

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION**

In re: § Chapter 11  
A’GACI, L.L.C., §  
Debtor. § Case No. 18-\_\_\_\_\_

**DEBTOR’S EMERGENCY MOTION FOR AN ORDER AUTHORIZING USE OF  
CASH COLLATERAL AND GRANTING ADEQUATE PROTECTION**

A’GACI, L.L.C. (“A’GACI” or the “Debtor”), debtor-in-possession in the above-referenced chapter 11 case, files this *Debtor’s Emergency Motion for an Order Authorizing Use of Cash Collateral and Granting Adequate Protection* (the “Motion”) and in support thereof, respectfully states as follows:

**Jurisdiction and Venue**

1. The United States District Court for the Western District of Texas (the “District Court”) has jurisdiction over the subject matter of this Motion pursuant to 28 U.S.C. § 1334. The District Court’s jurisdiction has been referred to this Court pursuant to 28 U.S.C. § 157 and the District Court’s *Order of Reference of Bankruptcy Cases and Proceedings* dated October 4, 2013. This is a core matter pursuant to 28 U.S.C. §157(b), which may be heard and finally determined by this Court. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

**Background**

2. On January 9, 2018 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) commencing the above captioned case (the “Chapter 11 Case”). The Debtor continues to manage and operate its business as a debtor-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108.



3. An official committee of unsecured creditors has yet to be appointed in this Chapter 11 Case. Further, no trustee or examiner has been requested or appointed in this Chapter 11 Case.

4. A detailed description of the Debtor and its business, and the facts and circumstances of the Debtor's Chapter 11 Case are set forth in greater detail in the *Declaration of Mark Butterbach in Support of the Debtor's Chapter 11 Petition and First Day Motions* (the "First Day Declaration").

5. In support of this Motion, the Debtor relies upon and incorporates by reference the *Declaration of Gabe Koch in Support of Debtor's Emergency Motion for an Order Authorizing Use of Cash Collateral and Granting Adequate Protection* (the "Koch Declaration"), which is attached to this Motion as **Exhibit B**.

#### **Relief Requested**

6. The Motion requests entry of an interim order, substantially in the form attached hereto as **Exhibit A** (the "Interim Order"): (1) authorizing the Debtor's use of Cash Collateral (defined below) and all other collateral on an interim basis in accordance with the budget attached to the Interim Order as **Schedule 1** (the "Budget"); (2) providing the adequate protection described herein to the Debtor's pre-petition secured lender, JPMORGAN CHASE BANK, N.A. ("Secured Creditor"), for the use of the Pre-Petition Collateral (defined below); and (3) scheduling a hearing to consider approval and authorize the relief granted in the Interim Order on a final basis (the "Final Order" and, together with the Interim Order, the "Cash Collateral Orders").

**Concise Statement of the Material Terms of the Interim Order**

7. In accordance with Bankruptcy Rule 4001, below is a summary of the material proposed terms of the Debtor’s use of Cash Collateral.<sup>1</sup>

<b>Summary of Material Terms</b>		<b>Location</b>
<b>Cash Collateral to be Used</b>	The Interim Order authorizes the Debtor to use Cash Collateral through the Termination Date only in accordance with the Budget and the Interim Order.	Interim Order, ¶¶ 2-3, 5.
<b>Parties With Interest in Cash Collateral</b>	JPMORGAN CHASE BANK, N.A.	Interim Order, ¶ B-C.
<b>Budget and Reporting Provisions</b>	<p>The Debtor is authorized to use Cash Collateral during the Budget Period exclusively for the purposes of and to the extent described in the Budget and the Order, and with respect to each calendar week during the Budget Period, the expenditure for any line item described in the Budget shall not exceed 115% of the aggregate amount projected to be expended by the Budget on such line item during such calendar week. Further, the Debtor may not exceed the total expenses set forth in the Budget for the Budget Period by more than ten percent (10%) in the aggregate.</p> <p>The Debtor shall make available to the Secured Creditor, upon request but not less frequently than monthly, all balance sheets, income statements, records of funds received in connection with the Collateral, and all other standard financial statements. Further, the Debtor shall also provide the Secured Creditor with copies (which may include electronic copies submitted via e-mail or electronic case filing) of all monthly operating reports delivered to the Office of the United States Trustee within two (2) days after filing of such reports. And, the Debtor shall provide the Secured Creditor with all other reports and information concerning the Debtor’s business, financial or otherwise, as the Secured Creditor may from time to time reasonably request.</p>	Interim Order, ¶¶ 2-3, 11.

<sup>1</sup> To the extent the terms and conditions listed herein conflict or are inconsistent with those in the Interim Order, the terms and conditions of the Interim Order shall control. All terms not otherwise defined below shall have the meanings ascribed to them in the Interim Order.

Summary of Material Terms		Location
<b>Adequate Protection</b>	<p>The Debtor proposes to provide the Secured Creditor with the following forms of adequate protection:</p> <p><b>Replacement Liens / Post-Petition Liens.</b> In addition to all existing security interests and liens granted to or for the benefit of Secured Creditor in the Pre-Petition Collateral (including the Cash Collateral), the Secured Creditor is granted replacement security interests and liens (the “<u>Replacement Liens</u>” or “<u>Post-Petition Liens</u>”) of the same extent, validity, and priority as the Pre-Petition Liens in the Pre-Petition Collateral (including the Cash Collateral) on all the Debtor’s assets and property (except for avoidance actions arising under Bankruptcy Code Sections 544, 545, 546, 547, 548, 549, 550 or any similar provision of the Bankruptcy Code), whether now owned or hereafter created or acquired, real or personal, assets or rights, of any kind or nature, wherever located, and the income, receivables, proceeds, products, and profits thereof, whether arising from Bankruptcy Code § 552(b) or otherwise (the “<u>Post-Petition Collateral</u>”). Such Replacement Liens include, without limitation, liens on all cash, including Cash Collateral generated or received by the Debtor after the Petition Date.</p> <p>The Replacement Liens are subject and subordinate to the Carve Out and to the liens of Bank of America on the BOA Collateral.</p>	Interim Order, ¶7.
	<p><b>Adequate Protection Payment.</b> The Debtor shall pay the Secured Creditor the payments set forth in the Budget (the “<u>Adequate Protection Payments</u>”),<sup>2</sup> beginning from and after the Petition Date. The first such payment shall be due as provided in the Budget.</p>	Interim Order, ¶8.
	<p><b>Superpriority Claims.</b> If and to the extent that the Replacement Liens and Adequate Protection Payments prove insufficient to adequately protect the interests of the Secured Creditor in the Cash Collateral, then the Secured Creditor is granted a super-priority cost of administration claim under 11 U.S.C. § 507(b) (the “<u>Superpriority Claim</u>”), subject to further order of this Court. Notwithstanding the foregoing, (i) any such Superpriority</p>	Interim Order, ¶9.

<sup>2</sup> The Adequate Protection Payments include the amounts identified in lines 21 (ABL Interest Expenses and Unused Fee), 22 (ABL Legal Fees), and 38 (ABL/DIP Draw/(Pay Down) of the Budget.

	<b>Summary of Material Terms</b>	<b>Location</b>
	<p>Claim shall under no circumstances be superior to or prime any valid lien or security interest; (ii) this Order shall not alter the priority of any such Superpriority Claim in relation to any other §507(b) claim awarded to any other creditor; and (iii) the Superiority Claim shall be junior to the Carve Out and the liens of Bank of America on the BOA Collateral.</p> <p><b>Insurance.</b> The Debtor shall maintain, with financially sound and reputable insurance companies, insurance covering the Pre-Petition Collateral and the Post-Petition Collateral (collectively, the “<u>Collateral</u>”), which insurance shall be issued by companies, associations, or organizations reasonably satisfactory to the Secured Creditor and shall cover such casualties, risks, perils, liabilities, and other hazards reasonably required by the Secured Creditor. The Debtor shall name the Secured Creditor as an additional loss payee on all such insurance policies obtained by the Debtor in accordance with this provision in the Interim Order.</p>	Interim Order, ¶10.
<b>Priority of Post-Petition Liens</b>	<p>The Post-Petition Liens shall be subject to the “<u>Carve-Out</u>”, which shall mean the sum of (i) fees and expenses required to be paid to the Clerk of the Court and to the U.S. Trustee pursuant to 31 U.S.C. § 3717 and 28 U.S.C. § 1930, (ii) to the extent allowed by the Court on a final basis pursuant to a final and non-appealable order, all unpaid fees and expenses incurred by persons or firms retained by the Debtor (collectively, the “<u>Case Professionals</u>”) at any time before the Termination Date as long as those fees and expenses do not exceed the amounts designated in the Budget for such fees and expenses, and (iii) after the Termination Date, the payment of allowed and unpaid professional fees and expenses incurred by the Case Professionals in an aggregate amount not to exceed \$75,000.</p>	Interim Order, ¶¶ 13.
<b>Perfection of Replacement Liens</b>	<p>The Replacement Liens are deemed valid, binding, enforceable and perfected upon entry of this Order and no further notice, filing, recording or order shall be required to validate or perfect the Replacement Liens.</p>	Interim Order, ¶ 7.

<b>Summary of Material Terms</b>		<b>Location</b>
<b>Stipulations of the Debtor</b>	The Debtor stipulates to the facts surrounding the Pre-Petition Debt; the Loan Documents; the Pre-Petition Collateral; the Pre-Petition Liens; the extent of the Secured Lender's Cash Collateral; segregation and accounting of the Cash Collateral; and the Debtor's need for the use of Cash Collateral.	Interim Order, ¶ B-G.
<b>Termination</b>	The Debtor's right to use Cash Collateral under the Interim Order shall terminate on the earlier to occur of the following: (a) an order of the Court terminating the use of Cash Collateral; or (b) [●], 2018 at 11:59 p.m. (Prevailing Central Time) (the " <u>Termination Date</u> "), unless otherwise extended by consent of the parties or order of the Court.	Interim Order, ¶ 15.
<b>Survival</b>	<p>The terms and provisions of the Interim Order granting liens shall (i) survive the entry of any order that may be entered converting this Chapter 11 Case to Chapter 7 or dismissing it and (ii) shall be treated as permitted by the Bankruptcy Code under any plan of reorganization of the Debtor or order confirming such plan. The Interim Order, as well as the priorities, if any, in payment granted to any lien, pledge, and security interest under the Interim Order shall continue in this or any superseding case of the Debtor under the Bankruptcy Code. Such priorities, if any, in payment granted to any such lien, pledge, and security interest shall maintain their priority as provided by the Interim Order until the Secured Creditor is indefeasibly satisfied in full by their terms and discharged, and the Secured Creditor shall have no further obligation or financial accommodation to the Debtor.</p> <p>The stipulations and provisions of the Interim Order shall inure to the benefit of the Debtor and the Secured Creditor, and they shall bind the Debtor and its successors and assigns, including any trustees or other fiduciaries hereafter appointed as legal representatives of the Debtor or with respect to any property of the Debtor's estate, whether under Chapter 11 of the Bankruptcy Code or any subsequent Chapter 7 case.</p>	Interim Order, ¶¶ 14-15.

### **Description of Secured Lender's Secured Debt**

8. As of the Petition Date, the aggregate principal amount of \$6,189,922.38 was due and owing to the Secured Creditor (including, *inter alia*, a certain principal loan amount as well as outstanding credit card charges), plus certain interest, fees, expenses, and other charges (collectively, the "Pre-Petition Debt").

9. The Secured Creditor holds certain liens, pledges, and security interests in certain of the Debtor's assets and property, (collectively, the "Secured Property") as more fully described in the credit agreement, pledge and security agreement, and related agreements, amendments, and documents between the Debtor and the Secured Creditor (collectively, the "Loan Documents"), as well as certain liens and security interests in any and all cash, receivables, leases, issues, proceeds, and profits of and/or in any way associated with the Secured Property (collectively, the "Pre-Petition Collateral"). The liens and security interests of the Secured Creditor are referred to collectively as the "Pre-Petition Liens".

10. For clarification, the Pre-Petition Collateral does not include the collateral more particularly described in that certain Security Agreement dated as of January 19, 2017, by and among the Debtor and Bank of America, N.A. ("Bank of America"), and also listed on Exhibit A to that certain UCC Financing Statement Amendment naming JPMorgan Chase Bank, N.A., as secured party, filed in the office of the Texas Secretary of State as #17-00021177 on January 18, 2017 (the "BOA Collateral").

11. All cash of the Debtor's bankruptcy estate and cash equivalents, which represent income, payables, proceeds, products, rents, or profits of the Pre-Petition Collateral wherever located, that are now in the Debtor's possession, custody, or control, or in which the Debtor will obtain an interest during the pendency of the Chapter 11 Case constitute "Cash Collateral" of the

Secured Creditor (collectively, the “Cash Collateral”) within the meaning of Bankruptcy Code § 363. The Debtor has no interest, directly or indirectly, in any such cash that is not the Secured Creditor’s Cash Collateral.

**Basis for Relief Requested**

**I. The Debtor’s Urgent Need to Use Cash Collateral**

12. In the normal course of business, the Debtor uses cash on hand and cash flow from operations to fund working capital, capital expenditures and for other general corporate purposes. An inability to use cash on hand and cash generated from operations during the Chapter 11 Case could potentially cripple the Debtor’s business operations to the detriment of all parties in interest. The Debtor must use its cash to, among other things, continue the operation of its businesses in an orderly manner, maintain business relationships with lessors, vendors, suppliers and customers, pay employees and satisfy other working capital and operational needs – all of which are necessary to preserve and maintain the Debtor’s going-concern value and, ultimately, effectuate a successful reorganization. If the Debtor is unable to continue using Cash Collateral during the Chapter 11 Case, and if its continued use of the Cash Collateral is not immediately approved, there will be immediate and irreparable harm to the Debtor’s business and the estate.

13. The Debtor’s use of property of its estate is governed by Bankruptcy Code § 363, which provides in pertinent part, as follows:

If the business of the debtor is authorized to be operated under section . . . 1108 . . . of this title and unless the court orders otherwise, the [debtor] may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

11 U.S.C. § 363(c)(1)



14. Bankruptcy Code § 363(c)(2)(A) permits a debtor in possession to use cash collateral with the consent of the secured party. Alternatively, Bankruptcy Code § 363(c)(2)(B) permits the Bankruptcy Court, after notice and a hearing, to authorize a debtor in possession's use of cash collateral without the consent of the secured party so long as the use is consistent with the provisions of Bankruptcy Code § 363.

**I. The Debtor has the Requisite Consent to Use Cash Collateral**

15. Having negotiated in good faith and at arm's length with the Secured Creditor, the Debtor has the Secured Creditor's consent to use Cash Collateral. The Secured Creditor has agreed to the terms of the Interim Order. The Interim Order will allow the Debtor to use the Pre-Petition Collateral, including the Cash Collateral, in accordance with the Budget. Accordingly, because the Debtor has the Secured Creditor's requisite consent for the use of Cash Collateral under the proposed Interim Order, the Debtor's use of Cash Collateral should be approved under Bankruptcy Code § 363(c)(2)(A).

**II. The Debtor's Request to Use Cash Collateral and the Proposed Adequate Protection Are Appropriate**

16. The Debtor's proposed adequate protection is consistent with the requirements of Bankruptcy Code § 363 and, therefore, the Debtor's use of Cash Collateral—in addition to the Secured Creditor having consented to it—meets the standard for approval under Bankruptcy Code § 363(c)(2)(B).

17. Bankruptcy Code § 363(e) requires that the debtor adequately protect the secured creditor's interest in property to be used by the debtor from the diminution in value of such secured creditor's interest resulting from the debtor's use of the property during the chapter 11 case. Notably, the Bankruptcy Code does not specifically state what must be provided in an adequate protection package.

18. Instead, Bankruptcy Code § 361 contains a non-exhaustive list of acceptable forms of adequate protection, including a cash payment or periodic cash payments, additional liens, replacement liens or the “indubitable equivalent of such entity’s interest in such property.” 11 U.S.C. § 361; *Resolution Trust Corp. v. Swedeland Dev. Group, Inc. (In re Swedeland Dev. Group, Inc.)*, 16 F.3d 552, 564 (3d Cir. 1994) (“The Code does not expressly define adequate protection, but section 361 states that it may be provided by (1) periodic cash payments; (2) additional or replacement liens; or (3) other relief resulting in the ‘indubitable equivalent’ of the secured creditor’s interest in such property.”).

19. As a result, the determination of adequate protection is an inherently fact-specific inquiry. *In re Swedeland Dev. Group, Inc.*, 16 F.3d at 564 (“[A] determination of whether there is adequate protection is made on a case by case basis.”) (citing *In re O’Connor*, 808 F.2d 1393, 1397 (10th Cir. 1987)). The focus of the adequate protection requirement is to preserve the secured creditor’s position at the time of the bankruptcy filing and protect the secured creditor from diminution in the value of its collateral during the reorganization process. *Id.* (“The whole purpose of adequate protection for a creditor is to insure that the creditor receives the value for which he bargained prebankruptcy.”) (quoting *In re O’Connor*, 808 F.2d at 1396); *see also In re WorldCom, Inc.*, 304 B.R. 611, 618–19 (Bankr. S.D.N.Y. 2004) (“The legislative history for section 361 of the Bankruptcy Code, which sets forth how adequate protection may be provided under section 363, makes clear that the purpose is to insure that the secured creditor receives the value for which the creditor bargained for prior to the debtor’s bankruptcy.”). “However, neither the legislative history nor the Bankruptcy Code requires the Court to protect a creditor beyond what was bargained for by the parties.” *In re WorldCom*, 304 B.R. at 619.

20. By requiring debtors to provide adequate protection to those creditors affected by debtors' use of creditors' cash collateral, the Bankruptcy Code seeks to shield a secured creditor from diminution in the value of its interest in the particular collateral during the period of its use. *See In re Cont'l Airlines, Inc.*, 146 B.R. 536, 539–40 (Bankr. D. Del. 1992) (secured creditor only entitled to adequate protection to the extent the collateral declined in value); *In re Pursuit Athletic Footwear, Inc.*, 193 B.R. 713, 716 (Bankr. D. Del. 1996) (if there is no diminution in the value of the secured creditor's collateral and the debtor can operate profitably post-petition, the secured creditor is adequately protected against the use of cash collateral); *see also In re 495 Cent. Park Ave. Corp.*, 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992) ("The goal of adequate protection is to safeguard the secured creditor from diminution in the value of its interest during the chapter 11 reorganization.").

21. Here, with the Secured Creditor's consent, the Debtor proposes to provide the Secured Creditor with the adequate protection set out in summary of material terms above and the Interim Order. Specifically, the Debtor proposes to provide the Secured Creditor with four primary forms of adequate protection to protect against the post-petition diminution in value of the Pre-Petition Collateral (including the Cash Collateral) resulting from the use, sale or lease of the Pre-Petition Collateral (including the Cash Collateral) by the Debtor: (a) replacement liens; (b) superpriority administrative expense claims as provided in Bankruptcy Code § 507(b); and (c) periodic payments to the Secured Creditor (d) maintenance of insurance coverage on the Pre-Petition Collateral and the Post-Petition Collateral. Considered in the context of the Debtor's current and projected cash position, the proposed adequate protection—to which the Secured Creditor has agreed—is sufficient to protect the Secured Creditor from any diminution in value to the Pre-Petition Collateral. Under the circumstances of the Chapter 11 Case, the Debtor's

provision of the adequate protection is not only necessary to protect against any diminution in value, but is also fair and appropriate to ensure the Debtor is able to continue using Pre-Petition Collateral (including the Cash Collateral) for the benefit of its estate and all parties in interest and to continue its business operations during the Chapter 11 Case. The Debtor submits that the proposed adequate protection to be provided for the benefit of the Secured Creditor is appropriate.

### **III. The Debtor's Interim Use of Cash Collateral Is Necessary to Preserve Assets of the Debtor's Estate**

22. The Debtor has an immediate need to use the Pre-Petition Collateral, including the Cash Collateral, to, among other things, permit the orderly continuation of the operation of its business, to make payroll, and to satisfy other working capital and operational needs. Without use of the Cash Collateral, the Debtor will not be able to generate revenue and operate its business, and, therefore, will suffer immediate and irreparable harm to the detriment of all creditors and other parties in interest. In short, the Debtor's ability to fund its operations and the availability to the Debtor of sufficient working capital and liquidity through the use of Cash Collateral is vital to the preservation and maintenance of the going concern value of the Debtor's estate. Failure to pay these expenses would result in immediate and irreparable harm to the Debtor's estate.

23. The Debtor's ability to fund its operations and the availability to the Debtor of sufficient working capital and liquidity through the use of Cash Collateral, therefore, is vital to the confidence of the Debtor's employees, suppliers and customers and to the preservation and maintenance of the going-concern value of the Debtor's estate. Thus, the Debtor seeks immediate authority to use the Cash Collateral pursuant to the terms and conditions in the

Interim Order to prevent immediate and irreparable harm to the Debtor's estate pending the Final Hearing pursuant to Bankruptcy Rule 4001(b).

#### **IV. The Terms of the Requested Relief Are Fair, Reasonable, and Appropriate**

24. The Debtor has concluded that the requested relief is the best alternative available under the circumstances of these Chapter 11 Cases. Bankruptcy courts routinely defer to a debtor's business judgment on most business decisions, including the decision to borrow money, unless such decision is arbitrary and capricious. *See In re Trans World Airlines, Inc.*, 163 B.R. 964, 974 (Bankr. D. Del. 1994) (noting that an interim loan, receivables facility, and asset-based facility were approved because they "reflect[ed] sound and prudent business judgment, . . . [and were] reasonable under the circumstances and in the best interest of [the debtor] and its creditors"); *In re Simasko Prods. Co.*, 47 B.R. 444, 449 (D. Conn. 1985) ("[B]usiness judgments should be left to the board room and not to this Court."). Indeed, "more exacting scrutiny [of the debtor's business decisions] would slow the administration of the debtor's estate and increase its cost, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially."); *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985).

25. The Debtor has exercised sound business judgment in determining that the requested relief is appropriate and has satisfied the legal prerequisites to use Cash Collateral and Pre-Petition Collateral on an interim basis on the terms and conditions set forth in the Interim Order. The terms and conditions of the requested relief were negotiated by the Debtor and the Secured Creditor in good faith and at arms' length. In the reasonable exercise of the Debtor's business judgment, the requested relief is the best option available under the Debtor's present circumstances. The purpose of the requested relief is to enable the Debtor to continue normal

business operations during the Chapter 11 case. Further, the requested relief, on an interim basis, does not, directly or indirectly, materially prejudice the Debtor's estate or other parties-in-interest. Based on all of the foregoing, the adequate protection is fair and reasonable and sufficient to satisfy the requirements of Bankruptcy Code § 363(c)(2) and (e). Accordingly, the Debtor should be granted authority to obtain the use of Cash Collateral and Pre-Petition Collateral on the terms and conditions described above.

### **Notice**

26. Notice of this Motion has been provided to: (i) the Office of the United States Trustee; (ii) the Debtor's secured creditors; (iii) any party whose interests are directly affected by this specific pleading; (iv) those persons who have formally appeared and requested notice and service in these proceedings pursuant to Bankruptcy Rules 2002 and 3017; (v) counsel for and the members of any official committees appointed by this Court; (vi) the 20 largest unsecured creditors of the Debtor; and (vii) all governmental agencies having a regulatory or statutory interest in this case.

### **Request for Final Hearing**

27. Pursuant to Bankruptcy Rules 4001(b) and (d), the Debtor requests that the Court set a date for the Final Hearing that is as soon as practicable and fix the time and date prior to the Final Hearing for parties to file objections to this Motion.

WHEREFORE, the Debtor respectfully request that the Court (i) enter the Interim Order attached hereto as Exhibit A; (ii) set a final hearing on this Motion; and (iii) grant such other and further relief as is just and proper.

RESPECTFULLY SUBMITTED this 9th day of January, 2018.

**HAYNES AND BOONE, LLP**

By: /s/ Ian T. Peck

Ian T. Peck

State Bar No. 24013306

David Staab

State Bar No. 24093194

2323 Victory Avenue, Suite 700

Dallas, TX 75219

Telephone: 214.651.5000

Facsimile: 214.651.5940

Email: [ian.peck@haynesboone.com](mailto:ian.peck@haynesboone.com)

Email: [david.staab@haynesboone.com](mailto:david.staab@haynesboone.com)

**PROPOSED ATTORNEYS FOR DEBTOR**

**Exhibit A**

Interim Order



**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION**

In re:	§	Chapter 11
	§	
A’GACI, L.L.C.,	§	Case No. 18-_____
	§	
Debtor.	§	

**INTERIM ORDER AUTHORIZING USE OF CASH COLLATERAL AND  
GRANTING ADEQUATE PROTECTION**

Upon *Debtor’s Emergency Motion for an Order Authorizing Use of Cash Collateral and Granting Adequate Protection* (the “Motion”),<sup>3</sup> filed by A’GACI, L.L.C. (“A’GACI” or the “Debtor”) in the above-styled, Chapter 11 bankruptcy case (the “Chapter 11 Case”); and the Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and the Court

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<sup>3</sup> Capitalized terms not otherwise defined in this Order shall have the meaning ascribed to such terms in the Motion.

having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and that the Court may enter a final order consistent with Article III of the United States Constitution; and the Court having found that venue of this proceeding and the Motion in the Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that the relief requested in the Motion is in the best interest of the Debtor's estate, its creditors, and other parties-in-interest; and the Court having found that the Debtor's notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and the Court having reviewed and considered the Motion, the First Day Declaration, the Koch Declaration and the consent of JPMORGAN CHASE BANK, N.A. (the "Secured Creditor") to the terms of this Order and the use of cash collateral as set forth herein, and the Court having heard the statements in support of the relief requested in the Motion at the hearing before the Court (the "Hearing"); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefore, the Court is of the opinion that the Motion should be GRANTED.

THE DEBTOR AND SECURED CREDITOR STIPULATE AND AGREE THAT:

A. All capitalized terms not otherwise defined in this order (the "Order") shall have the meanings assigned to them in the Motion.

B. The Debtor acknowledges that, as of January 9, 2018 (the "Petition Date"), the aggregate principal amount of \$6,189,922.38 was due and owing to the Secured Creditor (including, *inter alia*, a certain principal loan amount as well as outstanding credit card charges), plus certain interest, fees, expenses, and other charges (collectively, the "Pre-Petition Debt"). Further, the Debtor acknowledges and admits that the Secured Creditor holds certain liens,

pledges, and security interests in certain of the Debtor's assets and property, (collectively, the "Secured Property") as more fully described in the credit agreement, pledge and security agreement, and related agreements, amendments, and documents between the Debtor and the Secured Creditor (collectively, the "Loan Documents"), as well as certain liens and security interests in any and all cash, receivables, leases, issues, proceeds, and profits of and/or in any way associated with the Secured Property (collectively, the "Pre-Petition Collateral"). (The liens and security interests of the Secured Creditor are referred to collectively as the "Pre-Petition Liens".) For clarification, the Pre-Petition Collateral does not include the collateral more particularly described in that certain Security Agreement dated as of January 19, 2017, by and among the Debtor and Bank of America, N.A. ("Bank of America"), and also listed on Exhibit A to that certain UCC Financing Statement Amendment naming JPMorgan Chase Bank, N.A., as secured party, filed in the office of the Texas Secretary of State as #17-00021177 on January 18, 2017 (the "BOA Collateral").

C. The Debtor further acknowledges and admits that all cash of the Debtor's bankruptcy estate and cash equivalents, which represent income, payables, proceeds, products, rents, or profits of the Pre-Petition Collateral wherever located, that are now in the Debtor's possession, custody, or control, or in which the Debtor will obtain an interest during the pendency of the Chapter 11 Case constitute "Cash Collateral" of the Secured Creditor (collectively, the "Cash Collateral") within the meaning of § 363 of Title 11 of the United States Code (the "Bankruptcy Code"). The Debtor acknowledges and admits that the Debtor has no interest, directly or indirectly, in any such cash that is not the Secured Creditor's Cash Collateral.

D. The Debtor agrees to segregate and account to the Secured Creditor for all Cash Collateral: (i) that the Debtor now possesses or (ii) that the Debtor might hereafter obtain. The

Debtor agrees to account to the Secured Creditor for all Cash Collateral (i) that the Debtor has permitted to be transferred into the possession of others, if any; or (ii) that is being held by those in privity with the Debtor. Unless already done, the Debtor shall account to the Secured Creditor for the receipt and use, if any, of Cash Collateral received by the Debtor since the Petition Date, including without limitation by providing monthly operating reports and financial statements.

E. The Debtor does not have sufficient available sources of working capital and financing to operate its business without the use of Cash Collateral. The Secured Creditor objects to the use of its Pre-Petition Collateral, including the Cash Collateral, except on the terms provided for in this Order.

F. Good, adequate, and sufficient cause has been shown for the entry of this Order. The entry of this Order and the use of Cash Collateral as provided herein are in the best interests of the Debtor, its creditors, and its estate.

G. The Debtor must provide adequate protection to the Secured Creditor as set forth in this Order for the use of the Pre-Petition Collateral, and the Secured Creditor is entitled, pursuant to Sections 361 and 363 of the Bankruptcy Code, to adequate protection for the Debtor's use of the Cash Collateral and to protect against the diminution of the Secured Creditor's interest in the Pre-Petition Collateral resulting from the use, sale, or lease thereof.

H. The foregoing paragraphs represent binding stipulations between the Secured Creditor and the Debtor for purposes of this Order. The adequate protection arrangements set forth in this Order have been negotiated in good faith and at arm's length between the Secured Creditor and the Debtor. The terms of such adequate protection arrangements are fair and reasonable, reflect the exercise of prudent business judgment by the Debtor consistent with its fiduciary duties, and are supported by reasonably equivalent value and fair consideration.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. The Motion is GRANTED to the extent set forth in this Order.
2. The Secured Creditor consents to the Debtor's use of the Cash Collateral during the period ("Budget Period") beginning on January 9, 2018, and ending on the Termination Date (as defined below) solely and exclusively for the disbursements set forth in the budget attached hereto as Schedule 1 (the "Budget") **and** solely and exclusively upon the protections, terms and conditions provided for in this Order, and for no other purpose. Further, and in strict accordance with the Budget, the Debtor may not under any circumstance use Cash Collateral to pay any pre-petition claim or debt of any party other than that of the Secured Creditor or transfer Cash Collateral to any affiliate of the Debtor or other person other than as strictly permitted by the Budget.
3. The Debtor is authorized to use Cash Collateral during the Budget Period exclusively for the purposes of and to the extent described in the Budget and this Order, and with respect to each calendar week during the Budget Period, the expenditure for any line item described in the Budget shall not exceed 115% of the aggregate amount projected to be expended by the Budget on such line item during such calendar week. Further, the Debtor may not exceed the total expenses set forth in the Budget for the Budget Period by more than ten percent (10%) in the aggregate.
4. The Debtor shall not use, sell, or expend, directly or indirectly, the Pre-Petition Collateral, the Post-Petition Collateral (as defined below), or the Cash Collateral except upon the terms and conditions set forth in this Order. The consent of the Secured Creditor to the use of Cash Collateral shall not be deemed to be a consent to any further or other use of the Pre-Petition Collateral, the Post-Petition Collateral, or the Cash Collateral other than such use as may be

expressly set forth in this Order.

5. Notwithstanding anything to the contrary stated herein, the Debtor's right to use Cash Collateral under this Order shall terminate on the earlier to occur of the following: (a) an order of the Court terminating the use of Cash Collateral; or (b) \_\_\_\_\_, 2018 at 11:59 p.m. (Prevailing Central Time) (the "Termination Date"), unless otherwise extended by consent of the parties or order of the Court.

6. The Secured Creditor is entitled to adequate protection of its interests in the Pre-Petition Collateral and Cash Collateral under Bankruptcy Code § 363(e) against any diminution in value of the Pre-Petition Collateral and Cash Collateral during the period from the entry date of this Order through the Termination Date. Nothing in this Order shall impair, affect, limit or circumscribe the Secured Creditor's right to apply the Adequate Protection Payments, if any, to any component of the Pre-Petition Debt and/or in any order that the Secured Creditor may, in its discretion, determine.

7. As adequate protection of the Secured Creditor's interests, and in addition to all existing security interests and liens granted to or for the benefit of Secured Creditor in the Pre-Petition Collateral (including the Cash Collateral), the Secured Creditor is hereby granted replacement security interests and liens (the "Replacement Liens" or "Post-Petition Liens") of the same extent, validity, and priority as the Pre-Petition Liens in the Pre-Petition Collateral (including the Cash Collateral) on all the Debtor's assets and property (except for avoidance actions arising under Bankruptcy Code Sections 544, 545, 546, 547, 548, 549, 550 or any similar provision of the Bankruptcy Code), whether now owned or hereafter created or acquired, real or personal, assets or rights, of any kind or nature, wherever located, and the income, receivables, proceeds, products, and profits thereof, whether arising from Bankruptcy Code § 552(b) or

otherwise (the “Post-Petition Collateral”). Such Replacement Liens include, without limitation, liens on all cash, including Cash Collateral generated or received by the Debtor after the Petition Date. The Replacement Liens are deemed valid, binding, enforceable and perfected upon entry of this Order and no further notice, filing, recording or order shall be required to validate or perfect the Replacement Liens. The Replacement Liens shall be subject and subordinate to the Carve Out (as defined below) and to the liens of Bank of America on the BOA Collateral.

8. As further adequate protection for the Debtor’s use of the Collateral and Cash Collateral, the Debtor shall pay the Secured Creditor the payments set forth in the Budget (the “Adequate Protection Payments”)<sup>4</sup>, beginning from and after the Petition Date. The first such payment shall be due as provided in the Budget.

9. As further additional adequate protection, if and to the extent that the Replacement Liens and Adequate Protection Payments prove insufficient to adequately protect the interests of the Secured Creditor in the Cash Collateral, then the Secured Creditor is granted a super-priority cost of administration claim under 11 U.S.C. § 507(b) (the “Superpriority Claim”), subject to further order of this Court. Notwithstanding the foregoing, (i) any such Superpriority Claim shall under no circumstances be superior to or prime any valid lien or security interest; (ii) this Order shall not alter the priority of any such Superpriority Claim in relation to any other §507(b) claim awarded to any other creditor; and (iii) the Superpriority Claim shall be junior to the Carve Out (as defined below) and the liens of Bank of America on the BOA Collateral.

10. As additional adequate protection, the Debtor shall maintain, with financially sound and reputable insurance companies, insurance covering the Pre-Petition Collateral and the Post-Petition Collateral (collectively, the “Collateral”), which insurance shall be issued by

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<sup>4</sup> The Adequate Protection Payments include the amounts identified in lines 21 (ABL Interest Expenses and Unused Fee), 22 (ABL Legal Fees), and 38 (ABL/DIP Draw/(Pay Down) of the Budget).

companies, associations, or organizations reasonably satisfactory to the Secured Creditor and shall cover such casualties, risks, perils, liabilities, and other hazards reasonably required by the Secured Creditor. The Debtor shall name the Secured Creditor as an additional loss payee on all such insurance policies obtained by the Debtor in accordance with this paragraph.

11. The Debtor shall make available to the Secured Creditor, upon request but not less frequently than monthly, all balance sheets, income statements, records of funds received in connection with the Collateral, and all other standard financial statements. Further, the Debtor shall also provide the Secured Creditor with copies (which may include electronic copies submitted via e-mail or electronic case filing) of all monthly operating reports delivered to the Office of the United States Trustee within two (2) days after filing of such reports. And, the Debtor shall provide the Secured Creditor with all other reports and information concerning the Debtor's business, financial or otherwise, as the Secured Creditor may from time to time reasonably request.

12. Nothing in this Order shall prejudice or limit the Secured Creditor's right to file, pursue, and/or oppose any motion or seek other relief in this Chapter 11 Case, including but not limited to the following: 1) the right to oppose the Motion and any further use of Cash Collateral by the Debtor following the Termination Date, 2) the right to file and/or pursue a motion to terminate exclusivity, a motion to transfer venue of this Chapter 11 Case to any court of competent jurisdiction, a motion to lift stay under Bankruptcy Code § 362(d), and/or a motion for further adequate protection, 3) the right to seek appointment of a trustee under Bankruptcy Code § 1104 or to seek dismissal or conversion of this Chapter 11 Case under Bankruptcy Code § 1112, and/or 4) the right to request any other appropriate relief to which the Secured Creditor may be entitled at law or equity. This Order shall likewise not limit the rights of the Debtor or



any other party-in-interest to contest any such relief, except to the extent this Order creates the Post-Petition Liens and Superpriority Claim.

13. The Post-Petition Liens shall be subject to the “Carve-Out”, which shall mean the sum of (i) fees and expenses required to be paid to the Clerk of the Court and to the U.S. Trustee pursuant to 31 U.S.C. § 3717 and 28 U.S.C. § 1930, (ii) to the extent allowed by the Court on a final basis pursuant to a final and non-appealable order, all unpaid fees and expenses incurred by persons or firms retained by the Debtor (collectively, the “Case Professionals”) at any time before the Termination Date as long as those fees and expenses do not exceed the amounts designated in the Budget for such fees and expenses, and (iii) after the Termination Date, the payment of allowed and unpaid professional fees and expenses incurred by the Case Professionals in an aggregate amount not to exceed \$75,000.

14. The terms and provisions of this Order granting liens shall (i) survive the entry of any order that may be entered converting the Chapter 11 Case to Chapter 7 or dismissing it and (ii) shall be treated as permitted by the Bankruptcy Code under any plan of reorganization of the Debtor or order confirming such plan. This Order, as well as the priorities, if any, in payment granted to any lien, pledge, and security interest under this Order shall continue in this or any superseding case of the Debtor under the Bankruptcy Code. Such priorities, if any, in payment granted to any such lien, pledge, and security interest shall maintain their priority as provided by this Order until the Secured Creditor is indefeasibly satisfied in full by their terms and discharged, and the Secured Creditor shall have no further obligation or financial accommodation to the Debtor.

15. The stipulations and provisions of this Order shall inure to the benefit of the Debtor and the Secured Creditor, and they shall bind the Debtor and its successors and assigns,

including any trustees or other fiduciaries hereafter appointed as legal representatives of the Debtor or with respect to any property of the Debtor's estate, whether under Chapter 11 of the Bankruptcy Code or any subsequent Chapter 7 case.

16. If any provision of this Order is hereafter modified, vacated, or stayed, such modification, vacation, or stay shall not affect (a) the validity of any obligation, indebtedness, or liability incurred by the Debtor to the Secured Creditor before the effective date of such modification, vacation, or stay; or (b) the validity or enforceability of any such security interest, pledge, lien, priority, or other protection authorized or created hereby, including the Post-Petition Liens and Superpriority Claim. Notwithstanding any such modification, vacation, or stay, any indebtedness, obligations, or liabilities incurred by the Debtor to the Secured Creditor before the effective date of such modification, vacation, or stay shall be governed in all respects by the original provisions of this Order, and the Secured Creditor shall be entitled to all the rights, remedies, Post-Petition Liens, privileges, and benefits granted herein with respect to all such indebtedness, obligations, or liabilities.

17. This Court shall retain jurisdiction with respect to all matters relating to the interpretation, enforcement, or implementation of this Order.

18. The Debtor is authorized and directed to perform all acts, take any action, and execute and comply with such other documents, instruments, and agreements, as may be required for the protection of the Collateral or that may be otherwise necessary to effectuate the terms and conditions of this Order.

19. The Debtor shall, within two (2) business days of the entry of the Order, mail copies of this Order to (a) the twenty (20) largest unsecured creditors of the Debtor, (b) any secured creditor of the Debtor, including the Secured Creditor, (c) the parties on the Debtor's

proposed Service List, and (d) any other party which has as of the date hereof, filed with the Clerk of the Court and served upon counsel for the Debtor a request for notices in this Chapter 11 Case. Any other further obligation for notice of the relief granted herein shall be, and hereby is, dispensed with and waived

20. Any notice in connection with this Order shall be made by personal delivery, overnight delivery, legible facsimile transmission, or (where shown below) e-mail transmission to:

If to the Debtor: Ian T. Peck  
HAYNES AND BOONE, LLP  
2323 Victory Avenue, Suite 700  
Dallas, TX 75219  
Telephone: 214.651.5000  
Facsimile: 214.651.5940  
E-mail: ian.peck@haynesboone.com

If to the Secured Creditor: W. Steven Bryant  
LOCKE LORD LLP  
600 Congress Avenue, Ste. 2200  
Austin, Texas 78701  
Telephone: (512) 305-4726  
Facsimile: (512) 305-4800  
E-mail: sbryant@lockelord.com

If to the U.S. Trustee: Kevin M. Epstein  
OFFICE OF THE U.S. TRUSTEE  
615 E. Houston Street, Suite 533  
San Antonio, Texas 78205  
Telephone: (210) 472-4640  
Facsimile: (210) 472-4649

Notices shall be effective on personal delivery, delivery by overnight delivery service, or transmission by facsimile or e-mail.

21. To the extent any finding of fact can be construed as a conclusion of law, and vice versa, it is hereby deemed as such.

22. A further hearing (the "Final Hearing") on the Motion is set for \_\_\_\_\_, 2018,

at \_\_\_\_\_, in Courtroom \_\_\_\_\_, Hipolito F. Garcia Federal Building and United States Courthouse, 615 East Houston Street, San Antonio, Texas 78205.

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**AGREED AS TO FORM AND SUBSTANCE:**

/s/ Ian T. Peck

Ian T. Peck  
State Bar No. 24013306  
David Staab  
State Bar No. 24093194  
**HAYNES AND BOONE, LLP**  
2323 Victory Avenue, Suite 700  
Dallas, TX 75219  
Telephone: 214.651.5000  
Facsimile: 214.651.5940  
Email: ian.peck@haynesboone.com  
Email: david.staab@haynesboone.com

**PROPOSED ATTORNEYS FOR DEBTOR**

-and-

/s/ W. Steven Bryant

W. Steven Bryant  
Texas Bar. No. 24027413  
Federal I.D. No. 32913  
**LOCKE LORD LLP**  
600 Congress Avenue, Ste. 2200  
Austin, Texas 78701  
Telephone: (512) 305-4726  
Facsimile: (512) 305-4800  
sbryant@lockelord.com

**COUNSEL FOR SECURED CREDITOR**

**Schedule 1**

**Budget**

**Budget to be Provided**

**Exhibit B**

**Koch Declaration**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION**

In re:	§	Chapter 11
	§	
A’GACI, L.L.C.,	§	Case No. 18-_____
	§	
Debtor.	§	
	§	

**DECLARATION OF GABE KOCH IN SUPPORT OF DEBTOR’S  
EMERGENCY MOTION FOR AN ORDER AUTHORIZING USE OF  
CASH COLLATERAL AND GRANTING ADEQUATE PROTECTION**

I, Gabe Koch, make this declaration pursuant to 28 U.S.C. § 1746:

1. I am a Director at Berkeley Research Group, LLC (“BRG”), which currently serves as financial advisor to A’GACI, L.L.C. (“A’GACI” or the “Debtor”) in the above-captioned Chapter 11 case.

2. BRG is a global business advisory firm that provides multidisciplinary solutions to complex challenges and opportunities. The restructuring and turnaround experts at BRG help management stabilize finances and operations to reassure all parties-in-interest that proactive steps are being taken to enhance value. BRG’s professionals have a deep expertise across many industries, allowing them to ascertain key issues quickly and react immediately on behalf of their clients. For clients in crisis, BRG’s professionals develop liquidity forecasts, improve cash flow management, obtain and consult regarding additional financing, and guide complex debt restructuring, among other services.

3. I have approximately 20 years of experience serving as a financial advisor and providing performance improvement services to corporations, various creditor groups, equity owners, and directors of underperforming companies. I have significant experience assisting distressed companies with day-to-day management activities, including development of business



plans, cash flow management, and implementation of liquidity and cost saving strategies, including store closing strategies. I have also served in general management roles and on advisory engagements with large multinationals, private equity portfolio companies, and entrepreneurial startups in North and South America, Europe, and Asia.

4. On October 27, 2017, BRG was retained to serve as financial advisor for the Debtor. Since November 15, 2017, I have overseen a team of individuals that has assisted the Debtor's management team with, among other things, managing and forecasting the Debtors' liquidity position, evaluating store profitability, assessing business performance, and other financial analysis and planning. Specifically, I have been involved in the review and negotiation of the terms of the Debtor's proposed use of cash collateral as well as the preparation of financial modeling, including cash flow forecasts and budgets. Accordingly, I am knowledgeable and familiar with the Debtors' day-to-day operations, business and financial affairs, cash flow needs and projections, and books and records. I am also familiar with the Debtors' supply chain and the status of the Debtors' relationships with various vendors, suppliers, and service-providers.

5. I submit this declaration (this "Declaration") in support of the *Debtor's Emergency Motion for an Order Authorizing Use of Cash Collateral and Granting Adequate Protection* (the "Cash Collateral Motion").<sup>5</sup>

6. Except as otherwise indicated herein, the facts set forth in this Declaration are based upon my personal knowledge, my review of relevant documents, information provided to me by the Debtor's employees or BRG employees working with the Debtor, or my opinion based upon experience, knowledge, and information concerning the Debtor's operations and the retail clothing industry. If called upon to testify, I would testify competently to the facts set forth in this Declaration. I am authorized to submit this Declaration on behalf of the Debtor.

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<sup>5</sup> Capitalized terms not otherwise defined in this Declaration shall have the meaning set forth in the Motion.

## CASH COLLATERAL MOTION

7. Through the Cash Collateral Motion, the Debtor requests entry of an Interim Order (1) authorizing the Debtor's use of Cash Collateral and all other collateral on an interim basis in accordance with the budget attached to the Cash Collateral Motion as **Schedule 1** (the "**Budget**"); (2) providing the adequate protection described herein to the Debtor's pre-petition secured lender, JPMORGAN CHASE BANK, N.A. (the "**Secured Creditor**"), for the use of the Pre-Petition Collateral (defined below); and (3) scheduling a hearing to consider approval and authorize the relief granted in the Interim Order on a final basis (the "**Final Order**" and, together with the Interim Order, the "**Cash Collateral Orders**").

8. The Secured Creditor has agreed to the terms of the proposed use of Cash Collateral pursuant to the terms of the Interim Order and in accordance with the Budget. The Debtor therefore has the requisite consent to use Cash Collateral.

9. In the normal course of business, the Debtor uses cash on hand and cash flow from operations to fund working capital, capital expenditures and for other general corporate purposes. An inability to use cash on hand and cash generated from operations during the Chapter 11 Case could potentially cripple the Debtor's business operations to the detriment of all parties in interest. The Debtor must use its cash to, among other things, continue the operation of its businesses in an orderly manner, maintain business relationships with lessors, vendors, suppliers and customers, pay employees and satisfy other working capital and operational needs – all of which are necessary to preserve and maintain the Debtor's going-concern value and, ultimately, effectuate a successful reorganization. If the Debtor is unable to continue using Cash Collateral during the Chapter 11 Case, and if its continued use of the Cash Collateral is not

immediately approved, there will be immediate and irreparable harm to the Debtor's business and the estate.

10. The Debtor and the Secured Creditor have agreed that the Debtor will provide the following primary forms of adequate protection (the "Adequate Protection Package"):

- **Replacement Liens / Post-Petition Liens.** In addition to all existing security interests and liens granted to or for the benefit of Secured Creditor in the Pre-Petition Collateral (including the Cash Collateral), the Secured Creditor is granted replacement security interests and liens (the "Replacement Liens" or "Post-Petition Liens") of the same extent, validity, and priority as the Pre-Petition Liens in the Pre-Petition Collateral (including the Cash Collateral) on all the Debtor's assets and property (except for avoidance actions arising under Bankruptcy Code Sections 544, 545, 546, 547, 548, 549, 550 or any similar provision of the Bankruptcy Code), whether now owned or hereafter created or acquired, real or personal, assets or rights, of any kind or nature, wherever located, and the income, receivables, proceeds, products, and profits thereof, whether arising from Bankruptcy Code § 552(b) or otherwise (the "Post-Petition Collateral"). Such Replacement Liens include, without limitation, liens on all cash, including Cash Collateral generated or received by the Debtor after the Petition Date. The Replacement Liens are subject and subordinate to the Carve Out and to the liens of Bank of America on the BOA Collateral.
- **Adequate Protection Payment.** The Debtor shall pay the Secured Creditor the payment set forth in the Budget (the "Adequate Protection Payment"), beginning from and after the Petition Date. The first such payment shall be due as provided in the Budget.
- **Superpriority Claims.** If and to the extent that the Replacement Liens and Adequate Protection Payments prove insufficient to adequately protect the interests of the Secured Creditor in the Cash Collateral, then the Secured Creditor is granted a super-priority cost of administration claim under 11 U.S.C. § 507(b) (the "Superpriority Claim"), subject to further order of this Court. Notwithstanding the foregoing, (i) any such Superpriority Claim shall under no circumstances be superior to or prime any valid lien or security interest; (ii) this Order shall not alter the priority of any such Superpriority Claim in relation to any other §507(b) claim awarded to any other creditor; and (iii) the Superiority Claim shall be junior to the Carve Out and the liens of Bank of America on the BOA Collateral.
- **Insurance.** The Debtor shall maintain, with financially sound and reputable insurance companies, insurance covering the Pre-Petition Collateral and the Post-Petition Collateral (collectively, the "Collateral"), which insurance shall

be issued by companies, associations, or organizations reasonably satisfactory to the Secured Creditor and shall cover such casualties, risks, perils, liabilities, and other hazards reasonably required by the Secured Creditor. The Debtor shall name the Secured Creditor as an additional loss payee on all such insurance policies obtained by the Debtor in accordance with this provision in the Interim Order.


11. I believe that the Adequate Protection Package, to which the Secured Creditor has agreed, is sufficient to protect the Secured Creditor from any diminution in value to the Pre-Petition Collateral. Under the circumstances of the Chapter 11 Case, I believe that the Debtor's provision of the Adequate Protection Package is not only necessary to protect against any diminution in value, but is also fair and appropriate to ensure the Debtor is able to continue using Pre-Petition Collateral (including the Cash Collateral) for the benefit of its estate and all parties in interest and to continue its business operations during the Chapter 11 Case. I submit that the proposed Adequate Protection Package to be provided for the benefit of the Secured Creditor is appropriate and should be approved.

12. I believe that the Debtor has exercised sound business judgment in determining that the requested relief is appropriate. The terms and conditions of the relief requested in the Cash Management Motion were negotiated by the Debtor, its professionals, and the Secured Creditor in good faith and at arms' length. I believe that the requested relief is the best option available under the Debtor's present circumstances. The purpose of the requested relief is to enable the Debtor to continue normal business operations during the Chapter 11 case. Further, the requested relief, on an interim basis, does not, directly or indirectly, materially prejudice the Debtor's estate or other parties-in-interest. Based on all of the foregoing, I believe the terms of the Debtor's proposed use of Cash Collateral pursuant to the terms of the Interim Order and in accordance with the Budget are fair and reasonable.

I declare under penalty of perjury that the foregoing is true and accurate to the best of my personal knowledge and information.

Dated January 9, 2018

**Berkeley Research Group, LLC**

By:   
\_\_\_\_\_

Gabe Koch  
Director

*Signature Page to Declaration of Gabe Koch in Support of Debtor's Emergency Motion for an Order Authorizing Use of Cash Collateral and Granting Adequate Protection*