

SO ORDERED.

SIGNED this 30th day of August, 2017.



*Benjamin A. Kahn*

BENJAMIN A. KAHN  
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
GREENSBORO DIVISION

IN RE:	)	
	)	Case No. 17-10775
MOREHEAD MEMORIAL HOSPITAL,	)	
	)	Chapter 11
Debtor.	)	
	)	

**THIRD STIPULATION AND AGREED INTERIM ORDER (I) AUTHORIZING USE OF CASH COLLATERAL PURSUANT TO SECTIONS 361 AND 363 OF THE BANKRUPTCY CODE AND BANKRUPTCY RULE 4001, (II) GRANTING ADEQUATE PROTECTION, (III) SCHEDULING FURTHER HEARING, AND (IV) GRANTING RELATED RELIEF**

Upon the Debtor’s *Motion of Debtor for (I) Interim Order (A) Authority Debtor to Use Cash Collateral, and (B) Scheduling Further Hearing Pursuant to Rule 4001 of the Federal Rules of Bankruptcy Procedure and (II) Further Order Authority Debtor to Use Cash Collateral on Further Basis* [ECF No. 19] (the “Cash Collateral Motion”), wherein the Debtor sought, among other things, (i) the entry of an interim order authorizing the Debtor’s use of Cash Collateral (as defined below) on an interim basis (the “Interim Relief”), (ii) scheduling further hearings on the relief requested in the Cash Collateral Motion (collectively, the “Interim

Hearings”), and (iii) scheduling a final hearing on the Cash Collateral Motion to consider entry of a final order pursuant to Bankruptcy Rule 4001 (the “Final Hearing”); and upon the Interim Hearing on the Cash Collateral Motion held on July 14, 2017, after which the Court entered a stipulation authorizing the Debtor’s use of Cash Collateral (as defined below) on an interim basis through and including August 18, 2017 [ECF No. 40] (the “First Agreed Interim Order”) and scheduling a further Interim Hearing on the Cash Collateral Motion for August 16, 2017; and upon the Interim Hearing on the Cash Collateral Motion held on August 16, 2017, after which the Court entered a stipulation authorizing the Debtor’s use of Cash Collateral (as defined below) on an interim basis through and including September 1, 2017 [ECF No. 166] (the “Second Agreed Interim Order”) and scheduling a further Interim Hearing on the Cash Collateral Motion for August 30, 2017; and after the Interim Hearing on August 30, 2017, the Court finds, on an interim basis, subject to the terms and conditions hereof, that (i) the Interim Relief requested in the Cash Collateral Motion is in the best interests of the Debtor, its estate and its creditors; (ii) the Interim Relief is necessary to provide the Debtor with sufficient cash and liquidity to avoid immediate and irreparable harm during the term of this order; (iii) in accordance with Rule 4001(a), (b) and (d) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), due and proper notice of the Cash Collateral Motion and the Interim Hearings has been given, and no other or further notice is necessary with respect to the Interim Relief; and (iv) upon the record herein, including, without limitation, statements of counsel and certain of the factual assertions raised in the *Affidavit of Dana M. Weston in Support of First Day Motions and Applications* [ECF No. 12], after due deliberation thereon, good and sufficient cause exists for the entry of this third stipulation and agreed interim order granting the Interim Relief as set forth herein (the “Third Agreed Interim Order”).

Therefore,

**THE COURT HEREBY FINDS AND CONCLUDES** that:

**Background**

A. The Motion is GRANTED and is incorporated by reference in this Third Agreed Interim Order, as interim findings, subject to further hearings from the Court.

B. On July 10, 2017 (the "Petition Date"), the Debtor commenced this Chapter 11 case (the "Chapter 11 Case") by filing a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, as amended (the "Bankruptcy Code"), in the United States Bankruptcy Court for the Middle District of North Carolina (the "Court").

C. 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. No trustee or examiner has been appointed in this Chapter 11 Case. On July 24, 2017, the Office of the United States Bankruptcy Administrator for the Middle District of North Carolina appointed an official committee of unsecured creditors (the "Committee") pursuant to Section 1102(a) of the Bankruptcy Code.

D. The Court has jurisdiction, pursuant to 28 U.S.C. §§ 157(b) and 1334, over the Chapter 11 Case, and over the persons and property affected hereby. Consideration of the Cash Collateral Motion constitutes a core proceeding as defined in 28 U.S.C. § 157(b)(2). The statutory predicates for the relief sought herein are sections 105, 361, 363 and 507 of the Bankruptcy Code, and Bankruptcy Rules 4001(a), (b) and (d) and 6003.

E. The Debtor is a North Carolina non-profit corporation that owns and operates a 108-bed general acute care community hospital (the "Hospital") in a 22-acre campus located at 117 East Kings Highway, Eden, North Carolina (the "Hospital Real Property"). Within the Hospital Real Property, the Debtor also owns and operates a 121-bed skilled nursing facility. In

addition to the Hospital Real Property, the Debtor also owns several other parcels of real property located in Eden that are contiguous to, or in the general vicinity of, the Hospital Real Property (collectively, the “Additional Real Property”). The Additional Real Property is as follows:

<i>Property Name</i>	<i>Location</i>
Women’s Health Center	522 S. Van Buren Road, Eden, North Carolina
Dayspring Building	250 W. Kings Highway, Eden, North Carolina
Thompson Street Building	515 Thompson Street, Eden, North Carolina
Smith McMichael Cancer Center	516 S. Van Buren Road, Eden, North Carolina
Medical Office Building No. 1	518 S. Van Buren Road, Eden, North Carolina
Medical Office Building No. 2	520 S. Van Buren Road, Eden, North Carolina
Wright Diagnostic Center	618 Pierce Street, Eden, North Carolina

### **The Debtor’s Capital Structure**

#### **a. 2005 Bond Transaction**

F. On June 15, 2005, the Debtor issued FHA-insured North Carolina Medical Care Commission Mortgage Revenue Bonds, Series 2005 of \$47,675,000 (the “Series 2005 Bonds”) to fund the costs of certain capital improvements of the Hospital’s healthcare facilities and to refinance certain of its then-existing debt. The Series 2005 Bonds were issued pursuant to the Health Care Facilities Finance Act, Chapter 131A of the North Carolina General Statutes, as amended, and a Trust Indenture, dated as of June 15, 2005, between the North Carolina Medical Commission (the “Commission”) and Wells Fargo Bank, N.A. (as successor to Wachovia Bank, N.A.), as Trustee (the “Trustee”).

G. The proceeds of the Series 2005 Bonds were loaned by the Commission to the Debtor pursuant to a Loan Agreement, dated as of June 1, 2005, between the Commission and the Debtor. The obligations of the Debtor were evidenced by a Deed of Trust Note, dated as of June 15, 2005 (the “Series 2005 Note”) from the Debtor to the Trustee for the Series 2005 Bonds. The Department of Housing and Urban Development (“HUD”), acting by and through

the Federal Housing Commissioner (“FHA”), insured the advancement of funds pursuant to Section 242 of Title II of the National Housing Act, as amended. The Debtor entered into an FHA Regulatory Agreement, a Building Loan Agreement with Trustee, and certain other documents delivered to FHA and the Trustee, as beneficiary. In September 2008, final endorsement required by HUD was completed.

**b. 2012 Refinance with Berkadia**

H. In late 2012, the Debtor refinanced its Series 2005 Note obligations with a third-party commercial mortgage company, Berkadia Commercial Mortgage, LLC (“Berkadia”). The purpose of the refinance was to reduce the then-existing debt service payments.

I. On December 14, 2012, the Debtor executed a promissory note in favor of Berkadia in the amount of \$40,566,294 (the “Berkadia Note”). The proceeds of the Berkadia loan were put into an escrow account that was used to service the existing Series 2005 Bonds until they were eligible to be redeemed in May 2015.

J. Under the terms of the Berkadia Note, the interest rate on the new loan is a fixed rate of 3.59%. Principal and interest payments are due monthly until the Berkadia Note matures in April 2032. As of the Petition Date, the amount outstanding under the Berkadia Note is approximately \$33,848,885.

K. In conjunction with its refinancing, the Debtor entered into a new Regulatory Agreement with HUD (the “HUD Regulatory Agreement”). The Debtor was required to establish a Mortgage Reserve Fund (the “MRF”) with the Trustee. The MRF provides, subject to HUD approval, funds to, among other things, cure or prevent a default, engage a consultant, or implement a turnaround plan for the Debtor. The Debtor is required to make quarterly payments to the MRF which, when coupled with investment income, will equal certain required levels of

debt service funds. As of the Petition Date, the MRF had a balance of approximately \$5,347,588.80.

L. Berkadia asserts a perfected first priority security interest in certain of the Debtor's real property, including the Hospital Real Property, the Wright Diagnostic Center, and the Smith McMichael Cancer Center (collectively, the "Berkadia Real Property") by virtue of a Deed of Trust and Assignment of Rents, Profits, and Income filed on December 12, 2012 at Book 1447, Page 31, in the Registry of Deeds of Rockingham County, North Carolina (the "Berkadia Deed of Trust," and together with the Berkadia Note, the "Berkadia Secured Financing Agreements").

M. Berkadia and HUD assert, together, a perfected first priority security interest in, among other things, the Debtor's accounts receivable, general intangibles, and health care insurance receivables (collectively, the "Berkadia and HUD Personal Property" and together with the Berkadia Real Property, the "Berkadia Prepetition Collateral") by virtue of that certain Security Agreement dated December 14, 2012 and a UCC Financing Statement filed with the North Carolina Secretary of State, File No. 20120114847A, on December 13, 2012. Together, the Berkadia Real Property and the Berkadia and HUD Personal Property shall constitute the Prepetition Collateral.

N. The Berkadia Note is insured by the FHA, an organizational unit of HUD, pursuant to a commitment of insurance for refinancing under the provisions of sections 242/241 and 223(a)(7) of Title II of the National Housing Act, issued to InnoVative Capital, LLC by Roger E. Miller, Agent of the Federal Housing Commissioner, dated November 20, 2012, assigned to Berkadia, as amended by that certain letter from Roger E. Miller, Agent for the Federal Housing Commissioner, to InnoVative Capital, LLC dated December 12, 2012 (the

“FHA Commitment”). The FHA insurance endorsement is subject to compliance with the requirements and regulations and terms and conditions of a Regulatory Agreement dated December 14, 2012.

O. The Debtor owes approximately \$1.3 million to First-Citizens Bank & Trust Company (“First-Citizens”) pursuant to a promissory note (the “First-Citizens Note”), and that debt is purportedly secured by a first priority security interest on the Dayspring Building and the Thomson Street Building, and an assignment of leases and rents to the Dayspring Building and the Thomson Street Building, by virtue of a Deed of Trust filed on November 1, 2007 at Book 1335, Page 2151, in the Registry of Deeds of Rockingham County, North Carolina (the “First-Citizens Deed of Trust,” and together with the First-Citizens Note, the “First-Citizens Secured Financing Agreements and Assignments”). In addition, First-Citizens alleges contract and common law setoff rights against the Debtor’s First-Citizens deposit accounts. The real property, rents, and First-Citizens deposit accounts subject to the First-Citizens Deed of Trust shall be referred to as the First-Citizens Pre-Petition Collateral.

P. The Debtor is not aware of any other asserted liens or security interests against its real property, accounts receivable, general intangibles, health care insurance receivables, or rents, the proceeds of which would constitute “cash collateral” as that term is defined in the Bankruptcy Code (“Cash Collateral”).

Q. Without prejudice to the rights of any other party (but subject to the limitations thereon described below in Paragraph 21), the Debtor acknowledges and stipulates that, in accordance with the terms of the Berkadia Secured Financing Agreements, the Debtor is truly and justly indebted to Berkadia, without defense, counterclaim, or offset of any kind, and that as of the Petition Date, (i) the Debtor was liable to Berkadia in respect of loans made, and certain

accrued and unaccrued interest, costs and fees, pursuant to the Berkadia Secured Financing Agreements in the aggregate amount of no less than \$33,848,885 (exclusive of certain interest and fees accrued and unpaid thereon and other costs, expenses and indemnities), and (ii) pursuant to the Berkadia Secured Financing Agreements, the Debtor is liable to Berkadia for accrued and unpaid interest, commitment fees, attorneys' and advisors' fees, Expenses and other out-of-pocket expenses, costs and indemnities (collectively, subsections (i) and (ii) of this section are the "Berkadia Note Obligations").

R. Without prejudice to the rights of any other party (but subject to the limitations thereon described below in Paragraph 21), the Debtor acknowledges and stipulates that under the Berkadia Secured Financing Agreements and as security for repayment of the Berkadia Note Obligations, the Debtor granted to Berkadia and HUD security interests in, and liens upon, the Berkadia Pre-Petition Collateral.

S. Without prejudice to the rights of any party (but subject to the limitations thereon described below in Paragraph 21), the Debtor acknowledges and stipulates that Berkadia's security interests in, and liens on, the Berkadia Pre-Petition Collateral were properly perfected and are valid and enforceable first priority liens on and security interests in the Berkadia Pre-Petition Collateral. The Debtor further acknowledges that the Debtor's cash on hand and cash equivalents as of the Petition Date that constitute proceeds of the Berkadia Pre-Petition Collateral are cash collateral of Berkadia and HUD within the meaning of Section 363(a) of the Bankruptcy Code (the "Berkadia Cash Collateral"). Berkadia and HUD are entitled, pursuant to Sections 361 and 363(e) of the Bankruptcy Code, to adequate protection of their interests in the Berkadia Pre-Petition Collateral, including for the use of Berkadia Cash Collateral, the use, sale,



or lease of the Berkadia Pre-Petition Collateral other than Berkadia Cash Collateral, and for the imposition of the automatic stay.

T. In accordance with Section 552(b) of the Bankruptcy Code, the Berkadia Pre-Petition Collateral includes, without limitation, all proceeds, products and profits of the Berkadia Pre-Petition Collateral, whether existing before or after the commencement of the Chapter 11 Case.

U. Without prejudice to the rights of any other party (but subject to the limitations thereon described below in Paragraph 21), the Debtor acknowledges and stipulates that, in accordance with the terms of the First-Citizens Secured Financing Agreements and Assignments, the Debtor is truly and justly indebted to First-Citizens, without defense, counterclaim, or offset of any kind, and that as of the Petition Date, (i) the Debtor was liable to First-Citizens in respect of loans made, and certain accrued and unaccrued interest, costs, and fees, pursuant to the First-Citizens Secured Financing Agreements and Assignments in the aggregate amount of \$1,309,165.95 (exclusive of certain interest and fees accrued and unpaid thereon and other costs, expenses and indemnities), and (ii) pursuant to the First-Citizens Secured Financing Agreements and Assignments, the Debtor is liable to First-Citizens for accrued and unpaid interest, commitment fees, attorneys' and advisors' fees, Expenses and other out of pocket expenses, costs and indemnities (collectively, subsections (i) and (ii) of this section are the "First-Citizens Note Obligations").

V. Without prejudice to the rights of any other party (but subject to the limitations thereon described below in Paragraph 21), the Debtor acknowledges and stipulates that under the First-Citizens Secured Financing Agreements and Assignments and as security for

repayment of the First-Citizens Note Obligations, the Debtor granted to First-Citizens security interests in, and liens upon, the First-Citizens Pre-Petition Collateral.

W. Without prejudice to the rights of any party (but subject to the limitations thereon described below in Paragraph 21), the Debtor acknowledges and stipulates that First-Citizens' security interests in, and liens on, the First-Citizens Pre-Petition Collateral were properly perfected and are valid and enforceable first priority liens on and security interests in the First-Citizens Pre-Petition Collateral. The Debtor further acknowledges that the Debtor's cash on hand and cash equivalents as of the Petition Date that constitute proceeds of the First-Citizens Pre-Petition Collateral are cash collateral of First-Citizens within the meaning of Section 363(a) of the Bankruptcy Code (the "First-Citizens Cash Collateral"). First-Citizens is entitled, pursuant to Sections 361 and 363(e) of the Bankruptcy Code, to adequate protection of its interests in the First-Citizens Pre-Petition Collateral, including for the use of First-Citizens Cash Collateral, the use, sale, or lease of the First-Citizens Pre-Petition Collateral other than the First-Citizens Cash Collateral, and for the imposition of the automatic stay.

X. In accordance with Section 552(b) of the Bankruptcy Code, the First-Citizens Pre-Petition Collateral includes, without limitation, all proceeds, products and profits of the First-Citizens Pre-Petition Collateral, whether existing before or after the commencement of the Chapter 11 Case.

Y. The Debtor acknowledges and stipulates that, subject to the following exceptions, as of the Petition Date, all of the Debtor's cash and cash equivalents (the "Available Cash") are the proceeds, products, and profits of the Berkadia Pre-Petition Collateral and/or the First-Citizens Pre-Petition Collateral. The exceptions are (1) income

from Medical Office Building No. 1, Medical Office Building No. 2, and the Women's Health Center; and (2) restricted donations from donors (collectively, the "Excepted Cash").

Z. The Debtor acknowledges and agrees that, except for the Excepted Cash, all of the Debtor's Available Cash held on the Petition Date together with any cash or cash equivalent proceeds of the Berkadia Pre-Petition Collateral received on or after the Petition Date shall constitute Berkadia Cash Collateral and/or the First-Citizens Pre-Petition Collateral.

AA. Without prejudice to the rights of any party (but subject to the limitations thereon described below in Paragraph 21), the Debtor acknowledges and agrees that (i) the Berkadia Note Obligations and the First-Citizens Note Obligations constitute legal, valid and binding obligations of the Debtor, enforceable in accordance with the terms of the Berkadia Secured Financing Agreements and the First-Citizens Secured Financing Agreements and Assignments (other than in respect of the stay of enforcement arising from Section 362 of the Bankruptcy Code), (ii) no offsets, defenses or counterclaims exist to the currently outstanding Berkadia Note Obligations or the First-Citizens Note Obligations, (iii) the liens and security interests of Berkadia, HUD, and First-Citizens (the "Lenders") are first priority, valid, enforceable, perfected, and not subject to avoidance, subordination, or challenge; and (iv) no portion of the Berkadia Note Obligations or the First-Citizens Note Obligations is subject to avoidance, subordination, or disallowance pursuant to the Bankruptcy Code or applicable non-bankruptcy law.

BB. Subject to the provisions of Paragraph 23 hereof, upon entry of this Third Agreed Interim Order, in light of the Lenders' agreement to subordinate their rights of payment, liens, and super-priority/priority claims to the Carve-Out (as defined herein) and to also carve out from their liens and super-priority administrative claim rights under Chapter 5 of the Bankruptcy Code

and their proceeds, to the extent set forth below, Berkadia and HUD are entitled to and shall receive with respect to the Berkadia Pre-Petition Collateral and any Berkadia Replacement Collateral, and First-Citizens is entitled to and shall receive with respect to the First-Citizens Pre-Petition Collateral and any First-Citizens Replacement Collateral, a waiver of the provisions of Section 506(c) of the Bankruptcy Code.

**The Debtor's Need for Use of Cash Collateral**

CC. An immediate need exists for the Debtor to have access to the Berkadia Cash Collateral and the First-Citizens Cash Collateral in order to continue its operations, meet its payroll, and other necessary, ordinary course business expenditures, administer and preserve the value of its estate, and maintain adequate access to cash in amounts customary and necessary for companies of this size in this industry to maintain customer and vendor confidence. The ability of the Debtor to finance its operations by way of working capital requires its access to cash resources, the absence of which would immediately and irreparably harm the Debtor, its estate, and its creditors. The Debtor requires these cash resources to operate its businesses, preserve the confidences of vendors, suppliers and customers, and to preserve the value of its businesses.

DD. The Debtor has requested that, pursuant to Section 363(c) of the Bankruptcy Code, the Lenders consent to the Debtor's use of Berkadia Cash Collateral and First-Citizens Cash Collateral and the Debtor's use, sale, and lease of the other Berkadia Pre-Petition Collateral and First-Citizens Pre-Petition Collateral in the ordinary course of business pursuant to the terms and conditions of this Third Agreed Interim Order during the Interim Cash Collateral Period (as defined below). The Debtor acknowledges and agrees that the Lenders are entitled to adequate protection pursuant to Sections 361 and 363(e) of the Bankruptcy Code with respect to Berkadia Cash Collateral, First-Citizens Cash Collateral, and other Berkadia Pre-Petition Collateral and

First-Citizens Pre-Petition Collateral, including, without limitation, to compensate the Lenders for any loss or diminution in the value of Berkadia Cash Collateral, First-Citizens Cash Collateral, or other Berkadia Pre-Petition Collateral and First-Citizens Pre-Petition Collateral resulting from the Debtor's use of Berkadia Cash Collateral or First Citizen Cash Collateral, the use, sale or lease of other Berkadia Pre-Petition Collateral and First-Citizens Pre-Petition Collateral in the ordinary course of business and the imposition of the automatic stay during the Interim Cash Collateral Period.

EE. Subject to the entry, and continued effectiveness, of this Third Agreed Interim Order, the Lenders have consented to the Debtor's use of Berkadia Cash Collateral, First-Citizens Cash Collateral, and use, sale or lease of other Berkadia Pre-Petition Collateral and First-Citizens Pre-Petition Collateral in the ordinary course of business during the Interim Cash Collateral Period. The foregoing notwithstanding, nothing in this Third Agreed Interim Order shall be construed as limiting or prohibiting the Lenders from objecting to any relief sought by the Debtor in the Chapter 11 Case, including, without limitation, any DIP Financing<sup>1</sup> or any motion for the further use of Berkadia Cash Collateral or First-Citizens Cash Collateral, other than the entry of this Third Agreed Interim Order and any Further Order entered on the Cash Collateral Motion ("Further Order"), provided such final order is on terms acceptable to the Lenders.

FF. The Interim Relief requested herein is, subject to the terms and conditions hereof, necessary, essential and appropriate for the continued operations of the Debtor's businesses and the preservation of its estate and the value of the Debtor's businesses.

---

<sup>1</sup> The term "DIP Financing" means any debtor-in-possession financing facility, cash loans or liquidity facility provided to the Debtor pursuant to Section 364 of the Bankruptcy Code secured by liens on and against property of the Debtor's estate. Any party that provides the Debtor with DIP Financing shall be referred to as a "DIP Lender."

GG. Good and sufficient cause has been shown for the entry of this Third Agreed Interim Order. Among other things, the entry of this Third Agreed Interim Order is in the best interests of the Debtor, its creditors, and its estate because it will enable the Debtor to (i) continue operating its businesses and avoid an immediate shutdown of operations, (ii) meet obligations for payroll, necessary expenditures, and other operating expenses, (iii) pay necessary fees and professional expenses under the Bankruptcy Code and make payments authorized under other orders entered by the Court, (iv) obtain needed goods and services, (v) retain vendor, patient and employee confidence, and (vi) maintain adequate cash resources customary and necessary for hospitals of this size, thereby avoiding immediate and irreparable harm to the Debtor's estate.

HH. Prior notice of the Interim Hearing for entry of the Third Agreed Interim Order and the Interim Relief requested in the Cash Collateral Motion was provided by the Court to the Master Service List<sup>2</sup>, including (i) the office of the United States Bankruptcy Administrator for the Middle District of North Carolina; (ii) all known parties asserting liens on the Debtor's assets; (iii) counsel to Berkadia; (iv) counsel to HUD; (v) counsel to First-Citizens; and (vi) proposed counsel to the Committee. Requisite, due and proper notice has been provided in accordance with Bankruptcy Rule 4001, which notice is sufficient for all purposes under the Bankruptcy Code and no other notice need be provided for entry of this Third Agreed Interim Order.

II. The Debtor has requested immediate entry of this Third Agreed Interim Order pursuant to Bankruptcy Rule 6004(g), and the Lenders have consented to the Interim Relief

---

<sup>2</sup> As defined in the *Order Establishing Certain Notice and Case Management Procedures* [ECF No. 49].

contained herein. Good and sufficient cause has been shown for the entry of this Third Agreed Interim Order.

NOW, based upon the Cash Collateral Motion of the Debtor and the record before the Court with respect to the Cash Collateral Motion made by the Debtor at the Interim Hearing, and good cause appearing therefor,

**IT IS ORDERED, ADJUDGED AND DECREED** effective immediately that:

1. The Cash Collateral Motion is GRANTED with respect to the Interim Relief on the terms and conditions set forth herein and the findings and conclusions above are incorporated by reference in this Third Agreed Interim Order.

2. (a) So long as no breach of the termination provisions pursuant to Section 16 hereof has occurred, this Third Agreed Interim Order shall remain in effect until the earliest of (i) the close of business on September 15, 2017, (ii) the conclusion of the further hearing on the Cash Collateral Motion authorizing the Debtor's continued use of Berkadia Cash Collateral and First-Citizens Cash Collateral (the "Further Hearing"), or (iii) the breach of the termination provisions provided in Paragraph 16 of this Third Agreed Interim Order (such period, as it may be extended pursuant to the following proviso, the "Interim Cash Collateral Period"). The Debtor's ability and authorization to use Berkadia Cash Collateral and First-Citizens Cash Collateral during the Interim Cash Collateral Period shall at all times be subject to the termination provisions of Paragraph 16 of this Third Agreed Interim Order.

(b) During the Interim Cash Collateral Period, the Debtor waives any right to seek relief under the Bankruptcy Code, including, without limitation, under Sections 105(a) and 363(c)(2), to the extent any such relief would in any way restrict or impair the rights and remedies of the Lenders as set forth in this Third Agreed Interim Order; *provided, however*, (i)

after the occurrence of a termination event set forth in Paragraph 16 hereof, the Debtor may seek entry of an Order authorizing the use of Cash Collateral over the Lenders' objection; (ii) at any time, the Debtor may seek to sell the Berkadia Pre-Petition Collateral and/or the First-Citizens Pre-Petition Collateral; and (iii) with respect to sub-paragraphs (i) and (ii) above, the Lenders reserve all rights and remedies, under the Bankruptcy Code, this Third Agreed Interim Order or otherwise, including, without limitation, the right to object to such relief. If the Debtor, or any other person, challenges the expiration or termination of the Interim Cash Collateral Period, any such objector's remedy shall be limited to requesting a hearing before the Court, with at least three (3) business days' written notice to the Lenders. In any such hearing, the sole issue before the Court shall be whether the Interim Cash Collateral Period expired or was terminated pursuant to the terms of this Third Agreed Interim Order.

**Good Faith, Reliance and Conduct**

3. The Debtor, the Lenders, and their respective agents, advisors, and employees have acted in good faith in negotiating, consenting, and agreeing to the Debtor's use of Berkadia Cash Collateral and First-Citizens Cash Collateral and the use, sale, and lease of other Berkadia Pre-Petition Collateral and First-Citizens Pre-Petition Collateral in the ordinary course of business as contemplated and provided by this Third Agreed Interim Order. The negotiation of the terms and provisions of this Third Agreed Interim Order has been conducted at arm's length, and the Court finds that such terms and conditions are fair and reasonable, under the circumstances, and reflect the Debtor's exercise of reasonable business judgment consistent with the Debtor's fiduciary duties.

4. To the extent Berkadia or HUD is not secured in the Berkadia Pre-Petition Collateral and to the extent that First-Citizens is not secured in the First-Citizens Pre-Petition Collateral, the Lenders shall not have Replacement Liens (as defined below) or a Super-Priority



Claim (as defined below) with regard to any use of cash or cash equivalents that is not found to be their Cash Collateral pursuant to Section 363 of the Bankruptcy Code. In the event that any Court of competent jurisdiction determines, in a final non-appealable order, that the Lenders were undersecured or unsecured as of the Petition Date, and not entitled to be paid interest, fees, and related charges post-petition, then (i) the Debtor's obligations to make all payments and to comply with all other terms and conditions established by this Third Agreed Interim Order shall not terminate or abate, but all such payments of interest, fees, and related charges paid during the Interim Cash Collateral Period shall be applied to the secured principal amount of the Berkadia Note Obligations or the First-Citizens Note Obligations as of the Petition Date, or as may otherwise be provided in such order, and (ii) the Lenders shall be entitled to a hearing before the Court with at least three (3) business days' written notice to the Debtor and its counsel, re-examining the adequate protection of their secured interests in the Berkadia Pre-Petition Collateral, the First-Citizens Pre-Petition Collateral, the First-Citizens Replacement Collateral (as defined below), and Berkadia Replacement Collateral (as defined below), and the authority of the Debtor to use Berkadia Cash Collateral and First-Citizens Cash Collateral.

5. In exercising any of its rights or remedies, as and when permitted pursuant to this Third Agreed Interim Order, the Berkadia Secured Financing Agreements, or the First-Citizens Secured Financing Agreements and Assignments, the Lenders shall not be deemed to be in control of the operations of the Debtor.

6. Based on the findings set forth in this Third Agreed Interim Order, and the Lenders' reliance in good faith on the terms thereof, if any of the provisions of this Third Agreed Interim Order are hereafter modified, vacated, or stayed by an order of this Court or another court, such stay, modification, or vacation shall not affect the validity and enforceability of any

claim, lien, security interest, or priority authorized for the Lenders' benefit that is granted or attaches prior to the effective date of such stay, modification or vacation, and any use of Berkadia Cash Collateral or First-Citizens Cash Collateral or the use, sale, or lease of other Berkadia Pre-Petition Collateral or First-Citizens Pre-Petition Cash Collateral in the ordinary course of business by the Debtor pursuant to this Third Agreed Interim Order prior to the effective date of such modification, stay, or vacation shall be governed in all respects by the original provisions of this Third Agreed Interim Order.

**Authorized Use of Berkadia Cash Collateral**

7. Cash Collateral. The Debtor is hereby authorized to use Berkadia Cash Collateral and First-Citizens Cash Collateral during the Interim Cash Collateral Period, subject to the conditions and limitations set forth herein.

8. Authorized Uses of Cash Collateral. The Debtor may use Berkadia Cash Collateral and First-Citizens Cash Collateral during the Interim Cash Collateral Period, in the amounts and for the purposes set forth in the Budget described in Paragraph 11 herein, not to exceed 115% on a cumulative basis, to pay only the ordinary and reasonable expenses of operating its businesses that are necessary to avoid immediate and irreparable harm.

9. Secured Financing Agreement Amendments. During the Interim Cash Collateral Period, the terms of the Berkadia Secured Financing Agreements and the First-Citizens Secured Financing Agreements and Assignments shall continue in full force and effect except as may be modified by operation of law or pursuant to the terms of this Third Agreed Interim Order.

**Adequate Protection in Favor of Berkadia and HUD  
for the Debtor's Use of Berkadia Cash Collateral**

10. Adequate Protection. On account of the Debtor's use of Berkadia Cash Collateral and First-Citizens Cash Collateral, its use, sale, or lease of the other Berkadia Pre-Petition

Collateral and the First-Citizens Pre-Petition Collateral and the imposition of the automatic stay pursuant to Section 362 of the Bankruptcy Code, in each case during the Interim Cash Collateral Period, the Lenders are hereby granted the following adequate protection pursuant to Sections 361 and 363(e) of the Bankruptcy Code:

(a) Interest, Fees and Costs. The Debtor shall pay Berkadia and First-Citizens all interest, fees, and charges including, without limitation, all obligations, expenses, and other charges accruing under the Berkadia Secured Financing Agreements or the First-Citizens Secured Financing Agreements and Assignments, respectively, regardless of whether such amounts appear on the Budget. All payments of interest shall be calculated at the applicable interest rate under the Berkadia Secured Financing Agreements or the First-Citizens Secured Financing Agreements and Assignments, as applicable, in effect as of the Petition Date.

(b) Replacement Collateral and Replacement Liens for HUD and Berkadia. The Debtor hereby grants, assigns, and pledges to Berkadia and HUD valid, perfected, and enforceable liens and security interests (the "Berkadia Replacement Liens") in all of the Debtor's accounts receivable created from and after the Petition Date and all of the Debtor's right, title, and interest in, to, and under the Berkadia Pre-Petition Collateral, to the extent same existed on the Petition Date and the proceeds, products, offspring, rents, and profits of all of the foregoing, all as may otherwise be described in the Berkadia Secured Financing Agreements (collectively, the "Berkadia Replacement Collateral").

(c) Automatic Perfection of Berkadia Replacement Liens. The Berkadia Replacement Liens granted under this Third Agreed Interim Order shall be valid, perfected, and enforceable against the Berkadia Replacement Collateral as of the Petition Date without further filing or recording of any document or instrument or the taking of any further actions, and shall

not be subject to dispute, avoidance or subordination. Notwithstanding the automatic perfection of the Berkadia Replacement Liens granted pursuant to this Third Agreed Interim Order, Berkadia either hereby authorized, but not required, to file financing statements and other similar instruments in any jurisdiction, and to take any other action it deems necessary or appropriate in order to validate, evidence, or perfect such Berkadia Replacement Liens. A certified copy of this Third Agreed Interim Order may, in Berkadia's or HUD's discretion, be filed with any filing offices in addition to, or in lieu of, such financing statements or other similar instruments, and all filing offices are hereby authorized to accept such certified copy of this Third Agreed Interim Order for filing. The Debtor is authorized and directed to execute and deliver all instruments and documents prepared by Berkadia or HUD and to pay all reasonable fees and expenses that are reasonably required or necessary to facilitate any such filings or recordings elected to be made by Berkadia or HUD.

(d) Priority of Berkadia Replacement Liens. The Berkadia Replacement Liens granted hereunder shall be subject and subordinate in priority to any liens, security interests, and other encumbrances, existing as of the Petition Date, or which attach to the Berkadia Replacement Collateral after the Petition Date, that are senior, valid, perfected, enforceable, and unavoidable, that are granted with Berkadia's or HUD's consent, or that are otherwise senior to the pre-petition liens in favor of Berkadia or HUD. The Berkadia Replacement Liens shall be valid and enforceable against any trustee appointed in the Chapter 11 Case, or in any subsequent proceeding affecting the Debtor, including any conversion of the Debtor's Chapter 11 Case to a case under Chapter 7 of the Bankruptcy Code.

(e) Replacement Collateral and Replacement Liens for First-Citizens. The Debtor hereby grants, assigns, and pledges to First-Citizens valid, perfected, and enforceable

liens and security interests (the “First-Citizens Replacement Liens”) in all of the rents received from the Thompson Street Building and Dayspring Building on and after the Petition Date and all of the Debtor’s right, title, and interest in, to, and under the First-Citizens Pre-Petition Collateral, to the extent same existed on the Petition Date and the proceeds, products, offspring, rents, and profits of all of the foregoing, all as may otherwise be described in the First-Citizens Secured Financing Agreements and Assignments (collectively, the “First-Citizens Replacement Collateral”).

(f) Automatic Perfection of First-Citizens Replacement Liens. The First-Citizens Replacement Liens granted under this Third Agreed Interim Order shall be valid, perfected, and enforceable against the First-Citizens Replacement Collateral as of the Petition Date without further filing or recording of any document or instrument or the taking of any further actions, and shall not be subject to dispute, avoidance, or subordination. Notwithstanding the automatic perfection of the First-Citizens Replacement Liens granted pursuant to this Third Agreed Interim Order, First-Citizens is hereby authorized, but not required, to file financing statements and other similar instruments in any jurisdiction, and to take any other action it deems necessary or appropriate in order to validate, evidence, or perfect such First-Citizens Replacement Liens. A certified copy of this Third Agreed Interim Order may, in First Citizen’s discretion, be filed with any filing offices in addition to, or in lieu of, such financing statements or other similar instruments, and all filing offices are hereby authorized to accept such certified copy of this Third Agreed Interim Order for filing. The Debtor is authorized and directed to execute and deliver all instruments and documents prepared by First-Citizens and to pay all reasonable fees and expenses that are reasonably required or necessary to facilitate any such filings or recordings elected to be made by First-Citizens.

(g) Priority of First-Citizens Replacement Liens. The First-Citizens Replacement Liens granted hereunder shall be subject and subordinate in priority to any liens, security interests, and other encumbrances, existing as of the Petition Date, or which attach to the First-Citizens Replacement Collateral after the Petition Date, that are senior, valid, perfected, enforceable, and unavoidable, that are granted with First-Citizens' consent, or that are otherwise senior to the pre-petition liens in favor of First-Citizens. The First-Citizens Replacement Liens shall be valid and enforceable against any trustee appointed in the Chapter 11 Case, or in any subsequent proceeding affecting the Debtor, including any conversion of the Debtor's Chapter 11 Case to a case under Chapter 7 of the Bankruptcy Code.

(h) Taxes. The Debtor shall and hereby agree to pay all post-petition federal, state, and county taxes (other than real property taxes) as and when due, regardless of whether such taxes appear on the Budget and any such payments in excess of amounts budgeted pursuant to paragraph 11 below shall not be considered in calculating whether Debtor has exceeded the Budget and caused a default or termination event under this Third Agreed Interim Order.

(i) Super-priority Administrative Expense Claim for Berkadia. Subject and subordinate only to the Carve-Out (defined below), the Berkadia Note Obligations, to the extent that the stay under Section 362 of the Bankruptcy Code or the use, sale, or lease of the Berkadia Prepetition Collateral results in a decrease in Berkadia's interest in the Berkadia Prepetition Collateral, are hereby granted and entitled to status as an administrative expense claim (the "Berkadia Super-Priority Claim") pursuant to Section 507(b) of the Bankruptcy Code, with priority over all other administrative expense claims, now existing or hereafter arising, of the kind specified in or ordered pursuant to Sections 105, 326, 330, 331, 351, 503(b), 506(c), 507(a), and 1114 of the Bankruptcy Code.

(j) Super-priority Administrative Expense Claim for First-Citizens. Subject and subordinate only to the Carve-Out (defined below), the First-Citizens Note Obligations, to the extent that the stay under Section 362 of the Bankruptcy Code, or the use, sale, or lease of the First-Citizens Prepetition Collateral results in a decrease in First-Citizens' interest in the First-Citizens Prepetition Collateral, is hereby granted and entitled to status as an administrative expense claim (the "First-Citizens Super-Priority Claim") pursuant to Section 507(b) of the Bankruptcy Code, with priority over all other administrative expense claims, now existing or hereafter arising, of the kind specified in or ordered pursuant to Sections 105, 326, 330, 331, 351, 503(b), 506(c), 507(a), and 1114 of the Bankruptcy Code.

#### **The Budget**

11. Interim Budget. Attached to this Third Agreed Interim Order as Exhibit A is a budget (the "Budget") for the week ending September 1, 2017 through and including September 15, 2017, which has been prepared by the Debtor. The Budget reflects, on a line-item basis, anticipated cash receipts and expenditures and includes all necessary and required expenses which the Debtor expects to incur during the term of the Budget in order to avoid immediate and irreparable harm. The Debtor is authorized to use the Berkadia Cash Collateral and the First-Citizens Cash Collateral only for payment of such items as is set forth in the Budget, with allowance for a fifteen percent (15%) aggregate (and not line-item) variance on a rolling forward, cumulative basis and also subject to the terms and conditions set forth in the Berkadia Secured Financing Agreements, the First-Citizens Secured Financing Agreements and Assignments, and this Third Agreed Interim Order; provided, however, for purposes of calculating such variance, any line item reflecting payment of professional fees for Retained Professional (as defined in Paragraph 22) shall not be included and no such professional shall be entitled to be paid more than is set forth on such line item (other than as set forth in

Paragraph 22). Any disbursements by the Debtor other than for budgeted amounts that cause a 15% variance as set forth above, shall constitute a termination event in accordance with the provisions of this Third Agreed Interim Order unless the Lenders consent to those changes in writing or the Court enters an Order, after notice to the Lenders and a hearing. First-Citizens, Berkadia, and, for avoidance of any doubt, HUD are not required to advance to the Debtor any amounts that may be available for lending under the Berkadia Secured Financing Agreements or the First-Citizens Secured Financing Agreements and Assignments. So long as no defaults exist under this Third Agreed Interim Order, the Lenders shall consent to the use by the Debtor of such amounts of Berkadia Cash Collateral and First-Citizens Cash Collateral authorized for use by the Debtor pursuant to the terms and conditions of this Third Agreed Interim Order and the Budget.

**Disclosure Required of the Debtor**

12. Required Disclosure. As additional adequate protection for the benefit of the Lenders, the Debtor shall provide the Lenders the following information during the Interim Cash Collateral Period:

(a) Reporting. Copies of all reports as are required by the Berkadia Secured Financing Agreements, the First-Citizens Secured Financing Agreements and Assignments, the HUD Regulatory Agreement, or such additional reports as the Lenders may reasonably request from time to time, all in form, detail and substance reasonably satisfactory to the Lenders;

(b) Copies of Documents. Copies of (i) all non-privileged reports, appraisals, business plans, investigations, or other similar documents provided to the Committee or any potential lender of post-petition financing, (ii) any and all audits prepared by the Debtor's accountants, and (iii) subject to the Debtor's reasonable best efforts, copies of every final version



of all non-privileged consultants' reports, appraisals, and business plans as they become available to the Debtor;<sup>3</sup>

(c) Communications Regarding Any Asset Sale, DIP Financing, or Plan of Reorganization. Weekly oral status reports concerning any asset sale, DIP Financing, or Plan of Reorganization or Liquidation involving the Debtor, together with copies of all non-privileged documents including, without limitation, letter(s) of intent, copies of draft and final versions of all consultants' reports, business plans, term sheets, equity purchase agreements, merger agreements, asset purchase agreements, Chapter 11 plan term sheets, draft Chapter 11 plans, and similar documents as they become available to the Debtor;

(d) Requests for Additional Information. Within two (2) business days or such other time period agreed to at the time of the request by Berkadia or HUD, the Debtor shall, to the extent possible, provide such requested non-privileged reports, analysis, documents, and information as reasonably requested; and

(e) Reports. The Debtor agrees to provide the following information to the Lenders, with copies to the Committee and the Bankruptcy Administrator's office:

(i) By Wednesday of each week, weekly cash flow report of the prior week with a comparison of the actual cash flow to the forecasted cash flow and an explanation of significant variances;

(ii) By Wednesday of each week, a 13-week cash flow forecast for the next 13 weeks;

---

<sup>3</sup> With regard to Paragraph 12, Subparagraphs (b)(i), (b)(iii) and (c), to the extent any privilege is claimed, the Debtor shall provide Berkadia and HUD with a privilege log, within seven (7) business days of the Debtor providing such documents to any Official Committee or that become available to the Debtor, identifying the title of the document provided, preparer of the document, the legal privilege claimed and a general description of such document(s).

(iii) By Friday of each week, the Debtor's operations personnel shall speak with non-attorney representatives from the Lenders regarding the Debtor's operations, including the 13-week cash flow forecasts required in subsection (ii) above; and

(iv) By the end of each month, the Income Statement, Balance Sheet, and Cash Flow Statement for the preceding month starting with the Income Statement, Balance Sheet, and Cash Flow Statement for the month starting July 1, 2017 as attached to the monthly reports filed with the Court.;

13. If the Debtor fails to deliver the reports, documents, information, and analysis to the Lenders by the dates and times required under Paragraph 12, the Lenders may request that the Court further restrict the Debtor's use of Cash Collateral, and the Debtor agrees that the Lenders' request shall be heard in an expedited manner by the Court with at least three (3) business days' written notice to the Debtor.

14. Access and Inspection. Upon written notice by the Lenders, to Debtor and its counsel, the Debtor shall, within a commercially reasonable time, permit any of the Lenders' agents, consultants, advisors, auditors, and employees (collectively, "Lenders' Consultants") full and reasonable access, during normal business hours, to inspect, review, and photocopy or otherwise duplicate (as applicable) the Debtor's books, records, and place of business to verify the existence, condition, value, and location of property in which the Lenders hold liens or security interests. The Debtor shall permit, without material disruption to the operation of the Debtor's business, Lenders' Consultants full access to examine the respective corporate, financial, and operating records, and, make copies thereof, inspect the assets, properties, operations, and affairs of the Debtor, visit any or all of the offices of the Debtor to discuss such

matters with its officers, independent auditors (and the Debtor hereby authorize such independent auditors to discuss such matters with the Lenders' Consultants), and the Debtor shall cooperate with the Lenders' Consultants in all respects. The Debtor shall provide the Lenders and the Lenders' Consultants, with commercial reasonable promptness, such financial information concerning the Debtor's cash flow projections, business plan, and other aspects of operations as such parties may reasonably request from time to time except matters and documents that are privileged.

### **Accounts**

15. **Cash Management Accounts.** Except to the extent Section 345(b) of the Bankruptcy Code requires otherwise, the Debtor shall maintain the cash management system as in existence as of the Petition Date, in accordance with any interim or final order entered on the Debtor's *Motion for Order (A) Authorizing Continued Use of Existing Cash Management System and (B) Authorizing the Maintenance of Existing Bank Accounts* [ECF No. 4].

### **Termination of the Debtor's Ability to Use Cash Collateral**

16. **Termination Events.** The Debtor's ability to use Berkadia Cash Collateral and First-Citizens Cash Collateral during the Interim Cash Collateral Period will terminate (i) immediately upon the occurrence of any event described in Subparagraphs (a), (c), (e), (f), (g), or (h) below, or (ii) if any event described in any other subparagraph below shall occur, seven (7) business days after the Lenders or one of them delivers written notice to the Debtor that an event of default has occurred, unless such event of default has been substantially cured within such seven (7) business day period:

(a) the expiration of this Third Agreed Interim Order as provided in Paragraph 2 hereof, other than due to the entry of the Further Order or any other order of the

Court approving the Debtor's use of Cash Collateral, without the Lenders' prior written consent to such extension of the Interim Cash Collateral Period;

(b) the Debtor's failure to comply with any of the material terms or conditions of this Third Agreed Interim Order;

(c) the modification or extension of this Third Agreed Interim Order, without providing the Lenders a minimum of three (3) business days prior written notice of the hearing on such modification or extension;

(d) an application is filed by the Debtor, without the prior written consent of the Lenders, which consent shall not be unreasonably withheld, for the approval of any claim arising under Section 507(b) of the Bankruptcy Code or any lien in the Chapter 11 Case which is *pari passu* with or senior to the Berkadia Super-Priority Claim, the First-Citizens Super-Priority Claim, the First-Citizens Replacement Liens, or the Berkadia Replacement Liens, including, in all cases, the Berkadia Super-Priority Claim, the Berkadia Replacement Liens, the First-Citizens Super-Priority Claim, the First-Citizens Replacement Liens, or other liens arising under or otherwise permitted by this Third Agreed Interim Order;

(e) the commencement by the Debtor of any action against (i) Berkadia, its agents, advisors, and/or employees, (ii) HUD, its agents, advisors, and/or employees, or (iii) First-Citizens, its agents, advisors, and/or employees, to subordinate, avoid, or disallow any liens, security interests, or claims made in connection with the Berkadia Note Obligations or the First-Citizens Note Obligations;

(f) (i) the Chapter 11 Case shall be dismissed or converted to a case under Chapter 7 of the Bankruptcy Code; (ii) the Debtor's shall file a motion, or other pleading, seeking dismissal of any of its Chapter 11 Case under Section 1112 of the Bankruptcy Code, or

otherwise; or (iii) a trustee under Chapter 11 of the Bankruptcy Code or an examiner with enlarged powers relating to the operation of the Debtor's businesses (powers beyond those set forth in Section 1106(a)(3) and (4) of the Bankruptcy Code) under Section 1106 of the Bankruptcy Code shall be appointed or elected in the Chapter 11 Case;

(g) (i) the Debtor shall assert in any pleading filed in any court that any material provision of this Third Agreed Interim Order is not valid and binding for any reason, or (ii) any material provision of this Third Agreed Interim Order shall for any reason, other than the entry of the Further Order, or any other order of this Court approving the Debtor's use of Berkadia Cash Collateral or First-Citizens Cash Collateral, cease to be valid and binding without the prior written consent of the Lenders;

(h) the Debtor shall fail in any material respect to comply with any provisions in the Berkadia Secured Financing Agreements or the First-Citizens Secured Financing Agreements and Assignments governing the maintenance of the Debtor's properties or insurance thereon;

(i) in the event the Lenders consent in writing to any DIP Financing, the occurrence of a default, material breach, or termination event under the terms of such DIP Financing, or an order approving such DIP Financing, shall constitute an event of default under this Third Agreed Interim Order as though this Third Agreed Interim Order contained such provisions in its entirety;

Upon the occurrence of written notice to the Debtor of a termination event as set forth above (and after the passage of any applicable cure period), the Lenders' consent to the Debtor's use of Cash Collateral shall automatically terminate and the Debtor may not use, sell, or lease Cash Collateral and shall segregate and account for any Berkadia Cash Collateral and First-

Citizens Cash Collateral in its possession, custody, or control, for the exclusive benefit of the respective Lenders subject to further order of the Court.

**Exercise of Remedies by the Lenders**

17. Limitation on Exercise of Rights and Remedies. The Lenders shall not take any action during the Interim Cash Collateral Period to seize or take control over any of the Berkadia Cash Collateral, Berkadia Pre-Petition Collateral, Berkadia Replacement Collateral, the First-Citizens Cash Collateral, First-Citizens Pre-Petition Collateral, First-Citizens Replacement Collateral, or the Debtor's other property, nor shall it impose freezes of assets or seek to exercise any alleged right of setoff or recoupment, or exercise any other right or remedy against the Berkadia Pre-Petition Collateral, Berkadia Cash Collateral, Berkadia Replacement Collateral, the First-Citizens Cash Collateral, First-Citizens Pre-Petition Collateral, First-Citizens Replacement Collateral, or the Debtor's other property during the Interim Cash Collateral Period; provided, that the Lenders or any of them may do any of the foregoing after application to, and receiving authority from, the Court, to the extent necessary, upon a breach or violation by the Debtor of any of the terms or conditions of, or upon the termination of, this Third Agreed Interim Order.

18. Additional Relief. Notwithstanding any provision hereof, this Third Agreed Interim Order is without prejudice to the Lenders' rights to seek any other or additional relief in, or relating to, the Chapter 11 Case, including, without limitation, relief from the automatic stay pursuant to Section 362 of the Bankruptcy Code, and the filing of objections and/or claims relating to motions for adequate protection, or the use, sale, lease, or other disposition of the Berkadia Pre-Petition Collateral, Berkadia Replacement Collateral, Berkadia Cash Collateral, the First-Citizens Cash Collateral, First-Citizens Pre-Petition Collateral, or First-Citizens Replacement Collateral. Berkadia and First-Citizens expressly reserves their rights to claim that the provisions of this Third Agreed Interim Order do not constitute "adequate protection" for the

purposes of Sections 361 and 363(c) and (e) of the Bankruptcy Code, or otherwise, and to request additional protection over and above the provisions of this Third Agreed Interim Order.

19. No Waiver. Except as expressly set forth herein, no rights of the Lenders are waived pursuant to, or modified by, this Third Agreed Interim Order. The Lenders' rights and remedies pursuant to the Berkadia Secured Financing Agreements, the First-Citizens Financing Agreements, and this Third Agreed Interim Order shall be cumulative, and the exercise or waiver of any such right or remedy shall not preclude or inhibit the exercise of any additional rights or remedies. The Lenders' failure, at any time or times hereafter, to require strict performance by the Debtor of any provision of this Third Agreed Interim Order shall not waive, affect, or diminish any right of the Lenders thereafter to demand strict compliance and performance herewith. Any failure or delay on the part of Berkadia or First-Citizens in the exercise of any rights, remedies, claims, powers, benefits, or privileges under the Berkadia Secured Financing Agreements, the First-Citizens Secured Financing Agreements and Assignments, or this Third Agreed Interim Order shall not constitute a waiver by the Lenders, subject the Lenders to any liability to any entity under this Third Agreed Interim Order, or preclude any other or further exercise of any such right or remedy or the exercise of any other right or remedy. None of the Lenders' rights or remedies under this Third Agreed Interim Order shall be deemed to have been suspended or waived by the Lenders unless such suspension or waiver is in writing and directed to the Debtor or the Court specifying such suspension or waiver.

20. No Reliance. In the negotiation of this Third Agreed Interim Order, the Lenders did not, and during the Interim Cash Collateral Period, the Lenders do not, have any obligation or duty to any other entity to exercise any of its rights, remedies, claims, powers, benefit, or privileges. No entity may rely upon any delay or failure or in any way seek to assert a defense to

any obligation owing to the Lenders based on the Lenders' failure or delay to exercise rights or remedies.

**Additional Provisions Governing Rights of the Parties**

21. Challenge Rights. The findings contained in recital paragraphs of this Third Agreed Interim Order shall be binding upon all parties in interest, including without limitation, the Debtor and any Official Committee, unless (a) a party in interest (other than the Debtor but including any Official Committee) has filed an appropriate request for relief challenging the amount, validity, enforceability, perfection, or priority of (i) the Berkadia Note Obligations or Berkadia liens or HUD liens on the Berkadia Pre-Petition Collateral in respect thereof, or otherwise asserting any claims or causes of action against Berkadia or HUD relating to the Berkadia Note Obligations, or (ii) the First-Citizens Note Obligations or First-Citizens liens on the First-Citizens Pre-Petition Collateral in respect thereof, or otherwise asserting any claims or causes of action against First-Citizens relating to the First-Citizens Note Obligations, on behalf of the Debtor's estate, no later than the last to occur of: (1) ninety (90) days after the Petition Date; (2) 60 days after the appointment of an Official Committee; (3) 60 days after the filing of a Proof of Claim, unless such deadline is extended by order of the Court by agreement of the parties or for good cause shown, and (b) the Court subsequently enters a judgment in favor of the plaintiff in any such timely and properly filed adversary proceeding. If no such proceeding is commenced as of such date, the Berkadia Note Obligations and the First-Citizens Note Obligations shall constitute an allowed fully secured claim, not subject to subordination and otherwise unavoidable, and, in that event, for all purposes in the Chapter 11 Case and any subsequent Chapter 7 case, (i) Berkadia's liens, HUD's liens on the Berkadia Pre-Petition Collateral shall be deemed legal, valid, binding, perfected, not subject to defense, counterclaim, offset of any kind, subordination, and otherwise unavoidable, and Berkadia, HUD, the Berkadia



Note Obligations and Berkadia liens and the HUD liens on the Berkadia Pre-Petition Collateral shall not be subject to any other or further challenge by any party in interest seeking to exercise the rights of the Debtor's estate, including without, limitation, any successor thereto (including, without limitation, any Chapter 7 Trustee), and (ii) First-Citizens' liens on the First-Citizens Pre-Petition Collateral shall be deemed legal, valid, binding, perfected, not subject to defense, counterclaim, offset of any kind, subordination, and otherwise unavoidable, and First-Citizens, the First-Citizens Note Obligations and First-Citizens liens on the First-Citizens Pre-Petition Collateral shall not be subject to any other or further challenge by any party in interest seeking to exercise the rights of the Debtor's estate, including without, limitation, any successor thereto (including, without limitation, any Chapter 7 Trustee).

22. Carve-Out.

(a) The Debtor shall be authorized to use the Cash Collateral to pay the professionals of the Debtor and any Official Committee retained or to be retained pursuant to Sections 327, 328 or 1103(a) (each a "Retained Professional," and collectively, the "Retained Professionals") the amount of allowed professional fees and disbursements incurred by the Retained Professionals only in accordance with the Professional Fees line item in the Budget (collectively, the "Budgeted Professional Fees").

(b) Any provision of this Third Agreed Interim Order to the contrary notwithstanding, the Retained Professionals shall have a carve-out from the Berkadia Pre-Petition Collateral, the Berkadia Replacement Liens, the Berkadia Super-Priority Claim, the First-Citizens Pre-Petition Collateral, the First-Citizens Replacement Liens, the First-Citizens Super-Priority Claim, and this Third Agreed Interim Order (the "Carve-Out") for (1) any fees and expenses incurred and unpaid prior to the occurrence of a termination event hereunder in an

amount no greater than the difference between (x) the Est. Professional Fee Accrual line item for the week in which the termination event occurs in the Budget and (y) amounts authorized by the Bankruptcy Court and actually paid before the termination event through the occurrence of the termination event for each respective Retained Professional, plus \$50,000, plus any quarterly fees pursuant to 28 U.S.C. § 1930(a)(6) and fees payable to the Clerk of the Court, plus fees payable to a chapter 7 trustee in an aggregate amount not to exceed \$10,000 and (2) any ordinary course trailing expenses (the “Trailing Expenses”) in the budget incurred through the occurrence of the termination event. Professional fees not covered by the Carve-Out under Sub-Paragraph (1) shall be subordinated to the Trailing Expenses. Notwithstanding anything herein to the contrary, no Berkadia Pre-Petition Collateral, First-Citizens Pre-Petition Collateral, Cash Collateral, or any portion of the Carve-Out may be used to object to or contest in any manner, or raise any defenses to, the amount, validity, perfection, priority, extent, or enforceability of the Berkadia Note Obligations, the First-Citizens Note Obligations, or the liens securing the Berkadia Note Obligations or the First-Citizens Note Obligations, or to prosecute or assert any claims or causes of action against the Lenders. *Provided, however,* that nothing in this paragraph shall prevent use of Cash Collateral for investigation purposes.

(c) Nothing herein shall be construed as consent to the allowance of, or a cap on, any fees and expenses of the Retained Professionals, or shall affect any party’s right to object to the allowance and payment of such fees and expenses, all of such rights being expressly preserved. Nothing shall be construed as an allocation of any portion of the Est. Professional Fee Accrual line item in the Budget to any particular Retained Professional. All Retained Professionals may share in the Est. Professional Fee Accrual and the Carve-Out subject to the

allowance of their fees and expenses pursuant to the Bankruptcy Code, the Bankruptcy Rules and Orders of this Court.

**Miscellaneous**

23. Surcharge Waiver. Upon entry of this Third Agreed Interim Order, no costs or expenses of administration that have been or may be incurred in the Chapter 11 Case through the end of the Interim Cash Collateral Period shall be charged against Berkadia, HUD, or First-Citizens or any of their respective claims or the Berkadia Pre-Petition Collateral, the Berkadia Replacement Collateral, the First-Citizens Pre-Petition Collateral, or the First-Citizens Replacement Collateral, pursuant to Section 105 or 506(c) of the Bankruptcy Code, or otherwise, without the prior written consent of Berkadia and HUD or First-Citizens, as applicable, and no such consent shall be implied from any action, inaction, or acquiescence by any such agents or lenders. Notwithstanding anything to the contrary herein, except as provided in this Paragraph 23, nothing shall be construed as a waiver, limitation or subordination of the Debtor's or its estate's surcharge rights pursuant to Section 105 or 506(c) of the Bankruptcy Code or otherwise, absent further Order of the Court.

24. Binding Effect. The provisions of this Third Agreed Interim Order shall be binding upon and inure to the benefit of the Debtor and the Lenders. Such binding effect is an integral part of this Third Agreed Interim Order.

25. Force and Effect, Jurisdiction. In the event that any order dismissing the Chapter 11 Case is entered pursuant to Section 1112 of the Bankruptcy Code, or otherwise, (a) the Berkadia Note Obligations, Berkadia Replacement Liens, Berkadia Super-Priority Claim, the First-Citizens Note Obligations, First-Citizens Replacement Liens, and First-Citizens Super-Priority Claim granted to or for the benefit of the Lenders pursuant to this Third Agreed Interim Order shall continue in full force and effect and shall maintain its priorities as provided in this

Third Agreed Interim Order until all of the Berkadia Note Obligations and the First-Citizens Note Obligations shall have been indefeasibly paid in full, and (b) this Court shall retain jurisdiction, notwithstanding such dismissal, for the purposes of enforcing such claims and liens.

26. Continuing Effect of Berkadia Secured Financing Agreements. Except to the extent this Third Agreed Interim Order expressly provides otherwise, the Debtor shall continue to faithfully perform, and be bound by, terms of the Berkadia Secured Financing Agreements and the First-Citizens Secured Financing Agreements and Assignments. In the case of any conflict between the terms of the Berkadia Secured Financing Agreements or the First-Citizens Secured Financing Agreements and Assignments and this Third Agreed Interim Order, this Third Agreed Interim Order shall control.

27. Titles and Headings. The titles and headings in this Third Agreed Interim Order are and shall be without substantive meaning or content of any kind whatsoever.

28. Time of the Essence. Time is of the essence as to all terms, conditions and provisions set forth in this Third Agreed Interim Order.

29. Amendment and Modification. The Lenders and the Debtor may make non-material modifications or amendments to the Budget in a writing signed by both parties without further order of this Court, and all actions taken pursuant to such modified Budget shall be and hereby are expressly authorized hereunder.

30. Immediate Effect. This Third Agreed Interim Order shall constitute findings of fact and conclusions of law and shall take effect and be fully enforceable immediately upon execution thereof.

#### **FURTHER HEARING**

31. Further Hearing. A Further Hearing to consider entry of further relief on the Debtor's use of the Cash Collateral is scheduled for September 13, 2017 at 9:30 a.m. before the

Honorable Benjamin A. Kahn, United States Bankruptcy Judge, in Courtroom 1, United States Bankruptcy Court for the Middle District of North Carolina, 101 S. Edgeworth Street, Greensboro, NC 27401.

32. Retention of Jurisdiction. The Bankruptcy Court has and will retain jurisdiction to enforce this Third Agreed Interim Order according to its terms.

[END OF DOCUMENT]