kevin J. Simard), ksimard@choate.com; (vi) counsel to the Prepetition Term Loan Agent, Paul Hastings LLP, 71 S. Wacker Drive, Forty-Fifth Floor, Chicago, Illinois 60606 (Attn: Matthew M. Murphy), mattmurphy@paulhastings.com; (vii) counsel to the Prepetition Senior Noteholders and the Prepetition Subordinated Noteholders, Weil Gotshal & Manges LLP, 767 Fifth Avenue, New York, New York 10153 (Attn: Jacqueline Marcus, Esq.); (viii) counsel to the DIP Lender, Arent Fox LLP, 1675 Broadway, New York, New York 10019 (Attn: Robert M. Hirsh, Esq.); (ix) proposed counsel to the Committee (as defined below); and (x) any party that has requested notice pursuant to Bankruptcy Rule 2002.

D. Jurisdiction and Venue. This Court has core jurisdiction over the persons and property affected hereby pursuant to 28 U.S.C. §§ 157(b) and 1334. Consideration of the Motion constitutes a core proceeding under 28 U.S.C. § 157(b)(2). Venue for the Chapter 11 Cases and proceedings on the Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

E. Committee Formation. On September 26, 2017 (the "**Committee Formation Date**"), the Office of the United States Trustee (the "**U.S. Trustee**") appointed an official committee of unsecured creditors (the "**Committee**") in the Chapter 11 Cases pursuant to section 1102 of the Bankruptcy Code.



F. No Credit Available on More Favorable Terms. The Debtors are unable to procure financing in the form of unsecured credit allowable as an administrative expense under §§ 364(a), 364(b), or 503(b)(1) of the Bankruptcy Code or in exchange for the grant of a superpriority administrative expense, junior liens on encumbered property of the Debtors' estates, or liens on property of the Debtors' estates not subject to a lien pursuant to § 364(c)(1), 364(c)(2) or 364(c)(3) of the Bankruptcy Code. The Debtors have been unable to procure the necessary financing on terms more favorable, taken as a whole, than the financing offered by each of the DIP Agent and the DIP Lender pursuant to the Loan Documents.

G. Best Interests of Estates. It is in the best interest of the Debtors' estates and creditors that the Debtors be allowed to enter into the DIP Facility to obtain postpetition secured financing from the DIP Lender under the terms and conditions set forth herein and in the Loan Documents, as such financing is necessary to avoid immediate and irreparable harm to the Debtors' estates and for the continued operation of the Debtors' businesses.

H. Good Faith. The extension of credit and financial accommodations under the Loan Documents are fair, reasonable, in good faith, negotiated at arm's length, reflect the Debtors' exercise of prudent business judgment, and are supported by reasonably equivalent value and fair consideration and the DIP Lender is entitled to the protections of section 364(e) of the Bankruptcy Code.

I. 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 (1) minimize disruption to the Debtors' businesses and ongoing operations, (2) preserve and maximize the value of the Debtors' estates for the benefit of all the Debtors'

creditors, and (3) avoid immediate and irreparable harm to the Debtors, their creditors, their businesses, their employees, and their assets.

J. *Necessity of DIP Facility Terms.* The terms of the Loan Documents and this Interim Order assuring that the liens and the various claims, superpriority claims, and other protections granted in this Interim Order will not be affected by any subsequent reversal or modification of this Interim Order or any other order, as provided in section 364(e) of the Bankruptcy Code, which is applicable to the postpetition financing arrangement contemplated in the Loan Documents, are necessary in order to induce the DIP Lender to provide postpetition financing to the Debtors.

K. *Need for Post-Petition Financing.* The Debtors do not have sufficient available sources of working capital, including cash collateral, to continue to operate their businesses in the ordinary course of business without the financing requested in the Motion. 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 to the Debtors' continued viability as the Debtors seek to maximize the value of the assets of their estates for the benefit of all creditors of the Debtors through a sale as a going concern. The ability of the Debtors to obtain sufficient working capital and liquidity through the proposed post-petition financing arrangements with the DIP Agent and the DIP Lender as set forth in this Interim Order and the Loan Documents, is vital to the preservation and maintenance of the going concern value of each Debtor. 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 of their business operations, and preserve and maximize the value of the

assets of the Debtors' bankruptcy estates in order to maximize the recovery to all creditors of the estates.

L. Need to Use Cash Collateral. The Debtors need to use the Prepetition Collateral, including the Cash Collateral (subject to the Budget), in order to, among other things, preserve, maintain and maximize the value of their assets and businesses. The ability of the Debtors to maintain liquidity through the use of the Prepetition Collateral, including the Cash Collateral, is vital to the Debtors and their efforts to maximize the value of their assets. Accordingly, the Debtors have demonstrated good and sufficient cause for the relief granted herein.

M. Sections 506(c) and 552(b). As material inducement to the DIP Lender to agree to provide the DIP Facility, and in exchange for (a) the DIP Lender's agreement to subordinate their liens and superpriority claims to the Carve-Out; and (b) the Prepetition Secured Credit Parties' agreement to the use of the DIP Loans (as defined below), the subordination of their Prepetition Liens, as more fully set forth in this Interim Order, and the consensual use of Cash Collateral in accordance with and subject to the Budget, the DIP Lender and the Prepetition Secured Credit Parties are entitled to receive upon, and subject to entry of the Final Order (i) a waiver of any equities of the case exceptions under section 552(b) of the Bankruptcy Code and (ii) a waiver of the provisions of section 506(c) of the Bankruptcy Code.

N. Priming of Prepetition Liens. The priming of the Prepetition Liens on the Prepetition Collateral under section 364(d)(1) of the Bankruptcy Code, as contemplated by this Interim Order and the DIP Facility Documents, and as further described below, will enable the Debtors to obtain the DIP Facility and, among other benefits, continue to operate their businesses for the benefit of their estates and stakeholders. The Prepetition Agents, on behalf of and at the

direction of the Prepetition Lenders consent to the priming of the Prepetition Liens on the Prepetition Collateral, as more fully set forth in this Interim Order.

O. Adequate Protection. The Prepetition Term Loan Credit Parties and the Prepetition Secured Note Credit Parties are entitled to receive adequate protection on account of their interests in the Prepetition Collateral pursuant to sections 361, 362, and 363 of the Bankruptcy Code solely to the extent of any diminution in the value of their interests in the Prepetition Collateral (including Cash Collateral) resulting from the priming of their Prepetition Liens, the subordination to the Carve-Out, the Debtors' use, sale or lease of such Prepetition Collateral, and the imposition of the automatic stay (collectively, to the extent of any such diminution in value, the "**Diminution in Value**"). As part of the adequate protection provided by this Interim Order, (y) the Prepetition Term Loan Credit Parties shall receive, among other things, the Adequate Protection Liens, the Adequate Protection Superpriority Claims, and the Adequate Protection Payments (each, as defined below); and (z) the Prepetition Secured Note Credit Parties shall receive Adequate Protection Liens and Adequate Protection Superpriority Claims.

P. Debtors' Stipulations. After consultation with their attorneys and financial advisors, and without prejudice to the rights of parties in interest as set forth in paragraph 18 herein the Debtors admit, stipulate, acknowledge and agree that (collectively, paragraphs P(i) through P(xiv) below are referred to herein as the "**Debtors' Stipulations**):

(i) Prepetition Revolver Credit Facility. Prior to the commencement of the Chapter 11 Cases, the Prepetition Revolver Lenders provided the Prepetition Revolver Loan Parties with, among other things \$37,588,729 in aggregate maximum principal amount of revolving loan commitments, including letter of credit and swingline loan commitments, with a

submit for letters of credit of \$5,000,000, (the “**Prepetition Revolver Facility**”) pursuant to that certain Credit Agreement, dated as of June 9, 2014 (as amended, supplemented, restated, or otherwise modified prior to the Petition Date, the “**Prepetition Revolver Credit Agreement**”, and together with all related Loan Documents (as defined in the Prepetition Revolver Credit Agreement), the “**Prepetition Revolver Credit Documents**”), by and among Aerogroup International, Inc. (“**Aerogroup International**”) as Lead Borrower and the other Borrowers and the Guarantor identified therein (collectively with Aerogroup International, the “**Prepetition Revolver Loan Parties**”), Wells Fargo Bank, National Association (“**Wells Fargo**”), as administrative agent (in such capacity, the “**Prepetition Revolver Agent**”), the lenders party thereto from time to time (the “**Prepetition Revolver Lenders**” collectively with the Prepetition Revolver Agent and the other “Credit Parties” (as defined in the Prepetition Revolver Credit Agreement), the “**Prepetition Revolver Credit Parties**”), and the other parties thereto.

(ii) **Prepetition Revolver Obligations**. As of the Petition Date, the outstanding principal amount owed by the Prepetition Revolver Loan Parties under the Prepetition Revolver Facility was not less than \$22,454,455.69 and \$500,000.00 of issued and outstanding letters of credit (collectively, together with any amounts paid, incurred or accrued prior to or following the Petition Date in accordance with the Prepetition Revolver Credit Documents, unpaid principal, interest, fees, charges, expenses and disbursements (including, without limitation, attorneys’ fees and related expenses and disbursements), and other obligations owed to the Prepetition Revolver Agent and Prepetition Revolver Lenders, whether or not contingent, whenever arising, accrued, accruing, due, owing or chargeable in respect of any obligations under the Prepetition Revolver Credit Documents, including all “Obligations” as described in the Prepetition Revolver Credit Agreement, the “**Prepetition Revolver Obligations**”).

(iii) Prepetition Term Loan Agreement. Prior to the commencement of the Chapter 11 Cases, the Prepetition Term Loan Lenders provided a term loan to Aerogroup International in the principal amount of \$20,000,000 (the “Prepetition Term Loan Facility”, and together with the Prepetition Revolver Facility, the “Prepetition Senior Credit Facilities”) pursuant to that certain Term Loan Agreement, dated as of June 9, 2014 (as amended, supplemented, restated, or otherwise modified prior to the Petition Date, the “Prepetition Term Loan Agreement” and, together with all related Loan Documents (as defined in the Prepetition Term Loan Agreement), the “Prepetition Term Loan Credit Documents”) by and among Aerogroup International as Lead Borrower and the Borrowers and Guarantors named therein (collectively the “Prepetition Term Loan Parties”, together with the Prepetition Revolver Loan Parties, the “Prepetition Loan Parties”), THL Corporate Finance, Inc., as Administrative Agent (the “Prepetition Term Loan Agent” and, together with the Prepetition Revolver Agent, the “Prepetition Agents”), the lenders party thereto from time to time (the “Prepetition Term Loan Lenders”, together with the Prepetition Revolver Lenders, the “Prepetition Lenders” and the Prepetition Term Loan Lenders collectively with the Prepetition Term Loan Agent and the other “Credit Parties” (as defined in the Prepetition Term Loan Agreement), the “Prepetition Term Loan Credit Parties”, together with the Prepetition Revolver Credit Parties, the “Prepetition Senior Credit Parties”) and the other parties thereto.

(iv) Prepetition Term Loan Obligations. As of the Petition Date, the Prepetition Term Loan Parties were indebted under the Prepetition Term Loan Facility in the aggregate amount of not less than \$19,699,148.47 (collectively, together with any amounts paid, incurred or accrued prior to the Petition Date in accordance with the Prepetition Term Loan Credit Documents, unpaid principal, interest, fees, charges, expenses and disbursements

(including, without limitation, attorneys' fees and related expenses and disbursements) and other obligations owed to the Prepetition Term Loan Agent and the Prepetition Term Loan Lenders, whether contingent, whenever arising, accrued, accruing, due, owing or chargeable, including all "Obligations" as described in the Prepetition Term Loan Credit Documents, the "**Prepetition Term Loan Obligations**" and, together with the Prepetition Revolver Obligations, the "**Prepetition Senior Loan Obligations**").

(v) **Prepetition Subordinated Loan**. Prior to the commencement of the Chapter 11 Cases, the Equityholders (as defined in the Prepetition Subordinated Loan Agreement, the "**Prepetition Subordinated Lenders**") became entitled to receive the Holdback Amount (as defined in the Prepetition Subordinated Loan Agreement) in the principal amount of \$7,500,000 and certain interest payments described therein (together with the Holdback Amount, the "**Prepetition Subordinated Loan**") pursuant to that certain Agreement and Plan of Merger, dated as of April 18, 2014 (as amended, supplemented, restated, or otherwise modified prior to the Petition Date, the "**Prepetition Subordinated Loan Agreement**" and, together with all related documents, the "**Prepetition Subordinated Loan Documents**") by and among, among others, AGI Holdco, Inc. ("**AGI Holdco**") and Aerogroup International (collectively the "**Prepetition Subordinated Loan Parties**") and Shareholder Representative Services LLC, as "Equityholders' Representative."

(vi) **Prepetition Subordinated Loan Obligations**. As of the Petition Date, the Prepetition Subordinated Loan Parties were indebted under the Prepetition Subordinated Loan in the aggregate amount of not less than \$1,687,249 (collectively, together with any amounts paid, incurred or accrued prior to the Petition Date in accordance with the Prepetition Subordinated Debt Documents, unpaid principal, interest, fees, charges, expenses and disbursements

(including, without limitation, attorneys' fees and related expenses and disbursements) and other obligations owed to the Prepetition Subordinated Lenders, whether contingent, whenever arising, accrued, accruing, due, owing or chargeable, the "**Prepetition Subordinated Loan Obligations**").

(vii) **Prepetition Senior Notes**. Prior to the commencement of the Chapter 11 Cases, AGI Holdco and Aerogroup International (collectively the "**Prepetition Senior Note Parties**") issued those certain Subordinated Convertible Notes due March 9, 2020 (as amended, supplemented, restated, or otherwise modified prior to the Petition Date, the "**Prepetition Senior Notes**", together with all related Subordinated Debt Documents, the "**Prepetition Senior Note Documents**") pursuant to that certain Purchase Agreement dated as of January 20, 2016, by and among the Prepetition Senior Note Parties, Palladin Partners, LP, as agent (in such capacity, the "**Prepetition Senior Notes Agent**"), and the Purchasers, as defined therein (the "**Prepetition Senior Noteholders**" and, together with the Prepetition Senior Notes Agent, the "**Prepetition Senior Note Credit Parties**"), on account of a loan provided by the Prepetition Senior Noteholders to the Prepetition Senior Note Parties in the principal amount of \$16,275,885.

(viii) **Prepetition Senior Note Obligations**. As of the Petition Date, the Prepetition Senior Note Parties were indebted under the Prepetition Senior Notes in the aggregate amount of not less than \$19,052,301 (collectively, together with any amounts paid, incurred or accrued prior to the Petition Date in accordance with the Prepetition Senior Note Documents, unpaid principal, interest, fees, charges, expenses and disbursements (including, without limitation, attorneys' fees and related expenses and disbursements) and other obligations owed to the Prepetition Senior Note Credit Parties, whether contingent, whenever arising,



accrued, accruing, due, owing or chargeable, including all “Obligations” as described in the Prepetition Senior Note Documents, the “**Prepetition Senior Note Obligations**”).

(ix) Prepetition Subordinated Notes. Prior to the commencement of the Chapter 11 Cases, AGI Holdco (in such capacity, the “**Prepetition Subordinated Note Party**”, together with the Prepetition Subordinated Loan Parties, the “**Prepetition Subordinated Debt Parties**”) issued those certain Subordinated Convertible Non-Transferrable Notes due March 9, 2020 (as amended, supplemented, restated, or otherwise modified prior to the Petition Date, the “**Prepetition Subordinated Notes**”, together with all related Subordinated Debt Documents, the “**Prepetition Subordinated Note Documents**”, and, together with the Prepetition Subordinated Loan Documents and the Prepetition Senior Note Documents, the “**Prepetition Subordinated Debt Documents**”), to the “**Prepetition Subordinated Noteholders**” (together with the Prepetition Senior Note Credit Parties, the “**Prepetition Secured Note Credit Parties**” and, the Prepetition Secured Note Credit Parties, together with the Prepetition Senior Credit Parties, the “**Prepetition Secured Credit Parties**”), on account of a loan provided by the Prepetition Subordinated Noteholders to the Prepetition Subordinated Note Party in the principal amount of \$7,000,000.

(x) Prepetition Subordinated Note Obligations. As of the Petition Date, the Prepetition Subordinated Note Party was indebted under the Prepetition Subordinated Notes in the aggregate amount of not less than \$8,856,163 (collectively, together with any amounts paid, incurred or accrued prior to the Petition Date in accordance with the Prepetition Subordinated Note Documents, unpaid principal, interest, fees, charges, expenses and disbursements (including, without limitation, attorneys’ fees and related expenses and disbursements) and other obligations owed to the Prepetition Subordinated Noteholders, whether contingent, whenever

arising, accrued, accruing, due, owing or chargeable, including all “Obligations” as described in the Prepetition Subordinated Debt Documents, the “**Prepetition Subordinated Note Obligations**”).

(xi) **Prepetition Liens and Prepetition Collateral**. As more fully set forth in the Prepetition Documents (defined below), prior to the Petition Date, the Prepetition Loan Parties, for the benefit of the Prepetition Secured Credit Parties, and the Prepetition Subordinated Debt Parties, for the benefit of the Prepetition Secured Note Credit Parties, granted security interests in and liens on, among other things, substantially all assets of the Prepetition Loan Parties and the Prepetition Subordinated Debt Parties (collectively, the “**Prepetition Collateral**”) to: (1) the Prepetition Revolver Agent (the “**Prepetition Revolver Liens**”); (2) the Prepetition Term Loan Agent (the “**Prepetition Term Loan Liens**”, together with the Prepetition Revolver Liens, the “**Prepetition Senior Liens**”); and (3) the Prepetition Secured Note Credit Parties (the “**Prepetition Subordinated Liens**”, and, together with the Prepetition Revolver Liens and the Prepetition Term Loan Liens, the “**Prepetition Liens**”). The priorities of the Prepetition Senior Liens in respect of the Prepetition Collateral are governed by that certain Intercreditor Agreement, dated as of June 9, 2014 (the “**Intercreditor Agreement**”), between the Prepetition Agents and acknowledged by certain Prepetition Loan Parties. The priority of the Prepetition Subordinated Liens in respect of the Prepetition Collateral is governed by (a) that certain Subordination Agreement, dated as of June 9, 2014 by and among, (i) the Shareholder Representative Services LLC, as “Equityholders’ Representative”, (ii) the Prepetition Agents, and (iii) AGI Holdco and Aerogroup International; (b) that certain Subordination and Intercreditor Agreement dated as of August 5, 2015 by and among (i) (A) Palladin Partners, LP, (B) THL Credit, Inc., and (C) the other Subordinated Creditors (as defined therein), (ii) the

Prepetition Agents, and (iii) AGI Holdco and Aerogroup International; and (c) that certain Subordination and Intercreditor Agreement dated as of January 20, 2016 by and among (i) Palladin Partners, LP, as agent, (ii) the Prepetition Agents, and (iii) AGI Holdco and Aerogroup International (collectively, the “**Subordination Agreements**” and, together with the Prepetition Revolver Credit Documents, Prepetition Term Loan Credit Documents, Prepetition Subordinated Debt Documents, and the Intercreditor Agreement, collectively, the “**Prepetition Documents**”).

(xii) Validity, Perfection and Priority of Prepetition Senior Liens and Prepetition Senior Loan Obligations. Subject to the provisions of paragraph 18 of this Interim Order, the Debtors (for themselves and their estates only), the Prepetition Agents (each for themselves and for the applicable Prepetition Senior Credit Parties), and the Prepetition Secured Note Credit Parties acknowledge and agree that (a) the Prepetition Senior Liens are valid, binding, enforceable, non-avoidable and properly perfected liens on the Prepetition Collateral; (b) the Prepetition Senior Liens have priority over any and all other liens on the Prepetition Collateral, subject only to certain other liens otherwise permitted by the Prepetition Documents (to the extent any such permitted liens were valid, binding, enforceable, properly perfected, non-avoidable and senior in priority to the Prepetition Senior Liens as of the Petition Date, the “**Prepetition Permitted Liens**”) and otherwise had priority over any and all other liens on the Prepetition Collateral, provided that, in no event shall any alleged right of reclamation or return (whether asserted under section 546(c) of the Bankruptcy Code or otherwise) be deemed or treated hereunder as a Prepetition Permitted Lien; (c) the priorities of the Prepetition Senior Liens in respect of the Prepetition Collateral are governed by the Intercreditor Agreement, provided, that, pursuant to the Subordination Agreements, the Prepetition Subordinated Liens are junior to the Prepetition Senior Liens and Prepetition Permitted Liens; (d) the Prepetition Senior

Loan Obligations constitute legal, valid, binding, and non-avoidable obligations of the Debtors; (e) no offsets, challenges, objections, defenses, claims or counterclaims of any kind or nature to any of the Prepetition Senior Liens or the Prepetition Senior Loan Obligations exist, and no portion of the Prepetition Senior Liens or the Prepetition Senior Loan Obligations are subject to any challenge or defense including, without limitation, avoidance, disallowance, disgorgement, recharacterization, or subordination (whether equitable or otherwise) pursuant to the Bankruptcy Code or applicable non-bankruptcy law; (f) the Debtors and their estates have no claims, objections, challenges, causes of actions, and/or choses in action, including without limitation, avoidance claims under chapter 5 of the Bankruptcy Code, against any of the Prepetition Senior Credit Parties or any of their respective affiliates, agents, attorneys, advisors, professionals, officers, directors or employees arising out of, based upon or related to the Prepetition Documents; (g) as of the Petition Date, the value of the Prepetition Collateral securing the Prepetition Revolver Obligations exceeded the amount of those obligations, and accordingly the Prepetition Revolver Obligations are allowed secured claims within the meaning of section 506 of the Bankruptcy Code, in a principal amount of not more than \$22,454,455.69 and \$500,000.00 of issued and outstanding letters of credit, together with accrued and unpaid interest, fees (including, without limitation, attorneys' fees and related expenses), and any and all other charges of whatever nature owing in respect of such Prepetition Revolver Obligations; (h) any payments made on account of the Prepetition Revolver Obligations to or for the benefit of the Prepetition Revolver Lenders prior to the Petition Date were on account of amounts in respect of which the Prepetition Revolver Lenders were oversecured, were payments out of the Prepetition Collateral, and such payments did not diminish any property otherwise available for distribution to unsecured creditors; (i) as of the Petition Date, the value of the Prepetition Collateral securing

the Prepetition Term Loan Obligations exceeded the amount of those obligations, and accordingly the Prepetition Term Loan Obligations are allowed secured claims within the meaning of section 506 of the Bankruptcy Code, in a principal amount of not less than \$19,699,148.47, together with accrued and unpaid interest, fees (including, without limitation, attorneys' fees and related expenses), and any and all other charges of whatever nature owing in respect or such Prepetition Term Loan Obligations; and (j) any payments made on account of the Prepetition Term Loan Obligations to or for the benefit of the Prepetition Term Loan Agent or the Prepetition Term Loan Lenders prior to the Petition Date were on account of amounts in respect of which the Prepetition Term Loan Agent and the Prepetition Term Loan Lenders were oversecured, were payments out of the Prepetition Collateral, and such payments did not diminish any property otherwise available for distribution to unsecured creditors.

(xiii) Cash Collateral. The Debtors represent that all of the Debtors' cash, including the cash in its deposit accounts, wherever located, whether as original collateral or proceeds of other Prepetition Collateral, constitutes Cash Collateral and is Prepetition Collateral of the Prepetition Secured Credit Parties.

(xiv) Default by the Debtor. The Debtors acknowledge and stipulate that the Debtors are in default under the Prepetition Documents.

(xv) Release by the Debtor. Subject only to paragraph 18 of this Interim Order, the Debtors, on their own behalf and on behalf of their successors and assigns, hereby waive, release and discharge the Prepetition Senior Credit Parties, and all of their respective affiliates, and all of the directors, officers, employees, attorneys, representatives, agents, predecessors, successors and assigns of the Prepetition Senior Credit Parties and such affiliates (collectively the "**Released Parties**") from any and all claims, demands, actions or causes of action (known

and unknown) arising out of or in any way relating to any of the Prepetition Documents, the Prepetition Senior Loan Obligations, the Prepetition Senior Liens, and the Prepetition Collateral to the extent arising on or prior to the date hereof, including but not limited to, claims or challenges under section 105 of the Bankruptcy Code or chapter 5 of the Bankruptcy Code.

Q. Immediate Entry. Sufficient cause exists for immediate entry of this Interim Order pursuant to Bankruptcy Rule 4001(c)(2).

Based upon the foregoing findings and conclusions, the Motion and the record before the Court with respect to the Motion, and good and sufficient cause appearing therefor,

**IT IS HEREBY ORDERED** that:

1. DIP Facility Approval. The Motion is granted on an interim basis to the extent set forth herein, effective as of the date hereof. Any objections to the interim relief requested in the Motion that have not been withdrawn, waived or settled, and all reservations of rights included therein, are hereby denied and overruled. The Debtors are authorized, pursuant to section 364 of the Bankruptcy Code, to enter into and be a party to the DIP Facility pursuant to the Loan Documents (with such changes, if any, as were authorized to be made as amendments to the Loan Documents in accordance with this Interim Order), to execute the Loan Documents and such other and additional documents necessary or desired to implement the DIP Facility or the Loan Documents, to obtain postpetition secured financing from the DIP Lender, to avoid immediate and irreparable harm to the Debtors' estates.

2. DIP Facility Obligations. The Loan Documents shall constitute and evidence the valid and binding effect of the Debtors' obligations under the DIP Facility, which DIP Obligations shall be legal, valid, and binding obligations of the Debtors party thereto and enforceable against the Debtors, their estates, any successors thereto, including, without limitation, any trustee appointed in any of the Debtors' cases, or in any case under chapter 7 of

the Bankruptcy Code upon the conversion of any such cases, or in any other proceedings superseding or related to any of the foregoing, and any party determined to be the beneficial owner of the DIP Collateral by this Court. The Debtors and their successors shall be jointly and severally liable for repayment of any funds advanced pursuant to the Loan Documents, together with interest thereon, at the times and in the amounts set forth in the Loan Documents and all Obligations as defined and provided for in the DIP Credit Agreement (collectively, the “**DIP Obligations**”). No obligation, payment, transfer or grant of security under the Loan Documents or this Interim Order with respect to the DIP Facility shall be stayed, restrained, voided, voidable or recoverable under the Bankruptcy Code or under any applicable non-bankruptcy law, or subject to any defense, reduction, setoff, recoupment or counterclaim.

3. Authorization to Borrow. The Debtors are hereby authorized to borrow money under the Loan Documents from the DIP Lender, on an interim basis, in an aggregate principal amount of up to \$21,000,000.00, subject to the terms and conditions set forth in the Loan Documents and this Interim Order.

4. Use of Proceeds. From and after the entry of this Interim Order, the Debtors shall use advances of credit under the DIP Facility (the “**DIP Loans**”) only for the express purposes specifically set forth in this Interim Order, the Loan Documents and in compliance with the Budget subject to the permitted variances set forth in the Loan Documents. The Debtors are authorized to use the proceeds of the DIP Loans, in accordance with and subject to the Budget in part, to (i) to fund the working capital needs and chapter 11 administrative costs of the Debtors during the pendency of the Chapter 11 Cases, (ii) to pay fees, costs and expense of the DIP Facility on the terms and conditions described in the Loan Documents (including the reasonable and documented fees and expenses of the DIP Lender’s professionals), (iii) to pay all outstanding

Prepetition Revolver Obligations in full, (iv) maintain the Prepetition Indemnity Account, and (v) to pay other amounts as specified in the Budget.

5. Repayment of Prepetition Revolver Obligations. Upon entry of this Interim Order, the Debtors shall use the proceeds of the DIP Facility to pay all outstanding Prepetition Revolver Obligations in full, including amounts owed with respect to all outstanding letters of credit issued under the Prepetition Revolver Credit Documents, all in accordance with the terms, conditions, and procedures set forth in the DIP Financing Agreement.

6. Maintenance of Prepetition Indemnity Account. Pursuant to the *Interim Order Pursuant to 11 U.S.C. §§ 105, 361, 362, 363 and 507 (I) Authorizing Use of Cash Collateral, (II) Granting Adequate Protection, (III) Modifying Automatic Stay, and (IV) Scheduling a Final Hearing* [D.I. 63] (the “**Interim Cash Collateral Order**”), until the Challenge Period Termination Date (as defined below), the Debtors shall continue to maintain at Wells Fargo a segregated non-interest bearing account in the control of the Prepetition Revolver Agent with a minimum balance of \$150,000 of Cash Collateral (the “**Prepetition Indemnity Account**”) as security for any reimbursement, indemnification, or similar continuing obligations of the Debtors in favor of the Prepetition Revolver Credit Parties under the Prepetition Revolver Credit Documents (the “**Prepetition Indemnity Obligations**”).

(a) The funds in the Prepetition Indemnity Account shall secure all costs, expenses, and other amounts (including documented attorneys’ fees) incurred by the Prepetition Revolver Credit Parties in connection with or responding to (1) formal or informal inquiries and/or discovery requests, any adversary proceeding, cause of action, objection, claim, defense, or other challenge as contemplated in paragraph 18 herein, or (2) any Challenge (as defined below) against the Prepetition Revolver Credit Parties related to the Prepetition Revolver Credit



Documents, the Prepetition Revolver Liens or the Prepetition Revolver Obligations, whether in the Chapter 11 Cases, any Successor Case (as defined below) or independently in another forum, court, or venue.

(b) The Prepetition Indemnity Obligations shall be secured by a first priority lien on the Prepetition Indemnity Account and the funds therein. Upon the occurrence of the Challenge Period Termination Date (as defined below) without a Challenge having been filed and to the extent any funds remain in the Prepetition Indemnity Account, the Prepetition Indemnity Account and the funds therein shall become DIP Collateral (as defined below).

(c) Subject to the notice and objection procedures set forth in paragraph 14 herein, the Prepetition Revolver Credit Parties may apply amounts in the Prepetition Indemnity Account against the Prepetition Indemnity Obligations as and when they arise, without further notice to or consent from the Debtors, the Committee, or any other parties in interest and without further order of this Court.

(d) In addition to the establishment and maintenance of the Prepetition Indemnity Account, until the Challenge Period Termination Date the Prepetition Revolver Agent (for itself and on behalf of the Prepetition Revolver Lenders), shall retain and maintain the Prepetition Liens as security for any Prepetition Indemnity Obligations not capable of being satisfied from application of the funds on deposit in the Prepetition Indemnity Account (the “**Prepetition Indemnity Liens**”). The Prepetition Indemnity Liens shall be (i) junior to the DIP Liens and (ii) senior to all Prepetition Liens other than the THL First Priority Liens.

7. **Budget**. Except as otherwise provided herein or approved by the DIP Lender, the proceeds of the DIP Facility shall be used only in compliance with the Budget and in accordance

with terms of the Loan Documents, including the permitted variance set forth therein. The Debtors must comply with the liquidity reporting as set forth in the Loan Documents.

8. Payment of DIP Fees and Expenses. The (a) Commitment Fee, (b) Funding Fee; (c) Work Fee which shall serve as a retainer for the DIP Lender's counsel; (d) the Exit Fee; and (e) Stated Maturity Date Fee are each hereby approved as set forth on the record at the Interim Hearing and the Debtors are hereby authorized and directed to and shall pay such fees upon entry of this Interim Order, to the extent due, and in accordance with, and on the terms set forth in, this Interim Order, and the Loan Documents. The Debtors are also hereby authorized and directed to pay upon demand all other fees, costs, expenses and other amounts payable under the terms of this Interim Order and the Loan Documents and all other reasonable fees and out-of-pocket costs and expenses of the DIP Lender in accordance with the terms of this Interim Order, and the Loan Documents (including, without limitation, the reasonable and documented postpetition fees and out-of-pocket costs and expenses of Arent Fox LLP as counsel to the DIP Lender), subject to receiving a written invoice therefor. None of such fees, costs, expenses or other amounts shall be subject to Court approval except as otherwise provided herein or required to be submitted in any particular format, and no recipient of any such payment shall be required to file with respect thereto any interim or final fee application with this Court; provided, however, that copies of any such invoices shall be provided contemporaneously to the U.S. Trustee and the Committee; provided further, however, that such invoices may be redacted to the extent necessary to delete any information subject to the attorney-client privilege, any information constituting attorney work product, or any other confidential information (the "**Redactions**"), and the provision of such invoices shall not constitute a waiver of the attorney-client privilege or any benefits of the attorney work product doctrine. If the U.S. Trustee objects to the reasonableness of the fees and

expenses of the DIP Lender, and such objection cannot be resolved within ten (10) days of receipt of such invoices, the U.S. Trustee shall file with the Court and serve on the DIP Lender, an objection limited to the reasonableness of such fees and expenses (each, a “**Reasonableness Fee Objection**”). Without limiting the foregoing, if the U.S. Trustee objects to the Redactions and such objection cannot be resolved within ten (10) days of receipt of such invoices, the DIP Lender shall file with the Court and serve on the Debtors and the U.S. Trustee a request for Court resolution of the disputes concerning the propriety of the disputed Redactions (each, a “**Redaction Fee Objection**,” and each Reasonableness Fee Objection and Redaction Fee Objection may be referred to herein generally as a “**Fee Objection**”). The Debtors shall pay, in accordance with the terms and conditions of this Interim Order, within ten (10) days after receipt of the applicable invoice (a) the full amount invoiced if no Fee Objection has been timely filed, and (b) the undisputed fees, costs, and expenses reflected on any invoice to which a Fee Objection has been timely filed. All such unpaid fees, costs, expenses and other amounts owed or payable to the DIP Lender shall be secured by the DIP Collateral and afforded all of the priorities and protections afforded to the DIP Obligations under this Interim Order and the Loan Documents.

9. **Indemnification**. The Debtors are hereby authorized to and hereby agree to indemnify and hold harmless the DIP Lender and its directors, officers, employees, agents, attorneys, or any other Person affiliated with or representing the DIP Lender (collectively, an “**Indemnified Party**”) against: (a) all obligations, demands, claims, and liabilities (collectively, “**Indemnity Claims**”) asserted by any other party in connection with the transactions contemplated by the Loan Documents; and (b) all losses or expenses incurred, or paid by the DIP Lender from, following, or arising from the transactions contemplated by the Loan Documents

(including reasonable and documented attorneys' fees and expenses), except for Indemnity Claims and/or losses directly caused by the DIP Lender's gross negligence or willful misconduct. No Indemnified Party shall have any liability (whether direct or indirect, in contract, tort or otherwise) to any Debtor or any of its subsidiaries or any shareholders or creditors of the foregoing for or in connection with the transactions contemplated hereby, except to the extent such liability is determined by a court of competent jurisdiction in a final non-appealable judgment or order to have resulted solely from such Indemnified Party's gross negligence or willful misconduct. In no event, however, shall any Indemnified Party be liable on any theory of liability for any special, indirect, consequential or punitive damages. All indemnities of the Indemnified Parties shall be secured by the DIP Collateral and afforded all of the priorities and protections afforded to the DIP Obligations under this Interim Order and the Loan Documents.

10. Use of Cash Collateral. The Debtors are authorized to use Cash Collateral solely in accordance with and pursuant to this Interim Order. Prior to the Maturity Date and until indefeasible payment in full of the DIP Obligations, the Debtors agree that they will not use or seek to use Cash Collateral other than pursuant to the terms of this Interim Order.

11. DIP Superpriority Claims. In accordance with section 364(c)(1) of the Bankruptcy Code, the DIP Obligations shall constitute senior administrative expense claims against each Debtor and their estates (the "**DIP Superpriority Claims**") with priority in payment over any and all administrative expenses at any time existing or arising, of any kind or nature whatsoever, including, without limitation, the kinds specified or ordered pursuant to any provision of the Bankruptcy Code, including, but not limited to, sections 105, 326, 328, 330, 331, 503(b), 506(c), 507(a), 507(b), 726, 1113 and 1114 of the Bankruptcy Code or otherwise, including those resulting from the conversion of any of the Chapter 11 Cases pursuant to section

1112 of the Bankruptcy Code, whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment; provided, however, that the DIP Superpriority Claims shall be subject to and subordinate to only the Carve-Out; provided, further that the DIP Superpriority Claims shall have recourse to and be payable from all prepetition and postpetition property of the Debtors and their estates, all DIP Collateral and all proceeds thereof, including, proceeds of D&O claims, excluding however all claims and causes of action of any and all avoidance power claims under sections 544, 545, 547, 548 through 551 and 553(b) of the Bankruptcy Code (the “**Avoidance Actions**”); provided, further that any proceeds obtained on account of any D&O claims from the D&O policies or otherwise, shall be paid directly to the DIP Parties towards the payment of the DIP Obligations.

12. DIP Liens.

(a) Effective as of the entry of the Interim Order, as security for the DIP Obligations, the DIP Lender is granted continuing, valid, binding, enforceable, non-avoidable, and automatically and properly perfected security interests in and liens (collectively, the “**DIP Liens**”) on all DIP Collateral as collateral security for the prompt and complete performance and payment when due (whether at the Stated Maturity Date, by acceleration, or otherwise) of the DIP Obligations. The term “**DIP Collateral**” means collectively, all assets and properties (whether tangible, intangible, real, personal, or mixed) of the Debtors, whether now owned by or owing to, or hereafter acquired by, or arising in favor of, the Debtors, (including under any trade names, styles, or derivations thereof), and whether owned or consigned by or to, or leased from or to, or hereafter acquired by, the Debtors, and regardless of where located, before or after the Petition Date, including, without limitation: (i) all Prepetition Collateral; (ii) all cash and cash equivalents; (iii) all funds in any deposit account, securities account or other account of the

Debtors and all cash and other property deposited therein or credited thereto from time to time; (iv) all accounts and other receivables (including those owed to the Debtors generated by intercompany transactions); (v) all contracts and contract rights; (vi) all instruments, documents and chattel paper; (vii) all securities (whether or not marketable); (viii) all goods, as-extracted collateral, equipment, inventory and fixtures; (ix) all real property interests; (x) all interests in leaseholds, (xi) all franchise rights; (xii) Intellectual Property (as defined in the Loan Documents); (xiii) all general intangibles; (xiv) all capital stock, limited liability company interests, partnership interests and financial assets; (xv) all investment property; (xvi) all supporting obligations; (xvii) all letters of credit issued to the Debtors and letter of credit rights; (xviii) all commercial tort claims (including D&O claims); (xix) all other claims and causes of action and the proceeds thereof (excluding however, all Avoidance Actions and the proceeds thereof); (xx) all books and records (including, without limitation, customers lists, credit files, computer programs, printouts and other computer materials and records); (xxi) to the extent not covered by the foregoing, all other goods, assets or properties of the Debtors, whether tangible, intangible, real, personal or mixed including pre-paid expense and pre-paid inventory; and (xxii) all products, offspring, profits, and proceeds of each of the foregoing and all accessions to, substitutions and replacements for, and rents, profits and products of, each of the foregoing, any and all proceeds of any insurance, indemnity, warranty or guaranty payable to such Debtor from time to time with respect to any of the foregoing.

(b) To the fullest extent permitted by the Bankruptcy Code or applicable law, any provision of any lease, loan document, easement, use agreement, proffer, covenant, license, contract, organizational document, or other instrument or agreement that requires the consent or the payment of any fees or obligations to any entity in order for any of the Debtors to pledge,

grant, mortgage, sell, assign, or otherwise transfer any fee or leasehold interest or the proceeds thereof or other DIP Collateral, shall have no force or effect with respect to the DIP Liens on such leasehold interests or other applicable DIP Collateral or the proceeds of any assignment and/or sale thereof by any Debtor, in favor of the DIP Lender in accordance with the terms of the Loan Documents and this Interim Order or in favor of the Prepetition Senior Credit Parties in accordance with this Interim Order.

13. Priority of DIP Liens.

(a) To secure the DIP Obligations, immediately upon and effective as entry of this Interim Order, the DIP Lender, is hereby granted continuing, valid, binding, enforceable, non-avoidable, and automatically and properly perfected DIP Liens in the DIP Collateral as follows, in each case subject to the Carve-Out:

(i) pursuant to section 364(d)(1) of the Bankruptcy Code, valid, enforceable, non-avoidable automatically and fully perfected first priority senior priming liens on and security interests in, all DIP Collateral wherever located, which senior priming liens and security interests in favor of the DIP Lender shall be senior to all Prepetition Liens other than the THL First Priority Liens (as defined in the DIP Credit Agreement);

(ii) pursuant to section 364(c)(2) of the Bankruptcy Code, valid, binding, continuing, enforceable, non-avoidable automatically and fully perfected first priority liens on and security interests in all DIP Collateral that is not otherwise subject to a valid, perfected and non-avoidable security interest or lien as of the Petition Date (or perfected after the Petition Date to the extent permitted by section 546(b) of the Bankruptcy Code); and

(iii) pursuant to section 364(c)(3) of the Bankruptcy Code, valid, enforceable, non-avoidable automatically and fully perfected junior liens on and security interests in all DIP Collateral (other than as set forth in clauses (i) and (ii) of this paragraph) that is subject to Permitted Liens.

(b) Except as expressly set forth herein, the DIP Liens and the DIP Superpriority Claims: (i) shall not be made junior to or *pari passu* with (A) any lien, security interest or claim heretofore or hereinafter granted in any of the Chapter 11 Cases or any

Successor Cases, and shall be valid and enforceable against the Debtors, their estates, any trustee or any other estate representative appointed or elected in the Chapter 11 Cases or any Successor Cases and/or upon the dismissal of any of the Chapter 11 Cases or any Successor Cases, (B) any lien that is avoided and preserved for the benefit of the Debtors and their estates under section 551 of the Bankruptcy Code or otherwise, and (C) any intercompany or affiliate lien or claim; and (ii) shall not be subject to sections 506(c), 510, 549, 550 or 551 of the Bankruptcy Code.

14. Adequate Protection Payments. As additional adequate protection of the security interests of the Prepetition Senior Credit Parties, the Debtors are authorized and directed to pay (the “**Adequate Protection Payments**”) reasonable and documented costs, fees, and expenses of the Prepetition Senior Credit Parties and, including, without limitation, legal, accounting, collateral examination, monitoring and appraisal fees, financial advisory fees, fees and expenses, of other consultants, and indemnification and reimbursement of fees and expenses and any such other amounts as provided in the applicable Prepetition Documents (the “**Prepetition Senior Credit Parties’ Fees**”), and, with respect to the Prepetition Term Loan Credit Parties, in accordance with and subject in all respects to, the Budget; provided, that the Debtors are not authorized and shall not make any Adequate Protection Payments following the occurrence of either (i) the Maturity Date; or (ii) an Event of Default. The Debtors shall not make any Adequate Protection Payments inconsistent with or in violation of this Interim Order. For the avoidance of doubt, nothing in this Interim Order shall be construed to increase the Adequate Protection Payments permitted under the Budget and this Interim Order if the Prepetition Senior Credit Parties’ Fees are in excess of the estimated fees and disbursements set forth in the Budget. Payment of the Prepetition Senior Credit Parties’ Fees shall not be subject to allowance by the Court. Professionals for the Prepetition Senior Credit Parties (and any of their respective



participants) shall not be required to comply with the U.S. Trustee fee guidelines. Notwithstanding the foregoing, at the same time such invoices are delivered to the Debtors, the professionals for the Prepetition Senior Credit Parties (and any of their respective participants) shall deliver a summary of their respective invoices to counsel to the Committee, the DIP Parties, and the U.S. Trustee, redacted as necessary with respect to any privileged or confidential information contained therein. Any objections raised by the Debtors, the U.S. Trustee, the DIP Parties, or the Committee with respect to such invoices within ten (10) days of the receipt thereof will be resolved by the Court, provided that the procedures for Redactions and Redaction Fee Objection are consistent with those set forth in paragraph 8. Notwithstanding any such objection, any undisputed portion of any such invoice shall be promptly paid by the Debtors upon submission.

15. Adequate Protection Liens.

(a) Pursuant to sections 361, 363 and 364(d) of the Bankruptcy Code, to the extent of any Diminution in Value, (i) the Prepetition Term Loan Agent (for the benefit of itself and the other Prepetition Term Loan Credit Parties) is hereby granted valid and perfected replacement and additional security interests in, and liens on all of the Debtors' right, title and interest in, to and under all DIP Collateral to secure the Prepetition Term Loan Obligations (the "**Term Adequate Protection Liens**") and (ii) the Prepetition Subordinated Debt Parties are hereby granted, valid and perfected replacement and additional security interests in, and liens on all of the Debtors' right, title and interest in, to and under all DIP Collateral to secure the Prepetition Senior Note Obligations, the Prepetition Subordinated Note Obligations, and the Prepetition Subordinated Loan Obligations (the "**Subordinated Debt Adequate Protection Liens**", and, together with the Term Adequate Protection Liens, the "**Adequate Protection**

**Liens**”). The Adequate Protection Liens are granted solely to the extent of any Diminution in Value of the Prepetition Secured Credit Parties’ interest in the Prepetition Collateral. The Adequate Protection Liens are and shall be valid, binding enforceable and fully perfected as of the date hereof.

(b) The Term Adequate Protection Liens shall be (i) subordinated to the Carve-Out in all respects, (ii) senior to all liens on the THL First Lien Collateral and (ii) junior to only the DIP Liens and the Prepetition Indemnity Liens on all other DIP Collateral.

(c) The Subordinated Debt Adequate Protection Liens shall be subordinated to the DIP Liens and the Term Adequate Protection Liens, and shall be subject to the Subordination Agreements.

(d) Other than as set forth herein, the Adequate Protection Liens shall not be made subject to or *pari passu* with any lien or security interest heretofore or hereinafter granted in these Chapter 11 Cases or any case under chapter 7 of the Bankruptcy Code upon the conversion of these Chapter 11 Cases (a “**Successor Case**”). The Adequate Protection Liens shall be valid and enforceable against any trustee or other estate representative appointed in these Chapter 11 Cases or any Successor Case, upon the conversion of these Chapter 11 Cases to a case under Chapter 7 of the Bankruptcy Code (or in any other Successor Case), and/or upon the dismissal of these Chapter 11 Cases or any Successor Case. The Adequate Protection Liens shall be subject to the Prepetition Permitted Liens to the extent such liens are valid, binding, enforceable, properly perfected, non-avoidable and senior to the Prepetition Liens as of the Petition Date.

16. Adequate Protection Superpriority Claims.

(a) *Superpriority Claims of Prepetition Secured Credit Parties.* As further adequate protection of the interests of the Prepetition Secured Credit Parties, (i) the Prepetition Term Loan Credit Parties and the Prepetition Secured Note Credit Parties are hereby granted an allowed administrative claim against the Debtors' estates under section 503(b) of the Bankruptcy Code with superpriority pursuant to section 507(b) of the Bankruptcy Code to the extent that the Adequate Protection Replacement Liens do not adequately protect against any Diminution in Value of the Prepetition Secured Credit Parties' interests in the Prepetition Collateral and (ii) the Prepetition Revolver Credit Parties are hereby granted an allowed administrative claim against the Debtors' estates under section 503(b) of the Bankruptcy Code with superpriority pursuant to section 507(b) of the Bankruptcy Code to the extent that the Prepetition Indemnity Liens are insufficient to cover the Prepetition Indemnity Obligations (collectively, the "**Adequate Protection Superpriority Claims**").

(b) *Priority of Adequate Protection Superpriority Claims.* The Adequate Protection Superpriority Claims of (i) the Prepetition Secured Credit Parties shall be junior and subordinate to the Carve-Out and the DIP Superpriority Claims; (ii) the Prepetition Senior Credit Parties shall be *pari passu* with each other; and (iii) the Prepetition Secured Note Credit Parties shall be junior and subordinate to the DIP Superpriority Claims and the Adequate Protection Superiority Claims of the Prepetition Term Loan Credit Parties. The Adequate Protection Superiority Claims shall otherwise have priority over administrative expenses of the kinds specified in or ordered pursuant to Sections 503(b) and 507(b) of the Bankruptcy Code and shall have recourse to and be payable from all prepetition and postpetition property of the Debtors and their estates, all DIP Collateral and all proceeds thereof, including, proceeds of D&O claims, excluding, however, all Avoidance Actions.

17. Carve-Out.

(a) *Carve-Out.* As used in this Interim Order, the term “**Carve-Out**” means, collectively, the sum of: (i) all fees required to be paid to the Clerk of the Court and to the U.S. Trustee pursuant to 28 U.S.C. §1930(a) and section 3717 of title 31 of the United States Code; (ii) the reasonable fees and expenses up to \$25,000 incurred by a trustee under section 726(b) of the Bankruptcy Code; and (iii) the aggregate amount of unpaid fees and expenses of the Debtors’ and the Committee’s professionals, in each case retained by final order of the Court (which order has not been reversed, vacated or stayed unless such stay is no longer effective) under sections 327(a), 328 or 1103(a) of the Bankruptcy Code (the “**Case Professionals**”), to the extent such fees and expenses are allowed and payable pursuant to an order of the Court (which order has not been reversed, vacated or stayed) (“**Allowed Professional Fees**”), and the reimbursement of out-of-pocket expenses allowed by the Court and incurred by the members of the Committee in the performance of their duties (but excluding fees and expenses of third party professionals employed by such members) (“**Committee Expenses**”), which amount under this clause (iii) shall not exceed the sum of: (x) an aggregate amount limited to the amount set forth in the Budget for Allowed Professional Fees and Committee Expenses incurred prior to the delivery of a Carve-Out Trigger Notice, provided, that, (I) the Maturity Date has not occurred and (II) no Default or Event of Default has occurred and is continuing, *plus* (y) \$175,000 for Allowed Professional Fees and Committee Expenses (the “**Post Carve-Out Notice Trigger Cap**”) incurred from and after the delivery of the Carve-Out Trigger Notice (as defined below), *less* the outstanding amount of retainers received by Professionals prior to the Petition Date. No portion of the Carve-Out or any Cash Collateral may be used in violation of this Interim Order. Nothing in this Interim Order or otherwise shall be construed to increase the Carve-Out if actual (i)

Allowed Professional Fees of any Case Professional or (ii) Committee Expenses are higher in fact than the estimated fees and disbursements reflected in the Budget.

(b) *Carve-Out Trigger Notice*. As used herein, the term “**Carve-Out Trigger Notice**” means a written notice provided by the DIP Parties to the Debtors and the U.S. Trustee that the Post Carve-Out Trigger Notice Cap is invoked, which notice may be delivered following the occurrence and during the continuance of an Event of Default and acceleration of the DIP Obligations under the Loan Documents. After receipt of the Carve-Out Trigger Notice, the Debtors shall provide notice by email and facsimile to all Case Professionals, at the email addresses and facsimile numbers set forth in each Professional’s notice of appearance filed with the Bankruptcy Court (or, if there is no such notice of appearance, at such Professional’s last known email address and facsimile number) within one (1) day after the Debtors’ receipt of a Carve-Out Trigger Notice informing them that such Carve-Out Trigger Notice has been received and further advising them that the Debtors’ ability to pay such Case Professionals is subject to and limited by the Post Carve-Out Notice Trigger Cap.

18. Reservation of Certain Third Party Rights and Bar of Challenges and Claims. Nothing in this Interim Order shall prejudice the rights of the Committee, if granted standing to seek to assert claims against the Prepetition Senior Credit Parties on behalf of the Debtors or the Debtors’ creditors and interest holders, or to object to or to challenge the stipulations, findings or Debtors’ Stipulations set forth herein, including, but not limited to those in relation to: (a) the validity, extent, priority, or perfection of any mortgage, security interests, and liens of the Prepetition Senior Credit Parties; (b) the validity, allowability, priority, or amount of the Prepetition Senior Loan Obligations (including any fees included therein); (c) the secured status of the Prepetition Senior Loan Obligations; or (d) any liability of the Prepetition Senior Credit

Parties with respect to anything arising from any of the respective Prepetition Documents. A party in interest, including the Committee, that has been granted standing by the Court, must commence, as appropriate, a contested matter or adversary proceeding raising such objection or challenge, including, without limitation, any claim against the Prepetition Senior Credit Parties, a claim in the nature of a setoff, counterclaim or defense to the Prepetition Senior Loan Obligations or any other claim (each, a “**Challenge**”) within the applicable “**Challenge Period**”, which means (i) with respect to any person or any party-in-interest other than the Committee, the period from the Petition Date until the date that is seventy-five (75) calendar days after the entry of the Interim Cash Collateral Order and (ii) with respect to the Committee, the period from the Committee Formation Date until the date that is sixty (60) calendar days thereafter. The applicable Challenge Period may only be extended with the written consent of the Prepetition Agents or as ordered by the Court. Notwithstanding the foregoing, if a chapter 7 or 11 trustee is appointed prior to the expiration of the Challenge Period Termination Date, he or she shall have until the later of the expiration of the Challenge Period or 10 days from the date of appointment to assert a Challenge, subject to extension by the Court for cause; and (b) that if the Committee has asserted a Challenge prior to the Challenge Period Termination Date, the chapter 7 or 11 trustee will stand in the shoes of the Committee in such Challenge. Upon the expiration of the Challenge Period (the “**Challenge Period Termination Date**”), without the filing of a Challenge: (A) any and all such Challenges and objections by any party (including, without limitation, any Statutory Committee, any chapter 11 trustee, any examiner or other estate representative appointed in these Chapter 11 Cases, and any chapter 7 trustee, examiner, or other estate representative appointed in any Successor Case), shall be deemed to be forever waived, released and barred, (B) all matters not subject to a Challenge, findings, Debtors’ Stipulations,

waivers, releases, affirmations and other stipulations as to the priority, extent, and validity of the Prepetition Senior Credit Parties' claims, liens, and interests shall be of full force and effect and forever binding upon the Debtors, the Debtors' estates, and all creditors, interest holders, and other parties in interest in the Chapter 11 Cases and any Successor Case, and (C) any and all claims or causes of action against the Prepetition Senior Credit Parties and their agents, attorneys, etc. relating in any way to the Debtors or the Prepetition Documents or the Prepetition Senior Credit Facilities shall be forever waived and released by the Debtors' estates, all creditors, interest holders, and other parties in interest in the Chapter 11 Cases and any Successor Case.

19. Bankruptcy Code Sections 506(c) and 552(b) Waivers. Subject to the entry of the Final Order, without limiting the Carve-Out, the Debtors irrevocably waive and shall be prohibited from asserting (i) any surcharge claim, under section 506(c) of the Bankruptcy Code or otherwise, for any costs and expenses incurred in connection with the preservation, protection or enhancement of, or realization by the DIP Lender upon the DIP Collateral or the Prepetition Senior Credit Parties upon the Prepetition Collateral and no costs or expenses of administration that have been or may be incurred in any of the Chapter 11 Cases at any time shall be charged against the DIP Lender, the Prepetition Senior Credit Parties or their respective claims or liens (including any claims or liens granted pursuant to this Interim Order), and (ii) the "equities of the case" exception under section 552(b) of the Bankruptcy Code in connection with the DIP Facility, the Prepetition Term Loan Facility, the Prepetition Senior Notes or the Prepetition Subordinated Notes.

20. No Marshaling/Application of Proceeds. In no event shall the DIP Lender be subject to the equitable doctrine of "marshaling" or any other similar doctrine with respect to the

DIP Collateral, and all proceeds thereof shall be received and used in accordance with this Interim Order.

21. Disposition of Collateral; Application of Proceeds. The Debtors shall not sell, transfer, lease, encumber or otherwise dispose of any portion of the DIP Collateral, other than in the ordinary course of business, without the prior written consent of the DIP Lender (and no such consent shall be implied from any other action, inaction or acquiescence by the DIP Lender or from any order of this Court). Notwithstanding anything otherwise provided herein, upon the sale of all or substantially all of the DIP Collateral secured by the DIP Liens, the Debtors shall, subject to satisfaction of the Carve-Out, use the cash in an amount equal to 100% of any net cash proceeds of such sale to immediately satisfy the DIP Obligations.

22. Restrictions on Granting Postpetition Liens. Other than the Carve-Out or as otherwise provided in this Interim Order or the Loan Documents, no claim or lien having a priority superior or *pari passu* with those granted by this Interim Order, or the Loan Documents to the DIP Lender shall be granted or permitted by any order of this Court heretofore or hereafter entered in the Chapter 11 Cases, and the Debtors will not grant any such mortgages, security interests or liens in the DIP Collateral (or any portion thereof) or to any other parties pursuant to section 364(d) of the Bankruptcy Code or otherwise, while (i) any portion of the DIP Facility, any DIP Loans or any other DIP Obligations, are outstanding or (ii) the DIP Lender have any Commitment under the Loan Documents.

23. Automatic Effectiveness of Liens. The DIP Liens shall not be subject to a challenge and shall attach and become valid, perfected, binding, enforceable, non-avoidable and effective by operation of law as of the date of the entry of this Interim Order without any further action by the Debtors, the DIP Parties, respectively, and without the necessity of execution by



the Debtors, or the filing or recordation, of any financing statements, security agreements, vehicle lien applications, mortgages, filings with a governmental unit (including, without limitation, the U.S. Patent and Trademark Office or the Library of Congress), or other documents or the taking of any other actions. All DIP Collateral shall be free and clear of other liens, claims and encumbrances, except as provided in the Loan Documents and this Interim Order. If the DIP Lender hereafter request that the Debtors execute and deliver to the DIP Lender, financing statements, security agreements, pledge agreements, control agreements, collateral assignments, mortgages, or other instruments and documents considered by the DIP Lender to be reasonably necessary or desirable to further evidence the perfection of the DIP Liens, the Debtors are hereby authorized and directed to execute and deliver such financing statements, security agreements, pledge agreements, control agreements, mortgages, collateral assignments, instruments, and documents, and the DIP Lender is hereby authorized to file or record such documents in its discretion without seeking modification of the automatic stay under section 362 of the Bankruptcy Code, in which event all such documents shall be deemed to have been filed or recorded at the time and on the date of the entry of this Interim Order; provided, however, no such filing or recordation shall be necessary or required in order to create or perfect the DIP Liens. The DIP Lender, in its sole discretion, may file a photocopy of this Interim Order as a financing statement with any filing or recording office or with any registry of deeds or similar office, in addition to, or in lieu of, such financing statements, notices of liens or similar statements.

24. Protection Under Section 364(e) of the Bankruptcy Code. The DIP Parties have acted in good faith in connection with this Interim Order and their reliance on this Interim Order is in good faith. The reversal or modification on appeal of the authorizations under section 364

of the Bankruptcy Code contained in this Interim Order does not affect the validity of any DIP Obligation or DIP Liens, or the validity and enforceability of the DIP Loan, whether or not the DIP Parties knew of the pendency of the appeal, unless such authorization and incurrence of DIP Obligations and DIP Lien and advance of the DIP Loan under 364 of the Bankruptcy Code in this Interim Order, were stayed pending appeal.

25. Reservation of Rights of the DIP Parties. Notwithstanding any other provision of this Interim Order to the contrary, the entry of this Interim Order is without prejudice to, and does not constitute a waiver of, expressly or implicitly, or otherwise impair: (a) any of the rights of the DIP Lender under the Bankruptcy Code or under non-bankruptcy law, including, without limitation, the right of any of such parties to (i) request modification of the automatic stay of section 362 of the Bankruptcy Code, (ii) request dismissal of any of these Chapter 11 Cases, conversion of any of these Chapter 11 Cases to cases under chapter 7, or appointment of a chapter 11 trustee or examiner with expanded powers in any of these Chapter 11 Cases, (iii) seek to propose, subject to the provisions of section 1121 of the Bankruptcy Code, a chapter 11 plan or plans; or (c) any other rights, claims, or privileges (whether legal or equitable or otherwise) of the DIP Lender. The delay in or failure of the DIP Lender to seek relief or otherwise exercise their respective rights and remedies shall not constitute a waiver of any of the DIP Lender's rights and remedies.

26. Right to Credit Bid.

(a) *DIP Lender.* Pursuant to section 363(k) of the Bankruptcy Code, unless the Court orders otherwise for cause as provided under section 363(k) of the Bankruptcy Code, the DIP Lender shall have the right to credit bid the total of the DIP Obligations for any or all of the DIP Collateral at a sale, lease or other disposition of such DIP Collateral outside the ordinary

course of business (including any auction or similar sales), whether pursuant to a plan of reorganization or a motion pursuant to section 363 of the Bankruptcy Code or otherwise (which credit bid rights under section 363(k) or otherwise shall not be impaired in any manner).

(b) *Prepetition Secured Credit Parties.* Pursuant to section 363(k) of the Bankruptcy Code, unless the Court orders otherwise for cause as provided under section 363(k) of the Bankruptcy Code, the Prepetition Term Loan Credit Parties and the Prepetition Secured Note Credit Parties shall have the right to credit bid an amount up to the full face amount of their claims for their respective collateral at a sale, lease or other disposition of such collateral outside the ordinary course of business (including any auction or similar sales), whether pursuant to a plan of reorganization or a motion pursuant to section 363 of the Bankruptcy Code or otherwise (which credit bid rights under section 363(k) or otherwise shall not be impaired in any manner); provided, however, that any credit bid by the Prepetition Term Loan Agent or any Prepetition Term Loan Lender, if accepted, shall result in the payment in full in cash of the DIP Obligations upon the consummation thereof.

(c) A credit bid may be applied only to reduce the cash consideration with respect to those assets in which the party submitting such credit bid holds a perfected security interest. The DIP Lender and each of the Prepetition Term Loan Credit Parties and the Prepetition Secured Note Credit Parties shall be considered a “Qualified Bidder” with respect to their rights to acquire all or any of the assets by credit bid.

27. Remedies and Notice Upon the Occurrence of Maturity Date or Event of Default. Upon prior written notice by the DIP Lender to counsel for the Debtors and the U.S. Trustee of the occurrence of the Maturity Date or an Event of Default (each as defined in the Loan Documents and incorporated herein by reference) and without further order of the Court, the DIP

Lender may (i) declare the DIP Obligations to be immediately due and payable; (ii) terminate the Debtors' ability to access the DIP Loans; and/or (iii) upon five (5) days' notice to the Debtors and the U.S. Trustee, exercise all default-related rights and remedies against the DIP Collateral, without further order of or application or motion to the Bankruptcy Court, and without restriction or restraint by any stay under sections 362 and 105 of the Bankruptcy Code or otherwise, provided however, that during the five (5) day notice period, the Debtors have the right to seek an order from this Court determining that the Maturity Date or an Event of Default has not occurred; provided further however, that to the extent an Event of Default occurs as a result of the Borrowers' failure to indefeasibly satisfy the DIP Obligations by the Stated Maturity Date, the above referenced five (5) day notice period shall not apply and the Debtors, Committee and any interested party may not challenge (i) whether or not a Maturity Date or Event of Default occurred; (ii) the applicability of the Default Rate; and (iii) the applicability of the Stated Maturity Date Fee.

28. Modification of Stay. Subject to the terms set forth herein, the automatic stay imposed under section 362(a) of the Bankruptcy Code is hereby modified as necessary to effectuate all of the terms, rights, benefits, privileges, remedies and provisions of this Interim Order and the Loan Documents including without limitation, to permit the DIP Lender to exercise all rights and remedies provided for in the Loan Documents and take any and all actions provided therein, in each case, without further notice, application to, order of or hearing before this Court, including those set forth in paragraph 27 of this Interim Order.

29. Survival of DIP Liens, DIP Superpriority Claims, and Other Rights. If, in accordance with section 364(e) of the Bankruptcy Code, this Order does not become a final non-appealable order, if a trustee terminates this Order, or if any of the provisions of the Interim

Order are hereafter modified, amended, vacated or stayed by subsequent order of this Court or any other court, such termination or subsequent order shall not affect the priority, validity, enforceability or effectiveness of (or subordination to the Carve-Out of) any lien, security interests or any other benefit or claim authorized hereby with respect to any DIP Obligations incurred prior to the effective date of such termination or subsequent order. All such liens, security interests, claims and other benefits shall be governed in all respects by the original provisions of this Interim Order, and the DIP Lender shall be entitled to all the rights, remedies, privileges and benefits granted herein, including the liens and priorities granted herein, with respect to any DIP Loan, subject to the Carve-Out.

30. Survival of this Interim Order. The provisions of this Interim Order and any actions taken pursuant hereto shall survive the entry of any order: (i) confirming any plan of reorganization in any of the Chapter 11 Cases; (ii) converting any of the Chapter 11 Cases to a chapter 7 case; or (iii) dismissing any of the Chapter 11 Cases, and the terms and provisions of this Interim Order as well as the DIP Superpriority Claims and the DIP Liens in the DIP Collateral granted pursuant to this Interim Order and the Loan Documents shall continue in full force and effect notwithstanding the entry of any such order. Such claims and liens shall maintain their priority as provided by this Interim Order and the Loan Documents, and to the maximum extent permitted by law, until all of the DIP Obligations are indefeasibly paid in full in cash and discharged or otherwise treated under a plan of reorganization, which is reasonably acceptable to the DIP Lender. In no event shall any plan of reorganization be allowed to alter the terms of repayment of any of the DIP Obligations from those set forth in the Loan Documents unless agreed to by and among the Debtors and the DIP Lender.

31. Modifications of Loan Documents. The Debtors and the DIP Lender are hereby authorized, to implement, in accordance with the terms of the Loan Documents, any non-material modifications of the Loan Documents without further notice, motion or application to, order of or hearing before, this Court. Any material modification or amendment to the Loan Documents shall only be permitted pursuant to an order of this Court, after being submitted to this Court upon five (5) days' notice to the U.S. Trustee; provided, that any forbearance from, or waiver of, (a) a breach by the Debtors of a covenant representation or any other agreement or (b) a default or an Event of Default, in each case under the Loan Documents shall not require an order of this Court. Any modifications to the Budget that are provided to the DIP Parties shall also be provided to the U.S. Trustee and counsel to the Prepetition Term Loan Credit Parties. In the event of any inconsistency between this Interim Order and the DIP Credit Agreement, this Interim Order shall control.

32. Insurance Policies. Upon entry of this Interim Order, on each insurance policy maintained by the Debtors which in any way relates to the DIP Collateral: (i) the DIP Lender shall be, and shall be deemed to be, without any further action by or notice to any person, named as additional insureds; and (ii) the DIP Lender shall be and shall be deemed to be, without any further action by or notice to any person, named as loss payee. The Debtors are hereby authorized and shall take any actions necessary to have the DIP Lender be added as an additional insured and loss payee on each insurance policy maintained by the Debtors which in any way relates to the DIP Collateral.

33. Financial Information. The Debtors shall deliver to the DIP Parties such financial and other information concerning the business and affairs of the Debtors and any of the DIP Collateral as may be required pursuant to the Loan Documents and/or as the DIP Parties shall

reasonably request from time to time. The Debtors shall allow the DIP Parties access to the premises in accordance with the terms of the Loan Documents for the purpose of enabling the DIP Parties to inspect and audit the DIP Collateral and the Debtors' books and records.

34. Proofs of Claim. Notwithstanding any order entered by the Bankruptcy Court in relation to the establishment of a bar date in the Chapter 11 Cases to the contrary, or otherwise, the DIP Lender shall not be required to file proofs of claim in the Chapter 11 Cases for any claim allowed herein.

35. Immediate Effect of Order. The terms and conditions of this Order shall be effective and immediately enforceable upon its entry by the Clerk of the Court notwithstanding any potential application of Bankruptcy Rule 6004(h) or otherwise. Furthermore, to the extent applicable, the notice requirements and/or stays imposed by Bankruptcy Rules 4001(a)(3), 6003(b), and 6004(a) are hereby waived for good and sufficient cause. The requirements of Bankruptcy Rules 4001, 6003, and 6004, in each case to the extent applicable, are satisfied by the contents of the Motion. For the avoidance of doubt, this Interim Order supersedes any other prior order governing the use of Cash Collateral including the Interim Cash Collateral Order.

Dated: \_\_\_\_\_, 2017  
Wilmington, Delaware

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THE HONORABLE KEVIN J. CAREY  
UNITED STATE BANKRUPTCY JUDGE

**Exhibit A**

**DIP Credit Agreement**



**SENIOR SECURED, SUPER-PRIORITY DEBTOR-IN-POSSESSION  
LOAN AND SECURITY AGREEMENT**

This Senior Secured, Super-Priority Debtor-In-Possession Loan and Security Agreement (this “**Agreement**”), is entered into as of October \_\_\_\_, 2017 (the “**Effective Date**”), by and among the following parties:

1. The “**Borrowers**”:
  - Aerogroup International, Inc., a New Jersey corporation (“**AI**”);
  - Aerogroup Retail Holdings, Inc., a Delaware corporation (“**ARHI**”);
  - Aerogroup International, LLC, a Delaware limited liability company (“**AIL**”);
  - Aerogroup International Holdings, LLC, a Delaware limited liability company (“**AIH**”); and
  - Aerogroup Gift Card Co., Inc., a Virginia corporation (“**GiftCo**”).
2. The “**Guarantor**”: AGI HoldCo, Inc., a Delaware corporation (“**HoldCo**” and, together with the Borrowers, collectively the “**Loan Parties**”).
3. The “**Lender**”: Polk 33 Lending, LLC a California limited liability company.
4. The “**DIP Agent**”: Wilmington Savings Fund Society, FSB.

**Recitals**

A. On September 15, 2017 (the “**Petition Date**”), the Loan Parties commenced voluntary bankruptcy proceedings, under chapter 11 of the title 11 of the United States Code (the “**Bankruptcy Code**”), in the United States Bankruptcy Court for the District of Delaware (the “**Bankruptcy Court**”), which cases are pending as Case No. 17-11962 (jointly administered) (the “**Chapter 11 Cases**”).

B. The Loan Parties remain in possession of their businesses and manage their properties as debtors and debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

C. The Borrowers have requested that Lender provide financing to Borrowers consisting of a senior secured super-priority term loan in a principal amount of up to \$25,000,000 (the “**Facility**”) pursuant to sections 105, 363, 364(c) and 364(d) of the Bankruptcy Code.

D. The Guarantor has agreed to guarantee the Obligations under this Agreement.

E. The Lender has indicated its willingness to agree to extend the Facility to the Borrowers, all on terms and conditions set forth herein and in the other Loan Documents and in accordance with sections 105, 363, 364(c) and 364(d) of the Bankruptcy Code, so long as the Obligations are (i) secured by Liens on the Collateral granted by the Borrowers and the Guarantor as hereinafter provided, and (ii) given superpriority status as provided in the Interim Order or Final Order as applicable.

F. The Borrowers and the Guarantor have agreed to provide the Collateral and the grant of Superpriority Claims as applicable and as set forth in this Agreement, the Interim Order and the Final Order, subject to the approval of the Bankruptcy Court.

**NOW, THEREFORE**, in consideration of the premises and of the mutual covenants and agreements contained herein, the parties hereto hereby agree as follows:

## 1. DEFINITIONS AND CONSTRUCTION.

1.1 *Definitions.* In this Agreement:

“**Additional Documents**” is defined in Section 5.12.

“**Advance**” is defined in Section 2.1(a).

“**Affiliate**” means, as to any Person, any other Person (a) that, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, such Person, (b) who is a director or officer (i) of such Person, (ii) of any Subsidiary of such Person, or (iii) of any Person described in clause (a) above with respect to such Person, or (c) which, directly or indirectly through one or more intermediaries, is the beneficial or record owner (as defined in Rule 13d-3 of the Securities Exchange Act of 1934, as amended, as the same is in effect on the date hereof) of twenty-four percent (24%) or more of any class of the outstanding voting equity interests, securities or other equity or ownership interests of such Person. For purposes of this definition, the term “control” (and the correlative terms, “controlled by” and “under common control with”) means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies, whether through ownership of securities or other interests, by contract or otherwise.

“**Allowed Professional Fees**” means all unpaid fees and expenses incurred by the Borrowers and Committee Professionals, to the extent allowed by final order of the Court (which order has not been reversed, vacated or stayed unless such stay is no longer effective) under sections 327(a) or 1103(a) of the Bankruptcy Code.

“**Authorized Person**” means any one of the individuals identified on Schedule A-2, as such schedule is updated from time to time by written notice from the Borrowers to the DIP Parties.

“**Bankruptcy Code**” is defined in the recitals hereto.

“**Bankruptcy Court**” is defined in the recitals hereto.

“**Borrowers**” is defined in the preamble.

“**Budget**” is defined in Section 5.14.

“**Business Day**” means any day that is not a Saturday, Sunday, or other day on which banks are authorized or required to close in the state of New York.

“**Capital Expenditures**” means, with respect to any Person for any period, the aggregate of all expenditures by such Person during such period that are capital expenditures as determined in accordance with GAAP, whether such expenditures are paid in cash or financed.

“**Capital Lease**” means a lease that is required to be capitalized for financial reporting purposes in accordance with GAAP.

“**Capital Stock**” means, as to any Person that is a corporation, the authorized shares of such Person’s capital stock, including all classes of common, preferred, voting and nonvoting capital stock, and, as to any Person that is not a corporation or an individual, the membership or other ownership interests in such Person, including the right to share in profits and losses, the right to receive distributions of cash and other property, and the right to receive allocations of items of income, gain, loss, deduction and credit and similar items from such Person, whether or not such interests include voting or similar rights entitling the holder thereof to exercise Control over such Person, collectively with, in any such case, all warrants, options and other rights to purchase or otherwise acquire, and all other instruments convertible into or exchangeable for, any of the foregoing.

“**Carve Out**” has the meaning set forth in the Interim Order and the Final Order, as applicable. “**Carve-Out Trigger Notice**” means a written notice delivered by the DIP Agent to the Borrowers, their lead restructuring counsel, and the United States Trustee, which notice may be delivered following the occurrence and during the continuance of an Event of Default and acceleration of the Obligations under this Agreement stating that the Post Carve-Out Trigger Notice Cap has been invoked.

“**Change of Control**” means the occurrence of any of the following:

(a) if any Borrower is a corporation, any merger, consolidation, sale, transfer or pledge of such Borrower’s equity interests or the creation or issuance of new stock;

(b) if any Loan Party is a limited or general partnership or joint venture, any merger or consolidation or the change, removal, resignation or addition of a general partner, or the sale, transfer or pledge of the partnership interest of any general partner or any profits or proceeds relating to such partnership interest of any general partner or any profits or proceeds relating to such general partnership interest, or the sale or pledge of limited partnership interests or any profits or proceeds relating to such limited partnership interests or the creation or issuance of new limited partnership interests;

(c) if any Loan Party is a limited liability company, any merger or consolidation or the change, removal, resignation or addition of a managing member or non-member manager (or if no managing member, any member) or the sale, transfer or pledge of the

membership interest of a managing member (or if no managing member, any member) or any profits or proceeds relating to such membership interest, or the sale, transfer or pledge of non-managing membership interests or the creation or issuance of new non-managing membership interests;

(d) If without the Lender's prior consent, in its sole discretion, (i) a Loan Party voluntarily removes or replaces an independent director, if any, of any Borrower or Guarantor or subsidiary thereof; (ii) [intentionally omitted]; (iii) the current CRO of any Loan Party or subsidiary thereof is removed or replaced; or (iv) a majority of current the board of directors of any Loan Party or subsidiary thereof is removed or replaced.

**"Chapter 11 Cases"** is defined in the Recitals.

**"Closing Date"** means the date upon which the first Advance is made under Section 2.1.

**"Collateral"** means, collectively, all assets and properties (whether tangible, intangible, real, personal, or mixed) of the Borrowers and the Guarantor, whether now owned by or owing to, or hereafter acquired by, or arising in favor of, the Borrower and the Guarantor, including under any trade names, styles, or derivations thereof, and whether owned or consigned by or to, or leased from or to, or hereafter acquired by, any Loan Party, and regardless of where located, before of after the Petition Date, including, without limitation: (i) the Prepetition Collateral (as defined in the Interim Order and Final Order, as applicable); (ii) all cash and cash equivalents; (iii) all funds in any deposit account, securities account or other account of the Borrowers and the Guarantor and all cash and other property deposited therein or credited thereto from time to time; (iv) all accounts and all receivables (including those owed to the Borrowers and the Guarantor generated by intercompany transactions); (v) all contracts and contract rights; (vi) all instruments, documents and chattel paper; (vii) all securities (whether or not marketable); (viii) all goods, as-extracted collateral, equipment, inventory and fixtures; (ix) all real property interests; (x) all interests in leaseholds, (xi) all franchise rights; (xii) Intellectual Property; (xiii) all general intangibles; (xiv) all capital stock, limited liability company interests, partnership interests and financial assets; (xv) all investment property; (xvi) all supporting obligations; (xvii) all letters of credit issued to the Debtors and Guarantor and letter of credit rights; (xviii) all commercial tort claims (including D&O claims); (xix) all other claims and causes of action and the proceeds thereof; (xx) all books and records (including, without limitation, customers lists, credit files, computer programs, printouts and other computer materials and records); (xxi) to the extent not covered by the foregoing, all other goods, assets or properties of the Debtors and Guarantor, whether tangible, intangible, real, personal or mixed including pre-paid expenses and pre-paid inventory; and (xxii) all products, offspring, profits, and proceeds of each of the foregoing and all accessions to, substitutions and replacements for, and rents, profits and products of, each of the foregoing, any and all proceeds of any insurance, indemnity, warranty or guaranty payable to such Debtors and Guarantors from time to time with respect to any of the foregoing.

**"Commitment"** means the maximum principal amount of Lender's obligation to make Advances to the Borrowers under Section 2. As of the Closing Date, the Commitment is \$25,000,000. Upon entry of the Final Order, the Commitment is \$25,000,000.

“**Commitment Fee**” means the fee of 2.0% of the Facility, which shall be earned and payable upon entry of the Interim Order and which shall be paid to the Lender on the Closing Date from the proceeds of the Facility.

“**Committee**” means the statutory committee of unsecured creditors appointed by the United States Trustee in relation to the Chapter 11 Cases.

“**Committee Expenses**” means the out-of-pocket expenses allowed by the Bankruptcy Court and incurred by the members of the Committee in the performance of their duties (but excluding fees and expenses of third party professionals employed by such members).

“**Committee Professionals**” means the persons or firms retained by the Committee pursuant to section 328 or 1103 of the Bankruptcy Code by final order of the Court (which order has not been reversed, vacated or stayed unless such stay is no longer effective).

“**Compliance Certificate**” means a certificate substantially in the form of Exhibit B-1 delivered by the Authorized Person of Borrowers to the DIP Agent.

“**Control**” means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ability to exercise voting power, by contract or otherwise. “Controlling” and “Controlled” have meanings correlative thereto.

“**Daily Balance**” means, as of any date of determination and with respect to any fixed monetary Obligations, the amount of such Obligations owed at the end of such day.

“**Debtor Professionals**” means the persons or firms retained by the Borrowers pursuant to section 327, 328 or 363 of the Bankruptcy Code by final order of the Court (which order has not been reversed, vacated or stayed unless such stay is no longer effective).

“**Default**” means an event, condition, or default that, with the giving of notice, the passage of time, or both, would be an Event of Default.

“**Default Rate**” has the meaning set forth in Section 2.4(b).

“**Designated Account**” means the Borrowers’ deposit account identified on Schedule D-1.

“**Designated Account Bank**” is defined on Schedule D-1.

“**DIP Agent**” has the meaning set forth in the preamble to this Agreement.

“**DIP Parties**” means the DIP Agent and the Lender.

“**Dollars**” or “**\$**” means United States dollars.

“**Domain Names**” means all Internet domain names and associated URL addresses in or to which any Borrower or Guarantor now or hereafter has any right, title or interest.

**“Environmental Action”** means any written complaint, summons, citation, notice, directive, order, claim, litigation, investigation, judicial or administrative proceeding, judgment, letter, or other written communication from any Governmental Authority, or any third party involving violations of Environmental Laws or releases of Hazardous Materials (a) from any Collateral; (b) from adjoining properties or businesses of any Collateral, or (c) from or onto any facilities, with respect to the Collateral, which received Hazardous Materials generated by any Loan Party.

**“Environmental Law”** means any applicable federal, state, provincial, foreign or local statute, law, rule, regulation, ordinance, code, binding and enforceable guideline, binding and enforceable written policy, or rule of common law now or hereafter in effect and in each case as amended, or any judicial or administrative interpretation thereof, including any judicial or administrative order, consent decree or judgment, relating to the environment, the effect of the environment on employee health, or Hazardous Materials, in each case as amended from time to time.

**“Environmental Liabilities”** means all liabilities, monetary obligations, losses, damages, costs and expenses (including all reasonable fees, disbursements and expenses of counsel, experts, or consultants, and costs of investigation and feasibility studies), fines, penalties, sanctions, and interest incurred as a result of any claim or demand, or Remedial Action required, by any Governmental Authority or any third party, and which relate to any Environmental Action.

**“Environmental Lien”** means any Lien in favor of any Governmental Authority for Environmental Liabilities.

**“Event of Default”** is defined in Section 8.1.

**“Exit Fee”** means, as applicable, the fee of 2.0% of (i) the aggregate principal amount of the Facility that remains outstanding as of the Maturity Date, which fee shall be due and payable in cash, without further order of the Bankruptcy Court, upon the Maturity Date, or (ii) the aggregate principal amount of any Advance that is prepaid pursuant to Section 2.3(c) or (d).

**“Facility”** is defined in the Recitals.

**“Fees”** means all fees due to the Lender under this Agreement, any Loan Document or the Interim Order or Final Order as applicable, including the Commitment Fee, the Funding Fee, the Exit Fee, the Stated Maturity Fee and the Work Fee.

**“Final Order”** means a final order of the Bankruptcy Court authorizing and approving the Borrowers’ entry into this Agreement and the other Loan Documents, in form and substance satisfactory to the Lender, in its sole discretion, the Borrowers, and their respective counsel, on a final basis and entered following a final hearing.

**“Funding Fee”** means, with respect to each Advance, 2.0% of such Advance, which fee shall be payable in cash upon funding of such Advance by the Lender.

**“Governmental Authority”** means any federal, state, local, or other governmental or administrative body, instrumentality, board, department, or agency or any court, tribunal, administrative hearing body, arbitration panel, commission, or other similar dispute-resolving panel or body.

**“Guarantee Obligations”** is defined in Section 16.1.

**“Hazardous Materials”** means (a) substances that are defined or listed in, or otherwise classified pursuant to, any applicable laws or regulations as “hazardous substances,” “hazardous materials,” “hazardous wastes,” “toxic substances,” or any other formulation intended to define, list, or classify substances by reason of deleterious properties such as ignitability, corrosivity, reactivity, carcinogenicity, reproductive toxicity, or “EP toxicity”, (b) oil, petroleum, or petroleum derived substances, natural gas, natural gas liquids, synthetic gas, drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas, or geothermal resources, (c) any flammable substances or explosives or any radioactive materials, and (d) asbestos in any form or electrical equipment that contains any oil or dielectric fluid containing levels of polychlorinated biphenyls in excess of 50 parts per million.

**“Indebtedness”** means (a) all obligations for borrowed money, including the Obligations, (b) all obligations evidenced by bonds, debentures, notes, or other similar instruments and all reimbursement or other obligations in respect of letters of credit, bankers acceptances, or other financial products, (c) all obligations as a lessee under Capital Leases, (d) all obligations or liabilities of others secured by a Lien on any asset of such Person, irrespective of whether such obligation or liability is assumed, (e) all payment obligations to pay the deferred purchase price of assets (other than trade payables incurred in the ordinary course of business and repayable in accordance with customary trade practices), (f) all indebtedness created or arising under any conditional sale or other title retention agreement, or incurred as financing, in either case with respect to property acquired by such Person, (g) the principal balance outstanding under any synthetic lease, off-balance sheet loan or similar off balance sheet financing products, or (h) any obligation guaranteeing or intended to guarantee (whether directly or indirectly guaranteed, endorsed, co-made, discounted, or sold with recourse) any obligation of any other Person that constitutes Indebtedness under any of clauses (a) through (h) above.

**“Indemnified Liabilities”** is defined in Section 10.3.

**“Indemnified Person”** is defined in Section 10.3.

**“Intellectual Property”** means all intellectual and similar property of every kind and nature now owned or hereafter acquired by any Loan Party, including inventions, designs, Patents, Copyrights, Licenses, Trademarks, Trade Secrets, Domain Names (each as defined in the Intercreditor Agreement as defined in the Interim Order), confidential and proprietary information, including without limitation, all trade secrets, technology, ideas, know-how, formulae and customer lists, any and all intellectual property rights in computer software and computer software products (including, without limitation, source codes, object codes, data and related documentation), any and all design rights owned or used by such Loan Party, all other intellectual property rights of every description.

“**Interim Order**” means that interim order entered by the Bankruptcy Court authorizing and approving the Borrowers’ entry into this Agreement and the other Loan Documents, in form and substance satisfactory to the Lender, in its sole discretion, the Borrowers, and their respective counsel.

“**IRC**” means the Internal Revenue Code of 1986, as in effect from time to time.

“**Lender**” is defined in the preamble to this Agreement.

“**Lender Expenses**” means all reasonable and documented (i) costs or expenses (including taxes, and insurance premiums) required to be paid by the Borrowers under any of the Loan Documents that are paid, advanced, or incurred by Lender or DIP Agent, including the Work Fee owed to Lender’s counsel pursuant to the Interim Order, (ii) out-of-pocket fees or charges paid or incurred by Lender or DIP Agent in connection with its transactions with the Loan Parties under any of the Loan Documents, including, fees or charges for photocopying, notarization, couriers and messengers, telecommunication, public record searches (including tax lien, litigation, and UCC searches and including searches with the patent and trademark office, the copyright office, or the department of motor vehicles), filing, recording, publication, appraisal (including periodic collateral appraisals or business valuations to the extent of the fees and charges (and up to the amount of any limitation) contained in this Agreement), real estate surveys, real estate title policies and endorsements, and environmental audits, (iii) out-of-pocket costs and expenses incurred by Lender or DIP Agent in the disbursement of funds to Borrowers (by wire transfer or otherwise), (iv) out-of-pocket charges paid or incurred by Lender or DIP Agent resulting from the dishonor of checks payable by or to any Borrower, (v) out-of-pocket costs, fees (including attorneys’ fees) and expenses paid or incurred by Lender or DIP Agent to correct any default or enforce any provision of the Loan Documents, or during the continuance of an Event of Default, in gaining possession of, maintaining, handling, preserving, storing, shipping, selling, preparing for sale, or advertising to sell the Collateral, or any portion thereof, irrespective of whether a sale is consummated, (vi) out-of-pocket audit fees and expenses (including travel, meals, and lodging) of Lender or DIP Agent related to any inspections or audits to the extent of the fees and charges (and up to the amount of any limitation) contained in this Agreement, (vii) out-of-pocket costs and expenses of third party claims or any other suit paid or incurred by Lender or DIP Agent in enforcing or defending the Loan Documents or in connection with the transactions contemplated by the Loan Documents or Lender’s or DIP Agent’s relationship with the Loan Parties, (viii) Lender’s or DIP Agent’s costs and expenses (including reasonable attorneys’ fees) incurred in advising, structuring, drafting, reviewing, administering (including travel, meals, and lodging), or amending the Loan Documents, and (ix) Lender’s or DIP Agent’s costs and expenses (including reasonable attorneys, accountants, consultants, and other advisors fees and expenses) incurred in terminating, enforcing (including attorneys, accountants, consultants, and other advisors fees and expenses incurred in connection with a “workout,” a “restructuring,” or an insolvency proceeding concerning the Loan Parties or in exercising rights or remedies under the Loan Documents), or defending the Loan Documents, irrespective of whether suit is brought, or in taking any Remedial Action concerning the Collateral.

“**Lender Related Person**” means each of Lender’s Affiliates, officers, directors, employees, attorneys, and agents (including the DIP Agent).



“**Lender’s Liens**” means the Liens in and to the Collateral granted by the Loan Parties to the Lender with respect to the Loan Parties’ respective interests in the Collateral.

“**Lien**” means any security interest, pledge, hypothecation, assignment intended as security, charge, deposit arrangement intended as security, encumbrance, easement, lien (statutory or other), or other security arrangement and any other preference, priority, or preferential arrangement of any kind or nature whatsoever that is intended as security, including any conditional sale contract or other title retention agreement, the interest of a lessor under a Capital Lease, and any synthetic or other financing lease having substantially the same economic effect as any of the foregoing.

“**Loan Account**” means the Deposit Account of Lender identified on Schedule A-1.

“**Loan Documents**” means this Agreement, the Interim Order, the Final Order, the Additional Documents and any other note or notes executed by Borrowers in connection with this Agreement and payable to Lender, any other agreement entered into, now or in the future, by the any Loan Party or Lender in connection with this Agreement, and all amendments, modifications, renewals, substitutions and replacements of any of the foregoing.

“**Loan Parties**” has the meaning set forth in the preamble to this Agreement.

“**Material Adverse Change**” means, (i) except as a result of the commencement of the Chapter 11 Cases, a material adverse change in the business, operations, results of operations, assets, liabilities or financial condition of the Borrowers or with respect to the Collateral, (ii) except as a result of the automatic stay imposed under section 362 of the Bankruptcy Code, a material impairment of any Loan Party’s ability to perform its respective obligations with respect to the Collateral under the Loan Documents or of the Lender’s ability to enforce the Obligations or realize upon the Collateral, or (iii) a material impairment of the enforceability or priority of Lender’s Liens with respect to a material portion the Collateral as a result of an action or failure to act on the part of the Loan Parties, all determined at the Lender’s discretion.

“**Maturity Date**” means the earliest of (i) the Stated Maturity Date; (ii) the effective date of a Plan of Reorganization; (iii) if the Final Order has not been entered by the Bankruptcy Court, the date that is one day after the Final Hearing (as defined in the Interim Order); (iv) the entry of an order converting any of the Chapter 11 Cases to a case under Chapter 7 of the Bankruptcy Code or dismissing any of the Chapter 11 Cases; (v) the closing of a sale of substantially all of the Borrowers’ assets, which for the avoidance of doubt, shall include a sale of the Borrowers’ non-retail assets; and (vi) the acceleration of the outstanding Obligations under the Facility or termination of the Lender’s Commitment under the Facility, including as a result of the occurrence of an Event of Default pursuant to Section 8.

“**Net Cash Proceeds**” means with respect to any sale or disposition of Collateral by any Borrower or Guarantor, the amount of cash proceeds received (directly or indirectly) from time to time (whether as initial consideration or through the payment of deferred consideration) by or on behalf of such Borrower or Guarantor, in connection therewith, after deducting therefrom only (i) the reasonable fees, commissions, and expenses related thereto and required to be paid by such Borrower or Guarantor in connection with such sale or disposition; (ii) taxes paid or

payable to any taxing authorities, or accrued as a result thereof by such Borrower or Guarantor in connection with such sale or disposition; and (iii) the amount of any reasonable reserve established in accordance with GAAP against any adjustment to the sale price or any liabilities (A) related to any of the applicable assets and (B) retained by such Borrower or Guarantor including, without limitation, pension and other post-employment benefit liabilities and liabilities related to environmental matters or against any indemnification obligations; provided, however, that the amount of any subsequent reduction of such reserve (other than in connection with a payment in respect of any such liability) shall be deemed to be Net Cash Proceeds of such disposition of Collateral occurring on the date of such reduction), in each case to the extent, but only to the extent, that the amounts so deducted are payable to a Person that is not an Affiliate of such Borrower or Guarantor, and are properly attributable to such transaction; provided, however for the avoidance of doubt, that such reasonable fees, commissions and expenses shall exclude fees and expenses of estate professionals.

**“Obligations”** means any and all loans, Advances, debts, principal, interest (including default interest), contingent reimbursement or indemnification obligations, premiums, liabilities (including all amounts charged to the Loan Account pursuant to this Agreement), obligations (including indemnification obligations), Fees (including, without limitation the Commitment Fee, Funding Fee, Work Fee, Exit Fee, and Stated Maturity Date Fee), Lender Expenses, guaranties, covenants, and duties of any kind and description owing by any Loan Party to any DIP Party pursuant to or evidenced by the Loan Documents and/or pursuant to or in connection with any one or more documents, instruments or agreements described in clause (i) of the definition of Lender Expenses and, in each case, irrespective of whether for the payment of money, whether direct or indirect, absolute or contingent, due or to become due, now existing or hereafter arising, and including all interest not paid when due and all other expenses or other amounts that the Loan Parties are required to pay or reimburse by the Loan Documents or by law or otherwise in connection with the Loan Documents, including in connection with the collection or enforcement of or preservation of rights under the Loan Documents.

**“Ordinary Course”** or **“ordinary course”** means, in respect of any Person, the ordinary course and reasonable requirements of such Person’s business, as conducted in accordance with past practices, and undertaken in good faith and not for purposes of evading any provision of any Loan Document or material applicable law.

**“Organizational Documents”** means (a) for any corporation, the certificate or articles of incorporation, the bylaws, any certificate of designation or other instrument relating to the rights of preferred shareholders or stockholders of such corporation and any shareholder rights agreement, (b) for any partnership, the partnership agreement and, if applicable, the certificate of limited partnership, and (c) for any limited liability company, the operating agreement and articles or certificate of formation or organization.

**“Performance Covenants”** means the covenants set forth in Section 7.

**“Permits”** means any license, lease, power, permit, franchise, certificate, authorization or approval issued by a Governmental Authority.

**“Permitted Indebtedness”** means, with respect to the Loan Parties and subject in all respects to the Budget:

- 1) Indebtedness evidenced by this Agreement and the other Loan Documents;
- 2) Indebtedness incurred in the ordinary course of business during the Chapter 11 Cases under performance, surety, statutory, and appeal bonds;
- 3) Indebtedness listed on Schedule 4.8;
- 4) Indebtedness amongst the Loan Parties;
- 5) Indebtedness other than for borrowed money incurred in the ordinary course of business in respect of:
  - (i) overdraft facilities, employee credit card programs, netting services, automatic clearinghouse arrangements and other cash management and similar arrangements, and in connection with securities and commodities accounts;
  - (ii) performance bonds, bid bonds, appeal bonds, surety bonds and completion guarantees, return of money and similar obligations not in connection with money borrowed, including those incurred to secure health, safety and environmental obligations; and
  - (iii) deferred compensation or similar arrangements to employees of a Borrower, any subsidiary of a Borrower or any direct or indirect parent thereof; and
- 6) obligations (contingent or otherwise) of any Loan Party or any Subsidiary thereof existing or arising under any Swap Contract; provided that such obligations are (or were) entered into by such Person in the ordinary course of business for the purpose of directly mitigating risks associated with fluctuations in interest rates or foreign exchange rates, and not for purposes of speculation or taking a “market view;” provided that the aggregate Swap Termination Value thereof shall not exceed \$1,000,000 at any time outstanding.

**“Permitted Liens”** means, with respect to the Loan Parties:

- 1) Liens granted pursuant to any Loan Document;
- 2) the THL Liens;
- 3) Liens described in Schedule 6.2; provided that any such Lien shall only secure the obligations that it secures on the Closing Date;
- 4) Liens imposed by law for taxes that are not yet due or are being contested in good faith by appropriate proceedings, so long as such reserves or other appropriate provisions, if any, as shall be required by GAAP shall have been made for any such contested amounts;

- 5) carriers', warehousemen's, mechanics', materialmen's, repairmen's and other like Liens imposed by applicable Law, arising in the ordinary course of business and securing obligations that are not overdue or, for amounts that are overdue that are overdue for a period in excess of five days, or are being contested in good faith by appropriate proceedings, so long as such reserves or other appropriate provisions, if any, as shall be required by GAAP shall have been made for any such contested amounts;
- 6) pledges and deposits made in the ordinary course of business in compliance with workers' compensation, unemployment insurance and other social security laws or regulations, other than any Lien imposed by ERISA;
- 7) deposits to secure the performance of bids, trade contracts and leases (other than Indebtedness), statutory obligations, surety and appeal bonds, performance bonds and other obligations of a like nature incurred in the ordinary course of business;
- 8) Liens in respect of judgments that would not constitute an Event of Default hereunder;
- 9) easements, covenants, conditions, restrictions, building code laws, zoning restrictions, rights-of-way and similar encumbrances on real property imposed by law or arising in the ordinary course of business that do not secure any monetary obligations and do not materially detract from the value of the affected property or materially interfere with the ordinary conduct of business of a Loan Party and such other minor title defects or survey matters that are disclosed by current surveys that, in each case, do not materially interfere with the current use of the real property;
- 10) statutory Liens of landlords and lessors in respect of rent not in default;
- 11) Liens arising solely by virtue of any statutory or common law provisions relating to banker's liens, liens in favor of securities intermediaries, rights of setoff or similar rights and remedies as to deposit accounts or securities accounts or other funds maintained with depository institutions or securities intermediaries;
- 12) Liens arising from precautionary UCC filings regarding "true" operating leases or, to the extent permitted under the Loan Documents, the consignment of goods to a Loan Party;
- 13) Liens in favor of customs and revenues authorities imposed by applicable law arising in the ordinary course of business in connection with the importation of goods solely to the extent the following conditions are satisfied: (A) such Liens secure obligations that are being contested in good faith by appropriate proceedings, (B) the applicable Loan Party has set aside on its books adequate reserves with respect thereto in accordance with GAAP and (C) such contest effectively suspends collection of the contested obligation and enforcement of any Lien securing such obligation;

- 14) Liens that are non-exclusive licenses of Intellectual Property granted by any Loan Party in the ordinary course of business and not interfering in any material respect with the ordinary course of business of the Loan Parties; and
- 15) valid, perfected, nonavoidable liens perfected on the Petition Date solely to the extent permitted under section 546(b) of the Bankruptcy Code and (ii) reclamation claims asserted by the reclamation claimants that objected to the entry of the Final Order that are determined to be valid pursuant to section 546(c) of the Bankruptcy Code.

**“Permitted Protest”** means the right of any Borrower or Guarantor to protest any Lien (other than any Lien that secures the Obligations), taxes (other than payroll taxes or taxes that are the subject of a United States federal tax lien), or rental payment, provided that (a) a reserve with respect to such obligation is established on such Borrower’s or Guarantor’s books and records in such amount as is required under GAAP, (b) any such protest is instituted promptly and prosecuted diligently by such Borrower or Guarantor, as applicable, in good faith, and (c) the Lender is reasonably satisfied that, while any such protest is pending, there will be no impairment of the enforceability, validity, or priority of any of Lender’s Liens.

**“Permitted Variance”** means a variance of net cash flow on the Budget (referred to herein as the **“Permitted Variance Budget”**) of no more than 10% thereafter, which shall be tested on a four week cumulative basis, as opposed to a line-by-line, basis; provided that for the avoidance of doubt, the calculation of any aforementioned Permitted Variance includes any disbursements in connection with estate professional fees.

**“Person”** means natural persons, corporations, limited liability companies, limited partnerships, general partnerships, limited liability partnerships, joint ventures, trusts, land trusts, business trusts, or other organizations, irrespective of whether they are legal entities, and governments and agencies and political subdivisions thereof.

**“Petition Date”** has the meaning set forth in the Recitals.

**“Plan of Reorganization”** means a Chapter 11 plan that provides for, inter alia, payment in full in cash of all Obligations on the effective date thereof, together with releases, exculpations, waivers and indemnification to the extent acceptable to the Lender, in its reasonable discretion.

**“Post Carve-Out Notice Trigger Cap”** means Allowed Professional Fees of Debtor Professionals and the Committee Professionals in an aggregate amount not to exceed \$175,000 incurred after the first Business Day following delivery by the DIP Agent of the Carve Out Trigger Notice, to the extent allowed by final order of the Bankruptcy Court.

**“Record”** means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

**“Remedial Action”** means all actions taken to (a) clean up, remove, remediate, contain, treat, monitor, assess, evaluate, or in any way address Hazardous Materials in the indoor or outdoor environment, (b) prevent or minimize a release or threatened release of Hazardous

Materials so they do not migrate or endanger or threaten to endanger public health or welfare or the indoor or outdoor environment, (c) restore or reclaim natural resources or the environment, (d) perform any pre-remedial studies, investigations, or post-remedial operation and maintenance activities, or (e) conduct any other actions with respect to Hazardous Materials required by Environmental Laws.

**“Required Lien Priority”** means, (i) with respect to all of the Collateral other than the THL First Lien Collateral, a valid and perfected first priority security interest in the Collateral, and (ii) with respect to the THL First Lien Collateral, a valid and perfected security interest in the THL First Lien Collateral that has priority over all other valid and perfected security interests in the THL First Lien Collateral, other than the THL First Priority Liens. To the extent the Lien priority of the Lender’s security interest in the Collateral is effected by the Final Order, such Lien priority will be, at least in part, the consequence of the priming Lien resulting from the application of section 364 of the Bankruptcy Code.

**“Sale”** means the sale of all or substantially all of any of the assets of any Borrower to any party, including the Lender, pursuant to the provisions of section 363 of the Bankruptcy Code, which for the avoidance of doubt, shall include a sale of the Borrowers’ non-retail assets.

**“Schedules”** means the schedules attached to this Agreement.

**“Security Documents”** means (i) all UCC financing statements, or amendments or continuations thereof, (ii) any documentation or filings made in connection with a certificate of title for any Collateral consisting of equipment, (iii) any mortgages or related documents necessary to perfect the Lender’s security interest in Collateral consisting of real property and (iv) any other documents or filings in connection with the perfection of the Liens hereunder.

**“Stated Maturity Date”** means June 30, 2018.

**“Stated Maturity Date Fee”** means the fee of 10.0% of the Facility, which shall be due and payable in cash, without further order of the Bankruptcy Court, immediately following the Stated Maturity Date in the event that the Obligations are not indefeasibly paid in full on the Stated Maturity Date.

**“Subsidiary”** means, with respect to any Person, any corporation, partnership, limited liability company, association or other business entity of which more than fifty percent (50%) of the total voting power of shares of stock (or equivalent ownership or controlling interest) entitled (without regard to the occurrence of any contingency) to vote in the election of directors, managers, governors or trustees thereof is at the time owned or controlled, directly or indirectly, by that Person or one or more of the other Subsidiaries of that Person or a combination thereof.

**“Superpriority Claim”** means a claim against the applicable Loan Parties or their estates in the Chapter 11 Cases which is an administrative expense claim and having priority any and all administrative expenses at any time existing or arising, of any kind or nature whatsoever, including, without limitation, the kinds specified or ordered pursuant to any provision of the Bankruptcy Code, including, but not limited to sections 105, 326, 328, 330, 331, 503(b), 506(c), 507(a), 507(b), 726, 1113 and 1114 of the Bankruptcy Code or otherwise, including those resulting from the conversion of any of the Chapter 11 Cases pursuant to section 1112 of the

Bankruptcy Code, whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment.

**“Swap Contract”** means

(a) any and all rate swap transactions, basis swaps, credit derivative transactions, forward rate transactions, commodity swaps, commodity options, forward commodity contracts, equity or equity index swaps or options, bond or bond price or bond index swaps or options or forward bond or forward bond price or forward bond index transactions, interest rate options, forward foreign exchange transactions, cap transactions, floor transactions, collar transactions, currency swap transactions, cross-currency rate swap transactions, currency options, spot contracts, or any other similar transactions or any combination of any of the foregoing (including any options to enter into any of the foregoing), whether or not any such transaction is governed by or subject to any master agreement, and

(b) any and all transactions of any kind, and the related confirmations, which are subject to the terms and conditions of, or governed by, any form of master agreement published by the International Swaps and Derivatives Association, Inc., any International Foreign Exchange Master Agreement, or any other master agreement (any such master agreement, together with any related schedules, a “Master Agreement”), including any such obligations or liabilities under any Master Agreement.

**“Swap Termination Value”** means, in respect of any one or more Swap Contracts, after taking into account the effect of any legally enforceable netting agreement relating to such Swap Contracts, (a) for any date on or after the date such Swap Contracts have been closed out and termination value(s) determined in accordance therewith, such termination value(s), and (b) for any date prior to the date referenced in clause (a), the amount(s) determined as the mark-to-market value(s) for such Swap Contracts, as determined based upon one or more mid-market or other readily available quotations provided by any recognized dealer in such Swap Contracts (which may include a Lender or any Affiliate of a Lender).

**“Term Loan Documents”** means the Prepetition Term Loan Documents as defined in the Interim Order or the Final Order, as applicable.

**“THL”** means THL Corporate Finance, Inc.

**“THL First Lien Collateral”** means the Collateral of the Loan Parties consisting of only (1) all equipment, fixtures, real property, Intellectual Property and the Capital Stock of domestic subsidiaries of HoldCo, all as more particularly described on Schedule T-1; and (2) all identifiable cash proceeds with respect to the foregoing.

**“THL First Priority Liens”** means the valid and perfected first priority security interest of THL in the THL First Lien Collateral.

**“THL Junior Priority Liens”** means the valid and perfected security interest of THL in the Collateral (other than the THL First Lien Collateral), which security interest is junior in priority to the security interest of the Lender.

“**THL Liens**” means the THL First Priority Liens and the THL Junior Priority Liens.

“**Trade Secret License**” means any and all agreements, whether written or oral, providing for the grant by or to any Borrower or Guarantor of any right in or to Trade Secrets, to the extent that a grant of a security interest in such Trade Secret License is not prohibited by applicable law or the applicable Trade Secret License.

“**UCC**” means the Uniform Commercial Code as in effect in the State of New York, except that, if perfection or the effect of perfection or non-perfection or the priority of any security interest in any Collateral is governed by the Uniform Commercial Code as in effect in a jurisdiction other than the State of New York, “UCC” means the Uniform Commercial Code as in effect from time to time in such other jurisdiction for purposes of the provisions hereof relating to such perfection, effect of perfection or non-perfection or priority.

“**United States**” means the United States of America.

“**Weekly Budget Variance Report**” is defined in Section 5.2.

**1.2 Accounting Terms.** All accounting terms not specifically defined herein shall be construed in accordance with GAAP; provided, however, that if the Borrowers notify the DIP Parties that the Borrowers request an amendment to any provision hereof to eliminate the effect of any change occurring after the Closing Date in GAAP or in the application thereof on the operation of such provision (or if any DIP Party notifies the Borrowers that the Lender requests an amendment to any provision hereof for such purpose), regardless of whether any such notice is given before or after such change in GAAP or in the application thereof, then the Lender and the Borrowers agree that they will negotiate in good faith amendments to the provisions of this Agreement that are directly affected by such change in GAAP with the intent of having the respective positions of the Lender and the Borrowers after such change in GAAP conform as nearly as possible to their respective positions as of the date of this Agreement and, until any such amendments have been agreed upon, the provisions in this Agreement shall be interpreted on the basis of GAAP as in effect and applied immediately before such change shall have become effective. When used herein, the term “financial statements” shall include the notes and schedules thereto. Whenever the term “Borrowers” is used in respect of a financial covenant or a related definition, it shall be understood to mean the Borrowers on a consolidated basis, unless the context clearly requires otherwise.

**1.3 UCC.** Any terms used in this Agreement that are defined in the UCC shall be construed and defined as set forth in the UCC unless otherwise defined herein. To the extent the UCC is used to define any term herein and such term is defined differently in different Articles of the UCC, the definition of such term contained in Article 9 of the UCC shall govern.

**1.4 Construction.** Unless the context of this Agreement or any other Loan Document clearly requires otherwise, references to the plural include the singular, references to the singular include the plural, the terms “includes” and “including” are not limiting, and the term “or” has, except where otherwise indicated, the inclusive meaning represented by the phrase “and/or.” The words “hereof,” “herein,” “hereby,” “hereunder,” and similar terms in this Agreement or any other Loan Document refer to this Agreement or such other Loan Document, as the case may be,



as a whole and not to any particular provision of this Agreement or such other Loan Document, as the case may be. Section, subsection, clause, schedule, and exhibit references herein are to this Agreement unless otherwise specified. Any reference in this Agreement or in any other Loan Document to any agreement, instrument, or document shall include all alterations, amendments, changes, extensions, modifications, renewals, replacements, substitutions, joinders, and supplements, thereto and thereof, as applicable (subject to any restrictions on such alterations, amendments, changes, extensions, modifications, renewals, replacements, substitutions, joinders, and supplements set forth herein). The words “asset” and “property” shall be construed to have the same meaning and effect and to refer to any and all tangible and intangible assets and properties, including cash, securities, accounts, and contract rights. Any reference herein or in any other Loan Document to the satisfaction, repayment, or payment in full of the Obligations shall mean the indefeasible repayment in full in cash of all Obligations other than unasserted contingent indemnification Obligations (with all such Obligations consisting of monetary or payment Obligations having been indefeasibly paid in full in cash). Any reference herein to any Person shall be construed to include such Person’s successors and assigns. Any requirement of a writing contained herein or in any other Loan Document shall be satisfied by the transmission of a Record. Any reference herein to the DIP Agent shall mean the DIP Agent on behalf of the Lender and not in the DIP Agent’s individual capacity.

**1.5** *Schedules and Exhibits.* All of the schedules and exhibits attached to this Agreement shall be deemed incorporated herein by reference.

## **2. LOAN AND TERMS OF PAYMENT.**

### **2.1** *Agreement to Lend; Delayed Draw; Security Documents and Loan Documents.*

(a) Subject to the terms and conditions of this Agreement, the Lender agrees, that after entry of the Interim Order or the Final Order, as applicable, to make individual advances to the Borrowers (each, an “**Advance**”). Each Advance must be in a minimum amount of at least \$1,000,000 and the aggregate of all Advances shall not exceed the Facility. The Facility will not revolve; Advances that are repaid or prepaid (whether as an optional prepayment or a mandatory prepayment) cannot be re-borrowed.

(b) The Advances shall be evidenced by the Loan Documents (including the Final Order), and secured to the extent set forth in this Agreement, the Interim Order, the Final Order, and the other Loan Documents.

(c) Each Borrower agrees that it is jointly and severally liable for, and absolutely and unconditionally guarantees to the Lender the prompt payment and performance of, all Obligations and all agreements under the Loan Documents. The Borrowers promise to pay the Obligations (including principal, interest, Fees, costs, and expenses) in Dollars in full on the Maturity Date. Each Guarantor agrees that it is liable for all of the Obligations to the extent of the value of the Collateral that it has pledged under this Agreement.

**2.2** *Borrowing Procedures.* Each Advance under Section 2.1(a) shall be made by a written request by an Authorized Person of Borrowers delivered to the DIP Agent; provided, however, that Borrowers shall submit requests after approval of the Interim Order or the Final

Order, as applicable, and the aggregate amount of all such Advances shall not exceed \$25,000,000.

**2.3** *Payments; Prepayments.*

(a) *Payments by Borrowers.* Except as otherwise expressly provided herein, all payments by Borrowers shall be made to the Loan Account for the account of the Lender and shall be made in immediately available funds, no later than 4:00 p.m. (Eastern time) on the date specified herein. Any payment received by the Lender later than 4:00 p.m. (Eastern time) shall be deemed to have been received on the following Business Day and any applicable interest or fee shall continue to accrue until such following Business Day.

(b) *Apportionment and Application.* All payments remitted to the Lender and all Proceeds of Collateral received by the Lender shall be applied as follows (unless otherwise directed by the Lender):

(1) first, to pay any Lender Expenses (including cost or expense reimbursements owed to the Lender or Lender Related Persons and payable pursuant to Section 10.3) then due in accordance with the Interim Order or the Final Order, as applicable, or indemnities then due to the DIP Parties under the Loan Documents, until paid in full;

(2) second, to pay any Fees then due and payable to the Lender under the Loan Documents until paid in full;

(3) third, to pay unpaid and accrued interest due in respect of the Advances until paid in full;

(4) fourth, to pay the principal of all Advances until paid in full;

(5) fifth, to pay any other Obligations until paid in full; and

(6) sixth, to Borrowers (to be wired to the Designated Account) or as otherwise required by applicable law.

In the event of a direct conflict between the priority provisions of this Section 2.3 and any other provision contained in any other Loan Document (except for the Interim Order or the Final Order, as applicable), it is the intention of the parties hereto that such provisions be read together and construed, to the fullest extent possible, to be in concert with each other. In the event of any actual, irreconcilable conflict that cannot be resolved as aforesaid, the terms and provisions of this Section 2.3 shall control and govern. Notwithstanding the foregoing, to the extent there is a conflict between the Interim Order or the Final Order, as applicable and any other Loan Document, the Interim Order or the Final Order, as applicable shall control and govern.

(c) *Optional Prepayments.* Upon three (3) Business Days' prior notice to the DIP Parties, Borrowers may prepay any Advance, in whole or in part, as of the last day of any month during the term, provided that such principal amount being prepaid shall be an amount not less than \$1,000,000 and such prepayment shall also be subject to payment of all accrued and unpaid interest on such principal amount and the Exit Fee as applied to the principal amount that

was prepaid. For the avoidance of doubt, Optional Prepayments may only be made on the last day of a month.

(d) *Mandatory Prepayments.*

(1) *Dispositions.* Within one (1) Business Day after the date of receipt by any Borrower or Guarantor, as applicable, of the Net Cash Proceeds of any voluntary or involuntary sale or disposition of any Collateral except for sales of inventory in the ordinary course, the Borrower or Guarantor shall prepay such portion of the outstanding amount of the Obligations in accordance with Section 2.3(b) in an amount equal to 100% of such Net Cash Proceeds (including condemnation awards and payments in lieu thereof) received in connection with such sales or dispositions plus the Exit Fee as applied to the principal amount of such prepayment. Nothing contained in this Section 2.3(d)(1) shall permit any Borrower or Guarantor to sell or otherwise dispose of any Collateral other than in accordance with Section 6.4.

(2) *Indebtedness.* Within one (1) Business Day after the date of incurrence by any Borrower or Guarantor of any Indebtedness secured by the Collateral or any portion thereof (other than Permitted Indebtedness), such Borrower or Guarantor shall prepay the outstanding principal amount of the Obligations in accordance with Section 2.3(b) in an amount equal to 100% of the Net Cash Proceeds received by such Person in connection with the incurrence of such Indebtedness plus the Exit Fee as applied to the principal amount of such prepayment. The provisions of this Section 2.3(d)(2) shall not be deemed to be implied consent to any such incurrence otherwise prohibited by the terms and conditions of this Agreement.

(e) *Maturity.* All Obligations (including the Exit Fee) shall be due and payable on the Maturity Date.

**2.4** *Interest Rates and Rates, Payments and Calculations.*

(a) *Interest Rate.* Except as provided in Section 2.4(b), all Advances shall bear interest on the Daily Balance thereof at a rate equal to 11.00% per annum. For the avoidance of doubt, for the purpose of calculating interest hereunder, the Daily Balance shall exclude accrued but unpaid interest due or owing hereunder.

(b) *Default Rate.* Upon the occurrence and during the continuation of an Event of Default or the occurrence of the Stated Maturity Date, all Obligations shall bear interest on the Daily Balance thereof at a per annum rate equal to five percentage points (5%) (the “**Default Rate**”) above the per annum rate otherwise applicable hereunder without any notice from any DIP Party or any other Person. For the avoidance of doubt, for the purpose of calculating interest hereunder, the Daily Balance shall exclude accrued but unpaid interest due or owing hereunder.

(c) *Payment.* Except to the extent provided to the contrary herein, all interest, all Fees payable hereunder or under any of the other Loan Documents, and all costs, expenses, and Lender Expenses payable hereunder or under any of the other Loan Documents shall be due and payable, in arrears, on the first day of each month at any time that any Obligations are outstanding or the Lender’s Commitment has not yet terminated. The Borrowers hereby authorize the DIP Parties, from time to time, without prior notice to the Borrowers, to charge all

interest and all Fees payable hereunder or under any of the other Loan Documents (in each case, as and when due and payable), all Lender Expenses payable hereunder or under any of the other Loan Documents (in each case, as and when due and payable), all Fees provided for in (in each case, as and when due and payable), and all other payments as and when due and payable under any Loan Document to the Loan Account, which amounts thereafter shall constitute Obligations hereunder and shall accrue interest at the rate then applicable to Obligations. Any interest, Fees, Lender Expenses, or other amounts payable hereunder or under any other Loan Document not paid when due shall be compounded by being charged to the Loan Account and shall thereafter constitute Obligations hereunder and shall accrue interest at the rate then applicable to Obligations in accordance with the terms of this Agreement.

(d) *Computation.* All interest and fees chargeable under the Loan Documents shall be computed on the basis of a 360 day year, in each case, for the actual number of days elapsed in the period during which the interest or fees accrue.

(e) *Intent to Limit Charges to Maximum Lawful Rate.* Notwithstanding anything in this Agreement or the Loan Documents to the contrary, in no event shall the interest rate or rates payable under this Agreement, plus any other amounts paid in connection herewith, exceed the highest rate permissible under any law that a court of competent jurisdiction shall, in a final determination, deem applicable. Borrowers and the Lender, in executing and delivering this Agreement, intend legally to agree upon the rate or rates of interest and manner of payment stated within it; that, anything contained herein to the contrary notwithstanding, if said rate or rates of interest or manner of payment exceeds the maximum allowable under applicable law, then, *ipso facto*, as of the date of this Agreement, Borrowers is and shall be liable only for the payment of such maximum as allowed by law, and payment received from Borrowers in excess of such legal maximum, whenever received, shall be applied to reduce the principal balance of the Obligations to the extent of such excess.

(f) *Crediting Payments; Clearance Charge.* The receipt of any payment item by the Lender shall not be considered a payment on account unless such payment item is a wire transfer of immediately available federal funds made to the Loan Account or unless and until such payment item is honored when presented for payment. Should any payment item not be honored when presented for payment, then the Borrowers shall be deemed not to have made such payment and interest shall be calculated accordingly. Anything to the contrary contained herein notwithstanding, any payment item shall be deemed received by the Lender only if it is received into the Loan Account on a Business Day on or before 4:00 p.m. (Eastern time). If any payment item is received into the Loan Account on a non-business day or after 4:00 p.m. (Eastern time) on a Business Day, it shall be deemed to have been received by the Lender as of the opening of business on the immediately following Business Day.

## **2.5** *Designated Account.*

(a) The Lender (or the DIP Agent at the Lender's instruction) is authorized to make the Advances under this Agreement based upon telephonic or other instructions received from anyone purporting to be an Authorized Person to the Designated Account. The Borrowers agree to establish and maintain the Designated Account with the Designated Account Bank and

to receive the proceeds of the Advances requested by the Borrowers and made by the Lender (or the DIP Agent at the Lender's instruction) hereunder in such Designated Account.

(b) The Loan Parties agree to deposit all Proceeds of the Collateral into the Designated Account, including, for the avoidance of doubt, all amounts collected by the Loan Parties with respect to dispositions of Collateral consisting of inventory in the ordinary course of business.

**2.6** *Maintenance of Loan Account; Statements of Obligations.* The DIP Agent shall maintain the Loan Account on its books in the name of the Borrowers on which the Borrowers will be charged with all Advances made by the Lender to the Borrowers or for the Borrowers' account, and with all other payment Obligations hereunder or under the other Loan Documents including, accrued interest, Fees and Lender Expenses. In accordance with Section 2.7, the Loan Account will be credited with all payments received by the Lender (or by the DIP Agent on account of the Lender) from the Borrowers or for the Borrowers' account.

**2.7** *Fees.* Upon entry of the Interim Order, the Borrowers shall pay from the proceeds of the Facility (i) the Lender amounts equal to the Commitment Fee and the Funding Fee as set forth in the Interim Order and (ii) the Lender (or the Lender's counsel, Arent Fox LLP, at the direction of the Lender or the DIP Agent) \$200,000 (the "**Work Fee**"), against which all accrued but unpaid Lender Expenses shall be credited whether nor incurred as of the date of the Interim Order or thereafter. All such fees shall be non-refundable and non-avoidable obligations of the Borrowers and shall be paid by the Borrowers in cash.

### **3. CONDITIONS; TERM OF AGREEMENT.**

**3.1** *Conditions Precedent to Advances of Facility Amount.* The Lender shall not be required to make any Advances unless and until all of the conditions specified below shall have been satisfied.

(a) The Lender shall have received and approved the Budget.

(b) The Bankruptcy Court shall have entered the Interim Order or the Final Order, as applicable, in form and substance satisfactory to the Lender, in its sole discretion, and such order shall be in full force and effect and shall not have been modified or amended (unless otherwise approved by the Lender), reversed, stayed or subject to a motion for re-argument or reconsideration, or appealed. The Loan Parties and the Lender shall be entitled to rely in good faith upon the Interim Order or the Final Order, as applicable, and shall be permitted and required to perform their respective obligations in compliance with this Agreement notwithstanding any such objections thereto, unless the relevant order has been stayed by a court of competent jurisdiction.

(c) All fees required to be paid on the Closing Date under this Agreement shall have been paid (including the Work Fee).

(d) [Reserved.]

(e) The Lender shall have received copies of certificates of all insurance policies that Lender may require in its reasonable discretion, confirming that such policies are in effect and that the premiums due and owing with respect thereto have been paid in full.

**3.2** *Conditions Precedent to all Extensions of Credit.*

(a) The obligation of the Lender to make any Advances (or to extend any other credit hereunder), at any time shall be subject to the satisfaction (or waiver by the Lender in its sole discretion) of the following additional conditions precedent:

(b) The Loan Parties, as applicable, shall be in compliance with the conditions precedent set forth in Section 3.1.

(c) The Loan Parties, as applicable, shall have complied fully and completely with all applicable Performance Covenants through the date of the requested Advance as set forth in this Agreement.

(d) The representations and warranties of the Loan Parties, as applicable, contained in this Agreement or in the other Loan Documents shall be true and correct in all material respects (except that such materiality qualifier shall not be applicable to any representations and warranties that already are qualified or modified by materiality in the text thereof) on and as of the date of such extension of credit, as though made on and as of such date (except to the extent that such representations and warranties relate solely to an earlier date).

(e) No Default or Event of Default shall have occurred and be continuing on the date of such extension of credit, nor shall either result from the making thereof.

(f) The Interim Order or the Final Order, as applicable shall be in full force and effect and shall not have been modified or amended (unless otherwise approved by the Lender), reversed, stayed or subject to a motion for re-argument or reconsideration, or appealed.

(g) No injunction, writ, restraining order, or other order of any nature restricting or prohibiting, directly or indirectly, the extending of such credit shall have been issued and remain in force by any Governmental Authority against any Borrower, the Guarantor or the Lender.

(h) No action, proceeding, investigation, regulation or legislation shall have been instituted or threatened before any Governmental Authority to enjoin, restrain or prohibit, or to obtain damages in respect of, or which is related to or arises out of this Agreement or any of the other Loan Documents or the consummation of the transactions contemplated hereby and thereby and which, in the Lender's sole judgment, would make it inadvisable to consummate the transactions contemplated by this Agreement or any of the other Loan Documents.

**3.3** *Maturity.* This Agreement shall continue in full force and effect for a term ending on the Maturity Date. All Obligations, including the outstanding unpaid principal balance and all accrued and unpaid interest on the Advances (including the Exit Fee), shall be due and payable on the Maturity Date. On the Maturity Date, the Lender's Commitment to provide additional credit hereunder shall automatically be terminated. No termination of the obligations of the

Lender (other than payment in full of the Obligations (other than in respect of contingent indemnification and expense reimbursement obligations for which no claim has been made) and termination of the Lender's Commitment) shall relieve or discharge any Borrower or Guarantor of its duties, Obligations, or covenants hereunder or under any other Loan Document and the Lender's Liens in the Collateral shall continue to secure the Obligations and shall remain in effect until all Obligations (other than in respect of contingent indemnification and expense reimbursement obligations for which no claim has been made) have been indefeasibly paid in full and the Commitment has been terminated. When all of the Obligations (other than in respect of contingent indemnification and expense reimbursement obligations for which no claim has been made) have been indefeasibly paid in full in cash and the Lender's Commitment has been terminated, the Lender, at the Loan Parties' expense, will execute and deliver any termination statements, lien releases, discharges of security interests, and other similar discharge or release documents (and, if applicable, in recordable form) as are reasonably necessary to release, as of record, the Lender's Liens and all notices of security interests and Liens previously filed by the Lender with respect to the Obligations.

#### 4. REPRESENTATIONS AND WARRANTIES.

In order to induce the Lender to enter into this Agreement, the Loan Parties jointly and severally make the representations and warranties in this Section 4 to the Lender. The Loan Parties further represent and warrant that such representations and warranties shall be true, correct, and complete, in all respects, as of the Closing Date, and shall be true, correct, and complete, in all respects, as of the date of the making of each Advance (or other extension of credit) made thereafter, as though made on and as of the date of such Advance (or other extension of credit) (except to the extent that such representations and warranties expressly relate solely to an earlier date).

##### 4.1 *Due Organization and Qualification.*

(a) Each Loan Party (i) is duly formed and existing and in good standing under the laws of the jurisdiction of its formation, (ii) where the ownership of Collateral requires such qualification, is qualified to do business in any state where the failure to be so qualified could reasonably be expected to result in a Material Adverse Change, and (iii) subject to the Bankruptcy Court's entry of the Interim Order or the Final Order, as applicable, and any limitation under the Bankruptcy Code or other applicable debtor relief law, has all requisite power and authority to own and operate its properties, to carry on its business as now conducted and as proposed to be conducted, to enter into the Loan Documents to which it is a party and to carry out the transactions contemplated thereby.

(b) Schedule 4.1(b) sets forth the complete and accurate ownership of each Borrower and Guarantor.

**4.2 *Due Authorization; No Conflict.*** Subject to the Bankruptcy Court's entry of the Interim Order or the Final Order, as applicable, as to each Loan Party, the execution, delivery, and performance by such Loan Party of the Loan Documents to which it is a party have been duly authorized by all necessary action or pursuant to the Interim Order or the Final Order, as applicable, on the part of such Loan Party.

**4.3** *Binding Obligations.* Each Loan Document has been duly executed and delivered by each Loan Party that is a party thereto and is the legally valid and binding obligation of such Loan Party, enforceable against such Loan Party in accordance with its respective terms, except as enforcement may be limited by equitable principles or by bankruptcy, insolvency, reorganization, moratorium, or similar laws relating to or limiting creditors' rights generally (regardless of whether such enforceability is considered in a proceeding at law or in equity).

**4.4** *Title to Assets;* Each Loan Party has (i) good, sufficient and legal title to (in the case of fee interests in the real property), and (ii) good and marketable title to (in the case of personal property), all of such Loan Party's assets that constitute Collateral hereunder.

**4.5** [Intentionally Omitted.]

**4.6** *Litigation.* Schedule 4.6(b) sets forth a complete and accurate description, with respect to each of the actions, suits, or proceedings with asserted liabilities in excess of, or that could reasonably be expected to result in liabilities in excess of, \$25,000 that, as of the Closing Date, is stayed or is threatened against any Borrower, of (i) the parties to such actions, suits, or proceedings, (ii) the nature of the dispute that is the subject of such actions, suits, or proceedings, (iii) the status, as of the Closing Date, with respect to such actions, suits, or proceedings, and (iv) whether any liability of the Borrowers in connection with such actions, suits, or proceedings is covered by insurance.

**4.7** *Fraudulent Transfer.* No transfer of property is being made by a Loan Party and no obligation is being incurred by a Loan Party in connection with the transactions contemplated by this Agreement or the Loan Documents with the intent to hinder, delay or defraud either present or future creditors of any Loan Party.

**4.8** *Indebtedness.* Set forth on Schedule 4.8 is a true and complete list of all Indebtedness (other than the Obligations) of each Loan Party outstanding immediately prior to the Closing Date in excess of \$25,000 that is to remain outstanding immediately after giving effect to the closing hereunder on the Closing Date and such Schedule accurately sets forth the aggregate principal amount of such Indebtedness as of the Closing Date.

**4.9** *Payment of Taxes.* Except as provided on Schedule 4.9 and except as otherwise permitted under Section 5, all United States federal, state and other material tax returns and reports of each Borrower and Guarantor required to be filed by any of them with respect to the Collateral have been timely filed, and all taxes due with respect to the period covered by such tax returns and all material assessments, fees and other governmental charges upon any Loan Party's Collateral that are due and payable have been paid when due and payable, other than (a) taxes that are the subject of a Permitted Protest, and (b) with respect to the Collateral, no Loan Party knows of any proposed tax assessment against such Loan Party with respect to United States federal or state taxes that is not being actively contested by such Loan Party diligently, in good faith, and by appropriate proceedings; provided such reserves or other appropriate provisions, if any, as shall be required in conformity with GAAP shall have been made or provided therefor.

**4.10** *Budget.* Attached to this Agreement as Exhibit B-2 is a true and complete copy of the Budget delivered to the Lender pursuant to Section 3.1(a).



## 5. AFFIRMATIVE COVENANTS.

Each Loan Party, as applicable, covenants and agrees that, until termination of all of the Lender's Commitment and payment in full of the Obligations, it shall comply with each of the following:

**5.1 Compliance Certificates.** Each Borrower shall deliver to the DIP Parties, at the time of a request for any Advance, a Compliance Certificate. In addition, the Borrowers agree to maintain a system of accounting that enables the Borrowers to produce unaudited financial statements in accordance with GAAP.

**5.2 Reporting.** Each Borrower, as applicable, will: (a) comply with the agreements, requirements, covenants and undertakings set forth in Exhibit C-1, in accordance with the terms thereof; (b) commencing Friday November 3, 2017 and on the Friday of each week thereafter, prepare and deliver to the DIP Parties (x) a report in accordance with Section 7.2 showing actual cash receipts and disbursements of the entities covered by the Permitted Variance Budget for the immediately preceding Sunday through Saturday certified in writing by an Authorized Person of Borrowers as being true and accurate, and (y) a written explanation of all material variances from the Budget (the "**Weekly Budget Variance Report**"); (c) update and roll-forward the proposed Budget no less frequently than every four (4) weeks or at such other interval as agreed to by the Lender and the Borrowers, each such amended Budget to be delivered to the DIP Parties; and (d) participate in a weekly conference call, if required, commencing on the third Business Day of each week following the Petition Date regarding the Budget, management issues, sale process, and other matters.

**5.3 Existence.** Except as otherwise permitted under Section 6.3 or Section 6.4, at all times, each Borrower and Guarantor shall (a) maintain and preserve in full force and effect its existence (including being in good standing in its jurisdiction of formation) and (b) maintain all its rights and franchises, licenses and permits, except where the failure to maintain any such rights and franchises, or licenses and permits, could not reasonably be expected to result in a Material Adverse Change.

**5.4 Maintenance of Properties; Permits.** Except where the failure to do so could not be expected to result in a Material Adverse Change, each Loan Party shall (a) maintain and preserve the Collateral, that is necessary to the proper conduct of its business in good working order and condition, ordinary wear, tear, and casualty excepted, (b) comply with the material provisions of all material leases related to the Collateral, so as to prevent the loss or forfeiture thereof, unless such provisions are the subject of a Permitted Protest; and (c) maintain, comply with and keep in full force and effect its Permits with respect to the Collateral, except as could not be expected to result in a Material Adverse Change. Except as set forth on Schedule 5.4, each Loan Party is in material compliance with, and has, all Permits required for the operation of its business as it relates to the Collateral, and for the execution, delivery and performance by, and enforcement against, such Loan Party of each Loan Document. No Loan Party is in material breach of or default under the provisions of any such Permit, nor is there any event, fact, condition or circumstance which, with notice or passage of time or both, would constitute or result in any of the foregoing.

**5.5** *Taxes.* Each Loan Party shall cause all assessments and taxes imposed, levied, or assessed against any Collateral to be paid in full, before delinquency or before the expiration of any extension period.

**5.6** *Insurance.* At the relevant Loan Party's expense, each Loan Party shall maintain insurance respecting such Loan Party's Collateral wherever located, covering loss or damage by fire, theft, explosion, and all other hazards and risks as ordinarily are insured against by other Persons engaged in the same or similar businesses. Each Loan Party also shall maintain business interruption, general liability, product liability insurance, director's and officer's liability insurance, fiduciary liability insurance, employment practices liability insurance, title insurance as well as insurance against larceny, embezzlement, and criminal misappropriation. All such policies of insurance shall be with responsible and reputable insurance companies and in such amounts as is carried generally in accordance with sound business practice by companies in similar businesses similarly situated and located and in any event in amount, adequacy and scope reasonably satisfactory to the Lender. All property insurance policies and title insurance policies covering the Collateral are to be made payable to the Lender, in case of loss, pursuant to a standard loss payable endorsement with a standard non-contributory "lender" or "secured party" clause and are to contain such other provisions as the Lender may reasonably require to fully protect the Lender's interest in the Collateral and to any payments to be made under such policies. All certificates of property and general liability insurance are to be delivered to the Lender, with the loss payable (but only in respect of Collateral) and additional insured endorsements in favor of the Lender and shall provide for not less than 30 days (10 days in the case of non-payment) prior written notice to the Lender of the exercise of any right of cancellation. If any Loan Party fails to maintain such insurance, any DIP Party may arrange for such insurance, but at such Loan Party's expense and without any responsibility on any DIP Party's part for obtaining the insurance, the solvency of the insurance companies, the adequacy of the coverage, or the collection of claims. The Loan Parties shall give the DIP Parties prompt notice of any loss covered by its casualty or business interruption insurance. Upon the occurrence and during the continuance of an Event of Default, the Lender shall have the sole right to file claims under any property and general liability insurance policies in respect of the Collateral, to receive, receipt and give acquittance for any payments that may be payable thereunder, and to execute any and all endorsements, receipts, releases, assignments, reassignments or other documents that may be necessary to effect the collection, compromise or settlement of any claims under any such insurance policies.

**5.7** *Inspection.* Each Loan Party shall permit the Lender and each of its duly authorized representatives (including the DIP Agent) to visit any of its properties and inspect any of its Collateral or books and records, to conduct appraisals and valuations, to examine and make copies of its books and records, and to discuss its affairs, finances, and accounts with, and to be advised as to the same by, its officers and employees at such reasonable times during normal business hours and intervals as the Lender may reasonably require and, so long as no Default or Event of Default exists, with reasonable prior notice to the Loan Parties.

**5.8** *Environmental.* Each Loan Party shall:

(a) Keep the Collateral owned or operated by such Loan Party free of any Environmental Liens;

(b) Comply with Environmental Laws;

(c) Promptly notify the DIP Parties of any release of which such Loan Party has knowledge of a Hazardous Material in any reportable quantity from or onto property owned or operated by any Loan Party that could reasonably be expected to result in a Material Adverse Change; and

(d) Promptly, but in any event within five (5) Business Days of its receipt thereof, provide the DIP Parties with written notice of any of the following: (i) notice that an Environmental Lien has been filed against any of the Collateral, (ii) commencement of any Environmental Action or written notice that an Environmental Action will be filed against any Loan Party, and (iii) written notice of a violation, citation, or other administrative order from a Governmental Authority.

**5.9** *Compliance with Laws.* Each Loan Party shall comply with the requirements of all applicable laws, rules, regulations, and orders of any Governmental Authority, other than laws, rules, regulations, and orders the non-compliance with which, individually or in the aggregate, could not reasonably be expected to result in a Material Adverse Change.

**5.10** *Disclosure Updates.* Each Loan Party shall promptly and in no event later than three (3) Business Days after obtaining knowledge thereof, notify the DIP Parties if any written information, exhibit, or report (other than materials marked as drafts and forward-looking information and projections and information of a general economic nature and general information about such Loan Party's industry) furnished to any DIP Party contained, at the time it was furnished, any untrue statement of a material fact or omitted to state any material fact necessary to make the statements contained therein (taken as a whole) not misleading in light of the circumstances in which made. The foregoing to the contrary notwithstanding, any notification pursuant to the foregoing provision will not cure or remedy the effect of the prior untrue statement of a material fact or omission of any material fact nor shall any such notification have the effect of amending or modifying this Agreement or any of the Schedules hereto.

**5.11** *Formation of Subsidiaries.* No Loan Party may form any direct or indirect Subsidiary or acquire any direct or indirect Subsidiary after the Closing Date without the consent of the Lender, in its sole discretion. Any Subsidiary that is formed after the Closing Date shall be considered a Borrower and execute any documentation reasonably requested by the Lender.

**5.12** *Further Assurances.* At any time upon the reasonable request of the Lender, each Loan Party shall execute and deliver to the DIP Parties any and all financing statements, fixture filings, security agreements, pledges, assignments, endorsements of certificates of title, mortgages, deeds of trust, and all other documents (collectively, the "**Additional Documents**") that the Lender may reasonably request in form and substance reasonably satisfactory to the Lender, to create, perfect, and continue perfected or to better perfect Lender's Liens in all the Collateral (whether now owned or hereafter arising or acquired, tangible or intangible, real or personal).

**5.13** *Staffing.* Each Loan Party shall maintain at all times an appropriate and necessary staff to carry out its business with respect to the Collateral in compliance with all other applicable laws and with training and experience and in number equal to or greater than would be customarily maintained by businesses engaging in similar activities, except where the failure to maintain such staff could not, after taking into account any formal or informal compliance deadline extensions granted by applicable regulatory authorities in effect, reasonably be expected to result in a Material Adverse Change.

**5.14** *Budget.* Attached hereto as Exhibit B-2 is an initial budget, prepared by Borrowers, that sets forth in reasonable detail all receipts and disbursements of the entities identified therein on a weekly basis, separated into line items for each category of receipt or disbursement, and is otherwise in form and substance approved by the Lender (the “**Budget**”). For the avoidance of doubt, the Budget, as updated pursuant to Section 5.2 no less than every four (4) weeks, shall be in form and substance, approved by the Lender.

## **6. NEGATIVE COVENANTS.**

Each Loan Party covenants and agrees that, and without the prior consent of the Lender in its sole discretion, until termination of the Lender’s Commitment and indefeasible payment in full of the Obligations, such Loan Party will not do any of the following:

**6.1** *Indebtedness.* Except for any Permitted Indebtedness, create, incur, assume, suffer to exist, guarantee, or otherwise become or remain, directly or indirectly, liable with respect to any Indebtedness with respect to the Collateral.

**6.2** *Liens.* Except for any Permitted Liens, create, incur, or assume, on or after the date of this Agreement, directly or indirectly, any Lien on or with respect to any of the Collateral, of any kind, whether now owned or hereafter acquired, or any income or profits therefrom, except for Liens created by the Loan Documents.

**6.3** *Restrictions on Fundamental Changes.* Except in connection with a Plan of Reorganization or a Sale or Sales approved by the Bankruptcy Court, no Loan Party shall:

(a) Enter into any merger, consolidation, reorganization, or recapitalization, or reclassify its equity interests,

(b) Liquidate, wind up, or dissolve itself (or suffer any liquidation or dissolution), or

(c) Suspend or close a substantial portion of its or their business, in each case, other than the closing of certain retail stores pursuant to the Final Order (I) Authorizing Retail Store Closing Sales Free and Clear of All Liens, Claims and Encumbrances; (II) Approving the Store Closing Procedures; (III) Authorizing the Debtors to Assume the Liquidating Agent Agreement; IV) Authorizing Customary Bonuses to Employees at the Closing Stores; and (V) Granting Related Relief.

**6.4** *Disposal of Assets.* Convey, sell, lease, license, assign, transfer, or otherwise dispose of (or enter into an agreement to convey, sell, lease, license, assign, transfer, or

otherwise dispose of) any Collateral held by any Loan Party, including any sale lease, license, assignment, transfer or disposition of non-retail assets such as non-exclusive licenses, without the prior written consent of the Lender, which consent shall not be unreasonably withheld; provided that (i) the Borrowers may dispose of inventory in the ordinary course of their business, and (ii) all Proceeds of Collateral disposed of by the Loan Parties shall be used solely to satisfy the Obligations consistent with this Agreement.

**6.5** *Change of Name.* Change any Loan Party's name, organizational identification number, state of organization or organizational identity.

**6.6** *Nature of Business.* Make any change in the nature of its or their business as described in Schedule 6.6 or acquire any properties or assets that are not reasonably related to the conduct of such business activities; provided, however, that the foregoing shall not prevent any Loan Party from (i) engaging in any business that is reasonably related or ancillary to its business, or (ii) complying with any requirement of the Bankruptcy Code.

**6.7** *Prepayments and Amendments.* Change or modify the material terms of any material lease or contract in connection with Collateral or materially alter any Organizational Documents.

**6.8** *Change of Control.* Cause, permit, or suffer, directly or indirectly, any Change of Control.

**6.9** *Accounting Methods.* Modify or change its fiscal year or its method of accounting (other than as may be required to conform to GAAP).

**6.10** *Transactions with Affiliates.* Directly or indirectly enter into or permit to exist any transaction with any Loan Party or any Affiliate of any Loan Party except for transactions that are (a) in the ordinary course of such Loan Party's business, including intercompany transactions among the Borrowers and their Affiliates; or (b) reflected in the Budget.

**6.11** *Use of Advances.* Each Borrower covenants and agrees that it shall incur Advances and use the proceeds thereof solely (i) to the extent required to pay those expenses enumerated in the Budget as and when such expenses become due and payable, (ii) to pay the Fees and Lender's Expenses, (iii) to pay the Carve Out and (iv) repay the existing Indebtedness of the Loan Parties outstanding under that certain Credit Agreement, dated as of June 9, 2014 (as amended, amended and restated, supplemented or otherwise modified from time to time prior to the date hereof, the "Existing ABL Facility") among AGI Merger Sub, Inc., a Delaware corporation, as "Lead Borrower" thereunder, and each other Subsidiary of Holdings from time to time party thereto as a "Borrower", AGI Holdco, Inc., a Delaware corporation, the lenders from time to time party thereto and Wells Fargo Bank, National Association, as Agent, L/C Issuer and Swing Line Lender, including any prepayment fees and reimbursable expenses in connection with the termination of the Existing ABL Facility and related loan documents.

**6.12** *Limitation on Capital Expenditures.* Except as set forth in the Budget, make or incur any Capital Expenditure except for needed repairs to equipment.

**6.13** *Chapter 11 Cases.* Seek, consent or suffer to exist (i) any modification, stay, vacation or amendment to the Interim Order or the Final Order, as applicable; (ii) in connection with the Collateral, a priority claim for any administrative expense or unsecured claim against any Borrower (now existing or hereafter arising of any kind or nature whatsoever, including any administrative expense of any kind specified in section 503(b), 506(b) or (c) or 507(b) of the Bankruptcy Code) equal to or superior to the priority claim of the Lender in respect to the Collateral; and (iii) any Lien on Collateral having a priority equal or superior to the Lender's Liens (in each case, other than with respect to the THL First Priority Liens).

**6.14** *Plan.* Propose and/or support any plan or reorganization that that fails to indefeasibly and finally pay in full in cash all Obligations on the effective date of said plan or is otherwise not reasonably acceptable to Lender.

## 7. PERFORMANCE COVENANTS

Borrowers covenant and agree that Borrowers shall:

**7.1** *Budget Covenant.* Comply with the Budget and Permitted Variance.

**7.2** *Minimum Net Cash Collections.* Commencing on the fourth Friday following entry of the Interim Order or the Final Order, as applicable and on the fifth Business Day of each week thereafter, generate net cash collections in an amount no less than 30% of the amount set forth in the Budget for the cumulative period commencing on the date of the entry of the Final Order and ending on such testing date.

## 8. EVENTS OF DEFAULT.

**8.1** *Event of Default.*

(a) Any one or more of the following events shall constitute an event of default following the expiration of the applicable cure period (each, an "**Event of Default**") under this Agreement:

(1) Any of the Borrowers shall fail to pay any Obligations to the Lender as and when due, including the payment of any Fees or costs due to the Lender under this Agreement or any Loan Document.

(2) Any Loan Party shall fail to perform, or otherwise breach, any of its covenants (including the covenants listed in Sections 5, 6, 7, 9 and 16) or obligations contained in this Agreement, which failure or breach shall continue for 14 days after the date upon which the relevant Loan Party has received a written notice of such failure or breach from any DIP Party.

(3) Any representation or warranty made by any Loan Party, in this Agreement or in any agreement, certificate, instrument or financial statement or other statement delivered to the Lender pursuant to or in connection with this Agreement shall prove to have been incorrect in any material respect when made or deemed made, which failure or breach shall

continue for 14 days after the date upon which such Loan Party has received a written notice of such failure or breach from any DIP Party.

(4) Except upon the Lender's prior written request or with the Lender's express prior written consent (and no such consent shall be implied from any other action, inaction, or acquiescence of the Lender), any Loan Party shall file a motion with the Bankruptcy Court or any other court with jurisdiction in the matter seeking an order, or an order is otherwise entered, modifying, reversing, revoking, staying, rescinding, vacating, or amending the Final Order or any of the Loan Documents.

(5) Any Loan Party shall file or obtain Bankruptcy Court approval of a disclosure statement for a Plan of Reorganization that does not provide for the indefeasible payment in full in cash of the Obligations.

(6) Any Loan Party shall file any motion or application, or the Bankruptcy Court allows the motion or application of any other Person, which seeks approval for or allowance of any claim, lien, security interest ranking equal or senior in priority to the claims, liens and security interests granted to the Lender under the Interim Order or the Final Order, as applicable or the Loan Documents with respect to the Collateral or any such equal or prior claim, lien, or security interest shall be established in any manner, except, in any case, as expressly permitted under the Interim Order or the Final Order, as applicable.

(7) The Interim Order or the Final Order, as applicable shall cease to be in full force and effect from and after the date of entry thereof by the Bankruptcy Court.

(8) The occurrence of any default or event of default under the Interim Order or the Final Order, as applicable.

(9) The entry of an order that provides relief from the automatic stay otherwise imposed pursuant to section 362 of the Bankruptcy Code, which order permits any creditor, other than the Lender, to realize upon, or to exercise any right or remedy with respect to, any Collateral.

(10) Conversion of any of the Chapter 11 Cases to a Chapter 7 case under the Bankruptcy Code, or dismissal of any of the Chapter 11 Cases or any subsequent Chapter 7 case either voluntarily or involuntarily.

(11) The Interim Order or the Final Order, as applicable, is modified, reversed, revoked, remanded, stayed, rescinded, vacated or amended on appeal or by the Bankruptcy Court without the prior written consent of the Lender (and no such consent shall be implied from any other authorization or acquiescence by the Lender).

(12) A trustee or an examiner with special powers is appointed pursuant to section 1104 of the Bankruptcy Code.

(13) A Chapter 11 plan is confirmed that does not provide for the indefeasible payment in full in cash of all Obligations on the effective date thereof.

(14) The occurrence of a Change of Control.

(b) Upon the occurrence and during the continuance of an Event of Default, the Lender, by notice to the Borrowers (whether delivered by the Lender or the DIP Agent), may declare (i) the Lender's Commitment to be terminated, whereupon the Lender's Commitment shall immediately terminate, and (ii) the Obligations to be immediately due and payable, whereupon the Obligations shall be immediately due and payable.

## **8.2** *Rights and Remedies.*

(a) On the Maturity Date, and notwithstanding section 362 of the Bankruptcy Code and without further order of the Bankruptcy Court or any other court or the initiation of any further proceeding with the Loan Parties, in addition to any other rights or remedies provided for hereunder or under any other Loan Document (including the Interim Order or the Final Order, as applicable) or by the UCC or any other applicable law, the Lender may do any one or more of the following:

(1) declare the Obligations, whether evidenced by this Agreement or by any of the other Loan Documents immediately due and payable, whereupon the same shall become and be immediately due and payable, without presentment, demand, protest, or further notice or other requirements of any kind, all of which are hereby expressly waived by the Borrowers and Guarantor;

(2) terminate the Borrowers' ability to access the Facility;

(3) upon 5 days' prior written notice (which period shall be deemed to be reasonable notice) to the Borrowers and their lead bankruptcy counsel and the United States Trustee, obtain and liquidate the Collateral. A sale or other disposition of any Collateral shall be conclusively deemed commercially reasonable if made at a public sale which is advertised in a newspaper of general circulation in the area in which the Collateral is maintained, at least once each week for three successive weeks. The Lender may bid for and purchase the Collateral at any public sale. The Lender may bid and purchase any Collateral at a private sale if the Collateral in question has a readily ascertainable market value;

(4) require the applicable Loan Party to assemble all of the Collateral constituting personal property without judicial process pursuant to Section 9-609 of the UCC;

(5) upon 5 days' prior written notice (which period shall be deemed to be reasonable notice) to the Borrowers and their lead bankruptcy counsel and the United States Trustee, take possession of all Collateral constituting tangible personal property without judicial process pursuant to Section 9-609 of the UCC; and

(6) exercise any of its other rights under the Loan Documents.

(b) To the extent an Event of Default occurs as a result of the Borrowers' failure to indefeasibly satisfy the Obligations by the Stated Maturity Date, the above referenced five (5) day notice period shall not apply and the Debtors, Committee and any interested party



may not challenge (i) whether or not a Maturity Date or Event of Default occurred; (ii) the applicability of the Default Rate; and (iii) the applicability of the Stated Maturity Date Fee.

**8.3** *Application of Proceeds upon Event of Default.* The Lender shall apply the cash proceeds actually received from any foreclosure sale, other disposition of the Collateral upon an Event of Default as follows: (i) first, to reasonable costs and fees incurred by the DIP Parties (including reasonable attorneys' fees, court costs, advertising expenses, auctioneer's fees, premiums for any required bonds, auditor's fees, amounts advanced for taxes and other expenses) in attempting to enforce this Agreement or in the prosecution or defense of any action or proceeding related to the subject matter of this Agreement; (ii) to the extent such proceeds resulted from the disposition of any THL First Lien Collateral, to THL; (iii) third, to the discharge of any accrued but unpaid interest on the Obligations, (iv) fourth, to the outstanding principal balance of any Obligations, (v) fifth, to the satisfaction of the other security interests and liens of record (including the THL Junior Priority Liens) that are inferior to the security interest created by this Agreement, in order of their priority; and (vi) sixth, to pay any remaining surplus to the Borrowers.

**8.4** *Remedies Cumulative.* The rights and remedies of the Lender under this Agreement, the other Loan Documents, and all other agreements shall be cumulative. The Lender shall have all other rights and remedies not inconsistent herewith as provided under the UCC, by law, or in equity. No exercise by the Lender of one right or remedy shall be deemed an election, and no waiver by the Lender of any Event of Default shall be deemed a continuing waiver. No delay by the Lender shall constitute a waiver, election, or acquiescence by it.

## **9. PRIORITY AND COLLATERAL SECURITY**

### **9.1** *Superpriority Claims; Subordination in favor of Lender's Liens.*

(a) Each Loan Party warrants and covenants that, except as otherwise expressly provided in this paragraph, upon the entry of the Interim Order, the Obligations of any Borrower and the Guarantee Obligations of the Guarantor under the Loan Documents:

(1) shall at all times constitute a Superpriority Claim against such Loan Party, and shall constitute senior administrative expense claims having priority, pursuant to section 364(c)(1) and 507(b) of the Bankruptcy Code, over any and all administrative expenses at any time existing or arising, of any kind or nature whatsoever, including, without limitation, the kinds specified or ordered pursuant to any provision of the Bankruptcy Code, including, but not limited to, Bankruptcy Code sections 105, 326, 328, 330, 331, 503(b), 506(c), 507(a), 507(b), 726, 1113 and 1114 or otherwise, including those resulting from the conversion of any of the Chapter 11 Cases pursuant to section 1112 of the Bankruptcy Code, whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment subject and subordinate only to the Carve-Out, and such Superpriority Claims shall have recourse to and be payable from all pre-petition and post-petition property of the Loan Parties and their estates and all proceeds thereof, including, D&O claims, all other Collateral, and all claims and causes of actions excluding however, excluding however all claims and causes of action of any and all avoidance power claims under sections 544, 545, 547, 548 through 551 and 553(b) of the Bankruptcy Code; and

(2) shall be secured by valid, enforceable, non-avoidable and perfected liens on and security interests in favor of the Lender in all Collateral securing the Obligations as follows in each case, subject to the Carve-Out and as necessary to achieve the Required Lien Priority:

(i) pursuant to section 364(d)(1) of the Bankruptcy Code, valid, enforceable, non-avoidable automatically and fully perfected first priority senior priming liens on and security interests in, all Collateral wherever located, which senior priming liens and security interests shall be senior to all Prepetition Liens, other than the THL First Priority Liens;

(ii) pursuant to section 364(c)(2) of the Bankruptcy Code, valid, binding, continuing, enforceable, non-avoidable automatically and fully perfected first priority liens on and security interests in all Collateral that is not otherwise subject to a valid, perfected and non-avoidable security interest or lien as of the Petition Date (or perfected after the Petition Date to the extent permitted by section 546(b) of the Bankruptcy Code); and

(iii) pursuant to section 364(c)(3) of the Bankruptcy Code, valid, enforceable, non-avoidable automatically and fully perfected junior liens on and security interests in all Collateral wherever located (other than as set forth in clauses (i) and (ii) of this paragraph) that are subject only to the THL First Priority Liens.

(b) If any of the Collateral is transferred to any Loan Party, such transfer shall be subject in all respects to the Lender's Liens.

**9.2** *Grant of Security Interest in the Collateral.* To secure the payment and performance of the Obligations, each Loan Party hereby grants to the Lender a security interest in, and collaterally pledges and assigns, all of such Loan Party's right, title and interest in and to the Collateral.

**9.3** *Representations and Warranties in Connection with Security Interest.* Each Loan Party represents and warrants to the Lender as follows:

(a) Such Loan Party has full right and power to grant to the Lender a security interest and Lien on its respective interest in the Collateral pursuant to this Agreement and the other Loan Documents. The security interest granted by such Loan Party is fully perfected, irrevocable, non-avoidable and of first priority (except to the extent such security interest is granted in THL First Lien Collateral, in which case such security interest shall be of second priority and junior only to the THL First Priority Liens).

(b) Upon the execution and delivery of this Agreement, and upon the filing of the necessary financing statements, and other appropriate filings or recordations and/or delivery of any necessary certificates, as applicable, without any further action, the Lender will have a good, valid and perfected Lien and security interest in the Collateral granted by such Loan Party to the extent necessary to achieve the Required Lien Priority.

(c) As of the Closing Date, no financing statement relating to any of the Collateral granted by such Loan Party is on file in any public office except those on behalf of the Lender and those related to the THL Liens.

(d) As of the Closing Date, such Loan Party is not party or otherwise subject to any agreement, document or instrument that conflicts with this Section 9, other than the documents granting the THL Liens.

**9.4** *Lender's Ability to Perform Obligations on Behalf of Loan Parties with Respect to the Collateral.* The Lender, whether acting through the DIP Agent at Lender's instruction or on its own behalf, shall have the right, but not the obligation, to perform on such Loan Party's behalf any or all of such Loan Party's obligations under this Agreement with respect to the Collateral, when such obligations are due, at the expense, for the account and at the sole risk of the Loan Parties.

**9.5** *Filing of Financing Statements.* Each Loan Party irrevocably authorizes the Lender to prepare and file financing statements provided for by the UCC, to perfect the Lender's security interest in the Collateral, in all jurisdictions in which the Lender believes in its sole opinion that such filing is appropriate. Each Loan Party also irrevocably authorizes the Lender to file such continuation statements and to take such other action as may be required or appropriate, in either case in the Lender's sole judgment, in order to perfect and to continue the perfection of Lender's security interests in the Collateral, unless prohibited by law.

**9.6** *Liability of Guarantor.*

(a) The liability of each Guarantor under this Agreement shall be primary and direct and not conditional or contingent upon pursuit by the Lender of any remedies it may have against any Borrower or any other Guarantor. The Lender shall not be required to make any demand on any Borrower or other Guarantor to sell at foreclosure or otherwise pursue or exhaust its remedies against any Collateral or any Borrower or other Guarantor, before, simultaneously with, or after enforcing its rights and remedies hereunder against the Guarantor. Any number of successive and/or concurrent actions may be brought against the Collateral, either in the same action(s) brought against any Borrower or in separate actions.

(b) The obligations of the Guarantor under this Section 9 and under Section 16 shall be unconditional, irrespective of the enforceability of any Obligation or any security given for any Obligation or in connection with any Obligation or any other circumstances which might otherwise constitute a legal or equitable discharge of a surety or Guarantor.

**9.7** *No Discharge; Survival of Claims.* Pursuant to section 1141(d)(4) of the Bankruptcy Code, the Borrowers hereby waive any discharge of the Obligations with respect to any plan of reorganization that shall not provide for the indefeasible payment in full in cash of the Obligations (other than contingent indemnification and reimbursement Obligations in respect of which no claim for payment has been asserted by the Person entitled thereto) under this Agreement.

## 10. WAIVERS; INDEMNIFICATION.

**10.1 Demand; Protest; etc.** Each Loan Party waives demand, protest, notice of protest, notice of default or dishonor, notice of payment and nonpayment, nonpayment at maturity, release, compromise, settlement, extension, or renewal of documents, instruments, chattel paper, and guarantees at any time held by the Lender on which any Loan Party may in any way be liable.

**10.2 Agent's Liability for Collateral.** As long as the Lender complies with its obligations, if any, under the UCC, the Lender shall not in any way or manner be liable or responsible for: (i) the safekeeping of the Collateral, (ii) any loss or damage thereto occurring or arising in any manner or fashion from any cause, (iii) any diminution in the value thereof, or (iv) any act or default of any carrier, warehouseman, bailee, forwarding agency, or other Person. All risk of loss, damage, or destruction of the Collateral shall be borne by the Borrowers, except any thereof resulting from the gross negligence, bad faith or willful misconduct of Lender as finally determined by a court of competent jurisdiction.

**10.3 Indemnification.** Each Loan Party shall pay, indemnify, defend, and hold the Lender and all Lender Related Persons (each, an “**Indemnified Person**”) harmless (to the fullest extent permitted by law) from and against any and all claims, demands, suits, actions, investigations, proceedings, liabilities, fines, costs, penalties, and damages, and all reasonable and documented out-of-pocket fees and disbursements of attorneys, experts, or consultants and all other costs and expenses actually incurred in connection therewith or in connection with the enforcement of this indemnification (as and when they are incurred and irrespective of whether suit is brought), at any time asserted against, imposed upon, or incurred by any of them (a) in connection with or as a result of or related to the execution and delivery, enforcement, performance, or administration (including any restructuring or workout with respect hereto) of this Agreement, any of the other Loan Documents, or the transactions contemplated hereby or thereby or the monitoring of the Loan Parties' compliance with the terms of the Loan Documents, (b) with respect to any investigation, litigation, or proceeding related to this Agreement, any other Loan Document, or the use of the proceeds of the credit provided hereunder (irrespective of whether any Indemnified Person is a party thereto), or any act, omission, event, or circumstance in any manner related thereto, and (c) in connection with or arising out of any presence or release of Hazardous Materials at, on, under, to or from any Collateral or any Environmental Actions, Environmental Liabilities or Remedial Actions related in any way to any Collateral (each and all of the foregoing, the “**Indemnified Liabilities**”). The foregoing notwithstanding, the Loan Parties shall have no obligation to any Indemnified Person under this Section 10.3 with respect to any Indemnified Liability that a court of competent jurisdiction finally determines to have resulted from the gross negligence, bad faith or willful misconduct of such Indemnified Person or its officers, directors, employees, attorneys, or agents. This provision shall survive the termination of this Agreement and the repayment of the Obligations. If any Indemnified Person makes any payment to any other Indemnified Person with respect to an Indemnified Liability as to which any Loan Party (limited to such Loan Party's interest in the Collateral) was required to indemnify the Indemnified Person receiving such payment, the Indemnified Person making such payment is entitled to be indemnified and reimbursed by such Loan Party limited to such Loan Party's interest in the Collateral) with respect thereto. **This indemnity shall apply to each Indemnified Person with respect to**

**Indemnified Liabilities that in whole or in part are caused by or arise out of any negligent act or omission of such Indemnified Person or of any other Person.**

**11. NOTICES.**

All notices or demands relating to this Agreement or any other Loan Document shall be in writing and (except for financial statements and other informational documents which may be sent by first-class mail, postage prepaid) shall be personally delivered or sent by registered or certified mail (postage prepaid, return receipt requested), overnight courier, electronic mail (at such email addresses as a party may designate in accordance herewith), or facsimile. In the case of notices or demands to any Loan Party hereunder or any service of process to any Loan Party or DIP Party, as the case may be, such notice or demand shall be sent to the respective addresses set forth below:

If to any Borrower or Guarantor:      AeroGroup International, Inc.  
201 Meadow Road  
Edison, NJ 08817-6002  
Attn: Jonathan A. Weiss  
Telephone: 1 732 645 4406  
Email: [jweiss@aerosoles.com](mailto:jweiss@aerosoles.com)

with copies to                              Ropes & Gray LLP  
Prudential Tower, 800 Boylston Street  
Boston, MA 02199-3600  
Attn: Alyson Allen  
Telephone: 1 617 951 7483  
Email: [alyson.allen@ropesgray.com](mailto:alyson.allen@ropesgray.com)

If to the Lender:                              Polk 33 Lending, LLC  
1999 Avenue of the Stars, Suite 2040  
Los Angeles, CA 90067  
Attn: Vikas Tandon  
Telephone: 310-286-2929  
Facsimile: 310-286-6662

with copies to:                              Arent Fox LLP  
1675 Broadway  
New York, NY 10019  
Telephone: 212-484-3900  
Facsimile: 212-484-3990  
Attn: Robert M. Hirsh  
[robert.hirsh@arentfox.com](mailto:robert.hirsh@arentfox.com)  
Beth M. Brownstein  
[beth.brownstein@arentfox.com](mailto:beth.brownstein@arentfox.com)

If to Agent:

Wilmington Savings Fund Society, FSB  
501 Carr Road, Suite 100  
Wilmington, DE 19809  
Telephone: (302) 888-7420  
Attn: Patrick J. Healy  
Email: phealy@wsfsbank.com

Any party hereto may change the address at which they are to receive notices hereunder, by notice in writing in the foregoing manner given to the other party. All notices or demands sent in accordance with this Section 11, shall be deemed received on the earlier of the date of actual receipt or three (3) Business Days after the deposit thereof in the mail; provided, that (a) notices sent by overnight courier service shall be deemed to have been given when received, (b) notices by facsimile shall be deemed to have been given when sent (except that, if not given during normal business hours for the recipient, shall be deemed to have been given at the opening of business on the next Business Day for the recipient) and (c) notices by electronic mail shall be deemed received when sent. If any notice, disclosure, or report is required to be delivered pursuant to the terms of this Agreement on a day that is not a Business Day, such notice, disclosure, or report shall be deemed to have been required to be delivered on the immediately following Business Day.

**12. CHOICE OF LAW AND VENUE; JURY TRIAL WAIVER.**

**The validity of this Agreement and the other Loan Documents (unless expressly provided to the contrary in another Loan Document in respect of such other Loan Document), the construction, interpretation, and enforcement hereof and thereof, and the rights of the parties hereto and thereto with respect to all matters arising hereunder or thereunder or related hereto or thereto shall be determined under, governed by, and construed in accordance with the laws of the State of New York.**

**The Bankruptcy Court shall have exclusive jurisdiction with respect to any and all disputes or matters under, or arising out of or in connection with either this Agreement or the Loan Documents. To the maximum extent permitted by applicable law, each Loan Party and each DIP Party hereby waives its respective rights to a jury trial of any claim or cause of action based upon or arising out of any of the Loan Documents or any of the transactions contemplated therein, including contract claims, tort claims, breach of duty claims, and all other common law or statutory claims. Each Loan Party and each DIP Party represents that each such Person has reviewed this waiver and each knowingly and voluntarily waives its jury trial rights following consultation with legal counsel. In the event of litigation, a copy of this Agreement may be filed as a written consent to a trial by the court.**

**13. AMENDMENTS; WAIVERS; SUCCESSORS; INDEMNIFICATION.**

**13.1 Amendments and Waivers.** No amendment, waiver or other modification of any provision of this Agreement or any other Loan Document, and no consent with respect to any departure by any Loan Party therefrom, shall be effective unless the same shall be in writing and signed by the Lender and the Loan Parties that are party thereto and then any such waiver or

consent shall be effective, but only in the specific instance and for the specific purpose for which given.

**13.2** *No Waivers; Cumulative Remedies.* No failure by the DIP Parties to exercise any right, remedy, or option under this Agreement or any other Loan Document, or delay by the DIP Parties in exercising the same, will operate as a waiver thereof. No waiver by the DIP Parties will be effective unless it is in writing, and then only to the extent specifically stated. No waiver by the DIP Parties on any occasion shall affect or diminish the rights of the DIP Parties thereafter to require strict performance by the Loan Parties of any provision of this Agreement. The rights of the DIP Parties under this Agreement and the other Loan Documents will be cumulative and not exclusive of any other right or remedy that the DIP Parties may have.

**13.3** *Successors.* This Agreement shall bind and inure to the benefit of the respective successors and assigns of each of the parties; provided, however, that no Loan Party may assign this Agreement or any rights or duties hereunder without the Lender's prior written consent and any prohibited assignment shall be absolutely void *ab initio*. No consent to assignment by the Lender shall, unless otherwise provided in such consent, release any Loan Party from its Obligations or Guarantee Obligations, as applicable. The Lender may assign this Agreement and the other Loan Documents and its rights and duties hereunder and thereunder or assign any Advances or its Commitment (in whole or in part) to an Affiliate without notice to or consent of the Loan Parties.

#### **14. GENERAL PROVISIONS.**

**14.1** *Effectiveness.* This Agreement shall be binding and deemed effective when executed by the Loan Parties and the DIP Parties, whose signatures are provided for on the signature pages hereof.

**14.2** *Section Headings.* Headings and numbers have been set forth herein for convenience only. Unless the contrary is compelled by the context, everything contained in each Section applies equally to this entire Agreement.

**14.3** *Interpretation.* Neither this Agreement nor any uncertainty or ambiguity herein shall be construed against any DIP Party or any Loan Party, whether under any rule of construction or otherwise. On the contrary, this Agreement has been reviewed by all parties and shall be construed and interpreted according to the ordinary meaning of the words used so as to accomplish fairly the purposes and intentions of all parties hereto.

**14.4** *Severability of Provisions.* Each provision of this Agreement shall be severable from every other provision of this Agreement for the purpose of determining the legal enforceability of any specific provision.

**14.5** *Debtor-Creditor Relationship.* The relationship between the Lender, on the one hand, and the Loan Parties, on the other hand, is solely that of creditor and debtor. The Lender does not have (and shall be deemed to not have) any fiduciary relationship or duty to any Loan Party arising out of or in connection with the Loan Documents or the transactions contemplated thereby, and there is no agency or joint venture relationship between the Lender, on the one

hand, and any Loan Party, on the other hand, by virtue of any Loan Document or any transaction contemplated therein.

**14.6** *Counterparts; Electronic Execution.* This Agreement may be executed in any number of counterparts and by different parties on separate counterparts, each of which, when executed and delivered, shall be deemed to be an original, and all of which, when taken together, shall constitute but one and the same Agreement. Delivery of an executed counterpart of this Agreement by facsimile or other electronic method of transmission shall be equally as effective as delivery of an original executed counterpart of this Agreement. Any party delivering an executed counterpart of this Agreement by facsimile or other electronic method of transmission also shall deliver an original executed counterpart of this Agreement but the failure to deliver an original executed counterpart shall not affect the validity, enforceability, and binding effect of this Agreement. The foregoing shall apply to each other Loan Document *mutatis mutandis*.

**14.7** *Revival and Reinstatement of Obligations.* If the incurrence or payment of the Obligations by the Loan Parties or the transfer to the Lender of any property should for any reason subsequently be asserted, or declared, to be void or voidable under any state or federal law relating to creditors' rights, including provisions of the Bankruptcy Code relating to fraudulent conveyances, preferences, or other voidable or recoverable payments of money or transfers of property (each, a "**Voidable Transfer**"), and if the Lender is required to repay or restore, in whole or in part, any such Voidable Transfer, or elects to do so upon the reasonable advice of its counsel, then, as to any such Voidable Transfer, or the amount thereof that the Lender is required or elects to repay or restore, and as to all reasonable out-of-pocket costs, expenses, and attorneys' fees of the Lender related thereto, the liability of the Loan Parties automatically shall be revived, reinstated, and restored and shall exist as though such Voidable Transfer had never been made.

**14.8** *Lender Expenses.* Notwithstanding the Work Fee, the Borrowers agree to pay any and all the Lender Expenses (exclusive of those covered by the Work Fee) promptly after demand therefor by the Lender and agrees that its respective obligations contained in this Section 14.8 shall survive payment or satisfaction in full of all other Obligations.

**14.9** *Integration.* This Agreement, together with the other Loan Documents, reflects the entire understanding of the parties with respect to the transactions contemplated hereby and shall not be contradicted or qualified by any other agreement, oral or written, before the date hereof.

## **15. JOINT AND SEVERAL LIABILITY**

Each Loan Party acknowledges, represents and warrants the following:

**15.1** *Inducement.* The Lender has been induced to make the Advances to the Borrowers in part based upon the assurances by each Loan Party that each Loan Party desires that the Advances be honored and enforced as separate obligations of each Loan Party, should the Lender desire to do so.

**15.2** *Combined Liability.* Notwithstanding the foregoing, the Advances and the other Obligations constitute the joint and several obligations of each and every Loan Party, and the



Lender may, at its sole option, enforce the entire amount of the Advances and the other obligations of the Loan Parties against any one or more Loan Parties or any combination of them.

**15.3** *Separate Exercise of Remedies.* The Lender may exercise remedies against each Loan Party and its property separately, whether or not the Lender exercises remedies against any other Loan Party or its property. The Lenders may enforce one or more Loan Party's Obligations without enforcing any other Loan Party's Obligations. Any failure or inability of the Lender to enforce one or more Loan Party's Obligations shall not in any way limit the Lender's right to enforce the Obligations of any other Loan Party. If the Lender forecloses or exercises similar remedies on any Collateral, then such foreclosure or similar remedy shall be deemed to reduce the balance of the Advances only to the extent of the cash proceeds actually realized by the Lender from such foreclosure or similar remedy or, if applicable, the Lender's credit bid at such sale, regardless of the effect of such foreclosure or similar remedy on the Advances secured by such Collateral under the applicable state law.

## 16. GUARANTY

**16.1** *Guarantee.* Guarantor hereby fully, unconditionally and irrevocably guarantees, as Guarantor, to the Lender, on the Maturity Date (whether through acceleration or otherwise) that the Lender may collect the Obligations owed by any Borrower under this Agreement (including any default interest, Fees and Lender's Expenses in connection with enforcing this Section) (collectively, the "**Guarantee Obligations**"). Guarantor agrees that its Guarantee Obligations shall remain in full force and effect until indefeasible payment in full of all the Obligations.

**16.2** *Guarantor Waivers.* The obligations of the Guarantor shall not be subject to any reduction, limitation, impairment, or termination for any reason (other than for the payment of the Guarantee Obligations in full), including any claim of waiver, release, surrender, alteration or compromise and shall not be subject to any defense, setoff, counterclaim, recoupment, or termination whatsoever or by any reason of the invalidity, illegality or unenforceability of the Guarantee Obligations or otherwise. Without limiting the generality of the foregoing, the Guarantee Obligations of the Guarantor herein shall not be discharged or impaired or otherwise affected by (a) the failure of the Lender to assert any claim or demand or to enforce any right or remedy against the Borrowers or to provide notice of an Event of Default to the Guarantor; (b) any rescission, waiver, amendment or modification of any of the terms of this Agreement; (c) the failure of the Lender to exercise any right or remedy against the Guarantor; (d) any change in ownership of any Borrower or Guarantor; (e) any default, failure or delay, willful or otherwise, in the performance of the Guarantee Obligations, or (f) any act or thing or omission or delay to do any other act or thing which may or might in any manner or to any extent vary the risk of the Guarantor or would otherwise operate as a discharge of the Guarantor as a matter of law or equity (including the so-called "suretyship defenses"). The Guarantor hereby waives presentation to, demand of payment from and protest to the Borrowers of any of the Guarantee Obligations and also waives notice of protest for nonpayment.

## 17. AGENCY PROVISIONS

**17.1 Appointment of the DIP Agent.** The Lender hereby appoints the DIP Agent as its agent hereunder and under the other Loan Documents and the Lender hereby authorizes the DIP Agent, in such capacity, to act as the Lender's agent in accordance with the terms hereof and the other Loan Documents. The DIP Agent hereby agrees to act upon the express conditions contained herein and the other Loan Documents, as applicable. The provisions of this Article 17 are solely for the benefit of the DIP Agent and the Lender and no Loan Party shall have any rights as a third party beneficiary of any of the provisions thereof. In performing its functions and duties hereunder, the DIP Agent shall act solely as an agent of the Lender and does not assume and shall not be deemed to have assumed any obligation towards or relationship of agency or trust with or for any Loan Party.

**17.2 Powers and Duties.** The Lender authorizes the DIP Agent to take such action on the Lender's behalf and to exercise such powers, rights and remedies hereunder and under the other Loan Documents as are specifically delegated or granted to the DIP Agent by the terms hereof and thereof, together with such powers, rights and remedies as are reasonably incidental thereto. The DIP Agent shall have only those duties and responsibilities that are expressly specified herein and the other Loan Documents. The DIP Agent may exercise such powers, rights and remedies and perform such duties by or through its agents or employees. The DIP Agent shall not have, by reason hereof or any of the other Loan Documents, a fiduciary relationship in respect of the Lender; and nothing herein or any of the other Loan Documents, expressed or implied, is intended to or shall be so construed as to impose upon the DIP Agent any obligations in respect hereof or any of the other Loan Documents except as expressly set forth herein or therein

### 17.3 General Immunity

(a) No Responsibility for Certain Matters. The DIP Agent shall not be responsible to the Lender for the execution, effectiveness, genuineness, validity, enforceability, collectability or sufficiency hereof or any other Loan Document or for any representations, warranties, recitals or statements made herein or therein or made in any written or oral statements or in any financial or other statements, instruments, reports or certificates or any other documents furnished or made by the DIP Agent to the Lender or by or on behalf of any Loan Party to the DIP Agent in connection with the Loan Documents and the transactions contemplated thereby or for the financial condition or business affairs of any Loan Party or any other Person liable for the payment of any Obligations, nor shall the DIP Agent be required to ascertain or inquire as to the performance or observance of any of the terms, conditions, provisions, covenants or agreements contained in any of the Loan Documents or as to the use of the proceeds of the Loan or any Advances or as to the existence or possible existence of any Event of Default or Default or to make any disclosures with respect to the foregoing. Anything contained herein to the contrary notwithstanding, the DIP Agent shall not have any liability arising from confirmations of the amount of outstanding Loan or the component amounts thereof.

(b) Exculpatory Provisions. Neither the DIP Agent nor any of its officers, partners, directors, employees or agents shall be liable to the Lender for any action taken or

omitted by the DIP Agent under or in connection with any of the Loan Documents except to the extent caused by the DIP Agent's gross negligence or willful misconduct, as determined by a court of competent jurisdiction in a final, non-appealable order. The DIP Agent shall be entitled to refrain from any act or the taking of any action (including the failure to take an action) in connection herewith or any of the other Loan Documents or from the exercise of any power, discretion or authority vested in it hereunder or thereunder unless and until the DIP Agent shall have received instructions in respect thereof from the Lender and, upon receipt of such instructions from the Lender, the DIP Agent shall be entitled to act or (where so instructed) refrain from acting, or to exercise such power, discretion or authority, in accordance with such instructions. Without prejudice to the generality of the foregoing, (i) the DIP Agent shall be entitled to rely, and shall be fully protected in relying, upon any communication, instrument or document believed by it to be genuine and correct and to have been signed or sent by the proper Person or Persons, and shall be entitled to rely and shall be protected in relying on opinions and judgments of attorneys (who may be attorneys for the Loan Parties), accountants, experts and other professional advisors selected by it; and (ii) the Lender shall not have any right of action whatsoever against the DIP Agent as a result of the DIP Agent acting or (where so instructed) refraining from acting hereunder or any of the other Loan Documents in accordance with the instructions of the Lender.

**17.4** *Lenders' Representations, Warranties and Acknowledgment.*

(a) The Lender represents and warrants that it has made its own independent investigation of the financial condition and affairs of the Loan Parties in connection with the making of the Loan or any Advances hereunder and that it has made and shall continue to make its own appraisal of the creditworthiness of the Loan Parties. The DIP Agent shall not have any duty or responsibility, either initially or on a continuing basis, to make any such investigation or any such appraisal on behalf of the Lender or to provide the Lender with any credit or other information with respect thereto, whether coming into its possession before the making of the Loan or any Advances or at any time or times thereafter, and the DIP Agent shall not have any responsibility with respect to the accuracy of or the completeness of any information provided to the Lender.

(b) The Lender, by delivering its signature page to this Agreement and funding its Loan or any Advances, shall be deemed to have acknowledged receipt of, and consented to and approved, each Loan Document and each other document required to be approved by the Lender.

**17.5** *Right to Indemnity.* The Lender agrees to indemnify the DIP Agent, its Affiliates and their respective officers, partners, directors, trustees, employees and agents of the DIP Agent (each, an **Indemnatee Agent Party**), to the extent that such Indemnatee Agent Party shall not have been reimbursed by any Loan Party, for and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses (including counsel fees and disbursements) or disbursements of any kind or nature whatsoever which may be imposed on, incurred by or asserted against such Indemnatee Agent Party in exercising its powers, rights and remedies or performing its duties hereunder or under the other Loan Documents or otherwise in its capacity as such Indemnatee Agent Party in any way relating to or arising out of this Agreement or the other Loan Documents, **IN ALL CASES, WHETHER OR NOT CAUSED BY**

OR ARISING, IN WHOLE OR IN PART, OUT OF THE COMPARATIVE, CONTRIBUTORY, OR SOLE NEGLIGENCE OF SUCH INDEMNITEE AGENT PARTY; provided, the Lender shall not be liable for any portion of such liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements resulting from such Indemnitee Agent Party's gross negligence or willful misconduct, as determined by a court of competent jurisdiction in a final, non-appealable order.

**17.6 Successor DIP Agent.**

(a) The DIP Agent may resign at any time by giving thirty days' prior written notice thereof to the Lender and the Loan Parties, or the Lender may remove the DIP Agent at any time by giving thirty days' prior written notice thereof to the DIP Agent and the Loan Parties. Upon any such notice of resignation by the DIP Agent or notice of removal from the Lender, the Lender shall have the right, upon five (5) Business Days' notice to the Loan Parties to appoint a successor agent reasonably satisfactory to Borrowers. Upon the acceptance of any appointment as agent hereunder by a successor agent, that successor agent shall thereupon succeed to and become vested with all the rights, powers, privileges and duties of the retiring agent and the retiring agent shall promptly (i) transfer to such successor agent all records and other documents necessary or appropriate in connection with the performance of the duties of the successor agent under the Loan Documents, and (ii) take such other actions as may be necessary or appropriate in connection with the assignment of the retiring agent's rights and obligations under the Loan Documents to such successor agent, whereupon such retiring agent shall be discharged from its duties and obligations under the Loan Documents. After any retiring agent's resignation hereunder as agent, the provisions of this Section 17.6 shall inure to its benefit as to any actions taken or omitted to be taken by it while it was agent hereunder.

(b) Notwithstanding anything herein to the contrary, the DIP Agent may assign its rights and duties as agent hereunder to the Lender or an Affiliate of the Lender without the prior written consent of, or prior written notice to, the Loan Parties; provided that the Loan Parties may deem and treat such assigning agent as the agent for all purposes hereof, unless and until such assigning agent provides written notice to the Loan Parties of such assignment. Upon such assignment, the Lender or such Affiliate shall succeed to and become vested with all rights, powers, privileges and duties as agent hereunder and under the other Loan Documents.

[Signature pages follow.]

In witness whereof, the parties hereto have caused this Agreement to be executed and delivered as of the date first above written.

**Borrowers:**

**Aerogroup International, Inc., a New Jersey corporation**

**By:** \_\_\_\_\_

**Name:**

**Title:**

**Aerogroup Retail Holdings, Inc., a Delaware corporation**

**By:** \_\_\_\_\_

**Name:**

**Title:**

**Aerogroup International, LLC, a Delaware limited liability company**

**By:** \_\_\_\_\_

**Name:**

**Title:**

**Aerogroup International Holdings, LLC, a Delaware limited liability company**

**By:** \_\_\_\_\_

**Name:**

**Title:**

**Aerogroup Gift Card Co., Inc., a Virginia corporation**

**By:** \_\_\_\_\_  
**Name:**  
**Title:**

**Guarantor:**

**AGI HoldCo, Inc., a Delaware corporation**

**By:** \_\_\_\_\_  
**Name:**  
**Title:**

**Lender:**

**Polk 33 Lending, LLC a California limited liability company**

**By:** \_\_\_\_\_

**Name:**

**Title:**

**Agent:**

**Wilmington Savings Fund Society, FSB**

**By:** \_\_\_\_\_

**Name:**

**Title:**



## **LIST OF EXHIBITS AND SCHEDULES**

Exhibit B-1	Form of Compliance Certificate
Exhibit B-2	Budget
Exhibit C-1	Reporting Requirements
Schedule A-1	Loan Account
Schedule A-2	Authorized Person
Schedule D-1	Designated Account
Schedule T-1	List of THL First Lien Collateral
Schedule 4.1(b)	Ownership and Capital Structure
Schedule 4.6(b)	Litigation
Schedule 4.8	Indebtedness
Schedule 4.9	Taxes
Schedule 5.4	Permits
Schedule 6.6	Nature of Business

**EXHIBIT B-1**  
**FORM OF COMPLIANCE CERTIFICATE**

**Compliance Certificate**  
**[Borrower]**

**Date:** \_\_\_\_\_,

This Compliance Certificate (this “Certificate”) is given by the following parties (collectively, the “**Borrowers**”):

- Aerogroup International, Inc., a New Jersey corporation (“**AI**”);
- Aerogroup Retail Holdings, Inc., a Delaware corporation (“**ARHI**”);
- Aerogroup International, LLC, a Delaware limited liability company (“**AIL**”);
- Aerogroup International Holdings, LLC, a Delaware limited liability company (“**AIH**”); and
- Aerogroup Gift Card Co., Inc., a Virginia corporation (“**GiftCo**”),

pursuant to Section 5.2 of the Senior Secured, Super-Priority Debtor-In-Possession Loan and Security Agreement dated as of October \_\_, 2017 (as the same has been amended through the date hereof, the “**Credit Agreement**”)

By so executing this Certificate, the Borrowers hereby certifies that:

(a) The financial statements delivered with this Certificate in accordance with Section 5.1 and the reporting delivered with this Certificate in accordance with Section 5.2 of the Credit Agreement fairly present in all material respects the consolidated results of operations and financial condition of the Borrowers as of, and for the respective periods ending on, the dates of such financial statements and reporting.

(b) The Borrowers have reviewed the relevant terms of the Loan Documents and the condition of the Loan Parties.

(c) No Default or Event of Default has occurred or is continuing, except as set forth in Schedule 1 hereto, which includes a description of the nature and status and period of existence of such Default or Event of Default, if any, and what action the Borrowers have taken, and are undertaking and propose to take with respect thereto.

(d) The Borrowers have been and are in compliance with the Performance Covenants set forth in Section 7 of the Credit Agreement, except as set forth in Schedule 1 hereto.

[Signature Page Follows]

*IN WITNESS WHEREOF*, Borrowers has caused this Certificate to be executed by the Borrowers this \_\_\_\_\_ day of \_\_\_\_\_, 2017.

**Borrowers:**

**Aerogroup International, Inc., a New Jersey corporation**

By: \_\_\_\_\_

**Name:**

**Title:**

**Aerogroup Retail Holdings, Inc., a Delaware corporation**

By: \_\_\_\_\_

**Name:**

**Title:**

**Aerogroup International, LLC, a Delaware limited liability company**

By: \_\_\_\_\_

**Name:**

**Title:**

**Aerogroup International Holdings, LLC, a Delaware limited liability company**

By: \_\_\_\_\_

**Name:**

**Title:**

**Aerogroup Gift Card Co., Inc., a Virginia corporation**

By: \_\_\_\_\_

**Name:**

**Title:**

**Guarantor:**

**AGI HoldCo, Inc., a Delaware corporation**

**By:** \_\_\_\_\_

**Name:**

**Title:**

**Lender:**

**Polk 33 Lending, LLC a California limited liability company**

**By:** \_\_\_\_\_  
**Name:**  
**Title:**

**EXHIBIT B-2**

**Budget**

[See attached.]

## **EXHIBIT C-1 REPORTING REQUIREMENTS**

(a) **Financial Reports.** The Borrowers shall furnish to the DIP Parties, in a form satisfactory to the Lender in its sole discretion, as soon as available and in any event within twenty-five (25) Business Days after the end of each calendar month; provided that such monthly financial statements may be subsequently revised as a result of year-end audit adjustments:

(1) unaudited consolidated financial statements for such calendar month and/or quarter, as applicable, of the Borrowers consisting of a balance sheet, and related statements of income, retained earnings, cash flows and owners' equity, all of which shall be certified on behalf of the Borrowers by an Authorized Person as being in compliance with this paragraph (a);

(2) an operating report for the Borrowers, including a detailed comparison of the actual year-to-date operating results against the Budget; and

(3) solely with respect to the last month of each fiscal quarter, a management report signed by an Authorized Person of Borrowers, describing in reasonable detail the Borrowers' operations and financial condition for such month.

For the avoidance of doubt, the reports required under sections (a)(1) and (a)(3) above may consist of the monthly operating reports as filed in the Chapter 11 Cases.

All financial statements shall be prepared, and shall be complete, correct and fairly presenting in all material respects, in each case in accordance with GAAP consistently applied with prior periods the financial position and results of operations of the Borrowers (provided that interim financial statements shall not be required to have footnote disclosure and may be subject to normal year-end adjustments).

(b) **Other Materials.** The Borrowers shall furnish to the DIP Parties, in form and substance satisfactory to Lender in its sole discretion, as soon as available and in any event within ten (10) Business Days after the preparation, receipt or issuance thereof or request therefor by any DIP Party, (A) copies of any reports and management control letters provided by the Borrowers' independent accountants and (B) such additional information, documents, statements, and other materials as Lender may request from time to time in its sole discretion.

(c) **Notices.** The Loan Parties shall promptly, and in any event within five (5) Business Days after any Loan Party or Authorized Person thereof obtains knowledge thereof, shall notify the DIP Parties in writing of:

(1) any pending or threatened action, suit, proceeding or investigation involving any Loan Party or Subsidiary thereof, or any such Person's property to the extent the amount in controversy exceeds \$250,000 in the aggregate or any injunctive relief is sought;

(2) (A) the receipt of any notice or request from any Governmental Authority regarding any liability or claim equal to or exceeding \$250,000 in the aggregate or (B)

any material action taken or threatened to be taken by any Governmental Authority (or any notice of any of the foregoing);

(3) any notice regarding termination of any lease of material real property (other than any such termination resulting from the scheduled expiration thereof, pursuant to the originally agreed upon terms) or of any senior officer, or the loss, termination or expiration of any material contract to which any Borrower or its assets are bound; and

(4) the filing, recording or assessment of any federal, state, local or foreign tax Lien against any Collateral (other than real estate taxes and municipal charges related to the Real Property Collateral) or any Borrower.

**(d) Updates.** The Borrowers shall furnish to the DIP Parties revisions to the schedules to any Loan Document to the extent necessary or appropriate; provided, that delivery or receipt thereof by any DIP Party shall not constitute a waiver by the Lender or a cure of any Default or Event of Default resulting therefrom, or result in an amendment or modification of such schedules.

**(e) Material Adverse Change.** Promptly upon an Authorized Person of any Loan Party obtaining knowledge of any development or event that has caused, or which could reasonably be expected to cause, a Material Adverse Change with respect to which notice is not otherwise required to be given pursuant to this Exhibit C-1, an Officer's Certificate of the relevant Loan Party setting forth the details of such development or event and stating what action the relevant Loan Party has taken or proposes to take with respect thereto.

**(f) Management Letters.** Promptly after the receipt thereof by any Loan Party, copies of any management letters and any reports as to material inadequacies in accounting controls (including reports as to the absence of any such inadequacies) submitted to such Loan Party by its independent certified public accountants in connection with any audit of such Loan Party made by such accountants.

**(g) Other Information.** Any other information, including financial statements and computations, relating to the performance of any Loan Party that Lender may from time to time request in its sole discretion and which is reasonably capable of being obtained, produced or generated by such Loan Party (without undue effort and undue expense).



**Schedule A-1**

**Loan Account**

[To be provided by Lender]

**Schedule A-2**  
**Authorized Person**

**Schedule D-1**  
**Designated Account**

**Schedule 4.1(b)**

**Ownership and Capital Structure**

**Schedule 4.2**

**No Conflict**

**Schedule 4.6(b)**  
**Litigation; Other**

**Schedule 4.8**  
**Indebtedness**

**Schedule 4.9**

**Taxes**



**Schedule 5.4**

**Permits**

**Schedule 6.6**

**Nature of Business**

**Exhibit B**

**Budget**

Aerogroup International, Inc.  
Cash Forecast Summary - As of 10/14/17  
(\$ in thousands)

Receipts	week ending												Total Forecast
	Forecast 24-Oct	Forecast 21-Oct	Forecast 18-Oct	Forecast 15-Oct	Forecast 12-Oct	Forecast 9-Oct	Forecast 6-Oct	Forecast 3-Oct	Forecast 30-Dec	Forecast 24-Dec	Forecast 18-Dec	Forecast 13-Jan	
1.) Retail	1,417	1,358	1,416	1,477	1,613	1,546	1,396	1,396	1,518	1,336	1,183	46	18,277
2.) E-commerce/Marketing	607	662	591	547	688	723	774	705	728	728	670	966	9,389
3.) Franchise	802	1,139	1,073	1,101	1,130	1,195	1,086	1,023	1,077	1,125	865	745	14,412
4.) Int'l Franch Cost (incl. IFC Commission)	-	-	-	-	-	-	-	-	-	-	-	-	34
5.) Royalty Income/License Income	-	-	-	-	355	-	-	-	-	-	-	-	335
6.) Other	-	-	-	-	-	-	-	-	-	-	-	-	15
<b>Total Receipts</b>	<b>2,826</b>	<b>3,219</b>	<b>3,036</b>	<b>3,168</b>	<b>3,787</b>	<b>3,463</b>	<b>3,196</b>	<b>3,084</b>	<b>3,349</b>	<b>3,192</b>	<b>2,656</b>	<b>1,357</b>	<b>42,757</b>
<b>Operating Disbursements</b>	<b>(143)</b>	<b>(687)</b>	<b>(4,800)</b>	<b>(221)</b>	<b>(25)</b>	<b>(3)</b>	<b>(20)</b>	<b>(1,253)</b>	<b>(139)</b>	<b>(89)</b>	<b>(2,309)</b>	<b>(72)</b>	<b>(10,411)</b>
7.) Marketing/Advertising	(246)	(1,222)	(20)	(1,236)	(100)	(1,627)	-	(1,412)	(100)	(100)	(225)	(660)	(9,531)
8.) Salaries & Benefits	(888)	(175)	(495)	(204)	(324)	(101)	(344)	(184)	(504)	(504)	(574)	(379)	(4,934)
9.) Commissions	(10)	-	(9)	(105)	(183)	(200)	(185)	(183)	(200)	(183)	(157)	(160)	(2,383)
10.) Freight/Distribution	-	-	-	-	(31)	(1,028)	-	-	(31)	(85)	(85)	-	(2,351)
11.) Warehousing/PFL	(523)	(180)	(245)	(170)	(170)	(170)	(170)	(170)	(170)	(170)	(170)	(170)	(2,818)
12.) Insurance	(116)	(88)	(112)	(36)	(36)	(36)	(36)	(36)	(36)	(36)	(36)	(36)	(693)
13.) Advertising/Marketing	(130)	(31)	(31)	(37)	(37)	(37)	(37)	(37)	(37)	(37)	(37)	(37)	(532)
14.) Information Technology	(75)	(68)	(62)	(62)	(62)	(62)	(62)	(62)	(62)	(62)	(62)	(62)	(692)
15.) Other Retail	(100)	(100)	-	-	(15)	(15)	-	-	-	(50)	-	-	(1,825)
16.) Other Corp	(68)	(12)	(138)	(174)	(61)	(164)	(86)	(61)	(70)	(104)	(125)	(81)	(1,885)
17.) Other	(100)	(100)	-	-	-	-	-	-	-	-	-	-	(1,420)
18.) Franchise	(100)	(100)	-	-	-	-	-	-	-	-	-	-	(1,420)
19.) Ordinaly Course Professional Fees	(100)	(100)	-	-	-	-	-	-	-	-	-	-	(1,420)
20.) All Other	(100)	(100)	-	-	-	-	-	-	-	-	-	-	(1,420)
<b>Total Operating Disbursements</b>	<b>(2,902)</b>	<b>(2,909)</b>	<b>(6,112)</b>	<b>(3,571)</b>	<b>(837)</b>	<b>(3,496)</b>	<b>(1,036)</b>	<b>(3,400)</b>	<b>(2,862)</b>	<b>(1,909)</b>	<b>(1,912)</b>	<b>(2,278)</b>	<b>(37,730)</b>
<b>Operating Net Cash Flow</b>	<b>325</b>	<b>310</b>	<b>(2,076)</b>	<b>597</b>	<b>2,956</b>	<b>(33)</b>	<b>2,171</b>	<b>(336)</b>	<b>766</b>	<b>1,087</b>	<b>(1,256)</b>	<b>(921)</b>	<b>5,027</b>
<b>Non-Operating Disbursements</b>	<b>(1,000)</b>	<b>(1,000)</b>	<b>(93)</b>	<b>(193)</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>(193)</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>(1,478)</b>
21.) DIP Interest/Fees <sup>2</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-
22.) Term Loan Interest	-	-	-	-	-	-	-	-	-	-	-	-	-
23.) Sub-let	-	-	-	(561)	-	-	-	-	-	-	-	-	(561)
24.) Bad Debt	-	-	-	-	-	-	-	-	-	-	-	-	-
25.) Bad Debt Expenses	-	-	-	-	-	-	-	-	-	-	-	-	-
26.) Bad Debt Recoveries	-	-	-	-	-	-	-	-	-	-	-	-	-
27.) Debtor's Professionals	(53)	(106)	(54)	(54)	(56)	(57)	(53)	(53)	(53)	(53)	(22)	(38)	(758)
28.) Debtor's Counsel	-	-	-	(872)	-	-	-	-	-	(888)	-	-	(1,760)
29.) Debtor's Restructuring Advisor	-	-	-	(410)	-	-	-	-	-	(395)	-	-	(815)
30.) Debtor's FA <sup>3</sup>	-	-	-	(80)	(80)	-	-	-	(40)	(40)	-	-	(120)
31.) UCC Professionals	-	-	-	(160)	-	-	-	-	(250)	(250)	-	-	(410)
32.) S' Secured Professionals	(45)	(15)	(15)	(15)	(15)	(15)	(15)	(15)	(15)	(15)	(15)	(15)	(340)
33.) US Trustee Fees	(100)	(100)	-	-	-	-	-	-	-	-	-	-	(375)
34.) Claims Agent	(45)	(45)	-	-	-	-	-	-	-	-	-	-	(145)
35.) Miscellaneous	(100)	(100)	-	-	-	-	-	-	-	-	-	-	(1,000)
36.) Other	(100)	(100)	-	-	-	-	-	-	-	-	-	-	(1,000)
<b>Total Non-Operating Disbursements</b>	<b>(1,000)</b>	<b>(1,000)</b>	<b>(93)</b>	<b>(193)</b>	<b>(561)</b>	<b>(57)</b>	<b>(53)</b>	<b>(53)</b>	<b>(193)</b>	<b>(888)</b>	<b>(22)</b>	<b>(38)</b>	<b>(1,478)</b>
<b>Net Cash Flow</b>	<b>(675)</b>	<b>(699)</b>	<b>(2,109)</b>	<b>404</b>	<b>2,395</b>	<b>(90)</b>	<b>1,134</b>	<b>(687)</b>	<b>573</b>	<b>197</b>	<b>(1,467)</b>	<b>(959)</b>	<b>3,549</b>
<b>Cumulative Net Cash Flow</b>	<b>89</b>	<b>(788)</b>	<b>(3,823)</b>	<b>(3,419)</b>	<b>(1,024)</b>	<b>(1,613)</b>	<b>(391)</b>	<b>(131)</b>	<b>514</b>	<b>8</b>	<b>(854)</b>	<b>(1,827)</b>	<b>(1,827)</b>
<b>III. Cash Balance</b>	<b>3,557</b>	<b>3,646</b>	<b>4,088</b>	<b>4,270</b>	<b>2,470</b>	<b>3,360</b>	<b>3,255</b>	<b>5,257</b>	<b>4,854</b>	<b>4,854</b>	<b>5,380</b>	<b>4,013</b>	<b>3,557</b>
Beginning Book Cash Balance	89	(867)	(3,124)	(1,124)	2,013	(105)	2,003	(404)	506	21	(1,367)	(974)	(1,827)
Net Cash Flow	1,309	4,088	964	420	2,470	3,255	5,257	4,854	4,875	5,380	4,013	3,039	1,309
Net Loan Activity	-	-	-	-	-	-	-	-	-	-	-	-	-
Ending Book Cash Balance	<b>3,646</b>	<b>4,088</b>	<b>4,964</b>	<b>4,690</b>	<b>2,470</b>	<b>3,360</b>	<b>3,255</b>	<b>5,257</b>	<b>4,854</b>	<b>4,854</b>	<b>5,380</b>	<b>4,013</b>	<b>3,039</b>
<b>IV. Loan Balance</b>	<b>19,691</b>	<b>19,691</b>	<b>21,000</b>	<b>21,000</b>	<b>21,000</b>	<b>21,000</b>	<b>21,000</b>	<b>21,000</b>	<b>21,000</b>	<b>21,000</b>	<b>21,000</b>	<b>21,000</b>	<b>19,691</b>
Beginning Loan Balance	19,691	21,000	21,000	21,000	21,000	21,000	21,000	21,000	21,000	21,000	21,000	21,000	21,000
Loan Draw <sup>4</sup>	-	-	-	-	-	-	-	-	-	-	-	-	-
Outstanding Balance	<b>19,691</b>	<b>21,000</b>	<b>21,000</b>	<b>21,000</b>	<b>21,000</b>	<b>21,000</b>	<b>21,000</b>	<b>21,000</b>	<b>21,000</b>	<b>21,000</b>	<b>21,000</b>	<b>21,000</b>	<b>21,000</b>
Loan Net of Cash	<b>16,045</b>	<b>16,912</b>	<b>17,036</b>	<b>16,586</b>	<b>15,530</b>	<b>17,745</b>	<b>15,743</b>	<b>16,446</b>	<b>16,125</b>	<b>16,125</b>	<b>16,587</b>	<b>17,961</b>	<b>17,961</b>
Undrawn Availability	<b>5,309</b>	<b>4,000</b>	<b>4,000</b>	<b>4,000</b>	<b>4,000</b>	<b>4,000</b>	<b>4,000</b>	<b>4,000</b>	<b>4,000</b>	<b>4,000</b>	<b>4,000</b>	<b>4,000</b>	<b>4,000</b>

1 - Reflects conservative payment terms, negotiations with vendors ongoing  
 2 - Includes term sheet interest and fees subject to adjustment  
 3 - This does not include a restructuring fee potentially payable to Piper Jaffray  
 4 - Initial draw of \$21M to pay off loan net of cash of \$16.9M and to fund cash balance of \$4.09M