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10 **IN THE UNITED STATES BANKRUPTCY COURT**  
 11 **FOR THE DISTRICT OF NEVADA**

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|--|---|
| <p>12 In re:<br/>         13 STAR GOLDEN ENTERPRISES, LLC,<br/>         14 Debtor.</p> | <p>Case No.: BK-S-17-10440-BTB<br/>         Chapter 11<br/>         Date: September 12, 2017<br/>         Time: 1:30 p.m.</p> |
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16 **DEBTOR’S MOTION FOR AN ORDER: (I) AUTHORIZING POST-PETITION**  
 17 **FINANCING, (II) GRANTING LIENS AND PROVIDING ADMINISTRATIVE**  
 18 **EXPENSE CLAIM, (III) APPROVING LOAN DOCUMENTS RELATING TO**  
 19 **THE FOREGOING, (IV) GRANTING RELIEF FROM THE AUTOMATIC**  
**STAY, AND (V) GRANTING OTHER RELATED RELIEF**

20 Debtor and debtor-in-possession Star Golden Enterprises, LLC (the “Debtor”), by and  
 21 through its counsel, Garman Turner Gordon LLP, hereby submits its motion (the “Motion”) for  
 22 an order, substantially in the form attached hereto as **Exhibit 1** (the “Approval Order”): (i)  
 23 authorizing postpetition financing; (ii) granting liens and providing administrative expense  
 24 claim; (iii) approving loan documents relating to the foregoing; (iv) granting relief from the  
 25 automatic stay, and (v) granting related relief.

26 This Motion is made and based upon the memorandum of points and authorities provided  
 27 herein, the declaration of Nicholas Rubin filed concurrently herewith (the “Rubin Decl.”), the  
 28 papers and pleadings on file herein, judicial notice of which is respectfully requested, and any

1 argument of counsel entertained by the Court at the time of the hearing of the Motion.

2  
3 **I.**  
**JURISDICTION AND VENUE**

4 1. On January 31, 2017 (the "Petition Date"), the Debtor filed a voluntary petition  
5 for relief under Chapter<sup>1</sup> 11 of the Bankruptcy Code, thereby commencing the above-captioned  
6 case (the "Chapter 11 Case"). See ECF No. 1.

7 2. The Debtor continues to operate its business and manage its property as debtor  
8 and debtor-in-possession pursuant to Sections 1107(a) and 1108, and no request has been made  
9 for the appointment of a trustee or examiner and no official committees have been appointed in  
10 the Chapter 11 Case.

11 3. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and  
12 1134. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The statutory basis for the  
13 relief sought herein arises from Sections 361, 362, 363, 364(b), 364(c)(2), 364(c)(3) and 364(e),  
14 Bankruptcy Rules 2002, 4001, 6004, and 9014, and LR 4001.

15 4. Venue of the Debtor's Chapter 11 Case in this District is proper pursuant to 28  
16 U.S.C. §§ 1408 and 1409.

17 5. Pursuant to Local Rule 9014.2, the Debtor consents to entry of final order(s) or  
18 judgment(s) by the bankruptcy judge if it is determined that the bankruptcy judge, absent consent  
19 of the parties, cannot enter final orders for judgment consistent with Article III of the United  
20 States Constitution absent consent.

21 **II.**  
**RELIEF REQUESTED**

22  
23 6. The Debtor seeks entry of the Approval Order: (i) authorizing post-petition  
24 financing; (ii) granting liens and providing administrative expense priority pursuant to Sections  
25 364(b), 364(c)(2), and 364(c)(3); (iii) approving the Loan Documents (as defined below); (iv)

26 \_\_\_\_\_  
27 <sup>1</sup> Unless otherwise stated, all references to "Sections" herein shall be to the Bankruptcy Code appearing in Title 11  
28 of the U.S. Code; all references to a "Bankruptcy Rule" shall refer to the Federal Rules of Bankruptcy Procedure;  
and all references to a "Local Rule" shall refer to the Local Rules of Bankruptcy Practice of the U.S. District Court  
for the District of Nevada.

1 granting relief from the automatic stay pursuant to Section 362; and (v) granting other related  
2 relief.

3 7. The post-petition financing is a loan in the principal amount of no less than  
4 \$100,000 and up to \$250,000 (the “DIP Loan”) pursuant to: (i) the *Secured Promissory Note* (the  
5 “DIP Note”),<sup>2</sup> attached hereto as **Exhibit 2**, between the Debtor, as borrower, and Evan Sofer, as  
6 lender (the “Lender”); (ii) the *Deed of Trust*, attached to the DIP Note as Exhibit A; (iii) the  
7 Approval Order; and (iv) any other related loan documents (collectively, as may be amended,  
8 modified, or supplemented, the “Loan Documents”).

9 **III.**  
10 **STATEMENT UNDER BANKRUPTCY RULE 4001 AND LR 4001**

11 8. Pursuant to Bankruptcy Rule 4001(c), below is a summary of the material terms  
12 of the proposed DIP Loan (together with reference to applicable sections of the DIP Note and/or  
13 the Approval Order):

14 (a) **Total Dollar Commitment.** Up to \$250,000. See DIP Note, at p. 1.

15 (b) **Interest Rate.** A non-default rate of five percent (5.00%) per year, compounded  
16 annually, and a default rate of seven (7.00%) per year. Except as otherwise set forth  
17 in the DIP Note, all accrued but unpaid interest shall be paid on or before the  
Maturity Date. Id., §§ 4, 9.

18 (c) **Lender’s Fees and Expenses.** In the event of any litigation arising under the Loan  
19 Documents or arising from the Loan, the prevailing party will be entitled to recover  
20 from the non-prevailing party all reasonable attorneys’ fees and costs incurred in such  
21 action. Further, Debtor will pay on demand, costs and expenses incurred by or on  
behalf of Lender arising under or related to the DIP Note and other Loan Documents.  
Id., § 27.

22 (d) **Maturity.** The DIP Loan will mature on the earlier of: (a) any Default by Borrower;  
23 or (b) the ten (10) month anniversary of the Loan Date. Id., § 4.

24 (e) **Events of Default.** As more fully set forth in Section 18 of the DIP Note, the  
25 following are Events of Default, subject to certain cure periods: (i) entry of an order  
26 for the appointment of a Chapter 11 trustee; (ii) entry of an order for the appointment  
of an examiner with enlarged powers (beyond those set forth in Sections 1106(a)(3)  
and (4) of the Bankruptcy Code) under Section 1106(b) of the Bankruptcy Code; (iii)  
27 entry of an order to convert the Bankruptcy Case to a Chapter 7 case or to dismiss the

28 <sup>2</sup> All capitalized, undefined terms herein shall have the meanings ascribed to them in the DIP Note.

1 Bankruptcy Case; (iv) Borrower attempting to invalidate, reduce or otherwise impair  
2 the Liens of Lender or Lender’s claims or rights against Borrower or to subject the  
3 Collateral to assessment under Section 506(c) of the Bankruptcy Code; (v) any Lien  
4 or security interest crated by the DIP Note, Loan Documents, or Approval Order  
5 shall, for any reason, cease to be a valid Lien, subject only to the Permitted Liens; (vi)  
6 any action is commenced by Borrower which contests the validity, perfection,  
7 enforceability, or priority of any of the Liens and security interests of Lender created  
8 by the DIP Note, Loan Documents, or Approval Order; or (vii) the indictment of  
9 Borrower under any criminal statute, or commencement or threatened commencement  
10 of criminal or civil proceedings against Borrower, pursuant to which statute or  
11 proceedings the penalties or remedies sought or available include forfeiture to any  
12 governmental authority of any material portion of the Collateral. Id., § 18.

13 (f) **Purpose and Use of Proceeds.** The Debtor shall utilize the proceeds of the DIP Loan  
14 solely to fund: (i) the general working capital requirements of the Debtor, including  
15 obligations incurred in the ordinary course of the Debtor’s business, including,  
16 without limitation, ad valorem taxes, homeowners’ association fees or dues, insurance  
17 expenses, and maintenance expenses; (ii) payment of allowed fees, costs, and  
18 expenses of estate professionals; (iii) the costs to fund the investigation and  
19 prosecution of the Causes of Action, including the avoidance actions; and (iv)  
20 payment of obligations due and payable under the DIP Note. See id., § 35(c)(iv).  
The Initial Loan Advance, which shall not exceed \$100,000, shall be used in  
accordance with the budget that is approved by the Bankruptcy Court. Id., § 2.

21 (g) **Grant and Scope of Liens on Property of the Estate.** As security for the DIP Note,  
22 Debtor will make, execute, and deliver to Lender the Deed of Trust, pursuant to  
23 which Debtor will assign, pledge, and grant to Lender a security interest in, and a  
24 Lien against, the real property described in the Deed of Trust, including all property,  
25 assets, and interest therein and all proceeds thereof, whether now owned or hereafter  
26 acquired by the “estate” (within the meaning of the Bankruptcy Code). Any Liens  
27 granted in favor of Lender under the DIP Note, Loan Documents, and the Approval  
28 Order shall be valid and perfected Liens on the Collateral and such liens shall  
constitute allowed administrative expenses in the Bankruptcy Case (“Administrative  
Priority”), subject only to the Permitted Liens. Id., §§ 1(b), 3.

***This Motion does not propose to grant any priming liens pursuant to Section 364(d).***

(h) **Borrowing Limits and Borrowing Conditions.** The borrowing limits are specifically  
set forth in Section 2 of the DIP Note, and provides that Debtor may request an  
advance on account of the DIP Loan and Lender will fund each Loan Request,  
provided that (a) Debtor is not in breach; (b) Debtor is not in Default; (c) the first  
Loan Request will not exceed the sum of \$100,000.00; (d) absent the consent of  
Lender, which consent may be freely withheld in Lender’s sole and absolute  
discretion, the total aggregate amount of all Loan Requests during any thirty (30) day  
period will not exceed \$50,000.00; and (e) the total outstanding principal amount of  
all Loan Advances plus the amount of the Loan Request do not exceed \$250,000.00.  
The initial Loan Advance shall be used in accordance with the budget that is

1 approved by the Bankruptcy Court.

2 The conditions to the effectiveness of the DIP Note are specifically set forth in  
3 Section 1 of the DIP Note, which conditions include Bankruptcy Court approval in a  
4 final order, the granting of Liens and Administrative Priority, the delivery of the Loan  
Documents, and compliance with the law. Id., §§ 1-2.

5 (i) **No Adequate Protection or Priority for a Prepetition Claim.** The claims of  
6 prepetition secured creditors are not being primed under Section 364(d) of the  
Bankruptcy Code. See Approval Order.

7 (j) **Determination of the Validity of Prepetition Liens.** The Motion and Loan  
8 Documents do not address such provisions as the Lender holds no prepetition liens.

9 (k) **Waiver or Modification of the Automatic Stay.** The Motion seeks modification of  
10 the automatic stay imposed under Section 362 to the extent necessary to permit  
Debtor and Lender to perform all acts and to make, execute and deliver all  
11 instruments and documents and to pay all fees (when applicable), that may be  
reasonably required or necessary for the Debtor's performance of its obligations  
12 under the Loan Documents and the Approval Order. See DIP Note § 1, 3; Approval  
Order ¶¶ 17 and 28. Further, the DIP Note provides that Lender shall be permitted to  
13 file any financing statements, mortgages, certificates of title, notices of Lien or  
similar instruments in any jurisdiction or filing office and to take any other action  
14 with respect to the Lien granted by or pursuant to the DIP Note, any Loan DIP  
Documents, or the Approval Order. See DIP Note, § 1(b). Furthermore, as more  
15 fully discussed in Paragraph 28 of the Approval Order, the Motion also seeks  
modification of the automatic stay to allow the Lender to realize on the Collateral and  
16 exercise, upon the occurrence and during the continuance of any Event of Default, all  
rights and remedies provided for in the DIP Note and Loan Documents. See  
17 Approval Order ¶ 28.

18 (l) **Waiver of Right Regarding Filing of Plan and/or to Request Authority to Obtain**  
19 **Credit from Others.** As stated above, the Motion and the DIP Note do not include  
any waiver of rights regarding the filing of a plan. Under the terms of the DIP Note,  
20 Debtor shall not, without the Lender's written consent, create, incur, assume, or suffer  
to exist any Lien upon or with respect to the Collateral, other than Permitted Liens;  
21 file or suffer to exist under the Uniform Commercial Code or any requirement of law  
of any jurisdiction, a financing statement (or the equivalent thereof) that names  
22 Debtor as debtor; sign or suffer to exist any security agreement authorizing any  
secured party thereunder to file such financing statement (or the equivalent thereof)  
23 concerning the Collateral. See DIP Note § 35(a).

24 (m) **Plan-Related Deadlines.** The Loan Documents do not contain any plan-related  
25 deadlines.

26 (n) **Waiver Relating to Non-Bankruptcy Law.** The Lender's liens are automatically  
27 perfected without further action by the Lender or any other party. Id., § 1(b);  
Approval Order ¶ 25. Moreover, the DIP Note provides that Debtor: (a) waives  
28 demand for payment, presentment for payment, notice of nonpayment, exhibition of

1 the DIP Note, and any exemption rights against the indebtedness evidenced by the  
2 DIP Note; (b) consents to any extensions or renewals of the DIP Note; and (c) agrees  
3 that any release of any Collateral pledged as security for the Loan will not release  
4 Debtor from any obligation to pay the DIP Loan, or any other sums owed to Lender  
under the DIP Note. See DIP Note § 12. Lender and Debtor also waive their right to  
a jury trial. Id. § 37.

5 (o) ***Release, Waiver, or Limitation on Any Claim or Other Cause of Action.*** As  
6 discussed above, it is an Event of Default if: (iv) Debtor attempts to invalidate, reduce  
7 or otherwise impair the Liens of Lender or Lender's claims or rights against Debtor or  
8 to subject the Collateral to assessment under Section 506(c) of the Bankruptcy Code;  
9 (v) any Lien or security interest created by DIP Note, Loan Documents, or Approval  
Order shall, for any reason, cease to be a valid Lien, subject only to the Permitted  
10 Liens; (vi) any action is commenced by Debtor which contests the validity,  
perfection, enforceability, or priority of any of the Liens and security interests of  
Lender created by the DIP Note, Loan Documents, or Approval Order. Id., § 18.

11 (p) ***Indemnification.*** The Debtor will indemnify and hold harmless Lender and his  
12 officers, directors, employees, attorneys, consultants and agents from and against  
13 losses and claims relating to or in connection with (i) the negotiation, preparation,  
14 execution or performance or enforcement of DIP Note, Approval Order, or any other  
15 Loan Documents; (ii) Lender's furnishing of funds to Debtor under the DIP Note or  
16 other Loan Documents, including, without limitation, the management of the DIP  
17 Loan; (iii) any matter relating to the financing transactions contemplated by the DIP  
18 Note or other Loan Documents; or (iv) any claim, litigation, investigation or  
19 proceeding relating to any of the foregoing, whether or not any Indemnitee is a party  
thereto (collectively, the "Indemnified Matters"); provided, however, that Debtor  
shall not have any obligation to any Indemnitee (a) for any Indemnified Matter  
caused by the gross negligence or willful misconduct of such Indemnitee, as  
determined by a final judgment of a court of competent jurisdiction. Id., § 32. The  
DIP Note also provides that Debtor indemnifies and agrees to hold Lender harmless  
from and against Taxes and Other Taxes paid by such Person, whether or not such  
Taxes or Other Taxes were correctly or legally asserted. Id., § 36(c).

20 (q) ***Release, Waiver or Limitation on Rights Under Section 506(c).*** Pursuant to the DIP  
21 Note, it is an Event of Default Debtor attempts to invalidate, reduce or otherwise  
22 impair the Liens of Lender or Lender's claims or rights against Debtor or to subject  
the Collateral to assessment under Section 506(c) of the Bankruptcy Code. Id., §  
23 18(iv).

24 (r) ***Liens Granted on Claims Arising Under Chapter 5.*** The Lender's Liens shall *not*  
25 attach to, and the collateral for the DIP Loan shall not include: (i) avoidance actions  
26 under Sections 502(d), 544, 547, 548, 550, and 553; or (ii) any claims or causes of  
27 action against any of the Debtor's members or the affiliated entities and any proceeds  
of, or recoveries related to, the foregoing avoidance actions or claims. See Approval  
28 Order ¶ 24.

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**IV.**  
**RELEVANT FACTS**

**A. Prepetition Management of the Debtor and Retention of Force 10 Partners, LLC.**

9. On or about March 15, 2013, the Debtor was created as a Nevada series limited liability company in order to acquire property for refurbishment and sale at a profit. The initial members of the Debtor were Robert D. Goldsmith (“Goldsmith”), holding a 30% interest, IMME, LLC (“IMME”), holding a 35% interest, and certain trusts which held 35% of the membership interests. See Rubin Decl., ¶ 4.

10. Over time, the interests in the Debtor were realigned and sold. The Debtor’s current members are IMME, Sofer (the Lender), and Goldsmith. IMME holds 50% of the membership interests in the Debtor. Sofer holds 20% of the membership interests in Debtor. Presently, Goldsmith possesses a 30% interest. See id., ¶ 5.

11. Goldsmith was the initial manager of the Debtor. As manager, Goldsmith oversaw the Debtor’s assets, purchased property on behalf of the company, maintained the Debtor’s books and records, maintained Star Golden’s bank accounts, and managed litigation. See id., ¶ 6.

12. On or about December 5, 2015, following numerous disputes among the Debtor’s members regarding Goldsmith’s management of the Debtor, Goldsmith resigned as manager. Thereafter, David Peat served as the statutory manager of Star Golden. See id., ¶ 7.

13. On or about May 13, 2016, IMME and Sofer, as majority members, removed any and all current managers of the Debtor and duly elected Nicholas Rubin to serve as sole manager of the Debtor after determining it to be in the best interests of the Debtor to retain an independent manager. Thereafter, the members elected Force 10 Partners, LLC (“Force 10”), Mr. Rubin’s solely-owned entity, as manager. See id., ¶ 8.

14. Notwithstanding his resignation as manager, Goldsmith continued to hold himself out as manager of the Debtor and continued taking action on behalf of the Debtor. For this reason, among a number of others, Star Golden sought a preliminary injunction against Goldsmith in in *Star Golden Enterprises, LLC v. Robert Goldsmith, Jeff Goldsmith, Goldsmith*

1 *Enterprises, LLC, and R.D.G. Construction, LLC*, pending as Case No. A-16-732369-C in the  
2 Clark County District Court (the “State Action”). On June 29, 2016, Star Golden and Goldsmith  
3 entered into the *Stipulation and Order for Preliminary Injunction* (the “Preliminary Injunction”)  
4 in the State Action. See id., ¶ 9.

5 **B. Force 10’s Management of the Debtor as Independent Manager.**

6 15. In its capacity as independent manager, Force 10 has managed the numerous quiet  
7 title actions to which the Debtor is a party, analyzed the Debtor’s records to determine its assets,  
8 liabilities, and claims, managed the Debtor’s real property, attempted to secure the Debtor’s  
9 books and records from Goldsmith, the Debtor’s former counsel, and other parties, and  
10 investigated the transfer of money and property from the Debtor to Goldsmith and his insiders  
11 and affiliates, among other things. See Rubin Decl., ¶ 10.

12 16. On information and belief, formed after significant investigation, the Debtor has  
13 determined that while acting in his capacity as manager of the Debtor, Goldsmith diverted the  
14 Debtor’s assets to his own personal benefit and the benefit of his insiders and affiliates, including  
15 his brother, Jeff Goldsmith, Goldsmith Enterprises, LLC, and R.D.G. Construction, LLC. A  
16 number of these transactions appear to have been facilitated by attorneys Joseph Hong and  
17 Michael "Mike" Beede, acting as counsel for the Debtor, Goldsmith, and Goldsmith’s insiders  
18 and affiliates. The Debtor’s investigation has revealed numerous other transfers of money,  
19 services, or property by Goldsmith to other parties for which the Debtor received grossly  
20 insufficient or no consideration. Accordingly, in order to provide a meaningful recovery to  
21 creditors and equity holders, it will be necessary to prosecute avoidance actions. See id., ¶ 11.

22 17. Moreover, Goldsmith appears to have engaged in other acts of misfeasance or  
23 nonfeasance, including failing to file tax returns for the Debtor, failing to maintain adequate  
24 books and records, and commencing quiet title actions on behalf of the Debtor with respect to  
25 properties in which the Debtor ostensibly has no interest. See id., ¶ 12. Indeed, it appears that  
26 Goldsmith directed the commencement of these quiet title actions by Star Golden’s counsel for  
27 the benefit of those to whom the Debtor, at Goldsmith’s direction, fraudulently transferred the  
28 subject properties. See id.



1 18. Despite numerous informal and formal requests and the requirement in the  
2 Preliminary Injunction that Goldsmith turn over to the Debtor any and all documents and records  
3 in his possession pertaining to the Debtor, Goldsmith has alternately asserted that all such  
4 records have been provided to the Debtor, that all such records have been provided to David  
5 Peat, the manager of member IMME, LLC, and that such records do not exist. Whatever the  
6 case, the Debtor has been unable to complete its investigation and analysis of its financial affairs  
7 during the period of Goldsmith's management, nor file its tax returns for 2015 and 2016, and will  
8 require the processes afforded by the Bankruptcy Code to secure its books and records,  
9 investigate its financial affairs and determine its assets and liabilities, and secure and/or recover  
10 assets of the Debtor for distribution to its legitimate creditors and equity holders. See id., ¶ 13.

11 **C. The Debtor's Assets on the Petition Date.**

12 19. As set forth in the Debtor's Schedules [ECF No. 25], as of the Petition Date, the  
13 Debtor held assets, including, among others, the following:

14 a. (i) a Bank of America checking account holding \$431.75; (ii) tenant deposits of  
15 \$3,925 held by Berkshire Hathaway Home Services and \$724 held by Quality 1 Realty; (iii)  
16 retainers of \$10,590.72 held by Garman Turner Gordon, LLP, \$3,426.48 held by Force 10  
17 Partners, LLC, and an unknown amount held by Fennemore Craig; and (iv) accounts receivable  
18 of \$2,870.80 (collectively, the "Cash"). See Rubin Decl., ¶ 14.

19 b. Real property located in Las Vegas, Nevada at 6800 W. Charleston Blvd., 8101  
20 W. Flamingo Rd., 5430 Lavender Grove Ct., 3448 Castanda St., and 1199 Chestwood Ave., and  
21 in Mesquite, Nevada located at 799 Mesquite Springs, which are scheduled at an aggregate value  
22 of \$856,396 (collectively, the "Real Property"). See id.

23 c. Causes of action asserted in the following actions: (i) Star Golden Enterprises  
24 LLC vs. Robert Goldsmith, et al., Case No. Case No. A-16-732369-C; (ii) Star Golden  
25 Enterprises LLC v. Jennifer Brinkley, et al., Case No. A-14-708758-C; (iii) Star Golden  
26 Enterprises LLC v. Nationstar Mortgage LLC, et al., Case No. A-14-701939-C; (iv) Star Golden  
27 Enterprises LLC vs. Steven Jarrell, et al., Case No. A-14-708995-C; (v) Star Golden Enterprises  
28 LLC v. JP Morgan Chase Bank NA, et al., Case No. A-14701938-C; (vi) Star Golden Enterprises

1 LLC vs. MetLife Home Loans, et al., Case No. A-15-721871-C; (vii) Star Golden Enterprises  
2 LLC v. Carrington Mortgage Services, LLC, et al., Case No. A-15-722090-C; (viii) Star Golden  
3 Enterprises LLC vs. BAC Home Loans Servicing, LP, et al., Case No. A-15-722055-C; (ix) Star  
4 Golden Enterprises LLC vs. Green Tree Servicing LLC, et al., Case No. A-14-700689-C; (x)  
5 Star Golden Enterprises LLC vs. Bank of America NA, et al., Case No. A-15-722154-C; (xi) Star  
6 Golden Enterprises LLC, et al. v. Perry Guthrie, et al., Case No A-14-708927-C; (xii) Star  
7 Golden Enterprises LLC, et al. vs. National Default Servicing Corporation, et al., Case No. A-  
8 14-706242-C; and (xiii) Star Golden Enterprises LLC v. Bank of America NA, et al., Case No.  
9 A-14-702119-C; together with other contingent and unliquidated claims or causes of action,  
10 including avoidance and recovery actions, against Goldsmith, his affiliates and third parties,  
11 Joseph Hong, Michael Beede, Francis Fecteau, Harley Magden, Rick Salomon, and D N H  
12 Management, LLC (collectively, the “Causes of Action”). See id.

13 20. Thus, while the Debtor has significant assets that can be monetized, they are  
14 presently illiquid. As a result, the Debtor requires access to post-petition financing in order to  
15 fund its Chapter 11 Case, pursuant to which it will monetize its assets, adjudicate its liabilities,  
16 and tender a distribution to legitimate creditors through a confirmed plan of reorganization. See  
17 id., ¶ 15.

18 **D. Debtor’s Need for Financing.**

19 21. The Debtor’s ability to pay its independent manager and retained professionals,  
20 investigate and adjudicate claims asserted against it, investigate and prosecute the Causes of  
21 Action, including the potential avoidance actions, and otherwise finance its operations post-  
22 petition is essential to the Debtor’s ability to maximize the value of its estate for distribution to  
23 legitimate creditors. The Debtor does not have sufficient liquid assets to finance operations post-  
24 petition. As such, in the absence of the Debtor obtaining credit pursuant to Section 364, the  
25 Debtor would be unable to continue investigating the Debtor’s prepetition financial affairs, file  
26 required tax returns, and monetize its assets for the benefit of creditors by prosecuting the Causes  
27 of Action, including the avoidance actions. See Rubin Decl., ¶ 16.

28 22. The Debtor needs approval of and access to the DIP Loan to fund the Chapter 11

1 Case. The Debtor cannot meet its ongoing post-petition obligations unless it has the  
2 authorization to execute the Loan Documents and access the proceeds of the DIP Loan. In the  
3 absence of such access to funds, immediate and irreparable harm will result to the Debtor, the  
4 estate, and creditors, rendering a reorganization or liquidation of Debtor impossible and  
5 precluding any meaningful distribution to the Debtor's legitimate creditors. The Debtor believes  
6 that the terms and conditions of the Loan Documents, the proposed Approval Order, and the  
7 related relief requested herein are fair, reasonable, and in the best interests of the Debtor, the  
8 creditors, and the estate. See id., ¶ 17.

9 23. Debtor has been able to obtain financing in the aggregate maximum amount of  
10 \$250,000 in the form of secured credit, allowable under Section 364(b) as an administrative  
11 expense, or Section 364(c)(2) and (c)(3) as a secured expense. The source of the funding is the  
12 Lender, who is a minority owner of the Debtor. See id., ¶ 18.

13 **E. The Debtor Was Unable to Obtain Alternate Financing on Terms Similar to or**  
14 **Better than the DIP Loan.**

15 24. Force 10, the Debtor's independent manager, along with Debtor's counsel,  
16 negotiated the terms of the DIP Loan at length with the Lender. As a result of these good faith,  
17 arm's length negotiations, Force 10 secured for the Debtor a DIP Loan on favorable terms,  
18 including the absence of any priming liens, no plan filing restrictions, a reasonable interest rate  
19 of 5% and a default rate of 7%, and no interest due until the Maturity Date (and no payments due  
20 during the term of the DIP Loan). See Rubin Decl., ¶ 19.

21 25. The Debtor believes, based on discussions with institutional and non-institutional  
22 lenders, that it could not obtain financing from any other lender on terms equally or more  
23 favorable than the DIP Loan offered by the Lender, and certainly not before all of the Debtor's  
24 limited cash resources were depleted by the search.<sup>3</sup> Without unencumbered or traditional assets  
25 to serve as security, such as unencumbered real estate, inventory, equipment, etc., or strong  
26 guarantees, Force 10 is unable to obtain alternate financing on similar or better terms than

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28 <sup>3</sup> As a minority member of the Debtor, the Lender has already performed all the due diligence necessary in  
connection with the DIP Loan.

1 provided through the DIP Loan. See id., ¶ 20.

2 26. The Debtor, operating through the independent manager, Force 10, exercised  
3 sound business judgment in negotiating the favorable Loan Documents and the Approval Order  
4 that is presently before the Court. See id., ¶ 21. The Lender's offer to provide the DIP Loan as  
5 an administrative claim pursuant to Section 364(b) and a non-priming secured loan pursuant to  
6 Sections 364(c)(2) and (c)(3), in an amount necessary to meet the Debtor's working capital needs  
7 on the terms negotiated, simply cannot, in the judgment of Debtor, be matched by any third-party  
8 lender. See id. The Debtor believes that the DIP Loan is in the best interests of the estate and  
9 consistent with its fiduciary duties. See id.

10 **V.**  
11 **LEGAL ARGUMENT**

12 **A. Application of the Business Judgment Standard.**

13 As described above, the Debtor has concluded that the DIP Loan provides the only  
14 reasonable alternative available under the circumstances. Bankruptcy courts routinely defer to a  
15 debtor's business judgment on business decisions, including the decision to borrow money. See  
16 Group of Inst'l Investors v. Chicago Mil. St. P. & Pac. Ry., 318 U.S. 523, 550 (1943); In re  
17 Ames Dep't Stores, Inc., 115 B.R. 34, 38 (Bankr. S.D.N.Y. 1990) (in examining requests for  
18 interim financing, courts apply the same business judgment standard applicable to other business  
19 decisions); see also In re Yellowstone Mountain Club, LLC, 2008 WL 5869859 (Bankr. D.  
20 Montana, November 26, 2008) (acknowledging the use of the business judgment standard with  
21 respect to approval of Section 364 financing).

22 Courts generally will not second-guess a debtor-in-possession's business decisions when  
23 those decisions involve "a business judgment made in good faith, upon a reasonable basis, and  
24 within the scope of [its] authority under the Code." Id. at 513-14 (footnotes omitted). See also  
25 In re Simasko Prod. Co., 47 B.R. 444, 449 (D. Colo. 1985) ("Business judgments should be left  
26 to the board room and not to this Court."); In re Lifeguard Indus., Inc., 37 B.R. 3, 17 (Bankr.  
27 S.D. Ohio 1983) (same). In general, a bankruptcy court should defer to a debtor-in-possession's  
28 business judgment regarding the need for and the proposed use of funds, unless such decision is

1 arbitrary and capricious. See In re Curlew Valley Assoc., 14 B.R. 506, 511-13 (Bankr. D. Utah  
2 1981). Provided that a debtor's business judgment does not run afoul of the provisions of, and  
3 policies underlying, the Bankruptcy Code, courts generally grant a debtor considerable  
4 deference. See, e.g., In re Ames Dep't Stores, Inc., 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990)  
5 (“[T]he court’s discretion under section 364 is to be utilized on grounds that permit reasonable  
6 business judgment to be exercised so long as the financing agreement does not contain terms that  
7 leverage the bankruptcy process and powers or its purpose is not so much to benefit the estates as  
8 it is to benefit a party-in-interest.”).

9 Approval of the DIP Loan will provide the Debtor with immediate and ongoing access to  
10 funds so that the Debtor can administer its estate, monetize its assets, and propose a plan that  
11 provides a meaningful recovery to creditors. Absent access to the DIP Loan, the Debtor will not  
12 have sufficient available sources of capital to successfully monetize its assets, resolve the  
13 numerous claims asserted against it, fund the prosecution of the Causes of Action, and tender a  
14 distribution to the Debtor’s legitimate creditors through a plan of reorganization. The funds  
15 provided under the DIP Loan will enable the Debtor to prosecute the Chapter 11 Case and  
16 enhance the value of the estate.

17 The Debtor has exercised sound business judgment in determining that the proposed DIP  
18 Loan facility is appropriate and have satisfied the legal prerequisites to borrow under the Loan  
19 Documents. Accordingly, the Debtor should be granted authority to borrow funds from the  
20 Lender pursuant to Section 364, and take the other actions contemplated herein.

21 **B. Good Faith.**

22 Section 364(e) was designed to “encourage the extension of credit to debtors” by  
23 allowing lenders to “rely on a bankruptcy court’s authorization of the transaction.” In re EDC  
24 Holding Co., 676 F.2d 945, 947 (7th Cir. 1982) (the purpose of Section 364(e) is “to overcome  
25 people’s natural reluctance to deal with a bankrupt firm whether as purchaser or lender by  
26 assuring them that so long as they are relying in good faith on a bankruptcy judge’s approval of  
27 the transaction they need not worry about their priority merely because some creditor is objecting  
28 to the transaction and is trying to get the district court or the court of appeals to reverse the

1 bankruptcy judge”); see also In re North Atlantic Millwork Corp., 155 B.R. 271, 279 (Bankr. D.  
2 Mass. 1993) (“The purpose of section 364(e) is to allow good faith lenders to rely upon  
3 conditions at the time they extend credit and to encourage lenders to lend to bankrupt entities.”).

4 The proposed DIP Loan is the result of good faith and arm’s-length negotiations, with all  
5 parties represented by counsel. Although the Lender is a minority owner of the Debtor, the  
6 Debtor’s independent manager, Force 10, negotiated the DIP Loan solely in pursuit of the best  
7 interests of the Debtor and the estate. The Debtor believes that the terms of the DIP Loan are fair  
8 and reasonable under the circumstances, and that the Lender is entitled to the benefits of Section  
9 364(e).

10 **VI.**  
11 **MODIFICATION OF THE AUTOMATIC STAY**

12 The relief requested herein contemplates a modification of the automatic stay (to the  
13 extent applicable) to permit the Debtor to: (i) grant the liens as set forth herein and in the DIP  
14 Note to the Lender and to perform such acts as may be requested to assure the perfection and  
15 priority of such liens; (ii) permit the Lender to exercise, in compliance with the terms of the Loan  
16 Documents, all rights and remedies under such Loan Documents; and (iii) implement the terms  
17 of the Approval Order.

18 Stay modifications of this kind are ordinary and standard features of post-petition debtor  
19 financing facilities and, in the Debtor’s business judgment, are reasonable and fair under the  
20 present circumstances.

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**VII.**  
**CONCLUSION**

WHEREFORE, the Debtor respectfully requests entry of the Approval Order attached hereto as **Exhibit 1** granting the relief requested herein, and for such other and further relief as the Court may deem just and appropriate.

Dated: August 7, 2017.

GARMAN TURNER GORDON

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