

**SO ORDERED**



  
WENDELIN I. LIPP  
U. S. BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MARYLAND  
Greenbelt Division**

In re:

THE CONDOMINIUM ASSOCIATION OF  
THE LYNNHILL CONDOMINIUM,

Debtor.<sup>1</sup>

Case No. 18-10334

Chapter 11

**FINAL ORDER (I) AUTHORIZING THE DEBTOR TO OBTAIN POST-PETITION FINANCING, (II) GRANTING PRIMING LIENS AND PROVIDING SUPERPRIORITY CLAIMS AND (III) GRANTING RELATED RELIEF**

Upon the expedited motion (the “Motion”) of the Condominium Association of the Lynnhill Condominium, as debtor and debtor-in-possession (the “Debtor”), for interim and final orders pursuant to sections 105(a), 362, 363, 364 and 507 of the U.S. Bankruptcy Code,<sup>2</sup> Rules 2002, 4001, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Local Rules 4001-4 and 4001-5,<sup>3</sup> seeking, *inter alia*:

- a. authority to obtain a \$1,250,000.00 secured post-petition loan (the “DIP Loan”)

<sup>1</sup> The Debtor’s federal identification number is 52-0993760.

<sup>2</sup> 11 U.S.C. §§ 101–1532 (2012) (the “Bankruptcy Code”).

<sup>3</sup> Unless otherwise indicated, section references are to the Bankruptcy Code, rule references are to the Bankruptcy Rules, and local rule references are to the Local Bankruptcy Rules of the U.S. Bankruptcy Court for the District of Maryland.



from AHH16 Development, LLC or its designee (“AHH,” or in its capacity as lender under the DIP Loan, the “DIP Lender”) pursuant to the terms and conditions in the Motion and in the *Amended Commitment Letter of AHH16 Development, LLC or its Designee to Be Purchaser of the Property and Post-Petition Secured Lender in Connection with Lynnhill Condominium Bankruptcy Case* attached as **Exhibit A** to the Motion (the “Commitment”); and such DIP Loan:

- i. having priority, pursuant to section 364(c)(1) of the Bankruptcy Code, over all administrative expenses of the kind specified in sections 503(b) or 507(b) of the Bankruptcy Code (“Superpriority Administrative Expense Claims”), except for the United States Trustee’s quarterly fees (the “Carveout”);
  - ii. being secured, pursuant to section 364(c)(2) of the Bankruptcy Code, by a perfected first-priority lien and security interest on any and all current and future assets of the Debtor of any nature or type whatsoever, including, without limitation, cash, accounts, accounts receivable (excluding any causes of action under the Bankruptcy Code or applicable non-bankruptcy law, including causes of action and recoveries pursuant to chapter 5 of the Bankruptcy Code), all other tangible and intangible assets, the Property,<sup>4</sup> and any and all proceeds of the foregoing (collectively, the “DIP Collateral”); notwithstanding anything to the contrary in this Final Order or elsewhere, the DIP Collateral does not include funds received by Pillsbury Winthrop Shaw Pittman LLP that serve as a retainer for the fees and expenses incurred under its engagement with the Debtor;
  - iii. being secured, pursuant to section 364(d)(1) of the Bankruptcy Code, by perfected first-priority senior priming liens on and in the DIP Collateral ranking prior to all other claims and liens. The Senior Priming Liens (defined below) will be senior in priority to security interests and liens securing the indebtedness and other obligations owing under any prepetition loan and security agreements and other liens. The Senior Priming Liens shall not be subject to challenge, but instead shall attach and become valid and perfected without the requirement of any further action by the DIP Lender; and
- b. to schedule a final hearing (the “Final Hearing”) for this Court to consider entry of a final order authorizing the DIP Loan on a final basis.

The Debtor having requested in the Motion that pending the Final Hearing on the Motion, a hearing be scheduled on an expedited basis to consider entry of an order approving the Motion on an interim basis; and an interim hearing having been held by the Court on January 12, 2018;

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<sup>4</sup> Capitalized terms used but not defined in this Final Order have the meanings given such terms in the Motion.

and the Court having entered an order approving the DIP Loan on an interim basis on January 18, 2018 [Doc. 67] (the “Interim Order”); and the Court having set January 24, 2018 at 4:00 p.m. as the deadline for objecting to the Motion; and notice of the entry of the Interim Order and the Objection Deadline having been given as set forth in the Certificate of Service filed with the Court on January 25, 2018 [Doc. 104]; and no party having objected to the Motion by the Objection Deadline; and it appearing that on the record made in this case and after considering the Debtor’s need for financing, no other or further notice need be given; and the DIP Lender having agreed to provide the DIP Loan in accordance with the Commitment, the Interim Order and this Final Order.

NOW, THEREFORE, upon the Motion and the record of the Interim Hearing held on January 12, 2018; and after due deliberation and good and sufficient cause appearing therefore, the Court hereby makes the following findings of fact and conclusions of law:

Based upon the record presented to the Court, it appears that:

A. *Filing.* On January 10, 2018 (the “Petition Date”), the Debtor filed a voluntary chapter 11 petition in this Court. The Debtor continues to manage and preserve (as best it can) the Property as debtor-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

B. *Jurisdiction and Venue.* This Court has core jurisdiction over this case, the 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 Order is entered in a “core” proceeding as defined in 28 U.S.C. § 157(b)(2)(A), (D), (G), (K) and (M).

C. *Notice.* Under the circumstances, the notice provided by the Debtor to the Notice Parties of the Motion and the Interim Hearing is sufficient and adequate and no further notice of the relief sought at the Interim Hearing is necessary or required.

D. *Prince George's County Circuit Court Judgment.* The Court acknowledges and takes judicial notice of the Circuit Court's Amended Findings of Facts, Conclusions of Law and Amended Judgment, *Consumer Prot. Div. Office of the Md. Attorney Gen. v. Lynnhill Condo. Dev., Inc.*, No. CAE16-40059 (Cir. Ct. Prince George's Cnty. Nov. 2, 2017), attached as **Exhibit B** to the Motion.

E. *Condition of the Property.* The uncontradicted record on the state of the Property is that (among other things):

1. the Property is in a deplorable state;
2. the Property is completely vacant, surrounded by fencing, subject to 24-7 surveillance by a private security company engaged by the Debtor and now paid for on a weekly basis from DIP Loan proceeds;
3. the Property and all Units have been abandoned;
4. the Property is not generating any income and (aside from the contemplated sale to AHH) there is no prospect of it doing so during these proceedings;
5. the Property's interior and exterior is littered with trash, and human and animal excrement;
6. the Property suffers from mold and fungus;
7. the Property has been vandalized, and during November 2017, trespassers removed copper wiring and other assets without authorization;
8. the Property is infested with vermin, including rats;
9. the Property is without its own electrical power, running water or lights;
10. the Property is unsafe; and
11. the Property suffers from pre-petition structural deterioration (*e.g.*, eroded and eroding roofs).

F. *Sale Efforts and Value.* The uncontradicted record reflects (among other things):

1. the Debtor's opinion is the Property (in its present condition with separate title to each Unit (*i.e.*, not unified) and without the cleansing of a section

363 free-and-clear order) is worth nothing (zero dollars), or has a negative value;

2. on or about September 27, 2017, after having interviewed approximately a half dozen brokers, the Debtor selected Transwestern Carey Winston, L.L.C. d/b/a Transwestern (“Transwestern”) to market the Property for sale;
3. Transwestern launched a vigorous marketing process following its engagement by the Debtor; Transwestern prepared and sent marketing materials to over 3,500 parties, provided interested parties access to a “data room,” and gave 19 tours of the Property; Transwestern then made an initial request for offers, setting November 17, 2017 as the offer deadline; Transwestern received nine initial offers ranging from \$1 million to \$13.2 million; in the final round of bidding, Transwestern received five offers ranging from \$7 million to \$13.2 million. AHH’s offer was the best and highest offer at \$13.2 million (subject to, among other things, title unification and confirmation of a plan providing for the free-and-clear sale of the Property), with a commitment to advance \$400,000.00 pre-petition to fund expenses related to the Property and the commencement of this bankruptcy case, and provide debtor-in-possession financing to underwrite the chapter 11 plan-confirmation and sale process;
4. no bidder bid on the Property to purchase it in its as-is condition (with title as is and subject to existing liens, claims and encumbrances);
5. there is no market for the Property in its current state, and its market value “as is” is zero or negative; and
6. other than AHH’s bid, only one other bid included an offer to finance the chapter 11 sale process; the terms of that alternative bid were significantly less favorable than AHH’s because the interest rate and commitment fee were higher and the accompanying bid for the Property (again, for unified title to the Property and on a free-and-clear basis) was at least \$2.5 million lower than AHH’s bid.

G. *Existing Lienholders.* In the Motion, the Debtor indicates that, as of the Petition Date, (i) AHH holds a \$400,000.00 perfected first-priority secured claim against the Debtor for a pre-petition loan advanced (made on or about December 18, 2017) to the Debtor under the Commitment (the “Pre-Petition Advance”) that is secured by valid, enforceable and perfected first-priority liens on the Property; (iii) the Debtor believes there are liens on the Property,

including certain units, held by various lienholders (the “Existing Lienholders”), but (subject to obtaining the results of title work that the Debtor represents is underway) does not know the identity of, or amounts that may be due, Existing Lienholders; and (iii) the Property constitutes substantially all of the Debtor’s assets.

H. *Need for Post-Petition Financing.* The Debtor has an immediate need to obtain the DIP Loan. Without the DIP Loan, the Debtor does not have sufficient capital to pay for the expenses associated with preserving the Property and administering this case. The Debtor’s ability to pay for security, winterization and maintenance of the Property is essential to the Debtor’s ability to close on the sale of the Property to AHH. The purpose of the DIP Loan will thus be to preserve and maintain the Property and effectuate a court-approved sale of the Property pursuant to the chapter 11 plan.

I. *No Credit Available on More Favorable Terms.* Given the Debtor’s financial condition, the Debtor does not have sufficient capital to fund the expenses associated with preserving the Property, administering this case and closing on a sale of the Property. The Debtor is also unable to obtain unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense. Financing on a post-petition basis is not available without the Debtor’s granting, pursuant to section 364(c)(1) of the Bankruptcy Code, claims having priority over any and all administrative expenses of the kinds specified in sections 503(b) and 507(b) of the Bankruptcy Code, and securing such indebtedness and obligations with the security interests in and the liens on the DIP Collateral pursuant to section 364(c) and (d) of the Bankruptcy Code. Additionally, the Debtor’s only alternative offer for post-petition financing was on terms more onerous (*e.g.*, higher interest rate and higher commitment fee) than those offered by the DIP Lender under the DIP Loan. Consequently, the Debtor is unable to

obtain post-petition financing on terms more favorable than those provided by the DIP Loan.

J. *Need to Grant Superpriority Administrative Expense Claim and Senior Priming Liens.* The Debtor is unable to obtain an unsecured credit facility allowable under section 503(b)(1) of the Bankruptcy Code and must grant the DIP Lender a Superpriority Administrative Expense Claim pursuant to section 364(c)(1) of the Bankruptcy Code (subject to the Carveout). The DIP Lender has conditioned all loans and advances to be made under the DIP Loan on obtaining: (a) a Superpriority Administrative Expense Claim pursuant to section 364(c)(1) of the Bankruptcy Code with priority over any and all expenses of any kind or nature whatsoever specified in sections 503(b) and 507(b) of the Bankruptcy Code (other than the Carveout), including the Junior Superpriority Administrative Expense Claims (as defined in paragraph 15 below); and (b) in accordance with section 364(c)(2) and (d) of the Bankruptcy Code, the Senior Priming Liens on and security interests in the DIP Collateral.

K. *DIP Loan.* Pursuant to the DIP Loan, the DIP Lender has agreed to make a loan to the Debtor in the principal amount of \$1,250,000.00, consisting of \$850,000.00 in principal of new money and a \$400,000.00 (in principal) roll-up of the Pre-Petition Advance, including up to \$75,000.00 of AHH's fees and expenses incurred in connection with the DIP Loan, the purchase of the Property or this case and any claim (arising from the Debtor's default and a breach) under the Purchase and Sale Agreement between the Debtor and AHH (collectively, the "DIP Claim"). The DIP Lender agreed to make \$450,000.00 of the DIP Loan available upon entry of the Interim Order and the balance of the DIP Loan (*i.e.*, \$400,000.00 of new money) available upon entry of this Final Order, all in accordance with the Commitment and this Final Order; provided that the new loan proceeds advanced post-petition shall be spent in accordance with the Budget attached as **Exhibit C** to the Motion.

L. *Business Judgment and Good Faith.* The terms of the DIP Loan, including the interest rates and fees applicable thereto, are more favorable to the Debtor than those available from alternative sources. The terms of the DIP Loan have been negotiated in good faith and at arms' length between the Debtor and the DIP Lender, reflect the Debtor's exercise of prudent business judgment consistent with its fiduciary duties, are fair and reasonable under the circumstances and enforceable in accordance with applicable law. The credit extended to the Debtor by the DIP Lender under the DIP Loan and this Final Order were extended in "good faith" as that term is used in section 364(e) of the Bankruptcy Code and in express reliance on the protections set forth therein. Consequently, the DIP Loan is entitled to the full protection of section 364(e) of the Bankruptcy Code if this Final Order or any provision hereof is vacated, reversed or modified, on appeal or otherwise.

M. *Need for Approval.* Absent granting the relief sought by this Final Order, the Debtor's estate will be immediately and irreparably harmed. The Debtor has no alternative source of financing to meet its immediate and projected obligations, including those associated with the Property; consequently, it is essential that the Court approve the DIP Loan. The continued approval of the DIP Loan in accordance with the terms of this Final Order is therefore in the best interests of the Debtor's estate and consistent with the Debtor's sound business judgment and fiduciary duties.

N. *Record.* The record adequately demonstrates the need for the Court to have conducted the Interim Hearing on the notice provided because of the potential for immediate and irreparable harm to the Debtor, the Property and the Debtor's estate. Based on the record, pursuant to sections 105(a), 363, and 364 of the Bankruptcy Code and Rule 4001(c), notice of the Interim Hearing was adequate as set forth herein and on the record.



O. *Roll-Up of the Pre-Petition Advance.* In the Motion, the Debtor requested approval of a \$400,000.00 (in principal) roll-up of the Pre-Petition Advance. The roll-up of the Pre-Petition Advance was properly noticed, and at the Interim Hearing the Court indicated that it would not approve the roll-up of the Pre-Petition Advance on an interim basis and deferred consideration of the request for the Final Hearing.

Based upon the foregoing, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** as follows:

**Approval and Authorization**

1. *Motion Granted.* The Motion is granted on a final basis and on the terms set forth herein. Any objections to the Motion with respect to the entry of this Final Order that have not previously been withdrawn or resolved are hereby denied and overruled.

2. *Approval of Documents.* The DIP Loan and the Commitment are hereby approved subject to the terms of this Final Order. The failure to reference or discuss any particular provision of the Commitment shall not affect the validity or enforceability of any such provision.

3. *Authorization to Execute and Deliver Documents.* The Debtor is authorized, empowered and directed to do and perform all acts to make, execute, deliver and implement the Commitment and any other document required to be executed and delivered in connection therewith or with the DIP Loan. Upon entry of the Interim Order, the obligations under the DIP Loan (the "DIP Claims") became valid, binding and nonavoidable obligations of the Debtor, enforceable against the Debtor in accordance with the terms of the Interim Order and the Commitment, and now this Final Order. No obligation, payment, transfer or grant of security under the Commitment or this Final Order shall be stayed, restrained, voidable, avoidable or recoverable under the Bankruptcy Code or under any applicable nonbankruptcy law (including

without limitation, under sections 502(d), 548 or 549 of the Bankruptcy Code or under any applicable state Uniform Fraudulent Transfer Act, Uniform Fraudulent Conveyance Act or similar statute or common law), or subject to any defense, reduction, setoff, recoupment or counterclaim.

4. *Authorization to Borrow.* Good and sufficient cause has been shown for the entry of this Final Order. The Debtor is authorized and empowered to borrow the full amount of the DIP Loan pursuant to the Commitment and subject to the Budget. The Debtor shall use the DIP Loan proceeds for the purposes set forth in the Motion and as permitted under the Commitment and this Final Order, including to effectively repay the Pre-Petition Advance to the DIP Lender given the absence of objections to the Motion and the request for the roll-up of the Pre-Petition Advance.

5. *Amendments.* The DIP Lender and the Debtor may amend, modify, supplement or waive any provision of the Commitment if such amendment, modification, supplement or waiver is not material (in the good faith judgment of the DIP Lender and the Debtor), without having to request or receive further court approval. Any material amendment, modification, supplement or waiver shall be in writing, signed by the parties and subject to court approval on appropriate notice.

#### **Payment of DIP Claims**

6. *Payment of Principal, Interest, Fees, Etc.* The Debtor shall pay to the DIP Lender the DIP Claims as provided in this Final Order and the Commitment. In consideration for the DIP Loan, the Debtor is authorized and directed, without further order of the Court, to pay all fees and charges and to reimburse the DIP Lender for all reasonable out-of-pocket expenses and professional fees, subject to a \$75,000.00 cap, all as set forth herein, in the Motion and in the Commitment (*i.e.*, the DIP Claims); *provided, however*, that if the Property is sold to the DIP

Lender as anticipated, than all DIP Claims shall be credited against the purchase price.

7. *DIP Lender's Accounting of Fees, Charges and Expenses.* The DIP Lender and its counsel shall separately account for fees, charges and expenses incurred in connection with the pre- and post-petition financing from the fees, charges and expenses incurred in connection with all non-loan related matters, including but not limited to analyzing, negotiating, and taking steps to close on the purchase of the Property.

**Senior Superpriority Administrative Claim; Collateral**

8. *Superpriority Administrative Expense Claim; Waiver under Section 506(c).* Subject to the Carveout, all of the DIP Claims shall have the status of an allowed Superpriority Administrative Expense Claim in the case pursuant to section 364(c)(1) of the Bankruptcy Code, having priority over any and all administrative expenses, adequate protection claims and all other claims against the Debtor, whether heretofore or hereafter incurred, of any kind or nature whatsoever, including 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, 503(b), 506(c), 507(a), 507(b), 546, 726, 1113 or 1114 of the Bankruptcy Code, including the Junior Superpriority Administrative Expense Claims (as defined in paragraph 15 below), whether or not 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 (collectively, the "Senior Superpriority Administrative Expense Claims"). No claim or expense having a priority senior or *pari passu* to the priority granted to the DIP Lender in this Final Order shall be granted or permitted in this case, or any superseding chapter 7 case, and, no other costs or expenses of administration of any kind, nature or description whatsoever shall be imposed against the DIP

Collateral under sections 105, 506(c) or 552 of the Bankruptcy Code or otherwise, in each case, while any portion of the DIP Claims remains outstanding.

9. *Payment of Administrative Expenses.* Until an Event of Default (defined below) has occurred (or would result from such payment), the Debtor is permitted to pay, as the same may become due or authorized and payable, the quarterly fees of the U.S. Trustee and all administrative expenses of the kind specified in section 503(b) of the Bankruptcy Code incurred in the ordinary course of business, and to fund the retainers of the Debtor's professionals (and for the avoidance of doubt, such retainers shall not serve as DIP collateral, or any other form of security for the DIP Loan, and instead as collateral, against which the professionals hold a first priority perfected security interest, to ensure payment of the fees and expenses allowed by the Court).

10. *Senior Priming Liens.* As security for the full and timely payment of the DIP Claims, the DIP Lender is hereby granted pursuant to section 364(c)(2) and (d) of the Bankruptcy Code, senior, perfected priming liens on, and security interests in, all of the DIP Collateral (the "Senior Priming Liens"). Upon entry of the Final Order, the Senior Priming Liens shall be senior in priority to security interests and liens securing any indebtedness or other obligations owing under any prepetition loan and security agreements and other liens, including any liens of the Existing Lienholders. Upon entry of this Final Order, the Senior Priming Liens shall not be subject to challenge, but instead shall attach and become valid and perfected without the requirement of any further action by the DIP Lender.

11. *No Subordination.* The liens on, and security interests in, the DIP Collateral granted to the DIP Lender under this Final Order and pursuant to the Commitment shall not be subordinated to, or made *pari passu* with, any other lien or security interest, however and

whenever arising, in this case or any superseding chapter 7 case.

12. *Automatic Perfection of Liens.*

(a) The liens and security interests granted to the DIP Lender hereunder and under the Commitment are valid, binding, continuing, enforceable and fully-perfected with the priorities herein and therein set forth.

(b) The DIP Lender shall not be required to file any financing statements, mortgages, notices of lien or similar instruments in any jurisdiction or filing office, or to take any other action in order to validate or perfect the liens and security interests granted by or pursuant to this Final Order or the Commitment.

(c) Should the DIP Lender, in its sole discretion, from time to time, choose to file such financing statements, mortgages, notices of lien or similar instruments, take possession of any DIP Collateral securing the DIP Claims for perfection purposes, or take any other action to protect from infringement or otherwise validate or perfect any such security interest or lien, the Debtor and its officers are hereby directed to execute any such documents or instruments as the DIP Lender shall reasonably request, and all such documents and instruments shall be deemed to have been filed or recorded at the time and on the date of entry of this Final Order.

(d) In the DIP Lender's discretion, a certified copy of this Final Order may 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 directed to accept such certified copy of this Final Order for filing and recording, and such certified copy shall be deemed filed and recorded at the time and on the date of entry of this Final Order.

**Default**

13. *Default.* Notwithstanding the provisions of section 362 of the Bankruptcy Code

and without order of or application or motion to the Court, in the event of: (a) the Debtor's failure to perform any of its material obligations under this Final Order, or (b) the occurrence and continuance of a Termination Event under the Commitment or the Purchase and Sale Agreement between the Debtor and AHH, then and upon the occurrence of any of the foregoing (each an "Event of Default"), and at all times during the continuance thereof, the DIP Lender may, upon not less than five business days prior written notice to the Debtor and its counsel, the Office of the U.S. Trustee, and counsel for the Committee (and prior to its appointment, the Debtor's twenty largest unsecured creditors), exercise any and all rights and remedies allowed under this Final Order, the Commitment and applicable law. The DIP Lender's failure to exercise rights under this paragraph shall not constitute a waiver of any of its rights. At any hearing following an Event of Default, the Debtor shall be permitted to contest whether an Event of Default has occurred and is then continuing, but may not seek any relief that would in any way restrict or impair the rights and remedies of the DIP Lender set forth in this Final Order, the Commitment or applicable law.

14. *Due Date.* In addition to the DIP Lender's rights and remedies under this Final Order, the DIP Loan shall immediately and automatically terminate and the DIP Claims shall be immediately due and payable on February 27, 2018, unless the contemplated confirmation or sale order is entered, in which case the maturity date is extended until the closing of the sale of the Property.

**Adequate Protection for the Existing Lienholders**

15. *Superpriority Administrative Expense Claim; Waiver under Section 506(c).* While the uncontroverted evidence is that the Property has no market value in its present state and condition, in accordance with section 507(b) of the Bankruptcy Code, the amount of diminution

in value (if any) of the Existing Lienholders' liens in the Property following the Petition Date shall have the status of an allowed Superpriority Administrative Expense Claim in this case pursuant to section 364(c)(1) of the Bankruptcy Code, having priority over any and all administrative expenses, adequate protection claims and all other claims against the Debtor, whether heretofore or hereafter incurred, of any kind or nature 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, 503(b), 506(c), 507(a), 507(b), 546, 726, 1113 or 1114 of the Bankruptcy Code, whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment, 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, subject and junior only to the Senior Superpriority Administrative Expense Claims (the "Junior Superpriority Administrative Expense Claims").

#### **Miscellaneous Provisions**

16. *Binding Effect of Order; Successors and Assigns.* The Commitment and this Final Order shall be binding on all parties-in-interests in this case, including the DIP Lender, the Existing Lienholders, the Committee and the Debtor and their respective successors and assigns, including, without limitation, any chapter 11 or chapter 7 trustee or similar responsible person hereafter appointed as a representative of the Debtor's estate and any such successors or assigns, without further order of this Court and shall inure to the benefit of the DIP Lender, the Existing Lienholders, the Committee and the Debtor and their respective successors and assigns. The Debtor and its successors and assigns shall be deemed authorized and directed to comply with the provisions of this Final Order and Commitment. The DIP Lender shall not have any obligation to extend any financing to any chapter 11 or chapter 7 trustee or similar responsible

person appointed for the Debtor's estate.

17. *No Impairment of Liens and Order.* The liens, security interests, Senior Superpriority Administrative Expense Claims, DIP Claims and other rights and remedies granted to the DIP Lender in this Final Order and the Commitment, and any actions taken pursuant hereto or thereto shall survive, and shall not be modified, altered or impaired in any manner by: (a) any other financing or extension of credit or incurrence of debt by the Debtor (under section 364 of the Bankruptcy Code or otherwise); (b) the entry of an order confirming any plan of reorganization (except that the plan filed by the Debtor provides for the crediting of the DIP Claims against the purchase price to be paid by AHH at the closing); (c) the entry of an order converting this case to chapter 7 or dismissing this case; or (d) the maturity of the DIP Loan. The liens, security interests, claims and any other rights granted to the DIP Lender in this Final Order and the Commitment shall continue in effect until the DIP Claims are indefeasibly satisfied and paid, and the DIP Lender's commitment to make loans under the DIP Loan has terminated (all of which shall have occurred when the DIP Lender closes on the purchase of the Property and credits the DIP Claims as set forth in the plan and Commitment).

18. *Good Faith.* Having been found to be extending the DIP Loan to the Debtor in good faith, the DIP Lender is entitled to the full protection of section 364(e) of the Bankruptcy Code with respect to the DIP Loan, the DIP Claims and the Senior Superpriority Administrative Expense Claims and liens created or authorized by this Final Order in the event that this Final Order or any authorization contained herein is stayed, vacated, reversed or modified on appeal. If any provision of this Final Order is hereafter modified, vacated, reversed or stayed by subsequent order of this or any other court for any reason, then such modification, vacation, reversal or stay shall not affect the validity, enforceability and priority of the DIP Loan or the



DIP Claims, liens and security interests granted to the DIP Lender under this Final Order or the Commitment, and the validity, enforceability or priority of the DIP Loan and the DIP Claims, liens and security interests of the DIP Lender shall be governed in all respects by the original provisions of this Final Order, and the DIP Lender shall be entitled to all of the rights, privileges and benefits granted herein, including, without limitation, the liens, security interests and priorities granted to the DIP Lender in this Final Order with respect to all DIP Claims.

19. *Challenges in Respect of DIP Claims.* None of the advances under the DIP Loan may be used to prosecute actions, claims, demands or causes of action against the DIP Lender or to object to or contest in any manner, or to raise any defense in any pleading to the validity, perfection, priority or enforceability of the DIP Claims, the Senior Superpriority Administrative Claims or the Senior Priming Liens.

20. *No Third Party Beneficiaries.* Other than as expressly set forth herein, no rights are created hereunder for the benefit of any third party, or any direct, indirect or incidental beneficiary.

21. *No Marshaling.* In no event shall the DIP Lender be subject to the equitable doctrine of “marshaling” or any similar doctrine with respect to the DIP Collateral.

22. *Limitations under Section 552(b) of the Bankruptcy Code.* The DIP Lender shall be entitled to all of the rights and benefits of section 552(b) of the Bankruptcy Code and no expenses of administration of the this case or any future proceeding that may result therefrom, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, may be charged against proceeds, product, offspring or profits from any of the DIP Collateral under section 552(b) of the Bankruptcy Code.

23. *No Waiver.* Any delay or failure by the DIP Lender to exercise rights and

remedies under the Commitment or this Final Order shall not constitute a waiver of such party's rights, unless any such waiver is pursuant to a written instrument executed in accordance with the terms of the Commitment and this Final Order.

24. *Payments Free and Clear.* Any and all payments or proceeds remitted to the DIP Lender or Existing Lienholders pursuant to the provisions of this Final 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.

25. *Insurance.* The DIP Lender is deemed to be the loss payee under the Debtor's insurance policies and shall act in that capacity and distribute any proceeds recovered or received in respect of any such insurance policies to the payment in full of the DIP Claims.

26. *Automatic Stay.* The automatic stay imposed by section 362 of the Bankruptcy Code shall be vacated and modified as necessary to permit the DIP Lender to take any action authorized or contemplated by the Commitment and to carry out the terms thereof, subject, however, to the satisfaction of any notice, procedural and other conditions contained therein and herein.

27. *No Control.* By consenting to this Final Order, by making advances, loans or extending financial accommodations of any type, kind or nature under this Final Order or by administering the loans made hereunder, the DIP Lender shall not be deemed to be in control of the Debtor's operations or to be acting as a "responsible person," "managing agent" or "owner or operator" (as such terms or any similar terms are used in the United States Comprehensive Environmental Response, Compensation and Liability Act, as amended, or any similar Federal or

state statute) with respect to the operation or management of the Debtor.

28. *Indemnification.* Nothing in this Final Order or the Commitment shall in any way be construed or interpreted to impose or allow the imposition on the DIP Lender any liability for any claims arising from the Debtor's pre- or post-petition activities in the operation of its business, or in connection with its restructuring efforts. So long as the DIP Lender complies with its respective obligations under this Final Order and the Commitment and its obligations under applicable law (including the Bankruptcy Code): (a) the DIP Lender shall not, in any way or manner, be liable or responsible for (i) the safekeeping of the DIP Collateral, (ii) any loss or damage thereto occurring or arising in any manner or fashion from any cause, (iii) any diminution in the value thereof, or (iv) any act or default of any carrier, servicer, bailee, custodian, forwarding agency or other person; and (b) all risk of loss, damage or destruction of the DIP Collateral shall be borne by the Debtor.

29. *Inconsistency.* In the event of any inconsistency between this Final Order and the Commitment, any document or any other agreement heretofore or hereafter entered into by and between the Debtor, the DIP Lender and/or the Existing Lienholders, the terms of this Final Order shall govern and control.

30. *Retention of Jurisdiction.* This Court shall retain jurisdiction to enforce the provisions of this Final Order, and this retention of jurisdiction shall survive the confirmation and consummation of any chapter 11 plan in this case notwithstanding the terms or provisions of any such chapter 11 plan or any order confirming any such chapter 11 plan.

31. *Immediate Docketing of Order.* The Clerk of the Court is hereby directed to forthwith enter this Final Order on the docket of this Court maintained in this case.

32. *Effectiveness.* In accordance with Rule 7052, this Final Order shall constitute

findings of fact and conclusions of law and shall take effect and be fully enforceable immediately upon entry hereof. Notwithstanding Rules 4001(a)(3), 6004(h), 6006(d), 7062, or 9014 of the Bankruptcy Rules or any other Bankruptcy Rule, or Rule 62(a) of the Federal Rules of Civil Procedure, this Final Order shall be immediately effective and enforceable upon its entry and there shall be no stay of execution or effectiveness of this Final Order.

33. *Headings.* Section headings used in this Final Order are for convenience only and are not to affect the construction of or to be taken into consideration in interpreting this Final Order.

Seen and approved:

/s/ Michael J. Lichtenstein

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All Parties on the Mailing Matrix

**End of Order**