

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF LOUISIANA

IN RE:

INCA REFINING, L.L.C.,  
DEBTOR

WEST BANK LAND COMPANY, LLC,  
DEBTOR<sup>1</sup>

CASE NO. 17-11182  
(CONSOLIDATED WITH)  
CASE NO. 17-11183

CHAPTER 11

SECTION "B"

**DEBTORS' MOTION FOR FINAL ORDER PURSUANT TO 11 U.S.C. §§ 105, 364, FED  
R. BANKR. P. RULES 4001: (I) AUTHORIZING DEBTORS TO OBTAIN  
POSTPETITION FINANCING; (II) GRANTING RELATED RELIEF, AND  
(III) SCHEDULING A FINAL HEARING**

NOW INTO COURT, through undersigned counsel, comes Inca Refining LLC ("**INCA**") and West Bank Land Company, LLC ("**West Bank**") (collectively, the "**Debtors**"), debtors in the above-captioned case, who hereby move for entry of a final order (the "**Final DIP Order**"), through this motion (this "**Motion**") and pursuant to sections 105(a), 364 of title 11 of the United States Code, 11 U.S.C. §§ 101 – 1532 (as amended, the "**Bankruptcy Code**"), as well as Rule 4001(c) of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"): (i) Authorizing and approving, *inter alia*, the Debtors obtaining postpetition financing (the "**Postpetition Financing or DIP Financing**") from White Oak Strategic Master Fund, L.P., White Oak Opportunity SRV, L.P., and White Oaks Strategic II SRV, L.P. (collectively, "**White Oak Creditors**," also referred to herein as the "**DIP Lender**"), on a section 364(c) superpriority administrative and secured claim basis; and (ii) scheduling a final hearing with the respect to the relief requested herein.

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<sup>1</sup> On August 8, 2017, this Court entered an order procedurally consolidating Case No. 17-11182 and Case No. 17-11183, The Debtors are jointly administrated pursuant to Bankruptcy Code § 105(a) and Bankruptcy Rule 1015(b) (collectively, this "**Chapter 11 Case**").

The Debtors' ability to obtain the Postpetition Financing is critical to the Debtors' ability to maintain the value of the estates' assets in the Debtors' Chapter 11 Case and increase the recovery of the Debtors' creditors through an orderly liquidation or reorganization. The proceeds of such Postpetition Financing will be used to fund certain costs of administering the Debtors' estates, as approved by the Bankruptcy Court.

The Debtors' primary prepetition creditors include (1) NCC Financial, LLC ("NCC"); (2) Louisiana Loan Company, LLC ("La. Loan"); and (3) White Oak Creditors.<sup>2</sup> NCC is the first mortgage holder of real estate, approximately 447 acres on the Mississippi River in St. James Parish, Louisiana (the "St. James Property") owned by West Bank and has a security interest in permits owned by INCA and West Bank, securing approximately \$6,500,000.00. La. Loan is the second mortgage holder of real estate owned by West Bank and has a security interest in the same permits owned by INCA and West Bank, securing approximately \$180,000.00. Finally, the White Oak Creditors are the third mortgage holder of real estate owned by West Bank and also possess the same security interest in the permits owned by INCA and West Bank, securing a total indebtedness in excess of \$102,000,000.00. INCA and West Bank are allegedly jointly liable to all three—NCC, La. Loan, and the White Oak Creditors.

Pursuant to Bankruptcy Rule 4001(c), the principal provisions of the Final DIP Order, a proposed copy of which is attached as **Exhibit "B"** hereto, are as follows (capitalized terms used but not immediately defined herein shall have the meanings ascribed to them later in this Motion or in the Final DIP Order, as the case may be):

- a. Nature and Amount of Financing.** Pursuant to the terms provided herein, which, at the DIP Lender's sole discretion, may be subject to a DIP Credit Facility

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<sup>2</sup> Although the White Oak Creditors are creditors of the Debtors, the same entities constituting the "White Oak Creditors" hold a 57.6% equity interest in INCA and in West Bank. The remaining 39.4% equity interest is held by Millbrook Trust ("Millbrook") (the Trustee of Millbrook is Mike McQueen—the founder, president, and chairman of INCA and West Bank).

Agreement (the “**DIP Credit Facility Agreement**”) with substantially similar terms, (collectively with any other loan agreement, notes, guaranties, security documents or other agreements or instruments executed by Debtors in connection with the DIP Credit Facility Agreement, the “**Loan Documents**”), DIP Lender will lend to the Debtors, in a drawdown structure, for which the DIP Lender will have discretion as to each funding, the amounts set forth in the Budget, attached to this Motion as **Exhibit A**,

- b. Borrowing Limits.** Borrowings under the Postpetition Financing cannot exceed 15% of the aggregate amounts set forth in the Budget, attached to the Motion as **Exhibit A**.
- c. Borrowing Conditions.** The borrowing under the Postpetition Financing is conditioned upon (i) the entry of the Final DIP Order authorizing the financing; (ii) at the sole discretion of the DIP Lender, the DIP Lender’s receipt of the Debtors’ executed Loan Documents, upon entry of the Final DIP Order; and (iii) DIP Lender receipt of satisfactory evidence that each Debtor has obtained all required consents and approvals. All borrowings under the Postpetition Financing are conditioned upon (a) no event of default having occurred and continuing under the terms of the agreements as stated herein, (b) no injunction, writ, restraining order or other order prohibiting, directly or indirectly, the extending of credit under the DIP Financing or DIP Credit Facility Agreement, (c) the Final Order being in full force and effect and not having been vacated, reversed, modified or stayed in any respect (and if either such order is the subject of any pending appeal, no performance of any obligation of any party shall have been stayed pending such appeal). The DIP Lender will also have discretion as to each funding pursuant to the drawdown structure of the Postpetition Financing.
- d. Interest Rate and Origination Fee.** Interest accrues at the Prime Rate plus 400 basis points.
- e. Maturity Date.** The earlier of (a) the date concluding the sale of the St. James Property pursuant to section 363 of the Bankruptcy Code, or (b) eighteen (18) months from the entry of the Final DIP Order.
- f. Events of Default.** An Event of Default occurs if (i) the Debtors fail to timely pay Postpetition Financing obligations, (ii) the occurrence of an event that has or could reasonably be expected to have, a material adverse effect on the business, assets, operations, prospects or financial or other condition of a Debtor, (iii) the entry of an order amending, supplementing, staying, vacating or otherwise modifying the DIP Credit Facility Agreement, or Final DIP Order without the DIP Lender’s consent, (iv) a chapter 11 trustee or examiner with expanded powers is appointed in the Chapter 11 Case, (v) the Chapter 11 Case is dismissed or converted to chapter 7 of the Bankruptcy Code, (vi) the entry of an order by the Bankruptcy Court granting relief from or modifying the automatic stay to the detriment of DIP Lender, (vii) the entry of an order in the Chapter 11 Case

avoiding or requiring repayment of any portion of the payments made on account of obligations owed a Debtor to the DIP Lender, (viii) the Final DIP Order ceases to be in full force and effect, (ix) the filing by a Debtor of any plan of reorganization or arrangement without the prior consent of the DIP Lender, (xi) formation by either Debtor of a new subsidiary and failure to contemporaneously cause such subsidiary to become a borrower under the DIP Credit Facility Agreement or DIP Financing terms, (xii) either Debtor conducts its business in a manner that materially deviates from the Budget, and (xiii) if the St. James Property is not sold within eighteen (18) months from the date of entry of a Final Dip Order.

- g. Limitations on Use of Funds.** See the Budget, attached to the Motion as **Exhibit A**.
- h. Protections Afforded.** The DIP Lender requires repayment of all amounts loaned under the DIP Financing to be paid at the closing of the sale of the St. James Property, any partial sale thereof or receipt of any other funds, arising from a sale of the Debtors' assets or otherwise, to an account of its choosing. No individual and/or entity, other than the Debtor Representative, will be authorized to act on behalf of the Debtor generally and with respect to the DIP Financing. All proceeds from the sale of assets in excess of the amounts required for mortgage payoff shall be directed into an account in the name of and/or held by White Oak.
- i. Default Interest.** Upon default, the interest rate will increase by 500 basis points as of the date of default and onward.
- j. Carve-Out.** There will be a carve out for all fees and reimbursable expenses incurred by Jones Walker LLP and by the Debtor Representative, Bryan Perkinson.
- k. Superpriority Administrative Claim.** The DIP Lender shall have superpriority administrative claim basis pursuant to Bankruptcy Code section 364(c) as to all amounts advanced by the DIP Lender, including all costs and expense incurred by the DIP Lender, pursuant to the terms stated herein.

There are no provisions which might prohibit or hamper the Debtors or Debtors' counsel from exercising their fiduciary responsibilities following entry of the order.

In accordance with Fed. R. Bankr. P. 4001 and L.R. 4001-3, the Debtors have identified below, by page and paragraph number, the location of each of the following provisions:

No.	Provision	Contained in Credit Agreements or Proposed Order	Location in Proposed Order	Location in Motion
(i)	A grant of priority or a lien on property of the estate under § 364(c) or (d).	<input checked="" type="checkbox"/> <b>Yes</b> <input type="checkbox"/> <b>No</b>	¶13(k)	p. 4
(ii)	The providing of adequate protection or priority for a claim that arose before the commencement of the case, including the granting of a lien on property of the estate to secure the claim, or the use of property of the estate or credit obtained under § 364 to make cash payments on account of the claim.	<input type="checkbox"/> <b>Yes</b> <input checked="" type="checkbox"/> <b>No</b>	N/A	N/A
(iii)	A determination of the validity, enforceability, priority, or amount of a claim that arose before the commencement of the case, or of any lien securing the claim.	<input type="checkbox"/> <b>Yes</b> <input checked="" type="checkbox"/> <b>No</b>	N/A	N/A
(iv)	A waiver or modification of Code provisions or applicable rules relating to the automatic stay.	<input type="checkbox"/> <b>Yes</b> <input checked="" type="checkbox"/> <b>No</b>	N/A	N/A
(v)	A waiver or modification of any entity's authority or right to file a plan, seek an extension of time in which the debtor has the exclusive right to file a plan, request the use of cash collateral under § 363(c), or request authority to obtain credit under § 364.	<input type="checkbox"/> <b>Yes</b> <input checked="" type="checkbox"/> <b>No</b>	N/A	N/A

(vi)	The establishment of deadlines for filing a plan of reorganization, for approval of a disclosure statement, for a hearing on confirmation, or for entry of a confirmation order.	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	N/A	N/A
(vii)	A waiver or modification of the applicability of non-bankruptcy law relating to the perfection of a lien on property of the estate, or on the foreclosure or other enforcement of the lien.	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	N/A	N/A
(viii)	A release, waiver, or limitation on any claim or other cause of action belonging to the estate or the trustee, including any modification of the statute of limitations or other deadline to commence an action.	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	N/A	N/A
(ix)	The indemnification of any entity.	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	N/A	N/A
(x)	A release, waiver, or limitation of any right under § 506(c).	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	N/A	N/A
(xi)	The granting of a lien on any claim or cause of action arising under §§ 544, 545, 547, 548, 549, 553(b), 723(a), or 724(a).	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	N/A	N/A

In addition to the foregoing relief, the Debtors request that the Court:

- (i) Schedule, pursuant to Bankruptcy Rule 4001(c)(2), the final hearing on this Motion (the “**Final Hearing**”) on or before November 1, 2017, to consider entry of the Final DIP Order, authorizing borrowings under and approving the terms of the Postpetition Financing on a final basis as set forth herein; and,
- (ii) Approve the Debtors’ notice procedures with respect to the Final Hearing.

In further support of this Motion, the Debtors submit the following Memorandum of Points and Authorities.

### **I. JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b). The statutory predicates for relief sought herein are 11 U.S.C. §§ 105(a) and 364, Bankruptcy Rule 4001 and L.R. 4001-3.

### **II. BACKGROUND**

2. INCA was organized in Texas in 2005 for the purpose of developing and operating an oil refinery in Louisiana. INCA owns an eighty percent (80%) membership interest in Refinery Equipment Holdings LLC (“**REH**”), a Delaware limited liability company (the remaining twenty percent (20%) is owned by Del Mar Onshore Partners L.P. (“**Del Mar**”) entities. In addition to this ownership interest, INCA also holds property in Egan, Louisiana.

3. West Bank was organized in Texas in 2008 for the purpose of acquiring land to be developed by INCA into an oil refinery. West Bank owns the St. James Property (defined *supra*) for this purpose.

4. In 2009, West Bank (as lessor) entered into a long-term ground lease with INCA (as the lessee) allowing INCA to develop the St. James Property for a refinery. In addition to the St. James Property, West Bank owns an air emissions permit that was obtained for the intended oil refinery design project. Simultaneously, INCA worked to develop the refinery project resulting in substantial engineering design work and studies being completed as follows: (a) Phase One and Phase Two environmental assessment; (b) archeological survey; (c) threatened and endangered species clearance; (d) geotechnical assessment (site-wide, batture, and in-river);

(e) wetlands delineation (Section 404); and (f) obtaining one (1) dock permit (Section 401—U.S. Army Corps of Engineers) (collectively referred to herein as the “**St. James Project**”).

5. In 2010, White Oak Global Advisors, LLC (the “**White Oak Advisors**”) entered into two (2) funding agreements with INCA and West Bank on behalf of the White Oak Creditors. Specifically, INCA, West Bank, “Lenders named therein,” and the White Oak Advisors—in its capacity as “as Agent for the Lenders”—entered into and executed an Amended and Restated Funding Agreement (the “**First Funding Agreement**”). Pursuant to an Assignment and Assumption (the “**First Assignment**”), White Oak Opportunity Master Fund II, L.P. sold and assigned without recourse its interest, as well as its rights and obligations under, the First Funding Agreement regarding certain loans to White Oak Opportunity SRV II, L.P. This First Assignment related to “Initial Loans to INCA” in the amount of \$1,597,754.71, “plus all accrued, compounded, and capitalized interest thereon.” The effective date of this First Assignment, referred to therein as the “Assignment Date,” was June 30, 2011.

6. A second “Assignment and Assumption” was entered the same day (the “**Second Assignment**”). The Second Assignment references an Amended and Restated Funding Agreement (the “**Second Funding Agreement**”), entered into and executed by INCA, West Bank, “Lenders named therein,” and the White Oak Advisors—in its capacity as “as Agent for the Lenders”—on January 13, 2010. Pursuant to the Second Assignment, White Oak Opportunity Master Fund, L.P. sold and assigned without recourse its interest, as well as its rights and obligations, under the Second Funding Agreement regarding certain loans to White Oak Opportunity SRV, L.P. This Second Assignment related to “Additional Loans to INCA” in the amount of \$2,550,000.00, “plus all accrued, compounded and capitalized interest thereon,” as well as “Additional Loans to West Bank” in the amount of \$1,200,000.00, “plus all accrued,



compounded and capitalized interest thereon.” The effective date of this Second Assignment (also referred as the “Assignment Date”) was June 30, 2011. The current total indebtedness owed to the White Oak Creditors is now in excess of \$102,000,000.00.

7. In exchange for this funding, the White Oak Creditors were initially granted a first mortgage in the real estate owned by West Bank and security interest in the permits owned by the Debtors. However, in 2014, the White Oak Creditors subordinated their first mortgage and security interest to NCC, which now holds the first mortgage and security interest securing their \$6,500,000.00 plus in debt. On or about December 1, 2015, the St. James Property was appraised at \$14,190,000.00. Subsequently, in 2016, the White Oak Creditors subordinated its mortgage and security interest to La. Loan, with the goal of obtaining additional lending to the St. James Project. As stated *supra*, La. Loan now holds a second mortgage and security interest in the same collateral securing approximately \$180,000.00 in debt.

8. To date, the Debtors have been unsuccessful with the St. James Project in that the only completed construction is a docking facility. No refinery equipment has been installed or built on the property; neither INCA nor West Bank has ever operated as a business.

9. In February 2017, INCA and West Bank attempted to salvage a recovery of the assets in the St. James Project by entering into a letter of intent (the “**Letter of Intent**”) with a potential buyer of the assets and/or membership interests in INCA and West Bank for \$17,000,000.00. The identity of the prospective buyer and the terms of the potential agreement are unknown and may not be disclosed due to the confidentiality clause included in the Letter of Intent. Regardless, the purchase never came to fruition.

10. On April 4, 2017, NCC (as the first mortgage holder) foreclosed on the assets of West Bank and INCA by filing a petition for executory process, without appraisal, in the 23<sup>rd</sup> Judicial District Parish of St. James, State of Louisiana, Suit No. 38,062.

11. On May 9, 2017 (the “**Petition Date**”), the White Oak Creditors filed involuntary petitions for relief under chapter 11 of the Bankruptcy Code in this Court against West Bank (at Case No. 17-11183) and INCA (at Case No. 17-11182). Shortly thereafter, on May 12, 2017, the White Oak Creditors filed amended involuntary petitions against each Debtor, “supplanting and replacing the original petition[s].” [See Case No. 17-11183, Dkt No. 2; Case No. 17-11182, Dkt. No. 2].

12. On July 10, 2017, the White Oak Creditors filed their *Motion to Consolidate Cases Procedurally with Combined Supporting Memorandum* [Case No. 17-11183, Dkt No. 12; Case No. 17-11182, Dkt. No. 13].

13. The same day, July 10, 2017, the White Oak Creditors filed a *Motion to Appoint Chapter 11 Trustee with Combined Supporting Memorandum* in each case [Case No. 17-11183, Dkt No. 15; Case No. 17-11182, Dkt. No. 16] (the “**Motions to Appoint Trustee**”). The Motions to Appoint Trustee were noticed for hearing on August 2, 2017.

14. The United States Trustee responded in disfavor of the Motion(s) to Appoint Trustee, primarily asserting that it appeared “the involuntary petition was filed to stay a pending foreclosure sale, in hopes of preserving any equity which may exist,” for the White Oak Creditors, over the objection of the Debtors’ primary secured creditor. Consequently, a chapter 11 proceeding would be a “protected and expensive proposition” for which no funds appear to exist with which to pay an appointed trustee. On August 4, 2017, this Court denied the Motions

to Appoint Trustee; as a result, the Debtors continue as chapter 11 debtors-in-possession. [See Case No. 17-11183, Dkt No. 45; Case No. 17-11182, Dkt No. 47].

15. On August 9, Millbrook filed a *Motion to Designate Debtor in Possession Representative Pursuant to 11 U.S.C §§ 105, 1107, and Bankruptcy Rule 9001(5)*, see Case No. 17-11182, Dkt. No. 50, arguing, in part, that the White Oak Creditors should not be charged with representing the Debtors acting as debtors-in-possession. However, on September 13, 2017, Millbrook filed its *Ex Parte Motion with Consent to Withdraw the Motion to Designate Debtor In Possession Representative Pursuant to 11 U.S.C. §§ 105 and 1107 and Bankruptcy Rule 9001(5)*, Case No. 17-11182, Dkt. No. 76, which the Court granted on September 14, 2017, Case No. 17-11182, Dkt. No. 83.

16. On September 13, 2017, the Debtors filed their *Motion for an Order Extending the Time to Assume or Reject Unexpired Nonresidential Leases of Real Property*. [Case No. 17-11182, Dkt. No. 78]. The same day, the Debtors filed *Debtors' Motion for an Order Pursuant to 11 U.S.C. § 1121(d) Extending the Debtors' Exclusive Periods in which to File a Chapter 11 Plan and to Solicit Votes Thereon*. [Case No. 17-11182, Dkt. No. 80]. Pursuant to the latter, the Debtors seek an extension of the "Exclusive Filing Period" of a chapter 11 plan for ninety (90) days (from October 4, 2017 through and including January 2, 2018).

17. On September 21, 2017, Bryan Perkinson was appointed the debtor representative for the Debtors in this Bankruptcy Case (the "Debtor Representative"). [Dkt. No. 89].

18. Most recently, the Debtors have engaged in discussions with the parties in interest in this Chapter 11 Case concerning the resolution of various disputes and claims with a view toward the development of a consensual and confirmable chapter 11 plan of liquidation. [See Case No. 17-11182, Dkt. No. 80, ¶25].

19. The Debtors seek Postpetition Financing to fund the Debtors' chapter 11 administrative expenses, including the fees of the Debtors' professionals, whose services are required to (i) move these cases toward a plan of liquidation; (ii) fund a plan of liquidation; and (iii) allow the Debtors to properly and successfully market the estates' assets, thereby obtaining sufficient funds for the payment of NCC and other creditors. Furthermore, such actions will help maintain the value of the Debtors' assets and are otherwise in the best interest of the Debtors and their creditors (including, but not limited to, the White Oak Creditors).

20. If the Debtors are unable to obtain Postpetition Financing, they will be unable to fund the chapter 11 administration expenses and orderly liquidate, and thus the value of their estates and of their collateral will be adversely affected. By obtaining Postpetition Financing, the Debtors will be able to fund the necessary costs and expenses for an orderly liquidation, which will increase the value of their estates and of their collateral and maximize payments to all creditors, to the extent possible.

21. The DIP Lender is willing to provide such financing on a superpriority administrative claim basis pursuant to 11 U.S.C. § 364(c). The DIP Lender is willing to provide Postpetition Financing to the Debtors pursuant to the terms described herein and the proposed Final DIP Order, provided that the Court permits the DIP Lender's claim to be treated as a superpriority administrative expense under sections 364(c)(1) and 503(b)(1). As set forth in the DIP Credit Facility Agreement, the Debtors currently seek entry of the Final DIP Order authorizing the Debtors to obtain the Postpetition Financing.

### III. LEGAL ARGUMENT

#### A. The Debtors Have Satisfied the Legal Requirements for Approval of Obtaining Postpetition Financing

##### 1. The Debtors Cannot Obtain Financing on Terms More Favorable than those Provided by the DIP Lender

Section 364 of the Bankruptcy Code provides a debtor in possession that is authorized to operate its business may obtain financing either in the ordinary course of business or outside the ordinary course of business. First, section 364(a) of the Bankruptcy Code allows the debtor to obtain unsecured credit and to incur unsecured debt in the ordinary course of business. 11 U.S.C. § 364(a). Second, after notice and a hearing, the Court may authorize a debtor in possession to obtain unsecured credit or incur unsecured debt outside the ordinary course of business allowable as an administration expense under section 503(b)(1) of the Bankruptcy Code. 11 U.S.C. § 364(b).

Section 364 of the Bankruptcy Code provides a progression of various protections to induce a postpetition lender to extend credit to a debtor-in-possession. *In re Sun Runner Marine, Inc.*, 945 F.2d 1089, 1092-93 (9th Cir. 1991). These include administrative priority, superpriority and secured status. 11 U.S.C. § 364. In addition, parties who extend credit are protected under § 364(e) from the effects of a reversal on appeal of the authorization to incur debt as long as they have acted in good faith. Here the DIP Lender requires a superpriority administrative claim pursuant to Bankruptcy Code section 364(c) as to all amounts advanced by the DIP Lender pursuant to the terms stated herein. The Debtors firmly believe that, under these circumstances, the proposed Postpetition Financing from the proposed DIP Lender is the best available option.

##### 2. The Debtors' Decision to Obtain Postpetition Financing from the DIP Lender is Supported by Sound Business Judgment

Courts generally give broad deference to the business decisions of a debtor. *See, e.g., In*

*re Continental Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986); *In re Lionel Corporation*, 722 F.2d 1063, 1070 (2d Cir. 1983); *Walter v. Sunwest Bank (In re Walter)*, 83 B.R. 14, 19-20 (B.A.P. 9th Cir. 1987). In particular, a bankruptcy court should defer to a debtor's reasonable business judgment regarding the need for funds, so long as the proposed financing agreement does not contain terms that either leverage the bankruptcy process or that benefit a third party rather than the bankruptcy estate. *See, e.g., In re Trans World Airlines, Inc.*, 163 B.R. 964, 974 (Bankr. D. Del. 1994) (noting that an interim loan, receivables facility and asset-based facility were approved because they "reflect[ed] sound and prudent business judgment . . . [were] reasonable under the circumstances and in the best interest of [the debtor] and its creditors"). This was explained by the bankruptcy court in *In re Ames Department Stores, Inc.*, 115 B.R. 34 (Bankr. S.D.N.Y. 1990):

[A] court's discretion under section 364 is to be utilized on grounds that permit reasonable business judgment to be exercised so long as the financing agreement does not contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit a party-in-interest.

*Id.* at 40.

Here, the Debtors' decision to enter into the Postpetition Financing represents a reasonable exercise of business judgment.

### **3. The Terms of the Postpetition Financing are Reasonable under the Circumstances and Should Be Approved**

The terms of the proposed DIP Financing are similar to those often included in similar financing arrangements. Indeed, the DIP Financing conditions and proposed Final DIP Order reflect the give and take that result from financing negotiations. Courts have recognized that a debtor often must make significant concessions in exchange for financing. *See, e.g., In re Ellingsen MacLean Oil Co.*, 65 B.R. 358, 365 (Bankr. W.D. Mich. 1986), *aff'd*, 834 F.2d 599

(6th Cir. 1987) (chapter 11 postpetition financing is “fraught with dangers for creditors . . .”). Accordingly, courts recognize that a debtor may need to “enter into a hard bargain with a creditor in order to acquire the needed funds to complete reorganization.” *Id.* at 365.

Similarly, lenders often agree to subordinate or “carve-out” from their collateral funds to pay professionals. *See Harvis Trien & Beck, P.C. v. Federal Home Mortgage Corp. (In re Blackwood Assocs., L.P.)*, 187 B.R. 856, 860 (Bankr. E.D.N.Y. 1995) (court advised that if professionals really want to be paid they had best insist upon a “real carve out”); *In re Ames*, 115 B.R. at 40 (noting practice of district to insist on carve-out for fees to preserve adversary system). Here, the DIP Lender requires, among other things, a carve-out and superpriority claim, as a condition to financing. These terms are reasonable under the circumstances and should be approved.

#### **NOTICE**

Notice of this Motion will be given to: (a) the Office of the United States Trustee for the Eastern District of Louisiana; (b) all known or alleged secured creditors; (c) all persons and entities known or reasonably believed to have asserted a lien; (d) those financial institutions with which the Debtors maintain depository accounts; (e) all parties that have requested or that are required to receive notice pursuant to Bankruptcy Rule 2002; and (f) the parties included on each Debtors’ list of twenty (20) largest unsecured creditors (collectively, the “**Initial Notice Parties**”). The Debtors submit that, under the circumstances, no other or further notice is required. If an objection is timely filed and served prior to the Objection Deadline, such objection will be heard at the Final Hearing on this Motion. If no objections are timely filed and served, the Debtors will file a certification of counsel of no objection, while attaching the Final Order.

**CONCLUSION**

Based upon all the foregoing, as set forth in this Memorandum, the Motion, and all other papers, documents, or other evidence submitted in support of the Motion, the Debtors respectfully request that the Court grant the Motion in its entirety and: (1) approve the DIP Financing arrangement; (2) enter the Final DIP Order, in substantially the form attached hereto as Exhibit B; (3) authorize the Debtors to borrow under the terms discussed herein and in the Final DIP Order; (4) grant the DIP Lender the security, liens and superpriority claims provided for under the Final DIP Order; (5) schedule a final hearing on this Motion; and (6) grant to the Debtors such other relief as the Court deems necessary and appropriate.

**Dated:       October 10, 2017**

Respectfully submitted,

*/s/ Laura F. Ashley*

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