

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

In re:)	Chapter 11
)	
Daily Gazette Company, <i>et al.</i> ,)	Case No. 18-20028
)	
Debtors. ¹)	(Joint Administration Requested)

**DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL
ORDERS (I) AUTHORIZING DEBTORS TO OBTAIN POSTPETITION
FINANCING WITH PRIORITY OVER CERTAIN ADMINISTRATIVE EXPENSES
AND SECURED BY LIENS ON PROPERTY OF THE ESTATE PURSUANT TO 11
U.S.C. § 364, (II) AUTHORIZING DEBTORS TO USE CASH COLLATERAL AND
OTHER COLLATERAL AND GRANTING ADEQUATE PROTECTION PURSUANT
TO 11 U.S.C. §§ 361 AND 363, (III) MODIFYING THE AUTOMATIC STAY,
(IV) SCHEDULING A FINAL HEARING, AND (V) GRANTING RELATED RELIEF**

Daily Gazette Company, and its affiliated debtors and debtors-in-possession (collectively, the “Debtors”) in the above-captioned chapter 11 cases (the “Chapter 11 Cases”) hereby move (the “Motion”) this Court, pursuant to sections 361, 362, 363, 364 and 507 of title 11 of the United States Code (the “Bankruptcy Code”), and Rules 2002, 4001, 6003, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 4001-2 of the Local Rules for the United States Bankruptcy Court for the Southern District of West Virginia (the “Local Rules”), for entry of an interim order substantially in the form attached hereto as Exhibit A (the “Interim Order”) and a final order (the “Final Order,”² and together with the Interim Order, the “DIP Orders”): (a) authorizing the Debtors to obtain and use debtor-in-possession financing with priority over certain administrative expenses and secured by liens on property of

¹ The Debtors in these Chapter 11 Cases and the last four digits of each Debtor’s taxpayer identification number are as follows: Daily Gazette Company (4480); Daily Gazette Holding Company, LLC (2981); Charleston Newspapers Holdings, L.P. (3028), Daily Gazette Publishing Company, LLC (3074), Charleston Newspapers (6079), and G-M Properties, Inc. (4124). The Debtors’ headquarters are located at 1001 Virginia St. E, Charleston, West Virginia 25301.

² The Debtors will file the form of Final Order prior to the Final Hearing (as defined herein).

the Debtors' estates; (b) authorizing the Debtors to use cash collateral and other collateral and grant adequate protection; (c) modifying the automatic stay to the extent necessary to implement the terms of the DIP Orders; (d) scheduling a final hearing; and (e) granting related relief. In support of the Motion, the Debtors rely upon and incorporate by reference the Declaration of Norman W. Shumate III in Support of Chapter 11 Filings and First-Day Motions (the "First-Day Declaration"), which was filed contemporaneously herewith and incorporated herein by reference. In further support of this Motion, the Debtors respectfully state as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334.

2. This is a core proceeding under 28 U.S.C. § 157(b), and the Debtors consent to entry of a final order by the Court in connection with this Motion to the extent it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

3. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The statutory bases for the relief requested herein are sections 361, 362, 363 and 364 of the Bankruptcy Code, Bankruptcy Rules 2002, 4001, 6003, 6004 and 9014 and Local Rule 4001-2.

CONCISE STATEMENT OF THE RELIEF REQUESTED

5. The Debtors ordinary business activities require cash on hand and cash flow from operations to fund and operate their business. The Debtors also require access to additional liquidity to fund their Chapter 11 Cases while working toward a successful sale of substantially all of their assets. The Debtors' use of cash collateral and post-petition financing is critical to allow the Debtors to maintain their day-to-day operations in the ordinary course. Absent use of

cash collateral and access to post-petition financing, the Debtors may not be able to continue operating in the ordinary course and the sale transaction contemplated to maximize the value of the Debtors' assets and business may be jeopardized. Accordingly, it is imperative that the Debtors have sufficient liquidity to avoid imminent and irreparable harm and successfully close the sale transaction.

6. Therefore, by this Motion, the Debtors request entry of DIP Orders authorizing them to, *inter alia*, obtain post-petition financing from United Bank (the "Bank") and use the Bank's cash collateral pursuant to the terms of, at least initially, the Interim Order, and the terms and conditions of that certain Post-Petition Loan and Security Agreement by and among the Debtors and the Bank, dated as of January 29, 2018 (the "DIP Loan Agreement").³

A. The Debtor-In-Possession Financing

1. Dip Loan Amount. The Debtors request authorization to obtain postpetition financing described in the DIP Loan Agreement and Interim Order (the "DIP Loan") up to the aggregate principal amount of \$400,000 from United Bank (the "Bank"). *See* DIP Loan Agreement at § 2.1; Interim Order at ¶ 11.

2. Interest Rates. The principal advances under the DIP Loan shall bear interest at the rate of 6.73% per annum (the "Fixed Rate"), and the default rate of interest shall be 2.00% in excess of the Fixed Rate. *See* DIP Loan Agreement at § 2.4.

3. Maturity Date. The Maturity Date of the DIP Loan shall be March 31, 2018. *See* DIP Loan Agreement at p. 6, definition of Maturity Date.

4. Events of Default. Events of Default under the DIP Loan include, among other things, (a) the Debtors' failure to comply with the terms of the DIP Loan Agreement; (b) entry of the Interim Order, the Final Order or the Sale Order in form and substance unacceptable to the Bank in its discretion; (c) any representation or warranty of any of the Debtors made in connection with the DIP Loan Agreement shall be untrue or incorrect in any material respect when made; (d) the occurrence of an event of default or breach by Borrowers of the Asset Purchase Agreement; (e) loss, theft, damage or destruction of any material portion of the Collateral for which there is either no insurance coverage or insufficient insurance coverage; and (f) the Debtors shall fail to comply with any of the provisions of the DIP Orders, the Debtors

³ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Interim Order and/or DIP Loan Agreement, as applicable.

shall fail to achieve the 363 Sale Benchmarks set forth on Exhibit B to the DIP Loan Agreement on or before the date specified on such exhibit, a trustee shall be appointed in one or more of the Chapter 11 Cases, an examiner shall be appointed in one or more of the Chapter 11 Cases, a Chapter 11 Case shall be dismissed or converted to a case under Chapter 7 of the Bankruptcy Code or a motion for any such dismissal shall be filed by the Debtors, there shall be filed by the Debtors any motion to sell all or a substantial part of the Collateral pursuant to a sale that would not constitute an Acceptable 363 Sale, any Debtor shall file any motion to alter, amend, vacate, supplement, modify, or reconsider, in any respect, either of the DIP Orders or either of the DIP Orders is amended, vacated, stayed, reversed or otherwise modified (in each case, without the Bank's prior written consent), the Bankruptcy Court shall enter an order granting to any Person other than the Bank relief from the automatic stay to foreclose upon a Lien with respect to any of the Collateral (to the extent that such Lien is junior in priority to the Liens securing the Pre-Petition Debt), an order shall be entered for the substantive consolidation of the bankruptcy estate of any Debtor with any other Person that is not a Debtor unless the order of substantive consolidation provides that the assets of such Debtor remain subject to the Liens of the Bank securing the Obligations and the Pre-Petition Debt, the Debtors shall not have sufficient Excess Availability for a period of 30 consecutive days to pay, or shall otherwise fail to pay as and when due and payable, all costs and expenses of administration that are incurred by it in the Chapter 11 Cases that are due and payable, the Debtors shall file a motion or other request with the Bankruptcy Court seeking authority to use any cash proceeds of the Collateral or to obtain any financing under Section 364(d) of the Bankruptcy Code secured by a priming Lien, or Lien of equal priority with the Bank's Liens, upon any Collateral, in each case without the Bank's prior written consent, an application shall be filed by the Debtors for the approval of any superpriority claim in the Chapter 11 Cases that is *pari passu* with or senior to the Obligations or there shall arise or be granted any such *pari passu* or superpriority claim, the Debtors shall file any action, suit or other proceeding or contested matter challenging the validity, perfection or priority of any Liens of the Bank securing the Pre-Petition Debt, or the validity or enforceability of any of the Pre-Petition Loan Documents, or asserting any Avoidance Claims against the Bank or seeking to recover any monetary damages from the Bank, or, without the Bank's consent, any Debtor shall discontinue or suspend all or any material part of its business operations or commence an orderly wind-down or liquidation of its business. *See* DIP Loan Agreement at § 8.1.

5. Superpriority Claims. Obligations incurred by the Debtors under the DIP Loan Agreement shall have priority, pursuant to section 364(c)(1) of the Bankruptcy Code, over any and all administrative expenses of the kind specified in sections 503(b) or 507(b) of the Bankruptcy Code, subject to the Carve-Out (which carve-out pertains to the Debtors' professionals' fees and fees owed to the Office of the United States Trustee). *See* DIP Loan Agreement at § 3.3; Interim Order at ¶ G.

6. Liens and Security Interests. Obligations incurred by the Debtors under the DIP Loan Agreement shall be secured, pursuant to section 364(c)(2) and section 364(d) of the Bankruptcy Code, by perfected first priority security interests in and liens upon the following, wherever located and whether now owned by such Borrower or hereafter acquired, including but not limited to: (a) all Real Property (excluding the Tucker County Real Estate); (b) all Inventory; (c) all General Intangibles; (d) all Accounts; (e) all Chattel Paper; (f) all

Instruments and Documents and any other instrument or intangible representing payment for goods or services; (g) all Equipment and titled rolling stock; (h) all Deposit Accounts and funds on deposit therein, including but not limited to Borrowers' Bank Accounts, and funds otherwise on deposit with or under the Control of Lender or its agents or correspondents; (i) all Fixtures located at or affixed to the Real Property; (j) all parts, replacements, substitutions, profits, products, Accessions, cash and non-cash Proceeds, and Supporting Obligations of any of the foregoing (including, but not limited to, insurance proceeds) in any form and wherever located; (k) all written or electronically recorded books and records relating to any such collateral and other rights relating thereto; and (y) any other real or personal property as to which Lender, at any time of determination, has a Lien to secure the Obligations; provided, however, that "Collateral" shall not include Avoidance Claims and any proceeds of property recovered in connection with the successful prosecution or settlement of Avoidance Claims; provided, further, however that if Borrowers grant or consent to any Lien or security interest in Avoidance Claims or any proceeds of property recovered in connection with the successful prosecution or settlement of Avoidance Claims, then such property will become part of the collateral automatically and without further action (collectively, the "Post-Petition Collateral"), subject only to the Carve-Out. *See* DIP Loan Agreement at § 3.1; Interim Order at ¶¶ G, P.

7. Account Sweeps. To the extent Advances have been made pursuant to the DIP Loan Agreement and the principal balance of the DIP Loan is greater than \$0.00, the Bank shall be entitled to automatically sweep the Debtors' Operating Account—provided that the balance in such account does not drop below \$50,000—until the principal balance of the DIP Loan is \$0.00. *See* DIP Loan Agreement at § 2.7.

8. The Debtors' Acknowledgements. The Debtors acknowledge and agree that the Bank's prepetition liens are valid, binding, enforceable, unavoidable, and properly perfected liens on the Pre-Petition Collateral and remain senior in priority over any and all other liens on the Pre-Petition Collateral, if any. The Debtors further acknowledge and agree they have no valid claims (as such term is defined in § 101(5) of the Bankruptcy Code) or causes of action against the Bank relating to the DIP Loan, the DIP Loan Agreement, the Pre-Petition Loan Documents, and/or the transactions contemplated hereunder or thereunder. *See* Interim Order at ¶¶ 9, 10.

8. Waiver of Automatic Stay. The Debtors agree and acknowledge that the automatic stay in effect pursuant to section 362 of the Bankruptcy Code be vacated and modified so as to permit (i) all payments and applications with respect to the obligations as provided in the DIP Loan Agreement and the Interim Order, (ii) the Bank to exercise, upon the occurrence and continuation of an event of default, and the giving of five (5) days' written notice to any Official Committee of Unsecured Creditors appointed in this case, the Office of the United States Trustee and the Debtors' counsel, all rights and remedies the Bank has pursuant to the DIP Loan Agreement and under the Interim Order; and (iii) the implementation of other provisions of the Interim Order. *See* Interim Order at ¶ D.

9. Section 506(c) Waivers. The Debtors waive their right to surcharge the Bank or any portion of the Pre-Petition or Post-Petition Collateral pursuant to § 506(c) of the Bankruptcy Code. No costs, expenses, fees or charges incurred by the Debtors or any other party

in connection with the preservation or disposition of the Pre-Petition Collateral or the Post-Petition Collateral whether or not incurred in connection with this chapter 11 case shall be charged to or recovered from the Bank or the Pre-Petition Collateral or Post-Petition Collateral whether pursuant to § 506(c) of the Bankruptcy Code or otherwise. *See* Interim Order at ¶ W.

10. Survival Of Rights And Obligations. If any or all of the provisions of the Interim Order or the DIP Loan Agreement are hereafter modified, vacated, amended or stayed by subsequent order of the Bankruptcy Court or any other court, such modification, vacatur, amendment or stay shall not affect the validity of any obligation to the Bank that is or was incurred prior to the effective date of such modification, vacatur, amendment or stay, or the validity and enforceability of any priority authorized or created by the Interim Order or the DIP Loan Agreement and, notwithstanding any such modification, vacatur, amendment or stay, any obligations of the Debtors pursuant to this Interim Order or the DIP Loan Agreement arising prior to the effective date of such modification, vacatur, amendment or stay shall be governed in all respects by the original provisions of the Interim Order and the DIP Loan Agreement, and the use of Cash Collateral and the validity of any such credit extended pursuant to the Interim Order or the DIP Loan Agreement is subject to the protection accorded under § 364(e) of the Bankruptcy Code. *See* Interim Order at ¶ 10.

B. The Debtors' Use Of Cash Collateral

1. Interests In Cash Collateral. The Bank is the only entity of which the Debtors are aware that has an interest in Cash Collateral.

2. Use Of Cash Collateral. As set forth above, it is critical that the Debtors are able to utilize Cash Collateral to fund their ordinary business operations and preserve and maximize the value of their business. The Debtors' use of Cash Collateral will be subject to compliance with the Budget, a copy of which is attached to the Interim Order as Exhibit B and the DIP Loan Agreement as Exhibit A.

3. Duration Of Use. The Debtors shall be permitted to use Cash Collateral until the earlier of: (a) a default under the Interim Order; (b) the Maturity Date stated in the DIP Loan Agreement, i.e., March 31, 2018; and (c) further order of the Bankruptcy Court. *See* Interim Order at ¶ CC.

4. Adequate Protection. The Debtors shall provide adequate protection to the Bank in the form of continuing liens and security interests in all Post-Petition Collateral to the same extent, type and priority as the Bank has in the Pre-Petition Collateral, subordinate only to the liens granted to the Bank under the DIP Loan Agreement. *See* Interim Order at ¶ P.

BACKGROUND

A. The Debtors' Business

7. On the date hereof (the "Petition Date"), each of the Debtors filed a voluntary petition for relief with the Court under chapter 11 of the Bankruptcy Code. The Debtors are

continuing to operate and maintain their business as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner or creditors' committee has been appointed in these Chapter 11 Cases.

8. The Debtors, headquartered in Charleston, West Virginia, collectively operate privately owned information and entertainment businesses consisting of the flagship newspaper, The Charleston Gazette-Mail, as well as a related website, weekly publications, a saturation mail product and the following verticals: www.wvcarfinder.com; www.wvrealstatefinder.com; www.wvjobfinder.com; and www.gazettemailclassifieds.com. The Debtors employ, collectively, approximately 210 people, approximately 170 of which are full-time employees and 40 of which are part-timers.

9. In the past several years, competition from alternative news sources and a general decline in newspaper readership have contributed to a decline in the Debtors' revenue. Additionally, competition from internet-based advertising alternatives has eroded traditional print media sources of revenue for the Debtors and across the newspaper industry.

10. In response to declining revenues, the Debtors have worked hard to implement all reasonable measures to minimize operational expenses. As much as possible, the Debtors have reduced headcount, minimized unprofitable activities, and carefully implemented certain price increases. The Debtors have also placed a greater emphasis on increasing their digital advertising services to keep pace with the rapidly changing digital marketplace.

11. Notwithstanding the Debtors' strategic measures to reduce expenses and increase revenues while maintaining the highest quality product that the Charleston region has come to expect, the Debtors have not been able to fully achieve their goals to enable them to continue operating under their current circumstances. For example, not only have the Debtors been forced

to contend with a rapidly changing newspaper environment, but also an arbitration award of nearly \$4 million was confirmed against Daily Gazette and DGHC and in favor of MediaNews Group, Inc. and Charleston Publishing Company prior to the Petition Date, the Debtors owe more than \$15 million to the Pension Benefit Guaranty Corporation in connection with the prepetition termination of Charleston Newspapers' retirement plan, and the Debtors can no longer satisfy their ongoing obligations to the Bank, which, as of the Petition Date, was owed a principal balance of approximately \$15.6 million, plus interest, fees and expenses.

12. Accordingly, the Debtors have made the decision to sell substantially all of their assets pursuant to section 363 of the Bankruptcy Code. The Debtors believe that a sale of their assets and operations will maximize the potential return for creditors while ensuring the ongoing viability of their news and information products and the ongoing employment of hundreds of people. Additional information about the Debtors, including their business operations and the events leading up to the filing of the Chapter 11 Cases, can be found in the First-Day Declaration.

B. The Debtors' Prepetition Secured Debt

13. On or about March 28, 2006, the Bank made a term loan to Charleston Newspapers in the principal amount of \$31,000,000 (the "2006 Loan") pursuant to the terms of that certain Loan Agreement dated March 28, 2006 by and among the Debtors and Lender, as amended.

14. On or about May 18, 2011, the Debtors and two of their non-debtor affiliates, ABRY/Charleston, Inc. ("ABRY") and Ridgeview Express Delivery, LLC ("Ridgeview"), and the Bank, entered into a certain Amended and Restated Loan Agreement (the "Bank Loan Agreement"), pursuant to which the Bank made an additional term loan to Charleston Newspapers in the principal amount of \$6,000,000 (the "2011 Loan") and together with the 2006

Loan, the “Bank Loan”). The Bank Loan is evidenced by that certain Consolidated Renewal Promissory Note dated January 28, 2014, made by Charleston Newspapers and payable to the order of the Bank in the principal amount of \$20,738,922.22 (the “Bank Note”).

15. Debtors Daily Gazette, DGHC, CNH, DGPC, G-M and their non-debtor affiliates, ABRY and Ridgeview, each executed guaranties of Charleston Newspapers’ obligations to the Bank. To secure the Bank Loan, the Debtors, ABRY and Ridgeview granted security interests to the Bank in all of their tangible and intangible personal property (collectively, the “Personal Property”), pursuant to certain security documents and pledge agreements entered into among them and the Bank (as amended, restated, supplemented, or otherwise modified from time to time, collectively, the “Personal Property Security Documents”).

16. To further secure the Loan, Charleston Newspapers granted a deed of trust lien to DIP Lender on its real property located at 1001 Virginia St. E, Kanawha County, West Virginia (the “Borrower Real Property”), pursuant to that certain Amended and Restated Deed of Trust, Security Agreement, Assignment of Leases and Rents, Financing Statement and Fixture Filing dated May 18, 2011, granted by Charleston Newspapers to Joyce F. Ofsa, as Trustee, for the benefit of DIP Lender, of record in the Office of the Clerk of the County Commission of Kanawha County, West Virginia in Trust Deed Book 3796, at page 497 (as amended, restated, supplemented or otherwise modified from time to time, the “Borrower Deed of Trust”).

17. To further secure the Loan and to secure its obligations pursuant to that certain Subsidiary Guaranty dated as of March 28, 2006, as amended, G-M granted a deed of trust lien to DIP Lender on the parking garage located across the street from 1001 Virginia St. E, Kanawha County, West Virginia (the “G-M Real Property”, and together with the Borrower Real Property, the “Real Property”; the Personal Property and the Real Property is hereinafter collectively

referred to as the “Pre-Petition Collateral”), pursuant to that certain Amended and Restated Deed of Trust, Security Agreement, Assignment of Leases and Rents, Financing Statement and Fixture Filing dated May 18, 2011, granted by G-M to Joyce F. Ofsa, as Trustee, for the benefit of United Bank, of record in the Office of the Clerk of the County Commission of Kanawha County, West Virginia in Trust Deed Book 3796, at page 529 (as amended, restated, supplemented or otherwise modified from time to time, the “G-M Deed of Trust” and together with the Borrower Deed of Trust, the “Deeds of Trust”; the Deeds of Trust and the Personal Property Security Documents are hereinafter collectively referred to as the “Pre-Petition Security Documents,” which, together with the Bank Loan Agreement, the Bank Note and all other documents executed and delivered by the Debtors, ABRY and/or Ridgeview in connection with the Loan are hereinafter collectively referred to as the “Pre-Petition Loan Documents”; any and all security interests and liens on the Pre-Petition Collateral created by the Pre-Petition Loan Documents or otherwise created to secure any obligations of the Debtors, ABRY and/or Ridgeview to United Bank, the “Pre-Petition Liens”).

BASIS FOR RELIEF REQUESTED

A. The Court Should Approve The Post-Petition Financing

18. Section 364 of the Bankruptcy Code provides, in pertinent part:

(c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt—

- (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;
- (2) secured by a lien on property of the estate that is not otherwise subject to a lien; or
- (3) secured by a junior lien on property of the estate that is subject to a lien.

(d)(1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if—

(A) the trustee is unable to obtain such credit otherwise; and

(B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

11 U.S.C. § 364(c), (d)(1).

19. Bankruptcy Rule 4001(c) governs the procedures for securing authorization to obtain debtor-in-possession financing and provides, in pertinent part:

The court may commence a final hearing on a motion for authority to obtain credit no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a hearing before such 14-day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

Fed. R. Bankr. P. 4001(c)(2).

20. The Debtors seek entry of the Interim Order to avoid immediate and irreparable harm to their estates. Accordingly, the Court is authorized to grant the relief requested herein.

21. The Debtors are unable to procure adequate postpetition financing in the form of unsecured credit or unsecured debt with an administrative priority under their current circumstances. The realities of the Debtors' current predicament necessitate their obtaining of financing under sections 364(c) and 364(d) of the Bankruptcy Code to maintain their business and preserve and maximize the value of their assets. Indeed, where few lenders likely can or will extend the necessary credit to a debtor, "it would be unrealistic and unnecessary to require [the debtor] to conduct . . . an exhaustive search for financing." *In re Sky Valley, Inc.*, 100 B.R. 107, 113 (Bankr. N.D. Ga. 1988), *aff'd sub nom., Anchor Sav. Bank FSB v. Sky Valley, Inc.*, 99 B.R. 117, 113 (N.D. Ga. 1989); *see also, In re Garland Corp.*, 6 B.R. 456, 461 (B.A.P. 1st Cir. 1980)

(secured credit under section 364(c)(2) authorized, after notice and a hearing, upon showing that unsecured credit unobtainable).

22. The Debtors negotiated the DIP Loan Agreement with the Bank pursuant to their sound business judgment, which is to be accorded deference so long as it does not run afoul of the provisions of and policies underlying the Bankruptcy Code. *See, e.g., Bray v. Shenandoah Fed. Sav. & Loan Ass'n (In re Snowshoe Co.)*, 789 F.2d 1085, 1088 (4th Cir. 1986) (approving debtor-in-possession financing necessary to sustain seasonal business); *In re Ames Dept. Stores, Inc.*, 115 B.R. 34, 40 (S.D.N.Y. 1990) (“The cases consistently reflect that the court’s discretion under section 364 is to be utilized on grounds that permit 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) (noting that approval of post-petition financing requires, *inter alia*, an exercise of “sound and reasonable business judgment”).

23. Bankruptcy courts generally will defer to a debtor-in-possession’s business judgment regarding the need for and the proposed use of funds, unless such decision is arbitrary and capricious. *See In re Curlew Valley Assocs.*, 14 B.R. 506, 511-13 (Bankr. D. Utah 1981); *see also In re Trans World Airlines, Inc.*, 163 B.R. 964, 974 (Bankr. D. Del. 1994) (approving interim loan, receivables facility and asset-based facility based upon debtor’s prudent business judgment). Bankruptcy courts will generally not second-guess a debtor-in-possession’s business decisions involving “a business judgment made in good faith, upon a reasonable basis, and within the scope of his authority under the Code.” *Curlew Valley*, 14 B.R. at 513-14.

24. The Debtors have exercised sound business judgment in determining the appropriateness of the DIP Loan Agreement and have satisfied the legal prerequisites to incur debt on the terms and conditions set forth in the DIP Loan Agreement and Interim Order. The DIP Loan Agreement contains terms and conditions that are the best available under the circumstances and provides the Debtors with sufficient liquidity during the period of the Budget. *See Unsecured Creditors' Comm. Mobil Oil Corp. v. First Nat'l Bank & Trust Co. (In re Ellingsen MacLean Oil Co.)*, 65 B.R. 358, 365 (W.D. Mich. 1986) (recognizing that a debtor may have to enter into hard bargains to acquire funds).

25. The funds and liquidity to be provided by the DIP Loan are essential to enable the Debtors to continue to operate optimally during the course of these Chapter 11 Cases while the Debtors work towards a value-maximizing sale transaction that is in the best interests of the Debtors' estates, their creditors and stakeholders. Failure to obtain the DIP Loan pursuant to the DIP Loan Agreement could cause the Debtors to be unable to meet their post-petition operating expenses in the ordinary course of business, thereby leading to the potential wind-down of the Debtors' business and adverse impact on the proposed sale of the Debtors' assets and business as a going concern. Moreover, access to the DIP Loan will afford the Debtors' vendors and suppliers the necessary confidence to continuing ongoing relationships with the Debtors, and also will be viewed favorably by the Debtors' employees and customers, thereby enhancing the prospect for a successful sale transaction.

26. The Debtors submit that the terms and conditions of the DIP Loan Agreement are fair and reasonable under the circumstances and were negotiated with the Bank at arm's length and in good faith. Accordingly, the Debtors request that they be authorized to obtain post-petition financing in the form of the DIP Loan pursuant to the DIP Loan Agreement, and that the

Bank be granted all necessary and applicable protections contained therein and the Interim Order.

B. The Court Should Authorize The Debtors' Use Of Cash Collateral And Grant The Bank Adequate Protection

27. In addition to the need for debtor-in-possession financing, the Debtors have a critical need for the immediate use of Pre-Petition Collateral, including the Bank's Cash Collateral (as defined in section 363(a) of the Bankruptcy Code). Inability to use the Bank's Cash Collateral would have an immediate and detrimental effect on the Debtors' operations and their ability to continue operating in these Chapter 11 Cases while they try to consummate a value-maximizing sale of substantially all of their assets for the benefit of their estates, creditors and other stakeholders. If the Debtors are unable to use Cash Collateral, their ability to pay postpetition operating expenses, including payroll, and to pay vendors to ensure a continued supply of services and materials essential to the Debtors' continued viability. Indeed, the Debtors would be unable to operate their business before getting anywhere near the closing on a sale of substantially all of their assets. In sum, the Debtors would suffer immediate and irreparable harm if they are unable to use the Cash Collateral, which use shall be subject to the terms of the Budget.

28. Pursuant to section 363(c)(2) of the Bankruptcy Code, the Debtors may not use the Bank's Cash Collateral absent its consent or authorization by the Court. Section 363(e) of the Bankruptcy Code provides that on request of an entity that has an interest in property to be used by a debtor, the Court shall prohibit or condition such use as necessary to provide adequate protection of such interest. The Bank has consented to the use of its Pre-Petition Collateral and Cash Collateral, conditioned upon the Debtors providing the adequate protection described herein and in the Interim Order. The proposed adequate protection to be provided to the Bank in

connection with the Debtors' use of Pre-Petition Collateral and Cash Collateral includes continuing liens and security interests in the Post-Petition Collateral to the same extent, type and priority as the Bank has in the Pre-Petition Collateral, subordinate only to the liens granted to the Bank under the DIP Loan Agreement. In addition, the Debtors are obligated to provide the Bank with reports regarding their post-petition receipts and disbursements.

29. The Debtors request that the Court find that the foregoing adequate protection to be granted to the Bank is reasonable and sufficient to protect the Bank's interests without prejudice to the right of the Bank to seek additional adequate protection.

WAIVER OF BANKRUPTCY RULE 6004(a) and (h)

30. The Debtors believe and efficient and expeditious approval and implementation of the DIP Loan pursuant to the DIP Loan Agreement is in the best interests of the Debtors' estates, their creditors and other parties in interest. Accordingly, the Debtors seek waiver of the 14-day stay of orders authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h).

NOTICE

31. Notice of this Motion will be given to the following parties, or in lieu thereof, to their counsel: (a) the Office of the United States Trustee; (b) the holders of the 20 largest unsecured claims against each of the Debtors; (c) the Office of the United States Attorney for the Southern District of West Virginia; (d) the Internal Revenue Service; and (e) counsel to United Bank.

WHEREFORE, the Debtors respectfully request that the Court (a) enter the Interim Order, substantially in the form attached hereto as Exhibit A, (b) schedule a final hearing on the Motion, and (c) grant such other and further relief as is just.

DATED: January 30, 2018

SUPPLE LAW OFFICE, PLLC

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