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**UNITED STATES BANKRUPTCY COURT**
**DISTRICT OF NEW JERSEY**

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| In re: | Chapter 11 |
| Mountain Creek Resort, Inc., *et al.*,[1] | Case No. 17-19899 (SLM) |
| Debtors. | (Joint Administration Requested) |

**DEBTORS' MOTION FOR INTERIM AND FINAL ORDERS (I) AUTHORIZING USE OF CASH COLLATERAL PURSUANT TO 11 U.S.C. § 363 (II) GRANTING ADEQUATE PROTECTION PURSUANT TO 11 U.S.C. §§ 361 AND 363 (III) AUTHORIZING THE DEBTORS TO OBTAIN POSTPETITION FINANCING PURSUANT TO 11 U.S.C. §§ 105(a), 362 AND 364(c) and (d), (IV) GRANTING LIENS AND SUPERPRIORITY CLAIMS TO THE DIP LENDER PURSUANT TO 11 U.S.C. § 364(c), (V) MODIFYING THE AUTOMATIC STAY, AND (VI) SCHEDULING A FINAL HEARING PURSUANT TO BANKRUPTCY RULE 4001**

The above-captioned debtors and debtors-in-possession (collectively, the "Debtors" or the "Company"), by and through their undersigned proposed counsel, submit this motion (the "Motion") for entry of an interim order substantially in the form submitted herewith (the "Interim DIP Order"), and a final order (the "Final DIP Order," and together with the Interim DIP Order, the "DIP Orders") pursuant to sections 105(a), 361, 362, 363 and 364 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et. seq.* (the "Bankruptcy Code"), (i) authorizing

[1] The Debtors in these chapter 11 cases and the last four digits of each Debtor's taxpayer identification number are as follows: Mountain Creek Resort, Inc. (4557), Mountain Creek Services Inc. (3228), Mountain Creek Management, LLC (1394), Mountain Creek Mountainslide, LLC (1545), Mountain Leasing LLC (6057), and Appalachian Liquors Corporation (9542).

the Debtors' continued use of cash collateral pursuant to section 363 of the Bankruptcy Code; (ii) granting adequate protection for such use of cash collateral pursuant to sections 361 and 363 of the Bankruptcy Code; (iii) authorizing the Debtors to obtain secured postpetition financing from HSK Adventure, Inc. (the "DIP Lender" or "Lender"), consisting of a credit facility in the aggregate principal amount of up to $6.0 million (the "DIP Financing" or the "DIP Facility") for the purpose of funding the Debtors' general operating and working capital needs and the administration of the Debtors' chapter 11 cases, in accordance with (a) that certain Debtor-in-Possession Credit and Security Agreement, (the "DIP Credit Agreement"), substantially in the form attached to the Interim DIP Order as **Exhibit A**, between the Debtors and HSK Adventure, Inc. and (b) the budget ("Budget") attached to the Interim DIP Order as **Exhibit B**; (iv) authorizing and approving the Debtors' entry into the DIP Credit Agreement and any other documents, certificates or instruments ancillary thereto, and performance of such other acts as may be necessary or appropriate in connection therewith; (v) granting to the DIP Lender valid, fully perfected, and enforceable security interests and liens (collectively, the "DIP Liens") in and upon the DIP Collateral (as defined in the DIP Credit Agreement) pursuant to sections 364(c)(2) and 364(d)(1) of the Bankruptcy Code; (vi) granting an allowed superpriority administrative expense claim (the "DIP Superpriority Claim") to the DIP Lender pursuant to section 364(c)(1) of the Bankruptcy Code; (vii) vacating and modifying the automatic stay to the extent necessary to effectuate the terms and provisions of the DIP Credit Agreement and the DIP Orders; and (viii) scheduling a hearing (the "Final Hearing") pursuant to Rules 4001(b)(2) and (c)(2) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") to consider entry of the Final DIP Order, authorizing and approving the DIP Financing and use of cash collateral on a final basis.

In further support of this Motion, the Debtors rely upon the *Declaration of Jeffrey Koffman in Support of Debtors' Chapter 11 Petitions and First Day Pleadings* (the "First Day Declaration"), filed contemporaneously herewith, and respectfully state as follows:

## JURISDICTION, VENUE AND STATUTORY PREDICATES

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334 and the *Standing Order of Reference to the Bankruptcy Court Under Title 11* of the United States District Court for the District of New Jersey, entered on July 23, 1984, and amended on September 18, 2012 (Simandle, C.J.). Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

2. The statutory predicates for the relief requested herein are sections 105(a), 361, 362, 363 and 364 of the Bankruptcy Code, Bankruptcy Rules 4001, 6004 and 9014, and Rule 4001-3 of the Local Rules of the United States Bankruptcy Court for the District of New Jersey (the "Local Rules").

## BACKGROUND

### A. General Background

3. On the date hereof, the Debtors each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, commencing the above-captioned chapter 11 cases (collectively, the "Chapter 11 Cases") in the United States Bankruptcy Court for the District of New Jersey.

4. The Debtors are operating their business and managing their property as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. As of the filing of this Motion, no request has been made for the appointment of a trustee or examiner and no statutory committee has been appointed in the Chapter 11 Cases.

5. The Debtors own and operate a four-season resort located in Vernon, New Jersey ("Mountain Creek" or the "Resort"). The Resort is the New York/New Jersey Metro area's closest ski resort with 167 skiable acres on four mountain peaks, 1,040 vertical feet, 46 trails, and 11 lifts. The Resort offers a 34 lane snow tubing park, night skiing with more than 1,000 lights on all trails, North America's only eight passenger open-air gondola, and the region's most extensive, state of the art snowmaking system, (the "Winter Operations").

6. The Resort also offers substantial summer operations including a 25 acre waterpark, an alpine roller coaster (the "Mountain Coaster"), a bike park, and a zip line park (the "Summer Operations").

7. The Resort also operates and manages the Appalachian Hotel and the Black Creek Sanctuary townhomes (the "Hotel Operations"), which are structured as residential condominiums sold to individuals. Individual unit owners have the option of placing their unit within a hotel rental pool operated by the Resort, in which units are offered as part of the full-service hotel. The Black Creek Sanctuary townhome development is a residential style development with an outdoor pool, year round hot tubs, and outdoor barbeque sites, but has interior finishes more typical of those found in service hotels. The Appalachian Hotel is operated as a more traditional hotel and amenities include but are not limited to an exercise room, outdoor pool, hot tub, game room, and subterranean parking.

8. In the Appalachian Hotel and the Resort's two main lodges—the South Lodge and the Red Tail Lodge—Mountain Creek operates multiple restaurants including but not limited to Jack and Ottos, The Hawks Nest gourmet restaurant, Kink bar and grill, the Schuss Bar and Restaurant, the Market, the Boardwalk, and the Biergarten. The Red Tail Lodge also operates exclusive wedding and catering hall services (the "Food and Beverage Operations").

9. In 2007, under prior management, the Resort obtained general development approval for, among other things, additional lodging units, commercial/retail space, and a conference center, with vesting zoning rights over a twenty (20) year period. The Resort's master plan offers the potential for significant additional development at Mountain Creek.

10. A more detailed description of the resort, its history, and the facts surrounding the commencement of the Chapter 11 Cases is set forth in the First Day Declaration, which is incorporated herein by reference.

**B. Organizational Structure**

11. Each of the Debtors (other than Appalachian Liquors Corporation ("Appalachian Liquors")) is a wholly owned subsidiary of MCRI. MCRI owns all of the assets

at the Resort other than the Mountain Coaster (defined below), the Sojourn Chairlift (defined below), and the liquor licenses that allow for the sale of alcohol at the Resort.

12. Mountain Creek Services Inc. ("MC Services") is the payroll management company. MC Services allocates all payroll and expenses to the applicable companies. Mountain Creek Management, LLC ("MC Management") runs the Hotel Operations. Mountain Creek Mountainslide, LLC ("MC Mountainslide") owns the Mountain Coaster roller coaster. MCRI and MC Mountainslide have entered into a management agreement, whereby MCRI manages and operates the Mountain Coaster in return for a management fee. Mountain Leasing LLC ("Mountain Leasing") owns the fixed-grip double chairlift that connects South Peak to Granite Peak (the "Sojourn Chairlift"). Appalachian Liquors holds the liquor licenses and provides Food and Beverage Operations at the Resort and at the Appalachian Hotel. Appalachian Liquors does not hold any fixed assets. Appalachian Liquors is owned 100% by Jeffrey Koffman.

**C. The Debtors' Prepetition Capital Structure**

(i) Prepetition Senior Credit Documents

13. MCRI, as borrower, and the other Debtors (other than Appalachian Liquors), as guarantors, are parties to a loan agreement, promissory note, mortgage, security agreement and related documents dated June 4, 2015 pursuant to which M&T Bank ("M&T" or the "Prepetition Senior Lender") extended a secured financing facility to MCRI in the original principal sum of $25 million (the "M&T Loan Facility"). The M&T Loan Facility is also guaranteed by other affiliated non-debtor entities and individuals. As of the Petition Date, approximately $22.7 million remains outstanding under the M&T Loan Facility (together with any amounts incurred or accrued, but unpaid prior to the Petition Date, the "First Lien Obligations"). To secure the First Lien Obligations, MCRI granted the Prepetition Senior Lender first-priority security interests in and liens on all of its personal and real property (collectively, the "Prepetition Collateral"), subject only to certain permitted encumbrances (the "Permitted Liens").

14. On September 20, 2010, M&T issued an irrevocable standby letter of credit in favor of the Township of Vernon in the approximate amount of $1.97 million (the "Letter of Credit") in connection with the October 24, 2005 sewer agreement (the "Sewer Agreement") between MCRI and the Township of Vernon. Pursuant to the reimbursement agreement between MCRI and M&T, MCRI granted security interests in the Prepetition Collateral to secure any amounts drawn on the Letter of Credit. Together, the Letter of Credit Obligations and the First Lien Obligations will be referred to herein as the "M&T Prepetition Senior Obligations."

(ii) Prepetition Subordinated Credit Documents

15. MCRI, as borrower, is a party to a promissory note, mortgage, and security agreement dated June 4, 2015, pursuant to which HSK-MC, LLC ("HSK-MC") extended a secured financing facility to MCRI in the original sum of $3 million (the "$3 Million Loan"). To secure the $3 Million Loan, the Debtors granted to HSK-MC a mortgage and security interests in the Prepetition Collateral junior to the Prepetition Senior Obligations. On January 1, 2016, HSK-MC assigned its rights and interest in the $3 Million Loan to HSK Industries, Inc. ("HSK Industries"). Also on January 1, 2016, HSK Industries, in turn, assigned its rights and interest in the $3 Million Loan to HSK Adventure, Inc. ("HSK Adventure"). On February 17, 2016, MCRI and HSK Adventure entered into the Amended and Restated Senior Secured Convertible Note dated June 4, 2015, in the amount of $3 million (the "HSK Adventure Facility"). The HSK Adventure Facility is secured by liens and security interests on the Prepetition Collateral. As of the Petition Date, approximately $3 million was outstanding under the HSK Adventure Facility (the "HSK Adventure Obligations").

16. MCRI, as borrower, is also party to a promissory note (the "Senior Secured Convertible Note"), mortgage, and security agreement dated February 17, 2016 pursuant to which Kuzari Investor 27335 LLC ("Kuzari") extended a secured financing facility to MCRI in the original sum of $2 million (the "Kuzari Facility"). To secure the Kuzari Facility, MCRI granted to Kuzari a mortgage and security interests in the Prepetition Collateral junior to the Prepetition Senior Obligations and the HSK Adventure obligations. Kuzari has the option to

convert the Kuzari obligations to equity of MC-KK Holdings Inc. ("MC-KK Holdings") pursuant to the terms of the Senior Secured Convertible Note. The remaining Debtors (other than Appalachian Liquors) and certain other affiliated entities and individuals are guarantors of the Kuzari Facility. As of the Petition Date, approximately $2 million was outstanding under the Kuzari Facility (the "Kuzari Obligations").

17. MCRI, as borrower is also a party to the Amended and Restated Promissory Note dated May 10, 2016, pursuant to which HSK Adventure extended a secured financing facility to MCRI in the original sum of $4 million (the "HSK Adventure Junior Facility"). To secure the HSK Junior Facility, MCRI granted to HSK Adventure a mortgage and security interests in the Prepetition Collateral junior to the Prepetition Secured Obligations, the HSK Adventure Obligations and the Kuzari Obligations. As of the Petition Date, approximately $4 million was outstanding under the HSK Adventure Junior Lien Facility (the "HSK Adventure Junior Obligations," and together with the HSK Adventure Obligations and the Kuzari Obligations, the "Prepetition Subordinated Obligations").

18. HSK Adventure is a non-debtor affiliate of the Company. Together, HSK Adventure and Kuzari will be referred to herein as the "Prepetition Subordinated Lenders."

(iii) Other Secured Financing

19. Sojourn Chairlift. In 2013, Mountain Leasing acquired the Sojourn Chairlift to connect South Peak and Granite Peak. The purchase of the $1.6 million Sojourn Chairlift was financed with a $1,284,800 loan (the "Sojourn Loan") from Visions Federal Credit Union ("Visions"). The Sojourn Loan is evidenced by two promissory notes dated February 13, 2013 in the original principal sums of $1,184,800 and $100,000. The Sojourn Loan is secured by a security interest in the Sojourn Chairlift. As of the Petition Date, the balance due on the Sojourn Loan was $585,839.

20. Mountain Coaster Rollercoaster. In 2015, MC Mountainslide acquired the Mountain Coaster. The purchase of the $3.38 million Mountain Coaster was financed with a $636,250 term loan (the "Mountain Coaster Loan") from Bank of America, N.A ("BofA"). The Mountain Coaster Loan is evidenced by a loan agreement dated June 25, 2015 in the original

principal sum of $636,250. The Mountain Coaster Loan is secured by a security interest in all personal property of MC Mountainslide including equipment, inventory, and receivables. As of the Petition Date, the balance due on the Mountain Coaster Loan was $301,388.

21. Zero G. In 2015, MCRI acquired the Zero G waterslide. The purchase of the Zero G waterslide was financed with loan dated August 15, 2014, in the amount of $808,794 (the "Zero G Loan") from Proficio Bank. The Zero G Loan is secured by a security interest in the Zero G waterslide. As of the Petition Date, the balance due on the Zero G Loan was $300,878.

22. Rental and Demo Ski Equipment. MCRI acquired rental and demo ski equipment from Head USA, Inc. ("Head") in 2014 and from Alpina Sports Corp. ("Alpina") in 2016. Invoices for this equipment were payable over two years. Sums due to Alpina on outstanding invoices are secured by purchase money security interests in the equipment purchased from Alpina. Sums due to Head on outstanding invoices are secured by purchase money security interests in the equipment purchased from Head. As of the Petition Date, the balance due on the Alpina Loan was $86,000, and the balance due on the Head Loan was $110,000.

23. Vehicles, Machinery and Equipment. The Debtors are also parties to various other secured purchase money financing agreements with respect to vehicles, machinery and equipment with Axess North America ("Axess"), Dell Financial Services LLC ("Dell"), Marlin Business Bank ("Marlin"), Ally Financial Inc. ("Ally"), Kubota Credit Corporation USA ("Kubota"), GE Capital Information Technology Solutions ("GE Capital"), and Bank of the West ("BOTW").

24. Atlantic Health Building. MCRI owns real estate and a building located at 310 Route 94, Vernon, New Jersey (the "Atlantic Health Building"). Atlantic Healthcare operated an urgent care facility at the Atlantic Health Building through AHS Hospital Corporation. Atlantic Healthcare has vacated the building, but continues to pay rent pursuant to a lease that has not yet terminated. Highlands State Bank ("Highlands") holds a first-priority mortgage on the property to secure a mortgage loan in the original principal sum of $1.3 million

granted on January 10, 2016 (the "Highlands Mortgage"). As of the Petition Date, the outstanding balance on the Highlands Mortgage was $1,186,708.

25. Together, Visions, BofA, Proficio Bank, Head, Alpina, Axess, Dell, Marlin, Ally, Kubota, GE Capital, BOTW, and Highlands will be referred to herein as the "Other Secured Lenders," and the obligations owing to them, the "Other Secured Lenders."

(iv) Sewer Obligations

26. MCRI is indebted to the Township of Vernon in connection with the Sewer Agreement pursuant to which MCRI agreed to reimburse the Township for certain costs associated with the expansion of sewer capacity for the Township and the Resort by the Sussex County Municipal Utilities Authority ("SCUMA") and reimbursing the Township for payments due from the Township to SCUMA on certain bonds issued by SCUMA in connection with the sewer project. As of the Petition Date, the Debtors estimate that the amount due to the Township of Vernon under the sewer agreements is approximately $27 million (the "Vernon Township Obligations"). As noted above, MCRI posted the Letter of Credit in the sum of $1.97 million to partially secure this obligation.

(v) Unsecured Notes

27. As of the Petition Date, MCRI is indebted to HSK-MC in the sum of $1.13 million on account of unsecured loans evidenced by two promissory notes dated June 4, 2015 (the "HSK-MC Unsecured Notes"). MCRI is also indebted to HSK Funding, Inc. in the sum of $2.5 million on account of unsecured loans evidenced by two promissory notes also dated June 4, 2015 (the "HSK Funding Unsecured Notes"). MCRI, as borrower, is also a party to an unsecured promissory note dated June 9, 2016, pursuant to which HSK Adventure extended a $7 million revolving line of credit (the "HSK Adventure Unsecured Note," and together with the HSK-MC Unsecured Notes and the HSK Funding Unsecured Notes, the "HSK Unsecured Obligations"). As of the Petition Date, the balance due under the HSK Adventure Unsecured Note was $3.8 million. The total debt under the HSK Unsecured Notes as of the Petition Date is approximately $7.44 million.

28. The Company is also indebted to prior owners of the Resort pursuant to eight (8) unsecured notes dated June 4, 2015 in the aggregate original principal sum of $3.38 million which are due and payable on December 31, 2022 (the "Prior Owner Notes"). As of the Petition Date, the amount owing under the Prior Owner Notes is approximately $3.15 million (the "Prior Owner Note Obligations").

(vi) Trade Debt

29. As of the Petition Date, the Debtors have aggregate unsecured debts totaling approximately $40 million, which include amounts owing for the Vernon Township Obligations, the HSK Unsecured Obligations, the Prior Owner Note Obligations, and amounts owed for merchandise, utilities, professional fees, insurance, and employee-related expenses. Of that amount, approximately $2.6 million constitutes trade vendor payables.

## NEED FOR USE OF CASH COLLATERAL AND POSTPETITION FINANCING

30. The Debtors intend to use the Chapter 11 Cases to restructure their debt obligations and propose a feasible plan or reorganization. Pending the filing of a chapter 11 plan the Debtors intend to operate their business in the ordinary course by continuing to retain and pay their employees and provide high level services to their customers.

31. The Debtors, however, do not have sufficient unencumbered cash or other assets to continue to operate their business during these Chapter 11 Cases or to effectuate a reorganization. The Debtors will be immediately and irreparably harmed if they are not immediately granted the authority to use the cash collateral (the "Cash Collateral") of the Prepetition Senior Lender and Prepetition Subordinated Lenders[2] and to obtain postpetition financing from the DIP Lender in accordance with the terms of the DIP Credit Agreement. The relief sought herein is necessary in order to permit, among other things, the orderly continuation of its business, the ability to fund payroll and payroll taxes, the maintenance of its relations with vendors and suppliers, satisfaction of its working capital needs, as well as the ability to pay

[2] The Prepetition Subordinated Lenders have consented to the Debtors use of cash collateral during these Chapter 11 Cases consistent with the terms set forth herein.

taxes, inventory, supplies, overhead, insurance and other necessary expenses. The access of the Debtors to sufficient working capital and liquidity made available through the use of Cash Collateral, incurrence of new indebtedness for borrowed money and other financial accommodations is vital to the preservation and maintenance of the going concern value of the Debtors and to a successful reorganization of the Debtors.

32. Absent use of Cash Collateral and the additional funds provided by the DIP Financing, the Debtors project that they will run out of cash to operate within days. The Debtors require the continued use of Cash Collateral to fund their operations with any shortfall in funds provided for by the DIP Financing. It is critical that the Debtors have sufficient funding to meet their ordinary course and bankruptcy-related obligations in order to effectuate an orderly reorganization. The Debtors believe that the DIP Financing, together with the continued use of cash collateral, will enable them to meet all of their obligations in these Chapter 11 Cases.

33. Given the Debtors' existing capital structure and financial condition, the Debtors were unable to obtain adequate unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense. The Debtors are also unable to obtain secured credit allowable under sections 364(c)(1), 364(c)(2) and 364(c)(3) of the Bankruptcy Code without granting the DIP Lender, subject to the Carve-Out (defined below), the DIP Liens (defined below) and the DIP Superpriority Claims (defined below) under the terms and conditions set forth in the DIP Credit Agreement.

34. After good faith arm's length negotiations with respect to the terms and conditions of the DIP Financing, and after soliciting proposals from other potential DIP lenders, including M&T, the Debtors concluded, in an exercise of their sound business judgment, that the financing to be provided by the DIP Lender pursuant to the terms of the DIP Credit Agreement and the Interim DIP Order clearly represents the most favorable terms and adequate source of financing presently available to the Debtors.

35. The Debtors sought and received proposals for alternative financing. In the weeks prior to the Petition Date, the Debtors solicited a financing proposal from M&T. Within the week prior to the Petition Date, M&T made a proposal that failed to meet the

financial needs of the Debtors. In addition to failing to provide the $6 million in funding offered pursuant to the DIP Financing offered by the DIP Lender, the M&T proposal would have required, among other onerous terms, the Debtors to immediately commence a sales process, consummate a sale within months of the Petition Date and pay principal and interest to the bank pending the sale. It was apparent to the Debtors that M&T's proposal was designed for the sole benefit of the Prepetition Senior Lender and was not in the best interests of all of the Debtors creditors and other stakeholders.

36. The DIP Financing, which is proposed by a non-debtor affiliate, is far superior to the M&T Proposal, and is in the best interest of the Debtors, their creditors and other stakeholders. As outlined in more detail below, the DIP Financing (a) provides for up to $6 million of financing, $2 million of which is required on an interim basis, (b) has a stated maturity date of January 31, 2018 (more than 8 months), (c) is junior to the existing $24 million secured debt of M&T (but senior to the $9 million of debt of the Prepetition Subordinated Lenders who consent to their priming), (d) does not contain any case-control deadlines, (e) is not secured by any avoidance actions, (f) provides for the monthly payment of postpetition interest to M&T and (g) and contains very reasonable covenants and conditions.

37. Thus, Debtors submit that the terms of the proposed use of cash collateral and DIP Financing are fair, reasonable and balanced, reflect the Debtors' exercise of sound business judgment consistent with their fiduciary duties, are the best available under the circumstances, supported by reasonably equivalent value and fair consideration, and should be approved on an interim and final basis.

## SUMMARY OF DIP FINANCING TERMS

38. In accordance with the disclosure requirements of Bankruptcy Rule 4001(c) and Local Rule 4001-3, a summary of the material terms of the DIP Credit Agreement and Interim DIP Order, including a description of each of the provisions required to be highlighted by such rules, are set forth in the chart below.[3]

[3] The descriptions of the material terms of the proposed DIP Financing and Interim DIP Order provided in this Motion are intended only as a summary thereof. In the event of any inconsistency between the descriptions set forth

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| *Borrowers* | Mountain Creek Resort, Inc. (collectively, the "Debtor" or "Borrower"). |
| *Lender* | HSK Adventure, Inc. (the "Lender"). |
| *Commitment, Availability and Purpose* | The DIP Financing shall be a secured credit facility of up to $6,000,000 for which the DIP Lender will receive protection under Sections 364(c) and 364(d) of the Bankruptcy Code. $2 million of the DIP Loan will be delivered to the Borrower, for the benefit of all of the Debtors to be used by the Debtors solely in accordance with the Interim DIP Order, DIP Budget, the use of proceeds as set forth in Section 2(b), and the other provisions of this Agreement (the "Initial Draw").On or after the Final Order Entry Date, or the Business Day immediately succeeding such day, the Borrower may draw on one or more occasions, additional amounts under the DIP Loan to be used solely in accordance with the Financing Orders, DIP Budget, the use of proceeds as set forth in Section 2(b), and the other provisions of this Agreement. The Borrower may draw up to $4 million in addition to the Initial Draw. Each draw under the Additional Draw must be on no less than 1 Business Day notice by the Borrower to the DIP Lender. The aggregate principal amount that may be drawn pursuant to this Agreement (i.e., the sum of the Initial Draw and the Additional Draws) is the Maximum Commitment. Absent the written consent of the DIP Lender.<br><br>The DIP Loan and proceeds thereof will be used by the Debtors solely for the purposes as set forth in this Agreement and the DIP Budget. None of the proceeds of the DIP Loan will be used in connection with the investigation, including discovery proceedings, initiation, or prosecution of any claims, causes of action, adversary proceedings, or other litigation against the DIP Lender, including in connection with the validity of the DIP Liens granted to the DIP Lender; the foregoing will be without prejudice to any other rights of any Debtor. DIP Credit Agreement §2(b); Interim DIP Order ¶13. |
| *Term and Maturity* | The maturity date (the "Maturity Date") of the DIP Financing is as follows: the earliest of (i) January 31, 2018; (ii) June 30, 2017, if the DIP Final Order has not been entered by the Bankruptcy Court prior to June 30, 2017; (iii)the date on which any sale of substantially all of the Debtors' assets occurs; (iv) the date on which a plan of reorganization for any of is the Debtors approved by the Bankruptcy Court becomes effective; and (v) the day on which the DIP Lender accelerates the DIP |

herein and the terms of the DIP Credit Agreement and/or Interim DIP Order, the terms of the DIP Credit Agreement and Interim DIP Order shall govern. All capitalized terms used but not otherwise defined in this summary chart shall have the meanings ascribed to them in the DIP Credit Agreement. Sections that must be highlighted for the Court under either Bankruptcy Rule 4001(c) or Local Rule 4001-3 are in bold and references to the DIP Credit Agreement and Interim DIP Order are provided.

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| | Obligations, or the DIP Obligations automatically and immediately accelerate, or the DIP Obligations otherwise become immediately due and payable pursuant to the terms of this Agreement. DIP Credit Agreement §1(ppp). |
| *Interest Rate, Payments, Fees and Expenses* | **Interest Rate**: Prime Rate plus 200 basis points (the "Applicable Rate").<br><br>**Default Rate**: In the event of a default by the Debtor as specified in the DIP Credit Agreement, the interest rate charged will be the Applicable Rate plus 600 basis points.<br><br>**Interest Calculation.** Interest payable pursuant to this Agreement will be computed on the basis of a 360-day year for the actual number of days elapsed in the period during which it accrues. (2) In computing interest on the DIP Loan, the date of the making of an advance under the DIP Loan will be included, and the date of payment of the DIP Loan will be excluded.<br><br>**Cash Interest**: Accrued and unpaid interest on the DIP Loan will be payable in arrears on: (i) the first day of each calendar month, and if such day is not a Business Day, the immediately preceding Business Day; (ii) the date of any prepayment or payment of the DIP Loan principal, whether voluntary or mandatory, to the extent accrued on the amount being prepaid or paid; and the Maturity Date.<br><br>**No Fees**: The DIP Financing does not include the payment of any upfront or exit fees.<br><br>DIP Credit Agreement §2(d). |
| *Conditions Precedent to Closing and Funding* | The obligation of the DIP Lender to make the DIP Loan and the other financial accommodations as set forth in this Agreement on the Closing Date, or any other date on which the Debtors request an advance of the DIP Loan, is subject to the satisfaction, or waiver, of the following conditions (such satisfaction or waiver demonstrated by the funding of a DIP Loan):<br><br>**Interim and Final DIP Orders**. The Interim DIP Order and the Final DIP Order, and all motions relating thereto, approving, and authorizing the DIP Loan, all provisions thereof and the priorities and DIP Liens granted under Bankruptcy Code section 364(c) and (d), as applicable, will be in form and substance satisfactory to the DIP Lender and the Final DIP Order will be entered no later than June 30, 2017, in a form and substance acceptable to the DIP Lender in its sole discretion and will include, among others, the following provisions: (1) modifying the automatic stay to permit the creation and perfection of the DIP Liens; (2) prohibiting any granting or imposition of Liens other than DIP Liens and Permitted Liens; and (3) authorizing and approving the Debtors to sign and deliver the DIP Credit Documents to which each will be a party and the transactions |

contemplated therein, including, the granting of the super priority status, the first-priority, and DIP Liens upon the DIP Collateral, and the payment of all fees and expenses due to the DIP Lender.

As of the Final Order Entry Date, the DIP Final Order will further state, among other things, that, upon entry of the DIP Final Order: (1) the DIP Lender and its counsel, advisors, and consultants, will each be entitled to the benefit of a "good faith" finding pursuant to section 364(e) of the Bankruptcy Code; and (2) permit the DIP Lender the right to credit bid, subject to section 363(k) of the Bankruptcy Code or applicable law, the DIP Loan, in whole or in part, in connection with any plan, sale, or other disposition of assets in the Cases.

**Compliance with Financing Orders**. No Financing Order will have been reversed, modified, amended, stayed, or vacated, in the case of any modification or amendment, in a manner, or relating to a matter, without the prior written consent of the DIP Lender. The Debtors will be in compliance in all respects with the Financing Orders and all other orders of the Bankruptcy Court binding on them.

**Debtor-in-Possession**. No trustee or examiner will have been appointed with respect to the Debtors or their properties.

**DIP Budget and Projections**. The DIP Lender will have received: (1) the DIP Budget; (2) all information then required to be delivered to the DIP Lender pursuant to Section 10(b); and (3) such other information (financial or otherwise) as may be reasonably requested by the DIP Lender.

**Performance of Obligations**. All costs, fees, expenses, and other compensation payable to the DIP Lender will have been paid to the extent due and payable in accordance with the terms of any Financing Order, this Agreement, and the other DIP Credit Documents, and the Debtors will have complied in all material respects with all of their other obligations to the DIP Lender as set forth in this Agreement and the other DIP Credit Documents.

**Litigation, Etc**. There will not exist any action, suit, investigation, litigation, or proceeding pending (other than the Cases) or threatened in any court or before any Governmental Body that, in the opinion of the DIP Lender, affects any of the transactions contemplated by this Agreement, or that has or could be reasonably likely to have a Material Adverse Effect.

**Insurance/Assets**. The DIP Lender will be named as loss payee (in respect of property/casualty insurance policies maintained by the Debtors) and additional insured (in respect of liability insurance policies maintained by Debtors), and that the DIP Lender will be provided with 30 days' advance notice of non-renewal, cancellation, or amendment riders in respect of such policies.

**No Default**. No Default or Event of Default will exist at the time of, or after giving effect to, the transactions contemplated on the Closing Date, including the advancing of the DIP Loan.

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| | **Representations and Warranties**. All representations and warranties in the DIP Credit Documents and this Agreement will be true and correct in all material respects as of the Closing Date.<br><br>**DIP Credit Documents**. The DIP Lender will have received signed original copies of each DIP Credit Document.<br><br>**Other Information**. The DIP Lender will have received any other financial or non-financial information regarding any Debtor as the DIP Lender may reasonably request.<br><br>**Certain Expenses**. The Interim DIP Order and the DIP Budget will provide for the Debtors to pay, on the terms and schedule provided therein, all fees and reasonable out-of-pocket expenses of the DIP Lender incurred in connection with this Agreement and the other DIP Credit Documents, including the reasonable fees, costs and expenses of its counsel (the "Formation Expenses"); the DIP Lender will submit the Formation Expenses, on one or more occasions, to the Debtors. The Debtors will promptly pay such expenses, but in no event, such payment will be made by the Debtors to the DIP Lender on or before seven (7) business days after such expenses are submitted to the Debtors by the DIP Lender.<br><br>**No Material Adverse Change**. Each Debtor will have continued to operate its businesses in the ordinary course through the Closing Date and, since the Petition Date, there will have been no Material Adverse Effect.<br><br>DIP Credit Agreement §8. |
| *Collateral and Lien Priority* | **DIP Liens.** As security for the DIP Obligations, effective and perfected upon the Interim Order Entry Date and without the necessity of the execution, recordation, or filings by the Debtors of mortgages, security agreements, control agreements, pledge agreements, financing statements, or other similar documents or the possession or control by the DIP Lender, the DIP Lender shall be granted valid, binding, enforceable non-avoidable and automatically perfected security interests and liens on all of the DIP Collateral (as defined below) pursuant to an Interim DIP Order, the DIP Final Order, and the other DIP Credit Documents (collectively, the "DIP Liens"). Each of the Debtors grants and conveys to the DIP Lender, subject to the entry of the Financing Orders, the following liens and protections to secure the DIP Obligations, subject to the Carve-Out (as defined below):<br><br>**a. Senior DIP Lien.** pursuant to Section 364(c)(2) of the Bankruptcy Code, the DIP Lender is granted and will be secured by a valid, binding, continuing, enforceable and fully perfected first priority security interest and Lien on all pre- or post-petition property of the Debtors and/or interest of the Debtors in property, whether existing on the Petition Date or thereafter acquired, that, on or as of the Petition Date or the date acquired (if after the Petition Date) is not subject to valid, perfected and non-avoidable Liens, including, all cash and cash collateral of the Debtors (whether maintained with the |

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| | DIP Lender or otherwise) and investment of such cash and cash collateral, inventory, Accounts, other rights to payment whether arising before or after the Petition Date, commercial tort claims, books and records, Investments, Real Estate, contracts, properties, plants, Equipment, general intangibles, documents, instruments, vehicles, Deposit Accounts, goods, work-in-progress, fixtures, finished goods, chattel paper, investment property, in leaseholds, real properties), patents, copyrights, trademarks, trade names, other Intellectual Property, Capital Stock of Subsidiaries, other Capital Stock, and the proceeds rents, profits, accessions, substitution, insurance proceeds, warranty and indemnity proceeds, and all other product, offspring, or profits of all the foregoing (collectively, the "Prepetition Unencumbered Collateral," and together with the Prepetition Collateral, the "DIP Collateral"), but excluding any avoidance power actions the Debtors have under sections 544 through 551, and section 553, of the Bankruptcy Code (the "Avoidance Power Actions"). DIP Credit Agreement § 3(a); Interim DIP Order ¶15.<br><br>**b. Junior DIP Lien.** Pursuant to Section 364(c)(3) and (d)(1) of the Bankruptcy Code, the DIP Obligations owed to the DIP Lender will be secured by a valid, binding, continuing, enforceable, and fully perfected security interest and liens on the Prepetition Collateral, junior in priority only to valid and perfected liens or security interests existing on the Petition Date, **provided, however,** the security interests and liens shall be senior to the Prepetition Subordinated Obligations held by HSK Adventure and Kuzari and the valid and perfected liens or security interests held by the Other Secured Lenders. DIP Credit Agreement § 3(b); Interim DIP Order ¶16.<br><br>**Adequate Protection Liens.** The Debtors are authorized to use the Cash Collateral of the Prepetition Senior Lender and Prepetition Subordinated Lenders pursuant to and in accordance with the terms of the Interim DIP Order and the Budget. Until the Final Hearing, as adequate protection for the Debtors' use of the Cash Collateral of the Prepetition Senior Lender and Prepetition Subordinated Lenders, the Prepetition Senior Lender and Prepetition Subordinated Lenders are granted a replacement security interest and lien (the "Adequate Protection Liens") on their Prepetition Collateral, but solely to the extent of any diminution in the value of such Prepetition Collateral. The Adequate Protection Liens given to the Prepetition Subordinated Lenders shall be subordinated to the Adequate Protection Liens given to the Prepetition Senior Lender. Interim DIP Order ¶18. |
| *Superpriority Administrative Expense Claims* | **Adequate Protection Superpriority Claims.** In accordance with sections 364(c)(1) and 507(b) of the Bankruptcy Code, the Prepetition Senior Lender and Prepetition Subordinated Lenders are granted a claim with priority in payment over any and all administrative expenses of the kind specified or ordered pursuant to any provision of the Bankruptcy Code, including, but not limited to, sections 105, 326, 328, 330, 331, 503(b), 506(c), 507(a), 507(b), 546(c), 1113 and 1114 of the Bankruptcy |

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| | Code and shall at all times be senior to the rights of the Debtors, any successor or trustee to the extent permitted by law , or any other creditor in the Chapter 11 Cases (the "Adequate Protection Superpriority Claims"). Interim DIP Order ¶19.<br><br>**DIP Superpriority Claims**. In accordance with sections 364(c)(1) and 507(b) of the Bankruptcy Code and subject to the Adequate Protection Superpriority Claims, all DIP Obligations under the DIP Facility shall constitute claims (the "DIP Superpriority Claims") with priority in payment over any and all administrative expenses of the kinds specified or ordered pursuant to any provision of the Bankruptcy Code, including, but not limited to, sections 105, 326, 328, 330, 331, 503(b), 506(c), 507(b), 546(c), 1113 and 1114 of the Bankruptcy Code and shall at all times be senior to the rights of the Debtors, any successor trustee to the extent permitted by law, or any other creditor in the Chapter 11 Cases. DIP Credit Agreement §3; Interim DIP Order ¶14.<br><br>**Waiver**. No cost or expense of administration under sections 105, 364(c)(1), 503(b), 506(c), 507(b), 726 (to the extent permitted by law), 1113, 1114 or otherwise of the Bankruptcy Code, shall be senior to, equal to, or *pari passu* with, the Superpriority Claims of the DIP Lender arising out of the DIP Obligations, or, thereafter, the Adequate Protection Superpriority Claims of the Prepetition Senior Lender and Prepetition Subordinated Lenders. Interim DIP Order ¶ 24. |
| *Reporting Requirements* | Commencing on Monday, May 29, 2017, and every other Monday thereafter, a report setting forth, in a form and in sufficient detail satisfactory to the DIP Lender, a comparison of actual receipts and expenses to budgeted receipts and expenses in the then current DIP Budget for the preceding two week ending the prior Thursday. DIP Credit Agreement §10(b).<br><br>As soon as available and in any event within 25 days after the end of each calendar month, a report setting forth, in each case in a form and in sufficient detail satisfactory to the DIP Lender: (1) balance sheets of each Debtor as of the end of such month; (2) statements of income and cash flows, and (3) profit and loss statements of each Debtor. DIP Credit Agreement §10(b).<br><br>As soon as possible and in any event within one Business Day after the occurrence of any Default or Event of Default, a statement of an Authorized Officer of the Debtors setting forth details of such Default or Event of Default and the action that the Debtors have taken and propose to take with respect thereto. Within 5 days after any Debtor obtains Knowledge thereof, a statement of an Authorized Officer of the Debtors setting forth details of: (1) any litigation or governmental proceeding pending or threatened in writing against any Debtor; and (2)any other event, act or condition that has or could reasonably be expected to have a Material Adverse Effect. DIP Credit Agreement §10(b).<br><br>Promptly and in any event within five (5) Business Days after the existence of any of the following conditions, a duly executed certificate |

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| | of an Authorized Officer of the Debtors specifying in detail the nature of such condition and, if applicable, the proposed response of the Debtors thereto: (1) receipt by any Debtor of any written communication from a Governmental Body or any written communication from any other Person or other source of written information, including (to the extent not privileged) reports prepared by any Debtor, that alleges or indicates that any Debtors is not in compliance in all material respects with applicable Environmental Laws; (2) any Debtor obtains Knowledge that there exists any Environmental Liability or threatened in writing against any Debtor; or (3) any Debtor obtains Knowledge of any release, threatened release, emission, discharge or disposal of any Hazardous Materials or obtains Knowledge of any material noncompliance with any Environmental Laws that, in either such case, could reasonably be expected to form the basis for an Environmental Liability against any Debtor. DIP Credit Agreement §10(b).<br><br>As promptly as reasonably practicable on one or more occasions following the DIP Lender's request therefor, such other information regarding the operations, business affairs and financial condition of Debtors as the DIP Lender may reasonably request. DIP Credit Agreement §10(b).<br><br>Debtors shall provide to the counsel for the Prepetition Senior Lender and counsel for the Prepetition Subordinated Lenders all reports that are submitted to the DIP Lender pursuant to section 10 of the DIP Credit Agreement, at or about the same time that such reports are provided to the DIP Lender. DIP Credit Agreement §10; Interim DIP Order ¶ 22. |
| *Events of Default* | Upon the occurrence of an Event of Default contained in the DIP Credit Agreement, the DIP Lender may declare all DIP Obligations owing under the DIP Facility to be immediately due and payable and may declare a termination of any further obligation to extend credit to the Debtors and exercise all other remedies as set forth in the section 13 of the DIP Credit Agreement.<br><br>**Failure to Make Payments When Due**. Failure by the Borrower to pay any of the DIP Obligations, including failure by the Borrower pay when due any installment of principal of, or interest on, the DIP Loan, whether at stated Maturity, by acceleration, by notice of voluntary prepayment, by mandatory prepayment or otherwise, or any fee or any other amount due under this Agreement, and such failure, except in respect of principal and interest, is continuing for three (3) Business Days after the due date.<br><br>**Breach of Certain Covenants**. Failure of any Debtor to perform or comply with any material term or material condition contained in Section 10 and Section 11, such failure is continuing five (5) business days after the date such term or condition should have been performed or complied with; provided that such 5 day period will not apply in the case of: (i) any failure to observe any such covenant which is not capable of being cured at all or within such 5 day period or which has been the subject of a prior failure within a two (2) month period; or (ii) an intentional breach by the Debtors or any Debtor of any such covenant. |

**Breach of Representations, Etc.** Any representation, warranty, certification, or other statement made or deemed made by any Debtor in any DIP Credit Documents, or in any statement or certificate at any time given by any Debtor in writing, pursuant to this Agreement will be false in any material respect as of the date made or deemed made.

**Other Defaults Under DIP Credit Documents**. Any Debtor will default in the material performance, of or material compliance with, any term contained in this Agreement and the other DIP Credit Documents, other than any such term referred to in any other section of this Section 12, and such default will not have been remedied or waived within five (5) business days after the earlier of: (i) the date upon which an Authorized Officer of the Debtors had Knowledge of such default; and (ii) the date upon which written notice thereof is given to the Debtors by the DIP Lender.

**Change of Control**. A Change of Control occurs.

**DIP Collateral Documents and other DIP Credit Documents**. At any time after the signing and delivery thereof: (i) this Agreement or any DIP Credit Documents ceases to be in full force and effect (other than by reason of a release of DIP Collateral in accordance with the terms of this Agreement or thereof or the satisfaction in full of the DIP Obligations in accordance with the terms of this Agreement) or will be declared null and void, or the DIP Lender will not have or will cease to have a valid and perfected DIP Lien in any material portion of DIP Collateral; (i) any Debtor will contest the validity or enforceability of any DIP Credit Documents in writing or deny in writing that it has any further liability under any DIP Credit Documents to which it is a party.

**Other Events of Default**. (i) any Debtor files a plan of reorganization or liquidation, or enters into any transaction for the sale of all or substantially all of the Debtors' assets that does not provide for payment in full in cash of the DIP Obligations; (ii) a trustee, receiver, examiner, or responsible officer with enlarged powers relating to the operation of the business of any Debtor (powers beyond those set forth in sections 1106(a)(3) and (a)(4) of the Bankruptcy Code), will be appointed in the Cases; (iii) any other Lien will be granted with respect to any of the DIP Collateral without the prior written consent of the DIP Lender unless at the time such Lien is granted all DIP obligations are indefeasibly paid in full in cash; (iv) The Bankruptcy Court enters an order granting relief from the automatic stay to any creditor or party in interest: (a) to permit the enforcement of any Lien on any material assets of any Debtor; or (b) to permit other actions that the DIP Lender may, in its reasonable discretion, deem to have a Material Adverse Effect; (v) any material provision of the DIP Credit Documents will cease to be valid or binding on any Debtor, or any Debtor will so assert in any pleading filed in any court; (vi) any order will be entered reversing, amending, supplementing, staying, vacating, or otherwise modifying in any material respect a Interim DIP Order or the DIP Final Order without the prior written consent of the DIP Lender; (vii) the exclusive period for each Debtor to file a plan of reorganization under section 1121(b) of the Bankruptcy

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| | Code expires or is terminated; (viii) the DIP Final Order will not have been entered by the Bankruptcy Court by June 30, 2017.<br><br>DIP Credit Agreement §12; Interim DIP Order ¶ 26. |
| *506(c) Waiver* | Neither the Debtors nor any other person shall assert a claim under section 506(c) of the Bankruptcy Code for any costs and expenses incurred in connection with the preservation, protection or enhancement of, or realization by the DIP Lender, Prepetition Senior Lender or Prepetition Subordinated Lenders upon the DIP Collateral, the Prepetition Collateral or the collateral subject to the Adequate Protection Liens or for any expenses of the administration of the estate. Interim DIP Order ¶23. |
| *Carve-Out* | Notwithstanding anything to the contrary contained anywhere in this Interim Order and/or the DIP Credit Agreement, the Prepetition Collateral and all collateral which is made subject to the security interests and liens granted to the DIP Lender, the Prepetition Senior Lender, and Prepetition Subordinated Lenders pursuant to the terms of this Interim Order shall be subject to a carve-out (the "Carve-Out") for the sum of allowed administrative expenses payable pursuant to 28 U.S.C. § 1930(a)(6) and Priority Professional Expenses. "Priority Professional Expenses" means allowed fees, costs, and reasonable expenses allowed or permitted pursuant to sections 330 and 331 of the Bankruptcy Code of (a) professionals retained by the Debtors up to the amount of $400,000, and (b) any professionals retained by any Committee that may be appointed in these Chapter 11 Cases up to the amount of $100,000, but subject to the amount set forth in the Budget, provided, however, that following the occurrence of an Event of Default under the DIP Facility, these Carve-Out amounts shall be limited to $75,000 and $25,000 in fees and expenses incurred after the Event of Default for the Debtors' and Committees' professionals, respectively. Furthermore, Priority Professional Expenses shall not include any fees or expenses (collectively, the "Ineligible Professional Fees") incurred by any such professional in preventing, hindering or delaying the DIP Lender, the Prepetition Senior Lender, or the Prepetition Subordinated Lenders from enforcing or realizing upon any of their collateral once an Event of Default has occurred, using or seeking to use Cash Collateral or selling any collateral subject to the liens of the DIP Lender, the Prepetition Senior Lender, or the Prepetition Subordinated Lenders without the consent of the DIP Lender, the Prepetition Senior Lender, or the Prepetition Subordinated Lenders, objecting to or contesting in any manner, or raising any defenses to, the validity, extent, amount, perfection, priority or enforceability of the liens and security interests of the Prepetition Senior Lender or the Prepetition Subordinated Lenders, the First Lien Obligations, the Prepetition Subordinated Obligations, the DIP Facility, or any mortgages, assignments, liens, or security interests with respect thereto or any other rights or interests of the DIP Lender, the Prepetition Senior Lender, or the Prepetition Subordinated Lenders, or in asserting any claims or causes of action, including, |

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| | without limitation, any actions under chapter 5 or section 724(a) of the Bankruptcy Code, or for equitable subordination, against the DIP Lender, the Prepetition Senior Lender, or the Prepetition Subordinated Lenders. Interim DIP Order ¶25. |
| *Credit Bidding* | Following entry of the Final DIP Order, the DIP Lender will have the right to credit bid, subject to section 363(k) of the Bankruptcy Code or applicable law, the DIP Loan, in whole or in part, in connection with any plan, sale, or other disposition of assets in the Cases. DIP Credit Agreement §8(a)(ii)(2). |
| *Relief from Automatic Stay* | **Modification of Automatic Stay**. The automatic stay provisions of section 362 of the Bankruptcy Code are modified and lifted to the extent necessary to implement the provisions of the Interim DIP Order and the DIP Credit Agreement to permit the creation and perfection of the DIP Liens. DIP Credit Agreement §8(a)(i)(1).<br><br>**Termination of the Automatic Stay**. Upon the occurrence of an Event of Default and following the giving of five (5) business days' notice to counsel for the Debtors, counsel for any Committee appointed in these Chapter 11 Cases, and the United States Trustee, the DIP Lender shall have immediate relief from the automatic stay and foreclose on all or any portion of the DIP Collateral, or otherwise exercise remedies against the DIP Collateral, as permitted by applicable non-bankruptcy law and the Debtors' rights to use cash collateral shall cease. During such five-business-day notice period, the Debtors and any appointed Committee shall be entitled to an emergency hearing with this Court for the sole purpose of contesting whether an Event of Default has occurred. Interim DIP Order ¶26. |
| *Valid Liens* | **DIP Liens**. The DIP Liens granted to the DIP Lender pursuant to the Interim DIP Order and the DIP Facility are deemed valid and perfected upon the entry of the Interim DIP Order without the necessity of the DIP Lender taking possession of, filing financing statements, mortgages, or other documents. Upon the request of the DIP Lender, the Debtors shall execute and deliver to the DIP Lender any and all UCC financing statements, mortgages, notes, assignments, or other instruments or documents considered by the DIP Lender necessary in order to perfect the DIP Liens; and the DIP Lender is hereby granted relief from the automatic stay embodied in section 362(a) of the Bankruptcy Code to receive, file, and record the foregoing. DIP Credit Agreement §3; Interim DIP Order ¶14.<br><br>**Adequate Protection Liens.** The Adequate Protection Liens and security interests granted to the Prepetition Senior Lender and Prepetition Subordinated Lenders pursuant to the Interim DIP Order are deemed valid and perfected upon entry of the Interim DIP Order without the necessity of the Prepetition Senior Lender or Prepetition |

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| | Subordinated Lenders taking possession of, filing financing statements, mortgages, or other documents. Upon the request of the Prepetition Senior Lender and/or the Prepetition Subordinated Lenders, the Debtors shall execute and deliver to the Prepetition Senior Lender and/or Prepetition Subordinated Lenders any and all UCC financing statements, mortgages, notes, assignments, or other instruments or documents considered by the Prepetition Senior Lender and/or Prepetition Subordinated Lenders necessary in order to perfect the Adequate Protection Liens; and the Prepetition Senior Lender and Prepetition Subordinated Lenders are hereby granted relief from the automatic stay embodied in section 362(a) of the Bankruptcy Code to receive, file, and record the foregoing. Interim DIP Order ¶20. |
| *Avoidance Actions* | The DIP Collateral excludes Avoidance Power Actions. DIP Credit Agreement § 3(a); Interim DIP Order ¶15. |

**RELIEF REQUESTED**

39. By this Motion, the Debtors seek entry of the DIP Orders granting the following relief: (i) authorizing the Debtors' use of the Cash Collateral of the Prepetition Senior Lender and the Prepetition Subordinated Lenders pursuant to section 363 of the Bankruptcy Code; (ii) granting the Adequate Protection Liens and the Adequate Protection Superpriority Claims to the Prepetition Senior Lender and the Prepetition Subordinated Lenders pursuant to sections 361 and 363 of the Bankruptcy Code; (iii) authorizing and approving the Debtors' entry into the DIP Credit Agreement and performance of such other acts as may be necessary or appropriate in connection therewith, to obtain up to $6,000,000 of secured postpetition loans and advances pursuant to the DIP Orders, of which $2,000,000 will be available upon entry of the Interim DIP Order; (iv) granting to the DIP Lender the DIP Liens (subject to the Carve-Out) in and upon the DIP Collateral pursuant to sections 364(c)(2) and 364(d)(1) of the Bankruptcy Code; (v) granting an allowed DIP Superpriority Claim to the DIP Lender pursuant to section 364(c)(1) of the Bankruptcy Code; (vi) vacating and modifying the automatic stay to the extent necessary to effectuate the terms and provisions of the DIP Credit Agreement and the DIP Orders; and (vii) scheduling the Final Hearing to consider entry of the Final DIP Order.

**BASIS FOR RELIEF**

40. The Debtors do not have sufficient unencumbered cash or other assets to continue to operate their business during these Chapter 11 Cases or to effectuate a reorganization. The Debtors will be immediately and irreparably harmed if they are not immediately granted the authority to use the Cash Collateral of the Prepetition Senior Lender and Prepetition Subordinated Lenders and to obtain postpetition financing from the DIP Lender in accordance with the terms of the DIP Credit Agreement in order to permit, among other things, the orderly continuation of its business, the ability to fund payroll and payroll taxes, the maintenance of its relations with vendors and suppliers, satisfaction of its working capital needs, as well as the ability to pay taxes, inventory, supplies, overhead, insurance and other necessary expenses. The access of the Debtors to sufficient working capital and liquidity made available through the use of Cash Collateral, incurrence of new indebtedness for borrowed money and other financial accommodations is vital to the preservation and maintenance of the going concern value of the Debtors and to a successful reorganization of the Debtors.

41. Further, despite reasonable efforts, the Debtors have been unable to obtain financing on more favorable terms from sources other than the DIP Lender under the DIP Credit Agreement and are unable to obtain adequate unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense. The Debtors are also unable to obtain secured credit allowable under sections 364(c)(1), 364(c)(2) and 364(c)(3) of the Bankruptcy Code without granting the DIP Lender, subject to the Carve-Out (defined below), the DIP Liens and the DIP Superpriority Claim under the terms and conditions set forth in this Interim Order and in the DIP Credit Agreement. Significantly, the Prepetition Subordinated Lenders consent to granting the DIP Lender the DIP Liens pursuant to section 364(d)(1) of the Bankruptcy Code.

42. In the absence of sufficient funds to support the Debtors' ongoing operations, the value of the Debtors' assets and operations will dissipate, jeopardizing their ability to maximize value to the detriment of the Debtors' estates, creditors and all parties in interest. *See In re Farmland Indus., Inc.*, 294 B.R. 855, 885 (Bankr. W.D. Mo. 2003) (approving postpetition financing where it "gives the Debtors sufficient time to market and sell several of

their major assets so as to pay down the debt to the DIP Lenders and then reorganize around their remaining core assets [and where] [w]ithout the continued financing, the Debtors would likely be forced into a chapter 7 or 11 liquidation, to the detriment of all creditors . . .”). Thus, the continued use of Cash Collateral and the DIP Financing are in the best interests of the Debtors’ estates, creditors and all other stakeholders and, therefore, should be approved by this Court.

## I. The Proposed DIP Financing Should be Approved Pursuant to Sections 364(c) 364(d) of the Bankruptcy Code

43. Section 364(c) of the Bankruptcy Code provides, among other things, that if a debtor is unable to obtain unsecured credit allowable as an administrative expense under section 503(b)(1) of the Bankruptcy Code, the Court may authorize the debtor to obtain credit or incur debt (a) with priority over any and all administrative expenses specified in section 503(b) or 507(b) of the Bankruptcy Code, (b) secured by a lien on property of the estate that is not otherwise subject to a lien, or (c) secured by a junior lien on property of the estate that is subject to a lien. 11 U.S.C. § 364(c). The Debtors propose to obtain the DIP Financing by providing the DIP Lender, *inter alia*, the DIP Liens and the DIP Superpriority Claims pursuant to sections 364(c)(1)–(2) and 364(d)(1) of the Bankruptcy Code.

44. In seeking to obtain post-petition financing under section 364(c) of the Bankruptcy Code, the Debtors have the burden of demonstrating that:

> (1) They are unable to obtain unsecured credit pursuant to 11 U.S.C. § 364(b), *i.e.*, by allowing a lender only an administrative expense claim pursuant to 11 U.S.C. § 503(b)(1)(A);
>
> (2) The credit transaction is necessary to preserve the assets of the estate; and
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> (3) The terms of the transaction are fair, reasonable, and adequate, given the circumstances of the debtor-borrower and the proposed lender.

*In re Los Angeles Dodgers, LLC*, 457 B.R. 308, 312-13 (Bankr. D. Del. 2011). *See also In re Aqua Assocs.*, 132 B.R. 192, 195-96 (Bankr. E.D. Pa. 1991); *In re Crouse Grp., Inc.*, 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987). Further, section 364(d) of the Bankruptcy Code provides that

the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if the debtor is unable to obtain such credit otherwise and there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted. 11 U.S.C. § 364(d). As noted above, M&T, the Prepetition Senor Lender, is not being primed and the Prepetition Subordinated Lenders consent to granting the DIP Lender the DIP Liens pursuant to section 364(d)(1) of the Bankruptcy Code. Furthermore, the Debtors submit that the interests of Prepetition Subordinated Lenders are adequately protected by the value of the Debtors' property and the continued maintenance of the property that will be facilitated by the use of cash collateral and DIP Financing. Absent the use of cash collateral and the DIP Financing the Debtors will not have adequate funds to maintain the property thereby diminishing the value of their collateral.

45. For the reasons set forth herein, the Debtors submit that they have satisfied the standards required to access postpetition financing under section 364(c) and 364(d) of the Bankruptcy Code.

**A. The Debtors were Unable to Obtain DIP Financing on More Favorable Terms**

46. The Court may not approve a credit transaction under section 364(c) unless the debtor demonstrates that it has attempted, but failed, to obtain unsecured credit under section 364(a) or (b). *In re Los Angeles Dodgers, LLC*, 457 B.R. at 313 (citing *In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 37 (Bankr. S.D.N.Y. 1990)). To satisfy the requirements of section 364(c) of the Bankruptcy Code, a debtor need only demonstrate "by a good faith effort that credit was not available" to the debtor on an unsecured or administrative expense basis. *See Bray v. Shenandoah Fed. Savs. & Loan Ass'n (In re Snowshoe Co.)*, 789 F.2d 1085, 1088 (4th Cir. 1986). The statute does not impose a duty to seek credit from "every possible lender before concluding that such credit is unavailable." *See In re Reading Tube Indus.*, 72 B.R. 329, 332 (Bankr. E.D. Pa. 1987) (citing *In re Snowshoe Co.*, 789 F.2d at 1088).

47. Moreover, where few lenders likely can or will extend the necessary credit to a debtor, "it would be unrealistic and unnecessary to require [the debtor] to conduct such an exhaustive search for financing." *In re Sky Valley, Inc.*, 100 B.R. 107, 113 (Bankr. N.D. Ga. 1988), *aff'd sub nom., Anchor Sav. Bank FSB v. Sky Valley, Inc.*, 99 B.R. 117, 120 n.4 (N.D. Ga. 1989). *See also In re Stanley Hotel, Inc.*, 15 B.R. 660, 663 (D. Colo. 1981) (bankruptcy court's finding that two national banks refused to grant unsecured loans was sufficient to support conclusion that section 364 requirement was met); *Ames*, 115 B.R. at 37-39 (debtor must show that it made reasonable efforts to seek other sources of financing under section 364(a) and (b)).

48. Given their prepetition secured debt structure, the Debtors have been unable to procure any financing in the form of unsecured credit allowable as an administrative expense claim under section 503(b)(1) of the Bankruptcy Code. The Debtors face severe liquidity constraints, and were forced to file these Chapter 11 Cases in order to preserve the value of their assets for the benefit of their creditors, and other parties in interest.

49. As explained above, the Debtors sought proposals for alternative financing. Most significantly, M&T, the lender most likely to offer post-petition financing, made a last minute proposal that was inadequate in both amount and maturity. Moreover, it contained case-controlling deadlines that would have inured solely for the benefit of M&T. oppressive. The DIP Financing, on the other hand, provides for the full $6 million required by the Debtors to fund operations through the key summer and winter seasons, contains an 8 plus month term, is junior to the M&T prepetition senior debt and provides for interest to be paid to M&T on a current basis, and is otherwise fair, reasonable and balanced.

50. Unless the Debtors are able to immediately access postpetition financing on a secured basis through the DIP Financing, the Debtors will run out of cash within day of the Petition Date and will not be able to pay employees, insurance and other necessary and critical expenses necessary to maintain and maximize the value of the Debtors' assets. Indeed, absent the use of cash collateral and the DIP Financing, the Debtors would be forced to suspend or terminate operations which, the Debtors submit, would no doubt result in the diminution of value of the Debtors' assets. By contrast, approval of the DIP Financing will allow the Debtors to

continue to operate in the ordinary course, maintain and maximize the value of their assets, instill confidence in the Debtors' employees and customers, and permit the Debtors the opportunity to adequately assess restructuring options and propose a feasible chapter 11 plan within a reasonable time.

51. As it stands, the DIP Lender has provided the Debtors with the most favorable and flexible post-petition financing terms that the Debtors have been able to procure. The Debtors submit that their efforts to obtain sufficient postpetition financing on the most favorable terms available satisfies the standard required under section 364(c) and 364(d) of the Bankruptcy Code.

**B. The DIP Financing is Necessary to Preserve the Debtors' Assets and Going Concern Value**

52. As debtors-in-possession, the Debtors have a fiduciary duty to protect and maximize their estates' assets. *See Burtch v. Ganz (In re Mushroom Transp. Co.)*, 382 F.3d 325, 339 (3d Cir. 2004). As noted above, without the DIP Financing, there is a significant risk that the Debtors would be forced to shut down operations and liquidate their assets. *See, e.g., In re Simasko Production Co.*, 47 B.R. 444, 448-49 (D. Colo. 1985) (authorizing interim financing stipulation where debtor's best business judgment indicated financing was necessary and reasonable for benefit of estates); *In re Ames Dept. Stores*, 115 B.R. at 38 (with respect to postpetition credit, courts "permit debtors-in-possession to exercise their basic business judgment consistent with their fiduciary duties").

53. As explained herein, the Debtors require access to funds in the form of postpetition financing to continue to operate in the ordinary course, meet their chapter 11-related obligations, and reorganize their estates. Accordingly, the DIP Financing is necessary to preserve the Debtors' assets and the going concern value of the Company.

**C. The Terms of the DIP Financing are Fair, Reasonable, and Appropriate Under the Circumstances**

54. In considering whether the terms of proposed debtor-in-possession financing are fair and reasonable, courts consider the terms of such financing in light of the

relative circumstances of both the debtor and the potential lender. *See, e.g., Unsecured Creditors' Comm. Mobil Oil Corp. v. First Nat'l Bank & Trust Co. (In re Ellingsen MacLean Oil Co.),* 65 B.R. 358, 365n7 (W.D. Mich. 1986) (noting that, in appropriate situations, it may be necessary and prudent for a debtor to enter into a "hard bargain" to acquire needed funds in chapter 11).

55. The DIP Financing was negotiated in good faith and at arm's length between the Debtors and the DIP Lender, resulting in an agreement designed to permit the Debtors to continue to operate, satisfy all of their post-petition obligations, and maximize the value of their assets through an orderly sale process. *See, e.g., In re Snowshoe Co.,* 789 F.2d at 1088 (stating that section 364 of the Bankruptcy Code imposes no duty to seek credit from every possible lender, particularly when "time is of the essence to preserve a vulnerable seasonal enterprise"); *In re Western Pacific Airlines, Inc.*, 223 B.R. 567, 573 (Bankr. D. Colo. 1997) (authorizing postpetition financing to preserve value of aircraft leaseholds where to hold otherwise would result in the elimination of value and the "immediate collapse of the Debtor as a going concern").

56. Accordingly, and as set forth in more detail herein, the Debtors submit that the terms and conditions of the proposed DIP Financing are fair, reasonable and appropriate under the circumstances.

### D. Entry Into the DIP Credit Agreement Constitutes a Sound Exercise of the Debtors' Business Judgment

57. Provided that an agreement to obtain secured credit does not run afoul of the provisions of, and policies underlying, the Bankruptcy Code, courts grant a debtor considerable deference in acting in accordance with its sound business judgment in obtaining such credit. *See, e.g., Trans World Airlines, Inc. v. Travellers Int'l AG (In re Trans World Airlines, Inc.),* 163 B.R. 964, 974 (Bankr. D. Del. 1994) (approving postpetition loan and receivables facility because such facility "reflect[ed] sound and prudent business judgment."); *In re Barbara K. Enters., Inc.,* Case No. 08-11474, 2008 WL 2439649, at *14 (Bankr. S.D.N.Y. June 16, 2008) (explaining that courts defer to a debtor's business judgment "so long as a request

for financing does not 'leverage the bankruptcy process' and unfairly cede control of the reorganization to one party in interest."); *Ames Dep't Stores*, 115 B.R. at 40 ("[c]ases consistently reflect that the court's discretion under section 364 [of the Bankruptcy Code] is to be utilized on grounds that permit [a debtor's] reasonable business judgment to be exercised so long as the financing agreement does not contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit a party-in-interest.");

58. Bankruptcy courts consistently defer to a debtor's business judgment on many business decisions in bankruptcy, including a debtor's decision to borrow money. *See, e.g., In re AMR Corp.*, 485 B.R. 279, 287 (Bankr. S.D.N.Y. 2013) ("[i]n determining whether to approve a debtor's request under Section 364, a Court must examine whether the relief requested is an appropriate exercise of the debtor's business judgment); *In re DB Capital Holdings, LLC*, 454 B.R. 804, 822-23 (Bankr. D. Colo. 2011) (a debtor must demonstrate, among other things, that proposed financing is an exercise of its sound and reasonable business judgment). As one court noted, "[m]ore exacting scrutiny [of the debtors' business decisions] would slow the administration of the debtor's estate and increase its cost, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially." *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985). *See also Jurista v. Amerinox Processing, Inc.*, 2013 U.S. Dist. LEXIS 44057, at *96-97, Case No. 12-3825 (NLH/JS) (D.N.J. March 28, 2013) (the business judgment rule "has been fashioned as a means of protecting directorial decision-making from judicial interference and constant hindsight.").

59. To determine whether the business judgment standard is met, a court is "required to examine whether a reasonable business person would make a similar decision under similar circumstances." *In re Exide Techs.*, 340 B.R. 222, 239 (Bankr. D. Del. 2006). *See also In re Curlew Valley Assocs.*, 14 B.R. 506, 513-14 (Bankr. D. Utah 1981) (noting that courts should not second guess a debtor's business decision when that decision involves "a business judgment made in good faith, upon a reasonable basis, and within the scope of [the debtor's] authority under the [Bankruptcy] Code.") (citation omitted).

60. The Debtors believe that the proposed terms of the DIP Financing as set forth in the DIP Credit Agreement are the best available to the Debtors and are reasonable under the circumstances. The Debtors further believe that entry into the DIP Financing represents a sound exercise of the Debtors' business judgment because the funds provided by the DIP Financing are essential to enable the Debtors to continue to operate, reorganize their estates, and satisfy all of their chapter 11-related obligations. Without the additional funding provided by the DIP Facility, the Debtors will likely run out of cash during the course of these Chapter 11 Cases and may be forced to shut down all operations and liquidate. The Debtors respectfully submit that because the circumstances of these Chapter 11 Cases require the Debtors to obtain financing under section 364(c) and 364(d) of the Bankruptcy Code, their entry into the DIP Credit Agreement, and approval of the DIP Financing reflects a sound exercise of their sound business judgment and is clearly in the best interests of the Debtors' estates as a whole when compared with the alternatives.

## II. The Debtors Should be Authorized to Continue to Use Cash Collateral

61. Section 363(c)(2) of the Bankruptcy Code provides that a debtor may not use cash collateral unless "(A) each entity that has an interest in such cash collateral consents; or (B) the court, after notice and hearing, authorizes such use, sale, or lease in accordance with the provisions of this section." 11 U.S.C. § 363(c)(2). Thus, pursuant to section 363(c) of the Bankruptcy Code, a debtor may not use cash collateral without the consent of any entity with an interest in such cash collateral or Court approval. With respect to the Prepetition Senior Lenders and the Prepetition Subordinated Lenders, the Debtors respectfully submit that the Court should order the relief requested herein under section 363(c)(2)(B) of the Bankruptcy Code given the adequate protection being provided to M&T under sections 361 and 363(e) of the Bankruptcy Code as set forth herein. As noted above, the Prepetition Subordinated Lenders have consented to the use of Cash Collateral in exchange for the adequate protection provided by the Debtors.

62. Section 363(e) of the Bankruptcy Code provides, in pertinent part, that "on request of an entity that has an interest in property . . . proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease

as is necessary to provide adequate protection of such interest." 11 U.S.C. § 363(e). Examples of adequate protection are provided in section 361 of the Bankruptcy Code and include, but are not limited to: (a) lump sum or periodic cash payments to the extent that such use will result in a decrease in value of such entity's interest in the property; (b) provisions for an additional or replacement lien to the extent that the use of the property will cause a decrease in the value of such entity's interest in the property; and (c) such other relief as will result in the realization by the entity of the indubitable equivalent of such entity's interest in the property. 11 U.S.C. § 361.

63. By adequate protection, the Bankruptcy Code seeks to shield a secured creditor from diminution in the value of its interest in the particular collateral during the period of use. *See In re 495 Cent. Park Ave. Corp.*, 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992); *In re Beker Indus. Corp.*, 58 B.R. 725, 736 (Bankr. S.D.N.Y. 1986); *In re Hubbard Power & Light*, 202 B.R. 680 (Bankr. E.D.N.Y. 1996).

64. While section 361 of the Bankruptcy Code provides examples of forms of adequate protection, such as granting replacement liens and administrative claims, courts decide what constitutes sufficient adequate protection on a case-by case basis. *See In re Columbia Gas Sys., Inc.*, Nos. 91-803, 91-804, 1992 WL 79323, at *2 (Bankr. D. Del. Feb. 18, 1992); *In re Swedeland Dcv. Grp.*, Inc., 16 F.3d 552, 564 (3d Cir. 1994); *In re N.J. Affordable Homes Corp.*, No. 05-60442, 2006 WL 2128624, at *14 (Bankr. D.N.J. June 29, 2006); *see also In re Mosello, 195 BR. 277*, 289 (Bankr. S.D.N.Y. 1996); *In re Dynaco Corp.*, 162 B.R. 389, 394 (Bankr. D.N.H. 1993) (citing 2 Collier on Bankruptcy § 361.01[1] at 361-66 (15th ed. 1993)) (explaining that what constitutes adequate protection is not defined, and "must be determined based upon equitable considerations arising from the particular facts of each proceeding").

65. For example, courts have held that replacement liens are sufficient adequate protection. *See In re Mt. Olive Hospitality, LLC*, Civil No. 13-3395 (RBK), 2014 WL 1309953, at *3, n. 6 (D.N.J. March 31, 2014). *See also In re Airport Inn Assocs., Ltd.*, 132 B.R. 951, 960 (Bankr. D. Col. 1990) ("The court could order a lien in postpetition accounts receivable as adequate protection if that relief was requested . . . ."); *In re Int'l Design & Display Grp., Inc.*, 154 B.R. 362, 364 (Bankr. S.D. Fla. 1993) (court authorized debtor to use cash collateral and, as

adequate protection, granted secured creditor replacement lien on all post-petition accounts receivable, inventory and contracts to the extent the creditor's collateral was depleted).

66. The Interim DIP Order provides adequate protection for the Debtors' use of the Cash Collateral of the Prepetition Senior Lender and Prepetition Subordinated Lenders in the form of a replacement security interest and lien (the "Adequate Protection Liens") on their Prepetition Collateral, but solely to the extent of any diminution in the value of such Prepetition Collateral. The Adequate Protection Liens given to the Prepetition Subordinated Lenders shall be subordinated to the Adequate Protection Liens given to the Prepetition Senior Lender.

67. Additionally, in accordance with sections 364(c)(1) and 507(b) of the Bankruptcy Code, the Interim Order provides that the Prepetition Senior Lender and the Prepetition Subordinated Lenders are granted a claim with priority in payment over any and all administrative expenses of the kind specified or ordered pursuant to any provision of the Bankruptcy Code, including, but not limited to, sections 105, 326, 328, 330, 331, 503(b), 506(c), 507(a), 507(b), 546(c), 1113 and 1114 of the Bankruptcy Code and shall at all times be senior to the rights of the Debtors, any successor or trustee to the extent permitted by law, or any other creditor in the Chapter 11 Cases (the "Adequate Protection Superpriority Claims").

68. In addition, the Debtors propose to continue to make monthly interest payments to M&T at the contract rate set forth in the prepetition loan documents. Moreover, the use of cash collateral and the infusion of up to $6 million of new money that is junior in priority to M&T provides additional adequate protection for M&T's interest in the Debtors' assets because the use of those funds will ensure that the collateral securing M&T's debt will be maintained and preserved. Finally, the Debtors' believe that the value of the collateral far exceeds the amount of the M&T debt thereby providing additional adequate protection in the form of an equity cushion.[4]

[4] The collateral securing the amount owed to M&T under the M&T Loan Facility was appraised by M&T's valuation professional at approximately $45 million at the time the M&T Loan Facility was issued—nearly 100% greater than the amount owed under the M&T Loan Facility. This equity cushion is more than sufficient to constitute adequate protection. *See, e.g., In re Dunes Casino Hotel*, 69 B.R. 784, 795 (Bankr. D.N.J. 1986) (finding a secured creditor was adequately protected by a 30% equity cushion). *See also In re McKillips*, 81 B.R. 454, 458 (Bankr. N.D. Ill. 1987) (collecting cases and concluding that "[c]ase law has almost uniformly held that an equity cushion of 20% or more constitutes adequate protection").

69. In sum, the adequate protection offered by the Debtors to the prepetition secured lenders is fair, reasonable and sufficient to protect against the diminution of their collateral position. Accordingly, the Debtors respectfully submit that the use of Cash Collateral on the terms set forth in the proposed Interim DIP Order provides the Prepetition Senior Lenders and the Prepetition Subordinated Lenders with adequate protection and is in the best interest of the Debtors, the Debtors' estates, their creditors and all parties in interest, and, therefore should be authorized by this Court.

## III. The Section 506(c) Waiver Should be Approved

70. The Debtors seek approval of their waiver of any right to surcharge the Collateral pursuant to section 506(c) of the Bankruptcy Code. Congress' intent in enacting section 506(c) of the Bankruptcy Code was to assure that when a claimant "expends money to provide for the reasonable and necessary costs and expenses of preserving or disposing of a secured creditor's collateral, the ... debtor in possession is entitled to recover such expenses from the secured party or from the property securing an allowed secured claim held by such party." *In re Visual Indus., Inc.*, 57 F.3d 321, 325 (3d Cir. 1995) (quoting 124 Cong. Rec. 32,398 (cum. ed. Sept. 28, 1978) (statement of Rep. Edwards), reprinted in 1978 U.S. Code Cong. & Admin. News 6451). However, waivers of a debtor's right to surcharge a secured creditor's collateral are commonly found in DIP financing arrangements between sophisticated parties. As one court has noted, "the Trustee and Debtors-in-Possession in this case had significant interests in asserting claims under § 506(c) and have made use of their rights against the Lender under § 506(c) by waiving them in exchange for concessions to the estates (including a substantial carve-out for the benefit of administrative creditors)." *In re Molten Metal Tech., Inc.*, 244 B.R. 515, 527 (Bankr. D. Mass. 2000), vacated and remanded on other grounds, 2001 WL 36381917 (1st Cir. BAP March 11, 2001). *See also In re Nutri/System of Florida Assocs.*, 178 B.R. 645, 650 (E.D. Pa. 1985) (noting that the debtor had waived section 506(c) rights in obtaining debtor-in-possession financing).

71. The waiver of surcharge rights under section 506(c) is particularly appropriate where, as here, it is consented to in exchange for benefits to be received from both postpetition financing and a Carve-Out. The Debtors have agreed to waive the uncertainty of their surcharge rights in exchange for immediate and necessary liquidity from the DIP Lender and the valuable and predictable rights granted to the Debtors' estate professionals under the Carve-Out. *See In re Lunan Family Rests. Ltd., P'Ship*, 192 B.R. 173, 178 (N.D. Ill. 1996) ("The burden of proof is on any proponent of § 506(c) treatment, who must show by a preponderance of evidence that [(1) the expenditure was necessary, (2) the amounts were reasonable, and (3) the secured creditor was the party primarily benefited by the expenditure]"). Accordingly, the Debtors submit that the section 506(c) waiver is appropriate under the circumstances and should be approved.

## IV. Modification of the Automatic Stay Is Warranted

72. The DIP Credit Agreement provides certain circumstances under which the automatic stay of section 362 of the Bankruptcy Code may be modified. Specifically, the DIP Credit Agreement provides that upon the occurrence of an Event of Default (as defined in the DIP Credit Agreement), but subject to five (5) business days prior written notice to the Debtors with respect to an Event of Default (as defined in the DIP Credit Agreement), with a copy of such notice provided to counsel for the Debtor, counsel for any Official Committee of Unsecured Creditors, and the U.S. Trustee, the automatic stay shall terminate automatically to allow the DIP Lender to enforce its rights against the DIP Collateral and to exercise any other default-related rights and remedies under the DIP Credit Agreement or applicable law.

73. The Debtors submit that such modifications of the automatic stay are customary and market in DIP financings similar to the DIP Financing proposed herein. Accordingly, the Debtors submit that the Court should modify the automatic stay to the extent contemplated by the DIP Credit Agreement and the proposed Interim DIP Order.

## V. Interim Approval of the DIP Financing Should Be Granted

74. Bankruptcy Rules 4001(b)(2) and (c)(2) provide that a final hearing on a motion for authorization to use Cash Collateral or a motion to obtain credit may not be

commenced earlier than 14 days after service of such motion. The Court, however, is authorized to conduct an expedited hearing prior to the expiration of such 14-day period and to authorize the use of cash collateral or the obtaining of credit where, as here, such relief is necessary to avoid immediate and irreparable harm to a debtor's estate, pending a final hearing.

75. The failure to obtain interim approval of the use of Cash Collateral and the DIP Financing on an expedited basis is likely to lead to immediate and irreparable harm to the Debtors' estates because the Debtors have an immediate need for cash, and a need to quickly instill confidence in the their employees, their trade vendors, and service providers, that the Debtors will have access to sufficient working capital and liquidity for their operations during these Chapter 11 Cases. That confidence will help to preserve and maintain the going-concern value of the Company. Accordingly, the Debtors seek immediate entry of the Interim DIP Order to prevent immediate and irreparable harm to the Debtors' estates pending the Final Hearing pursuant to Bankruptcy Rules 4001(b)(2) and (c)(2).

## VI. Request for a Final Hearing

76. Pursuant to Bankruptcy Rule 4001(c)(2), the Debtors request that the Court set a date for the Final Hearing as soon as practicable, and fix in the Interim DIP Order a date and time prior to the Final Hearing for parties to file objections to approval of the Motion on a final basis and entry of a Final DIP Order.

## WAIVER OF MEMORANDUM OF LAW

77. Because the legal basis upon which the Debtors rely is incorporated herein and the Motion does not raise any novel issues of law, the Debtors respectfully request that the Court waive the requirement to file a separate memorandum of law pursuant to D.N.J. LBR 9013-1(a)(3).

## NO PRIOR REQUEST

78. No previous motion for the relief sought herein has been made to this or to any other court.

**NOTICE**

72. Notice of this Motion has been given to (i) the Office of the United States Trustee for the District of New Jersey, One Newark Center, Suite 2100, Newark, NJ 07102; (ii) Tarter Krinsky & Drogin LLP, 1350 Broadway, New York, New York 10018, Attention: Scott Markowitz, attorneys for the DIP Lender; (iii) the Internal Revenue Service, 2970 Market Street, Mail Stop 5-Q30.133, Philadelphia, PA 19104-5016; (iv) the New Jersey Division of Taxation Compliance and Enforcement - Bankruptcy Unit, 50 Barrack Street, 9th Floor, Trenton, NJ 08695; (v) the Office of the Attorney General of the State of New Jersey, Division of Law, Richard J. Hughes Justice Complex, 25 Market Street, Trenton, NJ 08625; (vi) the Office of the United States Attorney, Peter Rodino Federal Building, 970 Broad Street, Suite 700, Newark, NJ 07102; (vii) M&T Bank, PO Box 1302, Buffalo, NY 14240-1302; (viii) Head USA, Inc., 3125 Sterling Circle, Suite 101, Boulder, CO 80301; (ix) Alpina Sports Corp., 93 Etna Road, Lebanon, NH 03766; (x) HSK Adventure, Inc., 300 Plaza Drive, Vestal, NY 13850; (xi) Kuzari Investor 27335 LLC, 220 East 42nd Street, 29th Floor, New York, NY; (xii) Bank of America, N.A. Bank of America Corporate Center, 100 North Tryon St, Charlotte, NC 28255; (xiii) The Township of Vernon, 21 Church Street, Vernon, NJ 07462; (xiv) Highlands State Bank, PO Box 160, Vernon, NJ 07462; (xv)Visions Federal Credit Union, 24 McKinley Ave, Endicott, NY 13760-5491; (xvi) Axess North America, 6433 N Business Loop Rd, Park City, UT 84098; (xvii) Proficio Bank, 6985 Union Park Center, Suite 150, Cottonwood Heights, UT 84047; (xviii) Dell Financial Services LLC, 12234 North Interstate 35, Suite 35B, Austin, TX 78753; (xix) Marlin Business Bank, 300 Fellowship Rd, Mt Laurel, NJ 08054; (xx) Ally Financial Inc., Ally Detroit Center, 500 Woodward Ave, Detroit, MI 48226; (xxi) Kubota Credit Corporation USA, 4400 Amon Carter Boulevard, Suite 100, Fort Worth, TX 76155; (xxii) GE Capital Information Technology Solutions, LLC, 300 E. John Carpenter Freeway, Irving, TX 75062-2712; (xxii) Bank of the West, Dept. LA 23091, Pasadena, CA 91185-3091; and (xxiv) the Debtors' twenty largest unsecured creditors on a consolidated basis. In light of the nature of the relief requested herein, the Debtors respectfully submit that no other or further notice is required.

**WHEREFORE**, the Debtors respectfully request entry of the Interim DIP Order, substantially in the form submitted herewith, (a) authorizing the Debtors to continue to use cash collateral on the terms proposed and obtain the DIP Financing from the DIP Lender pursuant to the DIP Credit Agreement, (b) setting the Final Hearing on the Motion, and (c) granting the Debtors such other and further relief as the Court deems just and proper.

Dated: May 15, 2017

Respectfully submitted,

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*Proposed Counsel to the Debtors and Debtors-in-Possession*

VERIFIED STATEMENT

I, Jeffrey Koffman, the Chief Executive Officer of Mountain Creek Resorts, Inc., certify under penalty of perjury that I have read the attached motion and the facts set forth therein are true to the best of my knowledge, information and belief.

Dated: May 14, 2017

By:/s/ *Jeffrey Koffman*
Jeffrey Koffman