

Hearing Date: November \_\_, 2011 at 10:00 a.m. (prevailing Eastern time)  
Objection Deadline: November \_\_, 2011 at 4:00 p.m. (prevailing Eastern time)

**LOWENSTEIN SANDLER PC**

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**UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

In re:

Last Mile Inc. d/b/a Sting Communications,  
  
Debtor.

Chapter 11

Case No. 11-14769 (SHL)

**DEBTOR'S APPLICATION FOR AN ORDER PURSUANT TO  
§§ 327 AND 1107 OF THE BANKRUPTCY CODE AND  
FED. R. BANKR. P. 2014 AND 2016 AUTHORIZING THE EMPLOYMENT AND  
RETENTION OF GRIFFIN FINANCIAL GROUP, LLC  
AS INVESTMENT BANKER AND FINANCIAL ADVISOR  
TO THE DEBTOR EFFECTIVE AS OF JANUARY 1, 2012**

The above captioned debtor and debtor in possession (the "**Debtor**" or the "**Company**") hereby submits this application (the "**Application**") for entry of an order, substantially in the form attached hereto as **Exhibit A**, authorizing the Debtor to employ and retain Griffin Financial Group, LLC ("**Griffin**") as investment banker and financial advisor to the Debtor effective as of January 1, 2012. In support of the Application, the Debtor submit the Certification of Glenn S. Bernabeo, a managing director of Griffin (the "**Bernabeo Certification**"), attached hereto as **Exhibit B** and respectfully represents as follows:

## **JURISDICTION AND VENUE**

1. This Court has jurisdiction over this Application pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2).

2. The statutory bases for the relief requested herein are sections 327(a) and 328(a) of title 11 of the United States Code (the “**Bankruptcy Code**”), Rules 2014(a) and 2016 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”) and Rules 2014-1, 2016-1 and 2016-2(g) of the Local Bankruptcy Rules for the Southern District of New York (the “**Local Bankruptcy Rules**”).

## **BACKGROUND**

3. On October 12, 2011, (the “**Petition Date**”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “**Chapter 11 Case**”).

4. The Debtor continues to operate its business and manage its properties as debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. As of the date hereof, no trustee, examiner or committee has been appointed in the Chapter 11 Case.

6. Information regarding the Debtor’s business and the events leading to this chapter 11 case is set forth in the Affidavit Pursuant to Local Bankruptcy Rule 1007-2 and in Support of the Debtor’s Petition and First Day Motions. *See* Docket No. 4.

### **A. Griffin’s Qualifications.**

7. The Debtor seeks to retain Griffin as its investment banker and financial advisor in connection with (i) the sale of all or substantially all of the assets of the Debtor (the “**Sale**”); (ii) the review of private placement financing alternatives available to the Debtor, if any, involving raising debt and/or equity (the “**Financing**”); and (iii) the restructuring of the balance

sheet of the Debtor (the “**Restructuring**”), because, among other things, Griffin has substantial expertise in, and an excellent reputation for working with financially troubled companies from a range of industries in complex financial and operational restructurings, both in- and out-of-court. Griffin has a significant financial restructuring practice in which members have participated in numerous Bankruptcy Section 363 sale processes as investment bankers.

8. In light of the size of this Chapter 11 Case, the resources, capabilities and experience of Griffin in advising the Debtor is crucial to the Debtor’s successful restructuring. An experienced investment bank and financial advisor such as Griffin fulfills a critical need that complements the services offered by the Debtor’s other restructuring professionals. Broadly speaking, Griffin will assist in the evaluation of strategic alternatives and render investment banking services to the Debtor in connection with its ongoing chapter 11 process. For these reasons, the Debtor requires the services of a capable and experienced investment bank and financial advisor such as Griffin.

9. Prior to the Petition Date, Griffin provided the following services, among others, to the Debtor:

- (a) Financial Advisory Services; and
- (b) Capital Raising, specifically the placement of senior secured and junior secured debt.

10. In providing prepetition professional services to the Debtor, Griffin has become familiar with the Debtor and its business, including the Debtor’s financial affairs, debt structure, operations and related matters. Having worked with the Debtor’s management and its other advisors, Griffin has developed relevant experience and expertise regarding the Debtor that will assist it in providing effective and efficient services in the Chapter 11 Case. Accordingly, Griffin is both well qualified and uniquely able to represent the Debtor in the Chapter 11 Case in an efficient and timely manner.

**B. Services to Be Provided<sup>1</sup>**

11. On or about January 3, 2012, the parties entered into the Engagement Letter (including the indemnification agreement attached thereto, the “**Engagement Letter**”), which governs the relationship between Griffin and the Debtor. A true and correct copy of the Engagement Letter is attached to the Application as **Exhibit C**. The terms and the conditions of the Engagement Letter were negotiated between the Debtor and Griffin, and they reflect the parties’ mutual agreement as to the substantial efforts that will be required in this engagement. Subject to further order of this Court and consistent with the Engagement Letter, Griffin will provide a broad range of necessary financial advisory and investment banking services (the “**Services**”), as Griffin and the Debtor shall deem appropriate and feasible in order to advise the Debtor in the course of the Chapter 11 Case, including the following:

(a) Sale

- Assist the Company in compiling information and preparing an executive summary information memorandum describing the Company, its historical performance and prospects, including existing contracts, marketing and sales, labor force, and management and anticipated financial results of the Company;
- Assist the Company in developing a list of suitable potential buyers who will be contacted on a discreet and confidential basis after approval by the Company;
- Prepare a “teaser letter” to be sent to potential buyers to generate interest in the Transaction;
- Coordinate the execution of confidentiality agreements for potential buyers wishing to review the information memorandum;
- Assist the Company in coordinating due diligence site visits for interested buyers and work with the management team to develop appropriate presentations for visits with management;

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<sup>1</sup> The summaries of the Engagement Letter contained in this Application are provided for purposes of convenience only. In the event of any inconsistency between the summaries contained herein and the terms and provisions of the Engagement Letter, the terms of the Engagement Letter shall control. Capitalized terms used herein but not defined herein shall have the meanings ascribed to such terms in the Engagement Letter.

- Solicit competitive offers from potential buyers;
- Negotiate on behalf of the Company;
- Assist in developing and reviewing possible Transaction structures, including the financial impact of using different pricing and forms of consideration and Transaction structures;
- Provide various financial analyses for the Company to assist during negotiations;
- Assist the Company, its accountants and attorneys in negotiating, acquiring and closing the Transaction.
- A completed Sale transaction will be completed through a bankruptcy court approved sale order.

(b) Financing

- Advise, in light of current market conditions, on all aspects of the Financing, including timing, structure and terms;
- Conduct due diligence and assist in preparing an executive summary information memorandum describing the Company, its historical performance and prospects, including existing contracts, marketing and sales, labor force, and management and anticipated financial results of the Company;
- Approach potential lenders and investors, including commercial banks, commercial financing companies, private capital investment funds and other institutional investors;
- Solicit term sheets from those lenders and investors interested in the Financing;
- Negotiate with lenders and investors regarding the terms and structure of the Financing; and
- Otherwise assist the Company, its attorneys and accountants, as necessary, through closing on a best efforts basis.
- A completed Financing transaction will be completed through a confirmed plan of reorganization in a chapter 11 bankruptcy proceeding.

(c) Restructuring

- Griffin, on a best efforts basis, shall assist the Company in any negotiation with various stakeholders in the Company (the “Existing Stakeholders”),

including, but not limited to the senior lender, junior lenders, general unsecured creditors and shareholders in regard to a possible financial restructuring of existing claims and equity. Any Restructuring will be completed through a confirmed plan of reorganization in a chapter 11 bankruptcy proceeding.

12. The Services that Griffin will provide to the Debtor are necessary to enable the Debtor to maximize the value of its estate. All of the services that Griffin will provide to the Debtor will be undertaken at the request of the Debtor and will be appropriately directed by the Debtor so as to avoid duplicative efforts among the professionals retained in the Chapter 11 Case. Griffin will also use reasonable efforts to coordinate with the Debtor's other retained professionals to avoid the unnecessary duplication of services.

**C. Professional Compensation.**

13. Subject to Court approval, and in compliance with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules, the United States Trustee's Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses and any other applicable procedures and orders of this Court, the Debtor will compensate Griffin in accordance with the terms and conditions of the Engagement Letter, which provides a compensation structure (the "**Fee Structure**") that provides in relevant part as follows:

- **Retainer Fee.** A monthly retainer fee (the "**Retainer Fee**") of \$5,000 shall be due and payable on the first of every month beginning February 1, 2012, without separate invoice.
- **Transaction Fee.** Upon completion of a Sale, Financing or Restructuring Transaction, and subject to an order approving the sale of all or substantially all of the Companies assets or through a confirmed plan of reorganization in a chapter 11 bankruptcy proceeding, the Company shall pay Griffin a fee in the amount of \$250,000 (less retainers paid to date up to a maximum of \$50,000) (the "Transaction Fee",) payable in cash, in federal funds via wire transfer or certified check at any closing.
- **Expenses.** Griffin will invoice on a monthly basis, and the Company will promptly pay, Griffin's reasonable out-of-pocket expenses incurred in providing the above services (including, but not limited to, travel, meeting,

telephone, copy services, postage and shipping, legal fees and expenses and database expenses, etc.).

14. Subject to being so retained, Griffin agrees that during the pendency of the Chapter 11 Case it shall continue to perform its obligations under the Engagement Letter and that the Debtor shall file interim and final applications for the allowance of the fees and expenses payable to Griffin under the terms of the Engagement Letter pursuant to the applicable Federal Rules of Bankruptcy Procedure, and the local rules and order of the Bankruptcy Court. Griffin will not seek payment of any legal fees incurred in connection with its retention in the Debtor's bankruptcy case.

15. The Fee Structure is comparable to compensation generally charged by other firms of similar stature to Griffin for comparable engagements, both in and out of bankruptcy. Griffin and the Debtor believe that the foregoing compensation arrangements are both reasonable and market-based and consistent with Griffin's normal and customary billing practices for comparably sized and complex cases, both in- and out-of-court, involving the services to be provided in the Chapter 11 Case.

16. The Fee Structure is comparable to those generally charged by financial advisory and investment banking firms of similar stature to Griffin and for comparable engagements, both in and out of court, and reflect a balance between a fixed, monthly fee, and a contingency amount which is tied to the consummation and closing of the transactions contemplated in the Engagement Letter.

17. The proposed retention is reasonable and based on the customary compensation charged by Griffin and comparably skilled practitioners in matters outside and other than chapter 11 cases, as well as cases under chapter 11, and has been approved and implemented in not just this jurisdiction but also in chapter 11 cases elsewhere. Indeed, the entire engagement as set forth in the Engagement Letter is common within the industry and reflects what is considered to be "market" both in and out of chapter 11 proceedings, in each

case, in light of Griffin's experience in reorganizations and the scope of work to be performed pursuant to its retention.

18. The Debtor submits that Griffin has obtained valuable institutional knowledge of the Debtor's businesses, financial affairs and creditors as a result of providing services to the Debtor before the Petition Date and that Griffin is both well qualified and uniquely able to perform these services and assist the Debtor in the Chapter 11 Case. Moreover, the Debtor believes that Griffin's services will assist the Debtor in a successful outcome of the Chapter 11 Case.

19. The Debtor is advised by Griffin that it is not the general practice of investment banking and financial services firms to keep detailed time records similar to those customarily kept by attorneys. Notwithstanding the foregoing, Griffin intends to file interim and final fee applications for the allowance of compensation for services rendered and reimbursement of expenses incurred in accordance with applicable provisions of the Bankruptcy Code and the Bankruptcy Rules and any applicable orders of this Court. Such applications will include time records setting forth, in a summary format, a description of the services rendered by each professional, and the amount of time spent on each date by each such individual in rendering services on behalf of the Debtor. Because Griffin does not ordinarily maintain contemporaneous time records in one-tenth hour (.1) increments or provide or conform to a schedule of hourly rates for its professionals, Griffin is seeking a waiver, pursuant to Local Bankruptcy Rule 2016-2(g) of the requirement to bill activities in one-tenths (.1) of an hour. Griffin requests that it be permitted to file time records in one half (.5) hour increments. Griffin will also maintain detailed records of any actual and necessary costs and expenses incurred in connection with the services discussed above. Griffin's applications for compensation and expenses will be paid by the Debtor, pursuant to the terms of the Engagement Letter upon approval by this Court.



20. Griffin's strategic and financial expertise as well as its capital markets knowledge, financing skills, restructuring capabilities and mergers and acquisitions expertise, some or all of which may be required by the Debtor during the term of Griffin's engagement hereunder, were important factors in determining the Fee Structure. The Debtor believe that the ultimate benefit of Griffin's services hereunder cannot be measured by reference to the number of hours to be expended by Griffin's professionals in the performance of such services.

21. In addition, the Fee Structure has been agreed upon by the parties in anticipation that a substantial commitment of professional time and effort will be required of Griffin and its professionals hereunder, that such commitment may foreclose other opportunities for Griffin, and that the actual time and commitment required of Griffin and its professionals to perform its services hereunder may vary substantially from week to week or month to month.

22. The Debtor and Griffin negotiated the Fee Structure to function as and be an interrelated, integrated unit, in correspondence with Griffin's services, which Griffin renders not in parts, but as a whole. It would be contrary to the intention of Griffin and the Debtor for any isolated component of the entire Fee Structure to be treated as sufficient consideration for any isolated portion of Griffin's services. Instead, the Debtor and Griffin intend that Griffin's services be considered as a whole that is to be compensated by the Fee Structure in its entirety.

23. In sum, in light of the foregoing and given the numerous issues which Griffin may be required to address in the performance of its services hereunder, Griffin's commitment to the variable level of time and effort necessary to address all such issues as they arise, and the market prices for Griffin's services for engagements of this nature both out-of-court and in a chapter 11 context, the Debtor believes that the Fee Structure is market-based and fair and reasonable under the standards set forth in section 328(a) of the Bankruptcy Code.

24. Griffin has not shared or agreed to share any of its compensation from the Debtor with any other person, other than as permitted by section 504 of the Bankruptcy Code.

**D. Indemnification Provision**

25. As part of the overall compensation payable to Griffin under the terms of the Engagement Letter, and as more fully described in **Exhibit A** thereto, the Debtor has agreed to certain indemnification provisions as described in the Engagement Letter and **Exhibit A** thereto (the “**Indemnification Provision**”). More specifically, the Indemnification Provision provides that the Debtor will indemnify and hold Griffin harmless against liabilities arising out of or in connection with its retention by the Debtor, except for any liability for losses, claims, damages, or liabilities incurred by Griffin that are finally judicially determined by a court of competent jurisdiction to have resulted from the gross negligence or willful misconduct of Griffin.

26. The Indemnification Provision reflected in the Engagement Letter is customary and reasonable terms of consideration for financial advisors and investment bankers such as Griffin for proceedings both out of court and in chapter 11. *See, e.g., In re Delphi Corp.*, Case No. 05-44481 (Bankr. S.D.N.Y. Nov. 30, 2005); *In re Snyders Drug Store, Inc.*, Case No. 03-44577 (Bankr. N.D. Ohio Sept. 30, 2003 and Oct. 8, 2003); *In re Republic Engineered Prods. Holdings, Inc.*, Case No. 03-55118 (Bankr. N.D. Ohio Dec. 3, 2003); *In re Phar-Mor, Inc.*, Case No. 01-44007 (Bankr. N.D. Ohio Oct. 11, 2001); *In re LTV Steel, Inc.*, Case No. 00-43866 (Bankr. N.D. Ohio Feb. 20, 2001).

27. The terms of the Engagement Letter, including the Indemnification Provision, were fully negotiated between the Debtor and Griffin at arm’s length and the Debtor respectfully submits that the Indemnification Provision, as modified by the order requested herein, is reasonable and in the best interests of the Debtor, its estate and creditors. Accordingly, as part of this Application, the Debtor requests that this Court approve the Indemnification Provision as modified by the Debtor’s proposed order.

**E. Griffin's Disinterestedness.**

28. To the best of the Debtor's knowledge and except to the extent disclosed herein and in the Bernabeo Certification: (a) Griffin is a "disinterested person" within the meaning of section 101(14) of the Bankruptcy Code, as required by section 327(a) of the Bankruptcy Code and does not hold or represent an interest adverse to the Debtor's estate; and (b) Griffin has no connection to the Debtor, its creditors or its related parties except as may be disclosed in the Bernabeo Certification. The Debtor's knowledge, information and belief regarding the matters set forth in this paragraph are based, and made in reliance, upon the Bernabeo Certification. Griffin informed the Debtor that it has undertaken a detailed search of its relationships with certain entities as provided by the Debtor (collectively, the "**Potential Parties-In-Interest**"), to determine and to disclose whether it is performing or has performed services for any significant creditors or insiders in unrelated matters. To the extent that any new relevant facts or relationships bearing on the matters described herein during the period of Griffin's retention are discovered or arise, Griffin will use reasonable efforts to file promptly a supplemental declaration, as required by Bankruptcy Rule 2014(a).

29. Prior to the Petition Date, the last fee paid by the Debtor to Griffin was in July 2010 at which time Griffin was paid \$118,000 in fees and \$2,200 in expenses. Such compensation was for services provided in connection with the Debtor raising bridge financing. Prior to the Petition Date, the Debtor had not paid Griffin a retainer. As of the Petition Date, Griffin did not hold a prepetition claim against the Debtor for services rendered.

30. Prior to the Petition Date, the Debtor had issued 150,000 shares of its restricted common stock (the "**Equity**") to Griffin on May 20, 2008 as compensation for services provided. Prior to the Petition Date, Griffin made a good faith effort to dispose of the Equity and, on October 11, 2011, Griffin sold the Equity back to the Debtor for \$1.00. As of the Petition Date, Griffin did not own any shares of the Debtor's common stock. While Griffin believes that its prior holdings do not cause Griffin to be not disinterested for purposes of this

case, in order to avoid any appearance of not being disinterested, Griffin, on behalf of itself and its affiliates, is forever and irrevocably disclaiming any interest in the Equity (including any and all rights with respect to the Equity in relation to this case) and is forever and irrevocably waiving any rights to any distribution to which the Equity is or may be entitled.

31. Griffin will conduct an ongoing review of its files to ensure that no conflicts or other disqualifying circumstances exist or arise. If any new material facts or relationships are discovered or arise, Griffin will inform this Court.

### **RELIEF REQUESTED**

32. By this Application, the Debtor seeks entry of an order, pursuant to sections 327(a) and 328(a) of the Bankruptcy Code, Bankruptcy Rules 2014(a) and 2016 and Local Bankruptcy Rules 2014-1, 2016-1 and 2016-2(g) authorizing the Debtor to retain and employ Griffin as its investment banker and financial advisor in accordance with the terms and conditions set forth in the Engagement Letter, effective as of November 23, 2011.

### **BASIS FOR RELIEF REQUESTED**

33. The Debtor seeks approval of the Fee Structure and the Engagement Letter pursuant to section 328(a) of the Bankruptcy Code, which provides, in relevant part, that the Debtor “with the court’s approval, may employ or authorize the employment of a professional person under section 327 . . . on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis.” 11 U.S.C. § 328(a). Accordingly, section 328 of the Bankruptcy Code permits the compensation of professionals, including investment bankers, on flexible terms that reflect the nature of their services and market conditions. Thus, section 328 is a significant departure from prior bankruptcy practice relating to the compensation of professionals. Indeed, as the United States Court of Appeals for the Fifth Circuit recognized in *Donaldson Lufkin & Jenrette Securities Corp. v. National Gypsum (In re National Gypsum Co.)*:

Prior to 1978 the most able professionals were often unwilling to work for bankruptcy estates where their compensation would be subject to the uncertainties of what a judge thought the work was worth after it had been done. That uncertainty continues under the present § 330 of the Bankruptcy Code, which provides that the court award to professional consultants “reasonable compensation” based on relevant factors of time and comparable costs, etc. Under present § 328 the professional may avoid that uncertainty by obtaining court approval of compensation agreed to with the trustee (or debtor or committee).

123 F.3d 861, 862 (5th Cir. 1997) (internal citations and emphasis omitted).

34. To mitigate this inherent uncertainty, courts have approved similar arrangements that contain reasonable terms and conditions under section 328 of the Bankruptcy Code. *See, e.g., In re Chemtura Corp.*, Case No. 09-11233 (Bankr. S.D.N.Y. May 15, 2009); *In re Charter Commc’ns, Inc.*, Case No. 09-11435 (Bankr. S.D.N.Y. April 15, 2009); *In re Lyondell Chem. Co.*, Case No. 09-10023 (Bankr. S.D.N.Y. Feb. 25, 2009); *In re Wellman, Inc.*, Case No. 08-10595 (S.D.N.Y. Apr. 2, 2008); *In re Calpine Corp.*, Case No. 05-60200 (Bankr. S.D.N.Y. April 26, 2006); *see also In re Source Interlink Cos., Inc.*, Case No. 09-11424 (Bankr. D. Del. May 22, 2009); *In re Hines Horticulture, Inc.*, Case No. 08-11922 (Bankr. D. Del. Sept. 10, 2008); *In re Mervyn’s Holdings, LLC*, Case No. 08-11586 (Bankr. D. Del. Aug. 27, 2008); *In re Linens Holding Co.*, Case No. 08-10832 (Bankr. D. Del. June 19, 2008); *In re Tropicana Entm’t, LLC*, Case No. 08-10856 (Bankr. D. Del. May 30, 2008); *In re Leiner Health Prods., Inc.*, Case No. 08-10446 (Bankr. D. Del. April 8, 2008); *In re New Century TRS Holdings, Inc.*, Case No. 07-10416 (Bankr. D. Del. April 26, 2007); *In re Dura Auto. Sys., Inc.*, Case No. 06-11202 (Bankr. D. Del. Dec. 6, 2006); *In re FLYi, Inc.*, Case No. 05-20011 (Bankr. D. Del. Dec. 2, 2005); *In re Foamex Int’l, Inc.*, Case No. 05-12685 (Bankr. D. Del. Oct. 17, 2005).

35. The Fee Structure appropriately reflects the nature and scope of services to be provided by Griffin, Griffin’s substantial experience with respect to investment banking services, and the fee and expense structures typically utilized by Griffin and other leading investment banks that do not bill their clients on an hourly basis.

36. Similar fixed and contingency fee arrangements have been approved and implemented by courts in other chapter 11 cases. *See, e.g., In re Calpine Corp.*, Case No. 05-60200 (Bankr. S.D.N.Y. May 1, 2006); *In re Delphi Corp.*, Case No. 05-44481 (Bankr. S.D.N.Y. Nov. 30, 2005); *In re Solutia Inc.*, Case No. 03-17949 (Bankr. S.D.N.Y. April 13, 2003); *see also In re FLYi, Inc.*, Case No. 05-20011 (MFW) (Bankr. D. Del. Jan. 17, 2006); *In re Foamex Int'l, Inc.*, Case No. 05-12685 (PJW) (Bankr. D. Del. Oct. 17, 2005).

37. Furthermore, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 amended section 328(a) of the Bankruptcy Code as follows:

The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, *on a fixed or percentage fee basis*, or on a contingent fee basis.

11 U.S.C. § 328(a) (emphasis added). This change makes clear that debtors are able to retain a professional on a fixed fee basis with bankruptcy court approval, such as the Fee Structure for Griffin in the Engagement Letter.

38. The Debtor believes the Fee Structure set forth in the Engagement Letter are reasonable terms and conditions of employment and should be approved under section 328(a) of the Bankruptcy Code. The Fee Structure adequately reflects: (a) the nature of the services to be provided by Griffin; and (b) fee and expense structures and indemnification provisions typically utilized by Griffin and other leading investment banking firms, which do not bill their time on an hourly basis and generally are compensated on a transactional basis. In particular, the Debtor believes the Fee Structure creates a proper balance between fixed, monthly fees and contingency fees based on the successful consummation of a sale, financing or restructuring and the overall success of the Chapter 11 Case. Moreover, Griffin's substantial experience with respect to investment banking services, coupled with the nature and scope of work already

performed by Griffin before the Petition Date, further suggest the reasonableness of the Fee Structure.

39. Likewise, indemnification arrangements similar to the Indemnification Provision have been approved and implemented in other chapter 11 cases by courts in this jurisdiction and others. *See e.g., In re Chemtura Corp.*, Case No. 09-11233 (Bankr. S.D.N.Y. May 15, 2009); *In re Charter Commc'ns, Inc.*, Case No. 09-11435 (Bankr. S.D.N.Y. April 15, 2009); *In re Tronox Inc.*, Case No. 09-10156 (Bankr. S.D.N.Y. April 7, 2009); *In re Lyondell Chem. Co.*, Case No. 09-10023 (Bankr. S.D.N.Y. Feb. 25, 2009); *In re Calpine Corp.*, Case No. 05-60200 (Bankr. S.D.N.Y. April 26, 2006); *In re Joan & David Halpern, Inc.*, 248 B.R. 43 (Bankr. S.D.N.Y. 2000) (overruling United States Trustee's objection to indemnity provisions); *see also In re Hines Horticulture, Inc.*, Case No. 08-11922 (Bankr. D. Del. Sept. 10, 2008); *In re Mervyn's Holdings, LLC*, Case No. 08-11586 (Bankr. D. Del. Aug. 27, 2008); *In re Leiner Health Prods., Inc.*, Case No. 08-10446 (Bankr. D. Del. Apr. 8, 2008); *In re Dura Auto. Sys., Inc.*, Case No. 06-11202 (Bankr. D. Del. Dec. 6, 2006); *In re FLYi, Inc.*, Case No. 05-20011 (Bankr. D. Del. Jan. 17, 2006); *In re Foamex Int'l, Inc.*, Case No. 05-12685 (Bankr. D. Del. Oct. 17, 2005).

40. The Debtor seeks authority to employ and retain Griffin as its financial advisor and investment banker under section 327 of the Bankruptcy Code, which provides that a debtor is authorized to employ professional persons "that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the [Debtor] in carrying out their duties under this title." 11 U.S.C. § 327(a). Section 1107(b) of the Bankruptcy Code elaborates upon sections 101(14) and 327(a) of the Bankruptcy Code in cases under chapter 11 of the Bankruptcy Code and provides that "a person is not disqualified for employment under section 327 of [the Bankruptcy Code] by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case." 11 U.S.C. § 1107(b).

**NOTICE**

41. Notice of this Application has been given to (i) the Office of the United States Trustee; (ii) the Office of the United States Attorney for the District of New York; (iii) the Internal Revenue Service; (iv) counsel to the Committee; (v) the Debtor's prepetition secured lender; and (vi) all parties that have requested notice in these cases pursuant to Rule 2002 of the Bankruptcy Rules. In light of the nature of the relief requested, the Debtor respectfully submits that no further notice is necessary.

**NO PRIOR REQUEST**

42. No prior application for the relief requested herein has been made to this or any other court.

**WAIVER OF BRIEF**

43. Because the legal points and authorities upon which this Motion relies are incorporated herein, the Debtor respectfully submits that the service and filing of a separate memorandum of law is not required.



**CONCLUSION**

**WHEREFORE**, for the reasons set forth herein and in the Bernabeo Certification, the Debtor respectfully requests that this Court (a) enter an order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested herein and (b) grant such other and further relief as is just and proper.

Dated: January 5, 2012

**LOWENSTEIN SANDLER PC**

*/s/ Thomas A. Pitta*

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