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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re NEW YORK CRANE & EQUIPMENT CORP., et al.,[1] Debtors.	Chapter 11 Case No. 16-40043 (CEC) Case No. 16-40044 (CEC) Case No. 16-40045 (CEC) Case No. 16-40048 (CEC) Jointly Administered

[1] The Debtors, along with the last four digits of each Debtor's federal employer identification number or social security number, are: (i) New York Crane & Equipment Corp. ("N.Y. Crane") (7592); (ii) J.F. Lomma, Inc. (New Jersey) (2773 ("Lomma N.J.")); (iii) J.F. Lomma, Inc. (Delaware) (0251) ("Lomma Del."); and (iv) James F. Lomma (8914) ("Lomma").

JOINT MOTION OF THE CORPORATE DEBTORS AND CHAPTER 11 TRUSTEE FOR INDIVIDUAL DEBTOR JAMES F. LOMMA FOR ENTRY OF FINAL ORDER (I) AUTHORIZING THE DEBTORS TO OBTAIN POSTPETITION FINANCING AND GRANT SECURITY INTERESTS AND SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS WITH RESPECT TO THE COLLATERAL; (II) MODIFYING THE AUTOMATIC STAY; (III) AUTHORIZING THE DEBTORS AND NON-RECOURSE GUARANTORS TO ENTER INTO AGREEMENTS WITH COBRA KAI LENDING LLC; (IV) AUTHORIZING USE OF CASH COLLATERAL; AND (V) GRANTING RELATED RELIEF

TO: HONORABLE CARLA E. CRAIG,
CHIEF UNITED STATES BANKRUPTCY JUDGE:

Perry M. Mandarino, the Chapter 11 trustee duly appointed on June 23, 2017 as the operating trustee of individual debtor James F. Lomma, Case No. 16-40048 (CEC) (the "Chapter 11 Trustee") in the jointly administered cases of the above-captioned individual debtor James F. Lomma (the "Individual Debtor" or "Lomma"), by his counsel, Okin Hollander LLC, and the corporate debtors N.Y. Crane, Lomma N.J., and Lomma Del. (collectively, the "Corporate Debtors" and together with Lomma, the "Debtors"), by their counsel, Otterbourg P.C. seek entry of a final order, substantially in the form attached hereto as **Exhibit "A"** (the "Final Order"), (i) authorizing the Debtors to obtain post-petition financing from Cobra Kai Lending LLC (the "DIP Lender") on the terms described in this motion (the "Motion"); and (ii) granting related relief, and in support, state as follows:

Jurisdiction and Venue

1. The Bankruptcy Court for the Eastern District of New York (the "Court") has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334, and Administrative Orders 264 and 601 of the United States District Court for the Eastern District of New York referring cases under the Bankruptcy Code to bankruptcy judges for the Eastern District of New York. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

2. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory predicates for the relief requested herein include sections 105, 361, 362, 363, 364(c)(1), 364(c)(2) and 364(d)(1) of title 11 of the United States Code (the "Bankruptcy Code"), Rules 2002, 4001, and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rules 4001-5 and 9013-1(a) of the Local Bankruptcy Rules for the Eastern District of New York (the "Local Bankruptcy Rules").

Procedural Background

4. On January 6, 2016 (the "Petition Date"), the Individual Debtor and the Corporate Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code, thereby commencing the above-captioned bankruptcy cases (the "Chapter 11 Cases"). On January 8, 2016, the Court entered an order jointly administering the Individual Debtor's and Corporate Debtors' cases.

5. On February 12, 2016, an official committee of unsecured creditors (the "Committee") was appointed by the Office of the United States Trustee for the Eastern District of New York (the "United States Trustee"). The Committee is represented by Togut, Segal & Segal, P.C.

6. On June 23, 2017 (the "Appointment Date"), the Chapter 11 Trustee was appointed as the operating trustee of the Individual Debtor. An order authorizing the Chapter 11 Trustee's appointment (the "Appointment Order") was entered on June 27, 2017 [Dkt. No. 968].

7. The Individual Debtor continued to operate his business and manage his properties as a debtor and debtor-in-possession pursuant to Bankruptcy Code sections 1107(a) and 1108 through June 27, 2017, when the Court entered the Appointment Order. The Corporate Debtors continue to operate their businesses and manage their properties as debtors and debtors-in-possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

8. The organizational structure of the Debtors is comprised of the Individual Debtor, the Corporate Debtors, certain non-Debtor affiliated entities which Lomma controls or in which he has equity/ownership interests (collectively, the "Affiliates"), and certain entities that with Lomma, own various investment properties (the "FEK Entities," and together with the Affiliates, the "Non-Debtor Affiliates"), as set forth on the organizational chart annexed hereto as **Exhibit "B"**. Since the Petition Date, the Debtors and the Non-Debtor Affiliates have operated, in many respects, as if they were a single economic enterprise.

Relief Requested

9. By this Motion, the Chapter 11 Trustee requests entry of the Final Order, which will provide the Debtors with necessary access to a $10 million delayed draw debtor-in-possession ("DIP") facility (the "DIP Facility"). The proceeds of the DIP Facility (the "DIP Loan") will be used to (a) fund general working capital and the costs of administering the Chapter 11 Cases; (b) pay all fees, costs and expenses provided for under the DIP credit agreement (the "DIP Credit Agreement"), substantially in the form annexed hereto as **Exhibit "C," ** as authorized by the Court; and (c) pay other amounts as specified in the updated proposed DIP budget, as amended and restated as of August 24, 2017 (the "Proposed DIP Budget"), a copy of which is annexed hereto as **Exhibit "D," ** which will be implemented upon the closing of the DIP Loan. Due to the operational impacts of the Chapter 11 Cases, the approximately $8.5 million taken out of the Debtors' operating cash for payment to Confirmation Account 2 (as defined herein), the Committee's unwillingness to release the funds in Confirmation Account 2 to fund the Debtors' working capital needs, and the Chapter 11 Trustee's fiduciary duty to act in the best interests of the estates and creditors, the DIP Facility represents the only available

alternative by which the Chapter 11 Trustee can seek to preserve the Debtors' continued operations and viability going forward.

10. Prior to the filing of this Motion, the Chapter 11 Trustee obtained a term sheet from the DIP Lender, which provided a summary of the terms of the proposed DIP loan documents (the "DIP Loan Documents"), as set forth below. Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the DIP Credit Agreement.

Concise Statement Pursuant to Local Bankruptcy Rule 4001-5[2]

MATERIAL TERMS OF THE DIP FACILITY

Borrowers Bankruptcy Rule 4001(c)(1)(B)	New York Crane & Equipment Corp. J.F. Lomma, Inc. (New Jersey) J.F. Lomma, Inc. (Delaware)
Guarantors Bankruptcy Rule 4001(c)(1)(B)	(i) JLJD, LLC ("JLJD") shall guarantee the Obligations up to the amount of its interest in the Equipment Collateral (defined below); and (ii) South Kearny Associates ("South Kearny," and together with JLJD, the "Non-Recourse Guarantors"), shall guarantee the Obligations up to the amount of its interest the Real Property Collateral (defined below). The Non-Recourse Guarantors are serving as non-recourse guarantors of the DIP Loan, to the extent of their respective interests in the Collateral.
DIP Lender Bankruptcy Rule 4001(c)(1)(B)	Cobra Kai Lending LLC (See DIP Credit Agreement, Preamble)
DIP Facility Bankruptcy Rule 4001(c)(1)(B); Local Rule 4001-2(a)(1)	A term loan (the "Facility") made available to the Borrowers in a principal amount of up to $10,000,000 and amounts advanced by the DIP Lender (as defined below) under the Facility (the "Loan Amount") pursuant to the Budget (as defined below). The Facility is documented under a Senior Secured, Super-Priority, Debtor-in-Possession Loan and Security Agreement in form and substance acceptable to the Lender and the Debtors (the "DIP Credit Agreement"). (See DIP Credit Agreement, Preamble; Final Order at § 3)
Budget Bankruptcy Rule 4001(c)(1)(B)	Use of Proceeds of the Facility are in accordance with a Budget that will consist of weekly statements of receipts and disbursements of the entities identified therein.

[2] To the extent the summary of terms and conditions set forth in this Motion in inconsistent with or in conflict with the terms and conditions of the DIP Credit Agreement, the terms and conditions of the DIP Credit Agreement shall control and govern.

	The Chapter 11 Trustee believes that the Budget will be adequate, considering all available assets, to pay all administrative expenses due or accruing during the period covered by the financing or the Budget. (See Final Order at Preamble (iii) and § 5)
Use of DIP Proceeds Bankruptcy Rule 4001(c)(1)(B)	To (i) fund the working capital needs and chapter 11 administrative costs of the Debtors during the pendency of the Chapter 11 Cases, (ii) pay fees, costs and expense of the Facility on the terms and conditions described the Loan Documents (including the Lender's professionals), and (iii) pay other amounts as specified in the Budget. (See Final Order at § 4)
Interest Rate Bankruptcy Rule 4001(c)(1)(B)	12.0% payable in cash monthly, and only on amounts actually advanced, from time to time. (See DIP Credit Agreement at § 2.4(a))
Expenses and Fees	A Commitment Fee of 1.5% of the Facility amount, earned and payable in cash at the time of closing; a Funding Fee of 1.5% of the Facility amount, earned and payable in cash at time of funding; an Exit Fee of 1.5% of the Facility amount, earned at time of funding and payable in cash upon maturity or prepayment or repayment; a Work Fee in an amount not to exceed $175,000 payable in cash at time of funding, to offset Lender's costs for negotiating documentation and conducting due diligence, including the reasonable fees and expenses of counsel to Lender. The Work Fee is not subject to review by the U.S. Trustee, the Committee or the Court. (See DIP Credit Agreement at § 2.8; Final Order at § 6)
Maturity Date Bankruptcy Rule 4001(c)(1)(B)	The "Maturity Date" is the date that is the earliest of: (i) September 30, 2018; (ii) the effective date of a Plan of Reorganization; (iii) entry of an order converting any of the Chapter 11 Cases to a case under chapter 7 of the Bankruptcy Code or dismissing any of the Chapter 11 Cases; (iv) the closing of a sale of substantially all of the Debtors' asset; (v) the replacement or termination of the Chapter 11 Trustee and (vi) the acceleration of the outstanding Obligations under the Facility or termination of the commitments under the Facility, including, without limitation, as a result of the occurrence of an Event of Default. (See DIP Credit Agreement at §3.3)
Collateral and Priority Bankruptcy Rule 4001(c)(1)(B)(ii)	The DIP Liens shall be valid, enforceable, non-avoidable and perfected first priority senior priming liens on and security interests (ahead of Subordinated Liens) in the collateral (the "Collateral") comprised of (a) the Equipment Collateral comprised of certain equipment owned by JLJD as set forth in Schedule 1 attached to the Final Order; (b) the Real Property Collateral owned by South Kearny located at 81 North Hackensack Avenue, South Kearny, New Jersey and

	with respect to (a) and (b) all of the proceeds (as such term is defined in the UCC) and products of the foregoing, all leasehold interests, and all accessions to, substitutions and replacements for, and rents, profits and products of, the foregoing, whether tangible or intangible, money, or other tangible or intangible property resulting from the sale, lease, license, exchange, collection, or other disposition of any of the foregoing, the proceeds of any award in condemnation with respect to any of the foregoing, and all proceeds of any such proceeds, or any portion thereof or interest therein, and the proceeds thereof, and all proceeds of any loss of, damage to, or destruction of the above, whether insured or not insured, and, to the extent not otherwise included, any indemnity, warranty, or guaranty payable by reason of loss or damage to, or otherwise with respect to any of the foregoing; and (c) the Designated Account. (See DIP Credit Agreement, Definitions of "Equipment Collateral" and "Real Property Collateral;" Final Order at Preamble (iv)) The Obligations shall constitute Superpriority Claims against the applicable Debtor or its estate in the Chapter 11 Cases limited to the Debtors' interest in the Collateral, which is an administrative expense claim having priority, pursuant to Section 364(c)(1) and 507(b) of the Bankruptcy Code, over (a) any and all allowed administrative expenses, and (b) unsecured claims now existing or hereafter arising, including, without limitation, administrative expenses of the kind specified in Sections 105, 326, 328, 330, 331, 365, 503(a), 503(b), 506(b) and (c), 507(b), 546(c), 546(d), 726 (to the extent permitted by law), 1113 or 1114 of the Bankruptcy Code, and any other provision of the Bankruptcy Code; provided for the avoidance doubt, that such Superpriority Claim is senior to any Subordinated Lien. (See DIP Credit Agreement at § 9.1; Final Order at § 9) The Obligations shall be secured by valid, enforceable, non-avoidable and perfected first priority senior priming liens on and security interests (ahead of Subordinated Liens) in favor of the Lender in all Collateral securing the Obligations, which senior priming liens and security interests in favor of the Lender shall be senior to all other liens in the Collateral, and shall include first priority senior priming liens under section 364(d)(1) of the Bankruptcy Code. (See DIP Credit Agreement at § 9.1; Final Order at § 11(a)(i))

Conditions to Closing Bankruptcy Rule 4001(c)(1)(B)	Customary borrowing conditions, including, among other things, execution of the Loan Documents, entry of the Final Order approving the Facility and granting a lien upon and security interest in the Collateral, payment of fees and expenses and delivery of the Budget. (See DIP Credit Agreement at §3.1
Covenants Bankruptcy Rule 4001(c)(1)(B)	Usual and customary for financing of this type, including, among other things: Affirmative Covenants: Include delivery of financial and other information, maintenance of existing businesses, payment of taxes and claims, maintenance of properties and insurance, inspections and compliance with laws. Negative Covenants: Include limitations on indebtedness, liens, guarantees, negative pledges, restricted payments, capital expenditures, fundamental changes, disposition of assets, acquisitions, transactions with Affiliates and conduct of business. Performance Covenants: Include delivery of the Budget and compliance with Budget, subject to the Permitted Variance, and commencing on the fourth Friday following entry of the Final Order and on the fifth Business Day of each week thereafter, covenant to generate net cash collections in an amount no less than 30% of the amount set forth in the Budget for the cumulative period ending on the date of the entry of the Final Order and ending on such testing date. It shall constitute an Event of Default under the DIP Credit Agreement if the Borrowers fail to perform or otherwise breach and fail to cure any of their respective covenants (See DIP Credit Agreement at §§ 5, 6, 7, 9 and 16)
Events of Default Bankruptcy Rule 4001(c)(1)(B)	Usual and customary defaults for financings of this type, including payment defaults and covenant defaults, defaults for breaches of representations and warranties, modification to the Final Order, dismissal or conversion of the Chapter 11 Cases, lifting of stay as to material assets of the Debtors, invalidity of the Loan Documents, removal of the Chapter 11 Trustee and confirmation of a bankruptcy plan that does not require indefeasible payment in full of the Obligations. (See DIP Credit Agreement at § 8)
Carve-Outs **Local Rule 4001-5(a)**	The Loan Documents do not provide for a Carve-Out for U.S. Trustee fees, bankruptcy court fees or professional fees. Such fees will be paid by the Chapter 11 Trustee in accordance with the Budget and subject to an order of the Court, as applicable.
Duration of the DIP Facility Bankruptcy Rule 4001(b)(1)(B)(iii)	The earlier of (i) September 30, 2018; (ii) the effective date of a Plan of Reorganization; (iii) entry of an order

	converting any of the Chapter 11 Cases to a case under chapter 7 of the Bankruptcy Code or dismissing any of the Chapter 11 Cases; (iv) the closing of a sale of substantially all of the Debtors' assets; (v) the replacement or termination of the Chapter 11 Trustee and (vi) the acceleration of the outstanding Obligations under the Facility or termination of the commitments under the Facility, including, without limitation, as a result of the occurrence and continuation of an Event of Default pursuant to Section 8 (the "Termination Date"). (See DIP Credit Agreement at § 3.3)
Liens Provided for Use of DIP Facility Bankruptcy Rule 4001(b)(1)(B)(iv) and (c)(1)(B)(ii)	As security for the DIP Obligations, the Lender shall receive valid, enforceable, non-avoidable and perfected first priority senior priming liens on and security interests (ahead of Subordinated Liens) in favor of the Lender in all Collateral securing the Obligations, which senior priming liens and security interests in favor of the Lender shall be senior to all other liens in the Collateral, and shall include first priority senior priming liens under section 364(d)(1) of the Bankruptcy Code. (See DIP Credit Agreement at 9; Final Order at §§ K, 9)
Liens on Avoidance Actions Bankruptcy Rule 4001(c)(1)(B)(xi)	The Lender will not receive a lien on causes of action under chapter 5 of the Bankruptcy Code under the Loan Documents.
Waiver or Modification of Automatic Stay Bankruptcy Rule 4001(c)(1)(B)(iv)	The automatic stay is modified and vacated to the extent necessary to permit Lender to perform any act authorized or permitted under or by virtue of the Final Order or the Loan Documents, as applicable, including, without limitation, (a) to implement the financing arrangements authorized by the Final Order and pursuant to the terms of the Loan Documents, (b) to take any act to create, validate, evidence, attach or perfect any lien, security interest, right or claim in the Collateral, (c) to assess, charge, collect, advance, deduct and receive payments with respect to the Obligations, including, without limitation, all interests, fees, costs and expenses permitted under the Loan Documents and apply such payment to the Obligations pursuant to the Loan Documents and/or the Final Order, as applicable, and (d) immediately upon the occurrence of an Event of Default, to take any action and exercise all rights and remedies provided to it by the Final Order, the Loan Documents or applicable law other than those rights and remedies against the Collateral. Additionally, upon an uncured Event of Default, and upon five (5) business days' notice. Lender shall be entitled to exercise rights and remedies against the Collateral. (See Final Order at § 21, 22)
Waiver or Modification of Applicability of Non-Bankruptcy Law relating to the Perfection or Enforcement of a Lien	All security interests and liens in Collateral granted by the DIP Loan Documents shall be valid and perfected upon entry of the Final Order. (See Final Order at § 17)

Bankruptcy Rule 4001(c)(1)(B)(vii)	
Section 506(c) Waiver Bankruptcy Rule 4001(c)(1)(B)(x)	The Chapter 11 Trustee and the Debtors irrevocably waive and shall be prohibited from asserting any surcharge claim, under Bankruptcy Code section 506(c) or otherwise, for any costs and expenses incurred in connection with the preservation, protection or enhancement of, or realization by the Lender upon the Collateral and no costs or expenses of administration of the Collateral that have been or may be incurred in any of the Chapter 11 Cases at any time shall be charged against the Lender, or its respective claims or liens (including any claims or liens granted pursuant to this Final Order). (See Final Order at § 13)

Background

I. Prepetition Wrongful Death Judgments

11. According to the Consolidated Declaration of James F. Lomma Pursuant to Local Bankruptcy Rule 1007-4 (the "Lomma Declaration") [Dkt. No. 1], the Debtors' determination to seek chapter 11 bankruptcy relief followed certain events that left the Debtors no other option if they intended to continue active business operations and preserve the going concern value of their assets while they pursued an appeal from certain adverse judgments (the "Judgments") entered in the Supreme Court, New York County on January 5, 2016. The Judgments followed a highly-publicized civil trial in which two wrongful death claimants were awarded verdicts totaling $96 million for compensatory and punitive damages (subject to certain credits and offsets)[3] emanating out of litigation related to a crane collapse at 91st Street in New York City (Index No. 771000/2010) (the "91st Street Crane Collapse Litigation").[4]

[3] Whether any interest is due with respect to the Judgments is a disputed issue.

[4] In addition to the two wrongful death claims described above, other claims arising out of the 91st Street Crane Collapse Litigation, which are not included within the $96 million awarded the wrongful death claimants, have been asserted in filed proofs of claim against the Debtors, including, among others, claims asserted by (i) Sorbara Construction Corporation ("Sorbara") in the amount of $11,502,832, (ii) Sorbara's insurer, Zurich Insurance Company in the amount of $13,839,920 plus additional amounts to be determined, (iii) an employee of Sorbara and (iv) other parties asserting claims.

12. According to the Lomma Declaration, the Debtors appealed the Judgments and determined to focus on their businesses and available options for continuing operations while they awaited a ruling from the Appellate Division. The Lomma Declaration indicated that as the Debtors employ more than 129 people and are integral to a number of construction projects, any piecemeal or premature liquidation of the companies would have severe repercussions for third parties. A ruling from the Appellate Division is expected within the next several months.

II. Establishment of Confirmation Accounts and Post-Petition Liens

A. The Amended Confirmation Account Approval Order

13. On September 9, 2016, the Committee filed its *Motion of Official Committee of Unsecured Creditors for an Order Establishing Confirmation Account and Requiring Deposits Into Such Account Pursuant to Bankruptcy Rule 3020* (the "Committee Motion") [Dkt. No. 412]. The parties then entered into settlement negotiations in an effort to resolve the Committee Motion. Following such settlement negotiations, the parties entered into a proposed Stipulation and Order Resolving Committee Motion for Confirmation Account (the "Confirmation Account Settlement Stipulation"). Among other things, the Confirmation Account Settlement Stipulation provided for the creation of two confirmation accounts (together, the "Confirmation Accounts") pursuant to Bankruptcy Rule 3020, for the purpose of funding distributions under a confirmed chapter 11 plan.

14. At a hearing on December 15, 2016 to consider approval of the Confirmation Account Settlement Stipulation, the parties were directed to make certain revisions. During a teleconference with the Court on January 20, 2017, additional revisions to the Confirmation Account Settlement Stipulation were discussed. Thereafter, on January 26, 2017, the Committee filed an Amended Order Approving Confirmation Account Settlement Stipulation Pursuant to

Bankruptcy Rule 9019 (the "Amended Confirmation Account Approval Order") [Dkt. No. 717], which amended certain provisions of the Confirmation Account Settlement Stipulation. On January 31, 2017, the Court approved the Amended Confirmation Account Approval Order, including the establishment of the Confirmation Accounts.

15. One of the confirmation accounts ("Confirmation Account 1") consists of certain investment accounts previously maintained by Lomma. The second confirmation account ("Confirmation Account 2") consists of amounts that the Debtors agreed to fund from operating cash through a monthly $1 million contribution to Confirmation Account 2. The Amended Confirmation Account Approval Order provides that once the Appellate Division issues its ruling on the Debtors' appeal of the Judgments, certain additional asset liquidations are to occur to make the balance of the funds in the Confirmation Accounts sufficient to pay all allowed claims and allowed administrative expenses in the Chapter 11 Cases. See Amended Confirmation Account Approval Order at pg. 6.

16. While the Confirmation Account Settlement Stipulation contemplated the liquidation of the assets of certain Non-Debtor Affiliates to fund confirmation costs, the right to commence the liquidation of such assets in accordance with the provisions of the Confirmation Account Settlement Stipulation is triggered only "[u]pon issuance of a decision on the appeals of the Judgments…." See Confirmation Account Settlement Stipulation at para. 13. Accordingly, and as discussed herein, liquidating the amount of equipment required to obviate the need for a DIP loan is unrealistic and could not be accomplished in a time frame required to enable the Debtors to continue uninterrupted operations.

17. As of July 31, 2017, the value of the accounts in Confirmation Account 1 was approximately $8 million. As of that same date, Confirmation Account 2 held cash proceeds

totaling approximately $8.5 million.[5] The amounts in the Confirmation Accounts continue to be held "to pay all allowed claims and allowed administrative expenses in the Chapter 11 Cases." See Amended Confirmation Account Approval Order at pg. 6, first full-Ordered paragraph.

18. To secure the Debtors' and certain Non-Debtor Affiliates' obligations pursuant to the Amended Confirmation Account Approval Order to address allowed claims and allowed administrative expenses as and to the extent provided therein, the Amended Confirmation Account Approval Order granted to the Committee blanket liens on the assets of the Corporate Debtors and certain of the Non-Debtor Affiliates.[6] See Amended Confirmation Account Approval Order, pg. 10, Ordered para 1. The Committee and certain of the Non-Debtor

[5] This amount does not include certain uncollected and disputed Aged Receivables (as defined in paragraph 15 of the Confirmation Account Settlement Agreement) to be deposited in Confirmation Account 2 in accordance with paragraph 15 of the Confirmation Account Settlement Stipulation.

[6] Based on a review of documents provided by the Committee, it appears that on or about February 23, 2017, the Committee entered into a series of Equipment Security Agreements (each a "Security Agreement" and collectively, the "Security Agreements") with the following Corporate Debtors: JF Lomma Del., JF Lomma NJ, and N.Y. Crane; and with the following Non-Debtor Affiliates: JFL Leasing, Inc., Lomma LLC d/b/a JK Crane, JLJD, LLC and TES, Inc. Each of the Security Agreements were in substantially the same form. All of the Security Agreements included an Exhibit 1, which consisted of a copy of the Amended Confirmation Account Approval Order. Each of the Security Agreements also contained an Exhibit 2, which purported to identify the assets on which the Committee was granted a lien. With the exceptions of the Security Agreement executed and delivered by N.Y. Crane, Exhibit 2 of the other Security Agreements contained the following blanket lien language:

> Pursuant to the Bankruptcy Court's Orders in Case No. 16-40043 (CE) [Dkt. No. 717] all machinery, equipment, furniture, furnishings, tools, tooling, fixtures, and accessories, and all inventory, accounts receivable, instruments, contracts rights and other rights to receive the payment of money, patents, chattel paper, licenses, leases and general intangibles, including all trade names and trade styles and all additions, accessions, modifications, improvements, replacements and substitutions thereto and therefor, whether now owned or hereafter acquired or arising, and the proceeds, products and income of any of the foregoing, including insurance proceeds.

While Exhibit 2 to the N.Y. Crane Security Agreement may not have had this blanket lien language, the UCC -1 financing statement filed by the Committee against N.Y. Crane to perfect its lien contained the identical blanket lien language in the box entitled, "This Financing Statement covers the following collateral.…"

Affiliates disagree as to, among other things, the extent of the security interests granted to the Committee and the nature of the obligations that such liens[7] secure.[8]

B. The Order Approving Joint Motion

19. Following his appointment, the Chapter 11 Trustee addressed two predominant matters: first, implementing effective controls over the estates, and second, obtaining financing to stabilize operations and maximize the prospects for the Debtors' successful reorganization. To establish control over the estates, the Chapter 11 Trustee, along with the Corporate Debtors, filed a motion (the "Joint Motion") [Docket No. 994] seeking authority from this Court to implement a budget, budget processes and cash management protocols, and to modify certain provisions of the Amended Confirmation Account Approval Order to the extent necessary to enable the Chapter 11 Trustee to effectively operate the estates of the Individual Debtor, the Corporate Debtors and certain related Non-Debtor Affiliates. Based on the Chapter 11 Trustee's position as an independent fiduciary charged with acting in the best interest of the estates, the filing of a motion seeking DIP financing was an inevitable consequence of the Trustee's appointment and subsequent analysis of the Debtors' state of financial affairs. As such, the Joint Motion specifically anticipated the need to obtain a $10 million DIP loan once the Joint Motion was approved.[9] Further, the initial proposed budget attached as Exhibit C to the Joint Motion

[7] At the July 24, 2017 hearing (the "July 24 Hearing") to consider approval of the Joint Motion (as defined herein), the Committee acknowledged that the provisions establishing the Committee's blanket liens were not intended to be included in JK Crane's Security Agreement.

[8] The Chapter 11 Trustee reserves all of the rights of the Debtors' estates with respect to the Committee's liens on the assets of the Corporate Debtors and the Non-Debtor Affiliates identified above, and the extent of the obligations that such liens secure.

[9] Paragraph 19 of the Joint Motion states in relevant part, "By this Application, the Chapter 11 Trustee seeks… (e) the authority to negotiate and, subject to Court approval, enter into a debtor-in-possession ("DIP") financing facility and offer a DIP lender a first lien priority position on certain assets of the Debtors and the Non-Debtor Affiliates, notwithstanding the Restrictions or any prohibitions involving the Committee's rights under the Amended Confirmation Account Approval Order…."

(the "Original Budget") [Docket No. 1005] and attached hereto as **Exhibit "E**,**"** along with every budget updated since the filing of the Original Budget (as applicable, the "Budget" or "Budgets") reflected the need for a $10 million DIP loan no later than September 15, 2017 to meet the liquidity requirements of the Debtors and the Non-Debtor Affiliates.

20. Recognizing that the Chapter 11 Trustee intended to solicit DIP loan proposals, the Order Approving Joint Motion shifted certain approval rights previously held by the Committee to the Chapter 11 Trustee (with an exception as to JK Crane), and specifically authorized the Chapter 11 Trustee (i) to solicit and negotiate, in consultation with the Committee, proposed DIP financing proposals and (ii) to modify the liens and security interests previously granted to the Committee,[10] to allow the Chapter 11 Trustee to use collateral that was subject to the Security Agreements to secure a DIP loan, if such a loan was approved. See Exhibit "1" to Order Approving Joint Motion, boxes 8-9.

21. Additionally, among other things, pursuant to the Joint Motion, the Chapter 11 Trustee sought authority to continue making the $1 million contribution to Confirmation Account 2 each month, provided that sufficient cash was available to make such payments. As part of the Joint Motion, the Chapter 11 Trustee further agreed that the obligation to fund Confirmation Account 2 would continue to accrue for any month during which the Budget reflected insufficient cash to make such deposit(s) (the "Accrued Obligations").[11] The Joint

[10] The Order Approving Joint Motion specifically referenced the financing statements related to the Committee's liens and security interests. Pursuant to this Motion, the Chapter 11 Trustee is requesting that the authorization granted with respect to the Committee's liens and security interests be clarified to also apply to the lis pendens recorded by the Committee with respect to the Real Property Collateral (as defined herein).

[11] In addition to the Accrued Obligations, the Chapter 11 Trustee agreed, pursuant to the Joint Motion, to deposit into Confirmation Account 2 from Lomma's estate all unpaid $10,000 per diem sanctions (the "Sanctions Obligations") which accrued under the Court's May 30, 2017 contempt order [Dkt. No. 876] until the date of the Chapter 11 Trustee's appointment (computed as 24 days at $10,000 per day, or $240,000). The Chapter 11 Trustee paid $100,000 of the Sanctions Obligations on August 16, 2017, and anticipates making the remaining payment of the Sanctions Obligations into Confirmation Account 2 pursuant to the Budget.

Motion provided that unless the Committee requests otherwise, Accrued Obligations will be "caught up" and funded to Confirmation Account 2 at such time(s) as the Budget shows sufficient liquidity to make such payments in full or in part. The Chapter 11 Trustee did not make the $1 million contribution to Confirmation Account 2 for July 2017, based on insufficient cash reflected in the Budget. Thereafter, the Committee informed the Chapter 11 Trustee that it did not want Confirmation Account 2 funded through borrowings under the DIP Facility.

22. During the discussions related to the Joint Motion at the July 24 Hearing, the Committee expressed concerns with respect to the costs of a potential DIP loan. Notwithstanding the Committee's concerns related to the necessity of obtaining DIP financing, the costs associated with a DIP facility, and the temporarily deferral of those issues in order to focus on achieving a consensual resolution of the Order Approving Joint Motion, the Chapter 11 Trustee always viewed obtaining a DIP financing facility as part of his fiduciary duty to maintain the estates' business operations, following approval of the Joint Motion.

23. At the July 24 Hearing to consider approval of the Joint Motion, certain parties expressed concerns with respect to various provisions of the proposed Order Approving Joint Motion. Through ensuing discussions with those parties following the July 24 Hearing and certain further revisions to the proposed Order Approving Joint Motion, all objections were resolved. On August 3, 2017, this Court entered the further revised Order Approving Joint Motion, as approved by all parties in interest [Dkt. No. 1060].

C. Additional Funds for Working Capital are Essential

24. At this time, additional funds for working capital are essential. The Confirmation Accounts hold approximately $17 million in aggregate value. While the Confirmation Accounts were created for appropriate reasons given the circumstances that existed at the time they were

created, removing $8.5 million (plus Aged Receivables) from the Debtors' cash flow to fund Confirmation Account 2 inevitably has had a significant impact on the Corporate Debtors' liquidity. Were it not for the $8.5 million that has been paid to Confirmation Account 2, the Corporate Debtors' operating cash flow would be sufficient to satisfy the amounts set forth in the Budget, and a DIP loan would be unnecessary at this time.

25. At the July 24 Hearing, the Court directed the payment of outstanding professional fees (approximately $2.4 million that were included in the Original Budget and projected to be paid during the week of August 14, 2017).[12] Once the Court approved the payment of such professional fees, and without access to the funds in Confirmation Account 2, the parties should have realized at that point, that the need for a DIP loan essentially became a foregone conclusion. Accordingly, the Committee's idea (as discussed further herein) of liquidating a limited amount of aged equipment at TES, Inc. ("TES") to resolve the Debtors' liquidity problems is a completely unrealistic "solution" to the problems that the estates are facing.

26. From November 2016 to June 2017, the Debtors and Non-Debtor Affiliates (excluding JK Crane, LJ Ventures, and the FEK Entities) experienced a negative net cash flow of approximately $10.9 million. During this time frame, the Debtors generated $.6 million of cash flow from operations. The negative cash flow was due to the payment of $8.5 million to Confirmation Account 2 and $3 million of professional fees, as reflected on the chart annexed hereto as **Exhibit "F."**

[12] In accordance with the Court's directive, $1,619,614.00 of outstanding professional fees have been paid, which represents all invoices that were currently due. The Chapter 11 Trustee expects that additional professional fees approximating $1.7 million will be incurred for the months of June, July and August 2017.

27. For the trailing twelve months ending May 31, 2017, the Corporate Debtors and Non-Debtor Affiliates (excluding the FEK Entities) generated approximately $151 million of revenue and $11.6 million of earnings before interest, taxes, depreciation, amortization and restructuring costs ("EBITDAR"). The EBITDAR was used to make payments into Confirmation Account 2 of $8.5 million and approximately $3 million of professional and U.S. Trustee fees. These costs related to bankruptcy have removed the essential funds for working capital that the Debtors and certain of the Non-Debtor Affiliates need for normal operations. With the ongoing costs of running the bankruptcy process, the need for a DIP loan is indisputable.

28. In the exercise of his sound business judgment, the Chapter 11 Trustee believes that at least $3.5 million of cash should be available for operations at any time. While the Chapter 11 Trustee acknowledges that there is a cost to entering into the DIP Loan, it would be imprudent for the Chapter 11 Trustee to not ensure that the Corporate Debtors and the Non-Debtor Affiliates have adequate working capital to prevent a liquidity crisis. Further, the costs of the DIP Loan, while significant, are at market for a loan of this nature. Additionally, the Chapter 11 Trustee did not have the luxury of entering into a DIP loan in a vacuum; instead, the Chapter 11 Trustee was obligated to structure a DIP loan that fit within all of the debt structure arrangements that preceded his appointment. Given the events that transpired prior to the Chapter 11 Trustee's appointment, the constraints created by the Confirmation Account Settlement Stipulation and the Amended Confirmation Account Approval Order, and the Committee's unwillingness to release the proceeds in Confirmation Account 2 to fund working

capital, the DIP Loan represents the Chapter 11 Trustee's best opportunity to preserve the Debtors' going concern value and continued viability going forward.[13]

D. The Chapter 11 Trustee's Efforts to Secure Post-Petition Financing

29. Without DIP financing, the Debtors' options with respect to their Chapter 11 Cases narrow drastically and precipitously. Accordingly, the Chapter 11 Trustee (in addition to requesting the Committee to release the funds in Confirmation Account 2) directed his financial advisor, B. Riley & Co., LLC ("BRC") to secure DIP financing on the best terms that could be negotiated. BRC identified and contacted approximately fifteen (15) third parties as potential sources of financing, whether on an unsecured or secured basis. The third parties solicited by BRC included sophisticated financial institutions, hedge funds, and lower-middle-market business lenders active in the DIP financing market, which BRC had identified based on a number of factors, including their ability to quickly complete due diligence, expertise in the industrial sector and ability to fund a transaction through DIP financing. Approximately ten (10) of those parties executed nondisclosure agreements, and BRC and the Chapter 11 Trustee conducted numerous presentations and due diligence calls with a handful of those parties.[14] The DIP Lender was the only party to offer to provide financing on terms, and within the timing, required by the Debtors in these Chapter 11 Cases.[15]

[13] The Chapter 11 Trustee believes that any suggested alternative of precipitating a complete liquidation of all of the Debtors' wholly-owned Non-Debtor Affiliates' assets at this time, before the Chapter 11 Trustee has complete information related to the amount of the costs, liabilities and tax consequences associated with a liquidation would be premature and inadvisable. Further, the Non-Debtor Affiliates that are not wholly-owned, as parties to the Confirmation Account Settlement Stipulation and the Amended Confirmation Account Approval Order, have asserted that their assets may be liquidated only upon the terms set forth therein.

[14] The Chapter 11 Trustee continues to speak with all parties who have expressed a potential interest in extending DIP financing to the Corporate Debtors, including multiple parties referred by counsel to the Committee.

[15] The Chapter 11 Trustee shared a comparison of several DIP loan proposals with the Committee, and will be prepared at the September 11, 2017 hearing to offer testimony on this issue should any party challenge that the DIP Loan does not reflect the best terms available to the Debtors.

30. Unfortunately, many potential lenders were hesitant to provide financing to the Debtors. Nevertheless, through the efforts of the Chapter 11 Trustee and BRC, four (4) written proposals were received for DIP financing, including the proposal submitted by the DIP Lender. The Chapter 11 Trustee and BRC engaged in discussions with each of these potential DIP lenders. Through discussions with these potential third-party lenders, it also became apparent that the Debtors' financial situation and expedited time frame foreclosed any opportunities for the Debtors to access unsecured DIP credit.

31. After extended good-faith, arm's length negotiations, the DIP Lender agreed to provide the DIP Facility on the terms provided in the DIP Credit Agreement, summarized above. The proceeds of the DIP Facility will be used (a) for general working capital and other purposes permitted under the DIP Credit Agreement; (b) to fund the costs of administering the Chapter 11 Cases; and (c) to pay all fees and expenses provided for under the DIP Credit Agreement and authorized by the Court.

32. Terms similar to those included in the DIP Facility are standard for financing of this kind. The Chapter 11 Trustee successfully negotiated for several key concessions from the DIP Lender, including loan structure, limitations on collateral, and more favorable DIP Facility fees. As a result of negotiations with the DIP Lender, the Chapter 11 Trustee was able to structure the equipment and real property collateral[16] being pledged in a way that allows the DIP Facility to be approved within the parameters of the Amended Confirmation Account Approval Order and the Order Approving Joint Motion. The terms of the DIP Facility, therefore, are attractive, especially when compared to the terms and timing offered by other potential DIP

[16] Part of the collateral that was negotiated in connection with the DIP Loan consists of a first mortgage on certain real property located at 81 North Hackensack Avenue, South Kearny, New Jersey, owned by South Kearny Associates, one of the FEK Entities. As discussed more fully in Section "G" herein, the grant by South Kearny Associates to the DIP Lender of a mortgage on such real property is subject to the repayment of a post-petition advance by Frank Kearney of $297,686.61.

lenders, and particularly in light of the Committee's unwillingness to release the proceeds of Confirmation Account 2.

33. The DIP Loan Documents set forth the best financing terms the Chapter 11 Trustee is currently able to obtain. Further, without the proceeds of the DIP Facility it will be extremely difficult for the Chapter 11 Trustee to be able to fund all of the presently budgeted expenses and operate the businesses beyond the week of September 11, 2017. Thus, the DIP Facility represents the Chapter 11 Trustee's best available chance of preserving the value of the Debtors' estates for all creditors and parties in interest.

E. Chapter 11 Trustee's Request for Release of Confirmation Account 2 Proceeds

34. In the exercise of his fiduciary duties, the Chapter 11 Trustee expended significant time exploring various options to fund the Debtors' working capital needs. In an effort to avoid the fees and costs attendant to any DIP financing facility (and heeding the Committee's previous concerns about the costs of a DIP loan), prior to finalizing the DIP Facility, the Chapter 11 Trustee participated in a conference call of the Committee and its professionals on August 7, 2017 to discuss the alternative of using the proceeds in Confirmation Account 2 to fund the Debtors' working capital needs. The Committee declined at that time, and has since continued to decline to release the proceeds in Confirmation Account 2.

35. Thereafter, the Chapter 11 Trustee, in an email dated August 8, 2017 and attached hereto as **Exhibit "G" (**the "August 8 E-Mail"), requested that the Committee reconsider his request to release the $8.5 million in Confirmation Account 2 for working capital purposes. Pursuant to the August 8 E-Mail, the Chapter 11 Trustee also requested a temporary suspension of the $1 million monthly contribution to Confirmation Account 2 for July 2017, until he and the

Committee mutually agreed that such payments could be made in accordance with a revised Budget.

36. On August 10, 2017, the Chapter 11 Trustee received an email from Committee counsel attached hereto as **Exhibit "H**,**"** in which the Committee restated its unwillingness to "consent to the release of funds in Confirmation Account No. 2."

F. The Committee's Position that the Chapter 11 Trustee Should Sell Equipment as an Alternative to Either a DIP Loan or the Use of Confirmation Account 2 Proceeds

37. During the course of discussions, the Committee and its professionals expressed the position that as an alternative to obtaining a DIP loan or using the funds in Confirmation Account 2 for working capital needs, the Chapter 11 Trustee should immediately commence selling non-core assets at the Non-Debtor Affiliates, and use those sale proceeds to fund the Corporate Debtors' working capital needs. The Committee's suggestion is ill-conceived, as (i) working capital is needed immediately and there can be no assurance of the timing for the sale of equipment (the first draw under the DIP Loan is contemplated to be $5 million); (ii) under the Confirmation Account Settlement Stipulation, certain proceeds from asset sales would be required to be deposited in Confirmation Account 2 and thus not available to fund working capital needs; and (iii) notwithstanding the requirement to deposit proceeds from asset sales into Confirmation Account 2, the Chapter 11 Trustee's ability to liquidate certain assets of the Non-Debtor Affiliates in accordance with paragraph 13 of the Confirmation Account Settlement Stipulation may not take effect until after the appeal of the Judgments is decided.

38. When pressed about what equipment the Committee wanted to see sold prior to a ruling on the appeal of the Judgments, the Committee's professionals specified that a limited amount of equipment of TES (collectively, the "TES Equipment") could be sold immediately pursuant to a "de facto" modification, discussed during a May 22, 2017 hearing (the "May 22

Hearing"), of the sale restrictions set forth in paragraph 13 of the Confirmation Account Settlement Stipulation.[17]

39. While the parties disagree as to what may have been agreed upon at the May 22 Hearing, based on the Chapter 11 Trustee's due diligence and a review of the Transcript of the May 22 Hearing, the discussion involving a potential sale of TES Equipment[18] was limited to non-core equipment that (i) was more than five years old[19] and was not currently subject to a lease with a third party, (ii) was projected to generate net proceeds ranging between $1.7 million and $2 million,[20] and (iii) could possibly (but not conclusively) sell in 90 days.[21]

40. Based on an independent review of the TES Equipment (and putting aside the issue of whether the discussion during the May 22 Hearing represented an enforceable modification of the Confirmation Account Settlement Stipulation), the Chapter 11 Trustee has concluded that assuming the high end of the sale range at $2 million, less sales commissions of 5% or $100,000, and less applicable taxes at an assumed rate of 15% or $300,000, the sale of TES Equipment could generate, at best, approximately $1.6 million in net proceeds over a period of 90 days or longer. Accordingly, a sale of TES Equipment -- even under the best case scenario -- would require significant time and would generate insufficient proceeds to fund the estates' working capital needs to negate the need for a DIP Loan at this time. The Committee's "alternative" is thus unrealistic at best and arguably, is designed to further what at times appears

[17] Based on the diligence conducted by the Chapter 11 Trustee's professionals, it appears unclear as to whether between the May 22 Hearing and the June 19, 2017 hearing to consider the appointment of the Chapter 11 Trustee, any efforts were made to memorialize the arrangement with respect to the TES Equipment, to sell any equipment, or to conduct a tax analysis related to the sale of equipment.

[18] See generally *Transcript* of May 22 Hearing at 52:21-54:22, 61:12-62:7, 75:18-21, and 88:20-89:6.

[19] See *Transcript* of May 22 Hearing at 61:12-62:7.

[20] See *Transcript* of May 22 Hearing at 62:1-5.

[21] See *Transcript* of May 22 Hearing at 88:20-23.

to be the overreaching goal of the Committee to force (without economic justification or a clear understanding of the outcome) a de facto liquidation of the Debtors and Non-Debtor Affiliates.

41. Moreover, even if the sale of equipment at Non-Debtor Affiliates other than TES was an option at this time (which it may not be, based on paragraph 13 of the Confirmation Account Settlement Stipulation), such sales may generate tax liabilities based on recapture of previously recognized depreciation. If the estates realize only a partial recovery for each asset sold based on the attendant tax liabilities, the Chapter 11 Trustee would be forced to sell a multiple of the net dollar recovery of the assets to potentially realize only a portion of their value. Selling assets in this manner – simply so the Committee can hold onto Confirmation Account 2 proceeds that are not even being held exclusively for its benefit, but rather, to fund *all* of the costs of the Chapter 11 Cases – is in the judgment of the Chapter 11 Trustee, inefficient and wasteful. Further, commencing an accelerated sale of equipment in bulk at the Non-Debtor Affiliates (again, assuming that such a sale would not be prohibited by the Confirmation Account Settlement Stipulation) prior to having the benefit of (i) a complete analysis determining the tax effect of such sales; and (ii) a decision on the appeals of the Judgments, could adversely affect the operations of the Corporate Debtors and the Non-Debtor Affiliates, thereby creating a further need for cash.

42. The Committee appears to object to the DIP Loan based on cost, but has no problem holding onto the $8.5 million (which earns interest at a rate of 5 basis points or one-twentieth of one percent) in Confirmation Account 2 which, if released, would negate the need for the DIP loan. Simply stated, by refusing to acknowledge the simple economics of potential funding options, the Committee is acting contrary to the constituency of general unsecured creditors that it represents and is jeopardizing the Debtors' future operations. The Chapter 11

Trustee continues to believe that the release of Confirmation Account 2 proceeds represents the most sensible and cost-effective manner of providing needed liquidity to the estates in light of (i) the negative interest arbitrage between the costs of the DIP Loan and the low interest rate being earned in Confirmation Account 2, (ii) the savings on the fees and costs associated with the DIP Loan, and (iii) the amount of collateral otherwise subject to the Committee's Security Agreements/lis pendens being used in either scenario. Nevertheless, as of the filing of this Motion, the Committee has not agreed to release the funds in Confirmation Account 2, leaving the Chapter 11 Trustee without any other alternative for funding working capital except through the DIP Facility.

G. Payment of the Kearney Advance is a Condition to Approval of the DIP Facility

43. The DIP Loan Documents provide that in exchange for the $10 million DIP Loan, the DIP Lender will receive a valid, enforceable, and perfected first priority lien on and security interest in (i) specific equipment of JLJD identified on Schedule 1 to be attached to the Final Order hereto (the "Equipment Collateral"), (ii) a designated deposit account of the Corporate Debtors (the "Designated Account)" and (iii) a first mortgage on certain real property owned by South Kearny Associates ("South Kearny") and located at 81 North Hackensack Avenue, South Kearny, New Jersey (the "Real Property Collateral" or the "South Kearny Property," and together with the Equipment Collateral and the Designated Account, the "Collateral"). JLJD and South Kearny are serving as non-recourse guarantors ("Non-Recourse Guarantors") of the DIP Loan, to the extent of their respective interests in the Collateral.

44. The grant to the DIP Lender of the Real Property Collateral by South Kearny is subject to the resolution of a dispute with Frank Kearney, Jr. ("Kearney"), a fifty (50%) percent owner in South Kearny, in connection with the repayment of an advance by Kearney for the

benefit of TES of $297,686.61 (the "Kearney Advance"). Counsel for Kearney has advised the Chapter 11 Trustee that unless the Kearney Advance is repaid, Kearney will not agree to grant the DIP Lender a mortgage in the Real Property Collateral. The DIP Lender has advised that without the Real Property Collateral, it is unwilling to enter into the DIP Loan.

45. An investigation undertaken by the Chapter 11 Trustee with respect to the facts and circumstances surrounding the Kearney Advance has disclosed the following: On or about May 31, 2017, TES ordered from Manitou Americas ("Manitou") three (3) Multi-Purpose Telescopic Handlers (the "Handlers") having a total purchase price of $297,686.61 as evidenced by the TES purchase order attached hereto as **Exhibit "I"** and the Manitou invoices attached hereto collectively as **Exhibit "J"**. TES ordered the Handlers to fulfill an order it had received from Ports America, Inc. ("Ports America") as evidenced by the Ports America purchase order attached hereto as **Exhibit "K"**. Pursuant to a TES invoice attached hereto as **Exhibit "L**,**"** Ports America agreed to pay a total purchase price for the Handlers of $384,813.24 (inclusive of $31,368.24 in New York State sales tax.)

46. Due to liquidity issues at TES, TES funded the payment of the purchase price due Manitou by arranging for Kearney to wire $297,686.61 directly to Manitou as evidenced by a Fedwire Payment Confirmation attached hereto as **Exhibit "M"**. Upon payment of the purchase price due Manitou, the Handlers were released to TES which in turn completed its sale transaction with Ports America. On or about June 26, 2017, Ports America paid for the Handlers by issuing its check made payable to TES in the amount of $385,204.59 as evidenced by **Exhibit "N"** attached hereto. As a result of the Kearney Advance, TES made an after sales tax gross profit of $55,758.39 on the sale of the Handlers.

47. The Original Budget attached to the Joint Motion (Exhibit "E" attached hereto) proposed reimbursing Kearney for the Kearney Advance that was funded to pay for the Handlers. At the July 24 Hearing, Committee counsel stated that the Committee objected to the Kearney Advance reimbursement line item in the Original Budget. On July 25, 2017, the Committee forwarded to the Chapter 11 Trustee a written objection to the payment of the Kearney Advance, as set forth in **Exhibit "O"** attached hereto. The Committee claims that the Kearney Advance on behalf of TES was a violation of the Amended Confirmation Account Approval Order and that the estates of the Debtors have other pre- and post-petition claims against Kearney that are a basis for withholding this reimbursement payment.[22]

48. Paragraph 7 of the Confirmation Account Settlement Stipulation provides, in relevant part, as follows:

> TES and Lomma, LLC d/b/a JK Crane ("JK Crane") may purchase and sell equipment in the ordinary course of their businesses using revenue generated solely from their business operations and not in any manner from business operations of the debtors, directly or indirectly, and may, in the case of TES, do so only to fill non-Debtor third party orders for re-sale, only after ten business days' prior written notice to the Committee and after Order of the Bankruptcy Court on written notice to the Committee, should the Committee, for cause, object to such purchases; provided, however, that Lomma LLC d/b/a JK Crane need not provide prior notice to the Committee for existing purchase orders on or prior to November 1, 2016 or for purchases or sales of equipment for a gross price of $100,000 or less.

49. The second Ordered paragraph beginning on page 3 of the Amended Confirmation Account Approval Order provides, in relevant part, as follows:

> **ORDERED**, that the Debtors, TES, JFL Leasing, Inc., the Property Owners (defined below) and JLJD (together, the "Payors") shall not make any payments or transfers of any funds by check, wire or otherwise ("Payments") absent prior written notice to and written consent of the Committee:
>
> - Each of the Payors shall prepare weekly written schedules under the supervision of Marcum LLP identifying all of the proposed

[22] While the Committee asserts that it has claims against Kearney, to date it has not filed an adversary proceeding with respect to any such alleged claims.

payments, disbursements and adjustments proposed to be made by and of the Payors (the "Weekly Schedules");

- The Payors shall provide prior written notice to Committee Counsel of any and all proposed Payments and adjustments by providing all Weekly Schedules with an explanation and/or a copy of the document creating the obligation for each proposed Payment ad adjustment, and the Committee shall have two business days after receipt of such written notice to serve upon the Debtors a written objection to any proposed Payment or adjustment; provided, however, that the Payors may issue Payments to their non-insider service providers without providing two business days notice where such individual Payment does not exceed $25,000 (the "De Minimis Payments") (for purposes of this Order, the term "insider" shall have the meaning contained in Bankruptcy Code section 101(31));

- All De Minimis Payments shall be included in the next written report of proposed Payments provided to Committee Counsel;

- In the event that the Committee serves a timely written objection to a proposed Payment or adjustment ("Objection") by a Payor and such Objection cannot be resolved by the Debtors and the Committee within two business days after service of such Objection, or such longer period as the Debtors and the Committee may agree in writing, then the Debtors shall not make the proposed Payment(s) or adjustment(s) that is the subject of the Committee's Objection, and may present a proposed order authorizing such Payment to the Court on three business days' notice to the Committee, and the Court shall determine whether such Payment(s) or adjustment(s) may be made by the Payors;

- For the avoidance of doubt, the Payors shall not make any payment to any insider without the prior written consent of the Committee or an order of the Court obtained upon a written motion and a hearing.

50. Under paragraph 7 of the Confirmation Account Settlement Stipulation, it appears that TES was permitted to purchase and sell equipment in the ordinary course of business using revenue generated solely from its business operations to fill "non-Debtor third party orders for re-sale" but was required to give the Committee "ten business days' prior written notice" and was

required to obtain Bankruptcy Court approval for such purchases only if "the Committee, for cause, object[ed] to such purchases;…."

51. While the Chapter 11 Trustee has uncovered no evidence that the required ten business days' prior written notice was given to the Committee with respect to TES's intention to order the Handlers for resale to Ports America, it is difficult to understand what "cause" the Committee could have articulated to oppose a transaction that enabled TES to consummate a bona fide sale to a third party that realized an after sales tax gross profit of $55,758.39 in a relatively short period of time. The fact that the Committee may have issues with Kearney because he has had a long term partnership relationship with Lomma, would not appear to have been a sound business reason to object to the Kearney Advance, which facilitated TES earning a profit of $55,758.39, particularly at a time when the Committee, in the context of its motion for the appointment of a Chapter 11 Trustee, was placing great emphasis on the urgent need for the Lomma entities to achieve additional sources of income. Assuming the Court would have authorized TES's purchase and sale of the Handlers over any objection by the Committee, there was no provision in the Confirmation Account Settlement Stipulation that would have prevented TES from reimbursing the Kearney Advance.

52. Although the Confirmation Account Settlement Stipulation did not impose limitations on the disbursement of funds by TES, the above quoted provision of the Amended Confirmation Account Approval Order did impose restrictions on TES's disbursement of funds which required Bankruptcy Court approval in the event the Committee objected to a disbursement. However, in the absence of any evidence that the Kearney Advance had a deleterious effect on, or caused a loss to, the Debtors, it is difficult to understand why reimbursement would not have been appropriate other than (i) to be coercive toward Lomma and

Kearney for failing to give the necessary ten business days' notice; or (ii) to leverage the fact that Kearney advanced the funds in question without getting prior Court approval of his entitlement to reimbursement.

53. The request for reimbursement of the Kearney Advance comes before the Court in the context of Kearney having agreed to cooperate with the Chapter 11 Trustee in mortgaging, as security for the DIP Loan, a valuable property owned by South Kearny. Absent Kearney's agreement to cooperate in mortgaging the South Kearny Property to the DIP Lender, nothing in the Confirmation Account Settlement Stipulation compels Kearney to grant the requested mortgage. While paragraph 12 of the Confirmation Account Settlement Stipulation does provide that the South Kearny Property "will be part of Confirmation Account No. 2 and will be sold to the extent necessary to fund payments under a confirmed Plan," nothing in the Confirmation Account Settlement Stipulation or in the Amended Confirmation Account Approval Order requires Kearney to agree to mortgage the South Kearny Property as security for a DIP loan benefitting the Chapter 11 estates of the Debtors. Other than the Chapter 11 Trustee's agreement to seek Court approval to reimburse the Kearney Advance, Kearney has not requested, and the Chapter 11 Trustee has not agreed, to otherwise compromise, release, reduce, limit, impair or otherwise modify any claims or causes of action that the Chapter 11 estates of the Debtors have or may have against Kearney or any of the FEK Entities, nor is Kearney or South Kearny being compensated in any manner for providing this collateral to the DIP Lender.

54. Accordingly, by this Motion, the Chapter 11 Trustee requests authorization to repay the Kearney Advance, as such payment is a condition precedent to the Chapter 11 Trustee's ability to pledge the Real Property Collateral as security for the DIP Loan which, at this point, is the only viable alternative for the Debtors to obtain needed financing.

H. Ambiguities Related to the JLJD Lien Should Not Impact Approval of the DIP Facility

55. While certain ambiguities[23] continue to exist with respect to, among other things, the actual dollar amount of the obligations secured by the Security Agreements, these disputes should not impact the approval of the DIP Facility. Notwithstanding the different interpretations held by the Committee and certain of the Non-Debtor Affiliates as to the total amount of obligations secured by the liens granted to the Committee, the parties in interest all agree that in accordance with the Amended Confirmation Account Approval Order, JLJD pledged all of its assets to secure, *at minimum*, (i) a loan obligation of approximately $15 million owed to Lomma, and (ii) all of the excess rent collected by JLJD from the Corporate Debtors for the equipment it leased to those entities post-petition, approximating $4.4 million, for a total of approximately $20 million.

56. A dispute exists as to the actual amount of the obligations secured by JLJD's collateral, with JLJD asserting that its collateral (the "JLJD Collateral") secures obligations of no more than $20 million and the Committee asserting that the JLJD Collateral secures additional obligations, yet no party in interest disputes that JLJD's collateral secures *at least* $20 million in loan obligations. As the Chapter 11 Trustee is requesting to use JLJD's equipment to secure the repayment of $10 million under the DIP Facility (which is subsumed within the $20 million for which JLJD has already pledged all of its assets), any disputes related to additional amounts of obligations secured by the JLJD Collateral should not impede the approval of the Motion at this time.

[23] The Chapter 11 Trustee and his counsel will be prepared to address these ambiguities at the September 11, 2017 hearing to consider the Motion, at the Court's request.

Basis for Relief

I. The Chapter 11 Trustee Should Be Authorized to Obtain Post-Petition Financing Through the DIP Loan Documents.

A. Entering into the DIP Loan Documents is an Exercise of the Chapter 11 Trustee's Sound Business Judgment.

57. For the reasons set forth in greater detail below, the Court should authorize the Chapter 11 Trustee to enter into the DIP Loan Documents and obtain access to the DIP Facility, as an exercise of the Chapter 11 Trustee's sound business judgment.

58. Section 1107(a) of the Bankruptcy Code provides, in relevant part:

> Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

11 U.S.C. § 1107(a).

59. Upon the appointment of a chapter 11 trustee, the debtor-in-possession ceases to exist, and the trustee steps into the place of the debtor, taking over all aspects of the administration of the bankruptcy estate. Thus, upon the Appointment Date, the Chapter 11 Trustee effectively "stepped into the shoes" of the Individual Debtor Lomma, with authority to administer the estates in the best interest of creditors. Since Lomma is the sole shareholder of the Corporate Debtors, the Chapter 11 Trustee has the inherent authority to act in the collective best interests of all of the Debtors.

60. Section 364 of the Bankruptcy Code authorizes a debtor to obtain secured or superpriority financing under certain circumstances as described in greater detail below. Provided that an agreement to obtain secured credit does not run afoul of the provisions of, and policies underlying, the Bankruptcy Code, courts grant debtors considerable deference in acting in accordance with their sound business judgment in obtaining such credit. See In re Barbara K.

Enters., Inc., No. 08-11474 (MG), 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."); In re Ames Dep't Stores, Inc., 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) ("[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."); In re Farmland Indus., Inc., 294 B.R. 855, 881 (Bankr. W.D. Mo. 2003) ("[T]he applicable factors [include] [t]hat the proposed financing is an exercise of sound and reasonable business judgment….).

61. Furthermore, in determining whether the Chapter 11 Trustee has exercised sound business judgment in deciding to enter into the DIP Loan Documents, the Court should consider the economic terms of the DIP Facility in light of current market conditions. See, e.g., Transcript of Record at 734-35:24-1, In re Lyondell Chem. Co., No. 09-10023 (Bankr. S.D.N.Y. Mar. 5, 2009) (recognizing that "the terms that are now available for DIP facilities in the current economic environment aren't as desirable" as in the past). Moreover, the Court may appropriately take into consideration non-economic benefits to the Debtors offered by a proposed post-petition facility. For example, in In re ION Media Networks, Inc., the Bankruptcy Court for the Southern District of New York held that:

> Although all parties, including the Debtors and the Committee, are naturally motivated to obtain financing on the best possible terms, a business decision to obtain credit from a particular lender is almost never based purely on economic terms. Relevant features of the financing must be evaluated, including non-economic elements such as the timing and certainty of closing, the impact on creditor

> constituencies and the likelihood of a successful reorganization. This is particularly true in a bankruptcy setting where cooperation and establishing allegiances with creditor groups can be a vital part of building support for a restructuring that ultimately may lead to a confirmable reorganization plan. That which helps foster consensus may be preferable to a notionally better transaction that carries the risk of promoting unwanted conflict.

No. 09-13125, 2009 WL 2902568, at *4 (Bankr. S.D.N.Y. July 6, 2009).

62. The Order Approving Joint Motion granted the Chapter 11 Trustee the authority to negotiate and, subject to Court approval, enter into a DIP facility and offer a DIP lender a first lien priority position on certain assets of the Debtors and the Non-Debtor Affiliates, notwithstanding the restrictions or prohibitions involving the Committee's rights under the Amended Confirmation Account Approval Order. The Chapter 11 Trustee's execution of the DIP Loan Documents is an exercise of his sound business judgment that warrants approval by the Court. The Chapter 11 Trustee negotiated the DIP Loan Documents with the DIP Lender in good faith, at arm's-length, and with the assistance of outside advisors, in order to obtain the required post-petition financing on terms favorable to the Debtors. Based on the advice of his professionals and the Chapter 11 Trustee's own analysis, the Chapter 11 Trustee has determined in his sound business judgment that the DIP Loan Documents will provide financing to the Debtors in a way more beneficial than any other reasonably available alternative.

63. Specifically, as noted above, the DIP Loan Documents will provide the Chapter 11 Trustee with access of up to $10 million, which the Chapter 11 Trustee and his advisors have independently determined should be sufficient to support the Debtors' ongoing operations and reorganization activities through the pendency of these Chapter 11 Cases. Accordingly, the Chapter 11 Trustee submits that entering into the DIP Loan Documents constitutes an exercise of the Chapter 11 Trustee's sound business judgment that should be approved by the Court.

B. The Chapter 11 Trustee Should Be Authorized to Obtain Post-Petition Financing on a Senior Secured and Superpriority Basis.

64. Section 364 of the Bankruptcy Code authorizes a debtor to obtain, in certain circumstances, post-petition financing on a secured or superpriority basis, or both. Specifically, section 364(c) of the Bankruptcy Code provides, in pertinent part, that the Court, after notice and a hearing, may authorize a debtor that is unable to obtain credit allowable as an administrative expense under section 503(b)(1) of the Bankruptcy Code to obtain credit or incur debt:

> (a) with priority over any or all administrative expenses of the kind specified in § 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).

65. In order 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. Bray v. Shenandoah Fed. Says. & Loan Ass'n (In re Snowshoe Co.), 789 F.2d 1085, 1088 (4th Cir. 1986). "The statute imposes no duty to seek credit from every possible lender before concluding that such credit is unavailable." Id.; see also Pearl-Phil GMT (Far East) Ltd. v. Caldor Corp., 266 B.R. 575, 584 (S.D.N.Y. 2001) (superpriority administrative expenses authorized where debtor could not obtain credit as an administrative expense). When few lenders are likely to be able and willing to 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 Says. Bank FSB v. Sky Valley, Inc., 99 B.R. 117, 120 n.4 (N.D. Ga. 1989). See also Ames Dep't Stores, 115 B.R. at 40 (approving financing

facility and holding that the debtor made reasonable efforts to satisfy the standards of § 364(c) where it approached four lending institutions, was rejected by two, and selected the most favorable of the two offers it received).

66. As described above, BRC identified and solicited offers from multiple potential post-petition lenders. Notwithstanding these efforts, the Chapter 11 Trustee was unable to obtain any post-petition financing in the form of unsecured credit or as an administrative expense. The Debtors' financial situation precludes them from obtaining post-petition financing in the amount they require on terms other than on a secured and limited superpriority basis. Following numerous discussions, the DIP Lender has agreed that its superpriority status shall be limited only to the Debtors' interest in the Collateral, and not to any of the other assets of the Chapter 11 estates. Section 9.1(a)(i) of the DIP Credit Agreement provides:

> (a) Borrowers and Non-Recourse Guarantors, as applicable, warrant and covenant that, except as otherwise expressly provided in this paragraph, upon the entry of the Final Order, the Obligations of any Borrower and the Guaranteed Obligations of any Non-Recourse Guarantor under the Loan Documents:
>
> > (i) shall at all times constitute a Superpriority Claim against the applicable Debtor or its estate in the Chapter 11 Cases limited to the Debtors' interest in the Collateral, which is an administrative expense claim having priority, pursuant to Section 364(c)(1) and 507(b) of the Bankruptcy Code, over (a) any and all allowed administrative expenses, and (b) unsecured claims now existing or hereafter arising, including, without limitation, administrative expenses of the kind specified in Sections 105, 326, 328, 330, 331, 365, 503(a), 503(b), 506(b) and (c), 507(b), 546(c), 546(d), 726 (to the extent permitted by law), 1113 or 1114 of the Bankruptcy Code, and any other provision of the Bankruptcy Code; provided for the avoidance doubt, that such Superpriority Claim is senior to any Subordinated Lien

The Court should therefore (i) authorize the Chapter 11 Trustee to provide the DIP Lender senior liens on the Debtors' property as provided in section 364(c)(2) of the Bankruptcy Code, and (ii) grant the Debtors' repayment obligations under the DIP Loan Documents superpriority

administrative expense status as provided for in section 364(c)(1) of the Bankruptcy Code, but limited only to the Debtors' interest in the Collateral.

II. The Fee Provisions of the DIP Financing Agreements Are Appropriate.

67. As described above, the Chapter 11 Trustee has agreed, subject to Court approval, to pay to the DIP Lender, in exchange for it providing the DIP Facility, a $150,000 commitment fee (constituting 1.5% of the loan amount), a $150,000 funding fee (constituting 1.5% of the loan amount), and a $175,000 work fee to the DIP Lender's counsel, each of which is payable upon entry of the Final Order (these amounts will be payable from proceeds of the DIP Facility). These fees will be refunded in the event the Final Order is not entered. Additionally, the DIP Loan Documents provide for a $150,000 exit fee (constituting 1.5% of the loan amount) to be paid upon the Maturity Date or repayment of the DIP Facility. These fees, together with the other provisions of the DIP Loan Documents, represent the most favorable terms to the Chapter 11 Trustee on which the DIP Lender would agree to make the DIP Facility available. The Chapter 11 Trustee considered the fees described above when determining in his sound business judgment that the DIP Loan Documents constituted the best terms on which the Debtors could obtain the post-petition financing necessary to continue their operations and prosecute their Chapter 11 Cases, and paying the fees in order to obtain the DIP Facility is in the best interests of the Debtors' estates, creditors, and other parties in interest.

68. Courts routinely authorize debtors to pay fees similar to those the Chapter 11 Trustee proposes to pay, where the associated financing is, in the debtors' business judgment, beneficial to the debtors' estates. See, e.g., In re the Brown Publ'g Co., No. 10-73295 (DTE) (Bankr. E.D.N.Y. Jul. 2, 2010 (approving 4% closing fee); In re Insight Health Services Holdings Corp., No. 10-16564 (AJG) S.D.N.Y. Jan. 4, 2011) (approving 2.0% DIP closing fee); In re NR Liquidation III Co. (f/k/a Neff Corp.), No. 10-12610 (SCC) (Bankr. S.D.N.Y. June 30,

2010) (approving 3.1% DIP and exit facility fee); In re The Reader's Digest Ass'n, No. 09-23529 (RDD) (Bankr. S.D.N.Y. Oct. 6, 2009) (approving 3% exit fee), In re Lear Corp., No. 14326 (ALG) (Bankr. S.D.N.Y. Aug. 4, 2009) (approving 5.0% up-front fee and a 1.0% exit/conversion fee); In re Gen. Growth Prop., Inc., No. 09-11977 (Bantu. S.D.N.Y. May 14, 2009) (approving 3.75% exit fee); In re Aleris Int'l. Inc., No. 09-10478 (Banks. D. Del. Mar. 18, 2009) (approving 3.5% exit fee and 3.5% front-end net adjustment against each lender's initial commitment); In re Tronox Inc., No. 09-10156 (Bankr. S.D.N.Y. Jan. 13, 2009) (approving an up-front 3% facility fee); In re Lyondell Chem. Co., No. 09-10023 (Bankr. S.D.N.Y. Jan. 8, 2009) (approving exit fee of 3%); In re DJK Residential, No. 08-10375 (Bankr. S.D.N.Y. Feb. 29, 2008) (approving 3% fee in connection with post-petition financing).[24] Accordingly, the Court should authorize the Chapter 11 Trustee to pay the fees provided under the DIP Loan Documents in connection with entering into those agreements.

69. The terms of the DIP Loan Documents, including the key provisions described above, constitute, on the whole, the most favorable terms on which the Chapter 11 Trustee could obtain needed post-petition financing.

III. The DIP Lender Should Be Deemed a Good Faith Lender Under 364(e).

70. Section 364(e) of the Bankruptcy Code protects a good faith lender's right to collect on loans extended to a debtor, and its right in any lien securing those loans, even if the authority of the debtor to obtain such loans or grant such liens is later reversed or modified on appeal. Specifically, section 364(e) provides that:

> The reversal or modification on appeal of an authorization under this section [364 of the Bankruptcy Code] to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so

[24] Because of the voluminous nature of the orders cited herein, such orders have not been attached to the Motion. Copies of these orders are available upon request to the Chapter 11 Trustee's counsel.

> granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

11 U.S.C. § 364(e).

71. As explained herein, the DIP Loan Documents are the result of the Chapter 11 Trustee's reasonable and informed determination that the DIP Lender offered the most favorable terms on which to obtain needed post-petition financing, and of extended arm's-length, good faith negotiations between the Chapter 11 Trustee and the DIP Lender. The terms and conditions of the DIP Loan Documents are fair and reasonable, and the proceeds under the DIP Facility will be used only for purposes that are permissible under the Bankruptcy Code. Further, no consideration is being provided to any party to the DIP Loan Documents other than as described herein. Accordingly, the Court should find that the DIP Lender is a "good faith" lender within the meaning of section 364(e) of the Bankruptcy Code, and is entitled to all of the protections afforded by that section.

IV. Modification of the Automatic Stay Is Warranted.

72. The DIP Loan Documents and the proposed Final Order contemplate that the automatic stay arising under section 362 of the Bankruptcy Code shall be vacated or modified to the extent necessary to permit the DIP Lender to exercise, upon the occurrence and during the continuation of any Event of Default (as such term is defined in the DIP Credit Agreement), all rights and remedies provided for in the DIP Credit Agreement, and to take various other actions without further order of or application to the Court. The DIP Loan Documents provide, however, that the DIP Lender must provide the Chapter 11 Trustee, the Debtors, the United States Trustee and counsel to the Committee with five (5) days' prior written notice before exercising any enforcement rights or remedies against the Collateral, which will allow the

Chapter 11 Trustee and other interested parties to seek an expedited hearing before the Court for the purpose of determining whether, in fact, an Event of Default has occurred and is continuing.

73. Stay modification provisions of this sort are ordinary features of debtor in possession financing facilities and, in the Chapter 11 Trustee's business judgment, are reasonable under the circumstances. See, e.g., In re Hawker Beechcraft, Inc., No. 12-11873 (SMB) (Bankr. S.D.N.Y. June 1, 2012); In re Velo Holdings Inc., No. 12-11384 (MG) (Bankr. S.D.N.Y. Apr. 23, 2012); In re United Retail Grp., Inc., No. 12-10405 (SMB) (Bankr. S.D.N.Y. Feb. 23, 2012); In re Hostess Brands, Inc., No. 12-22052 (RDD) (Bankr. S.D.N.Y. Feb. 3, 2012); In re Insight Health Servs. Holdings Corp., No. 10-16564 (AJG) (Bankr. S.D.N.Y. Jan. 4, 2011); In re NR Liquidation HI Co. (f/k/a Neff Corp.), No. 10-12610 (SCC) (Bankr. S.D.N.Y. June 30, 2010); In re The Reader's Digest Ass'n, No. 09-23529 (RDD) (Bankr. S.D.N.Y. Oct. 6, 2009); In re Lear Corp., No. 14326 (ALG) (Bankr. S.D.N.Y. Aug. 4, 2009); In re Gen. Growth Prop. Inc., No. 09-11977 (Bankr. S.D.N.Y. May 14, 2009); In re Tronox Inc., No. 09-10156 (Bankr. S.D.N.Y. Feb. 6, 2009); In re Chemtura Corp., No. 09-11233 (Bankr. S.D.N.Y. Apr. 23, 2009); In re Wellman, Inc., No. 0810595 (Bankr. S.D.N.Y. Apr. 7, 2008); In re Musicland Holding Corp., No. 06-10064 (Bankr. S.D.N.Y. Feb. 21, 2006).

V. The Debtors Require Immediate Access to the DIP Facility.

74. The Chapter 11 Trustee has an immediate need for access to liquidity to, among other things, continue the operation of the Debtors' businesses, maintain important relationships with customers and landlords, meet payroll, procure goods and services from vendors and suppliers and otherwise satisfy the Debtors' working capital and operational needs, all of which

are required to preserve and maintain the Debtors' going concern value for the benefit of all parties in interest.[25]

75. The importance of a debtor's ability to secure post-petition financing to prevent immediate and irreparable harm to its estate has been repeatedly recognized in similar circumstances. See, e.g., In re the Brown Publ'g Co., No. 10-73295 (DTE) (Bankr. E.D.N.Y. Jul. 2, 2010 (same); In re United Retail Grp., Inc., No. 12-10405 (SMB) (Bankr. S.D.N.Y. Feb. 2, 2012) (same); In re Sbarro, Inc., No. 11-11527 (SCC) (Bankr. S.D.N.Y. Apr. 5, 2011) (same); In re MSR Resort Golf Course LLC, No. 11-10372 (SHL) (Bankr. S.D.N.Y. Mar. 16, 2011) (same); In re Insight Health Servs. Holdings Corp., No. 10-16564 (AJG) (Bankr. S.D.N.Y. Jan. 4, 2011); In re Great Atl. & Pac. Tea Co., No. 10-24549 (RDD) (Bankr. S.D.N.Y. Dec. 13, 2010) (same); In re The Reader's Digest Assoc., No. 09-23529 (RDD) (Bankr. S.D.N.Y. Aug. 26, 2009) (same); In re Tronox Inc., No. 09-10156 (ALG) (Bankr. S.D.N.Y. Jan. 13, 2009) (same); In re Lyondell Chem. Co., No. 09-10023 (REG) (Bankr. S.D.N.Y. Jan. 8, 2009) (same); In re Lenox Sales, Inc., No. 08-14679 (ALG) (S.D.N.Y. Nov. 25, 2008) (same); In re Wellman, Inc., No. 08-10595 (SMB) (S.D.N.Y. Feb. 27, 2008) (same). Accordingly, for all of the reasons set forth above, prompt entry of the Final Order is necessary to avert immediate and irreparable harm to the Debtors' estates and is consistent with, and warranted under, Bankruptcy Rules 4001(b)(2) and (c)(2).

Reservation of Rights

76. Nothing contained in this Motion is intended or should be construed as an admission as to the validity of any claim against the Chapter 11 Trustee, the Debtors, a waiver of

[25] The DIP Facility does not include a "carve-out" for the payment of professional fees. The Proposed DIP Budget provides for the payment in full of all outstanding professional fees incurred from the first interim fee period through June 2017 (for professionals who submitted a June invoice), and projects the additional fees to be incurred from June 2017 (for professionals who have not yet submitted a June invoice) through August 2017.

the Chapter 11 Trustee's rights to dispute any claim, or an approval or assumption of any agreement, contract, or lease under section 365 of the Bankruptcy Code. The Chapter 11 Trustee expressly reserves his right to contest any claim related to the relief sought herein. Likewise, if the Court grants the relief sought herein, any payment made pursuant to an order of the Court is not intended to be nor should it be construed as an admission as to the validity of any claim or a waiver of the Chapter 11 Trustee's rights to subsequently dispute such claim.

Notice

77. Notice of this Motion has been provided by email to: (a) the Office of the United States Trustee, U.S. Federal Office Building, 201 Varick Street, Suite 1006, New York, New York 10014 (Attn: Nazar Khodorovsky, Esq.); (b) Togut, Segal & Segal LLP, Counsel to the Committee, One Penn Plaza, Suite 3335, New York, New York 10019 (Attn: Albert Togut, Esq., and Neil Berger, Esq.); (c) Goldberg Weprin Finkel Goldstein LLP, Former Counsel to the Debtors, 1501 Broadway, 22nd Floor, New York, New York 10036 (Attn: Neal M. Rosenbloom, Esq., and Kevin J. Nash, Esq.); (d) all parties known to the Chapter 11 Trustee who hold any liens or security interests in the assets of the Non-Debtor Affiliates or Non-Recourse Guarantors who have filed UCC-1 Financing Statements against any of the Non-Debtor Affiliates or Non-Recourse Guarantors, or who, to the Chapter 11 Trustee's knowledge, have asserted any liens on any of such Non-Debtor Affiliates' or Non-Recourse Guarantors' assets; and (e) all parties who have requested notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the Chapter 11 Trustee respectfully submits that no other or further notice is necessary.

No Prior Request

78. No prior request for the relief sought in this Motion has been made to this or any other Court.

WHEREFORE, the Chapter 11 Trustee respectfully requests entry of the Final Order, substantially in the form attached hereto as **Exhibit "A**,**"** (i) granting the relief requested herein and (ii) granting such other relief as is just and proper.

Dated: Teaneck, New Jersey
August 25, 2017

Respectfully submitted,

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