

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
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IN RE: Chapter 11 Case
MAGNUM CONSTRUCTION MANAGEMENT, Case No.: 19-_____
LLC, f/k/a Munilla Construction Management, LLC,¹
Debtor.

EMERGENCY MOTION OF THE DEBTOR FOR INTERIM AND FINAL ORDERS (I) AUTHORIZING DEBTOR (A) TO OBTAIN POSTPETITION FINANCING FROM BERKSHIRE; AND (B) TO UTILIZE CASH COLLATERAL, (II) GRANTING ADEQUATE PROTECTION, (III) MODIFYING THE AUTOMATIC STAY, (IV) SCHEDULING FINAL HEARING; AND (V) GRANTING RELATED RELIEF

(Emergency Hearing Requested)

Statement of Exigent Circumstances

The Debtor seeks to continue to operate its businesses in the ordinary course, to preserve the value of the estate, to preserve jobs and to facilitate a financial restructuring. Without the immediate authorization to obtain financing and use cash collateral, the Debtor will not be able to meet payroll and other obligations necessary for its day-to-day operations. The Debtor respectfully requests that the Court conduct a hearing on this Motion within two business days of the Petition Date (as defined herein), consistent with Local Rule 9013-1(F), as the Debtor believes that a hearing on this Motion is needed as soon as possible in order for it to continue to operate. The Debtor respectfully requests that the Court waive the provisions of Local Rule 9075-1(B) which requires an affirmative statement that a bona fide effort was made in order to resolve the issues raised in the Motion, as the relief requested herein is urgent in nature and does not lend itself to advance resolution.

Magnum Construction Management, LLC, f/k/a Munilla Construction Management, LLC (d/b/a MCM) (the “Debtor”), as debtor in possession, hereby moves this Court pursuant to sections 105, 361, 362, 363, 364 and 507(b) of title 11 of the United States Code (the “Bankruptcy Code”),

¹ The Debtor’s address is 6201 SW 70th Street, 1st Floor, Miami, FL 33143. The last four digits of the Debtor’s federal tax identification number are 3403.



Rules 4001(b) and (c) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), Rules 4001-2 and 4001-3 of the Local Rules of United States Bankruptcy Court for the Southern District of Florida (the “Local Rules”), and this Court’s Guidelines for Motions Seeking Authority to Use Cash Collateral and Motions Seeking Approval of Postpetition Financing (the “Guidelines”), on an emergency basis, for entry of interim and final orders: (a) authorizing the Debtor to obtain senior secured postpetition financing; (b) authorizing the Debtor to use Cash Collateral (as defined below); (c) granting liens and providing superpriority claims with respect to such postpetition financing; (d) approving the form of adequate protection to be provided by the Debtor; (e) modifying the automatic stay to the extent necessary to effectuate the terms of the DIP Orders (as defined below); (f) scheduling a final hearing to consider entry of the Final Order (as defined below); and (g) granting related relief in connection with the DIP Financing (as defined below) (the “Motion”), and in support thereof, the Debtor respectfully represents as follows.

I. DISCLOSURES UNDER BANKRUPTCY RULES, LOCAL RULES AND GUIDELINES

1. Pursuant to Bankruptcy Rule 4001(b), (c) and (d), Local Rules 4001-2, 4001-3, 9013-1(F) and (G), and the Guidelines, the Debtor submits the following list and summary of the material terms of its proposed secured financing and use of cash collateral pursuant to the proposed Interim Order, setting forth the location of such material terms² in the Interim Order.

² The following summary contains truncated descriptions of material terms and is qualified in its entirety by the actual terms of the proposed Interim Order.

<u>Material Provision</u>	<u>Location in Interim Order and/or Loan and Security Agreement³</u>	<u>Summary Description</u>
Prepetition Lender, principal entity along with Travelers Casualty and Surety Company of America and Berkshire Hathaway Specialty Insurance Company with interest in cash collateral	Interim Order, 2, 3-6, ¶E(i), (ii), (iv), (vii), (viii) and (ix)	Bank of America, N.A.
DIP Lender	Loan and Security Agreement, p.1, 8, 12, ¶¶3 and 4	Berkshire Hathaway Specialty Insurance Company; Berkshire and the Debtor are parties to that certain Loan and Security Agreement which memorializes the terms and conditions of the DIP Loan; they are also parties to a Trust, Financing and Collateral Agreement, and with others certain Indemnity Agreements, as amended, if at all
Principal balance due Prepetition Lender	Interim Order, p. 4	Approximately \$4,072,470.14
DIP Loan Amount	Interim Order, p. 11, ¶2(a); Loan and Security Agreement, p.13-14, ¶4(a)(1)-(3)	Not to exceed \$1,200,000 (Interim) and \$3,000,000 (Final)
Interest Rate	Interim Order, p.19, ¶15;	Prime (Wall Street Journal) + 1%; \$75,000 DIP Lender Facility Fee
Security Interest	Loan and Security Agreement, p.16-17, ¶6	Lien on and security interest in the Collateral (as defined in the Loan and Security Agreement and summarized below as to Post-Petition Collateral)
Liens/Super priority claim and priming liens	Interim Order, p.13-14, ¶¶3-4(a)-(d); Loan and	Senior lien, subject to Bank of America liens, and super-priority

³ The Loan and Security Agreement is attached as **Exhibit A** to this Motion. References to the Budget are to the 13-week cash Budget contemplated by this Motion and attached as **Exhibit B** to this Motion. References to the Interim Order is to the proposed Interim Order attached as **Exhibit C**, respectively, to this Motion All capitalized terms not defined in this Chart shall have the meanings ascribed to them in this Motion, the Loan and Security Agreement and Interim Order, as applicable.

<u>Material Provision</u>	<u>Location in Interim Order and/or Loan and Security Agreement³</u>	<u>Summary Description</u>
	Security Agreement, p.15, ¶5 and p.16-17, ¶6	administrative expenses claim
Post-Petition Collateral	Loan and Security Agreement, p.3, Section 1 (Definitions)	Accounts, Chattel Paper, Commercial Tort Claims, Contract Rights, Documents, General Intangibles, Equipment, Goods, Inventory, Instruments, Investment Property, Records, all tangible and intangible property; but subject to the Inter-Creditor Agreement between the DIP Lender, Travelers and Bank of America, N.A.
Cash Collateral	Interim Order, p.17-18, ¶10	Subject to Interim Order and Loan and Security Agreement, Debtor is authorized to use Cash Collateral (as defined in Motion)
Proposed Use of DIP Loan/ Cash Collateral	Interim Order, p.8, ¶F(i); p.11, ¶2(a) 17, ¶10; Loan and Security Agreement, p.13-14,, ¶¶4; Budget	working capital and general corporate purposes, including payments in connection with completion of Bonded Contracts to subcontractors and suppliers; payment of certain administrative costs as set forth in the Budget, including professional fees contemplated by the Interim Order
Termination Date		The Interim Period up to a final hearing on this Motion, and subject to termination provisions in para. 17 of the Interim Order and p.4-7 (see Event of Default definition) and p.24, ¶16 (Termination of Automatic Stay for Berkshire to exercise remedies) of the Loan and Security Agreement
Termination Provisions	Interim Order, p.17-18, ¶¶11; 19, ¶17; 20-21, ¶18; Loan and Security Agreement p. 23-24, ¶¶15; p.24, ¶16; 28, ¶20; 30, ¶21	Upon Event of Default Debtor's right to use Cash Collateral terminates, and DIP Lender may declare all obligations immediately due and payable and charge interest under Surety Credit Documents; apply Collateral held or assigned to DIP Lender toward monies due as Surety Loss and any other obligations due the DIP Lender, or

<u>Material Provision</u>	<u>Location in Interim Order and/or Loan and Security Agreement³</u>	<u>Summary Description</u>
		alternatively, file suit(s) to foreclose Loan and Security Agreement; DIP Lender's remedies are cumulative and exercise of one remedy does not preclude exercise of another remedy
Remedies Notice Period	Interim Order, p. 17-18, ¶11; Loan and Security Agreement, p. 28, ¶20	Upon occurrence of Cash Collateral Termination Event, DIP Lender must give 5-days written notice to Debtor prior to commencing a proceeding to determine Debtor's right to further use of cash collateral; DIP Lender must give Debtor at least 10 days' notice before effectuating public sale or of time after which any private sale or other disposition of Collateral is to be made
Adequate Protection	Interim Order, p. 18, ¶12	<p>DIP Lender is entitled to adequate protection payments in an amount equal to the aggregate diminution in the value of its interest in the Pre-Petition Collateral including Cash Collateral as provided for under Bankruptcy Code. DIP Lender has additional rights under the Loan and Security Agreement, including para. 8 (to have Debtor deposit all remittances regard to the Collateral in Segregated Bank Accounts) and 15 (to take possession of Work under any Bonded Contract to avoid Surety Loss)</p> <p><u>Reporting.</u> During construction of Projects Debtor to promptly provide DIP Lender with copies of claims, liens or other notice Debtor receives regarding non-payment of labor and supplies on any Bonded Contract; any subcontractors or materialmen or Principal, change orders or work performed by Debtor contiguous to and in immediate vicinity of Work performed by Debtor on any Bonded Contract. Debtor obligated to continue utilizing and keeping current Procure</p>

<u>Material Provision</u>	<u>Location in Interim Order and/or Loan and Security Agreement³</u>	<u>Summary Description</u>
		Project Management System and Pvault Repository System for Records relating to Bonded Contracts, among other financial reporting related to the Bonded Contracts (set forth in para. 17(a)-(h) of Loan and Security Agreement.
Debtor's Acknowledgements and Agreement	Interim Order, p.3-8, ¶ E(i)-(xiii); p.13-14, ¶3; 14, ¶4; Loan and Security Agreement, p.16., ¶6; p.17-18, ¶7; 28-29, ¶20	Among other things, Debtor acknowledges DIP Lender's issuance of Bonds relating to the Bonded Contracts, entry onto the Indemnity Agreement (with others) in favor of the DIP Lender, enforceability of Pre-Petition Obligations, entry into the Trust, Financing and Collateral Agreement, receipt of Trust Funds relating to Bonded Contracts; DIP Lender's perfection of Prepetition Surety Lien, enforceability of Prepetition Liens, release and discharge of obligations to the Debtor and waiver of any preference claims against DIP Lender and any subcontractor under Bonded Contracts under Section 547 of the Bankruptcy Code. No Avoidance Action shall lie regarding obligations, transfer or grant of security interests under the DIP Documents. Stipulations of the Debtor are binding on any successor thereto including chapter 7 or 11 trustee.
Waiver /modification of stay	Interim Order, p.15, ¶5; Loan and Security Agreement, p.24, ¶16	Entry of an order granting relief from stay to allow DIP Lender to exercise rights under the DIP Documents, including rights set forth in paras. 13 and 15 of the Loan and Security Agreement, with the only issue to be raised by parties-in-interest, if any, being whether, in fact, an Event of Default has occurred and is continuing.

<u>Material Provision</u>	<u>Location in Interim Order and/or Loan and Security Agreement³</u>	<u>Summary Description</u>
Limitation on use of proceeds	Interim Order, p.17, ¶10; 25-26, ¶29	Debtor's right to use Cash Collateral subject to terms and conditions of Interim Order and Loan and Security Agreement as provided for in the Budget; such right shall be subject to a Cash Collateral termination Event. More specifically, proceeds of DIP Loan may not be used to, among other things, object to and or challenge the amount, validity, perfection, priority or enforceability of or asserting any defense, counterclaim or offset to any amount due under the DIP Documents or Indemnity Agreements for lender liability or actions pursuant to Sections 105, 502(d), 510, 544, 547, 548, 549, 550 or 552 of the Bankruptcy Code
Waiver of right to file a plan		None
Deadlines for filing a plan	Interim Order, p. 7	March 8, 2019
Waiver/modification of nonbankruptcy law re perfection	Interim Order, p.4, p¶E(iii); p.6, ¶E(x)p.4-5, ¶4(a)-(d)	Debtor acknowledges that DIP Lender's Prepetition Surety Lien was duly perfected; and perfection of DIP Liens provided under Loan and Security Agreement
Release/waiver of claims		See Comments to Debtor's Acknowledgements and Agreement, above.
Indemnification	Interim Order, E(ii); Loan and Security Agreement, p.3, ¶3	Per Indemnity Agreements, Debtor obligated to make whole and hold harmless DIP Lender, its affiliates and related entities from losses related to Bonds or based on relationships with indemnitors
Limitation of rights of parties under section 506(c)	Interim Order, ¶8	Debtor waives the right to surcharge DIP Lender's Collateral under Section 506(c)

<u>Material Provision</u>	<u>Location in Interim Order and/or Loan and Security Agreement³</u>	<u>Summary Description</u>
Granting of lien on claims/causes of action	Interim Order, ¶ E(viii)	No post-petition Lien shall encumber the Debtor's preference claims or causes of action arising under Section 547 of the Bankruptcy Code.
Administrative Expense Advance	Loan and Security Agreement, p. 14, ¶ 4(a)(iii)	The Administrative Expense Advance shall be used to pay fees due Office of U.S. Trustee under 28 U.S.C. §1930(a)(6); fees due Clerk of Court; fees and expenses due Debtor's professionals through an Event of Default up to amount in Budget, and from and after an Event of Default, \$50,000 for Debtor's professionals
Binding Effect	Loan and Security Agreement, p.34, ¶31	<u>See</u> Debtor's Acknowledgements and Agreement. Loan and Security Agreement binding on parties' successors and assigns.

RELIEF REQUESTED

1. Pursuant to this Motion, the Debtor seeks the scheduling of interim and final hearings, and the entry of the DIP Orders providing the following relief:
 - a. **DIP Financing**: authorizing the Debtor to obtain postpetition financing (the "DIP Financing") pursuant to the terms and conditions of the DIP Documents (as defined herein), the Interim Order (as defined herein) and the Final Order (as defined herein), pursuant to section 364(c)(1), 364(d), and 364(e) of the Bankruptcy Code and Rule 4001(c) of the Bankruptcy Rules;
 - b. **DIP Documents**: authorizing the Debtor to execute and enter into the Loan and Security Agreement attached as **Exhibit A** (the "Loan and Security Agreement"), the promissory note, and all related or ancillary documents and agreements, including all security and pledge agreements contemplated thereby (collectively, as may be amended, supplemented or otherwise modified pursuant to their respective terms, the "DIP Documents"), and to perform all such other and further acts as may be required in connection with the DIP Documents;
 - c. **Interim DIP Loan**: authorizing the Debtor to borrow, on an interim basis, post-petition financing of up to \$1,200,000 (the "Interim DIP Loan") and seek other financial accommodations from the DIP Lender as part of the DIP Financing;

- d. **Final DIP Loan**: authorizing the Debtor to borrow, on a final basis, post-petition financing of up to \$3,000,000 (the “Final DIP Loan”) and seek other financial accommodations from the DIP Lender as part of the DIP Financing;
- e. **Cash Collateral**: authorizing the Debtor to continue to use cash in which the DIP Lender has an interest (the “Cash Collateral”), including, but not limited to, the proceeds of Bonded Contract Funds in accordance with the Budget (as defined herein);
- f. **Reaffirmation of Indemnity**: providing Reaffirmation of Indemnity Agreements duly executed by the parties to the Indemnity Agreements who are not debtors, in a form acceptable to DIP Lender (the “Adequate Protection Obligations”).
- g. **Debtor Stipulations**: approving of certain stipulations in paragraph E of the Interim Order by the Debtor with respect to the DIP Documents and the liens and security interests arising therefrom, and releasing certain claims;
- h. **Superpriority Administrative Claims**: allowing the DIP Lender a superpriority administrative expense claim under section 364(c)(1) of the Bankruptcy Code for all of the Debtor’s obligations under the DIP Documents, the Interim Order and the Final Order;
- i. **Automatic Stay**: vacating or modifying the automatic stay imposed by Section 362 of the Bankruptcy Code to the extent necessary to implement and effectuate the terms of the DIP Documents, the Interim Order and the Final Order;
- j. **Interim Hearing**: pursuant to Bankruptcy Rule 4001, that an interim hearing (the “Interim Hearing”) on the Motion be held before this Court to consider entry of an order granting the Motion on an interim basis (the “Interim Order”), thereby authorizing the Debtor, on an interim basis to borrow from the DIP Lender under or as permitted by the DIP Documents up to an aggregate principal amount not to exceed \$1,200,000 subject to any limitations of borrowings under the DIP Documents and authorizing the Debtor’s use of Cash Collateral;
- k. **Final Hearing**: scheduling a final hearing (the “Final Hearing”) to be held within 45 days of the entry of this Interim Order to consider entry of a final order authorizing the DIP Financing (the “Final Order”); and
- l. **Other Related Relief**: granting the other relief set forth in the proposed Interim and Final Orders.

JURISDICTION AND VENUE

- 2. This Court has subject matter jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334.

3. This Court may enter a final judgment in this proceeding because it is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (D), (M) and the Debtor consents to final adjudication of the Motion pursuant to *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015).

4. Venue is proper under 28 U.S.C. § 1409(a).

BACKGROUND

A. General Background

5. On the date hereof, (the "Petition Date"), the Debtor commenced its reorganization case by filing a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor is authorized to continue to operate its businesses as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

6. A comprehensive description of the Debtor's businesses and operations, capital structure and events leading to the commencement of this chapter 11 case can be found in the *Declaration of Debtor's Chief Financial Officer in Support of First Day Pleadings* (the "First Day Declaration"), which was filed contemporaneously herewith and is incorporated herein by reference.

7. To operate its businesses, preserve value, and pursue its restructuring goals, the Debtor requires access to the proposed DIP Financing and the use of Cash Collateral. The Debtor is a construction company with numerous outstanding construction projects in various stages of completion. These projects, the related project receivables and the related equipment on the projects, represent substantially all of the assets of the bankruptcy estate. These assets and substantially all other assets of the Debtor are already fully encumbered by liens (in some cases, multiple tiers of liens), as well as the equitable subrogation rights of the sureties that have bonded the construction projects. The timely completion of these outstanding projects is necessary to (1)

ensure the Debtor's ability to obtain future projects both during the bankruptcy case and after plan confirmation, (2) preserve the value of the projected contract balances, and (3) create new value through continuing operations for the benefit of the estate. Through the proposed DIP Financing and authorization to use of Cash Collateral, the Debtor will have the liquidity necessary to finish the outstanding contracts and work toward confirmation of the Debtor's plan of reorganization.

8. Berkshire, which is the proposed DIP Lender, has estimated its aggregate loss on the outstanding bonds, after completion of all projects, recovery of all contract balances and liquidation of all remaining collateral, will exceed approximately \$3.0 million. To date, Berkshire has already advanced in excess of \$4.0 million to the Debtor in order to allow the Debtor to continue in operation and complete the outstanding projects, including both bonded and non-bonded jobs. Berkshire's decision to provide additional funding to the Debtor through the proposed DIP Financing Documents will satisfy the primary goals of (1) completing the remaining projects in an efficient and timely manner (thereby minimizing costs to the estate and the surety) and (2) ensuring the continued viability of the Debtor for the benefit of the Debtor's employees and the creditors of the estate.

9. The Debtor currently has no unencumbered assets available to secure post-petition financing from any proposed lender. Finding a lender willing to provide post-petition credit to a construction company in bankruptcy is challenging even if assets are available to secure the post-petition financing. In the absence of available unencumbered assets, finding a post-petition lender from outside the current capital structure of the Debtor is practically impossible. Consequently, the DIP Lender's willingness to provide the necessary funding is crucial to the restructuring of the Debtor.

10. In light of the anticipated benefits to the estate, the Debtor seeks authorization to obtain the DIP Financing and to use Cash Collateral pursuant to the terms set forth in (a) this

Motion; (b) the DIP Documents; (c) the Interim Order; and (d) after a final hearing, the Final Order (together with the Interim Order, the “DIP Orders”).

B. Debtor’s Prepetition Financial Obligations

(1) The Surety/Indemnity Obligations

11. The Debtor is a construction company specializing in building and heavy civil construction. The Debtor is required from time to time to provide surety bonds in connection with its obligations to certain third-party obligees. Some of these surety bonds related to certain projects (the “Bonded Projects”) were obtained or procured from or by the DIP Lender and from affiliated companies, co-sureties, and fronting companies (the “Bonds”).

12. In consideration for the issuance of the Bonds, the Debtor and various non-Debtors executed an indemnity agreement in favor of the DIP Lender and its affiliates (the “Indemnity Agreement”).⁴ Pursuant to the Indemnity Agreement, the Debtor is obligated to make whole and hold harmless the DIP Lender from any losses arising from the issuance of the Bonds. Prior to the Petition Date, the Debtor and the other indemnitors under the Indemnity Agreement defaulted on their obligations to the DIP Lender under to the Indemnity Agreement and under applicable law.

13. In the ordinary course of its business operations, with respect to each open project, the Debtor receives payments from the owner (or, if applicable, the governmental administrator), or general contractor of the relevant construction project and then disburses the appropriate payments to subcontractors and suppliers. Pursuant to the Indemnity Agreements and Trust, Financing and Collateral Agreement dated as of July 19, 2018 by and among the Debtor, Berkshire, and others, as amended by the First Amendment to Trust, Financing and Collateral Agreement

⁴ The Indemnity Agreements include (i) General Agreement of Indemnity dated October 31, 2016, executed by Magnum Construction Management Corporation (d/b/a M.C.M. Corp.), 7501 Medley Civil, LLC, MCM Global S.A., Jorge Munilla, Raul Munilla, Pedro Munilla, and Juan Munilla; and (ii) any and all other indemnity agreements heretofore or hereafter executed by any other indemnitors in favor of the DIP Lender.

dated February 28, 2019 (collectively, the “Trust Financing Agreement”), the payments due, received for, or on account of any contract referred to or described in any surety bond issued or procured by DIP Lender (including, without limitation, and whether earned and unpaid or to be earned, any increases in contract amounts, and payments made, as a result of affirmative claims (including, without limitation, changed condition claims, wrongful termination claims; claims against any architect, subcontractor, contractor, or obligee, the “Bonded Contract Funds”)) are trust funds to be used only for payment of all obligations for which DIP Lender (and any other issuer of any DIP Lender Bonds and their reinsurers and their successors and assigns) may be liable under any Bond.

14. The sureties have certain common law rights in the Bonded Contract Funds that are superior to any lien rights granted to creditors. Additionally, pursuant to the Indemnity Agreement and the Trust Financing Agreement, the Bonded Contract Funds received by the Debtor are trust funds held for the benefit of subcontractors, suppliers, and the surety on the bonded contracts. Finally, the sureties have perfected security interests in the Bonded Contract Funds and other assets that further secure the sureties’ interests. Accordingly, the sureties’ rights in the Bonded Contract Funds are superior to any right of the Debtor or interests of lien creditors and, in any event, the Debtor may only use the Bonded Contract Funds for the payment of subcontractors, suppliers and the surety that are beneficiaries of the trust.

i. Sureties’ Equitable Subrogation Rights Prime All Other Interests in Bonded Contract Funds

15. The DIP Lender asserts a right of equitable subrogation, which is superior to any interest held by the Debtor's estate or any of its secured creditors in the Bonded Contract Funds. *See generally, Pearlman v. Reliance Ins. Co.*, 371 U.S. 132 (1962), *Henningsen v. United States Fid. & Guar. Co.*, 208 U.S. 404 (1908); *Prairie State Nat’l Bank v. United States*, 164 U.S. 227 (1896); *Ky. Cent. Ins. Co. v. Brown (In re Larbar Corp.)*, 177 F.3d 439 (6th Cir. 1999); *Nat’l*

Shawmut Bank of Boston v. New Amsterdam Cas. Co., 411 F.2d 843 (1st Cir. 1969); *In re Jones Constr. & Renovation, Inc.*, 337 B.R. 579 (Bankr. E.D. Va. 2006); *c.f. Grochal v. Ocean Tech. Servs. Corp. (In re Baltimore Marine Indus. Inc.)*, 476 F.3d 238, 241 n.4, 242 (4th Cir. 2007); *In re Progressive Plumbing, Inc.*, No. 6:15-BK-07275-KSJ, 2016 WL 5122636, at *3 (Bankr. M.D. Fla. Sept. 21, 2016).

16. This superior interest exists regardless of whether the Bonded Contract Funds are in the Debtor's or DIP Lender's possession. A surety who pays the debt of its principal becomes equitably subrogated to the rights of the person paid to enforce his right to be reimbursed. *Transamerica Ins. Co. v. United States*, 998 F.2d 972 (Fed. Cir. 1993). "The law is clear that a surety under these circumstances has a right to the payments due the contractor to the extent of full reimbursement." *In re Jones Constr. & Renovation, Inc.*, 337 B.R. 579, 583 (Bankr. E.D. Va. 2006) (quoting *In re Larbar Corp.*, 177 F.3d at 443). A surety's equitable subrogation rights relate "back to the date of the surety's issuance of the bonds." *Id.*

17. Pursuant to its equitable subrogation rights, the DIP Lender is entitled to possession of the Bonded Contract Funds over and above all others to the extent that DIP Lender has received and paid any claims against the Bonds pursuant to the bonded contracts and the Bonds, and DIP Lender's costs and expenses continue to accrue with respect to said bonded contracts. In light of DIP Lender's equitable subrogation rights, absent the consent and agreement of DIP Lender, the Debtor is not permitted to use the Bonded Contract Funds for operational purposes until all subcontractors, laborers, materialmen, and/or DIP Lender are paid in full and the bonded contracts are fully completed, applicable warranty periods have expired, and the DIP Lender and any other surety does not have any exposure under any of the Bonds.

ii. Bonded Contract Funds Are Trust Funds

18. Additionally, in the Indemnity Agreement and the Trust Financing Agreement, the Debtor expressly agreed to hold all Bonded Contract Funds in trust for the benefit of DIP Lender. Specifically, Article 4 (Trust Funds) of the Trust Financing Agreement, provides, in part, that “[a]ll funds deposited into the Trust Account are declared to be, and shall be treated as, trust funds to be used solely for the purposes and in the manner set forth in the Surety Agreements and shall be held to secure and indemnify the Surety [Berkshire] against any and all liability and Surety Loss which the Surety [Berkshire] may at any time sustain or incur. The Contract Funds shall not be deposited in any Indemnitors' account, or any other Person's account. The Contract Funds as well as any other monies deposited into the Trust Account by the Indemnitors, the Surety [Berkshire], or any other Person, are hereby irrevocably segregated, earmarked, and set aside solely and only for the sole purposes set forth in this Agreement.” Accordingly, subject to the provisions and hierarchy for the use of funds set out in the Trust Financing Agreement, the Debtor is not permitted to use the Bonded Contract Funds for general operational purposes until all subcontractors, laborers, materialmen, and/or DIP Lender and any other Surety are paid in full and the Bonded Contracts are fully completed, applicable warranty periods have expired, and the DIP Lender/Surety does not have any exposure under any of the Bonds. In addition, and subject to the Intercreditor Agreements, DIP Lender has a senior perfected security interest in all Bonded Contract Funds.

19. Courts have consistently held that similar provisions in indemnity agreements to those found in the Indemnity Agreement and the Trust Financing Agreement impose a trust on bonded contract proceeds. *See Safeco Ins. Co. of Am. v. Hastings (In re Hastings)*, No. 08-80212-JAC-7, 2008 WL 5383586 at * 1 (Bankr. N.D. Ala. Dec. 23, 2008); *Int'l Fid. Ins. Co. v. Fox (In re Fox)*, 357 B.R. 770, 778 (Bankr. E.D. Ark. 2006) (“It is well-settled that the indemnity provision in the Indemnity Agreement at issue in this case creates a fiduciary relationship.”); *Int'l Fid. Ins.*

Co. v. Herndon (In re Herndon), 277 B.R. 765, 769 (Bankr. E.D. Ark. 2002) ("This Court agrees with the reasoning of these cases and recognizes that the express trust in the indemnity agreement created a trust relationship between the parties."); *Mountbatten Sur. Co., Inc. v. McCormick (In re McCormick)*, 283 B.R. 680, 684 (Bankr. W.D. Pa. 2002) ("We find that the language in ¶ 9 of the Indemnity Agreement creates a trust relationship between the parties. The Debtor, as trustee of the funds, owes a fiduciary duty arising from the trust."). The use of the trust funds for payment of legitimate business expenses of the contractor was held by at least one court to be "a defalcation for purposes of §523(a)(f)." *Hastings*, 2008 WL 5383586, at * 2; *see also Cumberland Sur. Ins. Co. v. Smith (In re Smith)*, 238 B.R. 664, 672-74 (Bankr. W.D. Ky. 1999) (a trust account provision in an indemnity agreement is not a condition precedent to the establishment of a trust, and failure to make payments to subcontractors and suppliers who were beneficiaries of the trust "constitutes a textbook example of defalcation").

20. Certain provisions of many of the Bonded Contracts provide that payments to the Debtor also comprise the *res* of a trust fund benefitting those furnishing labor or materials for use in performing services for, or which have been incorporated into the Debtor's work under the Bonded Contracts. To that end, the proceeds payable by the obligees under the Bonds to the Debtor are not property of the Debtor. *C.f. Gonzalez v. Raiser Constr. (In re Gonzalez)*, 22 B.R. 58, 59 (B.A.P. 9th Cir. 1992) (provision in subcontract sufficient to establish trust fund). The DIP Lender's equitable subrogation and trust fund rights in the Cash Collateral must be adequately protected in order to allow the Debtor's use of the Cash Collateral.

21. In addition to the sureties' rights of equitable subrogation, the sureties also hold pre-petition perfected security interests on substantially all of the assets of the Debtor, including the Bonded Contract Funds. The relative priorities of the sureties' liens are subject to certain Intercreditor Agreements described below in this Motion.

iii. The Bank of America Loans

22. Bank of America, N.A. (“BofA” or “Lender”) was the Company’s primary senior secured lender through a revolving line of credit facility up to \$25 million evidenced by a Loan Agreement (the “Loan Agreement”), Promissory Note and Security Agreement, each dated June 20, 2014, a Continuing and Unconditional Guaranty by Global and Limited Guaranty provided by each of Jorge Munilla, Raul Munilla, Pedro Munilla and Juan Munilla. The Loan Agreement was amended and restated on May 17, 2016 by letter agreement, and on November 2, 2017, January 24, 2018 and May 1, 2018 by Amendments to Loan Agreement (collectively, the “BofA Loan Facility”). The Debtor’s obligations under the BofA Facility are secured by liens on substantially all of the Company’s assets.

23. The relative priority of the Bank of America liens is subject to certain Intercreditor Agreements described below.

iv. The Intercreditor Agreements

24. By Intercreditor Agreement dated July 23, 2018, Travelers Casualty and Surety Company of America and Bank of America agreed that Travelers has a senior priority lien on the Travelers Bonded Contract Funds and certain assets relating to the Travelers Bonded Contracts, Berkshire had priority on the Berkshire Bonded Contracts and the Berkshire Bonded Contract Funds, and Bank of America would have a senior priority lien on assets in which it had a security interest in other assets of Debtor in which it had been granted a security interest.

25. By Surety Intercreditor Agreement dated August 8, 2018, Berkshire and Travelers agreed that (a) Travelers would have a senior priority lien on the Bonded Contract Funds relating to the Travelers Bonded Contracts, certain assets relating to the Travelers Bonded Contracts, and intercompany payables, and (b) Berkshire would have a senior priority lien on the Bonded Contract

Funds relating to the Berkshire Bonded Contracts, certain assets relating to the Berkshire Bonded Contracts, and profits on jobs not bonded by Travelers.

v. Unsecured Debt

26. As of the Petition Date, the Debtor owes approximately \$22,602,494 in unsecured, non-priority debt, excluding, contingent and unliquidated claims.

C. The Debtor's Immediate Need for Access to DIP Financing and Cash Collateral

27. Authorization of the use of Berkshire's Cash Collateral and approval of the DIP Financing will provide the Debtor with immediate and ongoing access to cash and borrowing availability to assist with the payment of its current and ongoing operating expenses related to its construction projects, including direct construction costs, general overhead expenses, and restructuring expenses. The Debtor has not been able to and does not anticipate having the ability in the short-term to generate sufficient operating cash flows to meet its continuing obligations. Without post-petition financing, the Debtor will be unable to continue to operate, and will likely be forced to liquidate.

28. Unless funding is available to pay the expenses of operations for the next 120 days, the Debtor will be forced to immediately cease operations, which would likely (a) result in irreparable harm to the business, (b) extinguish the going concern value of the Debtor, and (c) jeopardize the Debtor's ability to maximize the value of its estate. Moreover, the financing to be provided by the DIP Lender will allow the Debtor to satisfy certain of its critical subcontractors, suppliers, vendors, and operate the business in an orderly and reasonable manner to preserve and enhance the value of its estate for the benefit of all stakeholders. Accordingly, the timely approval of the relief requested herein is imperative.

29. The DIP Loans will not harm any of the creditors of the estate. Since all of the assets of the Debtors are already fully encumbered by perfected and unavoidable liens, the

additional liens on those assets as part of the financing will have no practical impact on unsecured creditors. Additionally, since the DIP Loans are being made consistent with the terms of the Intercreditor Agreements, the DIP Loans do not unduly impair any rights or priorities of existing secured creditors. The DIP Loans are also to be secured by additional collateral held by certain non-debtors, which creates value for, and an immediate benefit to, the estate. Finally, although the DIP Documents provide for the DIP Lender to have a super-priority administrative claim, such claim should not impact the unsecured creditors because, under the proposed Plan, the proceeds of any avoidance actions available under Chapter 5 of the Bankruptcy Code, which are the only unencumbered assets of the bankruptcy estate, are reserved for payment of claims of general unsecured creditors, not including claims of the DIP Lender.

30. In order to prevent the harm that would result from an abrupt halt in the Debtor's operations, the DIP Lender has agreed to provide the Debtor with postpetition financing on the terms described in this Motion, and more particularly, in the DIP Documents. The Debtor has closely conferred with its advisors to determine the cash needs of its businesses for the chapter 11 process. The Debtor and its advisors have contacted potential sources of postpetition financing and have been unable to procure sufficient financing on any terms, much less terms that are better than those represented in this Motion. The DIP Financing was negotiated at arm's length between the Debtor and the DIP Lender in good faith. The Debtor has determined that the resulting DIP Financing is the best available option for postpetition financing and is absolutely necessary to maximize the value of the estate and achieve confirmation of the Plan.

ARGUMENT

A. Entry into the DIP Financing is a Sound Exercise of the Debtor's Business Judgment

31. As described above, after appropriate investigation and analysis, the Debtor's management has concluded that the DIP Financing is the best option available under the circumstances of this case. Bankruptcy courts routinely defer to a debtor's business judgment on most business decisions, including the decision to borrow money, unless such decision is arbitrary and capricious. *See In re Farmland Indus., Inc.*, 294 B.R. 855, 879 (Bankr. W.D. Mo. 2003) (articulating that approval of postpetition financing requires, *inter alia*, an exercise of "sound and reasonable business judgment"); *see also In re YL West 87th Holdings I LLC*, 423 B.R. 421, 441 (Bankr. S.D.N.Y. 2010) (stating that "[c]ourts have generally deferred to a debtor's business judgment in granting section 364 financing"); *Trans World Airlines, Inc. v. Travellers Int'l AG (In re Trans World Airlines, Inc.)*, 163 B.R. 964, 974 (Bankr. D. Del. 1994) (noting that the interim loan, receivables facility and asset-based facility were approved because they "reflect[ed] sound and prudent business judgment on the part of TWA . . . [were] reasonable under the circumstances and in the best interest of TWA and its creditors"); *cf. In re Filene's Basement, LLC*, No. 11-13511(KJC), 2014 WL 1713416, at *12 (Bankr. D. Del. Apr. 29, 2014) (stating "[t]ransactions under § 363 must be based upon the sound business judgment of the debtor or trustee."). In fact, "[m]ore exacting scrutiny would slow the administration of the debtor's estate and increase its cost, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially." *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985).

32. Courts have noted that the business judgment test is not an onerous standard. See *Crystalin, LLC v. Selma Props. Inc. (In re Crystalin, LLC)*, 293 B.R. 455, 463–64 (B.A.P. 8th Cir. 2003). Moreover,

[u]nder the 'business judgment' rule, the management of a corporation's affairs is placed in the hands of its board of directors and officers, and the Court should interfere with their decisions only if it is made clear that those decisions are, inter alia, clearly erroneous, made arbitrarily, are in breach of the officers' and directors' fiduciary duty to the corporation, are made on the basis of inadequate information or study, are made in bad faith, or are in violation of the Bankruptcy Code.

In re Farmland Indus., Inc., 294 B.R. at 881 (internal citations omitted). Accordingly, courts have reasoned that, "[b]usiness judgments should be left to the board room and not to [the] Court." *In re Farmland Indus., Inc.*, 294 B.R. at 881 (citations omitted).

33. Courts recognize that a debtor is entitled (if not required) to consider noneconomic benefits offered by a proposed postpetition facility when exercising its business judgment:

Although all parties, including the Debtors and the Committee, are naturally motivated to obtain financing on the best possible terms, 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 noneconomic elements such as the timing and certainty of closing, the impact on creditor constituencies and the likelihood of a successful reorganization.

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

34. The Debtor's determination to enter into the DIP Financing represents an appropriate exercise of its sound business judgment and should be approved. The Debtor has already developed and submitted a reorganization plan that is in the best interests of the bankruptcy estate and the creditors. However, the Debtor's ability to achieve confirmation of the plan is contingent upon having the liquidity to meet its post-petition financial obligations during the plan confirmation process. Absent a credit facility to provide cash for operations and to fund this case,

the Debtor will be unable to achieve its restructuring goals to the detriment of its estate and creditors.

35. The DIP Financing also demonstrates the support of the DIP Lender for the broader restructuring process and will provide confidence to subcontractors, suppliers, vendors, customers, employees, other business partners that the Debtor can continue to meet its commitments during this chapter 11 case.

36. In light of the Debtor's overall circumstances, the Debtor believes that it could not obtain postpetition financing from another lending source on terms equal or superior to the DIP Financing. As such, and as further described in the First Day Declaration, the Debtor's decision to enter into the DIP Financing is a sound exercise of the Debtor's business judgment. Accordingly, the Court should grant the Debtor authority to enter into the DIP Financing and obtain the funds from the DIP Lender on the secured, administrative superpriority basis described herein.

B. The Debtor Should be Authorized to Obtain DIP Financing Under Section 364 of the Bankruptcy Code

37. It is essential to the success of the Debtor's chapter 11 case that the Debtor obtain access to sufficient postpetition financing and use of Cash Collateral. The preservation of estate assets, the Debtor's continuing viability and its ability to reorganize successfully and maximize value for stakeholders depends heavily upon the approval of the relief requested herein.

38. Section 364(c) of the Bankruptcy Code authorizes a debtor to incur credit with priority over all administrative claims. To incur credit on this basis, a debtor need only demonstrate that, despite a good faith effort, credit was not available without the protections of sections 364(c) of the Bankruptcy Code. *Bray v. Shenandoah Fed. Sav. & Loan Ass'n (In re Snowshoe Co.)*, 789 F.2d 1085, 1088 (4th Cir. 1986). Thus, "[t]he statute imposes no duty to seek credit from every possible lender before concluding that such credit is unavailable." *Id.*; see also *In re Ames Dep't Stores*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) (holding that debtor made a reasonable effort to

secure financing where it approached four lending institutions, was rejected by two, and selected the least onerous financing option from the remaining two lenders). Moreover, where few lenders are likely to be able and willing to extend the necessary credit to the debtor, "it would be unrealistic and unnecessary to require [the debtor] to conduct . . . an exhaustive search for financing." *In re Sky Valley, Inc.*, 100 B.R. 107, 113 (Bankr. N.D. Ga. 1988), *aff'd sub nom. Anchor Sav. Bank FSB v. Sky Valley, Inc.*, 99 B.R. 117, 120 n.4 (N.D. Ga. 1989).

39. The Debtor has satisfied the conditions under section 364(c) of the Bankruptcy Code to obtain financing in exchange for a superpriority administrative claim. The Debtor has determined that it is not able to secure sufficient funding on an unsecured or junior lien basis. The Pre-Petition Secured Lender and the sureties have existing liens on substantially all the Debtor's assets. What assets are unencumbered, if any, are insufficient to support the Debtor's needs. Likewise, the Debtor has determined that sufficient capital could not be raised on an unsecured basis or on a junior lien basis, even in combination with the Debtor's unencumbered non-cash assets.

40. Section 364(d)(1) authorizes the Debtor to obtain postpetition credit secured by a senior lien on assets of the estate, if the Debtor is unable to obtain sufficient credit without granting such a lien and the interests of any nonconsenting lien holders are adequately protected. 11 U.S.C. § 364(d)(1).

41. Courts have identified a number of factors that support a debtor's determination to obtain credit secured by a "priming" lien, including:

- (a) whether the party subject to a priming lien has consented to such treatment;
- (b) whether alternative financing is available on any other basis (i.e., whether any better offers, bids or timely proposals are before the court);
- (c) whether the proposed financing is necessary to preserve estate assets and is necessary, essential, and appropriate for continued operation of the debtor's business;

(d) whether the terms of the proposed financing are reasonable and adequate given the circumstances of both the debtor and proposed lender(s); and

(e) whether the proposed financing agreement was negotiated in good faith and at arm's length and entry therein is an exercise of sound and reasonable business judgment and in the best interest of the debtor's estate and its creditors.

See, e.g., In re Ames Dep't Stores, Inc., 115 B.R. at 37-39; *Bland v. Farmworker Creditors*, 308 B.R. 109, 113-14 (S.D. Ga. 2003); *In re Barbara K. Enter. Inc.*, No. 08-11474, 2008 WL 2439649 at *13 (Bankr. S.D.N.Y. Jun. 16, 2008); *see also* 3 COLLIER ON BANKRUPTCY ¶ 364.05 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2013).

42. The Debtor respectfully submits that the DIP Financing, including the granting of Priming Liens is appropriate under this analysis and the facts of this chapter 11 case. First, the priming requested is consensual. The proposed financing in this case provides for a senior lien on the assets of the estate, except to the extent of "Permitted Liens," which effectively proscribes the extent of the priming liens in order to comply with the terms of the Intercreditor Agreements. In other words, to the extent any of the liens of Bank of America or Travelers are being primed, the priming lien is consistent with the treatment of liens agreed to by Bank of America and Travelers in the Intercreditor Agreements. The Debtors are unaware of any secured claims other than the claims of the sureties and Bank of America and certain purchase money security interests in specific pieces of equipment. Consequently, the Debtor asserts that adequate protection to existing lien-holders is not an issue in this case.

43. Second, the Debtor and its advisors have determined that the DIP Financing is the only alternative readily available that can satisfy the Debtor's financing needs in this case and permit it to pursue a restructuring within chapter 11. The Debtor conducted extensive, arm's-length negotiations with the DIP Lender regarding the terms of the DIP Facilities. The Debtor is only able to obtain these negotiated terms by agreement to provide first priority priming liens. The

Debtor does not believe, moreover, that the financing necessary to fund this chapter 11 case and pursue the Debtor's restructuring goals is available from other lenders on comparable terms.

44. Third, the Debtor requires immediate access to the DIP Financing, along with the use of Cash Collateral, to provide adequate liquidity for the operation and maintenance of the Debtor's assets. The Debtor's access to the DIP Financing will benefit all stakeholders by facilitating the Debtor's efforts to preserve and enhance the value of the Debtor's assets.

45. Fourth, the Debtor and the DIP Lender negotiated the DIP Financing in good faith and at arm's-length. The Debtor's entry into the DIP Financing is an exercise of its sound business judgment and is in the best interests of its estate, creditors and other parties in interest.

C. The Debtor's Proposed Adequate Protection Should be Approved

46. Parties with an interest in cash collateral or collateral that may be used to secure postpetition financing are entitled to adequate protection. 11 U.S.C. § 363(e). Although section 361 of the Bankruptcy Code provides examples of forms of adequate protection, such as granting replacement liens and administrative claims, courts decide what constitutes sufficient adequate protection on a case-by-case basis. *See, e.g., Martin v. United States (In re Martin)*, 761 F.2d 472, 474-76 (8th Cir. 1985); *In re Satcon Tech. Corp.*, No. 12-12869, 2012 WL 6091160, at *6 (Bankr. D. Del. Dec. 7, 2012).

47. At the same time, it is well-recognized that "adequate protection" is not equivalent to "absolute protection." *In re Beker Indus., Inc.*, 58 B.R. 725, 741 (Bankr. S.D.N.Y. 1986) ("Adequate protection, not absolute protection, is the statutory standard."). Further, "[i]n order to encourage reorganization, the courts must be flexible in applying the adequate protection standard" as long as such flexibility does "not operate to the detriment of the secured creditor's interest." *In re Martin*, 761 F.2d at 476.

48. The Interim DIP Order provides for adequate protection for the DIP Lender and the subcontractors and suppliers of the Bonded Projects. As discussed in greater detail in the summary chart of the DIP Financing terms above, these adequate protection provisions include the reaffirmation of the protections provided by the Indemnity Agreements by certain non-Debtors and the waiver of preference claims against subcontractors and suppliers on the Bonded Contracts.

D. The Debtor Should be Authorized to Pay the Fees Required by the DIP Lender

49. In connection with the DIP Financing, the Debtor has agreed, subject to Court approval, to pay certain fees to the DIP Lender, including a facility fee in the amount of \$75,000. The fees that the Debtor has agreed to pay, together with the other provisions of the DIP Documents, represent the most favorable terms to the Debtor on which the DIP Lender would agree to make the DIP Financing available. The Debtor considered the fees when determining in its business judgment that the DIP Financing constituted the best terms on which the Debtor could obtain the necessary postpetition financing.

E. The Scope of the Administrative Expense Advance Is Appropriate

50. The DIP Financing provides for the payment of necessary fees and expense incurred during the administration of the estate. The proposed DIP Financing and the proposed Interim Order provides for the payment of all fees required to be paid to the clerk of the Bankruptcy Court and to the Office of the United States Trustee under section 1930(a) of title 28 of the United States Code, plus interest at the statutory rate. Additionally, the DIP Documents provide for the payment of professional fees approved pursuant to Section 330 of the Bankruptcy Code in the case to the extent set forth in the Budget.

F. The Debtor's Request for Use of Traveler's Cash Collateral is Appropriate and Necessary

51. By this Motion, the Debtor also requests authority to use Berkshire's Cash Collateral on the terms set forth in the proposed DIP Orders. The Debtor submits that this use of Cash Collateral is authorized pursuant to section 363(c) of the Bankruptcy Code.

52. Section 363(c) of the Bankruptcy Code provides as follows:

(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection 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.

11 U.S.C. § 363(c). Section 363(e) of the Bankruptcy Code further provides, in pertinent part, 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).

53. The Debtor must maintain sufficient access to cash to continue to operate its businesses as a going concern for the direct benefit of all stakeholders and implement its reorganization. It is, therefore, essential to the success of the Debtor's chapter 11 case that the Debtor immediately obtains authority to use Berkshire's Cash Collateral. The preservation of estate assets, the Debtor's continuing viability and its ability to maximize value for stakeholders successfully, thus, depend heavily upon the expeditious approval of the relief requested herein. The Debtor, therefore, seeks immediate authority to access the DIP Facilities on an interim basis

as set forth in this Motion and in the Interim Order to prevent immediate and irreparable harm to the Debtor's estate pending the Final Hearing pursuant to Bankruptcy Rule 4001(b).

G. The Automatic Stay Should be Modified for the Purposes of Granting the Relief Requested by this Motion

54. The Debtor seeks a modification of the automatic stay imposed by operation of section 362 of the Bankruptcy Code to the extent contemplated by the provisions of DIP Documents, as described above. Such stay modification provisions are customary features of postpetition financing facilities and, in the Debtor's business judgment, are reasonable under the circumstances. *See, e.g., In re Arch Coal, Inc.*, Case No. 16-41020-705 (CER) (Bankr. E.D. Mo. Jan. 15, 2016); *In re S. Reg'l Health Sys. Inc.*, No. 15-64266 (Bankr. N.D. Ga. Aug. 26, 2015); *In re Bakers Footwear Group, Inc.*, Case No. 12-49658-705 (CER) (Bankr. E.D. Mo. Nov. 5, 2012); *In re Cagle's, Inc.*, No. 11-80202 (Bankr. N.D. Ga. Oct. 21, 2011).

55. The DIP Financing provides that the DIP Lender is granted relief from the automatic stay in order to exercise all of its rights under the Loan and Security Agreement, the Interim Order, and the Final Order. These rights include the right to take control of the Bonded Projects in the DIP Lender's discretion. The Debtor is agreeable to this provision in light of the fact that, in the absence of continued funding from the DIP Lender, the Debtor will be unable to finish the projects or to continue in operation. Accordingly, the Debtor respectfully requests that this Court modify the automatic stay to the extent contemplated by the DIP Financing and the proposed Interim Order.

H. The Parties have Proceeded in Good Faith

56. The terms and conditions of the DIP Financing and the use of Cash Collateral are fair and reasonable and were negotiated by the parties in good faith and at arms' length. Therefore, the DIP Lender should be accorded the benefits of section 364(e) of the Bankruptcy Code to the extent any or all of the provisions of the DIP Documents, or any Interim Order or Final Order of

this Court pertaining thereto, are hereafter modified, vacated, stayed or terminated by subsequent order of this or any other court.

I. Request for Final Hearing

57. Pursuant to Bankruptcy Rules 4001(b)(2) and 4001(c)(2), the Debtor requests that the Court set a date that is no longer than 45 days from the Petition Date as date for the Final Hearing.

58. The Debtor requests that they be authorized to serve a copy of the Interim Order, which fixes the time and date for filing objections, by first class mail on the notice parties listed below. The Debtor further requests that the Court consider such notice of the Final Hearing to be sufficient notice under Bankruptcy Rule 4001(c)(2).

J. Request for Immediate Relief and Waiver of Stay

59. Pursuant to Bankruptcy Rules 6003(b) and 6004(h), the Debtor seeks entry of orders granting the relief requested by this Motion on an interim and final basis and, to the extent it applies, a waiver of any stay of the effectiveness of such orders.

60. Bankruptcy Rule 6003(b) provides, in relevant part, that "[e]xcept to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, issue an order granting ... a motion to use, sell, lease or otherwise incur an obligation regarding property of the estate including a motion to pay all or part of a claim that arose before the filing of the petition." Fed. R. Bankr. P. 6003(b). In other words, where the failure to grant any such requested relief would result in immediate and irreparable harm to the Debtor's estate, the Court may authorize the relief prior to the twenty-second day following the Petition Date. Bankruptcy Rule 6004(h) 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).

NOTICE

61. Notice of this Motion has been given to: (a) Counsel for the DIP Lender; (b) counsel for the Pre-Petition Secured Lender; (c) the Office of the United States Trustee for the Southern District of Florida; (d) counsel for Travelers; (e) the Debtor's 20 largest general unsecured creditors; (f) the Internal Revenue Service; and (g) the Securities and Exchange Commission. In light of the nature of the relief requested, the Debtor submits that no further notice is necessary.

NO PRIOR REQUEST

62. No prior request for the relief sought in this Motion has been made to this or any other Court in connection with this chapter 11 case.

WHEREFORE, the Debtor respectfully requests that the Court: (i) enter the Interim Order, substantially in the form attached hereto as **Exhibit C**, granting the relief requested herein on an interim basis; and (ii) grant such other and further relief to the Debtor as the Court may deem just proper.

Dated: March 1, 2019

Respectfully submitted,

BERGER SINGERMAN, LLP
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By: /s/ Jordi Guso
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Exhibit A
Loan and Security Agreement

LOAN AND SECURITY AGREEMENT

This LOAN AND SECURITY AGREEMENT ("this Agreement") made and entered into this ____ day of March, 2019, by and between MAGNUM CONSTRUCTION MANAGEMENT, LLC, f/k/a MUNILLA CONSTRUCTION MANAGEMENT, LLC, a Florida limited liability company (successor by conversion to Magnum Construction Management Corp.) (d/b/a MCM), as debtor and debtor-in-possession ("Debtor"), and BERKSHIRE HATHAWAY SPECIALTY INSURANCE COMPANY ("DIP Lender"). All capitalized terms will have the meaning set out in this paragraph, the recitals, and Section 1.

WHEREAS, Debtor and certain Indemnitors heretofore executed in favor of Surety (including DIP Lender) certain of the Indemnity Agreements;

WHEREAS, Debtor and Indemnitors are in default of their obligations under the Indemnity Agreements and Debtor admits that it is financially unable to perform or complete the performance of the Bonded Contracts without the assistance of and certain financial accommodations from DIP Lender ("Existing Defaults");

WHEREAS, Debtor and certain other Indemnitors are parties to that certain Trust, Financing and Collateral Agreement dated as of July 19, 2018, as amended by that First Amendment to Trust, Financing and Collateral Agreement dated February 28, 2019 (as may be amended, restated, supplemented, or otherwise modified, "the Trust Financing Agreement"), pursuant to which DIP Lender made certain loans and other financial accommodations to Debtor;

WHEREAS, Debtor is a construction company specializing in building and heavy civil construction and Debtor has been required from time to time in connection with its business to give certain bonds, some of which have been issued or procured by DIP Lender;

WHEREAS, on March 1, 2019, Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court, Southern District of Florida ("the Bankruptcy Court"), styled In Re: Munilla Construction Management, LLC, et al., Case No. __("the Bankruptcy Case");

WHEREAS, Debtor has requested that DIP Lender extend financing to Debtor in connection with the Bankruptcy Case to facilitate its reorganization and the completion of Work with respect to the Bonded Contracts;

WHEREAS, DIP Lender is willing to make loans and extend credit to Debtor, subject to the terms and conditions set out herein and subject to the terms and conditions set forth in the Financing Order and any other orders of the Bankruptcy Court approving the proposed financing by DIP Lender; and

WHEREAS, the parties desire to enter into this Agreement and to memorialize their agreements with respect to the matters herein set forth.

NOW, THEREFORE, in consideration of the foregoing premises, and other good and valuable considerations, the adequacy and sufficiency of all of which are hereby acknowledged, the parties hereto agree as follows:

1. Definitions. Unless the context otherwise requires, the following terms when used in this Agreement will have the meanings set forth below:

"Acceptable Plan" means a Chapter 11 Plan which (a) provides for: (i) allowance of all claims in favor of DIP Lender as fully secured claims; (ii) repayment of all Surety Loss in accordance with the terms of the Note; (iii) the incorporation of the terms of this Agreement and the Financing Order after the effective date, including, but not limited to, the assumption of the Trust Financing Agreement, Indemnity Agreements, and all other Surety Credit Documents; (iv) the assumption by Debtor of the Bonded Contracts, which assumption will be subject to all of the terms and provisions of this Agreement, including, but not limited to, Sections 11 - 16; (v) an effective date no later than August 2, 2019; and (vi) a full and complete release of any and all claims that Debtor might have or assert against DIP Lender, Surety, or any affiliate of DIP Lender or Surety, whether arising prior to or after the effective date of such Chapter 11 Plan, including all claims challenging or related to DIP Lender's position as a secured creditor or that arise under any provision of Chapter 5 of the Bankruptcy Code; or (b) which is otherwise acceptable to DIP Lender in its discretion. For the avoidance of doubt, the Chapter 11 Plan is an Acceptable Plan.

"Account Debtors," "Chattel Paper," "Commercial Tort Claims," "Deposit Accounts," "Equipment," "Goods," "Instruments," and "Investment Property" have the same respective meanings as are given those terms in the UCC.

"Accounts" means and includes all of Debtor's now owned or hereafter acquired accounts (as defined in the UCC); accounts receivable; fees generated from their Work; any and all intercompany payables and receivables by and between Debtor and MCM Global, S.A. and/or any other Indemnitor, Proceeds, including without limitation, Proceeds of any letter of credit on which any of Debtor is beneficiary, and all forms of obligations whatsoever owing to any of Debtor together with all instruments and documents of title representing any of the foregoing; and all rights, security, and guaranties with respect to each of the foregoing, in each case arising out of or related to any Bonded Contract.

"Acknowledgments of Default" means Debtor's notices of default to certain Obligees signed by Debtor and provided to the DIP Lender prior to the Petition Date.

"Administrative Expense Advance" means the portion of the DIP Facility advance for the payment of (i) fees and expenses incurred by professionals retained by Debtor and the Committee, all up to the amount set forth in the Budget; (ii) fees due to the United States Trustee pursuant to 28 U.S.C. Section 1930(a)(6); and (iii) fees due the Clerk of the Court, as set forth in Section 4(d) of this Agreement.

"Administrative Expense Carve Out" means the carve out from DIP Lender's super-priority administrative expense claim (allowed under Section 5 of this Agreement) in order to allow the Administrative Expense Advance to be used as set forth in Section 4(d).

"Affiliate" means, with respect to any Person, any other Person or group acting in concert with respect of such Person that, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under the common control with such Person. For purposes of this definition, "control" (including, with correlative meanings, the terms "controlled by" and "under common control with"), as used with respect to any Person or group of Persons, will mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities or by contract or otherwise. None of Indemnitors is an Affiliate of Surety.

"Avoidance Claim" means any claim that could be asserted by or on behalf of Debtor or any estate created in a Chapter 11 case pursuant to 11 USC §541(a) against a person under §§502(d), 544, 545, 547, 548, 549, 550, 551, or 553 of the Bankruptcy Code.

"Bankruptcy Code" means Title 11 of the United States Code entitled "Bankruptcy," as now and hereafter in effect, or any successor statute.

"Bond" means any surety bonds, guarantees, undertakings, and/or contractual obligations, including renewals and extensions thereof, and including bonds and undertakings for which Surety has obligations as a result of an asset purchase, acquisition, or like transaction having heretofore been and may hereafter be required by, for, or on behalf of any one or more of Indemnitors and any other indemnitors under any of the Indemnity Agreements.

"Bonded Contract" means an agreement of Indemnitors, or any other indemnitor under any of the Indemnity Agreements, for which Surety executes a Bond, procures a Bond, assumed the obligations of a Bond, or has guaranteed performance.

"Bonded Contract Funds" means all payments made, or to be made, to or on behalf of Principal pursuant to, arising out of, or relating to any Bonded Contract, including, without limitation, and whether earned and unpaid or to be earned, any increases in contract amounts, and payments made, as a result of affirmative claims (including, without limitation, changed condition claims; wrongful termination claims; claims against any architect, subcontractor, contractor, or Obligee).

"Budget" means Debtor's budget attached as Exhibit A.

"Business Day" means any day excluding Saturday, Sunday, and any day which is a legal holiday under the laws of the State of Florida or is a day on which banking institutions located in such state are authorized or required by law or other governmental action to close.

"Chapter 11 Plan" means Debtor's plan of reorganization filed on the Petition Date in the Bankruptcy Case.

"Collateral" means Accounts, Chattel Paper, Commercial Tort Claims, Contract Rights, Documents, General Intangibles, Equipment, Goods, Inventory, Instruments, Investment Property, Records, the Credit Card Deposit Account, all tangible and intangible property, and any and all

assets with respect to which Surety is granted a Lien in Section 6 of this Agreement, and Proceeds of any of the foregoing, whether now owned or hereafter acquired.

"Committee" means creditors or equity security holders committee appointed in any Chapter 11 case by the U.S. Trustee.

"Confirmation Order" means an order entered by the Bankruptcy Court confirming a Chapter 11 Plan.

"Contract Rights" means all of Debtor's contracts, contract rights (including, but not limited to, rights under contracts for Work performed by Debtor, subcontracts, and contracts for the purchase of supplies), and rights under Bonded Contracts.

"Credit Card Deposit account" means that certain deposit account DDA No. #####5627 established with Pre-Petition Lender, which is collateral security for certain obligations of Debtor to Pre-Petition Lender with respect to credit cards issued by Pre-Petition Lender.

"Debt" means, as of any applicable date of determination and as to any Person, all items of indebtedness, obligation, or liability of such Person, whether matured or unmatured, liquidated or unliquidated, direct or indirect, absolute or contingent, joint or several, that should be classified and presented as a liability on a balance sheet prepared in accordance with GAAP, including without limitation any billings in excess of costs and estimated earnings on Work that has not been completed.

"Event of Default" means any one or more of the following occurring after the date of this Agreement that is determined by DIP Lender to constitute an Event of Default on or after its occurrence:

(a) Debtor has failed or refused to comply with any provisions of the Financing Order or has failed or refused to perform any obligation under this Agreement; or

(b) any Indemnitor has failed or refused to perform any obligation to Surety under the Indemnity Agreements, or otherwise, provided, that, Debtor's obligation to satisfy any Surety Loss will be governed by the terms and provisions of this Agreement and the Note as long as no Event of Default occurs after the execution of this Agreement; or

(c) any Obligee has declared Principal in default under any Bonded Contract and Principal has failed to cure such default within any cure period provided in such Bonded Contract. It will be no defense to the enforcement of this Agreement by DIP Lender that Principal asserts that it is not in default under the Bonded Contract; or

(d) Principal has acknowledged in writing its default under any Bonded Contract, irrespective of whether Principal is actually in default of the Bonded Contract; or

(e) Debtor fails to deposit any Bonded Contract Funds into the appropriate Segregated Deposit Account as required under the terms of the Trust Financing Agreement;

(f) DIP Lender receives notice or knowledge of facts, giving rise to a reasonable belief that Surety has sustained or may sustain or incur a Surety Loss (other than Surety Loss described in item (b) of the definition of Surety Loss and other attorneys' fees and similar fees and professional fees incurred in the ordinary course of business that are promptly reimbursed to Surety by Indemnitors) in excess of the loans and advances contemplated by DIP Lender under Section 4; or

(g) Principal has failed or refused to pay or is unable to pay claims, bills, or other indebtedness incurred in, or in connection with, the performance of any Bonded Contract after taking into account advances and loans made by DIP Lender to Debtor pursuant to the terms and conditions of this Agreement; or

(h) the occurrence of a default under any document relating to any Debt of Debtor; or the foreclosure or notice of foreclosure by any lender or holder of any Debt of Debtor on any collateral that secures any Debt of Debtor; or

(i) Debtor fails to pay any Debt that arises post-petition, or any pre-petition Debt that is assumed by Debtor, in excess of Two Hundred Fifty Thousand Dollars (\$250,000) due any Person and such failure will continue beyond any applicable grace period, or Debtor will suffer to exist any other post-petition event of default under any agreement binding Debtor if the result of such an event of default is the acceleration of debt in excess of Two Hundred Fifty Thousand Dollars (\$250,000); or

(j) any financial statement, representation, warranty, or certificate made or furnished by Debtor to DIP Lender in connection with this Agreement, the other Loan Documents or the Surety Credit Documents, or as an inducement to DIP Lender to enter into this Agreement, or in any separate statement or document to be delivered hereunder to DIP Lender was or proves to be false, incorrect, or incomplete in any material respect when made; or

(k) Debtor fails to give prompt notice to DIP Lender of its knowledge of any pending or threatened claim or suit for payment of money aggregating in excess of Two Hundred Fifty Thousand Dollars (\$250,000) or will fail to vigorously defend any such claim or suit or seek to stay execution of any such judgment; provided, however, that the foregoing will not apply to any litigation, claim, or demand that was pending or threatened as of the Petition Date, provided, that, Debtor has provided DIP Lender with written notice of any such pending or threatened claim; or

(l) Debtor allows a judgment creditor to obtain possession of any of the Collateral by any means, including, but without limitation, levy, distraint, replevin, or self-help; or

(m) if Debtor violates, breaches, or fails to adhere to any of the terms, conditions, or covenants of any of the Loan Documents or the Surety Credit Documents; or

(n) the filing of a petition under any applicable provisions of the Bankruptcy Code by or against one or more of Indemnitors (other than Debtor and/or MCM Global, S.A.), the making by any one or more of Indemnitors (other than Debtor and/or MCM Global, S.A.) of any assignment for the benefit of creditors, or if any one or more of the Indemnitors (other than Debtor and/or MCM Global, S.A.) becomes insolvent or generally unable to satisfy debts as they become due, the filing of a tax lien against one or more of the Indemnitors (other than Debtor and/or MCM Global, S.A.), the filing of a petition for the appointment of a receiver or trustee with respect to an Indemnitor (other than Debtor and/or MCM Global, S.A.) or the commencement of any proceeding by or against one or more of the Indemnitors (other than Debtor and/or MCM Global, S.A.) under any reorganization, arrangement, readjustment of debts, dissolution, liquidation or assignment for the benefit of creditors by statute or law of any jurisdiction; or

(o) Debtor fails to give prompt notice to DIP Lender of the knowledge of any pending or threatened proceeding or claim before any court or governmental agency or department which involves a risk of having a Material Adverse Effect; or

(p) if the Bankruptcy Case is dismissed, suspended, or converted to a case under Chapter 7 of the Bankruptcy Code or a trustee will be appointed in the Bankruptcy Case; or an application will be filed by Debtor for the approval of, or there will arise, any other claim not contemplated by this Agreement having priority senior to or *pari passu* with the claims of Surety under this Agreement or any other claim having priority over any or all administrative expenses of the kind specified in Section 503(b) or 507(b) of the Bankruptcy Code; or

(q) if the Bankruptcy Court enters an order (i) granting relief from the automatic stay applicable under Section 362 of the Bankruptcy Code to any holder (other than DIP Lender) of any security interest in the Collateral; or (ii) approving any settlement or other stipulation with any creditor of Debtor (other than DIP Lender), or otherwise providing for payments as adequate protection or otherwise to such creditor, individually or in the aggregate in excess of Two Hundred Fifty Thousand Dollars (\$250,000) for any and all such creditors; provided, however, that the granting of relief from the automatic stay to a creditor to pursue any claim solely to the limits of available insurance will not constitute or deemed an Event of Default; or

(r) except as otherwise permitted by an order of the Bankruptcy Court to which DIP Lender has not objected as of the date hereof, and to which it has consented after the date hereof, Debtor makes any payment (as adequate protection or otherwise) on account of any claim arising or deemed to have arisen prior to the commencement of the Bankruptcy Case; or

(s) the Bankruptcy Court enters an order in the Bankruptcy Case appointing an examiner with powers beyond the duty to investigate and report as set forth in Section 1106(a)(3) and (4) of the Bankruptcy Code; or

(t) Debtor brings a motion in the Bankruptcy Case: (a) to obtain working capital financing from any Person under Section 364 of the Bankruptcy Code (other than with respect to a financing: (i) used, in whole or part, to repay in full Surety Loss that is consistent with the terms of this Agreement, or (ii) provided by any lender after the Petition Date authorized by

an order authorizing debtor in possession to enter into postpetition financing pursuant to Section 364 of the Bankruptcy Code, and granting liens, security interest, and super priority claims entered by the Bankruptcy Court, that is consistent with the terms of this Agreement); (b) to grant any Lien upon or affecting any Collateral other than Liens in favor of Surety and Liens in favor of Pre-Petition Lender and Travelers consistent with this Agreement and the Intercreditor Agreements; (c) to use any proceeds arising from Bonded Contracts (said proceeds constituting "cash collateral" as that term is defined under Section 363 of the Bankruptcy Code) under Section 363(c) of the Bankruptcy Court other than as is permitted under this Agreement without the prior written consent of DIP Lender; (d) to recover from any portions of the Collateral any costs or expenses of preserving or disposing of such Collateral under Section 506(c) of the Bankruptcy Court; (e) to effect any other action or actions materially adverse to DIP Lender or its rights and remedies hereunder or its interest in the Collateral; (f) to obtain Bankruptcy Court approval of a disclosure statement for a Chapter 11 Plan other than an Acceptable Plan or a Confirmation Order will be entered with respect to a Chapter 11 Plan (regardless of the proponent of such Chapter 11 Plan) if such Chapter 11 Plan is not an Acceptable Plan; or (g) to alter, amend, vacate, supplement, modify, or reconsider, in any respect, of the Financing Order or, without DIP Lender's prior written consent, the Financing Order is amended, vacated, stayed, reversed, or otherwise modified, whether on appeal or otherwise; or

(u) any Person (including any Committee) will successfully prosecute any action, suit, or other proceeding or contested matter challenging the validity, perfection, or priority of any Liens of DIP Lender securing Surety Loss, or the validity or enforceable of any of the Loan Documents or the Surety Credit Documents, or asserting any avoidance claims against DIP Lender or seeking to recover any monetary damages from DIP Lender;

(v) the determination of Debtor, whether by vote of its managers, members, or otherwise, to suspend the operation of Debtor's business in the ordinary course, liquidate all or substantially all of Debtor's assets, or the filing of a motion or other application in the Bankruptcy Case, seeking authority to do any of the foregoing; or

(w) this Agreement or any related document will be terminated, revoked, or declared void or unenforceable or challenged by Debtor;

(x) for any reason (other than the failure of DIP Lender to take any action available to it to maintain perfection of DIP Lender's Liens pursuant to this Agreement) this Agreement ceases to be in full force and effect or any Lien with respect to any material portion of the Collateral ceases to be, or is not, valid, perfected, and prior to all other Liens except for Permitted Liens, if any, that, pursuant to the Financing Order, are senior to DIP Lender's Liens under this Agreement), or this Agreement is terminated, revoked, or declared void;

(y) Debtor fails to submit an Acceptable Plan for approval to the Bankruptcy Court on or before March 8, 2019; and

(z) Debtor fails to obtain a Confirmation Order of an Acceptable Plan with an effective date that is on or before August 2, 2019.

(aa) The occurrence of a Material Adverse Effect on any of the Bonded Contracts.

Notwithstanding anything in any of the Surety Credit Documents to the contrary, no Event of Default will be deemed to have occurred as a result of the filing of the Bankruptcy Case. An Event of Default will be deemed to continue to exist and will not be deemed to be cured notwithstanding the payment by Surety pursuant to the Bonds of claims, bills, or other indebtedness incurred in, or in connection with, the performance of the Bonded Contracts.

"Existing Defaults" has the meaning set forth in the recitals above.

"Facility Fee" means seventy five thousand dollars (\$75,000.00).

"Financial Statements" means balance sheets, income statements, and other financial data of Debtor.

"Financing Order" means an interim order and/or a financing order that is entered by the Bankruptcy Court, following proper notice and a hearing thereon, which is in all respects satisfactory to DIP Lender and which, among other things, authorizes the incurrence by Debtor of post-petition secured and super administrative priority Debt as contemplated by this Agreement and that complies with Section 24(g) and affords adequate protection of Liens in favor of DIP Lender.

"GAAP" means generally accepted accounting principles set forth in the opinions and pronouncements of the Accounting Principles Board and the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board.

"Indemnitors" Debtor, M.C.M. Global, S.A., Principal, 7501 Medley Civil, LLC, Gail Munilla, Jacquelyn Munilla, Jorge Munilla, Juan Munilla, Madeleine Munilla, Pedro Munilla, and Raul Munilla. The failure to include any Person who is a party to or bound by any of the Indemnity Agreements as an "Indemnitor" under the terms and provisions of this Agreement will not be deemed to effect or modify the obligations of any such Person under any of the Indemnity Agreements.

"Indemnity Agreements" means: (i) General Agreement of Indemnity dated October 31, 2016, executed by Indemnitors in favor of Surety; (ii) any and all other indemnity agreements heretofore or hereafter executed by any of Indemnitors in favor of Surety; and (iii) any and all amendments, modifications, replacements, and restatements of any of the foregoing.

"Intercreditor Agreements" means: (i) Intercreditor Agreement dated as of August, 2018, by and between Surety and Pre-Petition Lender; (ii) Surety Intercreditor Agreement dated as of August 8, 2018, by and between Travelers and Surety; (iii) Intercreditor Agreement dated as of the date hereof by and between DIP Lender and Travelers; and (iv) any and all modifications, amendments, substitutions, or restatements of either of the foregoing.

"Inventory" means all of Debtor's present and subsequently acquired inventory wherever

located together with all goods and materials used or usable in manufacturing, processing, packaging or shipping same in all stages of production from raw materials to finished goods and all Proceeds from such Inventory.

"Laws" means all ordinances, statutes, rules, regulations, orders, injunctions, writs, or decrees of any government or political subdivision or agency thereof, or any court or similar entity established by any thereof.

"Lien" means any mortgage, security interest, lien, pledge, charge, proxy, voting trust or arrangement, encumbrance, lease, sublease, license, or other rights of use by another or other interest of any character whatsoever.

"Liquidation Event" means (i) any voluntary or involuntary liquidation, dissolution, or winding up of Debtor, (ii) any sale of all or substantially all of the assets of Debtor, and/or (iii) any sale of all or substantially all of the membership or other equity interest of, including, but not limited to, any merger, reorganization, or recapitalization of substantially all of the membership or other equity interest of Debtor.

"Loan Documents" means this Agreement, the Note, the Amended Mortgage, and any other instruments, agreements or other documents entered into in connection herewith.

"Loan Parties" means, collectively, the Debtor and the Mortgagor.

"Material Adverse Effect" means, relative to any occurrence of whatever nature (including the adverse determination in any litigation, arbitration, or governmental investigation or proceeding), (i) a material adverse effect on the financial condition, business, or business operations of Debtor and its Subsidiaries taken as a whole, or (ii) a material impairment of the ability of Debtor to satisfy its obligations to DIP Lender under the Loan Documents or to Surety under the Surety Credit Documents, or (iii) a material adverse impact on DIP Lender's or Surety's security interest in the Collateral; or (iv) the loss or removal of any of Debtor's equipment currently being utilized to complete the Bonded Contract relating to the A1A Project, and (A) Debtor is unable to procure replacement equipment necessary to complete the Bonded Contract for the A1A Bonded Project, or (B) the rental or other costs associated with obtaining new equipment exceeds \$18,900.00.

"Amended Mortgage" means the Amended and Restated Mortgage dated as of the date hereof executed by Mortgagor for the benefit of DIP Lender.

"Mortgagor" means 7501 Medley Civil, LLC, a Florida limited liability company.

"Note" means certain secured Promissory Note of even date, in the original principal amount of Three Million Dollars (\$3,000,000.00) executed by Debtor in favor of DIP Lender.

"Obligations" means and includes the punctual payment and performance of Loan Parties obligations under this Agreement and the other Loan Documents, Surety Loss and all loans, advances (including, without limitation, advances for overdrafts of Indemnitors or interest

payments to prior secured parties, mortgagees, or lienors, or for Taxes, levies, insurance, rent, repairs to, or maintenance or storage of any of the Collateral; provided, however, except as provided in Section 3, nothing herein will be construed as a requirement or commitment that DIP Lender will make any advances), Debts, liabilities, obligations, covenants, and duties owing by Indemnitors to Surety of any kind or nature, present or future, whether or not evidenced by any note, guaranty, or other instrument, arising under the Surety Credit Documents whether or not for the payment of money, whether arising by reason of an extension of credit, opening of a letter of credit, loan, lease, guaranty, indemnification, or in any other manner, whether direct or indirect, absolute or contingent, due or to become due, including without limitation, all interest, charges, expenses, fees, attorneys' fees, consulting and accounting fees, and any other sums chargeable to Indemnitors under the Surety Credit Documents, or any other agreement with Surety.

"Obligee" means any named party or parties appearing on any Bond in whose favor the Bond is issued, and such parties' successors and assigns.

"Overhead" means the general operating and administrative expenses of Debtor, including, but not limited to, the cost of rent, utilities, Taxes, and all other expenses of Debtor.

"Permitted Liens" means:

(a) Liens of governmental agencies for taxes, assessments, or governmental charges not yet past due or that are being contested in good faith by appropriate proceedings and for which adequate reserves have been established in accordance with GAAP;

(b) inchoate non perfected mechanics', workmen's, and repairmen's Liens or other like Liens arising by operation of law in the ordinary course of business of Debtor and not past due unless contested in good faith by appropriate proceedings;

(c) any Lien granted to Surety to secure the payment of Surety Loss;

(d) provided, that, the respective Intercreditor Agreements are in full force and effect, any liens granted to Pre-Petitioned Lender and Travelers that are consistent with the terms and provisions of the Intercreditor Agreements; and

(e) purchase money Liens on individual specific pieces of Equipment that are evidenced by UCC financing statements recorded with the Florida Secretary of State at least ninety (90) days prior to the Petition Date.

"Person" means any entity, whether an individual, trustee, corporation, partner, joint stock company, unincorporated organization, business association or firm, joint venture, a government or any agent or instrumentality or political subdivision thereof.

"Petition Date" means March 1, 2019 (the date on which Debtor filed for bankruptcy pursuant to the Bankruptcy Code).

"Pre-Petition Lender" means Bank of America, N.A., in its capacity as a lender to Debtor.

"Principal" means Debtor and any other Person that is designated as the "principal" under any Bond.

"Proceeds" means whatever is receivable or received when Collateral or proceeds are sold, collected, exchanged, or otherwise disposed of, whether such disposition is voluntary or involuntary, and includes, without limitation, all rights to payment, including returned or rebate of premiums, with respect to any insurance relating thereto.

"Records" means correspondence, memoranda, tapes, books, discs, paper, magnetic storage, and other documents or information of any type, whether expressed in ordinary or machine language.

"Segregated Deposit Accounts" means (i) Account No. #####2533 with Wells Fargo Bank titled Alan Gray LLC/FBO Berkshire Hathaway Specialty Ins/Munilla Construction Management, established by an agent for Berkshire for and on behalf of Surety; and (ii) any account owned by Surety, or any agent of Surety, into which any of the funds in the foregoing accounts may be transferred.

"Subsidiary" means, with respect to any Person, any corporation, partnership, association, joint venture, or other business entity of which more than fifty percent (50%) of the total voting power of shares of stock or other ownership interests entitled (without regard to the occurrence of any contingency) to vote in the election of the Person or Persons performing similar functions) having the power to direct or cause the direction of the management and policies 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.

"Surety" means Berkshire Hathaway Specialty Insurance Company, National Liability and Fire Insurance Company, National Indemnity Company and any subsidiaries or affiliates and any other companies from whom any of them procures bonds on behalf of Principal, and their respective co-sureties and reinsurers and their respective successors.

"Surety Credit Documents" means, collectively: (i) the Indemnity Agreement, (ii) the Trust Financing Agreement, (iii) the Surety Note, (iv) Mortgage and Security Agreement dated as of July 25, 2018, executed by Mortgagor in favor of DIP Lender, as amended by that Notice of Future Advance and Mortgage Modification Agreement dated as of February 28, 2019, (v) the Bonds, and (vi) all other documents and instruments heretofore or hereafter executed by or on behalf of Indemnitors or any of their Affiliates in connection therewith, and any and all modifications, amendments, substitutions, or other documents related thereto, whether executed by Indemnitors or any of their Affiliates.

"Surety Loss" means:

(a) All damages, costs, reasonable attorney fees and liabilities, including all related and incurred expenses that the Surety may sustain or incur by reason of issuing Bonds, which already or hereafter may be executed or procured on behalf of the Indemnitors, or any renewal or

continuation thereof; or which may be sustained or incurred by reason of making any investigation on account thereof, prosecuting or defending any action in connection therewith, obtaining a release, recovering or attempting to recover any salvage in connection therewith or enforcing by litigation or otherwise any of the provisions of this Agreement, or the other Surety Credit Documents, including, but not limited to:

(1) money judgments, amounts paid in settlement or compromise, the full amount of reasonable attorney and other professional fees incurred or paid by Surety, court costs and fees, including, but not limited to, any attorney and professional fees incurred in any bankruptcy involving any of Indemnitors, with interest at the maximum legal rate allowable on all sums due Surety from the date of the Surety's demand for such sums, whether or not interest has been awarded by a court; and

(2) any loss which Surety may sustain or incur in connection with the Bonded Contracts or Bonds, whether that loss results from the activity of the Indemnitors solely or as part of a joint venture, partnership or other entity which has been or may be formed with the Indemnitors; and

(3) any loss which the Surety may sustain or incur as a result of any actions taken by the Surety upon information provided by the Indemnitors; and

(4) any advances or loans made by Surety, if any; and

(5) any reserves established by Surety with respect to the Bonds and/or the Surety Credit Documents; and

(6) any amounts that have been paid to Surety that a court of competent jurisdiction determines constitute "preferences," within the meaning of §547 of the Bankruptcy Code, and by reason thereof the Surety is required to disgorge any such amounts paid.

(b) reasonable legal, accounting, and consulting fees and related expenses, including but not limited to, reasonable legal fees incurred in the enforcement of the Surety Credit Documents.

(c) all premiums, fees, interest and other charges due the Surety in connection with the Surety Credit Documents or the Bonds.

"Surety Note" means the Consolidated and Renewal Promissory Note dated as of February 28, 2019 in the face amount of \$3,666,157.21 executed by Debtor and Mortgagor to the order of DIP Lender.

"Tax" means any present or future tax, levy, impost, duty, charge, fee, deduction, or withholding of any nature and whatever called, by whomsoever, on whomsoever and wherever imposed, levied, collected, withheld, or assessed.

"Travelers" means, collectively, Travelers Casualty and Surety Company of America, St. Paul Fire and Marine Company and any of their present and future direct and indirect parent companies, any of the respective present and future direct or indirect affiliates or subsidiaries of such companies and parent companies, and/or any co-sureties, fronting companies, and reinsurers and/or any of the aforementioned entities' successors or assigns.

"Trust Financing Agreement" shall have the meaning set forth in the recitals above.

"UCC" means the Uniform Commercial Code as in effect on the date hereof in the State of Florida as it may be amended from time-to-time; provided that if by reason of mandatory provisions of law, the perfection or the effect of perfection or non-perfection of a security interest in any Collateral is governed by any state other than Florida, "UCC" means the Uniform Commercial Code as in effect in such other jurisdiction for purposes of the provisions hereof relating to such perfection or effect of perfection or non-perfection.

"Work" means the building and heavy civil constructions, and other work and services required by any Bonded Contract, whether completed or partially completed, of any Principal, and includes all other labor, materials, equipment, and services provided or to be provided by any Principal to fulfill any of Principal's obligations.

Unless otherwise provided herein: (i) any collective defined term and any defined term used in the plural will be taken to encompass all members of the relevant class; (ii) any defined term used in the singular preceded by "any" will be taken to indicate any number of the members of the relevant class; and (iii) any defined term used in the singular and preceded by the word "each" will indicate all members of the relevant class, individually.

2. Future Bonding. The execution of this Agreement in no manner binds DIP Lender to execute any future bonds on behalf of Debtor. Debtor specifically acknowledges and agrees that its execution of this Agreement has not been induced by reliance upon any oral or written representations by DIP Lender or its agents, employees, attorneys, or consultants that DIP Lender will execute any future bonds on behalf of Debtor.

3. Indemnification. Debtor hereby indemnifies and holds Surety, its officers, directors, attorneys, consultants, employees, and agents free and harmless from and against any and all actions, causes of action, suits, losses, liabilities, and damages, and expenses in connection therewith, including, without limitation, counsel fees and disbursements (including allocated costs of in-house counsel, accountants, and engineers), incurred by Surety as a result of, or arising out of, or relating to the execution, delivery, performance, or enforcement of this Agreement, the other Loan Documents or the Surety Credit Documents or any instrument contemplated therein. The duty of Debtor to indemnify Surety is a continuing duty, separate from the duty to exonerate, and survives any payments made in exoneration of Surety. Debtor recognizes and acknowledges the common law right of Surety to be exonerated by Principal. Upon the occurrence of an Event of Default and the failure or refusal of Principal to exonerate Surety upon demand, Debtor agrees, upon demand by Surety, to exonerate Surety from Surety Loss, by satisfying such Principal's obligations under the Bonded Contracts and obtaining either a withdrawal of all claims against Surety under the Bonds or a general release. If and to the extent that the foregoing undertaking

may be unenforceable for any reason, Debtor hereby agrees to make the maximum contribution to the payment and satisfaction of such liabilities and costs permitted under applicable Laws. The Indemnity Agreements remain in full force and effect.

Debtor possesses the duty to remain informed of all aspects of its business and the business activities and financial affairs of Principal. Surety possesses no obligation to inform any of Indemnitors of any aspect of any Principal's business or the business activities and financial affairs of any of Indemnitors or of the request for, or issuance of, any Bonds. Surety may, but has no obligations, to make additional advances for or on behalf of Principal, without any request having been made by Principal. In the event any such loans or advances are made by Surety, all such loans and advances will be governed by the terms and provisions of this Agreement.

4. DIP Facility.

(a) Subject to the terms and conditions of this Agreement and the Financing Order (including DIP Lender's right to cease making loans to Debtor), and subject to the satisfaction of the conditions precedent set out in Section 24, DIP Lender agrees to make loans and advances ("Advances") to or on behalf of Debtor in the aggregate principal amount of Three Million (\$3,000,000.00) as follows:

(i) Loans and advances to satisfy payments to (i) subcontractors, (ii), suppliers, or (iii) the direct or indirect labor costs incurred by the Debtor in the performance of the Bonded Contracts, in an aggregate amount not to exceed _____ ("Subcontractor and Supplier Advance") (after taking into account any Bonded Contract Funds remitted to any of the Segregated Deposit Accounts or to DIP Lender that are available to pay such subcontractors and suppliers), whether made directly by DIP Lender to any such subcontractor or supplier to satisfy any payment bond claim or otherwise, or deposited into any of the Segregated Deposit Accounts for payment to any such subcontractor or supplier – whether any loan or advance is to be made by DIP Lender to satisfy payments to subcontractors and suppliers is conditioned on DIP Lender determining to its satisfaction, its sole and absolute discretion, that any such amount asserted by any subcontractor or supplier to be due is a valid due amount for each such subcontractor or supplier and is for Work, services, or supplies provided to progress the Work under a Bonded Contract. Without limiting the foregoing discretion of DIP Lender, DIP Lender may rely on representations and warranties of Debtor, Pedro Munilla, and/or Jorge Munilla as to the validity and amount due any such subcontractor and supplier for which any such loan or advance may be made;

(ii) _____ in the aggregate to satisfy DIP Lender's percentage of Overhead reflected on the Budget ("Overhead Advance"); and

(iii) loans in the aggregate amount of Seven Hundred Thousand Dollars (\$700,000) (the "Administrative Expense Advance") to satisfy the fees and expenses of the professionals retained by Debtor (the "Debtor Professionals") and the Committee (the "Committee Professionals"), up to the amounts set forth in the Budget for each, fees due the United States Trustee pursuant to 28 USC Section 1930(a)(6) and fees due the Clerk of Court (collectively, the "Administrative Expenses"). So long as no Event of Default has occurred and to the extent that

the Administrative Expense Advance has not been exhausted, DIP Lender will advance commencing on the date of the entry of the Interim Order and continuing monthly thereafter, the amounts set forth in the Budget, and allocated for such fees and expenses; said funds will be advanced to and segregated and escrowed in an escrow account maintained by counsel for the Debtor for payment in accordance with any procedures which may be approved by the Court for the payment of professionals (the "Administrative Expense Escrow"). Neither the Debtor nor any creditor of any of the Debtor (except for the DIP Lender) will have a claim or interest in the funds on deposit in the Administrative Expense Escrow, other than the entitlement of the Debtor or a successor trustee to receive; (i) any balance remaining in the Administrative Expense Escrow after payment in full of (a) the Administrative Expenses that have accrued and that are allowed by final order of the Bankruptcy Court, and (b) the Obligations; and (ii) any amounts paid from the Administrative Expense Escrow but subsequently disallowed by final order of the Court that are not otherwise payable to the DIP Lender. From and after the occurrence of an Event of Default, to the extent that the Administrative Expense Advance has not been exhausted, DIP Lender will advance (a) the amount of the fees and expenses budgeted for the Debtor Professionals and Committee Professionals through such date, (b) Fifty Thousand Dollars (\$50,000) to be allocated towards the fees and costs incurred by the Debtor Professionals from and after the Event of Default, and (c) the amounts due to the Clerk of the Court and the US Trustee for any unpaid fees.

(b) Debtor will execute the Note to evidence the advances and loans to be made under this Agreement. Said loans and advances will be repaid to DIP Lender as set forth in this Agreement and in the Note.

(d) So long as there exists no Event of Default and subject to the terms of Paragraph 15 below, Overhead Advances and Administrative Expense Advances shall be advanced to the Debtor or the Administrative Expense Escrow, as appropriate, in the amounts and in accordance with the schedule set forth in the Budget.

(e) Interest shall accrue on the outstanding principal amount of each Advance at a rate per annum equal to five percent 5%. Upon the occurrence of any Event of Default, interest on all amounts not paid when due shall accrue and be payable at a rate per annum equal to the highest rate permitted by applicable law. Any imposition of default interest shall be made retroactive to the date of the occurrence of the applicable Event of Default. All interest on the Advances will be computed on the basis of the actual number of days elapsed over a 360-day year.

5. Facility Fee; Superpriority Administrative Expense Claim. In further consideration of DIP Lender entering into this Agreement, Debtor will pay to DIP Lender the Facility Fee within two (2) Business Days of entry of the Financing Order. In the event DIP Lender makes any advances to or on behalf of Debtor to satisfy the Facility Fee, then, the Facility Fee will constitute Surety Loss. Surety Loss occurring from and after the Petition Date will constitute a super priority administrative expense in accordance with Sections 507(a)(1) and 503(b) of the Bankruptcy Code, which will have priority and payment over all other administrative expenses and unsecured claims of any kind or nature, whether now or hereafter arising including all administrative expenses of the kind specified in or arising or ordered under Sections 105, 326, 328, 503(b), 506(e), 507 (b), 546(c), and 1114 of the Bankruptcy Code. Notwithstanding the foregoing, the super priority administrative expense claims of DIP Lender will be subordinate to the administrative expenses

paid from the Administrative Expense Advance (the “Administrative Expense Carve Out”). Debtor will not incur, create, assume, suffer to exist or permit or make any application or motion for any other super priority claim or Lien which is *pari passu* with or senior to the claims of DIP Lender under the Loan Documents or the Surety under the Surety Credit Documents, other than as expressly contemplated and permitted under this Agreement, including claims and Liens of Travelers contemplated by this Agreement.

6. Security Interest. As security for the payment and performance of all Obligations, now existing or hereafter incurred, matured or unmatured, direct or contingent, including all extensions and renewals thereof, Debtor hereby assigns to DIP Lender and grants to DIP Lender a Lien upon and security interest in the Collateral. The Collateral, together with all of Debtor's other property of any kind, both real and personal, held by, assigned to, mortgaged to, or conveyed in favor of DIP Lender, whether prior to or after the Petition Date, will stand as one general, continuing collateral security for all Obligations and may be retained by DIP Lender until all Obligations have been paid and satisfied in full.

As additional security for the prompt satisfaction of all Obligations, and subject to the terms of the Intercreditor Agreements, Debtor hereby assigns, transfers, and sets over to DIP Lender all right, title, and interest in and to, and grant DIP Lender, a Lien on and a security interest in, all amounts that may be owing from time to time by DIP Lender to Debtor in any capacity, including, but without limitation, any balance or share belonging to Debtor of any deposit or other account with DIP Lender, which Lien and security interest will be independent of any right of setoff which DIP Lender may have. Debtor also assigns transfers, and sets over to DIP Lender all right, title, and interest in and to, and grants DIP Lender, a Lien on and a security interest in, any refund due and owing to Debtor on account of the early termination of any insurance policy associated with the Debtor's operations that was full or partially funded or will be funded with monies from DIP Lender.

The foregoing Liens will be first and prior Liens except for any Permitted Liens which have priority or would have priority by the operation of Law. DIP Lender reserves the right to challenge the priority of any Lien of any other Person.

At the request of DIP Lender, Debtor will execute and deliver to DIP Lender documentation satisfactory to DIP Lender evidencing the security interests and Liens granted by the Loan Documents and the Surety Credit Documents, and providing for the perfection of such Liens. Without the prior written consent of DIP Lender, Debtor will not cause any Accounts arising out of, or related to, any of the Collateral to be evidenced by a promissory note, or other instruments for the payment of money, without providing DIP Lender with prior written notice of same. However, at the request of DIP Lender, Debtor will cause any intercompany receivables to be evidenced by a promissory note with any such note to be delivered and endorsed to DIP Lender. The automatic stay provisions of Section 362 of the Bankruptcy Code are modified to permit the execution, delivery, and filing of such documentation; provided, however, that no such documentation will be required as a condition to the validity, priority, or perfection of Liens created pursuant to this Agreement and the Surety Credit Documents, which Liens will be deemed valid and properly perfected upon entry of the Financing Order approving this Agreement. Debtor hereby irrevocably makes, constitutes, and appoints DIP Lender (and all other Persons designated

by DIP Lender for the purpose) as Debtor's true and lawful agent and attorney in fact to sign Debtor's names on any such agreements, instruments, and documents referred to in this Section 6 and to deliver such agreements, instruments, and documents to such Persons as DIP Lender in its sole and absolute discretion may elect. Debtor agrees to pay on demand any recording tax, filing fees, or other costs incurred by DIP Lender in connection with recording or filing any documentation requested in this Section 6, provided, that, DIP Lender advances the amount of such recording or filing fee and, if advanced, they shall be considered Surety Loss.

7. Representations, Warranties, and Covenants Regarding Preservation of the Collateral. Debtor will preserve the Collateral and DIP Lender's security interest therein, at Debtor's cost and expense. Debtor's place of business and chief executive office is 6201 SW 70th St., Second Floor, Miami, Florida. Debtor agrees to give DIP Lender immediate prior written notification of the establishment of any new office or place of business (other than temporary offices established in connection with any construction contract (other than any Bonded Contract); and the discontinuance of any office or place of business. Debtor will not change its state of formation (or location for purposes of the UCC) without providing DIP Lender with thirty (30) days written notice of such change.

Debtor will give prompt written notice to DIP Lender of the institution of any other suit or proceeding involving it, or the overt threat thereof, that might materially and adversely affect the Collateral. Debtor will pay and discharge promptly all Taxes and governmental charges or levies imposed upon the Collateral, as well as all judgment liens and all claims for labor and materials which, if unpaid, might constitute a Lien or charge upon the Collateral, unless and only to the extent that the same will currently be duly contested in good faith (and for which adequate reserves have been established, as determined by DIP Lender) by appropriate proceedings and as to which foreclosure and other enforcement proceedings will not have been commenced (unless fully bonded or otherwise effectively stayed).

At its option, DIP Lender may discharge Taxes, Liens, security interests, or other encumbrances at any time levied or placed on said Collateral. Debtor agrees to reimburse DIP Lender for any such payment made, or any such expense incurred by DIP Lender pursuant to the foregoing authorization. Any amounts so advanced, paid or expended will be included within the defined term " Surety Loss," and will bear interest from the time advanced, paid, or expended at the maximum lawful rate and be secured by the Collateral and its payment enforced as if it were part of the original Surety Loss. Any sum expended, paid, or advanced under this paragraph will be at DIP Lender's sole option and not constitute a waiver of any default or right arising from the breach by Indemnitors of any covenant or agreement contained in the Loan Documents or the Surety Credit Documents.

Debtor hereby further warrants:

(a) Debtor is the exclusive owner of the Collateral and has good and marketable title to the Collateral and that on the date hereof the Collateral is free of any and all Liens (excluding Permitted Liens of the type described in items (a) and (c) of the definition).

(b) Until such time as all of the Obligations have been paid and satisfied in full, Debtor will not sell, transfer, convey, or assign any of the Collateral without prior written consent of DIP Lender or permit any Lien other than Permitted Liens to exist on any of its assets, including the Collateral. Debtor is permitted to transfer and assign any of the Collateral referred to in item (iii) of the definition to any Obligee on the Bonds (or any assignees of such Obligee or any other owner, or assignee of any owner, of the Work that is subject of the Bonded Contracts) as contemplated under any applicable Bonded Contract.

(c) With regard to the Bonded Contracts in which Debtor has granted DIP Lender a security interest, Debtor represents and warrants to DIP Lender:

(i) Debtor's rights under the Bonded Contracts arise under one or more existing binding written contracts between Debtor and/or Principal and the other party thereto, or will be evidenced by a binding written contract before performance thereunder, and do or will represent a bona fide transaction, enforceable in accordance with its terms;

(ii) the title of Debtor/Principal to the Bonded Contracts are absolute;

(iii) no rights of Debtor or Principal under the Bonded Contracts have been transferred to any other Person;

(iv) Debtor/Principal has not received any prepayment of amounts under the Bonded Contracts (for purposes of the foregoing, overbillings will not be considered prepayments);

(v) Debtor will not, without the prior written consent of DIP Lender, permit any material amendment, modification, settlement, compromise, or extension to the Bonded Contracts, or extend the time of any payment or performance required thereunder; and

(vi) to the best of Debtor's knowledge, information, and belief, except for any breach or default by any subcontractor, supplier, or other Persons of which Debtor has provided DIP Lender with written notice, all parties to any contracts, and other commitments that constitute Collateral and to which Debtor is a party, have complied with the provisions of such contracts and other commitments; no party is in default under any provision thereof; and no event has occurred which, but for the giving of notice or the passage of time, or both, would constitute a default.

8. Segregated Deposit Accounts. DIP Lender and/or an agent or agents for and on behalf of DIP Lender have established the Segregated Deposit Accounts into which certain advances and loans made by DIP Lender to and on behalf of Debtor prior to the Petition Date have been deposited and into which Bonded Contract Funds have been deposited. These Segregated Deposit Accounts have been established in the name of DIP Lender or in the name of an agent or agents for and on behalf of DIP Lender. Under the terms of the Trust Financing Agreement under which the Segregated Deposit Accounts are established, Debtor confirmed and acknowledged that the Segregated Deposit Accounts are the sole property of Surety and further confirmed and acknowledged that in the event it was determined to have any interest therein, that it had granted

and conveyed to DIP Lender for Surety a security interest and Lien in the Segregated Deposit Accounts. In the event for any reason it is determined that Debtor has any interest in the Segregated Deposit Accounts, then any such interest will be deemed to be a part of the Collateral and governed as such pursuant to the terms of this Agreement. Debtor confirms and acknowledges that it will continue to adhere to all of the terms and provisions of the Trust Financing Agreement.

In the event the Segregated Deposit Accounts are terminated, following the occurrence of an Event of Default and written notice from DIP Lender, Debtor will deposit all checks, drafts, cash, and other remittances received in payment of or on account of Debtor with respect to any of the Collateral, immediately upon receipt thereof, in special bank accounts maintained by a bank selected by DIP Lender. The funds in said special bank accounts will be held in trust for the benefit of Surety as security for all Obligations. Said Proceeds will be deposited in precisely the form received except for the endorsement of Debtor where necessary to permit collection, which endorsement Debtor agrees to make and which DIP Lender also hereby is authorized to make on Debtor's behalf. Pending such deposit, Debtor agrees that it will not commingle any such checks, drafts, cash, and other remittances with any of Debtor's funds or property, but will hold them separate and apart therefrom and upon an express trust for DIP Lender until deposit thereof is made in the said special account.

9. Existence and Authority; Enforceability of this Agreement. Debtor is registered entity duly organized, validly existing, and in good standing under the laws of the State of Florida. Debtor will maintain its limited liability existence or registered status (in good standing where appropriate under state law) and remain or become duly qualified or licensed (and in good standing where appropriate under state law) as a foreign limited liability company in each jurisdiction in which the conduct of its businesses requires such qualification or license except where the failure to be so qualified could not reasonably be expected to have a Material Adverse Effect.

The execution and performance of this Agreement will not violate the governing document provisions of Debtor, or violate any laws or result in a default under any contract, agreement, or instrument to which Debtor is a party or by which Debtor or its property is bound, except for such violations or defaults that would not have a Material Adverse Effect. Debtor has the power and authority to enter into and perform this Agreement and the Loan Documents, and to incur the obligations herein and therein provided for, and have taken all corporate or other action necessary to authorize the execution, delivery, and performance of this Agreement and the Loan Documents.

Upon the execution of this Agreement and the other Loan Documents by Debtor, this Agreement and the Loan Documents will be valid and binding against Debtor enforceable against such parties in accordance with the terms thereof. The execution and delivery of this Agreement and the other Loan Documents, the fulfillment of the respective terms and conditions thereof, and the consummation of the respective transactions contemplated thereby will not violate any provisions of applicable law or any applicable order or regulation of any court or public governmental agency, and will not conflict with or constitute a breach of a default under the governing documents of Debtor, as amended, or any agreement, indenture, or other instrument to which Debtor is a party or by which Debtor is bound, or any law, ordinance, administrative regulation, or decree of court, that is applicable to Debtor.

10. Operation of Business. Debtor does not currently have and will not create any Subsidiaries. Debtor will not engage in any business activities or operations substantially different from or unrelated to its present business activities and operations without obtaining the prior written consent of DIP Lender provided, however, that nothing in this Section will be construed or enforced so as to limit: (i) Debtor's attempt to reorganize in accordance with the terms of any reorganization plan and related disclosure statement filed with the Bankruptcy Court; or (ii) the discretion of the Bankruptcy Court to require modifications or amendments to same as part of the approval and confirmation process. Notwithstanding the foregoing, nothing in this Section will be deemed a waiver by DIP Lender of its right to object or otherwise be heard with respect to any issue arising in connection with the approval of any disclosure statement or the confirmation of any reorganization plan.

Debtor will retain key employees sufficient to complete Work required by the Bonded Contracts pursuant to the terms of the Bonded Contracts and the Bonds.

Debtor represents that it has the insurance in force that is usual and customary for those engaged in the same or similar business of Debtor, and that it will maintain said insurance in force with good and substantial carriers. Debtor represents that it will have insurance in force as required under the terms of the Bonded Contracts. Debtor further agrees to furnish DIP Lender, upon request, with copies of the policies of said insurance evidencing the existence of the coverage called for by the Bonded Contracts. In addition, Debtor will name DIP Lender as a loss payee and additional insured on said insurance with respect to the Bonded Contracts and any insurance that covers any of the Collateral.

11. Completion of Bonded Contracts by Debtor; Payment of Labor, Material, and Other Costs; Duty to Notify DIP Lender. Unless otherwise agreed to in writing by DIP Lender, and subject to the rights of DIP Lender under Section 15, Debtor will continue to prosecute the Work under the Bonded Contracts and use its best good faith efforts to timely complete all remaining Work and obligations required under any and all of the Bonded Contracts, and avoid any default under any of the Bonded Contracts. In furtherance of the foregoing, at the request of DIP Lender, Debtor will seek to assume pursuant to Section 365 of the Bankruptcy Code any specific Bonded Contract, or all Bonded Contracts, entered into prior to the Petition Date.

In order to further the completion of the Bonded Contracts, Debtor will obtain the execution of Ratification Agreements, in a form provided by and acceptable to DIP Lender, from each and every subcontractor and supplier under any Bonded Contract as requested by DIP Lender. Notwithstanding any other provision of this Agreement, Debtor agrees that DIP Lender may undertake all action which the DIP Lender deems necessary and appropriate in its sole and absolute discretion to engage a contractor or replacement contractor to complete or assist in completion of the Bonded Contracts. To this end, DIP Lender may communicate directly with Obligees, all employees of Debtor, all subcontractors and suppliers associated with the Bonded Contracts, and any other person or entities as the DIP Lender deems necessary in its sole and absolute discretion. DIP Lender may also communicate with any potential contractors or replacement contractors, consultants, attorneys, or other persons regarding any and all aspects of the Bonded Contracts, may disclose and share information regarding the Bonded Contracts, may solicit bids, quotations and proposals from potential completion contractors, consultants or other persons and may take any

and all action when and as the DIP Lender deems necessary to transfer, assign, and/or relet any of the Bonded Contracts to another contractor, in DIP Lender's sole and absolute discretion. Debtor and Indemnitors agree to fully cooperate and assist the DIP Lender when and as the DIP Lender requests, and shall provide to the DIP Lender all information, access to the project sites and any other assistance and support that the DIP Lender may reasonably request to facilitate the assignment, transfer and/or relet of any of the Bonded Contracts when and as the DIP Lender may deem appropriate in its sole and absolute discretion.

Debtor agrees that it will take whatever action is reasonably necessary pursuant to the Bonded Contracts to preserve any and all rights claims or causes of action of whatever kind or nature that Debtor may have against Obligees. Further, Debtor agrees that it will take whatever action is necessary to dispute any and all claims of whatever kind or nature, including, but not limited to, backcharges, extras, change orders asserted against Debtor by Obligees. Debtor agrees that it will forward to DIP Lender copies of any and all documentation submitted by Debtor to Obligees with respect to the Bonded Contract, including, but not limited to, copies of certified payroll report, request for payment applications, close out documents, all documentation regarding warranty items, and any other documentation.

During construction of the Projects, Debtor will promptly deliver the following to DIP Lender:

(a) Copies of any claim, liens, or other notice received by Principal involving non-payment for labor and materials supplied with respect to an of the Bonded Contracts;

(b) written notice of any disagreement or dispute between any of the following: (i) the owner or Obligees of the projects related to any Bonded Contract; (ii) any of Principal's subcontractors or materialmen; (iii) any others who have provided labor and materials under the Bonded Contracts; or (iv) Principal; and

(c) written notice of any: (i) change orders, extras, additional improvements or work under any Bonded Contract, including, but not limited to, any decrease, increases or decreases in the amount of any Bonded Contract; or (ii) any work contiguous to and in the immediate vicinity of the Work performed or to be performed under any Bonded Contract for which Principal is involved.

12. Investigation by DIP Lender. Debtor will allow DIP Lender and its representatives, including attorneys, accountants, consultants, or employees, to visit at any time any of the projects related to any of the Bonded Contracts, to obtain at any time access to all job records and personnel of Principal to determine the status of the progress of the associated Work, and to obtain at any time any and all other information and documentation with respect to the Work and the Bonded Contracts deemed necessary in the sole discretion of DIP Lender and/or its representatives. Debtor agrees that Surety and its representatives may at any time communicate with any individual and or entity associated with the Bonded Contracts and/or the Work that DIP Lender deems appropriate, including but not limited to, Obligee, owner, and any subcontractor or supplier that it deems appropriate. The fees and expenses for all such attorneys, accountants, consultants, or employees, including, but not limited to, any fees incurred with Alan Gray, LLC, will be paid by

Debtor and subject to indemnity from Indemnitors, and, to the extent funds are available, may be paid from any of the Segregated Deposit Accounts.

Any inspections of the Work and projects related to any of the Bonded Contracts by DIP Lender are solely for the purpose of ascertaining the state of construction and whether certain Work has progressed and not for the purpose of determining whether the performance of the Work is in accordance with any plans and/or specifications relating thereto nor whether such construction has been accomplished in a reasonable, acceptable, substantial, or workmanlike manner. DIP Lender is not responsible for insuring: (v) that any of the Work will proceed or be completed; (w) that the performance of the work and the Bonded Contracts will be in accordance with governmental rules and regulations or all plans and/or specifications relating to the Work and the Bonded Contracts when and if performance under the Bonded Contracts is completed; (x) the quality of workmanship or materials; (y) that all obligations incurred by Principal in connection with the Work and the Bonded Contracts will be paid, satisfied, or discharged; or (z) that sufficient funds will be available to complete the Work and the Bonded Contracts.

13. Debtor to Hold Bonded Contract Funds in Trust. Debtor agrees and expressly declares that all funds due or to become due under the Bonded Contracts will immediately become trust funds, whether in possession of Debtor or another, for the benefit and the payment of all Persons to whom Debtor incurs obligations in the performance of the Bonded Contracts and for which Surety is or may be liable under the Bonds. If Surety discharges any such obligations, with or without a claim asserted against Surety under the Bonds, it will be entitled to assert the right of such Person to the trust fund. All payments received for or on account of any Bonded Contract will be held in a trust fund to assure the payment of obligations incurred or to be incurred in the performance of any Bonded Contract and for labor, materials, and services furnished in the prosecution of the Work on any Bonded Contract or any extension or modification thereof. All monies due and to become due under any Bonded Contract are also trust funds, whether in the possession of Debtor, Indemnitors, or otherwise. The trust funds will be for the benefit and payment of all obligations for which Surety is or may be liable under any Bonds. The trust funds will inure to the benefit of Surety for any liability or Surety Loss it may have or sustain under any Bond. This Agreement and declaration constitute notice of such trust. Subject to Section 8, the trust funds, unless otherwise restricted or regulated by state or local laws, can be commingled with other funds, but the trust fund nature and purpose as stated in this paragraph will not be modified nor waived by this commingling provision. The rights of Surety set out in this paragraph are in addition to the rights granted surety under the Indemnity Agreements and the Trust Financing Agreement.

14. Rights of DIP Lender to Settle Claims; Continued Cooperation. Debtor acknowledges that pursuant to the provisions of paragraph 6 Indemnity Agreement, DIP Lender has the exclusive right to compromise and settle claims, counterclaims, demands, and suits by or against Debtor arising out of or relating to the Bonds. In furtherance of the foregoing, DIP Lender will have the exclusive right for itself and for Debtor to decide and determine, whether any claim, demand, suit, or judgment on the Bonds will be pursued, paid, settled, defended, or appealed. It is expressly understood and agreed by Debtor that DIP Lender has no obligation to Debtor, or any other Indemnitor, to pursue or defend any affirmative or other claim, unless expressly agreed to in writing by DIP Lender. Any payment or determination made by DIP Lender that: (1) DIP Lender

was or might be liable therefor; and (2) such payments were necessary or advisable to protect any of DIP Lender's rights or to avoid or lessen DIP Lender's liability or alleged liability will be final, conclusive, and binding upon Debtor; and any Surety Loss which may be sustained or incurred will be paid by Debtor upon written demand by DIP Lender. In the event of any payment, settlement, compromise, or investigation, an itemized statement of Surety Loss sworn to by an officer or authorized representative of DIP Lender or vouchers or other evidence of such Surety Loss will be prima facie evidence of the fact and extent of the liability of Debtor to DIP Lender in any claim or suit and in any and all matters arising between Debtor and DIP Lender.

Debtor agrees to fully cooperate with DIP Lender in its investigation of any and all claims under any Bond and/or Bonded Contract and/or with respect to any Collateral and in the pursuit and/or settlement of any claim DIP Lender may decide to assert with respect to any of the Collateral, the Bonds, and/or the Bonded Contracts, including, but not limited to, any claim or claims against (i) any Oblige under any Bond, (ii) any architects, engineers, subcontractors, suppliers, or any other Person under or related to any Bonded Contract, (iii) any current or former employee, member, officer, or director of any of Indemnitors, and/or (iv) any of Debtor's accountants. Debtor's cooperation will include, but will not be limited to, the provision of statements, depositions, affidavits, documents, access to any attorneys or other professionals retained by Debtor (including access to any related documents, reports, and work product and subject to a common interest and joint defense agreement as appropriate), and other assistance to DIP Lender as requested by DIP Lender and at no expense to DIP Lender; provided, however, that Debtor will not be required or obligated to disclose any information that is protected from disclosure through the exercise of any attorney client or work product in anticipation of litigation privileges available to Debtor. This foregoing exception will not prevent Debtor from Sharing privileged information pursuant to any joint defense or common interest agreement or privilege, and all such information shared by Debtor to DIP Lender will retain all privilege afforded under any such joint defense or common interest agreement or at law. Any expenses and other costs advanced by Surety with respect to the foregoing will constitute Surety Loss.

15. Rights of DIP Lender to Take Possession of Work. DIP Lender is authorized and empowered, but is not obligated to take possession of the Work under any Bonded Contract and at the expense of Debtor to complete or to contract for the completion of the same, or to consent to the reletting of the completion thereof by, or to take such other steps as in the discretion of DIP Lender may be advisable or necessary to obtain its release or to avoid Surety Loss. It is expressly acknowledged by Debtor that DIP Lender has the right at any time to use one or more of the Acknowledgments of Default or the Existing Defaults on one or more of the Bonded Contracts. The foregoing rights are in addition to those rights granted DIP Lender under paragraph 5 of the Indemnity Agreement.

As of the date that the DIP Lender exercises its rights under this Section 15 to take over the Work under the Bonded Contracts, Debtor hereby assigns outright, transfers, and sets over to DIP Lender the following rights:

(a) all rights of the Debtor in and arising in any manner out of the Bonded Contracts;

(b) all the rights, title and interest of the Debtor in and to all machinery, Equipment, plants, tools, Inventory, and materials which are now or may hereinafter be used in connection with the Bonded Contracts, regardless of whether located at the construction site, in transit, in storage or elsewhere;

(c) all the rights, title and interest of the Debtor in and to any subcontracts and purchase orders let or to be let in connection with the Bonded Contracts;

(d) all the rights, title and interest of the Debtor in and to any actions, causes of action, claims or demands which the Debtor may have or acquire against any party to the Bonded Contracts, or arising out of, relating to, or in connection with the Bonded Contracts, including the Debtor's subcontractors and/or suppliers and the sureties of any of the Debtor's subcontractors and/or suppliers;

(e) all Bonded Contract Funds retained and any and all Bonded Contract Funds that may be due or hereinafter become due on account of the Bonded Contracts; and

(f) all funds or monies remaining in any of the Segregated Deposit Accounts.

The above rights are in addition to, and not lieu of, the security interest and Liens granted to DIP Lender with respect to the Collateral. The foregoing will not limit or otherwise adversely affect any rights that Debtor has as a secured party with respect to the Collateral. It is hereby confirmed and acknowledged by Debtor that the security interest and Liens granted to DIP Lender in this Agreement in the Collateral are to be an existing perfected security interest and Lien.

In the event that the DIP Lender exercises its rights under this Agreement to use the Acknowledgments of Default and to take over possession of any part or all of the Work under any of the Bonded Contracts, Debtor will immediately turn over to the DIP Lender all books, records, accounts, and documents relevant to the Bonded Contracts. Furthermore, Debtor authorizes the appropriate owner or Obligees to furnish to DIP Lender complete information and documentation concerning any payments of the Bonded Contract Funds made to the Debtor and to furnish any other information and documentation concerning the Bonded Contracts which the DIP Lender may require.

In the event DIP Lender exercises its rights under this Agreement to take possession of the Work under any Bonded Contract, or consent to the reletting of the completion thereof, DIP Lender and Debtor will discuss revisions to the Budget as a result of the reduced scale of the future ongoing operations of Debtor with respect to the Bonded Contracts. DIP Lender agrees that absent an Event of Default, it will not cease funding under this Agreement for a sixty (60) day period during which these discussions will take place as long as these discussions are ongoing; provided, that, DIP Lender reserves the right to terminate any such discussions in the event DIP Lender determines, in its discretion, that the discussions are not productive or likely to lead to an agreed to revised Budget. If a revised Budget has not been agreed to during the sixty (60) day period, or DIP Lender terminates discussions regarding a revised Budget, then DIP Lender will have the sole right to cease making any additional advances to Debtor pursuant to the terms of the attached Budget. Any additional loans that DIP Lender makes to or on behalf of the Debtor, whether

pursuant to the attached Budget or otherwise, will continue to constitute a part of the Obligations that are subject to and governed by the terms and provisions of this Agreement.

16. Termination of Automatic Stay. Any Order entered approving this Agreement will provide that the automatic stay, including specifically, but not limited to, the stay imposed by Section 362 of the Bankruptcy Code, is immediately and absolutely lifted and terminated without the need of further order by Court as to the exercise by DIP Lender of any and all of its rights under the terms of this Agreement, including, but not limited to, its rights as provided in the above Sections 13 and 15 with respect to the settlement of any and all claims, rights to take possession of the Work, and right to utilize the Acknowledgments of Default delivered by Debtor to DIP Lender prior to the Petition Date.

17. Financial Reporting. Debtor will to continue to utilize and keep current the Procore Project Management System and Pvault Repository System as the primary depository of Records related to the Bonded Contracts. In addition, Debtor will furnish the following documents to DIP lender when and as generated in the normal course of performance of the Bonded Contracts: (i) payment applications for each Bonded Contract; (ii) schedule updates for each Bonded Contract; (iii) Bonded Contract job cost reports; (iii) change orders/claim log; (iv) meeting minutes weekly or biweekly as generated; (v) monthly subcontractor status reports by Bonded Contract; and (vi) any other documents and reports that DIP Lender may reasonably request.

Debtor's fiscal year end is December 31. Debtor will advise Surety in writing of any change to its fiscal year end and in the event any of the reporting, payment of Surety Loss, or other provisions of this Agreement, the Loan Documents or the Surety Credit Documents are affected by the change in Debtor's fiscal year end, then Debtor agrees to obtain the approval of the Bankruptcy Court, if required under the Bankruptcy Code, to execute, and will execute any and all amendments and other modifications as are necessary or desirable to this Agreement, the Loan Documents and the Surety Credit Documents as a result of the change of Debtor's fiscal year end.

During the term of this Agreement, and thereafter for so long as any Surety Loss exists, unless otherwise waived by DIP Lender in writing, Debtor will deliver, or cause to be delivered, to DIP Lender without demand:

(a) Copies of Debtor's yearly audited Financial Statements as soon as possible upon completion but in no event later than 120 calendar days after the end of the period under audit. Additionally, Debtor will furnish DIP Lender with quarterly Financial Statements with complete entries prepared in conformity with GAAP, applied on a basis consistent with that of the preceding fiscal years and from year to year. Further, Debtor will maintain accurate books of account showing clearly, among other things, the itemized receipts and disbursements allocated to the Bonded Contracts;

(b) Within three (3) business days of the execution of this Agreement, Debtor will provide DIP Lender with a current schedule of accounts for each Bonded and Bonded Contract listing the name and address of each Account Debtor along with a description of the services and/or goods supplied together with an aging analysis;

(c) On a daily basis, Debtor will provide to DIP Lender access to all bank accounts maintained by Debtor, including all operating and payroll accounts, such that DIP Lender can see all deposits and disbursements relating to Bonded Contract Funds from all bank accounts on an ongoing basis at all times, and Debtor will further provide DIP Lender will on-line read-only access to any such accounts;

(d) On a weekly basis, Debtor will provide DIP Lender proof that Taxes on all Work are being timely paid;

(e) On a weekly basis, Debtor will provide DIP Lender a statement of cash flow with a rolling thirteen (13) week look ahead on a weekly basis of projected receipts and expenditures by Bonded Contract, to include receivables, Bonded Contract Costs, and Overhead and contract activity (work in process) report for each open Bonded Contract to include and reflect any anticipated changes in total Bonded Contract costs;

(f) Within three (3) calendar days after the end of each week, Debtor will provide DIP Lender with a report prepared by Debtor that reflects actual (i) revenues including accounts receivable by Bonded Contract, cash receipts by Bonded Contract, deposits by Bonded Contract, and billings by Bonded Contract; and (ii) disbursements including Bonded Contract costs incurred by Bonded Contract, accounts payable by Bonded Contract, and disbursements by Bonded Contract, including labor burden and Taxes;

(g) within forty-five (45) calendar days after the end of each month, Debtor will provide DIP Lender with Financial Statements, including, but not limited to, a balance sheet, profit and loss statement, revised management and financial report, a statement of cash flow and contract activity (work in process) report, prepared by Debtor and certified by Debtor's Senior Vice President and Controller or equivalent officer or representative; provided, however, that any year end reports will be delivered no later than sixty (60) days following calendar year end; and

(h) within forty-five (45) calendar days after the end of each month, Debtor will provide DIP Lender with a work in progress schedule for all Bonded Contracts (separate from other contracts) prepared by Debtor and certified by Debtor's Senior Vice President and Controller or equivalent officer or representative; provided, however, that any year end reports will be delivered no later than sixty (60) days following calendar year end.

These financial documents will be prepared in conformity with GAAP applied on a basis consistent with that of the preceding fiscal year, and in each instance will present fairly and accurately the financial condition of Debtor as of the dates of the statements and the results of their operations for the periods then ended.

Debtor agrees to immediately notify DIP Lender of the occurrence of any material change in its financial condition. Debtor represents that its books and records will be kept accurately and in a timely manner and in accordance with good business practices.

18. Affirmative Covenants. Until the Obligations have been paid in full, Debtor will:

(a) Compliance Certificate. Provide DIP Lender on a monthly basis (and at such other intervals as DIP Lender may reasonably require) with a letter in which its Chief Financial Officers and each of Jorge Munilla, Juan Munilla, Pedro Munilla, and Raul Munilla, personally, represent that they have no knowledge of the existence of any condition, event, or act which constitutes, or which with notice or the lapse of time, or both, would constitute an Event of Default. Debtor will also promptly give to DIP Lender notice in writing of any Event of Default or the occurrence of any event or circumstance which with the passage of time or giving not notice or both would constitute and Event of Default. In addition, Debtor will deliver to DIP Lender a copy of any Compliance Certificate that is delivered to any lender who provided financing after the Petition Date, contemporaneously with the delivery of such certificate to any lender who provided financing after the Petition Date.

(b) Books and Records. Permit DIP Lender at all times during regular business hours to free access, with twenty four (24) hours advance notice, to the Records and similar items of Indemnitors including, without limitation, its Records, computer software, and other computer stored information, and all plans, specifications, drawings, surveys, and related materials, and computer software, licenses, copyrights, patents, and other intellectual property, for the purpose of using, examining, copying, or reproducing same for the purpose of examining, copying, or reproducing the same. Debtor authorizes and requests any and all depositories in which funds of Debtor may be deposited to furnish to DIP Lender statements of account and any other documents reflecting receipts and disbursements and any Person doing business with Debtor is authorized to furnish any information requested by DIP Lender concerning any transaction. Without limiting the generality of the foregoing, will allow DIP Lender and any consultant or other representative of DIP Lender daily on line access to view and monitor all transactions and other information with respect to the Segregated Deposit Account. DIP Lender may furnish copies of any and all statements, agreements, and Financial Statements and any information which it now has or may obtain concerning Indemnitors to other Persons or companies for the purpose of procuring co-suretyship or reinsurance, or during the investigation of claims that may be, or have been, asserted against DIP Lender.

20. Acceleration; Deposit of Collateral; Remedies. Upon the occurrence of any Event of Default, DIP Lender may, at its option, immediately declare all Obligations to be immediately due and payable, whereupon the same will become forthwith due and payable, without presentment, demand, protest, or any notice of any kind.

Upon the occurrence of any Event of Default, all Collateral held by or assigned to DIP Lender by Debtor may be used by DIP Lender at any time in payment of Surety Loss and any other Obligations; DIP Lender will have, in addition to the rights and remedies given by the Loan Documents and the Surety Credit Documents, all those allowed by all applicable Laws, including, but without limitation, the UCC as enacted in any jurisdiction in which any Collateral may be located. Without limiting the generality of the foregoing, DIP Lender may immediately without demand of performance and without other notice (except as specifically required by the Loan Documents or the Surety Credit Documents) or demand whatsoever to Debtor, all of which are hereby expressly waived, and without advertisement, sell at public or private sale, in any manner and at any location authorized by Laws, or otherwise realize upon, the whole or, from time to time, any part of the Collateral, or any interest which Debtor may have therein. After deducting from

the Proceeds of sale or other disposition of the Collateral all expenses, including all expenses for legal services (including allocated costs of in-house counsel), such Proceeds will be applied toward the satisfaction of the Obligations. Any remainder of the Proceeds after satisfaction in full of the Obligations will be distributed as required by applicable Laws.

Notice of any sale or other disposition will be given to Debtor at least ten (10) days before the time of any intended public sale or of the time after which any intended private sale or other disposition of the Collateral is to be made which Debtor hereby agrees will be reasonable notice of such sale or other disposition. At any such sale, the Collateral, or portions thereof, to be sold may be sold in one lot as an entirety or in separate lots, as DIP Lender may, in its sole and absolute discretion, determine. Debtor agrees to assemble, or to cause to be assembled, at their own expense, the Collateral under its control or ownership at such place or places as DIP Lender will designate. At any such sale or other disposition, DIP Lender may to the extent permissible under applicable Laws, purchase the whole or any part of the Collateral, free from any right of redemption on the part of the Debtor, which right is hereby expressly waived and released.

DIP Lender will not be liable and Debtor agrees to make no claim against DIP Lender for decrease in value lost to any Collateral, however caused, other than for willful reckless misconduct or gross negligence. DIP Lender will not be obligated to make any sale of the Collateral if it will determine not to do so, regardless of the fact that notice of sale of the Collateral may have been given. DIP Lender may, without notice or publication, adjourn any public or private sale or cause the same to be adjourned from time to time by announcement at the time and place fixed for sale, and such sale may, without further notice, be made at the time and place to which the same was so adjourned. In case sale of all or any part of the Collateral is made on credit or for future delivery, the Collateral so sold may be retained by DIP Lender until the sale price is paid by the purchaser or purchasers thereof, but neither DIP Lender nor the holder of any of Surety Loss will incur any liability in case any such purchaser or purchasers will fail to take up and pay for the Collateral so sold and, in case of any such failure, such Collateral may be sold again upon like notice.

As an alternative to exercising the power of sale herein conferred, DIP Lender may proceed by a suit or suits at law or in equity to foreclose this Agreement and to sell the Collateral, or any portion thereof, pursuant to a judgment or decree of a court or courts of competent jurisdiction. The costs, including reasonable legal fees of DIP Lender, will be added to Surety Loss and paid by Debtor.

Without limiting the generality of any of the rights and remedies conferred upon DIP Lender under this Section 20, DIP Lender may upon the occurrence of an Event of Default, to the full extent permitted by applicable Laws:

- (a) Enter upon the premises of Debtor, exclude therefrom Debtor or any Affiliate thereof, and take immediate possession of the Collateral, either personally or by means of a receiver appointed by a court of competent jurisdiction, using all necessary and lawful self-help to do so;
- (b) at DIP Lender's option, use, operate, manage, and control the Collateral in any lawful manner;

(c) collect and receive all rents, income, revenue, earnings, issues, and profits therefrom; and

(d) maintain, repair, renovate, alter, or remove the Collateral as DIP Lender may determine in its discretion.

All rights and remedies of the DIP Lender set forth herein and in the other Loan Documents are subject to the terms and conditions set forth in the Intercreditor Agreements.

21. Authority of DIP Lender to Elect Remedies. Each right, remedy, and power of DIP Lender provided in this Agreement, the Loan Documents, the Surety Credit Documents, or by law, equity, or statute will be cumulative, and the exercise by DIP Lender of any right, remedy, or power will not preclude DIP Lender's simultaneous or subsequent exercise of any or all other rights, powers, or remedies. The failure or delay by DIP Lender to exercise any right, power, or remedy will not waive any right, power, or remedy. Except as required herein, no notice or demand upon DIP Lender by Debtor will limit or impair DIP Lender's right to take any action under this Agreement or to exercise any right, power, or remedy. All remedies hereunder are cumulative and are not exclusive of any other remedies provided by law.

22. Reservation of Surety Rights and Remedies. Notwithstanding anything contained herein to the contrary, the parties agree that with respect to all funds due or to become due under the Bonded Contracts nothing herein will waive, impair, or limit any right, power, or remedy of Surety under the Indemnity Agreements, or at law or in equity, including without limitation, Surety's right of equitable subrogation, which right the parties hereby expressly recognize. Surety further reserves all rights under the Indemnity Agreements and the other Surety Credit Documents, or at law or in equity, as to any and all Indemnitors and any other indemnitors under any of the Indemnity Agreements, which are not waived or modified in any manner whatsoever by this Agreement. No waiver of any right, power, or remedy of Surety will be effective unless said waiver is in writing and signed by Surety. Every power and remedy given by this Agreement to Surety may be exercised from time to time as often as may be deemed expedient by Surety.

23. Subordinated Debt. Debtor hereby agrees that any Debt of any of Indemnitors to Debtor is hereby expressly made subordinate and subject in right of payment to the prior payment in full in cash of all Surety Loss and the satisfaction of all Obligations of Indemnitors. Debtor hereby represents and warrants in favor of DIP Lender that no payment or distribution will be made on account of any Debt of Debtor to any of Indemnitors at any time that there exists any Surety Loss. Debtor agrees in favor of DIP Lender that no payment or distribution from Indemnitors on account of any Debt of any of Indemnitors to Debtor at any time that there exists any Surety Loss will be accepted by Debtor, but will be directed to be paid to DIP Lender to be applied to Surety Loss.

In the event that Debtor receives any payment or distribution in violation of the provisions of this Agreement before all Surety Loss will have been paid and satisfied in full, then such payment or distribution will be held in trust for DIP Lender and will be promptly remitted by

Debtor to DIP Lender for application to the payment of Surety Loss until all Surety Loss is paid and satisfied in full.

24. Condition Precedent to Effectiveness of this Agreement. The effectiveness of this Agreement is subject to the condition precedent that DIP Lender will have received on or before the day hereof each of the following, in form and substance satisfactory to DIP Lender and its counsel:

(a) This Agreement, the Note, the Amended Mortgage and each of the other Loan Documents duly executed by Debtor or Mortgagor.

(b) a Guarantee of Performance duly executed by Frigate Holdings, L.L.C., a Florida limited liability company, wherein said company guarantees the performance and completion of all of the Bonded Contracts by Debtor;

(c) a Limited Personal Guaranty of Performance whereby the Individual Indemnitors guaranty the repayment in full of the final \$50,000.00 of the Overhead Advance advanced by DIP Lender;

(d) Reaffirmation of Indemnity Agreement duly executed by the parties to the Indemnity Agreements who are not parties to this Agreement, in form acceptable to DIP Lender;

(e) no orders will have been entered by the Bankruptcy Court which DIP Lender reasonably determines are likely to have a Material Adverse Effect;

(f) all of the "first day orders" presented to the Bankruptcy Court at or about the time of the commencement of the Bankruptcy Case (including orders with respect to Debtor's cash management system) will be satisfactory in form and substance to DIP Lender;

(g) receipt of a copy of the duly executed Financing Order (an interim order to be followed in due course by a final order) entered by the Bankruptcy Court, in form acceptable to DIP Lender (without limiting the generality of the foregoing, the Financing Order will (i) ratify Debtor's obligations under the Indemnity Agreements, and the Trust Financing Agreement; (ii) authorize Debtor to enter into this Agreement, the Note, and all other documents contemplated by this Agreement; and (iii) confirms the waivers with respect to potential preferential transfers as provided in Section 26(d));

(h) an officer's certificate of Debtor certifying copies of Debtor's formation document, governing document, appropriate resolutions authorizing the execution, delivery, and performance of this Agreement and the other Loan Documents to which Debtor is a party and certifying incumbencies and true signatures of its officers so authorized;

(i) evidence of the existence and good standing, as applicable, of Debtor in the jurisdiction in which Debtor is formed; and

(j) such other information and documents as may reasonably be required by DIP Lender.

DIP Lender may waive compliance with any of the foregoing, with or without notice to Debtor.

25. Notices. Any notice, request, demand, or other communications required, permitted or otherwise contemplated by this Agreement will be in writing and either delivered personally, sent by regularly scheduled overnight air courier service, or postage prepaid certified United States mail, return receipt requested, to the following addresses:

DIP Lender: Berkshire Hathaway Specialty Insurance
1100 Abernathy Road NE, Ste. 1200
Atlanta, Georgia 30328
Attn: Kelly Perry
AVP Surety Claims

with a copy to: Hill Ward Henderson
101 E. Kennedy Blvd., Suite 3700
Tampa, Florida 33602
Attn: Patrick M. Mosley, Esq.

Debtor: Munilla Construction Management, LLC
6201 SW 70 Street
Second Floor
Miami, Florida 33155
Attn: Jorge Munilla

with a copy to: Berger Singerman LLP
1450 Brickell Avenue
Suite 1900
Miami, FL 33155
Attn: Jordi Guso

Any such communication will be deemed received at the earliest to occur of: (i) personal receipt; (ii) the date of promised delivery of a regularly scheduled overnight air courier service; or (iii) five days after deposit in the United States mail. Any of the foregoing addresses may be changed by means of a notice furnished in the manner provided herein.

26. Waiver and Release. To the maximum extent permitted by applicable Laws, Debtor:

(a) Waives: (i) protest of all commercial paper at any time held by Surety on which Debtor is in any way liable; and (ii) notice and opportunity to be heard before exercise by Surety of the remedies of self-help, setoff, or of other summary procedures permitted by any applicable Laws or by any agreement with Debtor, and, except where required hereby or by any applicable Laws, notice of any other action taken by Surety;

(b) releases Surety, its officers, directors, attorneys, employees, and agents from all claims for loss or damage caused by any act or omission on the part of any of them, except for their willful misconduct or gross negligence;

(c) waives any defense arising by reason of, and agree that the rights of Surety and the Obligations will be absolute and unconditional irrespective of, (i) any disability or other defense of any other Person; (ii) the unenforceability or cessation from any cause whatsoever, other than the indefeasible payment in full, of all Surety Loss and other Obligations; (iii) the application by Debtor of the Proceeds of any Collateral for purposes other than the purposes represented by Debtor to Surety; (iv) any modification of the Obligations in any form whatsoever, including without limitation the renewal, extension, acceleration, or other changes in the time for payment of Surety Loss, or other change in the terms of the Obligations or any part thereof; and (vi) any other circumstance that might otherwise constitute a defense available to, or a discharge of, any other Person in respect to the Obligations;

(d) waives any and all claims Debtor or Debtor's bankruptcy estate possess for preferential transfers, within the meaning of Section 547 of the Bankruptcy Code, as either adversary proceedings or objections to proofs of claim, against any subcontractor or other Person furnishing or agreeing to furnish or supply vehicles, labor, supplies, machinery, or other equipment in connection with or on account of any Bonded Contract, which waiver and all of the waivers and provisions of this Agreement will be binding upon any trustee appointed under Chapter 7 or Chapter 11 of the Bankruptcy Code;

(e) waives any right to enforce any remedy that Surety now has or may hereafter have against any other Person, and waive any benefit of, or any right to participate in, any security whatsoever now or hereafter held by Surety; and

(f) waives all claims, direct or indirect, absolute or contingent, against any other borrower, guarantor, endorser, or surety arising from or relating to this Agreement, any of the other Loan Documents, and/or the Obligations. Without limiting the foregoing, Debtor waives all rights of reimbursement, exoneration, indemnification, and/or contribution from any other borrower, guarantor, endorser, or surety under or relating to this Agreement, any of the other Loan Documents, and or the Obligations, and waives all rights of subrogation to the claims of Surety which may otherwise arise from such payment. Surety may proceed against any Collateral securing the Obligations and against parties liable therefor in such order as it may elect, and neither Debtor nor any surety or guarantor for Debtor nor, to the extent allowable by law, any creditor of Debtor will be entitled to require Surety to marshal assets. The benefit of any rule of law or equity to the contrary is hereby expressly waived.

27. Further Assurances. The parties will cooperate reasonably with each other and with

their respective representatives in connection with any steps required to be taken as part of their respective obligations under this Agreement, and the parties agree (i) to furnish upon request to each other such further information, (ii) to execute and deliver to each other such other documents, and (iii) to do such other acts and things, all as the other party may reasonably request for the purpose of carrying out the intent of this Agreement and the transactions contemplated hereby.

28. Failure to Execute Additional Documents - No Effect. The failure of Debtor or any other Person to execute documents referenced in this Agreement as being "anticipated to be executed," "anticipate entering into," "to be executed," or words of similar effect, will not affect the validity and enforceability of this Agreement by and among the parties hereto. This Agreement will be effective from the date of its execution until terminated in writing by the parties hereto regardless of whether any other document is entered into or executed by any Person.

29. Governing Law and Jurisdiction. This Agreement will be deemed to be a contract under the laws of the State of Florida and for all purposes will be governed by and construed and enforced in accordance with the laws of such State. Unless the jurisdictional prerequisites are not met, the parties hereto irrevocably consent to the exclusive jurisdiction of the United States District Courts of Florida and of all state courts without waiver of right or removal, for the purpose of any litigation concerning this Agreement. No party hereto will object to or contest Florida as the proper venue for any action or proceeding to enforce terms hereof. Notwithstanding the foregoing, all disputes regarding this Agreement involving Debtor arising during the pendency of the Bankruptcy Case will be heard and determined by the Bankruptcy Court.

30. Jury Waiver. TO THE EXTENT NOT PROHIBITED BY APPLICABLE LAW WHICH CANNOT BE WAIVED, EACH PARTY HERETO HEREBY WAIVES, AND COVENANTS THAT IT WILL NOT ASSERT (WHETHER AS PLAINTIFF, DEFENDANT, OR OTHERWISE), ANY RIGHT TO TRIAL BY JURY IN ANY FORUM IN RESPECT OF ANY ISSUE, CLAIM, DEMAND, ACTION, OR CAUSE OF ACTION ARISING OUT OF OR BASED UPON THIS AGREEMENT, ANY OTHER OF THE LOAN DOCUMENTS, OR THE SUBJECT MATTER HEREOF, IN EACH CASE WHETHER NOW EXISTING OR HEREAFTER ARISING OR WHETHER IN CONTRACT OR TORT OR OTHERWISE. EACH PARTY HERETO ACKNOWLEDGES THAT IT HAS BEEN INFORMED THAT THE PROVISIONS OF THIS SECTION 30 CONSTITUTE A MATERIAL INDUCEMENT UPON WHICH THE OTHER PARTIES HAVE RELIED, ARE RELYING, AND WILL RELY IN ENTERING INTO THIS AGREEMENT. THE PARTIES HERETO MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION 30 WITH ANY COURT A WRITTEN EVIDENCE OF THE CONSENT OF SUCH OTHER PARTY TO THE WAIVER OF ITS RIGHTS TO TRIAL BY JURY.

31. Binding Effect, Assignment, Amendment and Negotiation. This Agreement will inure to the benefit of, and will be binding upon, the respective successors and permitted assigns of the parties hereto. Debtor has no right to assign any of their rights or obligations hereunder without the prior written consent of DIP Lender. This Agreement may be amended only by a writing signed on behalf of each party. This Agreement has been negotiated by the parties and each party has had the benefit of counsel. This Agreement will not be construed against any party.

32. Support of Chapter 11 Plan. So long as no Event of Default has occurred under this Agreement, DIP Lender agrees that it shall:

(a) timely vote or cause to be voted, all of its claims against the Debtor to accept the Chapter 11 Plan, so long as such plan is and remains an Acceptable Plan, by delivering its duly executed and completed ballots accepting the Chapter 11 Plan; provided that such vote and release may be immediately revoked and deemed following the occurrence of an Event of Default under this Agreement;

(b) not change, revoke, or withdraw (or cause to be changed, revoked, or withdrawn) any such vote described in clause (i) above;

(c) not (A) object to, delay, postpone, challenge, reject, oppose, impede, or take any other action that would reasonably be expected to prevent, interfere with, delay or impede, directly or indirectly, in any material respect, the approval, acceptance, or implementation of the Chapter 11 Plan, (B) directly or indirectly solicit, encourage, propose, file with the Bankruptcy Court, support, participate in the formulation of or vote for, any restructuring, sale of assets, merger, workout, proposal or offer of dissolution, winding up, liquidation, or plan of reorganization for the Debtor other than the Plan, or (C) otherwise take any action that could in any material respect interfere with, delay, or postpone the consummation of the restructuring contemplated and proposed by the Chapter 11 Plan; and

(d) support and take all commercially reasonable actions necessary or reasonably requested by Debtor to facilitate the approval of the Disclosure Statement, and confirmation and consummation of the Chapter 11 Plan (it being understood that the DIP Lender shall not be required to incur any material costs, expense, or liability in connection therewith).

33. Severability. The provisions of this Agreement are intended to be severable. If any provision of this Agreement is held invalid or unenforceable in whole or in part in any jurisdiction such provision will, as to such jurisdiction, be ineffective to the extent of such invalidity or unenforceability without in any manner affecting the validity or enforceability of such provision in any other jurisdiction or the remaining provisions of this Agreement in any jurisdiction.

34. Survival. All of the representations and warranties set forth in this Agreement, the other Loan Documents and the Surety Credit Documents will survive until all Obligations are paid and satisfied in full.

35. Counterparts. This Agreement may be executed in counterparts (including by means of facsimile or pdf signature pages), any one of which need not contain the signatures of more than one party, but all such counterparts taken together will constitute one and the same agreement. This Agreement and each other agreement or instrument entered into in connection herewith or therewith or contemplated hereby or thereby, and any amendments hereto or thereto, to the extent signed and delivered by means of a facsimile machine or other electronic transmission (including .pdf files), will be treated in all manner and respects and for all purposes as an original agreement or instrument and will be considered to have the same binding legal effect as if it were to the original signed version thereof delivered in person. At the request of any party hereto or to any such agreement or instrument, each other party hereto or thereto will re-execute original forms

thereof and deliver them to all other parties, except that the failure of any party to comply with such a request will not render this Agreement invalid or unenforceable. No party hereto or to any such agreement or instrument will raise the use of a facsimile machine or other electronic transmission to deliver a signature or the fact that any signature or agreement or instrument was transmitted or communicated through the use of a facsimile machine or other electronic transmission as a defense to the formation or enforceability of a contract and each party forever waives any such defense.

36. Section Headings. The section headings in this Agreement are for convenience only and do not limit, define, or construe the contents of the sections.

37. Seal. This Agreement is intended to take effect as an instrument under seal.

38. No Contrary Action. Debtor will not apply to the Bankruptcy Court for the authority to take any action that is prohibited by the terms of this Agreement or any of the other Loan Documents or refrain from taking any action that is required to be taken by the terms of this Agreement or any of the other Loan Documents. The parties acknowledge that the foregoing will not preclude the entry of any order of the Bankruptcy Court approving or authorizing an amendment or modification to this Agreement or the other Loan Documents permitted by this Agreement, which order will be acceptable to DIP Lender whose consent is required to approve such amendment or modification.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the day and year first above written.

DIP LENDER:

BERKSHIRE HATHAWAY SPECIALTY INSURANCE
COMPANY

By: _____
Its: _____

DEBTOR:

MUNILLA CONTRACTION MANAGEMENT, LLC,
as debtor and debtor-in-possession

By: _____
Its: _____

Exhibit B
Budget

Exhibit C
Interim Order

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
www.flsb.uscourts.gov

IN RE:

Chapter 11 Case

MAGNUM CONSTRUCTION MANAGEMENT,
LLC, f/k/a Munilla Construction Management, LLC, ¹

Case No.: 19-_____

Debtor.

INTERIM ORDER AUTHORIZING DEBTOR (A) TO OBTAIN POSTPETITION FINANCING FROM BERKSHIRE HATHAWAY SPECIALTY INSURANCE COMPANY; AND (B) TO UTILIZE CASH COLLATERAL, (II) GRANTING ADEQUATE PROTECTION, (III) MODIFYING THE AUTOMATIC STAY, (IV) SCHEDULING FINAL HEARING AND (V) GRANTING RELATED RELIEF

THIS MATTER came before the Court on the _____ day of March, 2019 at _____ a.m./p.m. (the “Interim Hearing”) in Miami, Florida, upon the motion (the “Motion”) of Magnum Construction Management, LLC, f/k/a Munilla Construction Management, LLC, as debtor in possession (the “Debtor”) in the above-captioned chapter 11 case (the “Case”)

¹ The Debtor’s address is 6201 SW 70th Street, 1st Floor, Miami, FL 33143. The last four digits of the Debtor’s federal tax identification number are 3403.

pursuant to sections 105, 361, 362, 363, 364 and 507(b) of title 11 of the United States Code (the “Bankruptcy Code”) and Rules 4001(b) and (c) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), seeking entry of interim and final orders: (a) authorizing the Debtor to obtain senior secured postpetition financing, (b) authorizing the Debtor to use Cash Collateral (as defined in the Motion), (c) granting liens and providing superpriority claims with respect to such postpetition financing, (d) approving the form of adequate protection to be provided by the Debtor, (e) modifying the automatic stay to the extent necessary to effectuate the terms of the DIP Orders (as defined below)², (f) scheduling a final hearing to consider entry of the Final Order (as defined below), and (g) granting related relief in connection with the DIP Financing (as defined below).

Due and appropriate notice of the Motion and the interim hearing on the Motion (the “Interim Hearing”) having been served by the Debtor on: (a) counsel to Berkshire Hathaway Specialty Insurance Company (“Berkshire”) or (the “DIP Lender”); (b) counsel for Bank of America, N.A. (the “Pre-Petition Secured Lender”); (c) Counsel for Travelers Casualty and Surety Company of America (“Travelers”); (d) the Office of the United States Trustee for the Southern District of Florida (the “U.S. Trustee”); (e) the Debtor’s 20 largest unsecured creditors; (f) the Internal Revenue Service; and (g) the Securities and Exchange Commission, and it appearing that no other or further notice need be provided.

Upon the record made by the Debtor in the Motion, the *Declaration of Debtor’s Chief Financial Officer in Support of First Day Pleadings* [ECF No. ____] and at the Interim Hearing, and after due deliberation and consideration and sufficient cause appearing therefor:

² All capitalized terms not defined in this Interim Order have the meanings ascribed them in the DIP Documents.

IT IS HEREBY FOUND, DETERMINED, ORDERED and ADJUDGED as follows:

A. Disposition. The Motion is granted, on an interim basis, in accordance with the terms of this Interim Order. Any objections to the Motion with respect to the entry of this Interim Order that have not been withdrawn, waived, or settled (as set forth herein), and all reservations of rights included therein, are hereby denied and overruled on the merits.

B. Jurisdiction, Venue, and Constitutional Authority. This Court has core jurisdiction over the Case, this Motion, and the parties and property affected hereby pursuant to 28 U.S.C. §§ 157(b) and 1334. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This Court has the constitutional authority to enter a final order adjudicating the Motion.

C. Committee Formation. A statutory committee of unsecured creditors (the “Committee”) has not yet been appointed in this Case.

D. Notice. Proper, timely, adequate and sufficient notice of the Motion has been provided in accordance with the Bankruptcy Code, the Bankruptcy Rules, any local rule of the Court, and no other or further notice of the Motion or the entry of this Interim Order shall be required. The interim relief granted herein is necessary to avoid immediate and irreparable harm to the Debtor and its estate pending the Final Hearing.

E. Debtor’s Stipulations. Without prejudice to the rights of any other party, the Debtor acknowledges, stipulates and confirms the following:

i. Pre-Petition Bonds: The DIP Lender, as surety, issued on behalf of the Debtor and others, as principal, certain Bonds (as defined in the Loan and Security Agreement) related to certain construction projects undertaken by the Debtor (the “Berkshire Bonded Projects”).

ii. Pre-Petition Indemnity Agreements: In consideration for the issuance of the Bonds, the Debtor and various non-Debtors executed Indemnity Agreements (as defined in the

Motion) in favor of the DIP Lender and others. Pursuant to the Indemnity Agreements, among other obligations, the Debtor is obligated to make whole and hold harmless the DIP Lender, affiliates of the DIP Lender, and certain other surety-related companies from any losses arising directly or indirectly from the issuance of the Bonds and/or DIP Lender's relationship with the indemnitors referred to therein (collectively with the Debtor's obligations under the DIP Lender Bonds, and all of the Surety Agreements and other agreements referred to in the Trust Financing Agreement (defined below), including but not limited to, that certain (i) Equipment Security Agreement dated November 7, 2018, (ii) Consolidated and Renewal Promissory Note dated February 28, 2019, and (iii) Mortgage and Security Agreement dated July 25, 2018, as amended by that Notice of Future Advance and Mortgage Modification Agreement dated February 28, 2018, executed by 7501 Medley Civil, LLLC in favor of Berkshire (collectively, the "Berkshire Pre-Petition Obligations")). As of the Petition Date, the Pre-Petition Obligations totaled approximately \$4,072,470.14, inclusive of interest, costs and attorneys' fees.

iii. Berkshire Pre-Petition Obligations: The Berkshire Pre-Petition Obligations are (i) legal, valid, binding, unavoidable, and enforceable against the Debtor, each in accordance with its terms (other than in respect of the stay of enforcement arising from section 362 of the Bankruptcy Code), and (ii) not subject to any contest, attack, rejection, recoupment, reduction, defense, counterclaim, offset, subordination, recharacterization, avoidance or other claim, cause of action or other challenge of any nature under the Bankruptcy Code, under applicable non-bankruptcy law or otherwise.

iv. Prepetition Trust Financing Agreement: The Debtor and the DIP Lender are parties to that certain Trust, Financing and Collateral Agreement dated as of July 19, 2018, by and among Debtor, Berkshire, and others, as amended by the First Amendment to Trust, Financing and Collateral Agreement dated March __, 2019 (collectively, the "Trust Financing Agreement"),

which among other things, provide certain collateral and cash management requirements relating to the proceeds of Berkshire Bonded Contracts. The Debtor remains bound by and has agreed to continue to operate in accordance with the terms of the Trust Financing Agreement throughout this Case.

v. Trust Funds: In the course of its business, the Debtor receives payments from the owners (or, if applicable, governmental administrators), general contractors, and other of the relevant construction projects, and then disburses the appropriate payments to subcontractors and suppliers. Pursuant to the Indemnity Agreements and the Trust Financing Agreement, the payments due, received for, or on account of any Berkshire Bonded Contracts (including, without limitation, and whether earned and unpaid or to be earned, any increases in contract amounts, and payments made, as a result of affirmative claims including, without limitation, changed condition claims, wrongful termination claims; claims against any architect, subcontractor, contractor, or obligee, the “Berkshire Bonded Contract Funds”) are trust funds for the benefit and payment of all obligations for which DIP Lender may be liable under any Bond, which would include payments to certain subcontractors and suppliers.

vi. Equitable Subrogation Rights: The DIP Lender’s equitable subrogation rights and trust fund rights in the Collateral (as defined in the Loan and Security Agreement) are (i) legal, valid, binding, enforceable, and non-avoidable, and are (ii) not subject to any attachment, contest, attack, rejection, recoupment, reduction, defense, counterclaim, offset, subordination, recharacterization, avoidance or other claim, cause of action or other challenge of any nature under the Bankruptcy Code, under applicable non-bankruptcy law or otherwise.

vii. Prepetition Collateral: In addition to the equitable subrogation accorded to DIP Lender under applicable non-bankruptcy law,³ pursuant to the Indemnity Agreements and the Trust Financing Agreement, in order to secure the Debtor's Prepetition Obligations, Debtor granted the DIP Lender a lien and security interest in, among other things, the receivables of the Berkshire Bonded Contracts (the "Berkshire Prepetition Surety Liens"). The Berkshire Prepetition Surety Lien was duly perfected by the filing of a UCC-1 financing statement on May 16, 2018, as Instrument No. 201805241689.

viii. Berkshire/BofA Intercreditor Agreement: Berkshire and Bank of America, N.A. ("B of A") are parties to that certain Intercreditor Agreement dated August 28, 2018, which provides the agreed priority of each party's respective liens on assets of the Debtor.

ix. Travelers/Berkshire Surety Intercreditor Agreement: Berkshire and Travelers are parties to that certain Surety Intercreditor Agreement dated August 28, 2018, which provides the agreed relative priority of each party's respective liens on assets of the Debtor.

x. Enforceability of Berkshire Prepetition Liens: The Berkshire Prepetition Surety Liens are (i) legal, valid, binding, enforceable, and non-avoidable, and are (ii) not subject to any attachment, contest, attack, rejection, recoupment, reduction, defense, counterclaim, offset, subordination, recharacterization, avoidance or other claim, cause of action or other challenge of any nature under the Bankruptcy Code, under applicable non-bankruptcy law or otherwise. The Debtor does not have, hereby absolutely and unconditionally forever releases, and is forever barred from bringing or asserting any claims, counterclaims, causes of action, defenses or setoff rights relating to the Indemnity Agreements, the Trust Financing Agreement, the Loan and Security

³ See, *Pearlman v. Reliance Insurance Company*, 371 U.S. 132 (1962); *Capitol Indemnity Corp. v. Heidkamp*, 312 BR 437 (Bankr. M.D. FL 2003).

Agreement, the Promissory Note (as defined in the Motion), and all related or ancillary documents and agreements, including all security and pledge agreements, whether arising under the Bankruptcy Code, under applicable non-bankruptcy law or otherwise against the DIP Lender and its officers, directors, agents, employees, attorneys, successors, and assigns.

xi. *Berkshire Bonded Contract Funds*: Pursuant to its equitable subrogation rights, the DIP Lender is entitled to possession of the Berkshire Bonded Contract Funds over and above all others to the extent that DIP Lender has liability for claims and potential claims under the Bonds. Moreover, pursuant to the Indemnity Agreements and the Trust Financing Agreement, the Debtor expressly agreed to hold all Berkshire Bonded Contract Funds in trust for the benefit of subcontractors, suppliers, and the DIP Lender. Accordingly, subject to the provisions and hierarchy for the use of funds set out in the Trust Financing Agreement, the Debtor is not permitted to use the Berkshire Bonded Contract Funds for general operational purposes until all subcontractors, laborers, materialmen, and/or DIP Lender and any other Surety are paid in full and the Berkshire Bonded Contracts are fully completed, applicable warranty periods have expired, and the DIP Lender/Surety does not have any exposure under any of the Bonds. In addition, and subject to the Intercreditor Agreements, DIP Lender has a senior perfected security interest in all Berkshire Bonded Contract Funds.

xii. *Release of DIP Lender*: Subject to the entry of the Final Order, the Debtor hereby absolutely and unconditionally releases and forever discharges and acquits the DIP Lender from any and all obligations and liabilities to the Debtor (and its successors and assigns) and from any and all claims, demands, debts, accounts, contracts, liabilities, actions and causes of action arising prior to the Petition Date (collectively, the “Released Claims”) of any kind, nature or description, whether known or unknown, foreseen or unforeseen, or liquidated or unliquidated, arising in law or equity or upon contract or tort or under any state or federal law or otherwise,

arising out of or related to the Bonds, the Berkshire Pre-Petition Obligations, Indemnity Agreements, the Trust Financing Agreement, the obligations owing and the financial obligations made thereunder, the DIP Motion, the DIP Documents, the negotiation thereof and of the deal reflected thereby, and the obligations owing and the financial obligations made thereunder, as well as the Case, and/or the negotiation, formulation or preparation of any agreements, instruments or other documents related thereto, in each case that the Debtor at any time have, now have or may have, or that their successors or assigns hereafter can or may have against the DIP Lender for or by reason of any act, omission, matter, cause or thing whatsoever arising at any time on or prior to the date of this Interim Order, whether such Released Claims are matured or unmatured or known or unknown or contingent, liquidated or unliquidated. The foregoing Release in addition to, and not in lieu of, all waivers and releases provided to DIP Lender under the terms of the Loan and Security Agreement.

xiii. Waiver of Preference Claims: Subject to the entry of the Final Order, the Debtor hereby waives any and all claims the Debtor or the Debtor's bankruptcy estate possess for preferential transfers, within the meaning of Section 547 of the Bankruptcy Code, as either adversary proceedings or objections to proofs of claim, against any subcontractor or other person furnishing or agreeing to furnish or supply vehicles, labor, supplies, machinery, or other equipment in connection with or on account of any Berkshire Bonded Contract.

F. Findings Regarding the DIP Financing.

i. Good Cause; Need for Postpetition Financing: Good cause has been shown for the entry of this Interim Order. The Debtor has an immediate need to obtain the DIP Financing, and for authorization to continue to use any cash in which the DIP Lender has an interest (the

“Cash Collateral”)⁴ to permit, among other things, the orderly continuation of the operation of its business; the maintenance of business relationships with subcontractors, suppliers, vendors, and customers; the payment of payroll and related employee-related expenses; and the payment of other working capital and operational needs. The access of the Debtor to sufficient working capital and liquidity made available through the DIP Financing and use of Cash Collateral is vital to the preservation and maintenance of the going concern value of the Debtor and to the successful reorganization of the Debtor. The proposed DIP Financing is in the best interests of the Debtor, its estate and its creditors.

ii. No Credit Available on Equal or More Favorable Terms: The Debtor is unable to obtain financing on equal or more favorable terms from sources other than the DIP Lender. Specifically, the Debtor is unable to obtain unsecured credit allowable as an administrative expense under section 503(b)(1) of the Bankruptcy Code. The Debtor also is unable to obtain secured credit allowable solely under sections 364(c)(1), 364(c)(2) and 364(c)(3) of the Bankruptcy Code without the Debtor granting the DIP Lender. The financing terms set forth in the DIP Documents are the best terms available to obtain the needed financing.

iii. Business Judgment: The terms of the DIP Financing as approved herein, the terms of the Adequate Protection Obligations, and the terms on which the Debtor may continue to use Cash Collateral pursuant to this Interim Order and the DIP Documents are fair and reasonable, reflect the Debtor’s exercise of prudent business judgment consistent with its fiduciary duties and constitute reasonably equivalent value and fair consideration.

iv. No Impact on Existing Lien Holders: The terms of the DIP Financing have no material impact on the rights of existing lien holders because either (1) the terms of the DIP

⁴ Any continued use of the Cash Collateral in which the DIP Lender has an interest is subject to the consent of DIP Lender and the other terms and provisions of this Interim Order.

Financing are consistent with the terms of the applicable Intercreditor Agreements, or (2) the existing lienholders are included within the Permitted Liens that are not being primed by the DIP Financing. Consequently, the interests of the existing lienholders are adequately protected.

v. Good Faith Negotiations: The DIP Financing as approved herein, the terms on which the Debtor may continue to use Cash Collateral, and the terms of the Adequate Protection Obligations, the DIP Orders, and DIP Documents have been negotiated in good faith and at arm's length between the Debtor and the DIP Lender and all the Debtor's obligations and indebtedness arising under, in respect of or in connection with the DIP Financing and the DIP Documents, including (i) all loans made to the Debtor pursuant to the Loan and Security Agreement and (ii) any obligations under the Loan and Security Agreement (collectively, the "DIP Obligations") shall be deemed to have been extended in good faith as that term is used in section 364(e) of the Bankruptcy Code and in express reliance upon the protections offered by section 364(e) of the Bankruptcy Code, and the DIP Lender (and its successors and assigns) shall be entitled to the full protection of section 364(e) of the Bankruptcy Code in the event that this Interim Order or any provision hereof is vacated, reversed or modified, on appeal or otherwise.

vi. Good Faith of DIP Lender: The DIP Lender has acted in good faith regarding the DIP Financing and the Debtor's continued use of any property owned by the Debtor in which the DIP Lender has an interest pursuant to equitable subrogation, as a trust funds, or otherwise (the "Pre-Petition Collateral"), including Cash Collateral, in accordance with the terms hereof. The DIP Lender is entitled to the adequate protection provided in this Interim Order as and to the extent set forth herein pursuant to sections 361, 362, 363 and 364 of the Bankruptcy Code. In light of the good faith of the DIP Lender, in accordance with section 364(e) of the Bankruptcy Code, the rights and priorities granted to the DIP Lender under this Interim Order and

the DIP Documents will not be affected or avoided by any subsequent reversal or modification of this Interim Order or the Final Order.

vii. Best Interests of Estate: The Debtor has requested entry of this Interim Order pursuant to Bankruptcy Rules 4001(b)(2) and 4001(c)(2). Absent granting the relief set forth in this Interim Order, the Debtor's estate will be immediately and irreparably harmed. Consummation of the DIP Financing and the use of Pre-Petition Collateral, including Cash Collateral, in accordance with this Interim Order and the DIP Documents are therefore in the best interest of the Debtor's estate.

NOW, THEREFORE, on the Motion and the records before this Court with respect to the Motion, including the record created during the Interim Hearing, and with the consent of the Debtor, Bank of America and the DIP Lender to the form and entry of this Interim Order, and good and sufficient cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. Motion Granted. The Motion is granted, on an interim basis, in accordance with the terms of this Interim Order. Any objections to the Motion with respect to the entry of this Interim Order that have not been withdrawn, waived, or settled (as set forth herein), and all reservations of rights included therein, are hereby denied and overruled on the merits.

2. Authorization for the DIP Financing and DIP Documents. Pending the Final Hearing, the Debtor is hereby authorized to enter into and perform all obligations under the DIP Documents, subject to the following:

a. During the Interim Period, the Debtor is authorized to borrow money under the Loan and Security Agreement in up to an aggregate principal or face amount of \$1,200,000.00, inclusive of accrued and unpaid interest thereon and fees, expenses (including any attorneys', accountants', appraisers' and financial advisors' fees that are chargeable or reimbursable under the

Indemnity Agreements), amounts, charges, costs, indemnities and other obligations that are chargeable or reimbursable under the DIP Documents, in accordance with the terms and conditions of this Interim Order and the DIP Documents, which borrowings shall be used for all purposes permitted under the DIP Documents; provided, however, that the DIP Lender shall have no obligation to make any loans or advances to the Debtor during the Interim Period unless all conditions precedent to making such loans or advances under the DIP Documents have been satisfied or waived by the DIP Lender in its sole discretion.

b. In furtherance of the foregoing and without further approval of this Court, the Debtor is authorized to and directed to perform all acts, to make, execute, and deliver all instruments and documents (including, without limitation, the execution or recordation of security agreements, mortgages and financing statements), and to pay all fees, that may be reasonably required or necessary for the Debtor's performance of its obligations under the DIP Financing, including, as applicable and without limitation:

- i. the execution, delivery and performance of the DIP Documents,
- ii. the non-refundable payment to the DIP Lender, as the case may be, of all fees (which fees shall be, and shall be deemed to have been, approved upon entry of this Interim Order and upon payment thereof, shall not be subject to any contest, attack, rejection, recoupment, reduction, defense, counterclaim, offset, subordination, recharacterization, avoidance or other claim, cause of action or other challenge of any nature under the Bankruptcy Code, under applicable non-bankruptcy law or otherwise) and any amounts due (or that may become due) in respect of the indemnification obligations referred to in the DIP Documents and reasonable costs and expenses as may be due from time to time; and

iii. the performance of all other acts required under or in connection with the DIP Documents.

c. Upon execution and delivery of the DIP Documents, the DIP Documents shall constitute valid, binding and unavoidable obligations of the Debtor, enforceable against the Debtor in accordance with the terms of the DIP Documents and this Interim Order. No obligation, payment, transfer or grant of security under the DIP Documents or this Interim Order shall be stayed, restrained, voidable, or recoverable under the Bankruptcy Code or under any applicable law (including without limitation, any claims and causes of action pursuant to sections 502(d), 544, 545, 547, 548 and 550 of the Bankruptcy Code or under any applicable Uniform Fraudulent Transfer Act, Uniform Fraudulent Conveyance Act or other similar state statute or common law (each, an “Avoidance Action”), or subject to any defense, reduction, setoff, recoupment, recharacterization, subordination, disallowance, impairment, cross-claim or counterclaim.

3. **DIP Superpriority Claims.** Subject to the Carve-Out (as defined below), pursuant to section 364(c)(1) of the Bankruptcy Code, all of the DIP Obligations shall constitute allowed claims against the Debtor (without the need to file any proof of claim) with priority over any and all administrative expenses, diminution in value claims (including all Adequate Protection Obligations) and all other claims against the Debtor now existing or hereafter arising, of any kind whatsoever, including, without limitation, all administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy Code, and over any and all administrative expenses or other claims arising under sections 105, 326, 328, 330, 331, 365, 503(b), 506(c), 507(a), 507(b), 726, 1113 or 1114 of the Bankruptcy Code (collectively the “DIP Superpriority Claims”), regardless of whether such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment, which allowed claims shall for purposes of section

1129(a)(9)(A) of the Bankruptcy Code be considered administrative expenses allowed under section 503(b) of the Bankruptcy Code and shall be payable from and have recourse to the Collateral and any proceeds of the Collateral; provided, however, that the DIP Superiority Claims shall be subordinate to administrative expenses paid from the Administrative Expense Advance, including fees payable to the U.S. Trustee under Section 1930(a) of title 28 of the United States Code. Any payments, distributions or other proceeds received on account of such DIP Superpriority Claims shall be promptly delivered to the DIP Lender for distribution on account of the DIP Obligations in such order as is specified in the DIP Documents. The DIP Superpriority Claims shall be entitled to the full protection of section 364(e) of the Bankruptcy Code in the event that this Interim Order or any provision hereof is vacated, reversed or modified, on appeal or otherwise.

4. **DIP Liens.** As security for the DIP Obligations, effective and perfected upon the date of entry of this Interim Order and without the necessity of the execution, recordation of filings by the Debtor of mortgages, security agreements, control agreements, pledge agreements, financing statements or other similar documents, or the possession or control by the DIP Lender of, or over, any Collateral, the following security interests and liens are hereby granted to the DIP Lender:

a. *First Lien on Unencumbered Property.* Pursuant to section 364(c)(2) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected first priority senior security interest in and lien upon the Collateral to the extent it is unencumbered;

b. *Priming Lien (Subject to Permitted Liens).* Pursuant to section 364(d)(1) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected first priority senior

priming security interest in and lien upon the Collateral (the “Priming Liens”), subject only to Permitted Liens as defined in the Loan and Security Agreement;

c. Liens Junior to Certain Other Liens. Pursuant to section 364(c)(3) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected security interest in and lien upon the Collateral that is subject to any valid, perfected and unavoidable lien. Such junior lien shall include a valid, binding, continuing, enforceable, fully-perfected second position security interest in and lien upon all funds held in that certain deposit account at B of A with deposit account number DDA #####5627 (“BOA Account”). Such lien shall only be junior to B of A. The entry of this Order shall fully perfect Berkshire’s lien rights on the funds held in the BOA Account and Berkshire shall not be required to take any further action or execute any other documents to perfect that lien interest. A certified copy of the Interim Order may be filed or record with B of A and B of A is hereby directed to accept this Interim Order for purposes of filing and recording DIP Lender’s second position lien on the funds held in the BOA Account.

d. Liens Senior to Certain Other Liens. The DIP Liens shall not be subject or subordinate to or made *pari passu* with any lien or security interest that is avoided and preserved for the benefit of the Debtor and its estate under section 551 of the Bankruptcy Code. Unless otherwise provided for in the DIP Documents, the Priming Liens shall not be subject to or subordinate to or made *pari passu* with any liens arising after the Petition Date including, without limitation, any liens or security interests granted in favor of any federal, state, municipal or other governmental unit (including any regulatory body), commission, board, or court for any liability of the Debtor.

The liens granted under this paragraph 5 are collectively referred to as the “DIP Liens.”

5. **Modification/Termination of Automatic Stay.** Without the necessity of any further order of the Bankruptcy Court, the automatic stay provisions of section 362 of the Bankruptcy Code are hereby vacated, terminated, and modified to the extent necessary to permit the DIP Lender to enforce all of its rights and remedies under the DIP Documents (including any cash dominion as provided for in the DIP Documents or Trust Financing Agreement) and this Interim Order.

6. **Limitation of Defenses in Event of Default.** In any hearing regarding any exercise of rights under the DIP Documents, the only issue that may be raised by any party in opposition thereto shall be whether, in fact, an Event of Default has occurred and is continuing, and the Debtor and the Pre-Petition Secured Lender hereby waive their right to and shall not be entitled to seek relief, including, without limitation, under section 105 of the Bankruptcy Code, to the extent that such relief would in any way impair or restrict the rights and remedies of the DIP Lender set forth in this Interim Order or the DIP Documents. Further, subject only to and effective upon entry of the Final Order, in no event shall (i) the DIP Lender be subject to the equitable doctrine of “marshaling” or any similar doctrine with respect to the Collateral or (ii) the “equities of the case” exception in section 552(b) of the Bankruptcy Code apply to the claims of the DIP Lender.

7. **No Limitation on Enforcement.** No rights, protections or remedies of the DIP Lender granted by the provisions of this Interim Order or the DIP Documents shall be limited, modified or impaired in any way by (i) any actual or purported withdrawal of the consent of any party to the Debtor’s authority to continue to use Cash Collateral, (ii) any actual or purported termination of the Debtor’s authority to continue to use Cash Collateral or (iii) the terms of any other order or stipulation related to the Debtor’s continued use of Cash Collateral or the provision of adequate protection to any party.

8. **No Section 506(c) Claims.** Subject to the Carve Out, effective upon entry of this Interim Order with respect to the Pre-Petition Collateral and Collateral of the DIP Lender, no expenses of administration of the Case or any future proceeding that may result therefrom, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, shall be charged against or recovered from the Collateral (including Cash Collateral) pursuant to section 506(c) of the Bankruptcy Code or any similar principle of law, without the express 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.

9. **Payments Free and Clear.** Any and all payments or proceeds remitted to the DIP Lender pursuant to the provisions of this Interim Order, or any subsequent order of this Court shall be received free and clear of any claim, charge, assessment or other liability, including, without limitation, any such claim or charge arising out of or based on, directly or indirectly, sections 506(c) (whether asserted or assessed by, through or on behalf of the Debtor) or 552(b) of the Bankruptcy Code or the equitable doctrine of marshaling.

10. **Use of Cash Collateral.** The Debtor is hereby authorized, subject to the terms and conditions of this Interim Order and the Loan and Security Agreement, to use all Cash Collateral of the DIP Lender in accordance with the Budget. Each of the following events shall be deemed a “Cash Collateral Termination Event”)

a. the Debtor fails to use the DIP Lender’s cash collateral in accordance with the terms of the Budget.

b. confirmation of a plan of reorganization other than a plan of reorganization that is reasonably acceptable to the DIP Lender (any such plan, an “Acceptable Plan”) or if the Debtor files, proposes, supports, or fails to contest in good faith the filing or confirmation of a plan

of reorganization that is not an Acceptable Plan; provided that, for the avoidance of doubt, it shall not constitute a Cash Collateral Termination Event if, without the support of the Debtor, any part other than the Debtor seeks to or does confirm an Acceptable Plan;

c. a sale of all or substantially all of the assets of the Debtor;

d. the Debtor commences any action including the filing of any pleading, against the DIP Lender with respect to the (1) debts owed or interests granted by the Indemnity Agreements or (2) the Berkshire Pre-Petition Obligations.

11. Upon the occurrence of a Cash Collateral Termination Event, the DIP Lender may upon five business days' written notice to the Debtor, commence a proceeding in the Court to determine the Debtor's right to any further use of the Cash Collateral, and the Debtor's authorization to use the Cash Collateral shall be deemed automatically terminated on the fifth business day following commencement of such proceeding unless the Court orders otherwise by such time, and no further consent to the use of Cash Collateral shall be implied by any other action, inaction, or acquiescence by the DIP Lender.

12. **Adequate Protection of the DIP Lender.** The DIP Lender is entitled, pursuant to sections 361, 362, 363(e) and 364(d)(1) and 507 of the Bankruptcy Code, to adequate protection of its interests in the Pre-Petition Collateral, including the Cash Collateral, for and equal in amount to the aggregate diminution in the value of their respective interests in the Pre-Petition Collateral (including Cash Collateral) as provided in the Bankruptcy Code, by the reaffirmation of the protections provided by the Indemnity Agreements and the Trust Financing Agreement by certain non-Debtor parties.

13. **DIP Lender Fees.** Debtor shall pay to DIP Lender a facility fee in the amount of Seventy Five Thousand Dollars (\$75,000) (the “Facility Fee”) within two (2) Business Days of entry of the Interim Order.

14. **Perfection of DIP Liens.** The DIP Lender is hereby authorized, but not required, to file or record (and to execute in the name of the Debtor, as their true and lawful attorneys, with full power of substitution, to the maximum extent permitted by law) financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments in any jurisdiction, or take possession of or control over assets, or take any other action, in each case, in order to validate and perfect the liens and security interests granted to them hereunder. Upon the request of the DIP Lender, the Pre-Petition Secured Lender, without any further consent of any party, is authorized and directed to take, execute, deliver and file such instruments (in each case, without representation or warranty of any kind) to enable the DIP Lender to further validate, perfect, preserve and enforce the DIP Liens. All such documents will be deemed to have been recorded and filed, as applicable, as of the Petition Date.

15. A certified copy of this Interim Order may, in the discretion of the DIP Lender, be filed with or recorded in filing or recording offices in addition to or in lieu of such financing statements, mortgages, notices of lien or similar instruments, and all filing offices are hereby authorized and directed to accept such certified copy of this Interim Order for filing and recording, as applicable. For the avoidance of doubt, the automatic stay of section 362(a) of the Bankruptcy Code shall be modified to the extent necessary to permit the DIP Lender to take all actions, as applicable, referenced in this subparagraph (b) and in the immediately preceding subparagraph (a).

16. **Preservation of Rights Granted Under This Interim Order.** No claim or lien having a priority *pari passu* with those granted by this Interim Order to the DIP Lender shall be

granted or allowed while any portion of the DIP Financing (or any refinancing thereof) or the DIP Obligations remain outstanding, and the DIP Liens shall not be (i) subject or junior to any lien or security interest that is avoided and preserved for the benefit of the Debtor's estates under section 551 of the Bankruptcy Code or (ii) subordinated to or made *pari passu* with any other lien or security interest, whether under section 364(d) of the Bankruptcy Code or otherwise.

17. **Events of Default.** Unless all DIP Obligations shall have been indefeasibly paid in full in cash, and DIP Lender will have no exposure under any of the Bonds, the Debtor shall not seek, and it shall constitute an Event of Default (in addition to those Events of Default set forth in the Loan and Security Agreement) and terminate the right of the Debtor to use any and all Cash Collateral if the Debtor seeks or if there are entered, (i) any material modifications, amendments or any extensions of this Interim Order in a manner adverse to the DIP Lender, without the prior written consent of the DIP Lender, and no such consent shall be implied by any other action, inaction or acquiescence by the DIP Lender; (ii) an order dismissing the Case or converting the Case to a case under chapter 7 of the Bankruptcy Code; (iii) an order appointing any chapter 11 trustee in the Case without the prior written consent of the DIP Lender; (iv) an order appointing an examiner under section 1104 (other than a fee examiner) of the Bankruptcy Code without the prior written consent of the DIP Lender, (v) an order in the Case denying or terminating use of Cash Collateral by the Debtor if such order remains unstayed for more than three business days following its entry; (vi) a final, non-appealable order in the Case charging any of the Collateral under section 506(c) of the Bankruptcy Code against the DIP Lender without the consent of the DIP Lender, or the commencement of other actions materially adverse to the DIP Lender's rights and remedies under the applicable DIP Documents or otherwise inconsistent with the applicable DIP Documents; (viii) an order in the Case granting authority to obtain financing under section

364 of the Bankruptcy Code (other than under the DIP Facilities or in the ordinary course of the Debtor's businesses), unless such financing would, and in fact does, repay in full in cash all DIP Obligations upon consummation thereof.

18. **DIP Lender's Right to Take Possession of Bonded Projects.** In accordance with the provisions of the Loan and Security Agreement, the DIP Lender is authorized and empowered, but is not obligated, at any time and for any or no reason, to utilize any and all acknowledgments of default, takeover, tender, assign, or arrange for the completion of any project related to any Bonded Contract and prosecute, defend, settle, etc. any claims related to the Berkshire Bonded Contracts and/or the Collateral, at the expense of Debtor, or to take such other steps as in the discretion of DIP Lender may be advisable or necessary to obtain its release from all obligations under its Bonds or to avoid or mitigate Surety Loss. In the event that the DIP Lender exercises its rights under this Agreement to use the Acknowledgments of Default and to take over possession of any part or all of the work under any of the Berkshire Bonded Contracts, Debtor will immediately turn over to the DIP Lender all books, records, accounts, and documents relevant to the Berkshire Bonded Contracts.

19. **Survival of DIP Liens and Priorities in Event of Case Dismissal.** In the event that any order is entered dismissing the Case under section 1112 of the Bankruptcy Code or otherwise, such order shall provide (in accordance with sections 105 and 349 of the Bankruptcy Code) that (i) the DIP Superpriority Claims and DIP Liens, security interests, replacement security interests and administrative claims granted to the DIP Lender pursuant to this Interim Order shall continue in full force and effect and shall maintain their priorities as provided in this Interim Order until all DIP Obligations shall have been paid and satisfied in full (and that such DIP Superpriority Claims, DIP Liens, security interests, replacement security interests and administrative claims,

shall, notwithstanding such dismissal, remain binding on all parties in interest) and (ii) this Court shall retain jurisdiction, notwithstanding such dismissal, for the purposes of enforcing the claims, liens and security interests referred to in clause (i) above.

20. **Applicability of Section 364(e) of the Bankruptcy Code.** If any or all of the provisions of this Interim Order are hereafter reversed, modified, vacated or stayed, such reversal, modification, vacation or stay shall not affect (i) the validity of any DIP Obligations, the DIP Documents, or Adequate Protection Obligations incurred or the DIP Liens granted prior to the actual receipt of written notice by the DIP Lender, of the effective date of such reversal, modification, vacation or stay or (ii) the validity or enforceability of the DIP Liens. Notwithstanding any such reversal, modification, vacation or stay, any use of Cash Collateral or any DIP Obligations, DIP Liens, or Adequate Protection Obligations incurred by the Debtor to the DIP Lender prior to the actual receipt of written notice by the DIP Lender, as applicable, of the effective date of such reversal, modification, vacation or stay 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 in section 364(e) of the Bankruptcy Code, this Interim Order and pursuant to the DIP Documents with respect to all uses of Cash Collateral, DIP Obligations and Adequate Protection Obligations.

21. **Survival of DIP Liens and Priorities Generally.** Except as expressly provided in this Interim Order or in the DIP Documents, the DIP Liens, the DIP Superpriority Claims and all other rights and remedies of the DIP Lender granted by the provisions of this Interim Order and the DIP Documents shall survive, and shall not be modified, impaired or discharged by (i) the entry of an order converting the Case to a case under chapter 7, dismissing the Case, or by any other act or omission, (ii) the entry of an order approving the sale of any Collateral pursuant to

section 363(b) of the Bankruptcy Code (except to the extent permitted by the DIP Documents) or (iii) the entry of an order confirming a chapter 11 plan in the Case and, pursuant to section 1141(d)(4) of the Bankruptcy Code, the Debtor has waived any discharge as to any remaining DIP Obligations. The terms and provisions of this Interim Order and the DIP Documents shall continue in this Case, or in any superseding chapter 7 case under the Bankruptcy Code, and the DIP Liens, the DIP Superpriority Claims and all other rights and remedies of the DIP Lender granted by the provisions of this Interim Order and the DIP Documents shall continue in full force and effect until the DIP Obligations are indefeasibly paid in full in cash.

22. **Stipulations Binding on Successors of Debtor.** The Debtor's stipulations, admissions, agreements, and releases contained in this Interim Order, and the DIP Documents, shall be binding upon the Debtor and any successor thereto (including, without limitation, any chapter 7 or chapter 11 trustee or examiner appointed or elected for the Debtor) in all circumstances and for all purposes.

23. **Stipulations Binding on Third Parties; Challenge Period.** The Debtor's stipulations, admissions, agreements and releases contained in this Interim Order shall be binding upon all other parties in interest, including, without limitation, any committee appointed in this Case and any other person or entity acting on behalf of the Debtor's estate in all circumstances for all purposes; provided, however, that any committee appointed in this case shall have 60 days after entry of this Order (the "Challenge Period") to file an adversary proceeding or contested matter (subject to the limitations contained herein, including, *inter alia*, in paragraphs 19 and 20 of this Interim Order) challenging the amount, validity, perfection, enforceability, priority or extent of the DIP Lender's interest in the Pre-Petition Collateral or (ii) otherwise asserting or prosecuting any action for preferences, fraudulent transfers or conveyances, other avoidance power claims or any

other claims, counterclaims or causes of action, objections, contests or defenses (collectively, “Challenge Proceedings”) against the DIP Lender, their respective predecessors, successors and assigns, affiliates, subsidiaries, funds, portfolio companies, management companies, and, with respect to each of the foregoing entities, each of their respective current and former directors, officers, members, employees, partners, managers, independent contractors, agents, representatives, principals, Professionals, consultants, financial advisors, attorneys, accountants, investment bankers, and other professional advisors (each of the foregoing entities a “Representative” and, collectively, the “Representatives”) in connection with matters related to the Bonds, the Indemnity Agreements, and the Pre-Petition Collateral provided that any pleadings filed in any Challenge Proceeding shall set forth with specificity the basis for such challenge or claim and any challenges or claims not so specified prior to the expiration of the Challenge Period shall be deemed forever waived, released and barred.

24. **No timely filed Challenge Proceeding.** If no such Challenge Proceeding matter is timely and properly filed during the Challenge Period or the Court does not rule in favor of the plaintiff in any such proceeding then: (a) the Debtor’s stipulations, admissions, agreements and releases contained in this Interim Order, and the DIP Documents shall be binding on all parties in interest, including, without limitation, the Creditors’ Committee; (b) notwithstanding any reservations of rights contained in this Interim Order, the obligations of the Debtor under the Indemnity Agreements shall constitute allowed claims not subject to defense, claim, counterclaim, recharacterization, subordination, offset or avoidance, for all purposes in this Case, and any subsequent chapter 7 case; (c) the Stipulated Security Interests shall be deemed to have been, as of the Petition Date, legal, valid, binding, perfected, security interests and liens, not subject to recharacterization, subordination, avoidance or other defense; and (d) the Berkshire Pre-Petition

Obligations shall not be subject to any other or further claim or challenge by the Creditors' Committee, any non-statutory committees appointed or formed in this Case or any other party in interest acting or seeking to act on behalf of the Debtor's estate and any defenses, claims, causes of action, counterclaims and offsets by the Creditors' Committee, any non-statutory committees appointed or formed in this Case, or any other party acting or seeking to act on behalf of the Debtor's estate, whether arising under the Bankruptcy Code or otherwise, against the DIP Lender or its Representatives arising out of or relating to the Indemnity Agreements shall be deemed forever waived, released and barred.

25. **Timely Filed Challenge Proceeding.** If any such Challenge Proceeding is timely filed during the Challenge Period, the stipulations, admissions, agreements and releases contained in this Interim Order shall nonetheless remain binding and preclusive (as provided in the second sentence of this paragraph) on any other person or entity, except to the extent that such stipulations, admissions, agreements and releases were expressly and successfully challenged in such Challenge Proceeding as set forth in a final, non-appealable order of a court of competent jurisdiction.

26. **No Grant of Standing.** Notwithstanding any provision of this Interim Order, nothing in this Interim Order shall be deemed to vest or confer on any Person (as defined in the Bankruptcy Code), including any non-statutory committee appointed or formed in this Case, standing or authority to pursue any claim or cause of action belonging to the Debtor or its estate.

27. **Limitation on Deposit and Use of DIP Financing Proceeds and Collateral.** The Debtor shall maintain all funds received pursuant to the DIP Financing, as well as any proceeds of the Accounts and Berkshire Bonded Contracts, in accordance with the terms of the DIP Documents and the Trust Financing Agreement.

28. **Performance of Berkshire Bonded Contracts.** Unless otherwise agreed to in writing by DIP Lender, the Debtor will continue to prosecute the Work under the Berkshire Bonded Contracts and use its best good faith efforts to timely complete all remaining Work and obligations required under any and all of the Berkshire Bonded Contracts, and avoid any default under any of the Berkshire Bonded Contracts. In furtherance of the foregoing, in the Acceptable Plan, the Debtor shall seek to assume pursuant to Section 365 of the Bankruptcy Code any specific Berkshire Bonded Contract, or all Berkshire Bonded Contracts, entered into prior to the Petition Date.

29. **No Challenge.** No borrowings under the DIP Financing may be used, in the Case or any other proceeding of any kind, or in any jurisdiction, to (a) object and/or challenge the amount, validity, perfection, priority or enforceability of or asserting any defense, counterclaim or offset to, any amount due under the DIP Documents or the Indemnity Agreements, the validity, perfection, priority, extent or enforceability of any amount due under the DIP Documents or the Indemnity Agreements or the liens or claims granted under this Interim Order, the DIP Documents or the Indemnity Agreements, including, in each case, without limitation, for lender liability or pursuant to section 105, 502(d), 510, 544, 547, 548, 549, 550, or 552 of the Bankruptcy Code, applicable non-bankruptcy law or otherwise, (b) investigate, assert or prosecute any claims and defenses or causes of action against the DIP Lender or its respective Representatives, (c) prevent, hinder or otherwise delay the DIP Lender's assertion, enforcement or realization against or upon the Cash Collateral or the Collateral in accordance with the DIP Documents, the Indemnity Agreements, or this Interim Order, (d) seek to modify any of the rights granted to the DIP Lender, hereunder or under the DIP Documents or the Indemnity Agreement without the DIP Lender's prior written consent, (e) attempt to directly or indirectly modify any of the rights granted to the DIP Lender, (f) pay any amount on account of any claims arising prior to the Petition Date unless

such payments are (i) approved by an order of this Court and (ii) in accordance with the DIP Documents.

30. **Payments Held in Trust.** Except as expressly permitted in this Interim Order or the DIP Documents, in the event that any person or entity receives any payment on account of a security interest in Collateral, receives any proceeds of Collateral or receives any other payment with respect thereto from any other source prior to indefeasible satisfaction of all DIP Obligations under the DIP Documents, such person or entity shall be deemed to have received, and shall hold, any such payment or proceeds of Collateral in trust for the benefit of the DIP Lender and shall immediately turn over such proceeds to the DIP Lender, or as otherwise instructed by this Court, for application in accordance with the DIP Documents and this Interim Order.

31. **Credit Bidding.** The DIP Lender has the right to credit bid up to the full amount of the DIP Obligations in any sale of the Collateral (including, without limitation, sales occurring under Section 363 of the Bankruptcy Code or included as part of any plan of reorganization subject to confirmation of such reorganization plan) as provided for in section 363(k) of the Bankruptcy Code, without the need for further Court order authorizing the same and whether such sale is effectuated through section 363(k) or 1129(b) of the Bankruptcy Code, by a chapter 7 trustee under section 725 of the Bankruptcy Code, or otherwise.

32. **Bankruptcy Rule 6003.** The requirements of Bankruptcy Rule 6003 are satisfied by the contents of the Motion.

33. **Waiver of Stay.** Notwithstanding any Bankruptcy Rule (including, but not limited to, Bankruptcy Rule 6004(h)) or any local rule of the Court that might otherwise delay the effectiveness of this Interim Order, the terms and conditions of this Interim Order shall be immediately effective and enforceable upon its entry.

34. **Reliance by Berkshire.** In agreeing to provide the Loan, Berkshire has relied on the protections, covenants, and representations in this Interim Order and such protections, covenants and representations were a material inducement to Berkshire making the decision to provide the Loan.

35. **Necessary Action.** The Debtor is authorized to take all actions that are necessary or appropriate to implement the terms of this Interim Order.

36. **Retention of Jurisdiction.** This Court has and will retain jurisdiction to enforce this Interim Order according to its terms.

37. **Order Governs.** In the event of any inconsistency between the provisions of this Interim Order and the DIP Documents, the provisions of this Interim Order shall govern.

38. **Binding Effect; Successors and Assigns.** The DIP Documents and the provisions of this Interim Order, including all findings herein, shall be binding upon all parties in interest in this Case, including, without limitation, the DIP Lender, the Pre-Petition Secured Lender, any committee appointed in this Case, and the Debtor, and their respective successors and assigns (including any chapter 7 or chapter 11 trustee hereinafter appointed or elected for the estate of the Debtor) and shall inure to the benefit of the DIP Lender, the Pre-Petition Secured Lender, and the Debtor, and their respective successors and assigns; provided, however, that the DIP Lender shall have no obligation to extend any financing to any chapter 7 trustee or similar responsible person appointed for the estate of the Debtor. In determining to make any loan under the DIP Documents or to exercise any rights or remedies as and when permitted pursuant to this Interim Order or the DIP Documents, the DIP Lender shall not solely by reason thereof be deemed to be in control of the properties or operations of or participating in the management of the Debtor, be deemed to have authority to determine the manner in which the Debtor's operations are conducted or be

deemed to be acting as a “responsible person” or “owner or operator” with respect to the operation or management of the Debtor (as such terms, or any similar terms, are used in the United States Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601, et seq., as amended, or any similar federal or state statute).

39. **Final Hearing.** The Final Hearing to consider entry of the Final Order and final approval of the DIP Financing and use of Cash Collateral, shall be held on **March _____, 2019 at _____ a/p.m. (Eastern Time), at the United States Bankruptcy Court, C. Clyde Atkins United States Courthouse, 301 North Miami Avenue, Courtroom _____, Miami, Florida 33128.**

Objections to the entry of the Final Order shall be in writing and shall be filed and served so as to be actually received no later than 4:30 p.m. prevailing eastern standard time on March _____, 2019.

40. **Notice.** The Debtor shall promptly serve copies of this Interim Order (which shall constitute adequate notice of the Final Hearing, including, without limitation, notice that the Debtor will seek approval at the Final Hearing of a waiver of rights under section 506(c) of the Bankruptcy Code) to the parties having been given notice of the Interim Hearing and to any Committee after the same has been appointed, or such Committee’s counsel, if the same shall have been appointed. No later than 24 hours after such service, the Debtor shall file a certificate of service with the Court.

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Submitted by:

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Copies furnished to:

Jordi Guso, Esq.
(Attorney Guso is directed to serve a signed copy of this Order upon all interested parties and to file a Certificate of Service with the Court.)