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13 **UNITED STATES BANKRUPTCY COURT**
14 **DISTRICT OF NEVADA**

15 In re:
16 GOODWILL INDUSTRIES OF SOUTHERN
17 NEVADA, INC.,
18 Debtor.

19 Case No.: BK-S-17-14398-btb
20 Chapter 11

21 Date: August 18, 2017
22 Time: 1:30 p.m.

23 **EMERGENCY MOTION FOR: (I) INTERIM APPROVAL OF EMRGENCY INTERIM**
24 **ORDER BETWEEN THE DEBTOR AND UMB BANK, N.A., AS INDENTURE**
25 **TRUSTEE, FOR CONSENT TO USE CASH COLLATERAL PURSUANT TO**
26 **11 U.S.C. § 363(c)(2), AND GRANTING ADEQUATE PROTECTION PURSUANT TO**
27 **11 U.S.C. §§ 362 AND 363(e), AND (II) SETTING A FURTHER INTERIM HEARING**

28 Goodwill Industries of Southern Nevada, Inc., a Nevada non-profit corporation (the
"Debtor" or "GSN"), hereby submits its emergency motion (the "Motion") requesting that the
Court enter the *Emergency Order Authorizing Interim Use of Cash Collateral Pursuant to 11*
U.S.C. § 363(c)(2), and Granting Adequate Protection Pursuant to 11 U.S.C. §§ 362(c)(2) and
Granting Adequate Protection Pursuant to 11 U.S.C. § 362 and 363(e); and Scheduling Further
Interim Hearing (the "Emergency Interim Order") attached hereto as **Exhibit 1**.

This Motion is made and based on the points and authorities herein, the *Omnibus*
Declaration of John Helderman in Support of Debtor's Initial Motions and Related Relief (the
"Omnibus Declaration") [ECF No. 28], the *Declaration of John Helderman in Support of Cash*
Collateral Stipulation, the papers and pleadings on file herein, judicial notice of which is

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1 respectfully requested, and any arguments of counsel entertained by the Court at the time of the
2 hearing on this matter.

3 **I. Jurisdiction and Venue**

4 1. GSN is a nonprofit 501(c)(3) organization operating exclusively in Southern
5 Nevada that provides job training, employment placement services, and other community-based
6 programs for people with disabilities and other barriers to employment. GSN is funded by a
7 network of approximately twenty (20) retail thrift stores as well as numerous attended donation
8 centers throughout the Las Vegas Valley, which operate as nonprofits as well.

9 2. On August 11, 2017 (the "Petition Date"), GSN filed its voluntary petition for
10 relief under chapter 11 of the Bankruptcy Code, thereby commencing its bankruptcy case (the
11 "Chapter 11 Case"). Debtor is authorized to operate its business and manage its properties as
12 debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

13 **II. Jurisdiction and Venue**

14 3. The Court has subject matter jurisdiction to consider and determine this matter
15 pursuant to 28 U.S.C. §§ 157 and 1334, and Local Rule 1001(b)(1). This is a core proceeding
16 pursuant to 28 U.S.C. § 157(b). Pursuant to LR 9014.2, the Debtor consents to the entry of final
17 orders and judgments by the bankruptcy judge. Venue is proper before this Court pursuant to 28
18 U.S.C. §§ 1408(1) and 1409(a).

19 **III. Concise Statement of Relief Requested Pursuant to Fed. R. Bankr. P. 4001(d)(1)(B)**

20 4. Debtor requests entry of an order pursuant to Fed. R. Bankr. P. 4001(d) approving
21 the proposed Stipulation. As required by Fed. R. Bankr. P. 4001(d)(1)(B), the Stipulation
22 contains various provisions listed in Fed. R. Bankr. P. 4001(a)(1)(B)(i) through (xi) as referenced
23 hereinafter.

24 5. "[A] grant of priority or a lien on property of the estate under § 364(c) or (d)."
25 Yes, paragraph 9.

26 6. "[T]he providing of adequate protection or priority for a claim that arose before
27 the commencement of the case, including the granting of a lien on property of the estate to secure
28 the claim, or the use of property of the estate or credit obtained under § 364 to make cash

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1 payments on account of the claim.” Yes, paragraph 9.

2 7. “[A] determination of the validity, enforceability, priority, or amount of a claim
3 that arose before the commencement of the case, or of any lien securing the claim.” Yes,
4 paragraph D, but only as to the Debtor, and not binding any third party or any statutory
5 committee.

6 8. “[A] waiver or modification of Code provisions or applicable rules relating to the
7 automatic stay.” Yes, but subject to the terms and conditions in paragraph 11.

8 9. “[A] waiver or modification of any entity’s authority or right to file a plan, seek
9 an extension of time in which the debtor has the exclusive right to file a plan, request the use of
10 cash collateral under § 363(c), or request authority to obtain credit under § 364.” None.

11 10. “[T]he establishment of deadlines for filing a plan of reorganization, for approval
12 of a disclosure statement, for a hearing on confirmation, or for entry of a confirmation order.”
13 None.

14 11. “[A] waiver or modification of the applicability of nonbankruptcy law relating to
15 the perfection of a lien on property of the estate, or on the foreclosure or other enforcement of
16 the lien.” None.

17 12. “[A] release, waiver, or limitation on any claim or other cause of action belonging
18 to the estate or the trustee, including any modification of the statute of limitations or other
19 deadline to commence an action.” None, although the Debtor does make various basic
20 stipulations in paragraph D.

21 13. “[T]he indemnification of any entity.” None.

22 14. “[A] release, waiver, or limitation of any right under § 506(c).” None.

23 15. “[T]he granting of a lien on any claim or cause of action arising under §§ 544,
24 545, 547, 548, 549, 553(b), 723(a), or 724(a).” None.

25 **IV. Concise Statement of Relief Requested**

26 16. By way of the instant Motion, the Debtor first seeks authorization and approval
27 for the immediate entry of the Emergency Interim Order. Notably, the Emergency Interim Order
28 is proposed to terminate on September 1, 2017 (unless otherwise terminated earlier in accordance

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1 to its terms), and thus is simply a temporary two-week interim measure from the Petition Date to
2 allow the Debtor to continue operating and allow it to continue its dialogue with the Indenture
3 Trustee regarding a potential more permanent cash collateral arrangement. As a result, the
4 parties respectfully requests that the Court also schedule a further interim hearing on or about
5 August 30, 2017, and in any event prior to September 1, 2017.

6 **V. Statement of Facts**

7 17. As of December 1, 2015, GSN did a series of bond offerings to raise funds in the
8 total principal amount of \$22,145,000. First, GSN made a tax-exempt bond offering, Series
9 2015A, which raised \$19,735,000 in total proceeds (the "Series A Bonds"). The first tranche of
10 the Series A Bonds in the amount of \$8,975,000 were for a 20 year term (due December 1, 2035)
11 yielding 5.625%, and the second tranche was in the amount of \$10,760,000 and were for a 30
12 year term (due December 1, 2045) yielding 5.875%. The proceeds generated from the Series A
13 Bonds were used by GSN principally to finance the costs of acquiring and equipping three
14 facilities to be used as retail stores and donation centers: (a) 2575 East Lake Mead Blvd., North
15 Las Vegas, Nevada, for \$4,300,000 on December 16, 2015; (b) 6765 N. Durango Dr., Las Vegas,
16 Nevada, for \$8,200,000 on March 21, 2016; (c) 330 E. Silverado Ranch Blvd., Las Vegas,
17 Nevada, for \$5,068,984.62 on September 12, 2016 (collectively, the "Purchased Properties").
18 Some of the proceeds generated from the Series A Bonds were also used to fund a Reserve Fund
19 as set forth in the Indenture. Except for these three locations, all of GSN's other locations are
20 leased.

21 18. At the same time, GSN also did a taxable bond offering, Series 2015B, which
22 raised \$2,410,000 in total proceeds (the "Series B Bonds" and together with the Tax Exempt
23 Bonds, the "Bonds"). The Series B Bonds were for a three year term (due December 1, 2018)
24 yielding 5.400%. The proceeds generated from the Series B Bonds were used principally to
25 refinance certain existing indebtedness of GSN, and to pay the issuance expenses of the Bonds.

26 19. The Bonds were offered pursuant to a Limited Offering Memorandum dated as of
27 November 13, 2015 (as amended, the "Offering Memorandum"), a true and correct copy of
28 which is attached to the Omnibus Declaration as **Exhibit 1**.

1 20. The Bonds were issued pursuant to a Trust Indenture (the “Indenture”), dated as
2 of December 1, 2015, by and among the Public Finance Authority, a joint powers commission
3 under the laws of the State of Wisconsin (the “Authority”), U.S. Bank National Association, as
4 trustee (the “Trustee”), and GSN, as borrower. A true and correct copy of the Indenture is
5 attached to the Omnibus Declaration as **Exhibit 2**. The Bonds are limited obligations of the
6 Authority, and secured by the Trust Estate, as pledged to the Authority, and certain other rights,
7 title, and interest pledged by GSN to the Trustee. The Depository Trust Company serves as
8 securities depository for the Bonds.

9 21. Specifically, the Indenture provides that the Bonds are payable from all of the
10 following (collectively, the “Trust Estate”): (a) all rights, title and interest of the Authority under
11 the Loan Agreement and Promissory Note, except the Authority’s Unassigned Rights; (b) all
12 rights, title and interests of the Authority in the “Revenues; (c) all rights, title and interests of the
13 Authority in the Gross Revenues and the Gross Revenues Fund, subject to Permitted
14 Encumbrances and to the ratable sharing of such matters with holders of any Parity Debt, as
15 specified in the Loan Agreement; (d) all Funds created under the Indenture (except the Rebate
16 Fund), and (e) any and all other interests in real or personal property of every name and nature
17 from time to time hereafter by delivery or by writing of any kind specifically mortgaged, pledges
18 or hypothecated, as and for additional security under the Indenture.

19 22. Pursuant to a Loan Agreement (the “Loan Agreement”) dated as of December 1,
20 2015, by and between the Authority and GSN, the Authority lent the proceeds of the Bonds to
21 GSN for the uses as provided therein (the “Loan”). GSN’s obligation as borrower to repay such
22 Loan is evidenced by a promissory note. A true and correct copy of the Loan Agreement,
23 including the Promissory Note, is attached to the Omnibus Declaration as **Exhibit 3**.

24 23. Repayment of the Loan is secured by various instruments. First, the Loan is
25 secured by 4 UCC-1 financing statements filed against GSN with the Nevada Secretary of State.
26 The first UCC-1 was filed on December 10, 2015 for collateral described as all of GSN’s “Gross
27 Revenues” and all of its right, title and interest in all deposit accounts to which Gross Revenues
28 are deposited, including GSN’s bank accounts at Bank of Nevada, a division of Western Alliance

1 Bank (the "Bank"). "Gross Revenues" is defined by the foregoing to include "all revenues,
2 income, receipts and money now existing or hereafter received by or on behalf of Debtor, solely
3 from its Facilities, including (a) gross revenues derived from its operations and possession and
4 pertaining to such Facilities; (b) gifts, grants, bequests, donations and contributions, exclusive of
5 any gifts, grants, bequests, donations and contributions to the extent specifically restricted by the
6 donor to a particular purpose inconsistent with their use for the payment of Base Loan Payments,
7 (c) proceeds derived from (i) condemnation proceedings, (ii) accounts and accounts receivable,
8 (iii) securities and other investments, (iv) inventory and other tangible and intangible property,
9 (v) insurance, (vi) contracts rights and other rights and assets now or hereafter owned, held or
10 possessed by or on behalf of Debtor, (vii) payment intangibles and (viii) realization on any
11 collateral provided by Debtor under the Loan Agreement (hereinafter defined), including,
12 without limitation, any Deed of Trust, and (d) rentals received from the lease of real estate." The
13 other three UCC-1s were all filed at or around the time of the purchase of each of the Purchased
14 Facilities. True and correct copies of the 4 financing statements filed with the Nevada Secretary
15 of State are attached to the Omnibus Declaration as Exhibit 4.

16 24. Second, the Loan is also secured by three Deeds of Trust, Assignments of Rents
17 and Leases, Security Agreement, and Fixture Filings, and by three UCC-1 financing statements
18 all recorded against the Purchased Properties in the Official Records of the County Recorder,
19 Clark County, Nevada on the same date as GSN closed on its respective purchases of those
20 properties. The foregoing filings all indicated that the collateral was all of GSN's right, title and
21 interest in and to the Purchased Properties. True and correct copies of the foregoing three deeds
22 of trust are attached to the Omnibus Declaration as Exhibit 5, and the three financing statements
23 are attached thereto as Exhibit 6.

24 25. Third, the Loan is also secured by a Deposit Account Control Agreement (the
25 "DACA") among GSN, the Bank, as deposit bank, and the Trustee, as secured party, as against
26 GSN's bank accounts. A true and correct copy of the DACA is attached to the Omnibus
27 Declaration as Exhibit 7.

28 26. In or about January 2017, and as a result of its financial performance for 2016,

1 GSN was in covenant default under the Loan Agreement because of its inability to meet certain
2 liquidity and financial covenants therein. In particular, GSN failed to satisfy the Fixed Charges
3 Coverage Ratio. This covenant default led to the appointment of a management consultant who
4 analyzed GSN's operations and made various recommendations to try and improve operations in
5 a report issued June 30, 2017.

6 27. The Loan Agreement provides that payments on the Bonds are due semi-annually
7 on June 1 and December 1 of each year, commencing June 1, 2016, with the next payment of
8 \$1,393,950 due December 1, 2017. GSN presently lacks the funds to be able to make this next
9 payment on the Bonds, and thereafter. As of the commencement of GSN's Chapter 11 Case, the
10 total principal amount outstanding on the Bonds is \$20,570,000, and the amount in the Reserve
11 Fund is \$972,912.60. The Reserve Fund was originally \$1,447,187.50, but GSN drew
12 \$569,129.88 of the Fund to make the \$598,950.00 interest payment on the Bonds that was due on
13 June 1, 2017. The terms of the Bond Agreement require GSN to restore in twelve monthly
14 installments any draw on the Reserve Fund and GSN made payments of \$47,427.49 in July and
15 August in an effort to comply.

16 28. The Debtor has been advised very recently that UMB Bank, N.A., of
17 Minneapolis, Minnesota (the "Indenture Trustee"), has been appointed as successor Trustee for
18 the Bonds. Although proof of the foregoing remains outstanding, counsel for the Indenture
19 Trustee has represented that the assignments are forthcoming and will be filed with the Court,
20 and the Debtor accepts those representations as true.

21 29. The change in the Indenture Trustee as well as certain events that precipitated the
22 Debtor's Chapter 11 Case quicker than the Debtor had hoped did not allow for a substantial
23 amount of time pre-petition to engage in cash collateral discussions, and thus the parties propose
24 this Emergency Interim Order to provide them with a two-week window to engage in further
25 discussions regarding the possibility of a more long term potential cash collateral stipulation.
26 The parties negotiated the proposed Emergency Interim Order in good faith and at arm's length.
27 The terms of the proposed Emergency Interim Order were negotiated on an a very expedited
28 timetable, however, the parties took efforts to limit the terms and conditions therein to only what

1 is strictly needed for this interim period, and anticipate that any additional possible cash
2 collateral stipulation will need to contain significant additional terms and conditions as is
3 common and expected for such a possible arrangement. For the avoidance of doubt, however, no
4 party can guaranty that these further negotiations will, in fact, result in a fully agreed upon cash
5 collateral stipulation, and the parties fully reserve their rights and remedies in that regard, but
6 subject to the terms and conditions of the Emergency Interim Order.

7 30. Given that the Debtor funds its mission activities through, among other matters,
8 its retail thrift store operations, it is imperative that the Debtor have immediate access to use of
9 its cash and cash collateral in order to continue its operations, and the failure to grant such relief
10 will result in immediate and irreparable harm to the Debtor, its estate, and thus also to all
11 creditors and parties in interest.

12 **VI. Legal Argument**

13 31. Section 363 of the Bankruptcy Code provides that a debtor in possession may not
14 use cash collateral unless each entity with an interest in such cash collateral consents, or the
15 court, after notice and a hearing, authorizes the use. 11 U.S.C. § 363(c)(2); see Sears Savings
16 Bank v. Tucson Industrial Partners, 129 B.R. 614 (B.A.P. 9th Cir. 1991).

17 32. Section 363(e) of the Bankruptcy Code provides, in relevant part, that “at any
18 time, on request of an entity that has an interest in property used . . . or proposed to be used, by
19 the trustee, the court, with or without a hearing, shall prohibit or condition such use . . . as is
20 necessary to provide adequate protection of such interest.” 11 U.S.C. § 363(e). The debtor in
21 possession has the burden of proof on the issue of adequate protection, and the entity claiming an
22 interest in the alleged cash collateral has the burden of proof on the issue of the validity, priority,
23 and extent of its interest in the property. 11 U.S.C. § 363(p).

24 33. Section 363(c)(3) of the Bankruptcy Code permits a preliminary hearing and
25 order for use of Cash Collateral until a final hearing on the matter can be held. 11 U.S.C. §
26 363(c)(3). In addition, this section states that “[t]he court shall act promptly on any request for
27 authorization . . .” Id.

28 34. Pursuant to section 363(a) of the Bankruptcy Code, cash collateral includes cash,

1 cash equivalents, deposit accounts, rents, and proceeds “in which the estate and an entity other
2 than the estate have an interest.” 11 U.S.C. § 363(a). Whether an entity has a security interest in
3 a particular type of property is generally determined by state law. Butner v. United States, 440
4 U.S. 48, 57 (1979); Raleigh v. Illinois Dep’t of Revenue, 530 U.S. 15, 20 (2000). The “interest”
5 set forth in section 363(a) of the Bankruptcy Code refers to a valid and perfected security interest
6 between the parties that secures the cash collateral. Waldron v. Nw. Acceptance Corp. (In re
7 Johnson), 62 B.R. 24, 28-29 (B.A.P. 9th Cir. 1986); In re Corner Pockets of the Sw., Inc., 85
8 B.R. 559, 562 (Bankr. D. Mont. 1988). Pursuant to Nevada law, a security interest in cash or
9 deposit accounts can only be perfected by possession or control. NRS §§ 104.9312(2)(a) and (c),
10 and 104.9313(1); see Rus, Milibrand & Smith, APC v. Yoo (In re Dick Cepek, Inc.), 339 B.R.
11 730, 740 (B.A.P. 9th Cir. 2006).

12 35. In the exercise of its business judgment and as a matter of economic reality, the
13 Debtor has determined must restructure its operations. In order to accomplish this, the Debtor
14 must maintain and preserve its operations at some level in the meantime. Debtor has therefore
15 prepared and developed its Budget. Debtor requires the use of cash generated by its operations
16 and in its bank accounts in order to continue its operations. If Debtor is unable to continue its
17 operations, the organization and its reorganization will falter and fail.

18 36. Except for any dedicated grant funds and donations expressly earmarked for
19 matters other than payment to the obligations owed to the Indenture Trustee, the Debtor
20 recognizes that cash on hand and in its bank accounts, as well as cash generated from its
21 business, including the proceeds of all accounts receivable both existing on the Petition Date and
22 generated subsequent to the Petition Date, is cash collateral, and as such, the Indenture Trustee is
23 entitled, pursuant to sections 361 and 363(e) of the Bankruptcy Code, to adequate protection of
24 its interests as a condition to the Debtor’s use of cash collateral.

25 37. Debtor has requested authorization from the Indenture Trustee to use the cash
26 collateral in the operation of the business, and the Indenture Trustee has required that Debtor
27 enter into the Stipulation. Absent the Stipulation and the order approving it, then the Indenture
28 Trustee would not consent to the Debtor’s use of cash collateral. Debtor has an immediate need

1 for access to its cash, otherwise it will not be able to pay employees and other expenses essential
2 to maintain its operations. The preliminary approval of the Stipulation and the Budget is
3 therefore an emergency in order to sustain operations, and is necessary to avoid immediate and
4 irreparable harm.

5 38. The Ninth Circuit has recognized that immediate interim relief may be crucial to
6 the success of a corporate reorganization:

7 We realize that in certain circumstances, the entire reorganization
8 effort may be thwarted if emergency leave is withheld and that
9 reorganization under the Bankruptcy Code is a perilous process,
10 seldom more so than at the outset of the proceedings when the
11 debtor is often without sufficient cash flow to fund a central
12 business operation. It is for this reason that Congress specified that
13 hearings concerning the use of cash collateral “shall be scheduled
14 in accordance with the needs of the debtor.”

15 In re Center Wholesale, Inc., 759 F.2d 1440, 1449 n.21 (9th Cir. 1985) (citations omitted).

16 39. Because the cash needs of the Debtor are immediate, absent satisfying those
17 needs, the Debtor may be forced to terminate its operations. This would destroy the going
18 concern value of the enterprise as a whole and minimize the potential value of the estate for
19 creditors, not to mention a tremendous loss to the community at large. Consequently, the Debtor
20 has demonstrated “immediate and irreparable harm to the estate” absent emergency
21 consideration of the relief requested in this Motion.

22 40. While elaborating on the term “adequate protection: in section 361 of the
23 Bankruptcy Code, Congress did not provide a precise definition, but rather set forth three non-
24 exclusive examples. 11 U.S.C. § 102(3) (“includes” is not limiting). Though neither section 361
25 of the Bankruptcy Code nor any other provision of the Bankruptcy Code denies the nature and
26 extent of the “interest” of the secure creditor that is entitled to adequate protection, section 361
27 of the Bankruptcy Code plainly provides that the qualifying interest demands protection only to
28 the extent that the use of the creditor’s collateral will result in a decrease in the “value of such
entity’s interest in such property.” 11 U.S.C. § 361; see also 11 U.S.C. § 363(e).

41. The U.S. Supreme Court addressed the issue in United Savings Ass’n of Texas v.

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1 Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365 (1998). Timbers instructs that a
2 secured creditor is entitled to “adequate protection” against diminution in its interest in its
3 asserted collateral by reason of use of such collateral. Where the secured creditor’s interest and
4 the value of the collateral is not diminishing by its use, sale or lease, it follows that the secured
5 creditor’s interest is adequately protected. Id. 369-73 (holding that the “interest in property”
6 entitled to protection is “the value of the collateral” that secures such claim).

7 42. The purpose of adequate protection “is to ensure that the secured creditor
8 ultimately received what it would have received had not bankruptcy intervened,” such that “the
9 creditor received assurances that the value it could have received through foreclosure will not
10 decline.” In re Las Vegas Monorail Co., 429 B.R. 317, 326 (Bankr. D. Nev. 2010) (quoting
11 Security Leasing Partners, LP v. ProAlert, LLC (In re ProAlert, LLC), 314 B.R. 436, 441-42
12 (B.A.P. 9th Cir. 2004)).

13 43. When cash collateral is to be used consensually as set forth in this Motion and the
14 Stipulation, Fed. R. Bankr. P. 4001(d) applies. See In re Manchester Ctr., 123 B.R. 378 (Bankr.
15 C.D. Cal. 1991); Am. Savings & Loan Assoc. v. Weber (In re Weber), 99 B.R. 1001, 1005
16 (Bankr. D. Utah 1989). As discussed above, the Trustee consents to the use of cash collateral
17 subject to the terms and conditions set forth in the Stipulation.

18 44. It is undisputed that the Trustee is the senior secured lender with a first priority
19 security interest in and to any cash and cash collateral. As illustrated by the Budget, Debtor is
20 only seeking to use Cash Collateral to preserve, maintain and operate its operations in the
21 ordinary course of the business, and presently only for the first four (4) months of the Chapter 11
22 Case. Each expense included in the Budget is necessary and appropriate to the Debtor. As such,
23 Debtor should be granted authority to use Cash Collateral consistent with the Budget and the
24 other terms and conditions as set forth in the Stipulation, because such use to maintain the
25 Debtor’s operations, in and of itself, provides the Trustee with adequate protection.

26 **VII. Conclusion**

27 WHEREFORE, Debtor respectfully requests that the Court enter the proposed
28 Emergency Interim Order, thereby authorizing and approving Debtor’s use of Cash Collateral on

1 an interim basis, subject to the terms and conditions therein, and setting a further interim hearing
2 on or about August 30, 2017, and in any event prior to September 1, 2017, which is the
3 termination date of the Emergency Interim Order (unless terminated earlier pursuant to the terms
4 and conditions set forth therein). The Debtor also requests such other and further relief as is just
5 and proper.

6 DATED: August 18, 2017.

7 By: /s/ Matthew C. Zirzow
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