

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

----- X
In re: : Chapter 11
: :
FIRST MODE HOLDINGS, INC., *et al.*,¹ : Case No. 24-12794 (____)
: :
Debtors. : (Joint Administration Requested)
: :
----- X

**MOTION OF DEBTORS FOR ENTRY OF INTERIM AND FINAL ORDERS
(I) AUTHORIZING THE DEBTORS TO (A) OBTAIN POSTPETITION
FINANCING AND (B) USE CASH COLLATERAL, (II) GRANTING LIENS AND
PROVIDING CLAIMS WITH SUPERPRIORITY ADMINISTRATIVE EXPENSE
STATUS, (III) GRANTING ADEQUATE PROTECTION TO THE PREPETITION
FACILITY LENDER, (IV) MODIFYING THE AUTOMATIC STAY,
(V) SCHEDULING A FINAL HEARING, AND (VI) GRANTING RELATED RELIEF**

The debtors and debtors in possession (collectively, the “**Debtors**”) in the above-captioned cases (the “**Chapter 11 Cases**”) hereby file this motion (this “**Motion**”) and respectfully state as follows:²

RELIEF REQUESTED

1. By this Motion, the Debtors seek entry of an interim order, substantially in the form attached hereto as Exhibit A (the “**Interim Order**”) and a final order (the “**Final Order**” and together with the Interim Order, the “**DIP Orders**”):

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: First Mode Holdings, Inc. (7177), and Synchronous LLC (1829). The Debtors’ mailing address is 3417 1st Ave S, Seattle, WA, 98134.

² Capitalized terms used but not defined herein shall have the meanings given to them in the Interim Order or the DIP Credit Agreement (as defined below), as applicable.

- (i) authorizing First Mode Holdings, Inc. (the “**DIP Borrower**”) to obtain postpetition financing (“**DIP Financing**”) pursuant to a superpriority, senior secured and priming debtor-in-possession term loan credit facility (the “**DIP Facility**”) subject to the terms and conditions set forth in that certain Superpriority Senior Secured Debtor-in-Possession Loan Agreement attached to the Interim Order as Exhibit 1 (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time, the “**DIP Credit Agreement**”), by and among the DIP Borrower, the DIP Guarantor (as defined below), Anglo American International Holdings Limited (the “**DIP Lender**”) in an aggregate principal amount not to exceed \$26,000,000 (the commitments in respect thereof, the “**DIP Commitments**” and such loans, the “**DIP Loans**”), in the form of a new money superpriority senior secured delayed draw term loan in the aggregate principal amount of \$26,000,000, of which, \$6,625,219 will be immediately available upon entry of the Interim Order, in accordance with the terms and conditions set forth in the DIP Credit Agreement;
- (ii) authorizing Synchronous LLC (the “**DIP Guarantor**”) to guarantee the DIP Loans and the other DIP Obligations (as defined below);
- (iii) authorizing the Debtors to execute, deliver and perform under the DIP Credit Agreement and all other loan documentation related to the DIP Facility, including, without limitation, as applicable, security agreements, pledge agreements, control agreements, mortgages, deeds, charges, guarantees, promissory notes, intercompany notes, certificates, instruments, intellectual property security agreements, notes, and such other documents that may be reasonably requested by the DIP Lender, in each case, as amended, restated, supplemented, waived or otherwise modified from time to time in accordance with the terms thereof and in the Interim Order (collectively, together with the DIP Credit Agreement and any other Financing Documents (as defined in the DIP Credit Agreement), the “**DIP Documents**”);
- (iv) authorizing the Debtors to incur loans, advances, extensions of credit, financial accommodations, reimbursement obligations, fees (including, without limitation, commitment fees and any other fees payable pursuant to the DIP Documents), costs, expenses and other liabilities, and all other obligations (including indemnities and similar obligations, whether contingent or absolute) due or payable under the DIP Documents (collectively, the “**DIP Obligations**”), and to perform such other and further acts as may be necessary, desirable or appropriate in connection therewith;
- (v) subject to the Carve-Out (as defined in the Interim Order), granting to the DIP Lender, allowed superpriority administrative expense claims pursuant to section 364(c)(1) of the Bankruptcy Code in respect of all DIP Obligations of the Debtors;
- (vi) granting to the DIP Lender valid, enforceable, non-avoidable and automatically perfected liens pursuant to sections 364(c)(2) and 364(c)(3) of the Bankruptcy Code and priming liens pursuant to section 364(d) of the Bankruptcy Code on all

prepetition and postpetition property of the Debtors' estates (other than certain excluded property as provided in the DIP Documents (the "**Excluded Assets**")) and all proceeds thereof, including, subject only to and effective upon entry of the Final Order, any Avoidance Proceeds (as defined in the Interim Order), in each case subject to the Carve-Out;

- (vii) authorizing the DIP Lender and the Prepetition Facility Lender (as defined in the Interim Order), to take all commercially reasonable actions to implement and effectuate the terms of the Interim Order;
- (viii) authorizing the Debtors to waive, subject to entry of the Final Order, (a) their right to surcharge the Prepetition Facility Collateral (as defined in the Interim Order) and the DIP Collateral (as defined in the Interim Order) (together, the "**Collateral**") pursuant to section 506(c) of the Bankruptcy Code and (b) any "equities of the case" exception under section 552(b) of the Bankruptcy Code;
- (ix) subject to entry of the Final Order, waiving the equitable doctrine of "marshaling" and other similar doctrines (i) with respect to the DIP Collateral for the benefit of any party other than the DIP Lender and (ii) with respect to any of the Prepetition Facility Collateral (including the Cash Collateral (as defined in the Interim Order)) for the benefit of any party other than the Prepetition Facility Lender;
- (x) authorizing the Debtors to use proceeds of the DIP Facility solely in accordance with the Interim Order and the DIP Documents;
- (xi) authorizing the Debtors to pay the principal, interest, fees, expenses and other amounts payable under the DIP Documents as such become earned, due and payable to the extent provided in, and in accordance with, the DIP Documents;
- (xii) subject to the restrictions set forth in the DIP Documents and the Interim Order, authorizing the Debtors to use the Prepetition Facility Collateral, including Cash Collateral of the Prepetition Facility Lender under the Prepetition Facility Documents (as defined in the Interim Order), and provide adequate protection to the Prepetition Facility Lender for any diminution in value of its interests in the applicable Prepetition Facility Collateral (including Cash Collateral), including, without limitation, any diminution in value resulting from the imposition of the automatic stay under section 362 of the Bankruptcy Code (the "**Automatic Stay**"), the Debtors' use, sale, or lease of the Prepetition Facility Collateral (including Cash Collateral), and the priming of its interests in the Prepetition Facility Collateral (including Cash Collateral);
- (xiii) vacating and modifying the Automatic Stay to the extent set forth in the Interim Order to the extent necessary to permit the Debtors and their affiliates, the DIP Lender and the Prepetition Facility Lender to implement and effectuate the terms and provisions of the Interim Order, the DIP Documents and, upon entry, the Final Order and to deliver any notices of termination described and as further set forth in the Interim Order;

- (xiv) waiving any applicable stay (including under Bankruptcy Rule 6004) and providing for immediate effectiveness of the Interim Order and, upon entry, the Final Order; and
- (xv) scheduling a final hearing (the “**Final Hearing**”) to consider final approval of the DIP Facility and use of Cash Collateral pursuant to the proposed final order (the “**Final Order**”).

2. In support of this Motion, the Debtors respectfully submit and incorporate by reference the First Day Declaration (as defined below) and the *Declaration of Lyle Bauck in Support of Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Use Cash Collateral, (II) Granting Liens and Providing Claims with Superpriority Administrative Expense Status, (III) Granting Adequate Protection to the Prepetition Facility Lender, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief* (the “**Bauck Declaration**”), filed contemporaneously herewith.

JURISDICTION AND VENUE

3. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, dated February 29, 2012. This is a core proceeding under 28 U.S.C. § 157(b). Venue of these cases and this Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

4. The statutory predicates for the relief requested herein are sections 105, 362, 363, 364, 503, and 507 of Title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “**Bankruptcy Code**”), Rules 2002, 4001, and 9014 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), and Rule 4001-2 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “**Local Rules**”).

5. Pursuant to Local Rule 9013-1(f), the Debtors consent to the entry of a final judgment or order with respect to this Motion if it is determined that this Court would lack Article III jurisdiction to enter such final judgment or order absent consent of the parties.

BACKGROUND

6. On December 15, 2024 (the “**Petition Date**”), the Debtors filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to manage and operate their business as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been requested and no committee has been appointed in the Chapter 11 Cases.

7. The factual background regarding the Debtors, including their business operations, their capital and debt structures, and the events leading to the filing of the Chapter 11 Cases, is set forth in detail in the *Declaration of Colin Mark Freed in Support of Chapter 11 Petitions and First Day Pleadings*, filed contemporaneously herewith (the “**First Day Declaration**”).

8. Simultaneously with the filing of this Motion, the Debtors have filed a motion with this Court pursuant to Bankruptcy Rule 1015(b) seeking joint administration and consolidation of the Chapter 11 Cases for procedural purposes only.

PRELIMINARY STATEMENT

9. As set forth in the First Day Declaration and the Bauck Declaration, the Debtors filed these cases to swiftly and responsibly complete a value-maximizing sale and confirm a plan of liquidation that the Debtors expect will provide significant value to general unsecured creditors. The DIP Facility will provide the Debtors with the additional liquidity necessary to fund continued business operations, the sale process, and the successful administration of the Chapter 11 Cases.

10. The DIP Facility consists of a new money superpriority senior secured delayed draw term loan in the aggregate principal amount of \$26 million, of which, \$6,625,219 will be

immediately available upon entry of the Interim Order, and the remainder upon entry of the Final Order.

11. The Debtors, in consultation with their advisors and under the oversight of an independent transaction committee of the Board of Directors of First Mode Holdings, Inc. (the “**Restructuring Committee**”), determined that entry into the DIP Facility represented the best, and only viable, postpetition DIP financing option available to the Debtors. The DIP Facility provides the Debtors with immediate and critical access to liquidity which is necessary to ensure that the Debtors can proceed with the Chapter 11 Cases and maximize value for the Debtors’ estates.

CONCISE STATEMENT PURSUANT TO BANKRUPTCY RULE 4001³

9. Pursuant to Bankruptcy Rules 4001(b), (c), and (d), the following is a concise statement and summary of the proposed material terms of the DIP Documents and DIP Orders:

Summary of Material Terms	
Parties to the Proposed DIP Facility <i>Fed. R. Bankr. P. 4001(c)(1)(B)</i>	<u>Borrower</u> : First Mode Holdings, Inc. <u>Guarantors</u> : Synchronous LLC <u>DIP Lender</u> : Anglo American International Holdings Limited <i>See Preamble to DIP Credit Agreement, Preamble to DIP Order.</i>
Purpose <i>Fed. R. Bankr. P. 4001(c)(1)(B); Local Rule 4001-2(a)(i)</i>	Solely in accordance with the DIP Orders, the Approved Budget (subject to any variances permitted by Clause 9.28(b) of the DIP Credit Agreement) and the DIP Credit Agreement, the proceeds of the Loans will be used (i) to pay certain costs, fees and expenses related to business operations and the Cases (including, without limitation, professional fees, costs and expenses) and (ii) to fund the Carve-Out and to make payments under the Carve-Out in accordance with the terms of the DIP Orders; provided that any success fee paid in connection with any sale transaction shall first be paid out of the proceeds of such sale transaction. <i>See DIP Credit Agreement Particulars.</i>

³ The summaries contained in this motion are qualified in their entirety by reference to the applicable provisions of the DIP Documents. To the extent there exists any inconsistency between this motion and the provisions of the DIP Documents or the DIP Orders, the provisions of the DIP Documents or the DIP Orders, as applicable, will control. Capitalized terms used but not otherwise defined in this section have the meaning ascribed to such terms in the Interim Order or the DIP Credit Agreement.

Summary of Material Terms	
Borrowing Limits <i>Fed. R. Bankr. P. 4001(c)(1)(B); Local Rule 4001-2(a)(i)A</i>	Up to \$26,000,000 of new money delayed draw term loans to be made in multiple draws. See DIP Credit Agreement Particulars.
Initial DIP Budget <i>Fed. R. Bankr. P. 4001(c)(1)(B); Local Rule 4001-2(a)(iii)</i>	A copy of the Initial DIP Budget is attached as <u>Exhibit 2</u> to the Interim Order.
Interest Rates <i>Fed. R. Bankr. P. 4001(c)(1)(B)</i>	<u>Interest Reference Rate</u>: 3 Month Term SOFR (as on the Quotation Day) <u>Margin</u>: 6.00 per cent per annum <u>Credit Adjustment Spread</u>: 0.26161 per cent per annum <u>Interest</u>: (a) Interest shall accrue on all outstanding Loans in respect of each Interest Period at a rate equal to the sum of: (A) the Interest Reference Rate for that Interest Period; (B) the Margin for such Interest Period; and (C) the Credit Adjustment Spread, provided that, in relation to any Interest Period of the Loans, if the aggregate of the Interest Reference Rate and the Credit Adjustment Spread is less than zero, then the aggregate of the applicable Interest Reference Rate and the Credit Adjustment Spread shall be deemed to be zero. (b) Interest on each Loan will be paid in arrears on the first Business Day following the end of an Interest Period and shall, pursuant to Clause 6.3 (Capitalization of Interest), be added to and be deemed a Loan and bear Interest accordingly. <u>Capitalization of Interest</u>: (a) Unless otherwise agreed in writing, the Company all Interest on the outstanding Loans under the Facility will be capitalized and added to and deemed a Loan on the first Business Day following the end of an Interest Period ending on or prior to the Final Maturity Date and will bear Interest accordingly. Any Interest capitalized in accordance with Clause 6.3 (Capitalization of Interest) shall be disregarded for the purposes of calculating the Available Facility. (b) Interest in respect of an Interest Period which ends on the Final Maturity Date or during the continuance of an Event of Default may not be capitalized. <u>Default Rate</u>: (a) with respect to overdue amounts for a Loan constituting principal, capitalized Interest or capitalized Commitment Fees, a rate equal to the interest rate for such Loan for the then current Interest Period (being the sum of the applicable Interest Reference Rate, the applicable Margin and the Credit Adjustment Spread) plus 2 per cent per annum; and (b) with respect to any other overdue amount (including overdue interest), a rate equal to the interest rate for Loans for the then current Interest Period (being the sum of the applicable Interest Reference Rate, the applicable Margin and

Summary of Material Terms	
	the Credit Adjustment Spread) plus 2 per cent per annum, whether or not any Loans are outstanding at such time. See DIP Credit Agreement Particulars, §§ 6.1, 6.3, 10.3.
Maturity Date <i>Fed. R. Bankr. P. 4001(c)(1)(B); Local Rule 4001-2(a)(i)</i>	March 31, 2025. See DIP Credit Agreement Particulars.
Repayment Features / Roll-Up <i>Local Rule 4001-2(a)(i)(E) & (O)</i>	None.
Conditions Precedent to Closing and Lending <i>Fed. R. Bankr. P. 4001(c)(1)(B); Local Rule 4001-2(a)(i)(E)</i>	<u>Conditions to effectiveness.</u> The effectiveness of the DIP Credit Agreement and the obligation of the Lender to make Loans thereunder on the Closing Date are subject to the satisfaction of the following conditions: (a) the Lender (or its counsel) shall have received from each party to the DIP Credit Agreement a counterpart of that Agreement signed on behalf of such party; (b) [reserved]; (c) [reserved]; (d) [reserved]; (e) the Petition Date shall have occurred, and each of the Company and the Guarantor shall be a debtor and a debtor-in-possession in the Cases; (f) the Obligors and certain of their affiliates shall have entered into an asset purchase agreement (the “Stalking Horse Purchase Agreement”) acceptable to the Lender pursuant to which the Stalking Horse Purchaser has agreed to acquire substantially all the assets and the assumption of specified liabilities of the Obligors and such affiliates; (g) the Lender shall have received a copy of the Budget in form and substance satisfactory to the Lender (the “Initial Budget”); (h) the Lender shall have received an operating budget of the Company covering the period commencing on the Petition Date and ending on the Final Maturity Date and setting forth, on a weekly basis, projected operating and non-operating receipts, disbursements, net operating cash flow and Liquidity prepared by the Company’s management and in form and substance acceptable to the Lender; (i) the Lender shall have received a wind-down budget for the non-Debtor Subsidiaries of the Company; (j) the Cases of any of the Debtors shall not have been dismissed or converted into cases under Chapter 7 of the Bankruptcy Code; (k) a motion, in form and substance satisfactory to the Lender seeking approval of the Facility shall have been filed in each of the Cases within one (1) day of the Petition Date;; (l) all “first day” orders and all related pleadings intended to be entered on or prior to the Interim Order Entry Date shall have been entered by the Bankruptcy Court and shall be in form and substance acceptable to the Lender, it being understood that drafts approved by counsel to the Lender prior to the Petition Date are acceptable; (m) the Company shall not have made any payments after the Petition Date on account of any Indebtedness arising prior to the Petition Date unless such payment is expressly authorized by the “first day” orders or the DIP Orders and is made with the consent of the Lender (1)

Summary of Material Terms	
	“consistent with the Approved Budget” or (2) as required by the Stalking Horse Purchase Agreement; (n) no trustee under Chapter 7 or Chapter 11 of the Bankruptcy Code or examiner with expanded powers shall have been appointed in any of the Cases; (o) the Interim Order Entry Date shall have occurred not later than three calendar days following the Petition Date, and the Interim DIP Order shall be in full force and effect and shall not have been vacated or reversed, shall not be subject to a stay, and shall not have been modified or amended in any respect without the prior written consent of the Lender, and the Lender shall have received a certified copy of the Interim DIP Order entered by the Bankruptcy Court; (p) except for the Cases, there shall exist no unstayed action, suit, investigation, litigation or proceeding pending or (to the knowledge of the Obligors) threatened in any court or before any arbitrator or governmental instrumentality (other than the Bankruptcy Court) that would reasonably be expected to have a Material Adverse Effect. <u>Conditions to drawdown.</u> Subject to the terms of the DIP Credit Agreement, the Lender will only be obliged to make a Loan if on both the date of the Request and the proposed Date of the Loan: (a) the Effective Date shall have occurred; (b) [reserved]; (c) Interim DIP Order (with respect to the period on and after entry of the Interim DIP Order and prior to entry of the Final DIP Order) or the Final DIP Order (with respect to the period on and after entry of the Final DIP Order) shall be in full force and effect and shall not have been vacated or reversed, shall not be subject to a stay, and shall not have been modified or amended in any respect without the prior written consent of the Lender in its sole discretion; (d) the Lender shall have received a duly completed Request; (e) the representations and warranties set out in Clause 8 (Representations) and in each other Financing Document shall be true correct in all material respects (or, in the case of any representations and warranties qualified by materiality, Material Adverse Effect or words of similar import, in all respects) on and as of the Delayed Draw Borrowing Date with the same effect as though made on and as of such date (other than any such representations and warranties that are made as of a specific date, which shall be true and correct in all material respects (or, in the case of any representations and warranties qualified by materiality, Material Adverse Effect or words of similar import, in all respects) as of such earlier date); (f) at the time of and immediately after giving effect to the making of the Loans, no Default or Event of Default shall have occurred and be continuing or would result therefrom; (g) the Lender shall have received (i) an updated Budget in accordance with Clause 9.5(b) for the 13-week period commencing on or about the Delayed Draw Borrowing Date and (ii) all Budget Variance Reports then required have been delivered; (h) the requested principal amount of Loan to be made on the Delayed Draw Borrowing Date does not exceed an amount equal to the aggregate of (x) the forecasted disbursements in the four weeks following such Delayed Draw Borrowing Date as set forth in the then-extant Approved Budget, minus (y) the amount of cash on balance sheet of the Debtors in excess of \$1,000,000 on such Delayed Draw Borrowing Date; (i) the Chapter 11 Cases shall not have been dismissed or converted under Chapter 7 of the Bankruptcy Code; (j) no trustee under Chapter 7 or Chapter 11 of the Bankruptcy Code shall have been appointed in the Chapter 11 Cases; (k) All Milestones required to be satisfied pursuant to Clause 9.29 (Milestones) shall have been satisfied (unless waived or extended by the Lender); (l) The proceeds of the Loans made on the Delayed Draw Borrowing Date shall be disbursed in accordance with the Approved Budget; (m) no action has been taken under Clause 10.2 (Acceleration);

Summary of Material Terms	
	(n) with respect to the first request for a Loan, the Lender has received copies of board and shareholder/member resolutions of the Company approving incurrence of the Loans and each Obligor's obligations under the DIP Credit Agreement; (o) each requested Loan has been approved by a majority of the independent directors of FM (which such approval may be evidenced by emails from the majority of such independent directors); and (p) the Available Facility shall not be exceeded. By delivering a Request required pursuant to Clause 4.2(d), on the Delayed Draw Borrowing Date, the Company shall be deemed to have represented and warranted that the conditions specified in clauses (e) and (f) above have been satisfied. See DIP Credit Agreement §§ 4.1, 4.2.
Events of Default <i>Fed. R. Bankr. P. 4001(c)(1)(B); Local Rule 4001-2(a)(i)(M)</i>	The DIP Credit Agreement contains customary events of default for financings of this type, which are set forth in Article 10.1 of the DIP Credit Agreement. See DIP Credit Agreement § 10.1.
Carve-Out <i>Fed. R. Bankr. P. 4001(c)(1)(B); Local Rule 4001-2(a)(i)(F)</i>	Subject to the terms and conditions contained in the Interim Order, each of the DIP Liens, DIP Superpriority Claims, Prepetition Facility Liens, Adequate Protection Liens, and Adequate Protection Claims (each as defined in the Interim Order) shall be subject and subordinate to the Carve-Out. <u>Carve-Out.</u> As used in the Interim Order, the term "Carve-Out" means the sum of: (i) all unpaid fees required to be paid to the Clerk of the Court and to the U.S. Trustee under 28 U.S.C. § 1930(a) plus interest at the statutory rate, if any, pursuant to 31 U.S.C. § 3717, (ii) all unpaid reasonable and documented fees and expenses up to \$50,000 incurred by a trustee under section 726(b) of the Bankruptcy Code (without regard to the Carve-Out Trigger Notice (as defined below)), (iii) to the extent allowed at any time, whether by interim order, procedural order, final order, or otherwise, all accrued and unpaid claims for fees, cost, and expenses (the "Allowed Professional Fees") incurred by persons or firms (a) retained by the Debtors pursuant to section 327, 328, or 363 of the Bankruptcy Code (collectively, the "Debtor Professionals") or (b) retained by any Creditors' Committee pursuant to section 328 or 1103 of the Bankruptcy Code (collectively, the "Committee Professionals" and, together with the Debtor Professionals, the "Estate Professionals") (in each case in this clause (iii), excluding any restructuring, sale, success, or other transaction fee of any investment banker (any such fee, a "Back-End Fee") earned after the first business day following delivery by the DIP Lender of a Carve-Out Trigger Notice) at any time before or on the first business day following delivery by the DIP Lender of a Carve-Out Trigger Notice (as defined below) and up to the aggregate amount of such fees and expenses provided for in the Approved Budget through such time, whether allowed by the Court prior to or after delivery of the Carve-Out Trigger Notice, and whether such fees, costs, and expenses are provided for in the Approved Budget (the amounts set forth in the foregoing clauses (i), (ii) and (iii), the "Pre Carve-Out Trigger Notice Amount"; (iv) Allowed Professional Fees of Debtor Professionals incurred after the first business day following delivery by the DIP Lender of the Carve-Out Trigger Notice, to the extent allowed at any time, whether by interim order, procedural order, final order, or otherwise, in an aggregate amount not to exceed \$750,000 plus any Back-End Fee of any investment banker engaged by the Debtors (but not any Creditors' Committee) earned after the first business day following delivery by the DIP Lender of a Carve-Out Trigger Notice (the amount set forth in this clause (iv), the "Debtor Post-Carve-Out Cap"), provided that any Back-End Fee payable pursuant to this clause (iv) shall be payable solely from the proceeds of the transaction causing such Back-End Fee to be earned; and (v) Allowed Professional Fees of Committee Professionals, incurred after the first business day following delivery by the DIP Lender of the Carve-

Summary of Material Terms	
	Out Trigger Notice, to the extent allowed at any time, whether by interim order, procedural order, final order, or otherwise, in an aggregate amount not to exceed \$50,000 (the amount set forth in this clause (v), the “Committee Post-Carve-Out Cap” and, together with the Debtor Post-Carve-Out Cap, the “Post-Carve-Out Caps” and, the Post-Carve-Out Caps together with the Pre-Carve-Out Trigger Notice Amount, the “Carve-Out Cap”). For purposes of the Interim Order, the “Carve-Out Trigger Notice” shall mean a written notice (which may be via electronic mail) delivered by the DIP Lender to the Debtors and their counsel, Latham & Watkins LLP, Young Conaway Stargatt & Taylor, LLP, the U.S. Trustee, counsel to the Prepetition Facility Lender and counsel to the any Creditors’ Committee stating that the Post-Carve-Out Cap has been invoked, which Carve-Out Trigger Notice may, but need not, be included in a Termination Declaration (as defined in the Interim Order). Such Carve-Out Trigger Notice may be delivered following the occurrence and during the continuation of an Event of Default (as defined in the DIP Credit Agreement). <u>Pre-Carve-Out Trigger Notice.</u> Within two (2) business days of entry of the Interim Order, the Debtors shall deposit into a segregated account of the Debtor not subject to the control of the DIP Lender or the Prepetition Facility Lender (the “Carve-Out Account”) cash in an amount equal to the estimated Pre-Carve-Out Trigger Notice Amount set forth in the Approved Budget for each week from the Petition Date through the week in which the Interim DIP Order is entered. In addition to the initial funding, after the week in which the Interim DIP Order is entered, and prior to the date on which a Carve-Out Trigger Notice is delivered in accordance with paragraph 4 of the Interim Order, (any such date, the “Carve-Out Trigger Notice Date”), the Debtors shall fund the Carve-Out Account on a weekly basis in an aggregate amount equal to the estimated Pre-Carve Out Trigger Notice Amount set forth in the Approved Budget for the next unfunded week. The funds in the Carve-Out Account shall be earmarked and held in trust to pay unpaid fees and expenses incurred by Estate Professionals as they become allowed and payable pursuant to the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and any interim or final orders of this Court, prior to any and all other claims in the Chapter 11 Cases. <u>Post-Carve-Out Trigger Notice.</u> Immediately following receipt of a Carve-Out Trigger Notice, and prior to the payment of any DIP Obligations, the Debtors shall utilize all cash on hand (including from the proceeds of the DIP Financing) to deposit into the Carve-Out Account cash in an amount equal to the difference between the Carve-Out Cap and the balance held in the Carve-Out Account as of the Carve-Out Trigger Notice Date. Notwithstanding anything to the contrary in the Interim Order or in the DIP Documents, following delivery of a Carve-Out Trigger Notice, the DIP Lender shall not sweep or foreclose on cash (including cash received as a result of the sale or other disposition of any assets) of the Debtors until the Carve-Out Account has been fully funded as required above in an amount equal to the Carve-Out Cap. The amounts in the Carve-Out Account shall be available only to satisfy allowed fees and expenses of Estate Professionals and other amounts included in the Carve-Out until such amounts are paid in full, and if any amount remains, to pay the DIP Lender until paid in full, and lastly, to pay the Prepetition Facility Lender until paid in full. Any payment or reimbursement made prior to the occurrence of the Carve-Out Trigger Notice Date in respect of any allowed fees and expenses of Estate Professionals shall not reduce the Carve-Out. The amount in the Carve-Out Account shall be reduced on a dollar-for-dollar basis for allowed fees and expenses of Estate Professionals that are paid after the delivery of the Carve-Out Trigger Notice, and the Carve-Out Account shall not be replenished for such amounts so paid. Notwithstanding anything to the contrary in the Interim Order or the DIP Documents, (i) the failure of the Carve-Out Account to satisfy in full the amount set forth in the Carve-Out shall not affect the priority of the Carve-Out and (ii) in no way shall the Carve-Out, the Carve-Out Account, or any Approved Budget be construed as a cap or limitation on the amount of the allowed fees and expenses of Estate Professionals due and payable by the Debtors or that may be allowed by the Court at any time (whether by interim order, final order, or otherwise). See Interim Order ¶ 4.

Summary of Material Terms	
Priority of Claims and Liens; Collateral <i>Fed. R. Bankr. P. 4001(c)(1)(B)(i)</i>	As security for the DIP Obligations, effective and automatically and properly perfected upon the date of the Interim Order and without the necessity of the execution, recordation or filing by the Debtors or the DIP Lender of mortgages, security agreements, control agreements, pledge agreements, financing statements, intellectual property filings or other similar documents, notation of certificates of title for titled goods or other similar documents, instruments, deeds, charges or certificates, or the possession or control by the DIP Lender of, or over, any Collateral, without any further action by the DIP Lender, the following valid, binding, continuing, enforceable and non-avoidable security interests and liens (all security interests and liens granted to the DIP Lender, pursuant to the Interim Order and the DIP Documents, the “DIP Liens”) are granted to the DIP Lender (all property identified in clauses (a) through (c) below being collectively referred to as the “DIP Collateral”); provided that notwithstanding anything in the Interim Order to the contrary, the DIP Liens shall be (i) subject and junior to the Carve-Out in all respects, (ii) senior in all respects to the Prepetition Facility Liens and (iii) senior in all respects to the Adequate Protection Liens: <u>Liens on Unencumbered Property.</u> Pursuant to section 364(c)(2) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected first priority senior security interest in and lien upon all tangible and intangible prepetition and postpetition property of the Debtors, whether existing on the Petition Date or thereafter acquired, and the proceeds, products, rents, and profits thereof, that, on or as of the Petition Date, is not subject to (i) a valid, perfected and non-avoidable lien or (ii) a valid and non-avoidable lien in existence as of the Petition Date that is perfected subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code, including, without limitation, any and all unencumbered cash of the Debtors and any investment of cash, inventory, accounts receivable, other rights to payment whether arising before or after the Petition Date, contracts, properties, plants, fixtures, machinery, equipment, general intangibles, documents, instruments, securities, goodwill, causes of action, insurance policies and rights, claims and proceeds from insurance, commercial tort claims and claims that may constitute commercial tort claims (known and unknown), chattel paper (including electronic chattel paper and tangible chattel paper), interests in leaseholds, real properties, deposit accounts, patents, copyrights, trademarks, trade names, rights under license agreements and other intellectual property, equity interests of subsidiaries, joint ventures and other entities, wherever located, and the proceeds, products, rents and profits of the foregoing, whether arising under section 552(b) of the Bankruptcy Code or otherwise (the “Unencumbered Property”), in each case other than the Avoidance Actions (but, for the avoidance of doubt, subject to entry of the Final Order, “Unencumbered Property” shall include Avoidance Proceeds). <u>Liens Priming Certain Prepetition Facility Lender’s Liens.</u> Pursuant to section 364(d)(1) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected first priority senior priming security interest in and lien upon all tangible and intangible prepetition and postpetition property of the Debtors subject to the Prepetition Facility Liens, regardless of where located, regardless whether or not any liens on such assets are voided, avoided, invalidated, lapsed or unperfected (the “Priming Liens”), which Priming Liens shall prime in all respects the interests of the Prepetition Facility Lender arising from the current and future liens of the Prepetition Facility Lender (including, without limitation, the Adequate Protection Liens granted to the Prepetition Facility Lender) (the “Primed Liens”). <u>Liens Junior to Certain Other Liens.</u> Pursuant to section 364(c)(3) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully perfected security interest in and lien upon all tangible and intangible prepetition and postpetition property of each of the Debtors, which shall be immediately junior and subordinate to (i) valid, perfected and non-avoidable senior liens in existence immediately prior to the Petition Date (other than the Primed Liens) and permitted by the terms of the Prepetition Facility Documents, and (ii) valid and non-avoidable senior liens (other than the Primed Liens) in existence immediately prior to the Petition Date that are perfected subsequent to the Petition Date, as permitted by section 546(b) of the Bankruptcy Code and the terms of the Prepetition Facility

Summary of Material Terms	
	Documents; provided that nothing in the foregoing clauses (i) and (ii) shall limit the rights of the DIP Lender under the DIP Documents to the extent such liens are not permitted thereunder; and <u>Liens Senior to Certain Other Liens.</u> The DIP Liens shall not be (i) subject or subordinate to or made pari passu with (A) any lien or security interest that is avoided and preserved for the benefit of the Debtors or their estates under section 551 of the Bankruptcy Code, (B) unless otherwise provided for in the DIP Documents or in the Interim Order, any liens or security interests arising after the Petition Date, including, without limitation, any liens or security interests granted in favor of any federal, state, municipal or other governmental unit (including any regulatory body), commission, board or court for any liability of the Debtors, or (C) any intercompany or affiliate liens of the Debtors or security interests of the Debtors; or (ii) subordinated to or made pari passu with any other lien or security interest under section 363 or 364 of the Bankruptcy Code granted after the date of the Interim Order. <u>DIP Superpriority Claims.</u> Pursuant to section 364(c)(1) of the Bankruptcy Code, all of the DIP Obligations shall constitute allowed superpriority administrative expense claims against the Debtors on a joint and several basis (without the need to file any proof of claim) with, to the fullest extent permitted under the Bankruptcy Code or other applicable law, priority over any and all claims against the Debtors, now existing or hereafter arising, of any kind whatsoever, including, without limitation, all administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy Code, including any and all administrative expenses or other claims arising under sections 105, 326, 327, 328, 330, 331, 365, 503(b), 506(c), 507(a) (other than section 507(a)(1)), 507(b), 1113 or 1114 of the Bankruptcy Code (including the Adequate Protection Obligations), whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment, which allowed claims (the “<u>DIP Superpriority Claims</u>”) shall for purposes of section 1129(a)(9)(A) of the Bankruptcy Code be considered administrative expenses allowed under section 503(b) of the Bankruptcy Code, and which DIP Superpriority Claims shall be payable from all prepetition and postpetition property of the Debtors and all proceeds thereof (excluding claims and causes of action under sections 502(d), 544, 545, 547, 548, 549 and 550 of the Bankruptcy Code, or any other avoidance actions under the Bankruptcy Code (collectively, “<u>Avoidance Actions</u>”) but, subject to the entry of the Final Order, including any proceeds or property recovered, unencumbered or otherwise, from Avoidance Actions, whether by judgment, settlement or otherwise (“<u>Avoidance Proceeds</u>”)) in accordance with the DIP Documents, the Interim Order or the Final Order, subject only to the Carve-Out. The DIP Superpriority Claims shall be entitled to the full protection of section 364(e) of the Bankruptcy Code in the event that the Interim Order or any provision thereof is reversed or otherwise modified, on appeal or otherwise; provided, for the avoidance of doubt, that such DIP Superpriority Claims shall not have priority over claims of the type specified in section 507(a)(1) of the Bankruptcy Code. The DIP Superpriority Claims shall be pari passu in right of payment with one another and senior to the 507(b) Claims (as defined in the Interim Order), and subordinated to the Carve-Out. See Interim Order ¶¶ 5, 6.
Adequate Protection / Identity of Each Entity with Interest in Cash Collateral <i>Fed. R. Bankr. P. 4001(c)(1)(B)(ii); (b)(1)(B)(i), (iv); Local Rule 4001-2(a)(i)(K) & (P)</i>	The Prepetition Facility Lender shall be granted the following adequate protection, subject in all cases to the Carve-Out: <u>Adequate Protection Obligations.</u> The Prepetition Facility Lender is entitled, pursuant to sections 361, 362, 363(e), 364(d)(1) and 507 of the Bankruptcy Code, to adequate protection of its interests in all Prepetition Facility Collateral (including Cash Collateral) in an amount equal to the aggregate diminution in the value of the Prepetition Facility Lender’s interests in the Prepetition Facility Collateral (including Cash Collateral) from and after the Petition Date, for any reason provided for under the Bankruptcy Code, including, without limitation, any diminution resulting from the sale, lease or use by the Debtors of the Prepetition Facility Collateral, the priming of the Prepetition Facility Liens by the DIP Liens pursuant to the DIP Documents and the Interim Order, the grant of any other lien under section 364 of the Bankruptcy Code or the stay of the Prepetition Facility Lender’s rights under the Prepetition Facility Collateral, the payment of any amounts under the

Summary of Material Terms

Carve-Out or pursuant to the Interim Order, the Final Order or any other order of the Court or provision of the Bankruptcy Code or otherwise, and the imposition of the Automatic Stay (the “**Adequate Protection Claims**”). In consideration of the foregoing, the Prepetition Facility Lender is granted the following as Adequate Protection for, and to secure repayment of an amount equal to such Adequate Protection Claims, and as an inducement to the Prepetition Facility Lender to consent to the priming of the Prepetition Facility Liens and use of the Prepetition Facility Collateral (including Cash Collateral) (collectively, the “**Adequate Protection Obligations**”):

- (a) Prepetition Adequate Protection Liens. The Prepetition Facility Lender is granted (effective and perfected upon the date of the Interim Order and without the necessity of the execution of any mortgages, security agreements, pledge agreements, financing statements or other agreements) in the amount of the Prepetition Facility Lender’s Adequate Protection Claims, a valid, perfected replacement security interest in and lien upon all of the DIP Collateral (the “**Adequate Protection Liens**”), in each case senior to all other liens but subject and subordinate only to (A) the DIP Liens, (B) the Carve-Out, and (C) Prepetition Permitted Prior Liens.
- (b) Section 507(b) Claims. The Prepetition Facility Lender is granted, subject to the Carve-Out, an allowed superpriority administrative expense claim in each of the Chapter 11 Cases as provided for in section 507(b) of the Bankruptcy Code in the amount of the Adequate Protection Claims, with, to the fullest extent permitted under the Bankruptcy Code, priority in payment over any and all administrative expenses of the kind specified or ordered pursuant to any provision of the Bankruptcy Code (the “**507(b) Claims**”), which 507(b) Claims shall be payable from all prepetition and postpetition property of the Debtors and all proceeds thereof (excluding Avoidance Actions, but including, subject to entry of the Final Order, Avoidance Proceeds). The 507(b) Claims shall be subject and subordinate only to the Carve-Out and the DIP Superpriority Claims. Except to the extent expressly set forth in the Interim Order, the Final Order or the DIP Documents, the Prepetition Facility Lender shall not receive or retain any payments, property or other amounts in respect of the 507(b) Claims unless and until the DIP Obligations (other than contingent indemnification obligations as to which no claim has been asserted) have indefeasibly been paid in cash in full and all DIP Commitments have been terminated.
- (c) Prepetition Lender Payments. To the extent allowed pursuant to section 506(b) of the Bankruptcy Code, interest shall continue to accrue on the Prepetition Facility Loans at the Default Rate under the Prepetition Facility Documents, paid in kind by capitalizing such interest and adding it to the outstanding principal balance of the Prepetition Facility Loans in accordance with the Prepetition Facility Documents.
- (d) Milestones. Upon indefeasible payment in full of all DIP Obligations and termination of all DIP Commitments, the Prepetition Facility Lender is entitled to performance of those certain case milestones set forth in Section 9.29 of the DIP Credit Agreement.
- (e) Budget and Financial Covenants. Upon indefeasible payment in full of all DIP Obligations and all other obligations under the DIP Facility, (i) the Approved Budget shall continue to be updated in accordance with the terms and conditions of the DIP Credit Agreement and (ii) the Prepetition Facility Lender is entitled to performance of those certain financial and other covenants set forth in Section 9 of the DIP Credit Agreement.
- (f) Prepetition Facility Lender’s Adequate Protection Information Rights. Unless otherwise agreed by the Prepetition Facility Lender, the Debtors shall promptly provide the Prepetition Facility Lender and, to the extent applicable, counsel to such party (and subject to applicable confidentiality restrictions contained in any of the Prepetition Facility Documents), with all required written financial reporting and other periodic reporting that is required to be provided to the DIP Lender under the DIP Documents, including without limitation the reporting required under Section 9.5 of the DIP Credit Agreement (the “**Adequate Protection Reporting Requirements**”). Upon indefeasible payment in full of all DIP Obligations and termination of all DIP Commitments, the Prepetition Facility Lender shall continue to be entitled to satisfaction of the Adequate Protection Reporting Requirement.

Summary of Material Terms	
	(g) <u>Maintenance of Collateral</u>. The Debtors shall continue to maintain and insure the Prepetition Facility Collateral and DIP Collateral in amounts and for the risks, and by the entities, as required under the Prepetition Facility Documents and the DIP Documents. See Interim Order ¶ 13.
Debtors' Stipulations <i>Fed. R. Bankr. P.</i> <i>4001(c)(1)(B)(iii);</i> <i>Local Rule</i> <i>4001-2(a)(i)(B)</i>	Subject only to the limitations contained in paragraph 17 of the Interim Order, and after consultation with their attorneys and financial advisors, the Debtors admit, stipulate and agree that: (i) <u>Prepetition Secured Facility Agreement</u>. Pursuant to that certain Facility Agreement, dated as of December 21, 2023 (as amended by that certain Amendment No. 1, dated March 11, 2024, that certain Amendment No. 2, dated April 12, 2024, and that certain Amendment No. 3, dated December 9, 2024, and as supplemented by each Deed of Accession dated as of August 4, 2024) (the "<u>Prepetition Secured Facility Agreement</u>") and the other Financing Documents (as defined in Prepetition Secured Facility Agreement) and any other agreements and documents executed or delivered in connection therewith, each as may be amended, restated, amended and restated, supplemented, waived or otherwise modified from time to time prior to the Petition Date (collectively, the "<u>Prepetition Facility Documents</u>", and the loans issued pursuant thereto, the "<u>Prepetition Facility Loans</u>") by and among (1) First Mode Holdings, Inc. and Synchronous LLC (collectively, the "<u>Prepetition Facility Borrowers</u>"), (2) First Mode Holdings, Inc., Synchronous LLC, First Mode Pty Ltd, First Mode IPP Limited, First Mode Chile SpA, First Mode SA Proprietary Limited, First Mode SA Holdings Proprietary Limited (collectively, the "<u>Prepetition Facility Guarantors</u>", and together with the Prepetition Facility Borrowers, the "<u>Prepetition Facility Loan Parties</u>") and (3) Anglo American International Holdings Limited (the "<u>Prepetition Facility Lender</u>"), the Prepetition Facility Lender has extended the Prepetition Facility Secured Loans for the benefit of the Prepetition Facility Loan Parties. (ii) <u>Prepetition Facility Obligations</u>. The Prepetition Facility Loan Parties are lawfully indebted and liable to the Prepetition Facility Lender without defense, challenge, objection, claim, counterclaim, or offset of any kind, in the aggregate principal amount as of the Petition Date of not less than \$69,749,000 of outstanding Prepetition Facility Loans, comprised of not less than (i) \$63,000,000 of outstanding Loans under the Tranche B Facility (as defined in the Prepetition Secured Facility Agreement), and (iii) \$6,749,000.00 of outstanding Loans under the Tranche C Facility (as defined in the Prepetition Secured Facility Agreement), which Loans were issued pursuant to, and in accordance with the Prepetition Facility Documents, plus accrued and unpaid interest and fees (including commitment fees) thereon, premiums, reimbursement obligations (contingent or otherwise), fees, costs, expenses (including any attorneys', accountants', appraisers', and financial advisors' fees and expenses), charges, indemnities, and any other amounts, liabilities, or obligations of whatever nature, whenever arising or accruing (whether before or after the Petition Date), that may be due, owing, or chargeable in connection therewith, in each case, as and to the extent provided in the Prepetition Secured Facility Agreement, including all "<u>Guaranteed Obligations</u>" as defined in the Prepetition Secured Facility Agreement (collectively, the "<u>Prepetition Facility Obligations</u>"). (iii) <u>Prepetition Facility Liens</u>. Prior to the Petition Date, to secure the Prepetition Facility Obligations, (a) the Prepetition Facility Borrowers, First Mode Chile SpA and First Mode Pty Ltd, as Grantors, as more fully set forth in that certain Security Agreement dated December 21, 2023 (the "<u>Prepetition Facility U.S. Security Agreement</u>"), granted the Prepetition Facility Lender valid, binding, non-avoidable, properly perfected and enforceable first priority continuing liens on and security interests in the "Collateral" as defined in the Prepetition Facility U.S. Security Agreement, including, for the avoidance of doubt, Cash Collateral, and (b) the Prepetition Facility Borrowers and First Mode IPP Limited, as Chargors, as more fully set forth in that certain Security Debenture dated December 21, 2023 (the "<u>Prepetition Facility U.K. Security Agreement</u>"), granted the Prepetition Facility Lender valid, binding, non-avoidable, properly perfected and enforceable first priority continuing security interests in the "Charged Assets" as defined in the Prepetition Facility U.K. Security Agreement, including, for the avoidance of doubt, Cash Collateral (the liens and security

Summary of Material Terms

interests granted in clauses (a) and (b) collectively, the “**Prepetition Facility Liens**”, and the collateral described in clauses (a) and (b) collectively, the “**Prepetition Facility Collateral**”).

(iv) Validity, Perfection, and Priority of Prepetition Facility Liens and Prepetition Facility Loans. The Debtors acknowledge and agree that as of the Petition Date (a) the Prepetition Facility Liens on the Prepetition Facility Collateral were valid, binding, enforceable, non-avoidable and properly perfected and were granted to the Prepetition Facility Lender for fair consideration and reasonably equivalent value; (b) the Prepetition Facility Liens were senior in priority over any and all other liens on the Prepetition Facility Collateral, subject only to certain senior liens permitted under the Prepetition Facility Documents (solely to the extent any such liens were valid, properly perfected, non-avoidable and senior in priority to the Prepetition Facility Liens and permitted under the Prepetition Facility Documents as of the Petition Date, the “**Prepetition Permitted Prior Liens**”); (c) the Prepetition Facility Loans constitute legal, valid, binding, and non-avoidable obligations of the Prepetition Facility Loan Parties, enforceable in accordance with the terms of the applicable Prepetition Facility Documents; (d) no offsets, recoupments, challenges, objections, defenses, claims or counterclaims of any kind or nature to any of the Prepetition Facility Liens or Prepetition Facility Loans exist, and no portion of the Prepetition Facility Liens or Prepetition Facility Loans is subject to any challenge or defense, including avoidance, disallowance, disgorgement, recharacterization, or subordination (equitable or otherwise) pursuant to the Bankruptcy Code or applicable non-bankruptcy law; and (e) the Debtors waive, discharge, and release any right to challenge any of the Prepetition Facility Loans, the priority of the Debtors’ obligations thereunder, and the validity, extent, and priority of the Prepetition Facility Liens securing the Prepetition Facility Loans.

(vi) Corporate Authority. Each Debtor has all requisite corporate power and authority to execute and deliver the DIP Documents to which it is a party and to perform its obligations thereunder.

(vii) Release. Effective as of the earlier of (x) end of the Challenge Period and (y) later to occur of (i) the date of entry of the Final Order granting such relief and (ii) confirmation from the Restructuring Committee of the Debtors’ board of directors that the releases provided herein are appropriate, each of the Debtors and (subject to paragraph 17) the Debtors’ estates, on its and their own behalf and on behalf of its and their respective past, present and future predecessors, heirs, successors, subsidiaries, and assigns, absolutely, unconditionally and irrevocably releases and forever discharges and acquits the Prepetition Facility Lender, the DIP Lender, and each of their respective affiliates, subsidiaries, and Representatives (as defined in the Interim Order) (collectively, the “**Released Parties**”), from any and all (a) obligations and liabilities to the Debtors (and their successors and assigns) and (b) claims, counterclaims, demands, defenses, offsets, debts, accounts, contracts, liabilities, actions and causes of action of any kind, nature or description, whether matured or unmatured, known or unknown, asserted or unasserted, foreseen or unforeseen, accrued or unaccrued, suspected or unsuspected, liquidated or unliquidated, pending or threatened, arising in law or equity, upon contract or tort or under any state or federal law or otherwise, in each case arising out of or related to (as applicable) the Prepetition Facility Documents, the DIP Documents, the obligations owing and the financial obligations made thereunder, the negotiation thereof and of the transactions and agreements reflected thereby, and the obligations and financial obligations made thereunder, in each case that the Debtors at any time had, now have or may have, or that their predecessors, successors or assigns at any time had or hereafter can or may have against any of the Released Parties for or by reason of any act, omission, matter, cause or thing whatsoever arising at any time on or prior to the date of the Interim Order. For the avoidance of doubt, nothing in this release shall relieve the DIP Lender or the Debtors of their Obligations under the DIP Documents from and after the date of the Interim Order.

The Debtors’ stipulations, admissions, agreements and releases contained in the Interim Order shall be binding upon the Debtors and any successor thereto (including, without limitation, any chapter 7 or chapter 11 trustee or examiner appointed or elected for any of the Debtors) in all circumstances and for all purposes. The Debtors’ stipulations, admissions, agreements and releases contained in the Interim Order shall be binding upon all other parties in interest, including, without limitation, any statutory or non-statutory committees appointed or formed in the Chapter 11 Cases and any other

Summary of Material Terms	
	person or entity acting or seeking to act on behalf of the Debtors' estates in all circumstances and for all purposes unless (a) such committee or any other party in interest with requisite standing (in each case, to the extent requisite standing is obtained pursuant to an order of this Court entered prior to the expiration of the Challenge Period (as defined in the Interim Order) and subject in all respects to any agreement or applicable law that may limit or affect such entity's right or ability to do so) has timely filed an adversary proceeding or contested matter (subject to the limitations contained in the Interim Order, including, inter alia, in this paragraph) by no later than 75 calendar days after entry of the Interim Order, unless otherwise ordered by the Court for cause upon a motion timely filed and served within any applicable period (such time period, the "Challenge Period"), (A) objecting to or challenging the amount, validity, perfection, enforceability, priority or extent of the Prepetition Facility Loans or the Prepetition Facility Liens, or (B) otherwise asserting or prosecuting any action for preferences, fraudulent transfers or conveyances, other avoidance power claims or any other claims, counterclaims or causes of action, objections, contests or defenses (collectively, the "Challenges") against the Prepetition Facility Lender or its subsidiaries, affiliates, officers, directors, managers, principals, employees, agents, financial advisors, attorneys, accountants, investment bankers, consultants, representatives and other professionals and the respective successors and assigns thereof, in each case in their respective capacity as such (each, a "Representative" and, collectively, the "Representatives") in connection with matters related to the Prepetition Facility Documents, the Prepetition Facility Loans, the Prepetition Facility Liens and the Prepetition Facility Collateral; and (b) there is a final non-appealable order in favor of the plaintiff sustaining any such Challenge in any such timely filed adversary proceeding or contested matter; provided, however, that any pleadings filed in connection with any Challenge shall set forth with specificity the basis for such challenge or claim, and any challenges or claims not so specified prior to the expiration of the Challenge Period shall be deemed forever, waived, released and barred, including any amended or additional claims that may or could have been asserted thereafter through an amended complaint under Fed. R. Civ. P. 15 or otherwise. In the event that a chapter 7 or chapter 11 trustee is appointed prior to the end of the Challenge Period, the Challenge Period solely for such chapter 7 or chapter 11 trustee shall be extended (unless and until an order confirming a plan is entered by the Court) to the longer of (A) the remaining Challenge Period or (B) the date that is twenty-one (21) calendar days following the appointment of such trustee. If no such Challenge is timely and properly filed during the Challenge Period or the Court does not rule in favor of the plaintiff in any such proceeding then: (1) the Debtors' stipulations, admissions, agreements and releases contained in the Interim Order shall be binding on all parties in interest; (2) the obligations of the Debtors under the Prepetition Facility Documents, including the Prepetition Facility Loans, shall constitute allowed claims not subject to defense, claim, counterclaim, recharacterization, subordination (whether equitable, contractual, or otherwise), disallowance, recoupment, offset or avoidance, for all purposes in the Chapter 11 Cases, and any subsequent chapter 7 case(s); (3) the Prepetition Facility Liens on the Prepetition Facility Collateral shall be deemed to have been, as of the Petition Date, legal, valid, binding, and perfected, security interests and liens, not subject to recharacterization, subordination (whether equitable, contractual or otherwise), disallowance, impairment, claim, counterclaim, cross-claim, avoidance or other defense; and (4) the Prepetition Facility Loans and the Prepetition Facility Liens on the Prepetition Facility Collateral shall not be subject to any other or further claim or challenge by any statutory or non-statutory committees appointed or formed in the Chapter 11 Cases or any other party in interest acting or seeking to act on behalf of the Debtors' estates, including, without limitation, any successor thereto (including, without limitation, any chapter 7 trustee or chapter 11 trustee or examiner appointed or elected for any of the Debtors) and any defenses, claims, causes of action, counterclaims and offsets by any statutory or non-statutory committees appointed or formed in the Chapter 11 Cases or any other party acting or seeking to act on behalf of the Debtors' estates, including, without limitation, any successor thereto (including, without limitation, any chapter 7 trustee or chapter 11 trustee or examiner appointed or elected for any of the Debtors), whether arising under the Bankruptcy Code or otherwise, against the Prepetition Facility Lender and its Representatives arising out of or relating to any of the Prepetition Facility Documents, the Prepetition Facility Loans, the Prepetition Facility Liens and the Prepetition Facility Collateral shall be deemed forever waived, released and barred. If any such Challenge is timely filed during the

Summary of Material Terms	
	Challenge Period, the stipulations, admissions, agreements and releases contained in the Interim Order shall nonetheless remain binding and preclusive (as provided in the second sentence of this paragraph) on any statutory or nonstatutory committee appointed or formed in the Chapter 11 Cases and on any other person or entity, except to the extent that such stipulations, admissions, agreements and releases were expressly and successfully challenged in such Challenge as set forth in a final, non-appealable order of a court of competent jurisdiction. Nothing in the Interim Order vests or confers on any Person (as defined in the Bankruptcy Code), including any statutory or non-statutory committees appointed or formed in the Chapter 11 Cases, standing or authority to pursue any claim or cause of action belonging to the Debtors or their estates, including, without limitation, Challenges with respect to the Prepetition Facility Documents, the Prepetition Facility Loans or the Prepetition Facility Liens, and any ruling on standing, if appealed, shall not stay or otherwise delay the Chapter 11 Cases, confirmation of any plan of reorganization or consummation of any sale of all or substantially all assets of the Debtors. For the avoidance of doubt, any chapter 11 or chapter 7 trustee appointed or elected in these cases, upon the expiration of the Challenge Period (and subject to any tolling of the Challenge Period with respect to any claims that are the subject of an adversary proceeding or contested matter commenced pursuant to this paragraph (whether commenced by such trustee or commenced by any other party in interest on behalf of the Debtors' estates)), shall be bound by the acknowledgements, admissions, confirmations and stipulations of the Debtors in paragraph G of the Interim Order. See Interim Order ¶¶ G, 17.
Waiver or Modification of Automatic Stay <i>Fed. R. Bankr. P. 4001(c)(1)(B)(iv)</i>	Immediately upon the occurrence and during the continuation of an Event of Default, notwithstanding the provisions of section 362 of the Bankruptcy Code, without any application, motion, or notice to, hearing before, or order from the Court, but subject to the terms of the DIP Documents and the Interim Order, including the Remedies Notice Period for the exercise of remedies other than the following (i) the DIP Lender may declare, which declaration shall be in writing and delivered by email and overnight mail to the Debtors, any Creditors' Committee, and the U.S. Trustee (any such declaration shall be referred to in the Interim Order as a "Termination Declaration") (A) all DIP Obligations owing under the DIP Documents to be immediately due and payable, (B) the termination, reduction or restriction of any further commitment to extend credit to the Debtors to the extent any such commitment remains under the DIP Facility, (C) termination of the DIP Facility and the DIP Documents as to any future liability or obligation of the DIP Lender, but without affecting any of the DIP Liens or the DIP Obligations, and (D) that the obligation to fund the Carve-Out Account shall be triggered, through the delivery of the Carve-Out Trigger Notice to the DIP Borrower; and (ii) subject to paragraph 7(b) of the Interim Order, the Prepetition Facility Lender may declare a termination, reduction or restriction on the ability of the Debtors to use Cash Collateral (the date on which a Termination Declaration is delivered, the "Termination Date") and the right of the Prepetition Facility Lender to terminate, reduce, or restrict the use of Cash Collateral shall continue following termination of the DIP Credit Agreement, with each reference to "Event of Default" deemed a reference to the Events of Default under the DIP Credit Agreement as of the date of the Interim Order. The Automatic Stay in the Chapter 11 Cases otherwise applicable to the DIP Lender and the Prepetition Facility Lender is modified so that five (5) calendar days after the Termination Date (the "Remedies Notice Period"): (a) the DIP Lender shall be entitled to exercise all of its rights and remedies in accordance with the DIP Documents and the Interim Order to satisfy the DIP Obligations, DIP Superpriority Claims, and DIP Liens, including (subject to: (i) the funding of the Carve-Out Account in accordance with paragraph 4(c) of the Interim Order; and (ii) payment of all accrued but unpaid wages and benefits to the Debtors' employees) (w) freeze or sweep monies or balances in the Debtors' accounts; (x) immediately set-off any and all amounts in accounts maintained by the Debtors with the DIP Lender against the DIP Obligations; (y) enforce any and all rights against DIP Collateral, including, without limitation, foreclosure on all or any portion of the DIP collateral, occupying the Debtors' premises, sale or disposition of the DIP Collateral and (z) take any other actions or exercise any other rights or remedies permitted under the Interim Order, the DIP Documents or applicable law and (b) subject to the foregoing clause (a), the Prepetition Facility

Summary of Material Terms	
	Lender shall be entitled to exercise its rights and remedies to the extent available in accordance with the applicable Prepetition Facility Documents and the Interim Order with respect to the Debtors' use of Cash Collateral. During the Remedies Notice Period, the Debtors and other parties in interest shall be entitled to seek an emergency hearing within the Remedies Notice Period with the Court, provided that the Debtors shall not raise any defenses or arguments at the hearing other than with respect to whether an Event of Default has occurred or is continuing. Unless the Court orders otherwise prior to the expiration of the Remedies Notice Period, the Automatic Stay as to the DIP Lender and the Prepetition Facility Lender shall automatically be terminated at the end of the Remedies Notice Period without further notice or order. Upon expiration of the Remedies Notice Period, absent order of the Court to the contrary, the DIP Lender and the Prepetition Facility Lender shall be permitted to exercise all remedies set forth in the Interim Order, and in the DIP Documents, and as otherwise available at law without further order of or application or motion to this Court consistent with the Interim Order, and the Debtors shall provide the Prepetition Facility Lender cash payments of all reasonable and documented fees related to such exercise of remedies. No rights, protections or remedies of the DIP Lender or the Prepetition Facility Lender granted by the provisions of the Interim Order or the other DIP Documents shall be limited, modified or impaired in any way by: (i) any actual or purported withdrawal of the consent of any party to the Debtors' authority to continue to use Cash Collateral; (ii) any actual or purported termination of the Debtors' authority to continue to use Cash Collateral; or (iii) the terms of any other order or stipulation related to the Debtors' continued use of Cash Collateral or the provision of adequate protection to any party. See Interim Order ¶ 7 (e)-(f).
Milestones <i>Fed. R. Bankr. P. 4001(c)(1)(B)(vi); Local Rule 4001-2(i)(a)(H)</i>	Section 9.29 of the DIP Credit Agreement contains the following Milestones: (a) no later than one calendar day after the Petition Date, the Obligors shall have filed: (i) a motion, in form and substance acceptable to the Lender, seeking approval of bid procedures in respect of a sale of the Debtors' assets and approval of the bid protections in the Stalking Horse Purchase Agreement (the "Bidding Procedures Motion"); (ii) a motion in form and substance acceptable to the Lender seeking to establish deadlines to file proofs of claim; (iii) a motion, in form and substance acceptable to Anglo, seeking approval of the Facility; and (b) no later than the date that is three calendar days after the Petition Date, the Bankruptcy Court shall have entered the Interim DIP Order approving the Facility; (c) no later than the date that is five days after the Petition Date, the Obligors shall have filed a plan of reorganization and disclosure statement, each in form and substance acceptable to Anglo, with the Bankruptcy Court; (d) no later than the date that is 19 calendar days following the Petition Date the Obligors shall have filed each of the schedules and statements required pursuant to Rule 1007 of the Federal Rules of Bankruptcy Procedure; (e) no later than 20 days following the Petition Date, the Bankruptcy Court shall have entered an order in form and substance acceptable to Anglo approving the deadlines by which proofs of claim are required to be filed; (f) no later than the date that is 30 calendar days after the Petition Date, the Bankruptcy Court shall have entered an order approving the Bidding Procedures Motion; (g) no later than the date that is 35 days after the Petition Date, the Bankruptcy Court shall have approved the Final DIP Order; (h) no later than the date that is 36 days after the Petition Date, the deadline for qualified bids submitted pursuant to the Bidding Procedures (the "Bid Deadline") shall occur; (i) no later than the date that is 7 days after the Bid Deadline, the Company Entities shall have commenced the Auction;

Summary of Material Terms	
	(j) no later than the date that is 3 business days after the Auction concludes, the Bankruptcy Court shall have entered the Sale Order in form and substance acceptable to the Lender; (k) no later than the date that is 15 days after entry of the Sale Order, all conditions to closing of the Sale Transaction shall have been satisfied and the Sale Transaction shall be consummated; (l) no later than the date that is 57 calendar days after the Petition Date, the Bankruptcy Court shall have entered an order approving the disclosure statement for a chapter 11 liquidating plan, each in form and substance acceptable to the Lender; (m) no later than 94 days after the Petition Date, or as soon thereafter as the Bankruptcy Court may be available, the Bankruptcy Court shall have entered an order confirming the Plan (the “Confirmation Order”) in form and substance acceptable to the Lender; and (n) no later than the seven calendar days after entry of the Confirmation Order, the Plan shall have become effective in accordance with its terms. See DIP Credit Agreement § 9.29.
Indemnification <i>Fed. R. Bankr. P. 4001(c)(1)(B)(ix)</i>	Without limitation to any other right to indemnification, the Prepetition Facility Lender and the DIP Lender shall be and are indemnified (as applicable) as provided in the Prepetition Facility Documents and DIP Documents, as applicable, including, without limitation, Sections 7.3 and 11.1(b) of the DIP Credit Agreement, subject only to the Carve-Out. The Debtors agree that no exception or defense in contract, law, or equity exists as of the date of the Interim Order to any obligation set forth, as the case may be, in paragraph 19 of the Interim Order or otherwise in the DIP Documents or in the Prepetition Facility Documents to indemnify and/or hold harmless the DIP Lender or the Prepetition Facility Lender, as the case may be, and any such defenses that may be in existence as of the date of the Interim Order are waived. See Interim Order ¶ 19.
Section 506(c) Waiver / Section 552(b) Waiver <i>Fed. R. Bankr. P. 4001(c)(1)(B)(x)</i> <i>Local Rule 4001-2(a)(i)(C)</i>	Subject to entry of the Final Order granting such relief, except to the extent of the Carve-Out, no costs or expenses of administration of the Chapter 11 Cases or any Successor Cases or any future proceeding that may result therefrom, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, shall be charged against or recovered from the DIP Collateral (including Cash Collateral) or Prepetition Facility Collateral pursuant to section 506(c) of the Bankruptcy Code or any similar principle of law, without the prior written consent of the DIP Lender or the Prepetition Facility Lender, as applicable, and no consent shall be implied from any other action, inaction or acquiescence by the DIP Lender or the Prepetition Facility Lender, and nothing contained in the Interim Order shall be deemed to be a consent by the DIP Lender or the Prepetition Facility Lender to any charge, lien, assessment or claims against the DIP Collateral under section 506(c) of the Bankruptcy Code or otherwise. Subject to entry of the Final Order granting such relief, in no event shall the DIP Lender or the Prepetition Facility Lender be subject to the equitable doctrine of “marshaling” or any similar doctrine with respect to the DIP Collateral, the DIP Obligations, the Prepetition Facility Loans, or the Prepetition Facility Collateral. Further, subject to entry of the Final Order, in no event shall the “equities of the case” exception in section 552(b) of the Bankruptcy Code apply to the Prepetition Facility Lender with respect to proceeds, products, offspring or profits of any Prepetition Facility Collateral. See Interim Order ¶¶ 8, 9.
Liens on Avoidance Actions <i>Fed. R. Bankr. P.</i>	Pursuant to section 364(c)(2) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected first priority senior security interest in and lien upon all tangible and intangible prepetition and postpetition property of the Debtors, whether existing on the Petition Date or thereafter acquired, and the proceeds, products, rents, and profits thereof, that, on or as of the Petition

Summary of Material Terms	
4001(c)(1)(B)(xi)	Date, is not subject to (i) a valid, perfected and non-avoidable lien or (ii) a valid and non-avoidable lien in existence as of the Petition Date that is perfected subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code, including, without limitation, any and all unencumbered cash of the Debtors and any investment of cash, inventory, accounts receivable, other rights to payment whether arising before or after the Petition Date, contracts, properties, plants, fixtures, machinery, equipment, general intangibles, documents, instruments, securities, goodwill, causes of action, insurance policies and rights, claims and proceeds from insurance, commercial tort claims and claims that may constitute commercial tort claims (known and unknown), chattel paper (including electronic chattel paper and tangible chattel paper), interests in leaseholds, real properties, deposit accounts, patents, copyrights, trademarks, trade names, rights under license agreements and other intellectual property, equity interests of subsidiaries, joint ventures and other entities, wherever located, and the proceeds, products, rents and profits of the foregoing, whether arising under section 552(b) of the Bankruptcy Code or otherwise (the “Unencumbered Property”), in each case other than the Avoidance Actions (but, for the avoidance of doubt, subject to entry of the Final Order, “Unencumbered Property” shall include Avoidance Proceeds). See Interim Order ¶ 5.
Fees <i>Fed. R. Bankr. P. 4001(c)(1);</i> <i>Local Rule 4001-2(a)(i)(B)</i>	<u>Upfront Premium.</u> The Company shall pay to the Lender an upfront premium in an amount equal to 2.00% of the aggregate Facility Amount as of the Effective Date, which Upfront Premium will be fully earned and due and payable in kind (by capitalizing and adding to the principal amount of the Loans) on the first Delayed Draw Borrowing Date. <u>Commitment Fee.</u> At all times during the Availability Period, 35 per cent of the applicable Margin on the then unused and uncanceled Facility Amount, which Commitment Fee shall be due and payable in kind (by capitalizing and adding to the principal amount of the Loans) monthly in arrears, regardless of whether the conditions to borrowing Loans are satisfied at such time. <u>Exit Premium.</u> With respect to each repayment or prepayment of Loans under Clause 5 (other than a prepayment or repayment made pursuant to Clause 5.4), any other repayment or prepayment of Loans upon maturity (scheduled or otherwise) and/or any acceleration of the Loans and/or the other Guaranteed Obligations with respect thereto (regardless of whether before or after the occurrence of an Event of Default or the commencement of any bankruptcy or insolvency proceeding or any other proceeding under any Debtor Relief Law (including any deemed repayment or satisfaction in connection therewith)), in each case whether in full or in part, the Company shall be required to pay an amount equal to 2.00% of the amount of the Loans (including any unpaid capitalized Interest in accordance with Clause 6.3 (Capitalization of Interest) and/or any unpaid capitalized Commitment Fees in accordance with Clause 6.4 (Commitment Fee) and/or any unpaid capitalized Upfront Premium in accordance with Clause 6.5 (Upfront Premium)) repaid, prepaid or accelerated (the “Exit Premium”), in each case, concurrently with such repayment, prepayment or acceleration. For the avoidance of doubt, it is understood and agreed that, if the Loans are accelerated or otherwise become due prior to the Final Maturity Date, in each case whether in full or in part (regardless of whether before or after the occurrence of an Event of Default or the commencement of any bankruptcy or insolvency proceeding or any other proceeding under any Debtor Relief Law), the Exit Premium will also automatically be due and payable as though the Loans were being repaid or prepaid and shall constitute part of the Guaranteed Obligations with respect to the Loans. For the avoidance of doubt, the Exit Premium shall also be due and payable (i) in the event the Loans (or any notes representing the Loans) are satisfied or released by foreclosure (whether by power of judicial proceeding or otherwise), deed in lieu of foreclosure or by another means and/or (ii) upon the satisfaction, release, payment, restructuring, reorganization, replacement, reinstatement, defeasance or compromise of any Guaranteed Obligations (and/or the DIP Credit Agreement or the notes evidencing any Guaranteed Obligations) in any insolvency proceeding or other proceeding pursuant to any Debtor Relief Laws, foreclosure (whether by power of judicial proceeding or otherwise), deed in lieu of foreclosure or by other means or the making of a distribution of any kind

Summary of Material Terms	
	in any insolvency proceeding or under any Debtor Relief Law to the Lender, in full or partial satisfaction of the Guaranteed Obligations. <i>See</i> DIP Credit Agreement Particulars, §§ 5.11, 6.4, 6.5.
Cross-Collateralization <i>Local Rule 4001-2(a)(i)(N)</i>	None.
Provisions Governing Joint Liability <i>Local Rule 4001-2(a)(i)(J)</i>	Pursuant to section 364(c)(1) of the Bankruptcy Code, all of the DIP Obligations shall constitute allowed superpriority administrative expense claims against the Debtors on a joint and several basis (without the need to file any proof of claim) <i>See</i> Interim Order ¶ 5.

PREPETITION CAPITAL STRUCTURE

10. The Debtors are party to that certain Facility Agreement, dated as of December 21, 2023 (as amended by that certain Amendment No. 1, dated March 11, 2024, that certain Amendment No. 2, dated April 12, 2024, and that certain Amendment No. 3, dated December 9, 2024, and as supplemented by each Deed of Accession dated as of August 4, 2024) (the “**Prepetition Secured Facility Agreement**”) As of December 15, 2024, the principal amount of indebtedness that the Debtors have incurred under the Prepetition Secured Facility Agreement is not less than \$69,749,000 of outstanding Prepetition Facility Loans, comprised of not less than (i) \$63,000,000 of outstanding Loans under the Tranche B Facility (as defined in the Prepetition Secured Facility Agreement), and (iii) \$6,749,000.00 of outstanding Loans under the Tranche C Facility (as defined in the Prepetition Secured Facility Agreement), plus accrued interest, fees, expenses and other charges thereon and any other obligations owing to the Prepetition Facility Lender (as defined in the Interim Order) under the Prepetition Secured Facility Agreement (such obligations, the “**Prepetition Facility Loans**”). In connection with the Prepetition Secured Facility Agreement, the Debtors and their non-Debtor direct and indirect subsidiaries entered into

various security agreements with the Prepetition Facility Lender that created a first priority security interest in favor of the Prepetition Facility Lender in all or substantially all of the Debtors' assets.

11. In addition to the Prepetition Facility Loans, the Debtors also had approximately \$30 million in total ordinary course trade debt as of the Petition Date. The Debtors have also financed certain equipment in the amount of approximately \$1 million. The Debtors' total cash balance as of the Petition Date is approximately \$1.6 million, substantially all of which is encumbered by the liens securing the Prepetition Facility Loans.

THE PROPOSED DIP FACILITY

I. The Debtors' Have an Immediate Need to Access the Proposed DIP Facility and Use Cash Collateral

12. As further explained in the Bauck Declaration, the Debtors are an early-stage business and project to have virtually near-term revenue to fund the Debtors' projected expenses during the interim period. The Debtors believe they need access to new capital in order to fund on-going expenses and to maintain a minimum liquidity level equal to approximately \$1 million. Further, the Debtors anticipate that the commencement of the Chapter 11 Cases will cause the Debtors to incur out-of-the-ordinary expenses, including administrative and professional fees, which will further strain their liquidity. It is therefore critical that the Debtors obtain immediate access to the proposed DIP Facility and use of Cash Collateral on an interim basis in order to ensure a minimum liquidity level and avoid harmful disruption to the business which would impair any effort to preserve and maximize the value of the Debtors' assets.

13. As further described in the Bauck Declaration, the Debtors and their advisors negotiated the size of the DIP Facility after taking into account anticipated Cash Collateral, estimated cash receipts and disbursements during the projection period, and a number of other factors, including, but not limited to, the effect of the chapter 11 filing on the operations of the

business, fees and interest associated with postpetition financing, professional fees, as well as the expected operational performance of the Debtors' business and the cost of the DIP Facility. The Debtors and their advisors consolidated these factors into an initial 13-week operating budget (the "**Initial DIP Budget**"), attached as Exhibit 2 to the Interim Order. The Debtors believe that the Initial DIP Budget provides an accurate reflection of the Debtors' funding requirements over the identified period and is reasonable and appropriate under the circumstances. As described above, the Debtors do not project significant cash receipts over the interim period, as detailed in the Initial DIP Budget, let alone cash receipts sufficient to fund the Debtors' projected expenses under the Initial DIP Budget.

14. Ultimately, in order to pursue a value-maximizing chapter 11 process, the Debtors require sufficient funding to pay professionals, satisfy prepetition obligations subject to entry of the "first-day" orders, which are crucial to the Debtors' maintenance of value, fund the sale process, and fulfill other obligations contemplated under the Initial DIP Budget. Additionally, approval of the Interim Order within three calendar days after the Petition Date is a milestone under the DIP Credit Agreement. Accordingly, immediate access to the proposed DIP Facility is essential so the Debtors can best maximize value for all stakeholders.

15. Additionally, the Debtors' need for access to the proposed DIP Facility is further underscored by the fact that it would not be prudent, or even possible, to administer these Chapter 11 Cases solely on a "cash collateral" basis with no access to additional capital. The failure of the Debtors to make required payments will result in immediate and irreparable harm to the Debtors and their estates. If the Debtors cannot quickly access the proposed DIP Facility, based on the Debtors' financial forecasts and the Initial DIP Budget, the Debtors will almost immediately fall below the minimum liquidity required for operations, such that the Debtors would be forced to

take drastic action to minimize cash outlays. In turn, this would negatively impact the Debtors' estates, jeopardize the Debtors' sale process, and harm the value of the Debtors' estates to the detriment of all stakeholders.

16. Finally, to underscore the dire situation of the Debtors' liquidity position, without immediate access to the proposed DIP Facility and Cash Collateral, the Debtors could be forced to file liquidating proceedings without the opportunity to run a sale process in court. To avoid this outcome, it is imperative that the Debtors have access to the proposed DIP Facility from the outset of these cases in order to signal to the Debtors' stakeholders that they have the liquidity necessary for a competitive 363 sale process. In contrast, based on the Debtors' financial forecasts and the Initial DIP Budget, the liquidity provided by the proposed DIP Facility should allow the Debtors to avoid these negative outcomes and implement a competitive sale process that would maximize value for the Debtors' stakeholders.

II. The Terms of the DIP Facility Cannot be Replicated in the Market

17. As described in the Bauck Declaration, the Debtors' decision to enter into the DIP Facility is reflective of the practical realities of the Debtors' existing capital structure and the facts and circumstances of the Chapter 11 Cases. As substantially all of the Debtors' assets are encumbered under the Prepetition Facility Loans and the Debtors do not expect to generate significant revenue throughout the Chapter 11 Cases, the Debtors do not believe that any lender, including the DIP Lender, would be willing to extend financing on an unsecured or junior basis.

18. The Debtors also believe that entry into the DIP Facility provides significant and unique benefits compared to a third-party financing, including the preservation of the Debtors' liquidity through payable-in-kind interest and fees, the value of achieving consensus among key constituencies on the terms of a value-maximizing sale process, and the ability to obtain favorable terms due to the Prepetition Facility Lender's familiarity with the Debtors' business, liquidity

needs, and the circumstances of the Chapter 11. As an affiliate of the Debtors' majority equityholder, and a key proponent of the Plan, the DIP Lender is intimately familiar with the Debtors' businesses and the circumstances of the Chapter 11 Cases, allowing the Debtors to bypass the time and expense of due diligence and additional professional fees incidental to a debtor-in-possession financing facility with a third-party lender. Not only does the DIP Facility provide the Debtors with immediate liquidity without the execution risk and time constraints of a third-party lender proposal, the terms of the DIP Facility, in context with the commitments of the DIP Lender under the Restructuring Support Agreement (as defined in the First Day Declaration), are more favorable than those reasonably obtainable in the general financing market and superior to the terms that any third-party lender could reasonably be expected to provide to the Debtors.

19. Specifically, through the Restructuring Support Agreement, the DIP Lender has agreed to support a plan of liquidation under which (i) claims under the DIP Facility (including capitalized fees and interest) will, except to the extent that the Debtors' cash on hand as of the effective date of the plan exceeds the amount of other administrative claims, statutory fees, and the amount required to fund the professional escrow account and except with respect to the proceeds of the sale transaction, be subordinated to other allowed claims (including allowed general unsecured claims), and (ii) the DIP Lender or its affiliate will provide funding of up to \$28,870,592 on the effective date to fund distributions to other creditors. The DIP Facility played a key role in entry into the Restructuring Support Agreement and absent the Debtors' agreement, the Debtors believe that the DIP Lender would not have offered these key terms, which will inure to the benefit of the Debtors' stakeholders. Resultantly, the Debtors, in their sound business judgment, determined that focused negotiation of the terms of the DIP Facility and Restructuring Support Agreement presented the best, value-maximizing option for the Debtors' estates.

Resultantly, and in light of the Debtors' immediate liquidity needs, and the timing and diligence demands associated with a concerted search for third-party lender financings, the Debtors determined, in consultation with their advisors, that it was not necessary or helpful to the Debtors' estates to pursue DIP financing from other sources.

BASIS FOR RELIEF REQUESTED

I. The Debtors Should Be Authorized to Obtain Postpetition Financing Pursuant to Section 364(c) of the Bankruptcy Code

20. Section 364(c) of the Bankruptcy Code requires a finding, made after notice and a hearing, that a debtor seeking postpetition financing on a secured basis cannot "obtain unsecured credit allowable under section 503(b)(1) of [the Bankruptcy Code] as an administrative expense." 11 U.S.C. § 364(c).

21. In addition, under section 364(d)(1) of the Bankruptcy Code, courts may, after notice and a hearing, authorize a debtor to obtain postpetition credit secured by a "priming" lien from affected secured parties if (a) the debtor obtains the consent of such parties or (b) the debtor cannot obtain credit elsewhere and the interests of existing lienholders are adequately protected. 11 U.S.C. § 364(d)(1). Specifically, section 364(d)(1) provides, in relevant part, that a court may, after notice and a hearing:

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 [debtor] is unable to obtain 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(d)(1).

22. In evaluating proposed postpetition financing under sections 364(c) and 364(d)(1) of the Bankruptcy Code, courts perform a qualitative analysis and generally consider various factors including whether:

- a. unencumbered credit or alternative financing without superpriority status is available to the debtor;
- b. the credit transactions are necessary to preserve assets of the estate;
- c. the terms of the credit agreement are fair, reasonable, and adequate;
- d. the proposed financing agreement was negotiated in good faith and at arm's length and entry thereto is an exercise of sound and reasonable business judgment and in the best interest of the debtors' estate and their creditors; and
- e. the proposed financing agreement adequately protects prepetition secured creditors.

See, e.g., *In re Aqua Assoc.*, 123 B.R. 192 (Bankr. E.D. Pa. 1991) (applying the first three factors in making a determination under section 364(c)); *In re Crouse Group, Inc.*, 71 B.R. 544 (Bankr. E.D. Pa. 1987) (same); *Bland v. Farmworker Creditors*, 308 B.R. 109, 113-14 (S.D. Ga. 2003) (applying all factors in making a determination under section 364(d)).

23. As described above and as set forth in the Bauck Declaration, the Debtors do not believe that alternative sources of financing are reasonably available given the Debtors' lack of cash-flow and the DIP Lender's prepetition liens over substantially all of the Debtors' assets. In light of the Debtors' inability to gain access to financing from potential third-party lenders, the Debtors believe that, given the Debtors' circumstances, the proposed DIP Facility with the DIP Lender is the Debtors' only feasible source for the liquidity they need to navigate the chapter 11 process and position themselves to run a value-maximizing transaction process.

24. Absent the proposed DIP Facility, which will provide the Debtors with access to liquidity to administer the Chapter 11 Cases, the value of the Debtors' estates would be

significantly impaired to the detriment of all stakeholders. Without postpetition financing, the Debtors lack sufficient funds to continue operations, pay their debts as they come due, and cover the projected costs of the Chapter 11 Cases. Under the circumstances, the Debtors believe that the terms of the proposed DIP Facility, taken as a whole, are fair and reasonable. For these reasons, the Debtors submit that they have met the standard for obtaining postpetition financing.

25. Section 364 of the Bankruptcy Code also allows for postpetition financing secured by a priming lien. Section 364(d)(1) provides that the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt 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(d)(1).

26. For the reasons discussed herein, including the terms of the proposed DIP Facility as well as the unavailability of actionable alternative sources of financing, the Debtors satisfy the standards required to access postpetition financing on a superpriority claim and priming lien basis under sections 364(c) and 364(d) of the Bankruptcy Code.

27. As described in the Bauck Declaration, the Debtors believe that the terms and conditions of the DIP Facility are entirely fair under the circumstances and could not be improved upon or replicated in the marketplace. In the absence of immediate access to the DIP Facility from the DIP Lender, the Debtors will be unable to bear the costs of these Chapter 11 Cases, continue their operations, or complete their sale and plan confirmation process. Therefore, the Debtors submit that the requirement of section 364 of the Bankruptcy Code that alternative credit on more favorable terms be unavailable to the Debtors is satisfied.

A. The Debtors Cannot Obtain Postpetition Financing on More Favorable Terms

28. In demonstrating that credit is not available without the protections afforded by section 364(c) or 364(d) of the Bankruptcy Code, a debtor need only make a good faith effort. See, e.g., *In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) (approving financing facility and holding that debtor made reasonable efforts to satisfy the standards of section 364(c) to obtain less onerous terms where debtor approached four lending institutions, was rejected by two, and selected the least onerous financing option from the remaining two lenders); see also *In re Snowshoe Co.*, 789 F.2d 1085, 1088 (4th Cir. 1986) (holding “[t]he statute imposes no duty to seek credit from every possible lender before concluding that such credit is unavailable”); *In re Phoenix Steel Corp.*, 39 B.R. 218, 222 (D. Del. 1984) (holding the debtor satisfied its burden to show an inability to obtain credit on other terms through its time and effort spent trying to obtain credit on alternative terms and conditions).

29. Moreover, 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 such an exhaustive search for financing.” *In re Sky Valley, Inc.*, 100 B.R. 107, 113 (Bankr. N.D. Ga. 1988), *aff'd sub nom., Anchor Sav. Bank FSB v. Sky Valley, Inc.*, 99 B.R. 117, 120 n.4 (N.D. Ga. 1989); see also *In re Stanley Hotel, Inc.*, 15 B.R. 660, 663 (D. Colo. 1981) (holding that bankruptcy court’s finding that two national banks refused to grant unsecured loans was sufficient to support conclusion that section 364 requirement was met).

30. As set forth above and in the Bauck Declaration, given their current financial condition, financing arrangements, and capital structure, the Debtors could not reasonably expect to identify actionable alternative sources of interim and long-term financing other than the DIP

Lender or obtain unsecured credit allowable as an administrative expense under section 503(b)(1) of the Bankruptcy Code.

31. Among other issues, the Debtors have few, if any, unencumbered assets which could otherwise be used to collateralize postpetition financing. Such unencumbered assets are insufficient to secure the magnitude of financing required to meet the Debtors' needs during the Chapter 11 Cases. Furthermore, the Prepetition Facility Lender holds all of the first-priority security interests under the Prepetition Facility Loans.

32. As a result, the Debtors believe that new credit is unavailable to the Debtors without providing the DIP Superpriority Claims and the DIP Liens on the DIP Collateral, as provided herein and in the DIP Documents.

B. The Debtors Cannot Obtain Postpetition Financing on More Favorable Terms

33. As debtors in possession, the Debtors have a fiduciary duty to protect and maximize the value of their estates. *See In re Mushroom Transp. Co.*, 382 F.3d 325, 339 (3d Cir. 2004). As described in the Bauck Declaration, the DIP Facility, if approved, will provide critical funding for the Debtors' day-to-day operations and the Chapter 11 Cases, which provide a path for the Debtors to sell their assets pursuant to section 363 of the Bankruptcy Code. Without access to the DIP Facility, immediate and irreparable harm to Debtors would occur since the Debtors would also be unable to administer their Chapter 11 Cases or seek a value maximizing transaction. As noted above and in the Bauck Declaration, the DIP Facility will allow the Debtors to (i) continue pursuing a robust marketing process in accordance with the milestones set forth in the DIP Facility, (ii) maintain current operations during the Chapter 11 Cases, (iii) fund working capital needs for their business, (iv) fund payments to the Debtors' workforce, (v) fund the payments authorized by the Court pursuant to the "first day motions" filed contemporaneously with this Motion, (vi)

operate the Debtors' Cash Management System, as described in the Cash Management Motion, and (vii) fund administrative costs and expenses incurred in the Chapter 11 Cases, each of which is essential to the Debtors' continued viability and to maximizing the value of the Debtors' estates through a planned sale. Because the Debtors' available and projected Cash Collateral is insufficient to preserve and maximize the value of their assets, the credit to be provided under the DIP Facility is necessary to preserve the value of the Debtors' estates for the benefit of all stakeholders.

C. The Terms of the Proposed DIP Facility are Fair, Reasonable, and Adequate under the Circumstances

34. In considering whether the terms of postpetition financing are fair and reasonable, courts consider the terms in light of the relative circumstances of both the debtor and the proposed lender. *In re L.A. Dodgers LLC*, 457 B.R. 308, 312 (Bankr. D. Del. 2011) (stating that approval of DIP financing requires terms that are “fair, reasonable and adequate, given the circumstances of the debtor-borrower and the proposed lender”); *In re Farmland Indus., Inc.*, 294 B.R. 855, 886 (Bankr. W.D. Mo. 2003); *see also 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) (a debtor may have to enter into hard bargains to acquire funds). The appropriateness of a proposed financing facility should also be considered in light of current market conditions. See Transcript of Record at 740:4-6, *In re Lyondell Chem. Co.*, No. 09-10023 (REG) (Bankr. S.D.N.Y. Feb. 27, 2009) (“[B]y reason of present market conditions, as disappointing as the [DIP] pricing terms are, I find the provisions [of a DIP that included a roll-up of prepetition secured debt] reasonable here and now.”).

35. As described above and in the Bauck Declaration, the Debtors believe that the economic terms of the proposed DIP Facility: (a) were the subject of arm's-length negotiations

with the DIP Lender; (b) are an integral component of the overall terms of the proposed DIP Facility; and (c) were required by the DIP Lender as consideration for the proposed DIP Facility.

36. The Debtors and DIP Lender focused on the DIP size necessary to fund these Chapter 11 Cases and run a fulsome process for the sale of all or substantially all of the Debtors' assets pursuant to section 363 of the Bankruptcy Code. The DIP Lender ultimately agreed to provide the proposed DIP Facility, in accordance with the terms and conditions set forth in the DIP Credit Agreement.

37. The DIP Lender and the Debtors, along with their advisors, extensively negotiated the terms of the proposed DIP Facility. Such negotiations included numerous drafts of key documents, including the proposed Interim Order, the DIP Credit Agreement, a term sheet that included key terms exchanged between the parties, and various discussions both amongst key principles and advisors. The Debtors believe that the terms of the proposed DIP Facility, including the fees and conditions contained therein, represent the best available terms for the Debtors.

38. Further, the terms of the DIP Facility are favorable as compared to usual and customary terms for financings of this type. Among other things, the DIP Facility provides for payment of most fees and interest on a payable-in-kind, rather than cash, basis, which will preserve the Debtors' cash balance during the Chapter 11 Cases. Moreover, the DIP Lender has agreed, through the Restructuring Support Agreement, that claims under the DIP Facility (including capitalized fees and interest) will, except to the extent that the Debtors' cash on hand as of the effective date of the plan exceeds the amount of other administrative claims, statutory fees, and the amount required to fund the professional escrow account and except with respect to the proceeds of the sale transaction, be subordinated to other allowed claims (including allowed general unsecured claims). As a result, the Debtors believe that the fees and expenses under the

DIP Facility, compared against a comparable facility charging cash interest, will preserve significant value for the Debtors' other stakeholders. Given the Debtors' urgent need to obtain financial stability to preserve and maximize the value of the Debtors' estates, the terms of the DIP Facility are fair, reasonable, and adequate under the circumstances of the Chapter 11 Cases.

D. Entry into the DIP Documents is an Exercise of the Debtors' Sound Business Judgment

39. The Court should authorize the Debtors, as an exercise of their sound business judgment, to enter into the DIP Documents and obtain access to the DIP Facility. Section 364 of the Bankruptcy Code authorizes a debtor to obtain secured or superpriority financing under certain circumstances discussed in detail below. Courts grant a debtor in possession considerable deference in acting in accordance with its business judgment in obtaining postpetition secured credit, so long as the agreement to obtain such credit does not run afoul of the provisions of, and policies underlying, the Bankruptcy Code. *See, e.g., In re Trans World Airlines, Inc.*, 163 B.R. 964, 974 (Bankr. D. Del. 1994) (approving a postpetition loan and receivables facility because such facility "reflect[ed] sound and prudent business judgment"); *In re L.A. Dodgers LLC*, 457 B.R. 308, 313 (Bankr. D. Del. 2011) ("[C]ourts will almost always defer to the business judgment of a debtor in the selection of the lender."); *In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) ("[C]ases consistently reflect that the court's discretion under section 364 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.").

40. Specifically, to determine whether the business judgment standard is met, a court need only "examine whether a reasonable business person would make a similar decision under similar circumstances." *In re Exide Techs.*, 340 B.R. 222, 239 (Bankr. D. Del. 2006); *see also In*

re Curlew Valley Assocs., 14 B.R. 506, 513-14 (Bankr. D. Utah 1981) (noting that courts should not second guess a debtor's business decision when that decision involves "a business judgment made in good faith, upon a reasonable basis, and within the scope of [the debtor's] authority under the [Bankruptcy] Code.").

41. Furthermore, in considering whether the terms of postpetition financing are fair and reasonable, courts consider the terms in light of the relative circumstances of both the debtor and the potential lender. *In re Farmland Indus., Inc.*, 294 B.R. 855, 886 (Bankr. W.D. Mo. 2003); *see also Unsecured Creditors' Comm. Mobil Oil Corp. v. First Nat'l Bank & Trust Co. (In re Elingsen McLean Oil Co., Inc.)*, 65 B.R. 358, 365 n.7 (W.D. Mich. 1986) (recognizing a debtor may have to enter into "hard bargains" to acquire funds for its reorganization). The Court may also appropriately take into consideration non-economic benefits to the Debtors offered by a proposed postpetition facility. For example, in *In re ION Media Networks, Inc.*, the bankruptcy court held that:

Although all parties, including the Debtors and the Committee, are naturally motivated to obtain financing on the best possible terms, a business decision to obtain credit from a particular lender is almost never based purely on economic terms. *Relevant features of the financing must be evaluated, including non-economic elements such as the timing and certainty of closing, the impact on creditor constituencies and the likelihood of a successful reorganization.* This is particularly true in a bankruptcy setting where cooperation and establishing alliances with creditor groups can be a vital part of building support for a restructuring that ultimately may lead to a confirmable reorganization plan. That which helps foster consensus may be preferable to a notionally better transaction that carries the risk of promoting unwanted conflict.

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

42. The Debtors' determination to move forward with the DIP Facility is an exercise of their sound business judgment following an arm's-length process. Specifically, the Debtors and

their advisors determined that postpetition financing will create certainty with respect to cash flows necessary for the administration of the Chapter 11 Cases through the sale process and confirmation. The Debtors negotiated the DIP Credit Agreement and other DIP Documents with the DIP Lender in good faith and at arm's length with the assistance of their respective advisors.

43. Given the Debtors' immediate liquidity needs at this critical stage in the Chapter 11 Cases, the Debtors believe that the DIP Facility represents the best, and the only viable, financing available. Accordingly, the Court should authorize the Debtors' entry into the DIP Documents, as it is a reasonable exercise of the Debtors' business judgment.

E. Entry into the DIP Facility Also Satisfies the Entire Fairness Standard

44. The DIP Lender is an affiliate of the Debtors' majority equityholder. Nevertheless, the proposed DIP Facility should be approved under the business judgment rule notwithstanding the fact that the DIP Financing is a related-party transaction, because it was negotiated and approved by the Restructuring Committee. However, even if the Court were to apply the heightened "entire fairness" standard to its analysis of the proposed DIP Facility, the Debtors' actions in reviewing and approving the proposed DIP Facility more than satisfy this standard.

45. The entire fairness standard consists of "two aspects, fair dealing and fair price, both of which must be examined together in resolving the ultimate question of entire fairness." *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 937 (Del. 1985). Ordinarily, the party seeking to consummate the challenged transaction bears the burden of proving entire fairness. *See Kahn v. Lynch Comm'ns Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994). The burden of proving unfairness "shifts . . . entirely" to the challenging party, however, where the challenged transaction was approved by an independent committee of directors. *Rosenblatt*, 493 A.2d at 937. Where a controlling shareholder did not dictate the terms of the transaction and an independent negotiator had real bargaining power which was exercised on an arm's-length basis, the burden to prove

unfairness falls to the challenging party. *Kahn*, 638 A.2d at 1117. Indeed, the business judgment rule is set aside only upon a showing that the debtor's directors were uninformed, grossly negligent, or lacking independence. *See In re Los Angeles Dodgers LLC*, 457 B.R. 308, 313 (Bank. D. Del. 2011); *In re Mid-State Raceway, Inc.*, 323 B.R. 40, 58 (Bankr. S.D.N.Y. 2005) ("To overcome the business judgment rule, the entity opposing the decision by the directors must establish that they acted in bad faith or with fraudulent intent.").

46. Here, the DIP Lender was represented by separate counsel for purposes of negotiating the terms of the DIP Facility, and negotiation of the DIP Facility on the Debtors' behalf was led and conducted by the Debtors' outside advisors, under the oversight of the Restructuring Committee. The Restructuring Committee thoroughly reviewed and ultimately approved the terms of the proposed financing that culminated in the DIP Facility. Following approval of the DIP Facility by the Restructuring Committee, the Restructuring Committee recommended that the full Board approve the DIP Facility.

47. The process that led the Debtors to agree to the DIP Facility was at all times conducted in good faith and at arm's length, the terms of the DIP Facility are likewise fair, and entry into the DIP Facility is in the best interest of the Debtors' estates. Accordingly, the Debtors' entry into the DIP Facility satisfies the entire fairness standard to the extent such standard applies.

F. The Proposed Adequate Protection is Appropriate

48. To the extent a secured creditor's interests in the collateral constitute valid and perfected security interests and liens as of the Petition Date, section 364(d)(1)(B) of the Bankruptcy Code requires that adequate protection be provided where the liens of such secured creditor are being primed to secure the obligations under a debtor in possession financing facility. Section 361 of the Bankruptcy Code delineates the forms of adequate protection, which include

periodic cash payments, additional liens, replacement liens, and other forms of relief. What constitutes adequate protection must be decided on a case-by-case basis. *See In re Columbia Gas Sys., Inc.*, 1992 WL 79323, at *2 (Bankr. D. Del. Feb. 18, 1992); *In re O'Connor*, 808 F.2d 1393, 1396 (10th Cir. 1987); *In re Martin*, 761 F.2d 472 (8th Cir. 1985). The focus of the requirement is to protect a secured creditor from the diminution in the value of its interest in the particular collateral during the period of use. *See In re Swedeland Dev. Group, Inc.*, 16 F.3d 552, 564 (3d Cir. 1994) (“The whole purpose of adequate protection for a creditor is to insure that the creditor receives the value for which he bargained prebankruptcy.”) (internal citations omitted).

49. The proposed adequate protection provided to the Prepetition Facility Lender comprises the following (each as defined in the Interim Order): (a) the Adequate Protection Liens, (b) the 507(b) Claims, (c) the accrual of interest on the Prepetition Facility Loans at the Default Rate under the Prepetition Facility Documents, (d) the milestones under the DIP Credit Agreement, (e) certain budget and financial covenants, (f) the Prepetition Facility Lender’s Adequate Protection Reporting Rights, and (g) the maintenance of the Prepetition Facility Collateral and the DIP Collateral.

G. The Debtors Should be Authorized to Pay the Fees and Payments Required by the DIP Lender Under the DIP Documents

50. In connection with the DIP Facility, the Debtors have agreed, subject to Court approval, to pay certain fees and other payments to the DIP Lender. Specifically, DIP Facility provides for payment of interest at a rate of Adjusted 3 Month Term SOFR plus the applicable Margin (6.00%) per annum, payable in kind. In addition, the DIP Facility provides for payment of (a) a non-refundable upfront fee equal to 2.0% of the aggregate principal amount of the DIP Facility, payable in kind (the “**Upfront Premium**”), (b) a non-refundable monthly fee equal to 35% of the applicable Margin on the unused amounts available under the DIP Facility, payable in

kind (the “**Commitment Fee**”), and (c) a non-refundable exit fee equal to 2.0% of the aggregate principal amount of the DIP Facility, payable in cash under certain circumstances (the “**Exit Premium**”). As described in the Bauck Declaration, the Debtors, in consultation with their advisors, determined that these terms and fees were reasonable and appropriate under the circumstances.

51. It is understood and agreed by all parties, including the Debtors, that such fees are an integral component of the overall terms of the proposed DIP Facility and were required by the DIP Lender as consideration for the extension of postpetition financing after arm’s-length and good faith negotiations. Accordingly, the Court should authorize the Debtors to pay these fees to the DIP Lender.

II. Approval of Use of Cash Collateral is Appropriate

52. Section 363(c)(2) of the Bankruptcy Code provides that a debtor may not use, sell, or lease cash collateral unless “(a) each entity that has an interest in such cash collateral consents; or (b) the court, after notice and hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.”

53. The Debtors have an urgent need for the immediate use of the Collateral, including the Cash Collateral, and seek to use all Cash Collateral existing on or after the Petition Date pursuant to the terms of the DIP Documents. The Debtors need the Cash Collateral to pay operating expenses, as well as fund the Chapter 11 Cases so they can pursue a value-maximizing chapter 11 process. Indeed, absent such relief, the Debtors’ businesses will be brought to an immediate halt, with damaging consequences for the Debtors and their estates and creditors.

54. The Debtors believe that the terms and conditions of their use of the Cash Collateral (including the provision of adequate protection described above) are appropriate and reasonable. Furthermore, the Prepetition Facility Lender consented (or is deemed to consent) to the Debtors’

use of the Cash Collateral subject to the terms and conditions of the DIP Documents and the Interim Order. Therefore, the Debtors submit that they should be authorized to use the Cash Collateral on the terms set forth in the DIP Documents.

III. The Scope of the Carve-Out is Appropriate

55. The DIP Liens granted under the DIP Facility are subject to the Carve-Out. Without the Carve-Out, the Debtors and other parties in interest may be deprived of certain rights and powers because the services for which professionals may be paid in these Chapter 11 Cases would be restricted. *See In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) (observing that courts insist on carve-outs for professionals representing parties in interest because “[a]bsent such protection, the collective rights and expectations of all parties-in-interest are sorely prejudiced”). The Carve-Out does not directly or indirectly deprive the Debtors’ estates or other parties in interest of possible rights and powers. Additionally, the Carve-Out protects against administrative insolvency during the course of these Chapter 11 Cases by ensuring that assets remain for the payment of fees of the Clerk of the Court or the U.S. Trustee, and professional fees of the Debtors.

IV. The DIP Lender Should Be Deemed a Good-Faith Lender Under Section 364(e)

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

The reversal or modification on appeal of an authorization under this section [364 of the Bankruptcy Code] to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such

authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

57. As explained herein and described in the Bauck Declaration, the DIP Documents are the result of (a) the Debtors' reasonable and informed determination that the DIP Lender offered reasonable and favorable terms on which to obtain vital postpetition financing and (b) the arms'-length, good-faith negotiations between the Debtors and the DIP Lender. The Debtors submit that the terms and conditions of the DIP Documents are reasonable and appropriate under the circumstances, and the proceeds of the DIP Facility will be used only in accordance with the Approved Budget (as defined in the Interim Order) and for purposes that are permissible under the Bankruptcy Code. Further, no consideration is being provided to any party to the DIP Documents other than as described herein. Accordingly, the Court should find that the DIP Lender is a "good faith" lender within the meaning of section 364(e) of the Bankruptcy Code and is entitled to all of the protections afforded by that section.

V. The Automatic Stay Should Be Modified on a Limited Basis

58. The proposed Interim Order provides that the automatic stay provisions of section 362 of the Bankruptcy Code will be modified to allow the DIP Lender to file any financing statements, security agreements, notices of liens, and other similar instruments and documents in order to validate and perfect the liens and security interests granted to it under the Interim Order. The proposed Interim Order further provides that the automatic stay is modified as necessary to permit the Debtors to grant the DIP Liens to the DIP Lender and to incur all liabilities and obligations set forth in the Interim Order. Finally, the proposed DIP Order provides that, following the occurrence of an Event of Default, the automatic stay shall be modified to the extent necessary to permit the DIP Lender to exercise all rights and remedies in accordance with the DIP Documents, or applicable law.

59. Stay modifications of this kind are ordinary and standard features of debtor-in-possession financing arrangements, and, in the Debtors' business judgment, are reasonable and fair under the circumstances of the Chapter 11 Cases. *See, e.g., In re Magnum Hunter Res. Corp.*, No. 15-12533 (KG) (Bankr. D. Del. Dec. 15, 2015) (terminating automatic stay after event of default); *In re Peak Broad., LLC*, No. 12-10183 (PJW) (Bankr. D. Del. Feb. 2, 2012) (terminating automatic stay after occurrence of termination event); *In re TMP Directional Mktg., LLC*, No. 11-13835 (MFW) (Bankr. D. Del. Jan. 17, 2012) (modifying automatic stay as necessary to effectuate the terms of the order); *In re Broadway 401 LLC*, No. 10-10070 (KJC) (Bankr. D. Del. Feb. 16, 2010) (same); *In re Hights Cross Commc'ns, Inc.*, No. 10-10062 (BLS) (Bankr. D. Del. Feb. 8, 2010) (same).

VI. Approval of Interim Relief

60. Bankruptcy Rules 4001(b)(2) and 4001(c)(2) provide that a final hearing on a motion to use cash collateral or obtain credit, respectively, may not be commenced earlier than 14 days after the service of such motion. Upon request, however, the court may conduct a preliminary expedited hearing on the motion and authorize the use of cash collateral and the obtaining of credit on an interim basis "to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing." Fed. R. Bankr. P. 4001(b)(2); (c)(2).

61. As described above, the Debtors have an urgent and immediate need for cash in order to maintain their businesses and fund the Chapter 11 Cases. Given the immediate and irreparable harm to be suffered by the Debtors, their estates and their creditors absent interim relief, the Debtors request that, pending the Final Hearing, the Court schedule an interim hearing that will provide the Court with sufficient time to enter the Interim Order within three days of the Petition Date, as required by the milestone under the DIP Credit Agreement, or as soon thereafter as practicable to consider the interim relief requested in this Motion.

VII. Request for a Final Hearing

62. The DIP Credit Agreement requires that a final order approving this Motion be entered within 35 days after the Petition Date. As such, pursuant to Bankruptcy Rules 4001(b)(2) and 4001(c)(2), the Debtors request that the Court set a date for the Final Hearing that is as soon as practicable, but in no event later than 35 days following the Petition Date, and fix the time and date before the Final Hearing for parties to file objections to this Motion.

BANKRUPTCY RULE 6003 HAS BEEN SATISFIED AND BANKRUPTCY RULE 6004 SHOULD BE WAIVED

63. Certain isolated aspects of the relief requested herein may, if granted, be subject to Bankruptcy Rule 6003. Pursuant to Bankruptcy Rule 6003, a court may grant such relief if it is necessary to avoid immediate and irreparable harm. The Debtors submit that the facts set forth herein demonstrate that the relief requested is necessary to avoid immediate and irreparable harm to the Debtors and, therefore, Bankruptcy Rule 6003 has been satisfied.

64. To the extent that any aspect of the relief sought herein constitutes a use of property under section 363(b) of the Bankruptcy Code, the Debtors request a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the fourteen-day stay under Bankruptcy Rule 6004(h). As described above, the relief that the Debtors request in this Motion is immediately necessary in order for the Debtors to be able to continue to operate their business and preserve the value of their estates. The Debtors respectfully request that this Court waive the notice requirements imposed by Bankruptcy Rule 6004(a) and the fourteen-day stay imposed by Bankruptcy Rule 6004(h), as the exigent nature of the relief sought herein justifies immediate relief.

NOTICE

65. Notice of this Motion will be given to: (i) the Office of the United States Trustee for the District of Delaware; (ii) the United States Attorney's Office for the District of Delaware; (iii) the United States Department of Justice; (iv) the attorneys general for the states in which the Debtors conduct business; (v) the Internal Revenue Service; (vi) the creditors listed on the Debtors' consolidated list of thirty (30) creditors holding the largest unsecured claims; (vii) counsel to the DIP Lender, the Prepetition Facility Lender, and the Consenting Parent; (viii) any party known after a reasonable inquiry to have asserted a lien against the Debtors' assets; and (ix) any party that has requested notice pursuant to Bankruptcy Rule 2002. As this Motion is seeking "first day" relief, the Debtors will serve copies of this Motion and any order entered in respect of this Motion as required by Local Rule 9013-1(m). The Debtors believe that no further notice is required.

66. A copy of this Motion is available on (i) this Court's website, at www.deb.uscourts.gov, and (ii) the website maintained by the Debtors' proposed Claims and Noticing Agent, Omni Agent Solutions, Inc., at <https://omniagentsolutions.com/FirstMode>.

[Remainder of page intentionally left blank]

WHEREFORE, the Debtors respectfully request that this Court enter the proposed Interim Order substantially in the form attached hereto as Exhibit A, and following a noticed hearing on the relief sought, the Final Order, and grant the relief requested in this Motion and such other and further relief as may be just and proper.

Dated: December 16, 2024
Wilmington, Delaware

LATHAM & WATKINS LLP

Ray C. Schrock (*pro hac vice* admission pending)
Annemarie V. Reilly (*pro hac vice* admission pending)
Brian S. Rosen (*pro hac vice* admission pending)
1271 Avenue of the Americas
New York, NY 10020
Telephone: (212) 906-1200
Facsimile: (212) 751-4864
Email: ray.schrock@lw.com
annemarie.reilly@lw.com
brian.rosen@lw.com

- and -

Caroline Reckler (*pro hac vice* admission pending)
330 North Wabash Avenue, Suite 2800
Chicago, IL 60611
Telephone: (312) 876-7700
Facsimile: (312) 993-9767
Email: caroline.reckler@lw.com

- and -

Jeffrey T. Mispagel (*pro hac vice* admission pending)
355 South Grand Avenue, Suite 100
Los Angeles, CA 90071
Telephone: (213) 485-1234
Facsimile: (213) 891-8763
Email: jeffrey.mispagel@lw.com

Respectfully Submitted,

/s/ Joseph M. Mulvihill

**YOUNG CONAWAY STARGATT &
TAYLOR, LLP**

Michael R. Nestor (No. 3526)
Kara Hammond Coyle (No. 4410)
Joseph M. Mulvihill (No. 6061)
Rodney Square
1000 North King Street
Wilmington, DE 19801
Telephone: (302) 571-6600
Facsimile: (302) 571-1253
Email: mnestor@ycst.com
kcoyle@ycst.com
jmulvihill@ycst.com

Proposed Counsel for Debtors and Debtors in Possession

Exhibit A

Interim Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

	X	
In re:	:	Chapter 11
	:	
FIRST MODE HOLDINGS, INC., <i>et al.</i> , ¹	:	Case No. 24-12794 (____)
	:	
Debtors.	:	(Jointly Administered)
	:	
	X	Re: D.I. ____

**INTERIM ORDER (I) AUTHORIZING DEBTORS TO (A) OBTAIN POSTPETITION
FINANCING AND (B) USE CASH COLLATERAL, (II) GRANTING LIENS AND
PROVIDING CLAIMS WITH SUPERPRIORITY ADMINISTRATIVE EXPENSE
STATUS, (III) GRANTING ADEQUATE PROTECTION TO THE PREPETITION
FACILITY LENDER, (IV) MODIFYING THE AUTOMATIC STAY, (V) SCHEDULING
A FINAL HEARING AND (VI) GRANTING RELATED RELIEF**

Upon the motion (the “**DIP Motion**”)² of First Mode Holdings, Inc. and Synchronous LLC, as debtors and debtors-in-possession (each, a “**Debtor**” and collectively, the “**Debtors**”) in the above-captioned cases (the “**Chapter 11 Cases**”), pursuant to sections 105, 361, 362, 363(b), 363(c)(2), 363(m), 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1), 364(e), 503, 506(c) and 507 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the “**Bankruptcy Code**”), Rules 2002, 4001, 6003, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), and Rules 2002-1(b), 4001-2, 9006-1, and 9013 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “**Local Rules**”), seeking entry of this interim order (this “**Interim Order**”) among other things:

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: First Mode Holdings, Inc. (7177), and Synchronous LLC (1829). The Debtors’ address is 3417 1st Ave S, Seattle, WA, 98134.

² Capitalized terms used but not defined herein are given the meanings ascribed to such terms in the DIP Credit Agreement (as defined herein) or the DIP Motion, as applicable.

- (a) authorizing First Mode Holdings, Inc. (the “**DIP Borrower**”) to obtain postpetition financing (“**DIP Financing**”) pursuant to a superpriority, senior secured and priming debtor-in-possession term loan credit facility (the “**DIP Facility**”) subject to the terms and conditions set forth in that certain Superpriority Senior Secured Debtor-in-Possession Loan Agreement attached hereto as Exhibit 1 (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time, the “**DIP Credit Agreement**”), by and among the DIP Borrower, the DIP Guarantor (as defined below), Anglo American International Holdings Limited (the “**DIP Lender**”) in an aggregate principal amount not to exceed \$26,000,000 (the commitments in respect thereof, the “**DIP Commitments**” and such loans, the “**DIP Loans**”), in the form of a new money superpriority senior secured delayed draw term loan in the aggregate principal amount of \$26,000,000, of which, \$6,625,219 will be immediately available upon entry of this Interim Order, in accordance with the terms and conditions set forth in the DIP Credit Agreement;
- (b) authorizing Synchronous LLC (the “**DIP Guarantor**”) to guarantee the DIP Loans and the other DIP Obligations (as defined below);
- (c) authorizing the Debtors to execute, deliver and perform under the DIP Credit Agreement and all other loan documentation related to the DIP Facility, including, without limitation, as applicable, security agreements, pledge agreements, control agreements, mortgages, deeds, charges, guarantees, promissory notes, intercompany notes, certificates, instruments, intellectual property security agreements, notes, and such other documents that may be reasonably requested by the DIP Lender, in each case, as amended, restated, supplemented, waived or otherwise modified from time to time in accordance with the terms thereof and hereof (collectively, together with the DIP Credit Agreement and any other Financing Documents (as defined in the DIP Credit Agreement), the “**DIP Documents**”);
- (d) authorizing the Debtors to incur loans, advances, extensions of credit, financial accommodations, reimbursement obligations, fees (including, without limitation, commitment fees and any other fees payable pursuant to the DIP Documents), costs, expenses and other liabilities, and all other obligations (including indemnities and similar obligations, whether contingent or absolute) due or payable under the DIP Documents (collectively, the “**DIP Obligations**”), and to perform such other and further acts as may be necessary, desirable or appropriate in connection therewith;
- (e) subject to the Carve-Out (as defined herein), granting to the DIP Lender, allowed superpriority administrative expense claims pursuant to section 364(c)(1) of the Bankruptcy Code in respect of all DIP Obligations of the Debtors;
- (f) granting to the DIP Lender valid, enforceable, non-avoidable and automatically perfected liens pursuant to sections 364(c)(2) and 364(c)(3) of the Bankruptcy Code and priming liens pursuant to section 364(d) of the Bankruptcy Code on all prepetition and postpetition property of the Debtors’ estates (other than certain excluded property as provided in the DIP Documents (the “**Excluded Assets**”)) and

all proceeds thereof, including, subject only to and effective upon entry of the Final Order, any Avoidance Proceeds (as defined herein), in each case subject to the Carve-Out;

- (g) authorizing the DIP Lender and the Prepetition Facility Lender (as defined herein), to take all commercially reasonable actions to implement and effectuate the terms of this Interim Order;
- (h) authorizing the Debtors to waive, subject to entry of the Final Order, (a) their right to surcharge the Prepetition Facility Collateral (as defined herein) and the DIP Collateral (as defined herein) (together, the “**Collateral**”) pursuant to section 506(c) of the Bankruptcy Code and (b) any “equities of the case” exception under section 552(b) of the Bankruptcy Code;
- (i) subject to entry of the Final Order, waiving the equitable doctrine of “marshaling” and other similar doctrines (i) with respect to the DIP Collateral for the benefit of any party other than the DIP Lender and (ii) with respect to any of the Prepetition Facility Collateral (including the Cash Collateral (as defined herein)) for the benefit of any party other than the Prepetition Facility Lender;
- (j) authorizing the Debtors to use proceeds of the DIP Facility solely in accordance with this Interim Order and the DIP Documents;
- (k) authorizing the Debtors to pay the principal, interest, fees, expenses and other amounts payable under the DIP Documents as such become earned, due and payable to the extent provided in, and in accordance with, the DIP Documents;
- (l) subject to the restrictions set forth in the DIP Documents and this Interim Order, authorizing the Debtors to use the Prepetition Facility Collateral, including Cash Collateral of the Prepetition Facility Lender under the Prepetition Facility Documents (as defined herein), and provide adequate protection to the Prepetition Facility Lender for any diminution in value of its interests in the applicable Prepetition Facility Collateral (including Cash Collateral), including, without limitation, any diminution in value resulting from the imposition of the automatic stay under section 362 of the Bankruptcy Code (the “**Automatic Stay**”), the Debtors’ use, sale, or lease of the Prepetition Facility Collateral (including Cash Collateral), and the priming of its interests in the Prepetition Facility Collateral (including Cash Collateral);
- (m) vacating and modifying the Automatic Stay to the extent set forth herein to the extent necessary to permit the Debtors and their affiliates, the DIP Lender and the Prepetition Facility Lender to implement and effectuate the terms and provisions of this Interim Order, the DIP Documents and, upon entry, the Final Order and to deliver any notices of termination described below and as further set forth herein;
- (n) waiving any applicable stay (including under Bankruptcy Rule 6004) and providing for immediate effectiveness of this Interim Order and, upon entry, the Final Order; and

- (o) scheduling a final hearing (the “**Final Hearing**”) to consider final approval of the DIP Facility and use of Cash Collateral pursuant to a proposed final order (the “**Final Order**”), as set forth in the DIP Motion and the DIP Documents filed with this Court.

The Court having considered the interim relief requested in the DIP Motion, the exhibits attached thereto, the *Declaration of Colin Mark Freed in Support of Chapter 11 Petitions and First Day Pleadings* (the “**First Day Declaration**”), the *Declaration of Lyle Bauck in Support of Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing and (B) Use Cash Collateral, (II) Granting Liens and Providing Claims with Superpriority Administrative Expense Status, (III) Granting Adequate Protection to the Prepetition Facility Lender, (IV) Modifying the Automatic Stay, (V) Scheduling a Final Hearing, and (VI) Granting Related Relief* (the “**DIP Declaration**”), the available DIP Documents, and the evidence submitted and arguments made at the interim hearing held on December [●], 2024 (the “**Interim Hearing**”); and notice of the Interim Hearing having been given in accordance with Bankruptcy Rules 2002, 4001(b), (c) and (d), and all applicable Local Rules; and the Interim Hearing having been held and concluded; and all objections, if any, to the interim relief requested in the DIP Motion having been withdrawn, resolved or overruled by the Court; and it appearing that approval of the interim relief requested in the DIP Motion is necessary to avoid immediate and irreparable harm to the Debtors and their estates pending the Final Hearing, otherwise is fair and reasonable and in the best interests of the Debtors and their estates, and is essential for the continued operation of the Debtors’ businesses and the preservation of the value of the Debtors’ assets; and it appearing that the Debtors’ entry into the DIP Documents is a sound and prudent exercise of the Debtors’ business judgment; and after due deliberation and consideration, and good and sufficient cause appearing therefor.

BASED UPON THE RECORD ESTABLISHED AT THE INTERIM HEARING, THE COURT MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:³

A. *Petition Date.* On December 15, 2024 (the “**Petition Date**”), each of the Debtors filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the District of Delaware (the “**Court**”). On December [●], 2024, this Court entered an order approving the joint administration of the Chapter 11 Cases.

B. *Debtors in Possession.* The Debtors have continued in the management and operation of their businesses and properties as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

C. *Jurisdiction and Venue.* This Court has core jurisdiction over the Chapter 11 Cases, the DIP Motion, and the parties and property affected hereby pursuant to 28 U.S.C. §§ 157(a)–(b) and 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, dated February 29, 2012. Consideration of the DIP Motion constitutes a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The Court may enter a final order consistent with Article III of the United States Constitution. Venue for the Chapter 11 Cases and proceedings on the DIP Motion is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

D. *Committee Formation.* As of the date hereof, the United States Trustee for the District of Delaware (the “**U.S. Trustee**”) has not appointed an official committee of unsecured creditors in the Chapter 11 Cases pursuant to section 1102 of the Bankruptcy Code (a “**Creditors’ Committee**”).

³ The findings and conclusions set forth herein constitute the Court’s findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

E. *Notice.* The Interim Hearing was held pursuant to Bankruptcy Rule 4001(b)(2) and (c)(2). Notice of the Interim Hearing and the DIP Motion has been provided in accordance with the Bankruptcy Code, the Bankruptcy Rules and the Local Rules, and no other or further notice of the Interim Hearing was required.

F. *Cash Collateral.* As used herein, the term “**Cash Collateral**” shall mean all of the Debtors’ cash except for cash that is an Excluded Asset, wherever located and held, including cash in deposit accounts, that constitutes or will constitute “cash collateral” of the Prepetition Facility Lender and the DIP Lender within the meaning of section 363(a) of the Bankruptcy Code.

G. *Debtors’ Stipulations.*⁴ Subject only to the limitations contained in paragraph 17 hereof, and after consultation with their attorneys and financial advisors, the Debtors admit, stipulate and agree that:

(i) Prepetition Secured Facility Agreement. Pursuant to that certain Facility Agreement, dated as of December 21, 2023 (as amended by that certain Amendment No. 1, dated March 11, 2024, that certain Amendment No. 2, dated April 12, 2024, and that certain Amendment No. 3, dated December 9, 2024, and as supplemented by each Deed of Accession dated as of August 4, 2024) (the “**Prepetition Secured Facility Agreement**”) and the other Financing Documents (as defined in Prepetition Secured Facility Agreement) and any other agreements and documents executed or delivered in connection therewith, each as may be amended, restated, amended and restated, supplemented, waived or otherwise modified from time to time prior to the Petition Date (collectively, the “**Prepetition Facility Documents**”), and the loans issued pursuant thereto, the “**Prepetition Facility Loans**”) by and among (1) First Mode Holdings, Inc. and

⁴ The provisions of this Recital G constitute stipulations of the Debtors and are not findings or conclusions of the Court.

Synchronous LLC (collectively, the “**Prepetition Facility Borrowers**”), (2) First Mode Holdings, Inc., Synchronous LLC, First Mode Pty Ltd, First Mode IPP Limited, First Mode Chile SpA, First Mode SA Proprietary Limited, First Mode SA Holdings Proprietary Limited (collectively, the “**Prepetition Facility Guarantors**”, and together with the Prepetition Facility Borrowers, the “**Prepetition Facility Loan Parties**”) and (3) Anglo American International Holdings Limited (the “**Prepetition Facility Lender**”), the Prepetition Facility Lender has extended the Prepetition Facility Secured Loans for the benefit of the Prepetition Facility Loan Parties.

(ii) **Prepetition Facility Obligations.** The Prepetition Facility Loan Parties are lawfully indebted and liable to the Prepetition Facility Lender without defense, challenge, objection, claim, counterclaim, or offset of any kind, in the aggregate principal amount as of the Petition Date of not less than \$69,749,000 of outstanding Prepetition Facility Loans, comprised of not less than (i) \$63,000,000 of outstanding Loans under the Tranche B Facility (as defined in the Prepetition Secured Facility Agreement), and (iii) \$6,749,000.00 of outstanding Loans under the Tranche C Facility (as defined in the Prepetition Secured Facility Agreement), which Loans were issued pursuant to, and in accordance with the Prepetition Facility Documents, plus accrued and unpaid interest and fees (including commitment fees) thereon, premiums, reimbursement obligations (contingent or otherwise), fees, costs, expenses (including any attorneys’, accountants’, appraisers’, and financial advisors’ fees and expenses), charges, indemnities, and any other amounts, liabilities, or obligations of whatever nature, whenever arising or accruing (whether before or after the Petition Date), that may be due, owing, or chargeable in connection therewith, in each case, as and to the extent provided in the Prepetition Secured Facility Agreement, including all “Guaranteed Obligations” as defined in the Prepetition Secured Facility Agreement (collectively, the “**Prepetition Facility Obligations**”).

(iii) Prepetition Facility Liens. Prior to the Petition Date, to secure the Prepetition Facility Obligations, (a) the Prepetition Facility Borrowers, First Mode Chile SpA and First Mode Pty Ltd, as Grantors, as more fully set forth in that certain Security Agreement dated December 21, 2023 (the “**Prepetition Facility U.S. Security Agreement**”), granted the Prepetition Facility Lender valid, binding, non-avoidable, properly perfected and enforceable first priority continuing liens on and security interests in the “Collateral” as defined in the Prepetition Facility U.S. Security Agreement, including, for the avoidance of doubt, Cash Collateral, and (b) the Prepetition Facility Borrowers and First Mode IPP Limited, as Chargors, as more fully set forth in that certain Security Debenture dated December 21, 2023 (the “**Prepetition Facility U.K. Security Agreement**”), granted the Prepetition Facility Lender valid, binding, non-avoidable, properly perfected and enforceable first priority continuing security interests in the “Charged Assets” as defined in the Prepetition Facility U.K. Security Agreement, including, for the avoidance of doubt, Cash Collateral (the liens and security interests granted in clauses (a) and (b) collectively, the “**Prepetition Facility Liens**”, and the collateral described in clauses (a) and (b) collectively, the “**Prepetition Facility Collateral**”).

(iv) Validity, Perfection and Priority of Prepetition Facility Liens and Prepetition Facility Loans. The Debtors acknowledge and agree that as of the Petition Date (a) the Prepetition Facility Liens on the Prepetition Facility Collateral were valid, binding, enforceable, non-avoidable and properly perfected and were granted to the Prepetition Facility Lender for fair consideration and reasonably equivalent value; (b) the Prepetition Facility Liens were senior in priority over any and all other liens on the Prepetition Facility Collateral, subject only to certain senior liens permitted under the Prepetition Facility Documents (solely to the extent any such liens were valid, properly perfected, non-avoidable and senior in priority to the Prepetition Facility

Liens and permitted under the Prepetition Facility Documents as of the Petition Date, the **“Prepetition Permitted Prior Liens”**); (c) the Prepetition Facility Loans constitute legal, valid, binding, and non-avoidable obligations of the Prepetition Facility Loan Parties, enforceable in accordance with the terms of the applicable Prepetition Facility Documents; (d) no offsets, recoupments, challenges, objections, defenses, claims or counterclaims of any kind or nature to any of the Prepetition Facility Liens or Prepetition Facility Loans exist, and no portion of the Prepetition Facility Liens or Prepetition Facility Loans is subject to any challenge or defense, including avoidance, disallowance, disgorgement, recharacterization, or subordination (equitable or otherwise) pursuant to the Bankruptcy Code or applicable non-bankruptcy law; and (e) the Debtors waive, discharge, and release any right to challenge any of the Prepetition Facility Loans, the priority of the Debtors’ obligations thereunder, and the validity, extent, and priority of the Prepetition Facility Liens securing the Prepetition Facility Loans.

(v) Corporate Authority. Each Debtor has all requisite corporate power and authority to execute and deliver the DIP Documents to which it is a party and to perform its obligations thereunder.

(vi) Release. Effective as of the earlier of (x) end of the Challenge Period and (y) later to occur of (i) the date of entry of the Final Order granting such relief and (ii) confirmation from the Restructuring Committee of the Debtors’ board of directors that the releases provided herein are appropriate, each of the Debtors and (subject to paragraph 17) the Debtors’ estates, on its and their own behalf and on behalf of its and their respective past, present and future predecessors, heirs, successors, subsidiaries, and assigns, hereby absolutely, unconditionally and irrevocably releases and forever discharges and acquits the Prepetition Facility Lender, the DIP Lender, and each of their respective affiliates, subsidiaries, and Representatives (as defined herein)

(collectively, the “**Released Parties**”), from any and all (a) obligations and liabilities to the Debtors (and their successors and assigns) and (b) claims, counterclaims, demands, defenses, offsets, debts, accounts, contracts, liabilities, actions and causes of action of any kind, nature or description, whether matured or unmatured, known or unknown, asserted or unasserted, foreseen or unforeseen, accrued or unaccrued, suspected or unsuspected, liquidated or unliquidated, pending or threatened, arising in law or equity, upon contract or tort or under any state or federal law or otherwise, in each case arising out of or related to (as applicable) the Prepetition Facility Documents, the DIP Documents, the obligations owing and the financial obligations made thereunder, the negotiation thereof and of the transactions and agreements reflected thereby, and the obligations and financial obligations made thereunder, in each case that the Debtors at any time had, now have or may have, or that their predecessors, successors or assigns at any time had or hereafter can or may have against any of the Released Parties for or by reason of any act, omission, matter, cause or thing whatsoever arising at any time on or prior to the date of this Interim Order. For the avoidance of doubt, nothing in this release shall relieve the DIP Lender or the Debtors of their Obligations under the DIP Documents from and after the date of this Interim Order.

H. *Findings Regarding the DIP Financing and Use of Cash Collateral.*

(i) Good and sufficient cause has been shown for the entry of this Interim Order and for authorization of the Debtors to obtain financing pursuant to the DIP Documents.

(ii) The Debtors have an immediate and critical need to obtain the DIP Financing and to use the Prepetition Facility Collateral (including Cash Collateral) in order to, among other things (a) administer and preserve the value of their estates; (b) permit the orderly continuation of the operation of their business, (c) maintain business relationships with vendors, suppliers and customers, (d) make payroll, (e) satisfy other working capital and operational needs

and (f) fund expenses of the Chapter 11 Cases. In the absence of the DIP Facility and the use of Cash Collateral, the Debtors' business and estates would suffer immediate and irreparable harm. The access of the Debtors to sufficient working capital and liquidity through the use of Cash Collateral and other Prepetition Facility Collateral, the incurrence of new indebtedness under the DIP Documents and other financial accommodations provided under the DIP Documents are necessary and vital to the preservation and maintenance of the values of the Debtors and to a successful sale of all or substantially all of the Debtors' assets.

(iii) The Debtors are unable to obtain financing on more favorable terms from sources other than the DIP Lender under the DIP Documents and are unable to obtain adequate unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense. The Debtors are also unable to obtain secured credit allowable under sections 364(c)(1), 364(c)(2) and 364(c)(3) of the Bankruptcy Code without granting to the DIP Lender the DIP Liens and the DIP Superpriority Claims (each as defined herein) and incurring the Adequate Protection Obligations (as defined herein), in each case subject to the Carve-Out to the extent set forth herein, under the terms and conditions set forth in this Interim Order and in the DIP Documents.

(iv) The Debtors may continue to collect cash, rents, income, offspring, products, proceeds, and profits generated from the Prepetition Facility Collateral and acquire equipment, inventory and other personal property, all of which constitute Prepetition Facility Collateral under the Prepetition Facility Documents that are subject to the Prepetition Facility Lender's security interests as set forth in the Prepetition Facility Documents, as applicable.

(v) The Debtors desire to use a portion of the cash, rents, income, offspring, products, proceeds and profits described in the preceding paragraph in their business operations that constitute Cash Collateral of the Prepetition Facility Lender under section 363(a) of the

Bankruptcy Code. Certain prepetition rents, income, offspring, products, proceeds, and profits, in existence as of the Petition Date, including balances of funds in the Debtors' prepetition and postpetition operating bank accounts, also constitute Cash Collateral.

(vi) Based on the DIP Motion, the First Day Declaration, the DIP Declaration and the record presented to the Court at the Interim Hearing, the extension of credit under the DIP Financing, the terms of the adequate protection granted to the Prepetition Facility Lender as provided in paragraph 13 of this Interim Order (the "**Adequate Protection**"), and the terms on which the Debtors may continue to use the Prepetition Facility Collateral (including Cash Collateral) pursuant to this Interim Order and the DIP Documents are fair and reasonable, reflect the Debtors' exercise of prudent business judgment and constitute reasonably equivalent value and fair consideration.

(vii) Based on the DIP Motion, the First Day Declaration, the DIP Declaration and the record presented to the Court at the Interim Hearing, the DIP Financing, the Adequate Protection and the use of the Prepetition Facility Collateral (including Cash Collateral) have been negotiated in good faith and at arm's length among the Debtors, the DIP Lender and the Prepetition Facility Lender, and all of the Debtors' obligations and indebtedness arising under, in respect of, or in connection with, the DIP Financing and the DIP Documents, including, without limitation: all loans made to and guarantees issued by the Debtors pursuant to the DIP Documents and any DIP Obligations shall be deemed to have been extended by the DIP Lender and its affiliates in good faith, as that term is used in section 364(e) of the Bankruptcy Code and in express reliance upon the protections offered by section 364(e) of the Bankruptcy Code, and the DIP Lender (and the successors and assigns thereof) shall be entitled to the full protection of section 364(e) of the

Bankruptcy Code in the event that this Interim Order or any provision hereof is reversed or otherwise modified, on appeal or otherwise.

(viii) Based on the DIP Motion, the First Day Declaration, the DIP Declaration and the record presented to the Court at the Interim Hearing, the Prepetition Facility Lender has acted in good faith regarding the DIP Financing and the Debtors' continued use of the Prepetition Facility Collateral (including Cash Collateral) to fund the administration of the Debtors' estates and continued operation of their businesses (including the incurrence and payment of and performance under the Adequate Protection Obligations and the granting of the Adequate Protection Liens (as defined herein)), in accordance with the terms hereof, and the Prepetition Facility Lender (and the successors and assigns thereof) shall be entitled to the full protection of sections 363(m) and 364(e) of the Bankruptcy Code in the event that this Interim Order or any provision hereof is, reversed or modified, on appeal or otherwise.

(ix) The Prepetition Facility Lender is entitled to the Adequate Protection provided in this Interim Order as and to the extent set forth herein pursuant to sections 361, 362, 363 and 364 of the Bankruptcy Code. Based on the DIP Motion and on the record presented to the Court, the terms of the proposed adequate protection arrangements and of the use of the Prepetition Facility Collateral (including Cash Collateral) are fair and reasonable, reflect the Debtors' prudent exercise of business judgment and constitute reasonably equivalent value and fair consideration for the use of the Prepetition Facility Collateral, including the Cash Collateral, and the Prepetition Facility Lender has consented or is deemed hereby to have consented to the use of the Prepetition Facility Collateral, including the Cash Collateral, the priming of the Prepetition Facility Liens by the DIP Liens pursuant to the terms set forth in this Interim Order and the DIP Documents; *provided* that nothing in this Interim Order or the DIP Documents shall

(x) be construed as the affirmative consent by the Prepetition Facility Lender for the use of Cash Collateral other than on the terms set forth in this Interim Order and in the context of the DIP Financing authorized by this Interim Order to the extent such consent has been or is deemed to have been given, (y) be construed as a consent by any party to the terms of any other financing or any other lien encumbering the Prepetition Facility Collateral (whether senior or junior) other than as contemplated by the DIP Financing authorized by this Interim Order or (z) prejudice, limit or otherwise impair the rights of the Prepetition Facility Lender to seek new, different or additional adequate protection or assert any rights of the Prepetition Facility Lender, and the rights of any other party in interest, including the Debtors, to object to such relief are hereby preserved.

(x) The Debtors have prepared and delivered to the advisors to the DIP Lender an initial budget (the “**Initial DIP Budget**”), attached hereto as Exhibit 2. The Initial DIP Budget reflects, among other things, the DIP Borrower’s and its subsidiaries’ anticipated sources and uses of cash for each calendar week, in form and substance satisfactory to the DIP Lender. The Initial DIP Budget may be modified, amended, extended and updated from time to time in accordance with the DIP Credit Agreement, and once approved by the DIP Lender or the date for objections thereto has passed (as set forth in the DIP Credit Agreement), shall supplement and replace the Initial DIP Budget (the Initial DIP Budget and each subsequent approved budget, shall constitute without duplication, an “**Approved Budget**”). The Debtors believe that the Initial DIP Budget is reasonable under the facts and circumstances. The DIP Lender is relying, in part, upon the Debtors’ agreement to comply with the Approved Budget (subject only to permitted variances), the other DIP Documents and this Interim Order in determining to enter into the postpetition financing arrangements provided for in this Interim Order.

(xi) Subject to entry of the Final Order granting such relief, the Prepetition Facility Lender shall be entitled to all of the rights and benefits of section 552(b) of the Bankruptcy Code and the “equities of the case” exception under section 552(b) of the Bankruptcy Code shall not apply to the Prepetition Facility Lender with respect to proceeds, product, offspring, or profits with respect to any of the Prepetition Facility Collateral.

I. *Immediate Entry.* Sufficient cause exists for immediate entry of this Interim Order pursuant to Bankruptcy Rules 4001(b)(2), (c)(2) and 6003. Absent granting the relief set forth in this Interim Order, the Debtors’ estates will be immediately and irreparably harmed. Consummation of the DIP Financing and the use of Prepetition Facility Collateral (including Cash Collateral), in accordance with this Interim Order and the DIP Documents are therefore in the best interests of the Debtors’ estates and consistent with the Debtors’ exercise of their fiduciary duties.

J. *Prepetition Permitted Prior Liens; Continuation of Prepetition Facility Liens.* Nothing herein shall constitute a finding or ruling by this Court that any alleged Prepetition Permitted Prior Lien is valid, senior, enforceable, prior, perfected, or non-avoidable. Moreover, nothing herein shall prejudice the rights of any party-in-interest, including, but not limited to, the Debtors, the DIP Lender or the Prepetition Facility Lender to challenge the validity, priority, enforceability, seniority, avoidability, perfection, or extent of any alleged Prepetition Permitted Prior Lien and/or security interests. Subject to entry of the Final Order granting such relief, the right of a seller of goods to reclaim such goods under section 546(c) of the Bankruptcy Code is not a Prepetition Permitted Prior Lien and is expressly subject to the DIP Liens. The Prepetition Facility Liens, and the DIP Liens that prime the Prepetition Facility Liens, are continuing liens and the DIP Collateral is and will continue to be encumbered by such liens until indefeasible payment

in full of all Prepetition Facility Loans and all DIP Obligations, respectively, in light of the integrated nature of the DIP Facility, the DIP Documents and the Prepetition Facility Documents.

Based upon the foregoing findings and conclusions, the DIP Motion and the record before the Court with respect to the DIP Motion, and after due consideration and good and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. *Motion Granted.* The relief sought in the DIP Motion is granted as set forth herein, on an interim basis. The interim financing described herein is authorized, and the use of Cash Collateral on an interim basis is authorized, in each case subject to the terms and conditions set forth in the DIP Documents and this Interim Order. All objections to entry of this Interim Order to the extent not withdrawn, waived, settled, or resolved are hereby denied and overruled on the merits. The rights of all parties in interest to object to the entry of the Final Order on the DIP Motion are fully reserved.

2. *Authorization of the DIP Financing and the DIP Documents.*

(a) The Debtors are hereby authorized to execute, deliver, enter into and, as applicable, perform all of their obligations under the DIP Documents and such other and further acts as may be necessary, appropriate or desirable in connection therewith. The DIP Borrower is hereby authorized to borrow money pursuant to the DIP Credit Agreement and the DIP Guarantor is hereby authorized to provide a guaranty of payment in respect of the DIP Borrower's obligations with respect to such borrowings, subject to any limitations on borrowing under the DIP Documents, which shall be used for all purposes permitted under the DIP Documents (and subject to and in accordance with the Approved Budget (subject to any permitted variances)).

(b) In furtherance of the foregoing and without further approval of this Court, each Debtor is authorized to perform all acts, to make, execute and deliver all instruments, certificates, agreements, charges, deeds and documents (including, without limitation, the execution or recordation of pledge and security agreements, mortgages, financing statements and other similar documents), and to pay all fees, expenses and indemnities in connection with or that may be reasonably required, necessary, or desirable for the Debtors' performance of their obligations under or related to the DIP Financing, including, without limitation:

(i) the execution and delivery of, and performance under, each of the DIP Documents;

(ii) the execution and delivery of, and performance under, one or more amendments, waivers, consents or other modifications to and under the DIP Documents, in each case, in such form as the Debtors and the DIP Lender may agree, it being understood that no further approval of this Court shall be required for any authorizations, amendments, waivers, consents or other modifications to and under the DIP Documents (and any fees and other expenses (including attorneys', accountants', appraisers' and financial advisors' fees), amounts, charges, costs, indemnities and other like obligations paid in connection therewith) that do not shorten the maturity of the extensions of credit thereunder or increase the aggregate commitments, the fees or the rate of interest payable thereunder; *provided* that, for the avoidance of doubt, updates and supplements to the Approved Budget required to be delivered by the Debtors under the DIP Documents shall not, for purposes of this Interim Order or any Final Order, be considered amendments or modifications to the Approved Budget or the DIP Documents that require further approval of this Court;

(iii) the non-refundable payment to the DIP Lender of all fees, premiums and rights received as consideration under, or in connection with the DIP Facility, including, amendment fees, prepayment premiums, early termination fees, servicing fees, audit fees, liquidator fees, structuring fees, administrative agent's collateral agent's or security trustee's fees, upfront fees, closing fees, commitment premiums, closing date premiums or original issue discount fees or agency fees, and indemnities (the payment of which fees shall be irrevocable, and shall be, and shall be deemed to have been, authorized upon entry of this Interim Order, whether any such fees arose before or after the Petition Date, and whether or not the transactions contemplated hereby are consummated, and upon payment thereof, shall not be subject to any contest, attack, rejection, recoupment, reduction, defense, counterclaim, offset, subordination, recharacterization, avoidance, disallowance, impairment, or other claim, cause of action or other challenge of any nature under the Bankruptcy Code, applicable non-bankruptcy law or otherwise by any person or entity) and any amounts due (or that may become due) in respect of any indemnification and expense reimbursement obligations, and the costs and expenses as may be due from time to time, in each case referred to in the DIP Credit Agreement or DIP Documents (or in any separate letter agreements); and

(iv) the performance of all other acts required under or in connection with the DIP Documents, including the granting of the DIP Liens and the DIP Superpriority Claims and perfection of the DIP Liens and DIP Superpriority Claims as permitted herein and therein, and to perform such other and further acts as may be necessary, desirable or appropriate in connection therewith, in each case in accordance with the terms of the DIP Documents.

3. *DIP Obligations.* Upon execution and delivery of the DIP Documents, the DIP Documents shall constitute legal, valid, binding and non-avoidable obligations of the Loan Parties, enforceable against each Debtor and its estate in accordance with the terms of the DIP Documents and this Interim Order, and any successors thereto, including any trustee appointed in the Chapter 11 Cases, or in any case under Chapter 7 of the Bankruptcy Code upon the conversion of any of the Chapter 11 Cases, or in any other proceedings superseding or related to any of the foregoing (collectively, the “**Successor Cases**”). Upon execution and delivery of the DIP Documents, the DIP Obligations will include all loans and any other indebtedness or obligations, contingent or absolute, which may now or from time to time be owing by any of the Debtors to the DIP Lender, in each case, under, or secured by, the DIP Documents or this Interim Order, including all principal, interest, costs, fees, expenses, premiums, indemnities and other amounts under the DIP Documents (including this Interim Order). The Debtors shall be jointly and severally liable for the DIP Obligations. Except as permitted hereby, no obligation, payment, transfer, or grant of security hereunder or under the DIP Documents to the DIP Lender (including its Representatives) shall be stayed, restrained, voidable, avoidable, or recoverable, under the Bankruptcy Code or under any applicable law (including, without limitation, under sections 502(d), 544, and 547 to 550 of the Bankruptcy Code or under any applicable state Uniform Voidable Transactions Act, Uniform Fraudulent Transfer Act, Uniform Fraudulent Conveyance Act, or similar statute or common law), or subject to any defense, avoidance, reduction, setoff, recoupment, offset, recharacterization, subordination (whether equitable, contractual, or otherwise), disallowance, impairment, claim, counterclaim, cross-claim, or any other challenge under the Bankruptcy Code or any applicable law or regulation by any person or entity.

4. *Carve-Out.*

(a) *Carve-Out.* As used in this Interim Order, the term “**Carve-Out**” means the sum of: (i) all unpaid fees required to be paid to the Clerk of the Court and to the U.S. Trustee under 28 U.S.C. § 1930(a) plus interest at the statutory rate, if any, pursuant to 31 U.S.C. § 3717, (ii) all unpaid reasonable and documented fees and expenses up to \$50,000 incurred by a trustee under section 726(b) of the Bankruptcy Code (without regard to the Carve-Out Trigger Notice (as defined below)), (iii) to the extent allowed at any time, whether by interim order, procedural order, final order, or otherwise, all accrued and unpaid claims for fees, cost, and expenses (the “**Allowed Professional Fees**”) incurred by persons or firms (a) retained by the Debtors pursuant to section 327, 328, or 363 of the Bankruptcy Code (collectively, the “**Debtor Professionals**”) or (b) retained by any Creditors’ Committee pursuant to section 328 or 1103 of the Bankruptcy Code (collectively, the “**Committee Professionals**” and, together with the Debtor Professionals, the “**Estate Professionals**”) (in each case in this clause (iii), excluding any restructuring, sale, success, or other transaction fee of any investment banker (any such fee, a “**Back-End Fee**”) earned after the first business day following delivery by the DIP Lender of a Carve-Out Trigger Notice) at any time before or on the first business day following delivery by the DIP Lender of a Carve-Out Trigger Notice (as defined below) and up to the aggregate amount of such fees and expenses provided for in the Approved Budget through such time, whether allowed by the Court prior to or after delivery of the Carve-Out Trigger Notice, and whether such fees, costs, and expenses are provided for in the Approved Budget (the amounts set forth in the foregoing clauses (i), (ii) and (iii), the “**Pre Carve-Out Trigger Notice Amount**”); (iv) Allowed Professional Fees of Debtor Professionals incurred after the first business day following delivery by the DIP Lender of the Carve-Out Trigger Notice, to the extent allowed at any time, whether by interim order, procedural order, final order,

or otherwise, in an aggregate amount not to exceed \$750,000 plus any Back-End Fee of any investment banker engaged by the Debtors (but not any Creditors' Committee) earned after the first business day following delivery by the DIP Lender of a Carve-Out Trigger Notice (the amount set forth in this clause (iv), the "**Debtor Post-Carve-Out Cap**"), *provided* that any Back-End Fee payable pursuant to this clause (iv) shall be payable solely from the proceeds of the transaction causing such Back-End Fee to be earned; and (v) Allowed Professional Fees of Committee Professionals, incurred after the first business day following delivery by the DIP Lender of the Carve-Out Trigger Notice, to the extent allowed at any time, whether by interim order, procedural order, final order, or otherwise, in an aggregate amount not to exceed \$50,000 (the amount set forth in this clause (v), the "**Committee Post-Carve-Out Cap**" and, together with the Debtor Post-Carve-Out Cap, the "**Post-Carve-Out Caps**" and, the Post-Carve-Out Caps together with the Pre-Carve-Out Trigger Notice Amount, the "**Carve-Out Cap**"). For purposes of this Interim Order, the "**Carve-Out Trigger Notice**" shall mean a written notice (which may be via electronic mail) delivered by the DIP Lender to the Debtors and their counsel, Latham & Watkins LLP, Young Conaway Stargatt & Taylor, LLP, the U.S. Trustee, counsel to the Prepetition Facility Lender and counsel to the any Creditors' Committee stating that the Post-Carve-Out Cap has been invoked, which Carve-Out Trigger Notice may, but need not, be included in a Termination Declaration (as defined herein). Such Carve-Out Trigger Notice may be delivered following the occurrence and during the continuation of an Event of Default (as defined in the DIP Credit Agreement).

(b) Pre-Carve-Out Trigger Notice. Within two (2) business days of entry of this Interim Order, the Debtors shall deposit into a segregated account of the Debtor not subject to the control of the DIP Lender or the Prepetition Facility Lender (the "**Carve-Out Account**") cash in an amount equal to the estimated Pre-Carve-Out Trigger Notice Amount set forth in the

Approved Budget for each week from the Petition Date through the week in which the Interim DIP Order is entered. In addition to the initial funding, after the week in which the Interim DIP Order is entered, and prior to the date on which a Carve-Out Trigger Notice is delivered in accordance with this paragraph 4, (any such date, the “**Carve-Out Trigger Notice Date**”), the Debtors shall fund the Carve-Out Account on a weekly basis in an aggregate amount equal to the estimated Pre-Carve-Out Trigger Notice Amount set forth in the Approved Budget for the next unfunded week. The funds in the Carve-Out Account shall be earmarked and held in trust to pay unpaid fees and expenses incurred by Estate Professionals as they become allowed and payable pursuant to the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and any interim or final orders of this Court, prior to any and all other claims in the Chapter 11 Cases.

(c) *Post-Carve-Out Trigger Notice.* Immediately following receipt of a Carve-Out Trigger Notice, and prior to the payment of any DIP Obligations, the Debtors shall utilize all cash on hand (including from the proceeds of the DIP Financing) to deposit into the Carve-Out Account cash in an amount equal to the difference between the Carve-Out Cap and the balance held in the Carve-Out Account as of the Carve-Out Trigger Notice Date. Notwithstanding anything to the contrary in this Interim Order or in the DIP Documents, following delivery of a Carve-Out Trigger Notice, the DIP Lender shall not sweep or foreclose on cash (including cash received as a result of the sale or other disposition of any assets) of the Debtors until the Carve-Out Account has been fully funded as required above in an amount equal to the Carve-Out Cap. The amounts in the Carve-Out Account shall be available only to satisfy allowed fees and expenses of Estate Professionals and other amounts included in the Carve-Out until such amounts are paid in full,⁵ and if any amount remains, to pay the DIP Lender until paid in full, and lastly, to pay the

⁵ If an Estate Professional has incurred allowed fees and expenses at any time before or on the first business day following delivery by the DIP Lender of a Carve-Out Trigger Notice (whether allowed by the Court

Prepetition Facility Lender until paid in full. Any payment or reimbursement made prior to the occurrence of the Carve-Out Trigger Notice Date in respect of any allowed fees and expenses of Estate Professionals shall not reduce the Carve-Out. The amount in the Carve-Out Account shall be reduced on a dollar-for-dollar basis for allowed fees and expenses of Estate Professionals that are paid after the delivery of the Carve-Out Trigger Notice, and the Carve-Out Account shall not be replenished for such amounts so paid. Notwithstanding anything to the contrary in this Interim Order or the DIP Documents, (i) the failure of the Carve-Out Account to satisfy in full the amount set forth in the Carve-Out shall not affect the priority of the Carve-Out and (ii) in no way shall the Carve-Out, the Carve-Out Account, or any Approved Budget be construed as a cap or limitation on the amount of the allowed fees and expenses of Estate Professionals due and payable by the Debtors or that may be allowed by the Court at any time (whether by interim order, final order, or otherwise).

(d) *No Direct Obligation to Pay Allowed Professional Fees.* Except for the obligation to permit the funding of the Carve-Out Account, neither the DIP Lender nor the Prepetition Facility Lender shall be responsible for the payment or reimbursement of any fees or disbursements of any Estate Professional incurred in connection with these Chapter 11 Cases or any Successor Cases under any chapter of the Bankruptcy Code, regardless of whether such fees

prior to or after delivery of the Carve-Out Trigger Notice) that exceed the amount of such fees and expenses provided for in the Approved Budget for such Estate Professional, then until each other Estate Professional has been paid either in full or up to the amount of estimated fees and expenses set forth in the Approved Budget on account of fees and expenses incurred at any time before or on the first business day following delivery by the DIP Lender of a Carve-Out Trigger Notice (whether allowed by the Court prior to or after delivery of the Carve-Out Trigger Notice), such Estate Professional shall receive payment of such allowed fees and expenses from amounts in the Carve-Out Account only up to the amount of estimated fees and expenses for such Estate Professional set forth in the Approved Budget. After each Estate Professional has received payment for such allowed fees and expenses either in full or up to the amount of estimated fees and expenses set forth in the Approved Budget for such fees and expenses for such Estate Professional, any funds remaining in the Carve-Out Account shall be used to pay any such remaining allowed and unpaid fees and expenses of Estate Professionals on a pro rata basis.

or expenses have been allowed by the Court. Nothing in this Interim Order or otherwise shall be construed to obligate the DIP Lender or the Prepetition Facility Lender, in any way, to pay compensation to, or to reimburse expenses of, any Estate Professionals or to guarantee that the Debtors have sufficient funds to pay such compensation or reimbursement.

5. *DIP Superpriority Claims.* Pursuant to section 364(c)(1) of the Bankruptcy Code, all of the DIP Obligations shall constitute allowed superpriority administrative expense claims against the Debtors on a joint and several basis (without the need to file any proof of claim) with, to the fullest extent permitted under the Bankruptcy Code or other applicable law, priority over any and all claims against the Debtors, now existing or hereafter arising, of any kind whatsoever, including, without limitation, all administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy Code, including any and all administrative expenses or other claims arising under sections 105, 326, 327, 328, 330, 331, 365, 503(b), 506(c), 507(a) (other than section 507(a)(1)), 507(b), 1113 or 1114 of the Bankruptcy Code (including the Adequate Protection Obligations), whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment, which allowed claims (the “**DIP Superpriority Claims**”) shall for purposes of section 1129(a)(9)(A) of the Bankruptcy Code be considered administrative expenses allowed under section 503(b) of the Bankruptcy Code, and which DIP Superpriority Claims shall be payable from all prepetition and postpetition property of the Debtors and all proceeds thereof (excluding claims and causes of action under sections 502(d), 544, 545, 547, 548, 549 and 550 of the Bankruptcy Code, or any other avoidance actions under the Bankruptcy Code (collectively, “**Avoidance Actions**”) but, subject to the entry of the Final Order, including any proceeds or property recovered, unencumbered or otherwise, from Avoidance Actions, whether by judgment, settlement or otherwise (“**Avoidance Proceeds**”)) in

accordance with the DIP Documents, this Interim Order or the Final Order, subject only to the Carve-Out. The DIP Superpriority Claims shall be entitled to the full protection of section 364(e) of the Bankruptcy Code in the event that this Interim Order or any provision hereof is reversed or otherwise modified, on appeal or otherwise; *provided*, for the avoidance of doubt, that such DIP Superpriority Claims shall not have priority over claims of the type specified in section 507(a)(1) of the Bankruptcy Code. The DIP Superpriority Claims shall be *pari passu* in right of payment with one another and senior to the 507(b) Claims (as defined herein), and subordinated to the Carve-Out.

6. *DIP Liens.* As security for the DIP Obligations, effective and automatically and properly perfected upon the date of this Interim Order and without the necessity of the execution, recordation or filing by the Debtors or the DIP Lender of mortgages, security agreements, control agreements, pledge agreements, financing statements, intellectual property filings or other similar documents, notation of certificates of title for titled goods or other similar documents, instruments, deeds, charges or certificates, or the possession or control by the DIP Lender of, or over, any Collateral, without any further action by the DIP Lender, the following valid, binding, continuing, enforceable and non-avoidable security interests and liens (all security interests and liens granted to the DIP Lender, pursuant to this Interim Order and the DIP Documents, the “**DIP Liens**”) are hereby granted to the DIP Lender (all property identified in clauses (a) through (c) below being collectively referred to as the “**DIP Collateral**”); *provided* that notwithstanding anything herein to the contrary, the DIP Liens shall be (i) subject and junior to the Carve-Out in all respects, (ii) senior in all respects to the Prepetition Facility Liens and (iii) senior in all respects to the Adequate Protection Liens:

(a) *Liens on Unencumbered Property.* Pursuant to section 364(c)(2) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected first priority senior security interest in and lien upon all tangible and intangible prepetition and postpetition property of the Debtors, whether existing on the Petition Date or thereafter acquired, and the proceeds, products, rents, and profits thereof, that, on or as of the Petition Date, is not subject to (i) a valid, perfected and non-avoidable lien or (ii) a valid and non-avoidable lien in existence as of the Petition Date that is perfected subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code, including, without limitation, any and all unencumbered cash of the Debtors and any investment of cash, inventory, accounts receivable, other rights to payment whether arising before or after the Petition Date, contracts, properties, plants, fixtures, machinery, equipment, general intangibles, documents, instruments, securities, goodwill, causes of action, insurance policies and rights, claims and proceeds from insurance, commercial tort claims and claims that may constitute commercial tort claims (known and unknown), chattel paper (including electronic chattel paper and tangible chattel paper), interests in leaseholds, real properties, deposit accounts, patents, copyrights, trademarks, trade names, rights under license agreements and other intellectual property, equity interests of subsidiaries, joint ventures and other entities, wherever located, and the proceeds, products, rents and profits of the foregoing, whether arising under section 552(b) of the Bankruptcy Code or otherwise (the “**Unencumbered Property**”), in each case other than the Avoidance Actions (but, for the avoidance of doubt, subject to entry of the Final Order, “Unencumbered Property” shall include Avoidance Proceeds).

(b) *Liens Priming Certain Prepetition Facility Lender’s Liens.* Pursuant to section 364(d)(1) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully-perfected first priority senior priming security interest in and lien upon all tangible and intangible

prepetition and postpetition property of the Debtors subject to the Prepetition Facility Liens, regardless of where located, regardless whether or not any liens on such assets are voided, avoided, invalidated, lapsed or unperfected (the “**Priming Liens**”), which Priming Liens shall prime in all respects the interests of the Prepetition Facility Lender arising from the current and future liens of the Prepetition Facility Lender (including, without limitation, the Adequate Protection Liens granted to the Prepetition Facility Lender) (the “**Primed Liens**”).

(c) *Liens Junior to Certain Other Liens.* Pursuant to section 364(c)(3) of the Bankruptcy Code, a valid, binding, continuing, enforceable, fully perfected security interest in and lien upon all tangible and intangible prepetition and postpetition property of each of the Debtors, which shall be immediately junior and subordinate to (i) valid, perfected and non-avoidable senior liens in existence immediately prior to the Petition Date (other than the Primed Liens) and permitted by the terms of the Prepetition Facility Documents, and (ii) valid and non-avoidable senior liens (other than the Primed Liens) in existence immediately prior to the Petition Date that are perfected subsequent to the Petition Date, as permitted by section 546(b) of the Bankruptcy Code and the terms of the Prepetition Facility Documents; *provided* that nothing in the foregoing clauses (i) and (ii) shall limit the rights of the DIP Lender under the DIP Documents to the extent such liens are not permitted thereunder; and

(d) *Liens Senior to Certain Other Liens.* The DIP Liens shall not be (i) subject or subordinate to or made *pari passu* with (A) any lien or security interest that is avoided and preserved for the benefit of the Debtors or their estates under section 551 of the Bankruptcy Code, (B) unless otherwise provided for in the DIP Documents or in this Interim Order, any liens or security interests arising after the Petition Date, including, without limitation, any liens or security interests granted in favor of any federal, state, municipal or other governmental unit (including

any regulatory body), commission, board or court for any liability of the Debtors, or (C) any intercompany or affiliate liens of the Debtors or security interests of the Debtors; or (ii) subordinated to or made *pari passu* with any other lien or security interest under section 363 or 364 of the Bankruptcy Code granted after the date hereof.

7. *Protection of DIP Lender's and Prepetition Facility Lender's Rights.*

(a) So long as there are any DIP Obligations outstanding or the DIP Lender has any outstanding DIP Commitments under the DIP Documents, the Prepetition Facility Lender shall:

(i) have no right to and shall take no action to foreclose upon, or recover in connection with, the liens granted thereto pursuant to the Prepetition Facility Documents or this Interim Order, or otherwise seek to exercise or enforce any rights or remedies against the DIP Collateral, including in connection with the Adequate Protection Liens; (ii) be deemed to have consented to any transfer, disposition or sale of, or release of liens on, the DIP Collateral (but not any proceeds of such transfer, disposition or sale to the extent remaining after payment in cash in full of the DIP Obligations and termination of the DIP Commitments), to the extent such transfer, disposition, sale or release is authorized under the DIP Documents; (iii) not file any further financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments, or otherwise take any action to perfect its security interests in the DIP Collateral other than as necessary to give effect to this Interim Order other than, (x) solely as to this clause (iii), the DIP Lender filing financing statements or other documents to perfect the liens granted pursuant to this Interim Order, or (y) as may be required by applicable state law or foreign law to complete a previously commenced process of perfection or to continue the perfection of valid and non-avoidable liens or security interests existing as of the Petition Date; and (iv) deliver or cause to be delivered, at the Debtors' cost and expense, any termination statements, releases and/or

assignments in favor of the DIP Lender or other documents necessary to effectuate and/or evidence the release, termination and/or assignment of liens on any portion of the DIP Collateral subject to any sale or disposition permitted by this Interim Order and the other DIP Documents.

(b) To the extent the Prepetition Facility Lender has possession of any Prepetition Facility Collateral or DIP Collateral or has control with respect to any Prepetition Facility Collateral or DIP Collateral, or has been noted as a secured party on any certificate of title for a titled good constituting Prepetition Facility Collateral or DIP Collateral, then the Prepetition Facility Lender shall be deemed to maintain such possession or notation or exercise such control as a gratuitous bailee and/or gratuitous agent for perfection for the benefit of the DIP Lender, and the Prepetition Facility Lender shall comply with the instructions of the DIP Lender with respect to the exercise of such control or possession.

(c) Any proceeds of Prepetition Facility Collateral received by the Prepetition Facility Lender, whether in connection with the exercise of any right or remedy (including setoff) relating to the Prepetition Facility Collateral or otherwise received by a Prepetition Facility Lender, shall be segregated and held in trust for the benefit of and forthwith paid over to the DIP Lender in the same form as received by the Prepetition Facility Lender, with any necessary endorsements, or as a court of competent jurisdiction may otherwise direct. The DIP Lender is hereby authorized to make any such endorsements as agent for the Prepetition Facility Lender. This authorization is coupled with an interest and is irrevocable.

(d) *Termination Date.* On the Termination Date (as defined below), consistent with Section 5.1 of the DIP Credit Agreement, (i) all DIP Obligations shall be immediately due and payable and all DIP Commitments will terminate; (ii) the Prepetition Facility Lender may terminate, reduce or restrict the ability of the Debtors to use Cash Collateral; *provided, however,*

that during the Remedies Notice Period (as defined below), the Debtors may use Cash Collateral solely to fund the Carve-Out and pay payroll and other expenses critical to the administration of the Debtors' estates strictly in accordance with the Approved Budget; and (iii) the DIP Lender shall be otherwise entitled to exercise rights and remedies under the DIP Documents in accordance with this Interim Order.

(e) *Rights and Remedies Upon Event of Default.* Immediately upon the occurrence and during the continuation of an Event of Default, notwithstanding the provisions of section 362 of the Bankruptcy Code, without any application, motion, or notice to, hearing before, or order from the Court, but subject to the terms of the DIP Documents and this Interim Order, including the Remedies Notice Period for the exercise of remedies other than the following (i) the DIP Lender may declare, which declaration shall be in writing and delivered by email and overnight mail to the Debtors, any Creditors' Committee, and the U.S. Trustee (any such declaration shall be referred to herein as a "**Termination Declaration**") (A) all DIP Obligations owing under the DIP Documents to be immediately due and payable, (B) the termination, reduction or restriction of any further commitment to extend credit to the Debtors to the extent any such commitment remains under the DIP Facility, (C) termination of the DIP Facility and the DIP Documents as to any future liability or obligation of the DIP Lender, but without affecting any of the DIP Liens or the DIP Obligations, and (D) that the obligation to fund the Carve-Out Account shall be triggered, through the delivery of the Carve-Out Trigger Notice to the DIP Borrower; and (ii) subject to paragraph 7(b), the Prepetition Facility Lender may declare a termination, reduction or restriction on the ability of the Debtors to use Cash Collateral (the date on which a Termination Declaration is delivered, the "**Termination Date**") and the right of the Prepetition Facility Lender to terminate, reduce, or restrict the use of Cash Collateral shall continue following termination of

the DIP Credit Agreement, with each reference to “Event of Default” deemed a reference to the Events of Default under the DIP Credit Agreement as of the date of this Interim Order. The Automatic Stay in the Chapter 11 Cases otherwise applicable to the DIP Lender and the Prepetition Facility Lender is hereby modified so that five (5) calendar days after the Termination Date (the **“Remedies Notice Period”**): (a) the DIP Lender shall be entitled to exercise all of its rights and remedies in accordance with the DIP Documents and this Interim Order to satisfy the DIP Obligations, DIP Superpriority Claims, and DIP Liens, including (subject to: (i) the funding of the Carve-Out Account in accordance with paragraph 4(c) hereof; and (ii) payment of all accrued but unpaid wages and benefits to the Debtors’ employees) (w) freeze or sweep monies or balances in the Debtors’ accounts; (x) immediately set-off any and all amounts in accounts maintained by the Debtors with the DIP Lender against the DIP Obligations; (y) enforce any and all rights against DIP Collateral, including, without limitation, foreclosure on all or any portion of the DIP collateral, occupying the Debtors’ premises, sale or disposition of the DIP Collateral and (z) take any other actions or exercise any other rights or remedies permitted under this Interim Order, the DIP Documents or applicable law and (b) subject to the foregoing clause (a), the Prepetition Facility Lender shall be entitled to exercise its rights and remedies to the extent available in accordance with the applicable Prepetition Facility Documents and this Interim Order with respect to the Debtors’ use of Cash Collateral. During the Remedies Notice Period, the Debtors and other parties in interest shall be entitled to seek an emergency hearing within the Remedies Notice Period with the Court, *provided* that the Debtors shall not raise any defenses or arguments at the hearing other than with respect to whether an Event of Default has occurred or is continuing. Unless the Court orders otherwise prior to the expiration of the Remedies Notice Period, the Automatic Stay as to the DIP Lender and the Prepetition Facility Lender shall automatically be terminated at the end of

the Remedies Notice Period without further notice or order. Upon expiration of the Remedies Notice Period, absent order of the Court to the contrary, the DIP Lender and the Prepetition Facility Lender shall be permitted to exercise all remedies set forth herein, and in the DIP Documents, and as otherwise available at law without further order of or application or motion to this Court consistent with this Interim Order, and the Debtors shall provide the Prepetition Facility Lender cash payments of all reasonable and documented fees related to such exercise of remedies.

(f) No rights, protections or remedies of the DIP Lender or the Prepetition Facility Lender granted by the provisions of this Interim Order or the other DIP Documents shall be limited, modified or impaired in any way by: (i) any actual or purported withdrawal of the consent of any party to the Debtors' authority to continue to use Cash Collateral; (ii) any actual or purported termination of the Debtors' authority to continue to use Cash Collateral; or (iii) the terms of any other order or stipulation related to the Debtors' continued use of Cash Collateral or the provision of adequate protection to any party.

8. *Limitation on Charging Expenses Against Collateral.* Subject to entry of the Final Order granting such relief, except to the extent of the Carve-Out, no costs or expenses of administration of the Chapter 11 Cases or any Successor Cases or any future proceeding that may result therefrom, including liquidation in bankruptcy or other proceedings under the Bankruptcy Code, shall be charged against or recovered from the DIP Collateral (including Cash Collateral) or Prepetition Facility Collateral pursuant to section 506(c) of the Bankruptcy Code or any similar principle of law, without the prior written consent of the DIP Lender or the Prepetition Facility Lender, as applicable, and no consent shall be implied from any other action, inaction or acquiescence by the DIP Lender or the Prepetition Facility Lender, and nothing contained in this Interim Order shall be deemed to be a consent by the DIP Lender or the Prepetition Facility Lender

to any charge, lien, assessment or claims against the DIP Collateral under section 506(c) of the Bankruptcy Code or otherwise.

9. *No Marshaling / Section 552(b) Waiver.* Subject to entry of the Final Order granting such relief, in no event shall the DIP Lender or the Prepetition Facility Lender be subject to the equitable doctrine of “marshaling” or any similar doctrine with respect to the DIP Collateral, the DIP Obligations, the Prepetition Facility Loans, or the Prepetition Facility Collateral. Further, subject to entry of the Final Order, in no event shall the “equities of the case” exception in section 552(b) of the Bankruptcy Code apply to the Prepetition Facility Lender with respect to proceeds, products, offspring or profits of any Prepetition Facility Collateral.

10. *Payments Free and Clear.* Any and all payments or proceeds remitted to the DIP Lender pursuant to the provisions of this Interim Order or the DIP Documents shall be received free and clear of any claim, charge, assessment or other liability, whether asserted or assessed by through or on behalf of the Debtors, subject to the Carve-Out in all respects.

11. *Use of Cash Collateral.* The Debtors are hereby authorized, subject to the terms and conditions of this Interim Order, to use all Cash Collateral in accordance with the DIP Documents and the Approved Budget (subject to permitted variances); *provided* that (a) the Prepetition Facility Lender is granted the Adequate Protection as hereinafter set forth and (b) except on the terms and conditions of this Interim Order, the Debtors shall be enjoined and prohibited from at any times using the Cash Collateral absent further order of the Court.

12. *Disposition of DIP Collateral.* The Debtors shall not sell, transfer, lease, encumber or otherwise dispose of any portion of the DIP Collateral, except as otherwise provided for in the DIP Documents or an order of the Court.

13. *Adequate Protection of Prepetition Facility Lender.* The Prepetition Facility Lender is entitled, pursuant to sections 361, 362, 363(e), 364(d)(1) and 507 of the Bankruptcy Code, to adequate protection of its interests in all Prepetition Facility Collateral (including Cash Collateral) in an amount equal to the aggregate diminution in the value of the Prepetition Facility Lender's interests in the Prepetition Facility Collateral (including Cash Collateral) from and after the Petition Date, for any reason provided for under the Bankruptcy Code, including, without limitation, any diminution resulting from the sale, lease or use by the Debtors of the Prepetition Facility Collateral, the priming of the Prepetition Facility Liens by the DIP Liens pursuant to the DIP Documents and this Interim Order, the grant of any other lien under section 364 of the Bankruptcy Code or the stay of the Prepetition Facility Lender's rights under the Prepetition Facility Collateral, the payment of any amounts under the Carve-Out or pursuant to this Interim Order, the Final Order or any other order of the Court or provision of the Bankruptcy Code or otherwise, and the imposition of the Automatic Stay (the "**Adequate Protection Claims**"). In consideration of the foregoing, the Prepetition Facility Lender is hereby granted the following as Adequate Protection for, and to secure repayment of an amount equal to such Adequate Protection Claims, and as an inducement to the Prepetition Facility Lender to consent to the priming of the Prepetition Facility Liens and use of the Prepetition Facility Collateral (including Cash Collateral) (collectively, the "**Adequate Protection Obligations**):

(a) *Prepetition Adequate Protection Liens.* The Prepetition Facility Lender is hereby granted (effective and perfected upon the date of this Interim Order and without the

necessity of the execution of any mortgages, security agreements, pledge agreements, financing statements or other agreements) in the amount of the Prepetition Facility Lender's Adequate Protection Claims, a valid, perfected replacement security interest in and lien upon all of the DIP Collateral (the "**Adequate Protection Liens**"), in each case senior to all other liens but subject and subordinate only to (A) the DIP Liens, (B) the Carve-Out, and (C) Prepetition Permitted Prior Liens.

(b) *Section 507(b) Claims.* The Prepetition Facility Lender is hereby granted, subject to the Carve-Out, an allowed superpriority administrative expense claim in each of the Chapter 11 Cases as provided for in section 507(b) of the Bankruptcy Code in the amount of the Adequate Protection Claims, with, to the fullest extent permitted under the Bankruptcy Code, priority in payment over any and all administrative expenses of the kind specified or ordered pursuant to any provision of the Bankruptcy Code (the "**507(b) Claims**"), which 507(b) Claims shall be payable from all prepetition and postpetition property of the Debtors and all proceeds thereof (excluding Avoidance Actions, but including, subject to entry of the Final Order, Avoidance Proceeds). The 507(b) Claims shall be subject and subordinate only to the Carve-Out and the DIP Superpriority Claims. Except to the extent expressly set forth in this Interim Order, the Final Order or the DIP Documents, the Prepetition Facility Lender shall not receive or retain any payments, property or other amounts in respect of the 507(b) Claims unless and until the DIP Obligations (other than contingent indemnification obligations as to which no claim has been asserted) have indefeasibly been paid in cash in full and all DIP Commitments have been terminated.

(c) *Prepetition Facility Lender Payments.* To the extent allowed pursuant to section 506(b) of the Bankruptcy Code, interest shall continue to accrue on the Prepetition Facility

Loans at the Default Rate under the Prepetition Facility Documents, paid in kind by capitalizing such interest and adding it to the outstanding principal balance of the Prepetition Facility Loans in accordance with the Prepetition Facility Documents.

(d) *Milestones.* Upon indefeasible payment in full of all DIP Obligations and termination of all DIP Commitments, the Prepetition Facility Lender is hereby entitled to performance of those certain case milestones set forth in Section 9.29 of the DIP Credit Agreement.

(e) *Budget and Financial Covenants.* Upon indefeasible payment in full of all DIP Obligations and all other obligations under the DIP Facility, (i) the Approved Budget shall continue to be updated in accordance with the terms and conditions of the DIP Credit Agreement and (ii) the Prepetition Facility Lender is hereby entitled to performance of those certain financial and other covenants set forth in Section 9 of the DIP Credit Agreement.

(f) *Prepetition Facility Lender's Adequate Protection Information Rights.* Unless otherwise agreed by the Prepetition Facility Lender, the Debtors shall promptly provide the Prepetition Facility Lender and, to the extent applicable, counsel to such party (and subject to applicable confidentiality restrictions contained in any of the Prepetition Facility Documents), with all required written financial reporting and other periodic reporting that is required to be provided to the DIP Lender under the DIP Documents, including without limitation the reporting required under Section 9.5 of the DIP Credit Agreement (the “**Adequate Protection Reporting Requirements**”). Upon indefeasible payment in full of all DIP Obligations and termination of all DIP Commitments, the Prepetition Facility Lender shall continue to be entitled hereby to satisfaction of the Adequate Protection Reporting Requirement.

(g) *Maintenance of Collateral.* The Debtors shall continue to maintain and insure the Prepetition Facility Collateral and DIP Collateral in amounts and for the risks, and by the entities, as required under the Prepetition Facility Documents and the DIP Documents.

14. *Reservation of Rights of Prepetition Facility Lender.* Under the circumstances and given that the above-described Adequate Protection is consistent with the Bankruptcy Code, including section 506(b) thereof, the Court finds that the Adequate Protection provided herein is reasonable and sufficient to protect the interests of the Prepetition Facility Lender and any other parties holding interests that are secured by liens primed by the DIP Financing; *provided* that the Prepetition Facility Lender may request further or different adequate protection and the Debtors or any other party in interest may contest any such request.

15. *Perfection of DIP Liens and Adequate Protection Liens.*

(a) Without in any way limiting the automatic validity and effective perfection of the DIP Liens granted pursuant to paragraph 6 hereof and the Adequate Protection Liens granted pursuant to paragraph 13 hereof, the DIP Lender and the Prepetition Facility Lender are hereby authorized, but not required, to file or record (and to execute in the name of the Debtors, as their true and lawful attorneys, with full power of substitution, to the maximum extent permitted by law) financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments in any jurisdiction, including as may be reasonably required or deemed appropriate by the DIP Lender, or take possession of or control over cash or securities, or to amend or modify security documents, or enter into, amend or modify intercreditor agreements, or to subordinate existing liens and any other similar action or action in connection therewith or take any other action in order to document, validate and perfect the liens and security interests granted to them hereunder (the “**Perfection Actions**”). Whether or not the DIP Lender or the Prepetition Facility Lender

shall take such Perfection Actions, the liens and security interests shall be deemed valid, perfected, allowed, enforceable, non-avoidable and not subject to challenge, dispute or subordination, at the time and on the date of entry of this Interim Order. Upon the request of the DIP Lender, the Prepetition Facility Lender and the Debtors, without any further consent of any party, and at the sole cost of the Debtors as set forth herein, are authorized, and such direction is hereby deemed to constitute required direction under the applicable DIP Documents or Prepetition Facility Documents, to take, execute, deliver and file such actions, instruments and agreements (in each case, without representation or warranty of any kind) to enable the DIP Lender to further validate, perfect, preserve and enforce the DIP Liens in all jurisdictions required under the DIP Credit Agreement, including all local law documentation therefor determined to be reasonably necessary by the DIP Lender; *provided, however*, that no action need be taken in a foreign jurisdiction that would jeopardize the validity and enforceability of the Prepetition Facility Liens. All such documents will be deemed to have been recorded and filed as of the Petition Date. To the extent necessary to effectuate the terms of this Interim Order and the DIP Documents, the DIP Lender and the Prepetition Facility Lender hereby are deemed to appoint the other (and deemed to have accepted such appointment) to act as its agent with respect to the Collateral (as defined in the DIP Documents) and under the Security Agreement (as defined in the DIP Documents) to which they are a party in such capacity, with such powers as are expressly delegated thereto under the DIP Documents and Prepetition Facility Documents, (and even if it involves self-contracting and multiple representation to the extent legally possible,) together with such other powers as are reasonably incidental thereto.

(b) A certified copy of this Interim Order may, in the discretion of the DIP Lender or the Prepetition Facility Lender, as applicable, be filed with or recorded in filing or

recording offices in addition to or in lieu of such financing statements, mortgages, notices of lien or similar instruments, and all filing offices are hereby authorized to accept a certified copy of this Interim Order for filing and/or recording, as applicable. The Automatic Stay shall be modified to the extent necessary to permit the DIP Lender and the Prepetition Facility Lender to take all actions, as applicable, referenced in this subparagraph (b) and the immediately preceding subparagraph (a).

16. *Preservation of Rights Granted Under this Interim Order.*

(a) Other than the Carve-Out and other claims and liens expressly granted by this Interim Order, no claim or lien having a priority superior to or *pari passu* with those granted by this Interim Order to the DIP Lender or the Prepetition Facility Lender shall be permitted while any of the DIP Obligations or the Adequate Protection Obligations remain outstanding, and, except as otherwise expressly provided in or permitted under this Interim Order, the DIP Liens and the Adequate Protection Liens shall not be: (i) subject or junior to any lien or security interest that is avoided and preserved for the benefit of the Debtors' estates under section 551 of the Bankruptcy Code; (ii) subordinated to or made *pari passu* with any other lien or security interest, whether under section 364(d) of the Bankruptcy Code or otherwise; (iii) subordinated to or made *pari passu* with any liens arising after the Petition Date including, without limitation, any liens or security interests granted in favor of any federal, state, municipal or other domestic or foreign governmental unit (including any regulatory body), commission, board or court for any liability of the Debtors; or (iv) subject or junior to any intercompany or affiliate liens or security interests of the Debtors.

(b) Unless the DIP Lender and the Prepetition Facility Lender, as applicable, shall have provided their prior written consent, or all DIP Obligations and all Prepetition Facility Loans (excluding contingent indemnification obligations for which no claim has been asserted) have been indefeasibly paid in full and the DIP Commitments have terminated, it shall be an

Event of Default (under and as defined in the DIP Credit Agreement) if there is entered in these Chapter 11 Cases or any potential successor case any order (including any order confirming any plan of reorganization or liquidation) that authorizes any of the following: (i) the obtaining of credit or the incurring of indebtedness that is secured by a security, mortgage, or collateral interest or other Lien on all or any portion of the DIP Collateral or Prepetition Facility Collateral and/or that is entitled to administrative priority status, in each case that is superior to or *pari passu* with the DIP Liens, the DIP Superpriority Claims, the Prepetition Facility Liens, the Adequate Protection Liens, and/or the Adequate Protection Claims; (ii) the use of Cash Collateral for any purpose other than as permitted in the DIP Documents and this Interim Order; (iii) upon entry of the Final Order granting such relief, the return of goods pursuant to section 546(h) of the Bankruptcy Code (or other return of goods on account of any prepetition indebtedness) to any creditor of the Debtors or any creditor's taking any setoff or recoupment against any of its prepetition indebtedness based upon any such return of goods pursuant to section 553 of the Bankruptcy Code or otherwise; or (iv) any modification of the DIP Lender's or the Prepetition Facility Lender's rights under this Interim Order, the DIP Documents or the Prepetition Facility Documents, as applicable, with respect any DIP Obligations or Prepetition Facility Obligations.

(c) Upon the occurrence of any Event of Default, interest, including, where applicable, default interest, shall accrue and be paid as set forth in the DIP Credit Agreement. Notwithstanding any order that may be entered dismissing any of the Chapter 11 Cases under section 1112 of the Bankruptcy Code: (i) the DIP Superpriority Claims, the 507(b) Claims, the DIP Liens, and the Adequate Protection Liens, and any claims related to the foregoing, shall continue in full force and effect and shall maintain their priorities as provided in this Interim Order until all DIP Obligations and Adequate Protection Obligations shall have been paid in full

(and such DIP Superpriority Claims, 507(b) Claims, DIP Liens and Adequate Protection Liens shall, notwithstanding such dismissal, remain binding on all parties in interest); (ii) the other rights granted by this Interim Order, including with respect to the Carve-Out, shall not be affected and (iii) this Court shall, to the fullest extent permitted under applicable law, retain jurisdiction, notwithstanding such dismissal, for the purposes of enforcing the claims, liens and security interests referred to in this paragraph and otherwise in this Interim Order.

(d) If any or all of the provisions of this Interim Order are hereafter reversed or otherwise modified, such reversal or other modification, shall not affect: (i) the validity, priority or enforceability of any DIP Obligations or Adequate Protection Obligations incurred prior to the DIP Lender's or the Prepetition Facility Lender's, as applicable, receipt of written notice of the effective date of such reversal or modification; or (ii) the validity, priority or enforceability of the DIP Liens or the Adequate Protection Liens (with such protections applying as and to the extent afforded in accordance with and consistent with sections 364(e) and 363(m) of the Bankruptcy Code (as applicable)). Notwithstanding any such reversal or other modification of any use of Cash Collateral, any DIP Obligations, DIP Liens, Adequate Protection Claims, Adequate Protection Liens or other Adequate Protection Obligations incurred by the Debtors and granted to the DIP Lender or the Prepetition Facility Lender, as the case may be, prior to the DIP Lender's or the Prepetition Facility Lender's, as applicable, receipt of written notice of the effective date of such reversal or other modification shall be governed in all respects by the original provisions of this Interim Order, and the DIP Lender and the Prepetition Facility Lender shall be entitled to, and are hereby granted, all the rights, remedies, privileges and benefits arising under sections 364(e) and 363(m) of the Bankruptcy Code, this Interim Order and the other DIP Documents with respect to all uses of Cash Collateral, DIP Obligations and Adequate Protection Obligations.

(e) Except as expressly provided in this Interim Order or in the DIP Documents, the DIP Liens, the DIP Superpriority Claims, the Adequate Protection Liens, the Adequate Protection Obligations, the 507(b) Claims and all other rights and remedies of the DIP Lender and the Prepetition Facility Lender granted by the provisions of this Interim Order and the DIP Documents and the Carve-Out shall survive, and shall not be modified, impaired or discharged by: (i) the entry of an order converting any of the Chapter 11 Cases to a case under chapter 7 of the Bankruptcy Code, dismissing any of the Chapter 11 Cases or terminating the joint administration of the Chapter 11 Cases or by any other act or omission; (ii) the entry of an order approving the sale of any DIP Collateral pursuant to section 363(b) of the Bankruptcy Code (except to the extent permitted by the DIP Documents); or (iii) the entry of an order confirming a chapter 11 plan in any of the Chapter 11 Cases other than a chapter 11 plan consistent with the Restructuring Support Agreement. The terms and provisions of this Interim Order and the DIP Documents shall continue in the Chapter 11 Cases, in any Successor Cases if these Chapter 11 Cases cease to be jointly administered and in any superseding chapter 7 cases under the Bankruptcy Code, and the DIP Liens, the DIP Superpriority Claims, the Adequate Protection Liens and the Adequate Protection Obligations and all other rights and remedies of the DIP Lender and the Prepetition Facility Lender granted by the provisions of this Interim Order and the DIP Documents shall continue in full force and effect until either (a) the DIP Obligations or Prepetition Facility Obligations, as applicable, are indefeasibly paid in full in cash, as set forth herein and in the DIP Documents or Prepetition Facility Documents, as applicable, and the DIP Commitments have been terminated, and the Carve-Out shall continue in full force and effect, or (b) the effective date of a chapter 11 plan consistent with the Restructuring Support Agreement.

17. *Effect of Stipulations on Third Parties.* The Debtors' stipulations, admissions, agreements and releases contained in this Interim Order shall be binding upon the Debtors and any successor thereto (including, without limitation, any chapter 7 or chapter 11 trustee or examiner appointed or elected for any of the Debtors) in all circumstances and for all purposes. The Debtors' stipulations, admissions, agreements and releases contained in this Interim Order shall be binding upon all other parties in interest, including, without limitation, any statutory or non-statutory committees appointed or formed in the Chapter 11 Cases and any other person or entity acting or seeking to act on behalf of the Debtors' estates in all circumstances and for all purposes unless (a) such committee or any other party in interest with requisite standing (in each case, to the extent requisite standing is obtained pursuant to an order of this Court entered prior to the expiration of the Challenge Period (as defined herein) and subject in all respects to any agreement or applicable law that may limit or affect such entity's right or ability to do so) has timely filed an adversary proceeding or contested matter (subject to the limitations contained herein, including, *inter alia*, in this paragraph) by no later than 75 calendar days after entry of this Interim Order, unless otherwise ordered by the Court for cause upon a motion timely filed and served within any applicable period (such time period, the "**Challenge Period**"), (A) objecting to or challenging the amount, validity, perfection, enforceability, priority or extent of the Prepetition Facility Loans or the Prepetition Facility Liens, or (B) otherwise asserting or prosecuting any action for preferences, fraudulent transfers or conveyances, other avoidance power claims or any other claims, counterclaims or causes of action, objections, contests or defenses (collectively, the "**Challenges**") against the Prepetition Facility Lender or its subsidiaries, affiliates, officers, directors, managers, principals, employees, agents, financial advisors, attorneys, accountants, investment bankers, consultants, representatives and other professionals and the respective successors and assigns

thereof, in each case in their respective capacity as such (each, a “**Representative**” and, collectively, the “**Representatives**”) in connection with matters related to the Prepetition Facility Documents, the Prepetition Facility Loans, the Prepetition Facility Liens and the Prepetition Facility Collateral; and (b) there is a final non-appealable order in favor of the plaintiff sustaining any such Challenge in any such timely filed adversary proceeding or contested matter; *provided, however*, that any pleadings filed in connection with any Challenge shall set forth with specificity the basis for such challenge or claim, and any challenges or claims not so specified prior to the expiration of the Challenge Period shall be deemed forever, waived, released and barred, including any amended or additional claims that may or could have been asserted thereafter through an amended complaint under Fed. R. Civ. P. 15 or otherwise. In the event that a chapter 7 or chapter 11 trustee is appointed prior to the end of the Challenge Period, the Challenge Period solely for such chapter 7 or chapter 11 trustee shall be extended (unless and until an order confirming a plan is entered by the Court) to the longer of (A) the remaining Challenge Period or (B) the date that is twenty-one (21) calendar days following the appointment of such trustee. If no such Challenge is timely and properly filed during the Challenge Period or the Court does not rule in favor of the plaintiff in any such proceeding then: (1) the Debtors’ stipulations, admissions, agreements and releases contained in this Interim Order shall be binding on all parties in interest; (2) the obligations of the Debtors under the Prepetition Facility Documents, including the Prepetition Facility Loans, shall constitute allowed claims not subject to defense, claim, counterclaim, recharacterization, subordination (whether equitable, contractual, or otherwise), disallowance, recoupment, offset or avoidance, for all purposes in the Chapter 11 Cases, and any subsequent chapter 7 case(s); (3) the Prepetition Facility Liens on the Prepetition Facility Collateral shall be deemed to have been, as of the Petition Date, legal, valid, binding, and perfected, security interests and liens, not subject to

recharacterization, subordination (whether equitable, contractual or otherwise), disallowance, impairment, claim, counterclaim, cross-claim, avoidance or other defense; and (4) the Prepetition Facility Loans and the Prepetition Facility Liens on the Prepetition Facility Collateral shall not be subject to any other or further claim or challenge by any statutory or non-statutory committees appointed or formed in the Chapter 11 Cases or any other party in interest acting or seeking to act on behalf of the Debtors' estates, including, without limitation, any successor thereto (including, without limitation, any chapter 7 trustee or chapter 11 trustee or examiner appointed or elected for any of the Debtors) and any defenses, claims, causes of action, counterclaims and offsets by any statutory or non-statutory committees appointed or formed in the Chapter 11 Cases or any other party acting or seeking to act on behalf of the Debtors' estates, including, without limitation, any successor thereto (including, without limitation, any chapter 7 trustee or chapter 11 trustee or examiner appointed or elected for any of the Debtors), whether arising under the Bankruptcy Code or otherwise, against the Prepetition Facility Lender and its Representatives arising out of or relating to any of the Prepetition Facility Documents, the Prepetition Facility Loans, the Prepetition Facility Liens and the Prepetition Facility Collateral shall be deemed forever waived, released and barred. If any such Challenge is timely filed during the Challenge Period, the stipulations, admissions, agreements and releases contained in this Interim Order shall nonetheless remain binding and preclusive (as provided in the second sentence of this paragraph) on any statutory or nonstatutory committee appointed or formed in the Chapter 11 Cases and on any other person or entity, except to the extent that such stipulations, admissions, agreements and releases were expressly and successfully challenged in such Challenge as set forth in a final, non-appealable order of a court of competent jurisdiction. Nothing in this Interim Order vests or confers on any Person (as defined in the Bankruptcy Code), including any statutory or non-statutory committees

appointed or formed in the Chapter 11 Cases, standing or authority to pursue any claim or cause of action belonging to the Debtors or their estates, including, without limitation, Challenges with respect to the Prepetition Facility Documents, the Prepetition Facility Loans or the Prepetition Facility Liens, and any ruling on standing, if appealed, shall not stay or otherwise delay the Chapter 11 Cases, confirmation of any plan of reorganization or consummation of any sale of all or substantially all assets of the Debtors. For the avoidance of doubt, any chapter 11 or chapter 7 trustee appointed or elected in these cases, upon the expiration of the Challenge Period (and subject to any tolling of the Challenge Period with respect to any claims that are the subject of an adversary proceeding or contested matter commenced pursuant to this paragraph (whether commenced by such trustee or commenced by any other party in interest on behalf of the Debtors' estates)), shall be bound by the acknowledgements, admissions, confirmations and stipulations of the Debtors in paragraph G of this Interim Order.

18. *Limitation on Use of DIP Financing Proceeds and Collateral.* Notwithstanding any other provision of this Interim Order or any other order entered by the Court, no DIP Loans, DIP Collateral, Prepetition Facility Collateral (including Cash Collateral) or any portion of the Carve-Out, may be used directly or indirectly, including without limitation through reimbursement of professional fees of any non-Debtor party: (a) in connection with the investigation, threatened initiation or prosecution of any claims, causes of action, adversary proceedings or other litigation (i) against the DIP Lender, the Prepetition Facility Lender, their respective predecessors-in-interest, affiliates, or Representatives, or any action purporting to do the foregoing, including in respect of the DIP Obligations, DIP Liens, DIP Superpriority Claims, Prepetition Facility Loans, and/or the Adequate Protection Obligations and Adequate Protection Liens granted to the Prepetition Facility Lender, as applicable, or (ii) challenging the amount, validity, perfection, priority or enforceability

of or asserting any defense, counterclaim or offset with respect to the DIP Obligations, the Prepetition Facility Loans and/or the liens, claims, rights, or security interests securing or supporting the DIP Obligations granted under this Interim Order, the Final Order, the DIP Documents or Prepetition Facility Documents in respect of the Prepetition Facility Loans, including, in the case of each (i) and (ii), without limitation, for lender liability or pursuant to section 105, 510, 544, 547, 548, 549, 550 or 552 of the Bankruptcy Code, applicable non-bankruptcy law or otherwise; *provided that*, notwithstanding anything to the contrary herein, the proceeds of the DIP Loans and/or DIP Collateral (including Cash Collateral) may be used by the Creditors' Committee to investigate (but not to prosecute or initiate the prosecution of, including the preparation of any complaint or motion on account of) (A) the claims and liens (including the validity and priority thereof whether by legal, equitable or other means) of the Prepetition Facility Lender and (B) potential claims, counterclaims, causes of action or defenses against the Prepetition Facility Lender, up to an aggregate cap of no more than \$25,000; (b) to prevent, hinder, or otherwise delay or otherwise delay or interfere with the Prepetition Facility Lender's or the DIP Lender's, as applicable, enforcement or realization on the Prepetition Facility Loans, Prepetition Facility Collateral, DIP Obligations, DIP Collateral, and the liens, claims and rights granted to such parties under the Interim Order or Final Order, as applicable, each in accordance with the DIP Documents, the Prepetition Facility Documents or this Interim Order; (c) to seek to modify any of the rights and remedies granted to the Prepetition Facility Lender or the DIP Lender under this Interim Order, the Prepetition Facility Documents or the DIP Documents, as applicable; (d) to apply to the Court for authority to approve superpriority claims or grant liens (other than the liens permitted pursuant to the DIP Documents) or security interests in the DIP Collateral or any portion thereof that are senior to, or on parity with, the DIP Liens, DIP Superpriority Claims, Adequate

Protection Liens and 507(b) Claims granted to the Prepetition Facility Lender; or (e) to pay or to seek to pay any amount on account of any claims arising prior to the Petition Date unless such payments are approved or authorized by the Court, agreed to in writing by the DIP Lender, expressly permitted under this Interim Order or permitted under the DIP Documents (including the Approved Budget, subject to permitted variances), in each case unless all DIP Obligations, Prepetition Facility Loans, Adequate Protection Obligations, and claims granted to the DIP Lender and Prepetition Facility Lender under this Interim Order have been refinanced or paid in full in cash (including the cash collateralization of any letters of credit). For the avoidance of doubt, this paragraph 18 shall not limit the Debtors' right to use DIP Collateral (i) subject to the Approved Budget and permitted variances, in connection with an investigation being conducted by the Restructuring Committee of the Debtors' board of directors or (ii) to contest whether an Event of Default has occurred hereunder pursuant to and consistent with paragraph 7 of this Interim Order.

19. *Indemnification.* The Prepetition Facility Lender and the DIP Lender have acted in good faith and without negligence, misconduct, or violation of public policy or law, in respect of all actions taken by them in connection with or related in any way to negotiating, implementing, documenting, or obtaining requisite approvals of the DIP Facility and the use of Cash Collateral, including in respect of the granting of the DIP Liens and the Adequate Protection Liens, any challenges or objections to the DIP Facility or the use of Cash Collateral, the DIP Documents, and all other documents related to and all transactions contemplated by the foregoing. Accordingly, without limitation to any other right to indemnification, the Prepetition Facility Lender and the DIP Lender shall be and hereby are indemnified (as applicable) as provided in the Prepetition Facility Documents and DIP Documents, as applicable, including, without limitation, Sections 7.3 and 11.1(b) of the DIP Credit Agreement, subject only to the Carve-Out. The Debtors agree that

no exception or defense in contract, law, or equity exists as of the date of this Interim Order to any obligation set forth, as the case may be, in this paragraph 19 or otherwise in the DIP Documents or in the Prepetition Facility Documents to indemnify and/or hold harmless the DIP Lender or the Prepetition Facility Lender, as the case may be, and any such defenses that may be in existence as of the date of this Interim Order are hereby waived.

20. *Interim Order Governs.* In the event of any inconsistency between the provisions of this Interim Order and the DIP Documents (including, but not limited to, with respect to the Adequate Protection Obligations) the provisions of this Interim Order shall govern. Notwithstanding the relief granted in any other order by this Court, (a) all payments and actions by any of the Debtors pursuant to the authority granted therein shall be subject to this Interim Order, including compliance with the Approved Budget (subject to permitted variances) and all other terms and conditions hereof, and (b) to the extent there is any inconsistency between the terms of such other order and this Interim Order, this Interim Order shall control, in each case, except to the extent expressly provided otherwise in such other order.

21. *Binding Effect; Successors and Assigns.* The DIP Documents and the provisions of this Interim Order, including all findings herein, shall be binding upon all parties in interest in the Chapter 11 Cases, including, without limitation, the DIP Lender, the Prepetition Facility Lender, any statutory or non-statutory committees appointed or formed in the Chapter 11 Cases, the Debtors and their respective successors and assigns (including any chapter 7 or chapter 11 trustee hereinafter appointed or elected for the estate of any of the Debtors, an examiner appointed pursuant to section 1104 of the Bankruptcy Code, or any other fiduciary appointed as a legal representative of any of the Debtors or with respect to the property of the estate of any of the Debtors) and shall inure to the benefit of the DIP Lender, the Prepetition Facility Lender and the

Debtors and their respective successors and assigns; *provided* that the DIP Lender and the Prepetition Facility Lender shall have no obligation to permit the use of the Prepetition Facility Collateral (including Cash Collateral) by, or to extend any financing to, any chapter 7 trustee, chapter 11 trustee or similar responsible person appointed for the estates of the Debtors.

22. *Limitation on Liability.* Nothing in this Interim Order, the DIP Documents, the Prepetition Facility Documents or any other documents related to the transactions contemplated hereby shall in any way be construed or interpreted to impose or allow the imposition upon the DIP Lender or the Prepetition Facility Lender any liability for any claims arising from the prepetition or postpetition activities of the Debtors in the operation of their businesses, or in connection with their restructuring efforts. The DIP Lender and the Prepetition Facility Lender shall not, in any way or manner, be liable or responsible for (i) the safekeeping of the DIP Collateral or Prepetition Facility Collateral, (ii) any loss or damage thereto occurring or arising in any manner or fashion from any cause, (iii) any diminution in the value thereof or (iv) any act or default of any carrier, servicer, bailee, custodian, forwarding agency or other person and all risk of loss, damage or destruction of the DIP Collateral or Prepetition Facility Collateral shall be borne by the Debtors. By virtue of making any loan or other extension of credit under the DIP Documents, to permit the use of the DIP Collateral or Prepetition Facility Collateral (including Cash Collateral) or in exercising any rights or remedies as and when permitted pursuant to this Interim Order or the DIP Documents or Prepetition Facility Documents, neither the DIP Lender nor the Prepetition Facility Lender shall (a) have any liability to any third party or be deemed to be in “control” of the operations of the Debtors; (b) owe any fiduciary duty to the Debtors, their respective creditors, shareholders or estates; or (c) be deemed to be acting as a “Responsible Person” or “Owner” or “Operator” or “managing agent” with respect to the operation or management of

any of the Debtors (as such terms or similar terms are used in the United States Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601, *et seq.*, as amended, or any other federal or state statute, including the Internal Revenue Code). Furthermore, nothing in this Interim Order shall in any way be construed or interpreted to impose or allow the imposition upon the DIP Lender or the Prepetition Facility Lender of any liability for any claims arising from the prepetition or postpetition activities of any of the Debtors and their respective affiliates (as defined in section 101(2) of the Bankruptcy Code).

23. *Master Proof of Claim.* The Prepetition Facility Lender shall not be required to file proofs of claim in the Chapter 11 Cases or any Successor Case in order to assert claims for payment of the Prepetition Facility Loans arising under the Prepetition Facility Documents, including, without limitation, any principal, unpaid interest, fees, expenses and other amounts under the Prepetition Facility Documents. The statements of claim in respect of such indebtedness set forth in this Interim Order is deemed sufficient to and shall hereby constitute proofs of claim in respect of such debt and such secured status. Any order entered by this Court in relation to the establishment of a bar date for any claim (including, without limitation, administrative claims) in any of the Chapter 11 Cases or any Successor Cases shall not apply to the Prepetition Facility Lender with respect to the Prepetition Facility Loans (or with respect to the Adequate Protection Obligations). However, in order to facilitate the processing of claims, the Prepetition Facility Lender is authorized, but not directed or required, to file in the Debtors' lead chapter 11 case, Case No. 24-12794 (___), a single master proof of claim on behalf of the Prepetition Facility Lender on account of any and all of its claims against any of the Debtors arising under the applicable Prepetition Facility Documents and hereunder (each, a "**Master Proof of Claim**"). Upon the filing of a Master Proof of Claim by the Prepetition Facility Lender, it shall be deemed to have filed a

proof of claim in the amount set forth therein in respect of its claims against each of the Debtors of any type or nature whatsoever with respect to the applicable Prepetition Facility Documents, and the claim of each applicable Prepetition Facility Lender (and each of its respective successors and assigns) specified in a Master Proof of Claim shall be treated as if it had filed a separate proof of claim in each of these Chapter 11 Cases. The Master Proofs of Claim shall not be required to attach any instruments, agreements or other documents evidencing the obligations owing by each of the Debtors to the applicable Prepetition Facility Lender, which instruments, agreements or other documents will be provided upon written request to counsel to the applicable Prepetition Facility Lender. The DIP Lender shall similarly not be required to file proofs of claim with respect to its DIP Obligations under the DIP Documents, and the evidence presented with the DIP Motion and the record established at the Interim Hearing are deemed sufficient to, and do, constitute proofs of claim with respect to its obligations, secured status, and priority.

24. *Insurance.* To the extent that the Prepetition Facility Lender is listed as loss payee under the DIP Borrower's or DIP Guarantor's insurance policies, the DIP Lender is also deemed to be the loss payee under the insurance policies (in any such case with the same priority of liens and claims thereunder relative to the priority of the Prepetition Facility Liens and Adequate Protection Liens as set forth herein), and shall act in that capacity and distribute any proceeds recovered or received in respect of the insurance policies, to the indefeasible payment in full of the DIP Obligations (other than contingent indemnification obligations as to which no claim has been asserted) and termination of the DIP Commitments, and to the payment of the applicable Prepetition Facility Loans.

25. *Credit Bidding.* (a) The DIP Lender shall have the right to credit bid in accordance with the DIP Documents, subject to Section 363(k) of the Bankruptcy Code, including the rights

of any party in interest (other than the Debtors) arising under Section 363(k) of the Bankruptcy Code, up to the full amount of the DIP Obligations in any sale of the DIP Collateral (or any portion thereof), including any accrued interest, fees, and expenses and (b) subject to the entry of the Final Order granting such relief, the Prepetition Facility Lender shall have the right, consistent with the provisions of the Prepetition Facility Documents (and providing for the DIP Obligations to be indefeasibly repaid in full in cash and the termination of the DIP Commitments), to credit bid up to the full amount of the Prepetition Facility Loans (including any Adequate Protection Obligations) in each case including any accrued interest, fees, and expenses, in the sale of the Prepetition Facility Collateral (or any portion thereof), in each case (i) without the need for further Court order authorizing the same, (ii) subject, as applicable to section 363(k) of the Bankruptcy Code, including the rights of any party in interest (other than the Debtors) arising under Section 363(k) of the Bankruptcy Code and (iii) whether any such sale is effectuated through section 363(k), 1123 or 1129(b) of the Bankruptcy Code, by a chapter 7 trustee under section 725 of the Bankruptcy Code, or otherwise. No Debtor shall object to the DIP Lender or the Prepetition Facility Lender credit bidding up to the full amount of the applicable outstanding DIP Obligations or Prepetition Facility Obligations (including any DIP Superpriority Claims and Adequate Protection Obligations), in each case including any accrued interest, fees, and expenses, in any sale of any DIP Collateral or Prepetition Facility Collateral, as applicable, whether such sale is effectuated through sections 363 or 1129 of the Bankruptcy Code, by a chapter 7 trustee under section 725 of the Bankruptcy Code, or otherwise.

26. *Effectiveness.* This Interim Order shall constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052 and shall take effect and be fully enforceable *nunc pro tunc* to the Petition Date immediately upon entry hereof. Notwithstanding Bankruptcy

Rules 4001(a)(3), 6004(h), 6006(d), 7062, or 9014 of the Bankruptcy Rules or any Local Rules, or Rule 62(a) of the Federal Rules of Civil Procedure, this Interim Order shall be immediately effective and enforceable upon its entry and there shall be no stay of execution or effectiveness of this Interim Order.

27. *Headings.* Section headings used herein are for convenience only and are not to affect the construction of or to be taken into consideration in interpreting this Interim Order.

28. *Payments Held in Trust.* Except as expressly permitted in this Interim Order or the DIP Documents and except with respect to the Debtors, in the event that any person or entity receives any payment on account of a security interest in DIP Collateral, receives any DIP Collateral or any proceeds of DIP Collateral or receives any other payment with respect thereto from any other source prior to either (i) indefeasible payment in full in cash of all DIP Obligations and termination of all DIP Commitments or (ii) the effective date of a chapter 11 plan consistent with the Restructuring Support Agreement, such person or entity shall be deemed to have received, and shall hold, any such payment or proceeds of DIP Collateral in trust for the benefit of the DIP Lender and shall immediately turn over the proceeds to the DIP Lender, or as otherwise instructed by this Court, for application in accordance with the DIP Documents and this Interim Order.

29. *Bankruptcy Rules.* The requirements of Bankruptcy Rules 4001(b)(3), 4001(c)(3) 6003(b) and 6004(a), in each case to the extent applicable, are satisfied by the contents of the DIP Motion.

30. *No Third-Party Rights.* Except as explicitly provided for herein, this Interim Order does not create any rights for the benefit of any third party, creditor, equity holder or any direct, indirect or incidental beneficiary.

31. *Necessary Action.* The Debtors, the DIP Lender and the Prepetition Facility Lender are authorized to take all actions as are necessary or appropriate to implement the terms of this Interim Order.

32. *Retention of Jurisdiction.* The Court shall retain jurisdiction to enforce the provisions of this Interim Order.

33. *Final Hearing.* The final hearing (the “**Final Hearing**”) on the Motion shall be held on [●], 2025, at [__:___.m], prevailing Eastern Time. On or before [__:___.m], prevailing Eastern Time, on [●], 2025, any objections or responses to entry of a final order on the Motion shall be filed with this Court, and served on: (i) the Debtors, 3417 1st Ave S, Seattle, WA, 98134, Attn: Will Smith (will.smith@firstmode.com); (ii) proposed counsel to the Debtors: (a) Latham & Watkins LLP (x) 330 North Wabash Avenue, Suite 2800, Chicago, IL 60611, Attn: Caroline Reckler, Esq. (email: caroline.reckler@lw.com); (y) 1271 Avenue of the Americas, New York, NY 10020, Attn: Annemarie V. Reilly, Esq. and Brian S. Rosen, Esq. (emails: annemarie.reilly@lw.com, and brian.rosen@lw.com); and (z) 355 South Grand Avenue, Suite 100, Los Angeles, CA 90071, Attn: Jeffrey T. Mispagel, Esq. (email: jeffrey.mispagel@lw.com) and (b) Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, DE 19801, Attn: Michael R. Nestor, Esq., Kara Hammond Coyle, Esq., and Joseph M. Mulvihill, Esq. (emails: MNestor@ycst.com, KCoyle@ycst.com, and JMulvihill@ycst.com); (iii) counsel for the DIP Lender: (a) Davis Polk & Wardwell LLP, 450 Lexington Ave, New York, NY 10017, Attn: Darren S. Klein, Esq. and Aryeh Ethan Falk, Esq. (emails: darren.klein@davispolk.com and aryeh.falk@davispolk.com) and (b) Morris, Nichols, Arsht & Tunnell LLP, 1201 N Market St # 1600, Wilmington, DE 19801, Attn: Robert J. Dehney, Sr., Esq. (rdehney@morrisnichols.com); (iv) counsel to any statutory committee appointed in these cases; and (v) the United States Trustee

for the District of Delaware, 844 King Street, Suite 2207, Wilmington, DE 19801, Attn: Jane M. Leamy (email: jane.m.leafy@usdoj.gov). In the event no objections to entry of the Final Order on the Motion are timely received, this Court may enter such Final Order without need for the Final Hearing.

Exhibit 1

DIP Credit Agreement

[See Exhibit B to DIP Motion]

Exhibit 2

Initial DIP Budget

First Mode Holdings, Inc., et al.

Initial DIP Budget

(\$ in 000s)

Week # Week Ending	Wk 1 12/20/24	Wk 2 12/27/24	Wk 3 1/3/25	Wk 4 1/10/25	Wk 5 1/17/25	Wk 6 1/24/25	Wk 7 1/31/25	Wk 8 2/7/25	Wk 9 2/14/25	Wk 10 2/21/25	Wk 11 2/28/25	Wk 12 3/7/25	Wk 13 3/14/25	Total
Receipts	–	–	–	–	–	–	–	–	\$17,964	–	–	–	–	\$17,964
Total Receipts	–	–	–	–	–	–	–	–	\$17,964	–	–	–	–	\$17,964
<u>Operating Disbursements</u>														
Payroll	(\$120)	–	(\$592)	–	–	–	(\$1,210)	–	(\$448)	–	(\$196)	–	–	(\$2,566)
Vendors	(513)	(513)	(375)	(375)	(135)	(135)	(135)	(135)	(135)	–	–	–	–	(2,452)
Taxes	–	–	–	–	(502)	–	(39)	–	–	–	(48)	–	–	(589)
SG&A and Other	(245)	(245)	(448)	(245)	(245)	(245)	(245)	(321)	(245)	(165)	(181)	(181)	(181)	(3,191)
<u>Non Operating Disbursements</u>														–
Professional Fees	(925)	(850)	(970)	(850)	(915)	(765)	(765)	(885)	(6,790)	(555)	(555)	(665)	(545)	(16,035)
Other	(4)	–	–	–	–	–	(47)	–	–	–	–	–	–	(51)
Total Disbursements	(\$1,807)	(\$1,608)	(\$2,385)	(\$1,470)	(\$1,797)	(\$1,145)	(\$2,441)	(\$1,341)	(\$7,618)	(\$720)	(\$980)	(\$846)	(\$726)	(\$24,884)
Net Cash Flow	(\$1,807)	(\$1,608)	(\$2,385)	(\$1,470)	(\$1,797)	(\$1,145)	(\$2,441)	(\$1,341)	\$10,346	(\$720)	(\$980)	(\$846)	(\$726)	(\$6,920)
Beginning Cash	\$1,645	\$6,463	\$4,854	\$2,470	\$6,383	\$4,586	\$6,625	\$4,184	\$4,544	\$2,701	\$3,552	\$2,572	\$4,351	\$1,645
(+ / –) Net Cash Flow	(1,807)	(1,608)	(2,385)	(1,470)	(1,797)	(1,145)	(2,441)	(1,341)	10,346	(720)	(980)	(846)	(726)	(6,920)
(+) Term Loan Draw	6,625	–	–	5,383	–	3,184	–	1,701	–	1,572	–	2,625	–	21,089
(–) Mandatory Prepayment	–	–	–	–	–	–	–	–	(12,189)	–	–	–	–	(12,189)
Ending Cash	\$6,463	\$4,854	\$2,470	\$6,383	\$4,586	\$6,625	\$4,184	\$4,544	\$2,701	\$3,552	\$2,572	\$4,351	\$3,625	\$3,625
Beginning DIP Loan Balance	–	\$7,145	\$7,264	\$7,264	\$12,646	\$12,646	\$16,134	\$16,302	\$18,003	\$5,814	\$7,386	\$7,502	\$10,128	–
(+) Term Loan Draw	6,625	–	–	5,383	–	3,184	–	1,701	–	1,572	–	2,625	–	21,089
(+) Interest and Fees	520	119	–	–	–	304	168	–	–	–	117	–	–	1,227
(–) Term Loan Repayment	–	–	–	–	–	–	–	–	(12,189)	–	–	–	–	(12,189)
Ending DIP Loan Balance	\$7,145	\$7,264	\$7,264	\$12,646	\$12,646	\$16,134	\$16,302	\$18,003	\$5,814	\$7,386	\$7,502	\$10,128	\$10,128	\$10,128

EXHIBIT B

DIP Credit Agreement

**SENIOR SECURED SUPERPRIORITY DEBTOR-IN-POSSESSION FACILITY
AGREEMENT**

DATED 15 December, 2024

FOR

FIRST MODE HOLDINGS, INC.,

the Company and a Debtor-in-Possession under Chapter 11 of the Bankruptcy Code,

and

SYNCHRONOUS LLC,

as the Guarantor and a Debtor-in-Possession under Chapter 11 of the Bankruptcy Code

AND

ANGLO AMERICAN INTERNATIONAL HOLDINGS LIMITED

AS THE LENDER

FORMAL INSTRUMENT OF AGREEMENT

DATE OF AGREEMENT	15 December 2024
BETWEEN the Lender	Anglo American International Holdings Limited
Registration Number:	05501205
Address:	17 Charterhouse Street, London, EC1N 6RA United Kingdom
<i>Lender Contact Details for Notices</i>	
Attention:	Treasury Front Office
Email:	treasuryfrontoffice@angloamerican.com
FMH in its capacity as Company and Obligor	First Mode Holdings, Inc.
Registration Number:	604 502 569
Address:	300 Lenora Street PMB #1445 Seattle, WA 98121 United States
<i>FMH Contact Details for Notices</i>	
Attention:	Head of Legal
Email:	legal@firstmode.com
Synchronous in its capacity as Guarantor and Obligor	Synchronous LLC
Registration Number:	604-224-246
Address:	300 Lenora Street PMB #1445 Seattle, WA 98121 United States
<i>Synchronous Contact Details for Notices</i>	
Attention:	Head of Legal
Email:	legal@firstmode.com
BACKGROUND:	
(i) On December 15, 2024 (the “Petition Date”), the Company and the Guarantor (as defined below) (each a “Debtor” and collectively, the “Debtors”) filed voluntary petitions with the Bankruptcy Court commencing their respective cases that are pending under Chapter 11 of the Bankruptcy Code (each case of the Borrower and each other Debtor, a “Case” and collectively, the “Cases”) and have continued in the possession of their assets and management of their business pursuant to Section 1107(a) and 1108 of the Bankruptcy Code. (ii) FMH (the “Company”) wishes to borrow monies from the Lender and the Lender is willing to lend monies to the Company under the terms and subject to the conditions set out in this Agreement. (iii) In addition, the Guarantor guarantees the obligations of the Company under this Agreement. The Guarantor further confirms that the guarantee granted by it under this Agreement is for the corporate benefit of such entity, and there is no corporate power or similar limitation on the relevant entity’s ability to provide the applicable guarantee. Each Obligor further confirms that there is no corporate power or similar limitation on its ability to grant the security under a Security Agreement executed	

by it.

- (iv) The priority of the Facility with respect to the collateral granted to secure the Guaranteed Obligations (the “**Collateral**”) shall be as set forth in the Interim DIP Order and the Final DIP Order, as applicable, in each case upon entry thereof by the Bankruptcy Court.
- (v) The parties intend that the terms of this Agreement should in all material respects represent those which would be granted on an arm’s-length basis and that the terms of this Agreement shall at all times accord with the Anglo American Group’s transfer pricing policy (as may be amended and revised from time to time).

Now, it is agreed as set out in this Agreement.

THE PARTIES AGREE THAT:

- (1) The Lender must perform all obligations of the Lender in accordance with this Agreement.
- (2) Each Obligor must perform all obligations of the relevant Obligor and otherwise act in accordance with this Agreement.
- (3) This Agreement shall have effect from the Effective Date notwithstanding the actual date of signature of the Agreement.

AGREEMENT PARTICULARS

Availability Period	From the Effective Date to the first Business Day prior to the Final Maturity Date
Final Maturity Date	31 March, 2025
Currency	USD, as defined in <u>Clause 1.2(g)</u> (<i>Interpretation</i>)
Facility Amount	\$26,000,000
Facility Type	Superpriority, senior secured, priming debtor-in-possession term loan facility, consisting of new money delayed draw term loans to be made in multiple draws on Delayed Draw Borrowing Dates
Interest Reference Rate	3 Month Term SOFR (as on the Quotation Day)
Margin	6.00 per cent per annum
Credit Adjustment Spread	0.26161 per cent per annum
Upfront Premium	The Company shall pay to the Lender an upfront premium in an amount equal to 2.00% of the aggregate Facility Amount as of the Effective Date, which Upfront Premium will be fully earned and due and payable in kind (by capitalizing and adding to the principal amount of the Loans) on the first Delayed Draw Borrowing Date
Commitment Fee	At all times during the Availability Period, 35 per cent of the applicable Margin on the then unused and uncanceled Facility Amount, which Commitment Fee shall be due and payable in kind (by capitalizing and adding to the principal amount of the Loans) monthly in arrears, regardless of whether the conditions to borrowing Loans are satisfied at such time
Exit Premium	The Company shall pay an Exit Premium in accordance with the terms of Clause 5.11 (<i>Exit Premium</i>)
Standard Interest Period	3-month calendar period, commencing on each of 1 January, 1 April, 1 July and 1 October
Purpose	Solely in accordance with the DIP Orders, the Approved Budget (subject to any variances permitted by Clause 9.28(b)) and this Agreement, the proceeds of the Loans will be used (i) to pay certain costs, fees and expenses related to business operations and the Cases (including, without limitation, professional fees, costs and expenses) and (ii) to fund the Carve-Out and to make payments under the Carve-Out in accordance with the terms of the DIP Orders; provided that any success fee paid in connection with any sale transaction shall first be paid out of the proceeds of such sale transaction.
Prepayment Notice Period	3 Business Days

Drawdown Notice Period	3 Business Days
Cancellation Notice Period	5 Business Days
Lender Cancellation Option	Not applicable
Business Day	means a day (other than a Saturday, a Sunday or an official public holiday) on which banks are open for general business in New York, New York and London

EXECUTED AS AN AGREEMENT

SIGNED for and on behalf of First Mode Holdings, Inc. as Company and Obligor by a duly authorised representative

.....
Signature

.....
Name

SIGNED for and on behalf of Synchronous LLC as Obligor and Guarantor by First Mode Holdings, Inc., sole member

.....
Signature

.....
Name

SIGNED for and on behalf of Anglo American International Holdings Limited as the Lender by a duly authorised representative

.....
Signature

.....
Name

Attachment: SENIOR SECURED SUPERPRIORITY DEBTOR-IN-POSSESSION FACILITY AGREEMENT – GENERAL CONDITIONS

**SUPERPRIORITY SECURED DEBTOR-IN-POSSESSION FACILITY AGREEMENT –
GENERAL CONDITIONS**

1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this Agreement, unless a contrary intention clearly appears from the context, terms as defined in the Agreement Particulars shall bear a corresponding meaning herein, and:

“**Additional Business Day**” means any day other than:

- (a) a Saturday or a Sunday; and
- (b) a day on which the Securities Industry and Financial Markets Association (or any successor organisation) recommends that the fixed income departments of its members be closed for the entire day for purposes of trading in US Government securities.

“**Agreement**” means (i) the Formal Instrument of Agreement, (ii) the Agreement Particulars, (iii) these General Conditions and (iv) any other document stated in the Agreement to form part of the Agreement.

“**Agreement Particulars**” means the agreement particulars of this Agreement.

“**Alternative Term SOFR**” means the Term SOFR reference rate administered by ICE Benchmark Administration Limited (or any other person which takes over the administration of that rate) for the relevant period published (before any correction, recalculation or republication by the administrator) by ICE Benchmark Administration Limited (or any other person which takes over the publication of that rate).

“**Anglo American Group**” means collectively, Anglo American plc, a public limited company organized under the laws of England and Wales, and its affiliates.

“**Anglo Subsidiary**” is a Subsidiary of Anglo American plc.

“**Approved Budget**” means the Initial Budget or the then most current Budget prepared by the Company and approved by the Lender pursuant to Clause 9.5(b), as applicable.

“**Asset Sale**” shall mean the sale, transfer or other Disposition (by way of merger, casualty, condemnation or otherwise and including by way of a sale and leaseback) by any Obligor to any person other than any Obligor of any assets of any Obligor (other than (a) the sale of equity interests and (b) other sales, transfers or other dispositions in the ordinary course of business and consistent with the Approved Budget).

“**Available Facility**” means with respect to the Facility, subject to the relevant conditions in Clause 4.2 (*Conditions to drawdown*) being met, the Facility Amount as defined in the Agreement Particulars minus:

- (a) the aggregate amount of all outstanding Loans (excluding for this purpose any unpaid capitalized Interest in accordance with Clause 6.3 (*Capitalization of Interest*) and/or any unpaid capitalized Commitment Fees in accordance with Clause 6.4 (*Commitment Fee*) and/or any unpaid capitalized Upfront Premium in accordance with Clause 6.5 (*Upfront Premium*)); plus
- (b) in relation to any proposed Loan, on the date of the Request for such Loan, the aggregate amount of any Loans that are due to be made on or before the proposed Utilisation Date,

provided that, on the Utilization Date for such Loan, the Available Facility shall not include, in relation to any proposed Loans, any Loans that are due to be repaid on or before the proposed Utilisation Date under the Facility and that are, in fact, not paid or repaid on or before such date.

“Avoidance Action” shall mean the Debtors’ claims and causes of action under sections 502(d), 544, 545, 547, 548 and 550 of the Bankruptcy Code.

“Avoidance Proceeds” shall mean any proceeds or property recovered, unencumbered or otherwise in connection with successful Avoidance Actions, whether by judgment, settlement or otherwise.

“Bankruptcy Code” shall mean Title 11 of the United States Code entitled **“Bankruptcy”** as now or hereafter in effect, or any successor statute.

“Bankruptcy Court” shall mean the United States Bankruptcy Court for the District of Delaware, or any appellate court having jurisdiction over the Cases from time to time.

“Breakage Costs” means the amount (if any) by which:

- (a) the interest (less the Margin) which the Lender should have received for the period from the date of receipt of all or any part of a Loan to the last day of the current Interest Period in respect of that Loan, had the principal amount received been paid on the last day of that Interest Period;

exceeds:

- (b) the amount which the Lender would be able to obtain by placing an amount equal to the principal amount received by it on deposit with a leading bank approved by the US Federal Open Market Committee for a period starting on the Business Day following receipt or recovery and ending on the last day of the current Interest Period.

“Budget” means a 13-week budget in form and substance satisfactory to the Lender delivered on or prior to the Effective Date and updated from time to time as set forth Clause 9.5(b), setting forth on a weekly basis, among other things, the Obligors’ projected operating and non-operating receipts, disbursements, professional fees, net operating cash flow and Liquidity for the period described therein, prepared by the Company’s management and in form and level of

detail substantially consistent with the Initial Budget.

“Budget Variance Test Date” means the Thursday of every week (commencing with the Thursday of the second full calendar week occurring after the Petition Date) or, to the extent such Thursday is not a Business Day, the next Business Day thereafter.

“Budget Variance Test Period” means (i) with respect to the first Budget Variance Test Date, the two-week period ending on the Thursday of the week immediately preceding such Budget Variance Test Date, (ii) with respect to the second Budget Variance Test Date, the three-week period ending on the Thursday of the week immediately preceding such Budget Variance Test Date and (iii) with respect to the third Budget Variance Test Date and each Budget Variance Test Date thereafter, the four-week period ending on the Thursday of the week immediately preceding the applicable Budget Variance Test Date.

“Budget Variance Report” means a variance report, in a form satisfactory to the Lender and certified by the chief financial officer of the Company, setting forth (a) for the applicable Budget Variance Test Period, the cumulative positive variance (as compared to the Approved Budget) of the aggregate disbursements (including, for the avoidance of doubt, professional fees) made by the Obligors (presented on a line-item basis) and (b) an explanation, in reasonable detail, of any material variance and a distinction between permanent and timing-related variances.

“Business Day” is as defined in the Agreement Particulars.

“Cash Equivalents” means:

- (a) direct obligations of, or obligations the principal of and interest on which are unconditionally guaranteed by, the United States of America (or by any agency thereof to the extent such obligations are backed by the full faith and credit of the United States of America), in each case maturing within one year from the date of acquisition thereof;
- (b) investments in commercial paper maturing within 270 days from the date of acquisition thereof and having, at such date of acquisition, the highest credit rating obtainable from a credit rating agency;
- (c) investments in certificates of deposit, banker’s acceptances and time deposits maturing within 180 days from the date of acquisition thereof issued or guaranteed by or placed with, and money market deposit accounts issued or offered by, any domestic office of any commercial bank organized under the laws of the United States of America or any State thereof that has a combined capital and surplus and undivided profits of not less than \$500,000,000; and
- (d) money market funds that (i) comply with the criteria set forth in SEC Rule 2a-7 under the Investment Company Act of 1940, (ii) are rated AAA and Aaa (or equivalent rating) by at least two credit rating agencies; and (iii) have portfolio assets of at least \$5,000,000,000.

“Carve-Out” shall have the meaning assigned to such term in the Interim DIP Order or the Final DIP Order, as applicable.

“Case” and **“Cases”** shall have the meaning assigned to such term specified in the Formal Instrument of Agreement.

“Cash Collateral” shall have the meaning assigned to such term in the Interim DIP Order or the Final DIP Order, as applicable.

“Central Bank Rate” means:

- (a) the short-term interest rate target set by the US Federal Open Market Committee as published by the Federal Reserve Bank of New York from time to time; or
- (b) if that target is not a single figure, the arithmetic mean of:
 - (i) the upper bound of the short-term interest rate target range set by the US Federal Open Market Committee and published by the Federal Reserve Bank of New York; and
 - (ii) the lower bound of that target range.

“Central Bank Rate Adjustment” means, in relation to the Central Bank Rate prevailing at close of business on any Additional Business Day, the 20 per cent trimmed arithmetic mean (calculated by the Lender) of the Central Bank Rate Spreads for the five most immediately preceding Additional Business Days for which Term SOFR is available.

For this purpose, **“Central Bank Rate Spread”** means, in relation to any Additional Business Day, the difference (expressed as a percentage rate per annum) calculated by the Lender between:

- (a) the Term SOFR for that Additional Business Day; and
- (b) the Central Bank Rate prevailing at close of business on that Additional Business Day.

“Code” means the Internal Revenue Code of 1986, as amended.

“Commitment Fee” is as defined in the Agreement Particulars.

“**Credit Adjustment Spread**” is as defined in the Agreement Particulars.

“**Currency**” is as defined in the Agreement Particulars.

“**Debtor**” shall have the meaning assigned to such term specified in the Formal Instrument of Agreement.

“**Debtor Relief Laws**” shall mean the Bankruptcy Code, and all other liquidation, conservatorship, bankruptcy, judicial management, assignment for the benefit of creditors, moratorium, rearrangement, receivership, insolvency, reorganization, or similar debtor relief statute, law, ordinance, rule or regulation of the United States of America, any State thereof or the District of Columbia, or other applicable jurisdictions from time to time in effect.

“**Default**” means an Event of Default or an event or circumstance which, with the expiry of a grace period, the giving of notice or the making of any determination under this Agreement or any combination of them, would be an Event of Default.

“**Default Interest**” has the meaning given to it in Clause 10.3 (*Default Interest*).

“**Default Rate**” means (a) with respect to overdue amounts for a Loan constituting principal, capitalized Interest or capitalized Commitment Fees, a rate equal to the interest rate for such Loan for the then current Interest Period (being the sum of the applicable Interest Reference Rate, the applicable Margin and the Credit Adjustment Spread) plus 2 per cent per annum; and (b) with respect to any other overdue amount (including overdue interest), a rate equal to the interest rate for Loans for the then current Interest Period (being the sum of the applicable Interest Reference Rate, the applicable Margin and the Credit Adjustment Spread) plus 2 per cent per annum, whether or not any Loans are outstanding at such time.

“**Delayed Draw Borrowing Date**” means each date on which the conditions set forth in Clause 4.2 (*Conditions to drawdown*) are satisfied and the Loans are funded.

“**DIP Commitments**” means the commitment of the Lender to make Loans to the Company in an aggregate principal amount not to exceed the Facility Amount, as such amount may be adjusted from time to time in accordance with this agreement.

“**DIP Orders**” means the Interim DIP Order and the Final DIP Order, as applicable, in each case upon entry thereof by the Bankruptcy Court.

“**Disposition**” or “**Dispose**” means the sale, transfer, license, lease or other disposition of any property by any person (including any sale and leaseback transaction and any issuance of equity interests by a Subsidiary of such person), including any sale, assignment, transfer or other disposal, with or without recourse, of any notes or accounts receivable or any rights and claims associated therewith.

“**Drawdown Notice Period**” is as defined in the Agreement Particulars.

“**Effective Date**” means the date on which the conditions precedent set forth in Clause 4.1 (*Conditions to effectiveness*) have been satisfied or waived.

“Event of Default” means an event or circumstance specified as such in Clause 10.1 (*Event of Default*).

“Exit Premium” has the meaning given to it in Clause 5.11 (*Exit Premium*)

“Extraordinary Receipts” means any cash payments or proceeds (including Cash Equivalents) received (directly or indirectly) by or on behalf of any Obligor and not consisting of Net Cash Proceeds described in Clause 5.9 (*Mandatory prepayments – asset sales*) in respect of (i) insurance proceeds in connection with a casualty event, (ii) foreign, United States, state or local tax refunds, (iii) pension plan reversions, (iv) judgments, proceeds of settlements or other consideration of any kind in connection with any cause of action, (v) indemnity payments (other than to the extent such indemnity payments are (A) immediately payable to a person that is not an affiliate of the Company or any of its Subsidiaries or (B) received by any Obligor as reimbursement for any payment previously made to such person) and (vi) any purchase price adjustment received in connection with any purchase agreement to the extent not constituting Net Cash Proceeds.

“Facility” has the meaning given to it in Clause 2 (*The Facility*).

“Facility Amount” is as defined in the Agreement Particulars, to the extent not cancelled, or reduced under this Agreement.

“Facility Type” is as defined in the Agreement Particulars.

“FATCA Withholding” means a deduction or withholding from a payment under a Financing Document required by Sections 1471 through 1474 of the Code, as of the date of this Agreement (or any amended or successor version that is substantively comparable and not materially more onerous to comply with), any current or future regulations or official interpretations thereof, any agreements entered into pursuant to Section 1471(b)(1) of the Code and any fiscal or regulatory legislation, rules or practices adopted pursuant to any intergovernmental agreement, treaty or convention among governmental authorities and implementing such Sections of the Code.

“Final DIP Order” means an order of the Bankruptcy Court (and as to which no stay has been entered) authorizing and approving on a final basis, among other things, the Facility and the transactions contemplated by this Agreement in the form of the Interim DIP Order (with only such modifications thereto as are necessary to convert the Interim DIP Order to a final order and such other modifications as are satisfactory to the Lender in its sole discretion) (as the same may be amended, supplemented, or modified from time to time after entry thereof with the consent of the Lender in its sole discretion).

“Final Order Entry Date” shall mean the date on which the Final DIP Order is entered by the Bankruptcy Court.

“Final Maturity Date” is as defined in the Agreement Particulars.

“Financing Documents” means this Agreement and each Security Agreement.

“Formal Instrument of Agreement” means the formal instrument of agreement of this Agreement.

“GAAP” means the United States generally accepted accounting principles as in effect as of the date of determination of such principles.

“General Conditions” means the general conditions of this Agreement.

“Guaranteed Obligations” has the meaning given to it in Clause 11.1(a) (*Guaranty*).

“Guarantor” means the Initial Guarantor and any further entity which may accede as Guarantor in accordance with Clause 11.7 (*Accession of New Subsidiaries*).

“Indebtedness” means, as to any person at a particular time, without duplication, all of the following, whether or not included as indebtedness or liabilities in accordance with GAAP:

- (a) all obligations of such person for borrowed money and all obligations of such person evidenced by bonds, debentures, notes, loan agreements or other similar instruments;
- (b) all direct or contingent obligations of such person arising under or in respect of (i) letters of credit (including standby and commercial), bankers’ acceptances, demand guarantees and similar independent undertakings and (ii) surety bonds, performance bonds and similar instruments issued or created by or for the account of such person;
- (c) net obligations of such person under any swap contract;
- (d) all obligations of such person to pay the deferred purchase price of property or services (other than trade accounts payable in the ordinary course of business);
- (e) indebtedness (excluding prepaid interest thereon) secured by a lien on property owned or being purchased by such person (including indebtedness arising under conditional sales or other title retention agreements), whether or not such indebtedness shall have been assumed by such person or is limited in recourse; and
- (f) all guarantees of such person in respect of any of the foregoing.

“Initial Guarantor” means Synchronous LLC.

“Initial Budget” has the meaning set out in Clause 4.1(g) (*Conditions to effectiveness*).

“Interest” means any interest payable by the Company under Clause 6.1 (*Interest*) or any Default Interest.

“Interest Period” means, in relation to a Loan, the Standard Interest Period defined in the Agreement Particulars (or such other term as agreed in writing between the Company and the Lender), provided that if an Interest Period would otherwise extend beyond the Final Maturity Date, it will be shortened so that it ends on the Final Maturity Date.

“Interest Reference Rate” means:

- (a) the reference rate specified within the Agreement Particulars for this Agreement; or
- (b) as otherwise determined pursuant to Clause 6.2 (*Interest rate fallbacks*).

“Interim DIP Order” means an order of the Bankruptcy Court, in the form set forth in Exhibit A, authorizing on an interim basis, among other things, the Facility and the transactions contemplated by this Agreement, with only such modifications as are satisfactory to the Lender in its sole discretion.

“Interim Order Entry Date” shall mean the date on which the Interim DIP Order is entered by the Bankruptcy Court.

“Interpolated Alternative Term SOFR” means, in relation to any Loan, the rate (rounded to the same number of decimal places as Alternative Term SOFR) which results from interpolating on a linear basis between:

- (a) either:
 - (i) Alternative Term SOFR (as on the Quotation Day) for the longest period (for which Alternative Term SOFR is available) which is less than the Interest Period of that Loan; or
 - (ii) if no such Alternative Term SOFR is available for a period which is less than the Interest Period of that Loan, Overnight SOFR for the Overnight Reference Day; and
- (b) the applicable Alternative Term SOFR (as on the Quotation Day) for the shortest period (for which Alternative Term SOFR is available) which exceeds the Interest Period of that Loan.

“Interpolated Term SOFR” means, in relation to a Loan, the rate (rounded to the same number of decimal places as Term SOFR) which results from interpolating on a linear basis between:

- (a) either:
 - (i) Term SOFR (as on the Quotation Day) for the longest period (for which Term SOFR is available) which is less than the Interest Period of that Loan; or
 - (ii) if no such Term SOFR is available for a period which is less than the Interest Period of that Loan, Overnight SOFR for the Overnight Reference Day; and
- (b) Term SOFR (as on the Quotation Day) for the shortest period (for which Term SOFR is available) which exceeds the Interest Period of that Loan.

“Investment” means, as to any Person, any direct or indirect acquisition or investment by such Person, whether by means of (a) the purchase or other acquisition of capital stock or other securities of another Person, (b) a loan, advance or capital contribution to, guarantee or

assumption of debt of, or purchase or other acquisition of any other debt or equity participation or interest in, another Person, including any partnership or joint venture interest in such other Person and any arrangement pursuant to which the investor guarantees Indebtedness of such other Person, or (c) an acquisition. For purposes of covenant compliance, the amount of any Investment shall be the amount actually invested, without adjustment for subsequent increases or decreases in the value of such Investment.

“Lender” means Anglo American International Holdings Limited.

“Liquidity” means, as of any date, an amount equal to the aggregate unrestricted cash and Cash Equivalents of the Obligors calculated in a manner consistent with determining the Obligor’s “Unrestricted Cash” as set forth in the Initial Budget as of such date.

“Liquidity Certificate” means a certificate substantially in the form of Exhibit B.

“Loan” means each borrowing made under this Agreement or the principal amount outstanding of that borrowing together with all capitalized Interest and capitalized Commitment Fees.

“Margin” means the percentage per annum specified in the Agreement Particulars.

“Material Adverse Effect” means, with respect to any Obligor, an effect which is materially adverse to:

- (a) the ability of such Obligor to perform its payment or other material obligations under any Financing Document; or
- (b) the validity or enforceability of any Financing Document; or
- (c) any material right or remedy of the Lender in respect of any Financing Document;

provided that “Material Adverse Effect” shall expressly exclude (i) any matters disclosed in any “first day” pleadings or declarations and (ii) the effect of filing the Cases, the events and conditions related to, resulting from and/or leading up thereto and the effects thereon and any action required to be taken under the Financing Documents or the DIP Orders.

“Net Cash Proceeds” shall mean (a) with respect to any Asset Sale, the cash proceeds received by any Obligor (including cash proceeds subsequently received (as and when received) in respect of non-cash consideration initially received and including all insurance settlements and condemnation awards), net of (i) transaction expenses (including reasonable broker’s fees or commissions, legal fees, accounting fees, investment banking fees and other professional fees, transfer and similar taxes and the Company’s good faith estimate of income taxes paid or payable in connection with the receipt of such cash proceeds), (ii) amounts provided as a reserve, in accordance with GAAP, including pursuant to any escrow arrangement, against any liabilities under any indemnification obligations or purchase price adjustment associated with such Asset Sale (*provided that*, to the extent and at the time any such amounts are released from such reserve, such amounts shall constitute Net Cash Proceeds), (iii) in the case of insurance settlements and condemnation awards, amounts previously paid by the Obligors consistent with the Approved Budget to replace or restore the affected property, and (iv) the principal amount,

premium or penalty, if any, interest and other amounts on any Indebtedness for borrowed money which is secured by the asset sold in such Asset Sale and is required to be repaid with such proceeds (other than any such Indebtedness assumed by the purchaser of such asset), (b) with respect to any issuance or incurrence of Indebtedness or issuance of any equity interest, the cash proceeds thereof, net of all taxes and customary fees, commissions, costs and other expenses (including reasonable broker's fees or commissions, legal fees, accounting fees, investment banking fees and other professional fees, and underwriter's discounts and commissions) incurred in connection therewith and (c) with respect to any Extraordinary Receipts, 100% of such cash or proceeds received by any Obligor.

"New Lender" has the meaning set out in Clause 12.1 (*Assignments by the Lender*).

"Notice of Forbearance" shall mean the Notice of Forbearance delivered to FMH and Synchronous on August 20, 2024 in connection with the Pre-Petition Facility, as modified and extended through the following notices: Notice of Extension of Forbearance to the Companies dated October 4, 2024; Notice of Second Extension of Forbearance dated October 8, 2024; Notice of Third Extension of Forbearance dated October 25, 2024; Notice of Fourth Extension of Forbearance dated October 31, 2024; Notice of Fifth Extension of Forbearance dated November 7, 2024; Notice of Sixth Extension of Forbearance dated November 11, 2024; Notice of Seventh Extension of Forbearance dated November 18, 2024; Notice of Eighth Extension of Forbearance dated November 25, 2024; the Notice of Ninth Extension of the Notice of Forbearance dated December 2, 2024; Notice of Tenth Extension of the Notice of Forbearance dated December 9, 2024 (and as amended, restated, amended and restated, supplemented, extended or otherwise modified from time to time).

"Obligors" shall mean FMH and Synchronous.

"Overnight SOFR" means the secured overnight financing rate (SOFR) administered by the Federal Reserve Bank of New York (or any other person which takes over the administration of that rate) published (before any correction, recalculation or republication by the administrator) by the Federal Reserve Bank of New York (or any other person which takes over the publication of that rate).

"Overnight Reference Day" means the day which is two Additional Business Days before the Quotation Day.

"Petition Date" shall have the meaning assigned to such term specified in the Formal Instrument of Agreement.

"Post-Petition" means the time period commencing immediately upon the filing of the Cases.

"Pre-Petition Facility" shall mean that certain Facility Agreement, dated as of 21 December, 2023, among, *inter alios*, the Company, the other borrowers and obligors named therein and the Lender, as amended, supplemented or otherwise modified prior to the Petition Date.

"Pre-Petition Financing Documents" shall mean the "Financing Documents" as defined in the Pre-Petition Facility.

“Prepayment Notice Period” is as defined in the Agreement Particulars.

“Purpose” is as defined in the Agreement Particulars.

“Quotation Day” means two Additional Business Days before the first day of the relevant Interest Period.

“Relevant Nominating Body” means any applicable central bank, regulator or other supervisory authority or a group of them, or any working group or committee sponsored or chaired by, or constituted at the request of, any of them or the Financial Stability Board.

“Request” means a request for a Loan, substantially in the form of Schedule 1, or such other form as may be agreed between the Company and the Lender.

“Restricted Debt Payment” shall mean any payment or prepayment of principal of, premium, if any, or interest on, or redemption, purchase, retirement, defeasance (including in substance or legal defeasance), sinking fund or similar payment with respect to any Subordinated Debt or any unsecured Indebtedness for borrowed money of the Obligor.

“Restricted Junior Payment” shall mean collectively Restricted Debt Payments and Restricted Payments.

“Restricted Payment” shall mean (i) any dividend or other distribution, direct or indirect, on account of any shares of any class of stock of the Company, except a dividend payable solely in shares of that class of stock to the holders of that class, (ii) any redemption, retirement, sinking fund or similar payment, purchase or other acquisition for value, direct or indirect, of any shares of any class of capital stock of the Company and (iii) any payment made to retire, or to obtain the surrender of, any outstanding warrants, options or other rights to acquire shares of any class of capital stock of the Company.

“Second Currency” has the meaning given to it in Clause 7.4(a) (*Currency Indemnity*).

“Security” means a mortgage, charge, pledge, lien or other security interest securing any obligation of any person or any other agreement or arrangement having a similar effect.

“Security Agreement” means, collectively, (a) the security agreement governed under the law of New York entered into by FMH, Synchronous and the Lender, (b) [reserved], (c) any security agreement entered into pursuant to Clause 9.16 (*Additional Security*), and (d) each additional agreement entered into in respect of collateral granted by a New Subsidiary under Clause 11.7 (*Accession of New Subsidiaries*).

“SOFR” means a rate equal to the secured overnight financing rate as administered by the Federal Reserve Bank of New York (or a successor administrator of the secured overnight financing rate).

“Stalking Horse Purchaser” means Cummins, Inc.

“Stalking Horse Purchase Agreement” has the meaning given to it in Clause 4.1(f)

(*Conditions to effectiveness*).

“**Standard Interest Period**” is as defined in the Agreement Particulars.

“**Subordinated Debt**” shall mean Indebtedness of any Obligor that is subordinated in right of payment to the Guaranteed Obligations or secured on a junior basis to the Obligations.

“**Subsidiary**” of a person, means a corporation, partnership, limited liability company, association or joint venture or other business entity of which a majority of the equity interests having ordinary voting power for the election of directors or other governing body (other than securities or interests having such power only by reason of the happening of a contingency) are at the time owned or the management of which is controlled, directly, or indirectly through one or more intermediaries of such person, or such person otherwise controls the management and policies of such other entity. Unless otherwise specified, “Subsidiary” shall mean any Subsidiary of the Company.

“**Sum**” has the meaning given to it in Clause 7.4(a) (*Currency Indemnity*).

“**Superpriority Claim**” shall mean any administrative expense claim in the case of any Obligor having priority over any and all administrative expenses, diminution claims and all other priority claims against the Debtors, subject only to the Carve-Out, now existing or hereafter arising, of any kind whatsoever, including, without limitation, all administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy Code, and over any and all administrative expenses or other claims arising under sections 105, 326, 328, 330, 331, 365, 503(b), 506(c) (subject only to and effective upon entry of the Final Order), 507(a), 507(b), 726, 1113 or 1114 of the Bankruptcy Code.

“**Term SOFR**” means the term SOFR reference rate administered by CME Group Benchmark Administration Limited (or any other person which takes over the administration of that rate) for the relevant period published by CME Group Benchmark Administration Limited (or any other person which takes over the publication of that rate).

“**Termination Date**” shall mean the earliest of (a) the Final Maturity Date, (b) the effective date of any plan for the reorganization or liquidation of the Company or any other Debtor under chapter 11 of the Bankruptcy Code, (c) the entry of an order for the conversion of the Cases to case under Chapter 7 of the Bankruptcy Code, (d) the entry of an order for the dismissal of the Cases and (e) the date of acceleration of the Loans and the termination of unused DIP Commitments with respect to the Facility in accordance with the terms of this Agreement upon and during the continuance of an Event of Default.

“**Transfer Date**” means, in relation to an assignment, the later of:

- (a) the proposed Transfer Date specified in the relevant assignment agreement; and
- (b) the date on which the New Lender and the Existing Lender have executed the relevant assignment agreement.

“**Utilisation Date**” means, with respect to any Loan, the date on which such Loan is made.

1.2 Interpretation

In this Agreement, unless otherwise specified:

- (a) any reference in this Agreement to:
 - (i) any agreement or instrument is a reference to that agreement or instrument as amended and/or restated and/or novated;
 - (ii) a provision of law is a reference to that provision as amended or re-enacted;
 - (iii) a time of day is a reference to the time in New York, New York;
 - (iv) the singular includes the plural and *vice versa* and any gender includes the other genders; and
 - (v) a “**person**” shall be construed as a reference to any person, firm, company, corporation, government, state or agency of a state or any association or partnership (whether or not having separate legal personality) of two or more of the foregoing;
- (b) section, clause and schedule headings are for ease of reference only.
- (c) where any date for payment under this Agreement is not a Business Day, payment shall be effected on the immediately preceding Business Day;
- (d) any notice delivered after 1:00 p.m., New York City time, on any Business Day shall be deemed delivered on the next succeeding Business Day;
- (e) a certificate signed by an authorised signatory of the Lender as to the amount payable under this Agreement and any calculation of interest or costs shall, in the absence of manifest error, be conclusive for the purposes of this Agreement;
- (f) a reference to the “**Central Bank Rate**” shall include any successor rate to, or replacement for, that rate; and
- (g) the following currency terms or symbols shall bear the following meanings:

“**U.S. Dollar**”, “**Dollar**”, “**U.S.\$**”, “**\$**” and “**USD**” each means the lawful currency of the United States of America.

1.3 Third party rights

This Agreement shall be binding upon and inure solely to the benefit of the parties and their respective successors and permitted assigns and nothing herein, express or implied, is intended to or shall confer upon any other person any legal or equitable right, benefit or remedy of any nature whatsoever.

1.4 Joint and Several Liability

The liability of the Companies shall be joint and several between the Companies, and the liability of the Guarantors shall be joint and several between the Guarantors.

2 THE FACILITY

Subject to the terms and conditions of this Agreement and the DIP Orders, the Lender will make available to the Company, unless previously cancelled in accordance with this Agreement, the Facility Amount as a committed delayed draw term loan cash advance facility (the “**Facility**”) in the Currency. Once funded, each Loan shall be a “Loan” and a “New Money Loan” for all purposes under this Agreement and the other Financing Documents.

3 PURPOSE

3.1 Permitted use

The Facility shall be used by the Company solely for the Purpose.

3.2 No obligation to monitor

The Lender shall not be required to monitor or verify how any amount advanced under this Agreement is used by the Company.

4 DRAWDOWN

4.1 Conditions to effectiveness

The effectiveness of this Agreement and the obligation of the Lender to make Loans hereunder on the Effective Date are subject to the satisfaction of the following conditions:

- (a) the Lender (or its counsel) shall have received from each party hereto a counterpart of this Agreement signed on behalf of such party;
- (b) [reserved];
- (c) [reserved];
- (d) [reserved];
- (e) the Petition Date shall have occurred, and each of the Company and the Guarantor shall be a debtor and a debtor-in-possession in the Cases;
- (f) the Obligors and certain of their affiliates shall have entered into an asset purchase agreement (the “**Stalking Horse Purchase Agreement**”) acceptable to the Lender pursuant to which the Stalking Horse Purchaser has agreed to acquire substantially all the assets and the assumption of specified liabilities of the Obligors and such affiliates;
- (g) the Lender shall have received a copy of the Budget in form and substance satisfactory to the Lender (the “**Initial Budget**”);

- (h) the Lender shall have received an operating budget of the Company covering the period commencing on the Petition Date and ending on the Final Maturity Date and setting forth, on a weekly basis, projected operating and non-operating receipts, disbursements, net operating cash flow and Liquidity prepared by the Company's management and in form and substance acceptable to the Lender;
- (i) the Lender shall have received a wind-down budget for the non-Debtor Subsidiaries of the Company;
- (j) the Cases of any of the Debtors shall not have been dismissed or converted into cases under Chapter 7 of the Bankruptcy Code;
- (k) a motion, in form and substance satisfactory to the Lender seeking approval of the Facility shall have been filed in each of the Cases within one (1) day of the Petition Date;
- (l) all "first day" orders and all related pleadings intended to be entered on or prior to the Interim Order Entry Date shall have been entered by the Bankruptcy Court and shall be in form and substance acceptable to the Lender, it being understood that drafts approved by counsel to the Lender prior to the Petition Date are acceptable;
- (m) the Company shall not have made any payments after the Petition Date on account of any Indebtedness arising prior to the Petition Date unless such payment is expressly authorized by the "first day" orders or the DIP Orders and is made with the consent of the Lender (1) "consistent with the Approved Budget" or (2) as required by the Stalking Horse Purchase Agreement;
- (n) no trustee under Chapter 7 or Chapter 11 of the Bankruptcy Code or examiner with expanded powers shall have been appointed in any of the Cases;
- (o) the Interim Order Entry Date shall have occurred not later than three calendar days following the Petition Date, and the Interim DIP Order shall be in full force and effect and shall not have been vacated or reversed, shall not be subject to a stay, and shall not have been modified or amended in any respect without the prior written consent of the Lender, and the Lender shall have received a certified copy of the Interim DIP Order entered by the Bankruptcy Court;
- (p) except for the Cases, there shall exist no unstayed action, suit, investigation, litigation or proceeding pending or (to the knowledge of the Obligors) threatened in any court or before any arbitrator or governmental instrumentality (other than the Bankruptcy Court) that would reasonably be expected to have a Material Adverse Effect.

4.2 Conditions to drawdown

Subject to the terms of this Agreement, the Lender will only be obliged to make a Loan if on both the date of the Request and the proposed Utilisation Date of the Loan:

- (a) the Effective Date shall have occurred;

- (b) [reserved];
- (c) Interim DIP Order (with respect to the period on and after entry of the Interim DIP Order and prior to entry of the Final DIP Order) or the Final DIP Order (with respect to the period on and after entry of the Final DIP Order) shall be in full force and effect and shall not have been vacated or reversed, shall not be subject to a stay, and shall not have been modified or amended in any respect without the prior written consent of the Lender in its sole discretion;
- (d) the Lender shall have received a duly completed Request;
- (e) the representations and warranties set out in Clause 8 (*Representations*) and in each other Financing Document shall be true correct in all material respects (or, in the case of any representations and warranties qualified by materiality, Material Adverse Effect or words of similar import, in all respects) on and as of the Delayed Draw Borrowing Date with the same effect as though made on and as of such date (other than any such representations and warranties that are made as of a specific date, which shall be true and correct in all material respects (or, in the case of any representations and warranties qualified by materiality, Material Adverse Effect or words of similar import, in all respects) as of such earlier date);
- (f) at the time of and immediately after giving effect to the making of the Loans, no Default or Event of Default shall have occurred and be continuing or would result therefrom;
- (g) the Lender shall have received (i) an updated Budget in accordance with Clause 9.5(b) for the 13-week period commencing on or about the Delayed Draw Borrowing Date and (ii) all Budget Variance Reports then required have been delivered;
- (h) the requested principal amount of Loan to be made on the Delayed Draw Borrowing Date does not exceed an amount equal to the aggregate of (x) the forecasted disbursements in the four weeks following such Delayed Draw Borrowing Date as set forth in the then-extant Approved Budget, minus (y) the amount of cash on balance sheet of the Debtors in excess of \$1,000,000 on such Delayed Draw Borrowing Date;
- (i) the Chapter 11 Cases shall not have been dismissed or converted under Chapter 7 of the Bankruptcy Code;
- (j) no trustee under Chapter 7 or Chapter 11 of the Bankruptcy Code shall have been appointed in the Chapter 11 Cases;
- (k) All Milestones required to be satisfied pursuant to Clause 9.29 (*Milestones*) shall have been satisfied (unless waived or extended by the Lender); and
- (l) The proceeds of the Loans made on the Delayed Draw Borrowing Date shall be disbursed in accordance with the Approved Budget;
- (m) no action has been taken under Clause 10.2 (*Acceleration*);

- (n) with respect to the first request for a Loan, the Lender has received copies of board and shareholder/member resolutions of the Company approving incurrence of the Loans and each Obligor's obligations under this Agreement;
- (o) each requested Loan has been approved by a majority of the independent directors of FM (which such approval may be evidenced by emails from the majority of such independent directors); and
- (p) the Available Facility shall not be exceeded.

By delivering a Request required pursuant to Clause 4.2(d), on the Delayed Draw Borrowing Date, the Company shall be deemed to have represented and warranted that the conditions specified in clauses (e) and (f) above have been satisfied.

4.3 Drawdowns

Subject to the terms and conditions of this Agreement, in order to request a Borrowing of Loans during the Availability Period, the Company may from time to time, in accordance with the Drawdown Notice Period described in the Agreement Particulars (or such other period as may be agreed), request a Loan under the Facility by delivery to the Lender of a duly completed Request which shall:

- (a) specify the proposed Utilisation Date for the Loan, which must be a Business Day during the Availability Period; and
- (b) specify the requested amount of the Loan.

Unless otherwise agreed by the Lender, only two Requests in total may be delivered by the Company in each month during the Availability Period.

5 REPAYMENT, PREPAYMENT AND CANCELLATION

5.1 Repayment

On the Termination Date, the Company shall repay to the Lender all outstanding Loans, including all principal plus capitalized Interest plus all capitalized Commitment Fees plus all capitalized Upfront Premium, and all accrued and unpaid Interest, Commitment Fees and Upfront Premium and the Exit Premium. Any amounts borrowed (or deemed borrowed) and repaid or prepaid may not be reborrowed.

5.2 Voluntary prepayment

The Company may, provided that it has given not less than the specified Prepayment Notice Period (or such shorter notice period as may be agreed) prior notice to the Lender, prepay a Loan at any time in whole or in part without premium or penalty (other than customary Breakage Costs and subject to Clause 5.11 (Exit Premium)). Any amount prepaid shall be applied to any principal amount outstanding of the specified Loans and to any accrued but unpaid Interest on such prepaid Loans and any unpaid Commitment Fees and Upfront Premium with respect to the prepaid Loans, unless otherwise agreed.

5.3 Cancellation by the Company

- (a) The Company may, by giving to the Lender not less than the specified Cancellation Notice Period (or such shorter notice period as may be agreed) prior notice specifying the amount to be cancelled, cancel without penalty all or any part of the Facility Amount (as the Company shall specify in such notice) provided such amount shall be no less than US\$1,000,000 (one million US Dollars). In the event of such cancellation, any sums then outstanding in respect of the Facility in excess of the Facility Amount following such cancellation (plus accrued Interest on such excess amount) will be repaid to the Lender by the Company. Any such notice of cancellation shall be irrevocable.
- (b) Any Facility Amount which at that time is unutilised shall be cancelled at the end of the Availability Period.

5.4 Mandatory prepayment – illegality

- (a) If it becomes unlawful for the Lender to perform any of its obligations under this Agreement, to maintain the Facility Amount committed or to fund or maintain its participation in any Loan:
 - (i) the Lender must notify the Company promptly upon becoming aware of that illegality;
 - (ii) the Lender shall not be obliged to fund any further Loans, to the extent affected by that illegality; and
 - (iii) the Lender shall have the right, in its sole discretion, at any time following such event, to: (A) require the Company to repay or prepay the Lender an amount of outstanding Loans equal to the Facility Amount affected by the relevant illegality, together with all applicable accrued Interest, Commitment Fees and Upfront Premium, and all other amounts accrued or outstanding under this Agreement following which all such Loans, accrued Interest, Commitment Fees and other amounts shall become immediately due and payable; and/or (B) cancel the Facility Amount affected by the relevant illegality, whereupon such Facility Amount will be immediately cancelled and shall immediately cease to be available for further utilisation, **provided that** the relevant prepayment or cancellation date under paragraphs (A) and (B) above shall be not be earlier than the last day of any applicable grace period permitted by law.
- (b) The Lender shall, in consultation with the Company, take all reasonable steps to mitigate any circumstances which arise and which would result in any amount becoming payable under or pursuant to, or cancelled pursuant to this Clause 5.4 (*Mandatory prepayment – illegality*).

5.5 [Reserved]

5.6 Mandatory prepayment – Extraordinary Receipts

Not later than the second Business Day following the receipt of Net Cash Proceeds by any Obligor in respect of Extraordinary Receipts in excess of \$100,000 in the aggregate for all such Extraordinary Receipts during the term of this Agreement, the Company shall cause to be prepaid an aggregate principal amount of Loans in an amount equal to 100% of all such excess Net Cash Proceeds received therefrom.

5.7 [Reserved]

5.8 [Reserved]

5.9 Mandatory prepayments – Asset Sales

Not later than the second Business Day following the receipt of Net Cash Proceeds by any Obligor in respect of any Asset Sale (or series of related Asset Sales) in excess of \$100,000 in any single transaction or series of related transactions, the Company shall apply 100% of the Net Cash Proceeds received in excess of such threshold to prepay outstanding Loans.

5.10 Mandatory prepayments – debt incurrence or equity issuance

Not later than the second Business Day following the receipt of Net Cash Proceeds by any Obligor in respect of any issuance or incurrence of Indebtedness or issuance of any equity interest, in each case other than as permitted by this Agreement, the Company shall cause to be prepaid an aggregate principal amount of Loans in an amount equal to 100% of all such Net Cash Proceeds received therefrom.

The Company shall deliver to the Lender, at the time of each prepayment required under Clauses 5.6, 5.9 and 5.10, to the extent practicable, at least three Business Day's prior written notice of such prepayment. Each notice of prepayment shall specify the prepayment date and the principal amount of each Loan (or portion thereof) to be prepaid. All prepayments of Loans under this Clause 5 shall be accompanied by accrued and unpaid interest on the principal amount to be prepaid to but excluding the date of payment and the Exit Premium. Notwithstanding anything to the contrary herein, the Lender may in its sole discretion elect not to accept all or any part of any mandatory prepayment of Loans required to be made pursuant to Clauses 5.6 and 5.9 above by providing written notice to the Company no later than 5:00 p.m. on the Business Day the Lender receives notice from the Company regarding such prepayment. Any such declined amount shall be applied to prepay other Indebtedness to the extent required by the terms thereof and, after giving effect thereto, any remaining amounts may be retained by the Company.

5.11 Exit Premium

With respect to each repayment or prepayment of Loans under Clause 5 (other than a prepayment or repayment made pursuant to Clauses 5.4, 5.6 or 5.9), any other repayment or prepayment of Loans upon maturity (scheduled or otherwise) and/or any acceleration of the Loans and/or the other Guaranteed Obligations with respect thereto (regardless of whether before or after the occurrence of an Event of Default or the commencement of any bankruptcy or insolvency proceeding or any other proceeding under any Debtor Relief Law (including any deemed repayment or satisfaction in connection therewith)), in each case whether in full or in part, the Company shall be required to pay an amount equal to 2.00% of the amount of the

Loans (including any unpaid capitalized Interest in accordance with Clause 6.3 (*Capitalization of Interest*) and/or any unpaid capitalized Commitment Fees in accordance with Clause 6.4 (*Commitment Fee*) and/or any unpaid capitalized Upfront Premium in accordance with Clause 6.5 (*Upfront Premium*)) repaid, prepaid or accelerated (the “**Exit Premium**”), in each case, concurrently with such repayment, prepayment or acceleration. For the avoidance of doubt, it is understood and agreed that, if the Loans are accelerated or otherwise become due prior to the Final Maturity Date, in each case whether in full or in part (regardless of whether before or after the occurrence of an Event of Default or the commencement of any bankruptcy or insolvency proceeding or any other proceeding under any Debtor Relief Law), the Exit Premium will also automatically be due and payable as though the Loans were being repaid or prepaid and shall constitute part of the Guaranteed Obligations with respect to the Loans. For the avoidance of doubt, the Exit Premium shall also be due and payable (i) in the event the Loans (or any notes representing the Loans) are satisfied or released by foreclosure (whether by power of judicial proceeding or otherwise), deed in lieu of foreclosure or by another means and/or (ii) upon the satisfaction, release, payment, restructuring, reorganization, replacement, reinstatement, defeasance or compromise of any Guaranteed Obligations (and/or this Agreement or the notes evidencing any Guaranteed Obligations) in any insolvency proceeding or other proceeding pursuant to any Debtor Relief Laws, foreclosure (whether by power of judicial proceeding or otherwise), deed in lieu of foreclosure or by other means or the making of a distribution of any kind in any insolvency proceeding or under any Debtor Relief Law to the Lender, in full or partial satisfaction of the Guaranteed Obligations.

5.12 Interest

Any prepayment under this Agreement shall be made together with unpaid accrued Interest on the amount prepaid, and without premium or penalty (other than customary Breakage Costs and subject to Clause 5.11 (*Exit Premium*)).

6 INTEREST AND FEES

6.1 Interest

(a) Interest shall accrue on all outstanding Loans in respect of each Interest Period at a rate equal to the sum of:

- (A) the Interest Reference Rate for that Interest Period;
- (B) the Margin for such Interest Period; and
- (C) the Credit Adjustment Spread,

provided that, in relation to any Interest Period of the Loans, if the aggregate of the Interest Reference Rate and the Credit Adjustment Spread is less than zero, then the aggregate of the applicable Interest Reference Rate and the Credit Adjustment Spread shall be deemed to be zero.

(b) Interest on each Loan will be paid in arrears on the first Business Day following the end of an Interest Period and shall, pursuant to Clause 6.3 (*Capitalization of Interest*),

be added to and be deemed a Loan and bear Interest accordingly.

6.2 Interest rate fallbacks

- (a) *Interpolated Term SOFR*: If Term SOFR is not available for any Interest Period of a Loan, the applicable Interest Reference Rate shall be the Interpolated Term SOFR for a period equal in length to the Interest Period of that Loan.
- (b) *Alternative Term SOFR*: If paragraph (a) above applies to a Loan for an Interest Period but it is not possible to calculate the Interpolated Term SOFR, the applicable Interest Reference Rate shall be the Alternative Term SOFR as on the Quotation Day for a period equal in length to the Interest Period of that Loan.
- (c) *Interpolated Alternative Term SOFR*: If paragraph (b) above applies to a Loan for an Interest Period but no Alternative Term SOFR is available for the Interest Period of that Loan, the applicable Interest Reference Rate shall be the Interpolated Alternative Term SOFR for a period equal in length to the Interest Period of that Loan.
- (d) *Term Fallback Option*: If paragraph (c) above applies to a Loan for an Interest Period but it is not possible to calculate the Interpolated Alternative Term SOFR, the applicable Interest Reference Rate shall be:
 - (A) the percentage rate per annum which is the aggregate of:
 - (1) the Central Bank Rate for the Quotation Day; and
 - (2) any applicable Central Bank Rate Adjustment; or
 - (B) if the Central Bank Rate for the Quotation Day is not available, the percentage rate per annum which is the aggregate of:
 - (1) the most recent Central Bank Rate for a day which is no more than five Additional Business Days before the Quotation Day; and
 - (2) any applicable Central Bank Rate Adjustment.
- (e) *Parties Agreement Fallback Option*: If it is not possible to calculate the applicable Interest Reference Rate under paragraphs (a) to (d) above, the applicable Interest Reference Rate shall be such alternative benchmark rate as may be agreed between the Lender and the Company each acting in a commercially reasonable manner, in line with any rate (i) recommended as a replacement to Term SOFR by the administrator of Term SOFR or any Relevant Nominating Body or (ii) otherwise generally accepted in the relevant loan market.

6.3 Capitalization of Interest

- (a) Unless otherwise agreed in writing, the Company all Interest on the outstanding Loans under the Facility will be capitalized and added to and deemed a Loan on the first Business Day following the end of an Interest Period ending on or prior to the Final

Maturity Date and will bear Interest accordingly. Any Interest capitalized in accordance with this Clause 6.3 (*Capitalization of Interest*) shall be disregarded for the purposes of calculating the Available Facility.

- (b) Interest in respect of an Interest Period which ends on the Final Maturity Date or during the continuance of an Event of Default may not be capitalized.

6.4 Commitment Fee

- (a) The Company agrees to pay to the Lender a commitment fee calculated based on the average daily undrawn, uncanceled amount of the Facility, computed at a rate per annum equal to the Commitment Fee. Such Commitment Fee shall be payable (i) monthly in arrears which shall be due and payable on the last day of each calendar month during the Availability Period, and (ii) on the last day of the Availability Period, provided that if there is a cancellation in full or in part, such fee shall be due and payable on the cancelled amount of the Facility at the time the relevant cancellation becomes effective.
- (b) Other than the payment date occurring on the last day of the Availability Period, the Commitment Fee will be payable in kind, and such Commitment Fee shall be added to or be deemed a Loan under the Facility (although any such capitalized Commitment Fees shall be disregarded for the purposes of calculating the Available Facility).
- (c) Commitment Fee amounts due and payable on the last day of the Availability Period may not be capitalized.

6.5 Upfront Premium

- (a) The Company agrees to pay to the Lender an upfront premium equal to 2.00% of the aggregate amount of the DIP Commitments as of the Effective Date (the “**Upfront Premium**”).
- (b) The Upfront Premium will be fully earned and due and payable in kind, and such Upfront Premium be added to or be deemed a Loan under the Facility (although any such capitalized Upfront Premium shall be disregarded for the purposes of calculating the Available Facility) on the first Delayed Draw Borrowing Date hereunder.

6.6 Notification

The Lender shall promptly notify the Company of each new rate of Interest determined by it under this Clause 6 (*Interest and Fees*).

7 COSTS AND INDEMNITIES

7.1 Recovery of external costs

The Company shall promptly on demand reimburse the Lender the amount of all external costs and expenses (together with any applicable value added tax on them) that the Lender actually incurs in connection with the enforcement of any Loan and this Agreement.

7.2 Stamp duties and other documentary taxes

The Obligors shall pay any stamp, documentary, intangible, recording, filing and other similar duties and taxes to which the Financing Documents may be subject or give rise (including any such taxes that arise from any payment made under, from the execution, delivery, performance, enforcement or registration of, from the receipt or perfection of a security interest under, or otherwise with respect to, any Financing Documents) and shall indemnify the Lender against any losses or liabilities which it may incur as a result of any delay or omission by the Obligors in paying any such duties or taxes.

7.3 General indemnity

The Obligors will, on demand, indemnify the Lender against any costs, loss, expense or liabilities reasonably sustained or incurred by it directly as a result of any failure by an Obligor to comply with any of its obligations under this Agreement.

7.4 Currency Indemnity

(a) If any sum due from an Obligor under this Agreement (a “**Sum**”), or any order, judgment or award given or made in relation to a Sum, has to be converted from USD (the “**First Currency**”) into another currency (the “**Second Currency**”) for the purpose of:

- (i) making or filing a claim or proof against an Obligor;
- (ii) obtaining or enforcing an order, judgment or award in relation to any litigation or arbitration proceedings;

the relevant Obligor shall, as an independent obligation (joint and several between the Obligors), within three (3) Business Days of demand, indemnify the Lender to whom that Sum is due against any cost, loss or liability arising out of or as a result of the conversion including any discrepancy between (A) the rate of exchange used to convert that Sum from the First Currency into the Second Currency and (B) the rate or rates of exchange available to that person at the time of its receipt of that Sum.

(b) Each Obligor waives any right it may have in any jurisdiction to pay any amount under this Agreement in a currency or currency unit other than that in which it is expressed to be payable.

8 REPRESENTATIONS

8.1 Representations

Each Obligor makes the representations and warranties set out in this Clause 8.1 (Representations) to the Lender. The Lender enters into this Agreement on the strength of and relying on the representations and warranties set out in this Clause 8 (Representations), each of which is a separate representation and warranty, given without prejudice to any other representation or warranty and is deemed to be a material representation or warranty (as applicable) inducing the Lender to enter into this Agreement.

(a) Status

- (i) It is a duly organized and validly existing and in good standing (to the extent such concept exists in the relevant jurisdiction) under the laws of its jurisdiction of organization.
- (ii) It has the power to own its assets and carry on its business as it is being conducted.

(b) Capacity, power and authority

Subject to the entry of the DIP Orders and the terms thereof, it has the legal capacity, authority and power to enter into and perform, and subject to the entry of the DIP Orders and the terms thereof, it has taken all necessary action to authorise the entry into and performance of the Financing Documents to which it is a party and the transactions contemplated by such Financing Documents.

(c) Legal validity

- (i) Subject to the entry of the DIP Orders and the terms thereof, the Financing Documents constitute legally binding, valid and enforceable obligations, in the proper form for its enforcement, and other than violations arising as a result of the commencement of the Cases and except as otherwise excused by the Bankruptcy Code, the entry into the Financing Documents, their performance, and the transactions contemplated by them, do not conflict with any law or regulation applicable to the relevant Obligor party to such Financing Documents (other than to extent that any such conflict is an immaterial breach of such law or regulation).
- (ii) Subject to the DIP Orders and the terms thereof, to ensure the legality, validity, enforceability or admissibility into evidence of the Financing Documents, it is not necessary that the Financing Documents or any other document be filed or recorded with any governmental authority (other than the entry of the DIP Orders) in these jurisdictions, other than, as of the date of this Agreement, (i) filings of financing statements under the Uniform Commercial Code (UCC) in the Office of the Secretary of State of the State of Delaware and the Secretary of State of the State of Washington by each Obligor party to the Security Agreement governed under the law of New York, and (ii) filings with the United States Patent and Trademark Office and the United States Copyright Office with respect to intellectual property rights under the Security Agreement governed under the law of New York entered into by each of the Obligors and the Lender entered into by, among others, FMH and the Lender (in the case of each of (i) and (ii), as required to create first ranking security over all assets which are subject to security under the relevant Security Agreement).

(d) Non-conflict with other obligations

The entry into and performance by it of, and the transactions contemplated by, the Financing Documents to which it is a party, and the granting of any Security under the Security Agreements to which it is a party, do not conflict with:

- (i) the constitutional documents of any Obligor; or
- (ii) other than violations arising as a result of the commencement of the Cases and except as otherwise excused by the Bankruptcy Code, any document which is binding upon it or any of its assets or constitute a default or termination event (however described) under any such document,

in each case, to an extent or in a manner which has a Material Adverse Effect or could result in any liability on the part of the Lender to any third party.

(e) Authorisations

Subject to the DIP Orders and the terms thereof, all authorisations required by it in connection with the entry into, performance, validity and enforceability of, and the transactions contemplated by, the Financing Documents to which it is a party have been obtained or effected (as appropriate) and are in full force and effect.

(f) Pari passu ranking

Its payment obligations under this Agreement rank at least *pari passu* with the claims of all its other unsecured and unsubordinated creditors, except for obligations mandatorily preferred by law applying to companies generally.

(g) Encumbrances over assets

(i) It has no encumbrances on the whole or any part of its present or future assets save as arising by operation of law, as permitted by this Agreement or pursuant to any Security Agreement, or during the ordinary course of its business, or disclosed in writing to the Lender on or before the execution hereof.

(ii) Subject to the DIP Orders and the terms thereof, each Security Agreement (if any then exists):

(A) creates or, upon execution (and, where applicable, following registration and/or satisfaction of any other requirement for the perfection of the relevant security interest) will create, those security interests that it purports to create which security interests are (or will be, as applicable) perfected, first priority security interests in favor of the Lender; and

(B) is legal, valid and binding under its governing law.

(h) No default; no Material Adverse Effect

- (i) No Event of Default is continuing or will result from the entry into, or the performance of any transaction contemplated by, the Financing Documents.
 - (ii) Other than violations arising as a (i) result of the commencement of the Cases and except as otherwise excused by the Bankruptcy Code and (ii) alleged Defaults specifically identified by the Lender in the Notice of Forbearance, no other event or circumstance is continuing which constitutes a default under any other agreement, instrument or document which is binding on it or any of its assets to an extent or in a manner which has or is reasonably likely to have a Material Adverse Effect.
 - (iii) Since the Petition Date, no event, change, circumstance or condition has occurred that, individually or in the aggregate, has had, or could reasonably be expected to have, a Material Adverse Effect.
- (i) Financial Statements.
- (i) The consolidated financial statements of the Obligors were prepared in accordance with GAAP, and give a true and fair view of the financial condition of the Persons covered thereby as at the date such financial statements were prepared, subject only to any qualifications expressly set out in such financial statements. No Obligor has liabilities, obligations or commitments of a type required to be reflected in a financial statement in accordance with GAAP, except: (i) those which are adequately reflected or reserved against in the provided financial statements; and (ii) those which have been incurred in the ordinary course of business and which are not material in amount.
 - (ii) The Initial Budget, which was delivered to the Lender on or prior to the Effective Date, and each subsequent Budget was prepared in good faith based upon assumptions the Company believed to be reasonable assumptions on the date of delivery of such Budget. To the knowledge of the Company, no facts exist that (individually or in the aggregate) would result in any material change in the then-applicable Approved Budget. The Company shall deliver to the Lender updates to the Budget in accordance with Clause 9.5(b).
- (j) Taxes
- (i) Each Obligor has filed all income and other material federal, state and local or non-U.S. tax returns, as the case may be, which are required to be filed by it and has paid all income and other material taxes due pursuant to such returns or pursuant to any assessment received by an Obligor, except (i) to the extent that any such assessment is being contested in good faith by appropriate proceedings and (ii) taxes that need not be paid pursuant to an order of the Bankruptcy Court or pursuant to the Bankruptcy Code. The charges, accruals and reserves on the books of Obligors in respect of taxes or other governmental charges are adequate in accordance with GAAP.

(k) Governing Law

The submission to jurisdiction, consents and waivers by the Obligors in the relevant Financing Documents are valid and irrevocable.

(l) Validity and admissibility in evidence

It is not necessary in order for the Lender to enforce any rights or remedies under the Financing Documents against any Obligor or solely by reason of the execution, delivery and performance by Obligors of the Financing Documents that the Lender be licensed or qualified with any governmental authority in the United States.

(m) No Misleading Information

All information heretofore furnished by or on behalf of the Obligors and their Subsidiaries to the Lender for purposes of or in connection with the Financing Documents or any transaction contemplated under the Financing Documents (including any Budget) is, and all such information hereafter furnished by or on behalf of the Obligors and their Subsidiaries to the Lender will be, true and accurate in all material respects on the date as of which such information is stated or certified and does not contain any untrue statement of a material fact or omit any material fact necessary to make the statement made not misleading.

(n) No Litigation; Compliance with Laws

(i) Except for the Cases, there is no action, suit, proceeding or investigation pending against, or to the Obligors' knowledge threatened against or affecting, the Obligors before any court or arbitrator or any governmental body, agency or official in which there is a reasonable possibility of an adverse decision which could have a Material Adverse Effect, except those disclosed to the Lender as of the Effective Date, or which in any manner draws into question the validity or enforceability of the Financing Documents.

(ii) Except as excused by the Bankruptcy Code, none of the Obligors nor any of their respective material properties or assets is in violation of, nor will the continued operation of their material properties and assets as currently conducted violate, any law, rule or regulation, or is in default with respect to any judgment, writ, injunction, decree or order of any governmental authority, where such violation or default could reasonably be expected to result in a Material Adverse Effect.

(o) No Immunity

None of the Obligors nor any of their respective property has any immunity from the jurisdiction of any court or from any legal process (whether through service or notice, attachment prior to judgment, attachment in aid of execution, execution or otherwise) under applicable law in respect of their obligations under the Financing Documents.

(p) Properties; Intellectual Property; Collateral

- (i) Subject to the terms of the applicable DIP Orders, each Obligor has good title to, or valid leasehold interests in, all real and personal property material to its business, except for minor defects in title that do not interfere with its ability to conduct its business as currently conducted or to utilize such properties for their intended purposes or to the extent that any such failures would not in the aggregate reasonably be expected to have a Material Adverse Effect. No Obligor owns any fee owned real property.
- (ii) The properties of the Obligors are insured with financially sound and reputable insurance companies that are not affiliates of the Company, in such amounts, with such deductibles and covering such risks as are customarily carried by companies engaged in similar businesses and owning similar properties in localities where the applicable Obligor operates.
- (iii) Each of the Obligors owns, licenses or possesses the right to use all of the trademarks, tradenames, service marks, copyrights, patents, franchises, licenses and other intellectual property rights that are necessary for the operation of their respective businesses, as currently conducted, and the use thereof by any Obligor does not conflict with the rights of any other Person, except to the extent that such failure to own, license or possess or such conflicts, either individually or in the aggregate, would not reasonably be expected to have a Material Adverse Effect. No claim or litigation regarding any of the foregoing is pending or, to the knowledge of such Obligor, threatened that would reasonably be expected to be adversely determined, and, if so determined, would reasonably be expected to have a Material Adverse Effect.
- (iv) Upon the entry of the Interim DIP Order (and, if entered, the Final DIP Order), the liens granted thereunder by the Debtors to the Lender on any Collateral shall be valid and automatically perfected with the priority set forth herein and in the DIP Orders, and no filing or other action will be necessary to perfect or protect such liens and security interests with respect to any Debtor's Guaranteed Obligations under the Financing Documents and such DIP Order.

(q) Cases; Orders

- (i) The Cases were commenced on the Petition Date in accordance with applicable laws and proper notice thereof was given for (i) the motion seeking approval of the Financing Documents and the Interim DIP Order and, when applicable, Final DIP Order, (ii) the hearing for the entry of the Interim DIP Order, and (iii) the hearing for the entry of the Final DIP Order (*provided* that notice of the final hearing will be given as soon as reasonably practicable after such hearing has been scheduled).
- (ii) After the entry of the Interim DIP Order, and pursuant to and to the extent

permitted in the Interim DIP Order and the Final DIP Order, the Guaranteed Obligations will constitute allowed administrative expense claims in the Cases having priority over all administrative expense claims and unsecured claims against the Debtors now existing or hereafter arising, of any kind whatsoever, including all administrative expense claims of the kind specified in sections 105, 326, 330, 331, 503(b), 506(c), 507(a), 507(b), 546(c), 726, 1114 or any other provision of the Bankruptcy Code or otherwise, as provided under section 364(c)(1) of the Bankruptcy Code, subject to (i) the Carve-Out and (ii) the priorities set forth in the Interim DIP Order or Final DIP Order, as applicable.

- (iii) After the entry of the Interim DIP Order and pursuant to and to the extent provided in the Interim DIP Order and the Final DIP Order, the Guaranteed Obligations will be secured by a valid and perfected Lien on all of the Collateral and with the priority set forth in the Interim DIP Order or the Final DIP Order.
- (iv) The Interim DIP Order (with respect to the period on and after entry of the Interim DIP Order and prior to entry of the Final DIP Order) or the Final DIP Order (with respect to the period on and after entry of the Final DIP Order), as the case may be, is in full force and effect and has not been reversed, stayed (whether by statutory stay or otherwise), vacated, or, without the Lender's consent, modified or amended. The Obligors are in compliance in all material respects with the Interim DIP Order (with respect to the period on and after entry of the Interim DIP Order and prior to entry of the Final DIP Order) or the Final DIP Order (with respect to the period on and after entry of the Final DIP Order).
- (v) Notwithstanding the provisions of section 362 of the Bankruptcy Code, and subject to the applicable provisions of the Interim DIP Order or the Final DIP Order, as the case may be, upon the Termination Date (whether by acceleration or otherwise) of any of the Guaranteed Obligations, the Lender shall be entitled to immediate payment of such Guaranteed Obligations and, subject to Clause 10.1 (Event of Default), to enforce the remedies provided for hereunder or under applicable laws, without further notice, motion or application to, hearing before, or order from, the Bankruptcy Court.

8.2 Repetition

- (a) The representations and warranties set out in Clause 8.1 (Representations) are made by the Obligors on the date of this Agreement. The representations and warranties set out in Clause 8.1 (Representations) are further made on the date of any Security Agreement entered into pursuant to Clause 9.16 (Additional Security) by the Obligor executing such Security Agreement with respect to the relevant Security Agreement.
- (b) Each representation and warranty set out in Clause 8.1 (Representations) is deemed to be repeated by the Obligors on the date of each Request and on the first day of each Interest Period.

- (c) The representations and warranties set out in Clause 8.1 (*Representations*) are made by each New Subsidiary at the time it accedes hereto in accordance with Clause 11.7 (*Accession of New Subsidiaries*) and on the on the date of each Request thereafter.
- (d) When a representation and warranty is repeated, it is made with reference to the circumstances existing at the time of repetition.

9 COVENANTS

9.1 Authorisations

Each Obligor must promptly:

- (a) do or cause to be done all things necessary to preserve, renew and keep in full force and effect its legal existence; and
- (b) if so requested by the Lender, supply certified copies to the Lender of any authorisation required under any law or regulation to enable it to perform its respective obligations under the Financing Documents and to ensure the legality, validity, enforceability or admissibility in evidence of the Financing Documents.

9.2 Insurance

To the extent consistent with the Approved Budget, each Obligor must:

- (a) Keep its insurable properties adequately insured at all times by financially sound and reputable insurers; maintain such other insurance (including self-insurance), to such extent and against such risks, including fire and other risks insured against by extended coverage, as is customary with companies in the same or similar businesses operating in the same or similar locations and of same or similar size; and maintain such other insurance as may be required by law;
- (b) Notify the Lender promptly whenever any separate insurance is taken out by any Obligor concurrent in form or contributing in the event of loss with that required to be maintained under this Clause 9.2; and promptly deliver to the Lender a duplicate original copy of such policy or policies (including, for the avoidance of doubt, any flood or earthquake policy or policies);
- (c) In connection with the covenants set forth in this Clause 9.2, it is understood and agreed that:
 - (i) none of the Lender or its agents or employees shall be liable for any loss or damage insured by the insurance policies to be maintained under this Clause 9.2, it being understood that (A) the Obligors shall look solely to their insurance companies or any other parties other than the aforesaid parties for the recovery of such loss or damage and (B) such insurance companies shall have no rights of subrogation against the Lender or its agents or employees. If, however, the insurance policies do not provide waiver of subrogation rights

against such parties, as required above, then the Company and Guarantor each hereby agrees, to the extent permitted by law, to waive its right of recovery, if any, against the Lender and its agents and employees; and

- (ii) the designation of any form, type or amount of insurance coverage by the Lender under this Clause 9.2 shall in no event be deemed a representation, warranty or advice by the Lender that such insurance is adequate for the purposes of the Company and Synchronous LLC or the protection of their properties and the Lender shall have the right from time to time to require the Company and the Obligors to keep other insurance in such form and amount as the Lender may reasonably request; provided that such insurance shall be obtainable on commercially reasonable terms and consistent with the Approved Budget.

9.3 Pari passu ranking

Each Obligor must ensure that its payment obligations under the Financing Documents to which it is a party at all times rank at least *pari passu* with all its other present and future unsecured and unsubordinated payment obligations, except for obligations mandatorily preferred by law applying to companies generally.

9.4 Encumbrances over assets

Each Obligor shall not create or permit to subsist any encumbrance on the whole or any part of its present or future assets, except (i) subject to the DIP Orders and the terms thereof, liens, pledges or deposits under worker's compensation, unemployment insurance or other social security legislation; (ii) mandatory liens (not securing Indebtedness) arising solely by operation of law in the ordinary course of the relevant Obligor's business, (iii) entered into with the prior consent in writing of the Lender, (iv) encumbrances securing the obligations under the Pre-Petition Facility and encumbrances already existing as at the Effective Date and disclosed to the Lender in writing prior to the Effective Date, or (v) liens created under the Financing Documents or the DIP Orders.

9.5 Financial Statements, Reports, etc.

The Company shall furnish to the Lender:

- (a) not later than 1:00 p.m. (New York City time) on the Thursday of each week (or if such day is not a Business Day, the immediately succeeding Business Day), a duly completed Liquidity Certificate;
- (b) on or prior to the Effective Date, the Initial Budget. The Company shall update the Initial Budget (or the then-effective Approved Budget, as applicable) by no later than 1:00 p.m. (New York City time) on the Thursday of each week (or if such day is not a Business Day, the immediately succeeding Business Day), commencing with the Thursday of the first full calendar week after the Petition Date by delivering via email a Budget for the rolling 13-week period (or the period through the Final Maturity Date, if shorter) commencing on the Saturday of the prior week; *provided* that (i) any such

updated Budget must be approved by the Lender in its sole discretion; *provided* that the Lender shall be deemed to have approved any such updated Budget if it has not object to such updated Budget within three Business Days of receipt thereof and (ii) to the extent any such updated Budget is approved by the Lender, the line item amounts set forth therein shall only be used to calculate the projected line items commencing with the week in which such updated Budget is so approved and for subsequent weeks set forth therein, and any prior weeks tested as part of any then applicable Budget Variance Test Period or other test or period shall be calculated using the projected line items set forth in the applicable previously Approved Budget. Upon delivery on or about the Effective Date, in the case of the Initial Budget, and upon such approval by the Lender pursuant to this Clause 9.5(b) with respect to a Budget required to be approved pursuant to this Clause 9.5(b), such Budget shall constitute, together with the Initial Budget, the “**Approved Budget**”;

- (c) not later than 1:00 p.m. (New York City time) on each Budget Variance Test Date, a Budget Variance Report;
- (d) (x) in a manner (including with respect to timing of delivery) consistent with past practice of the Obligors and their Subsidiaries, all management reporting materials for each Obligor and its Subsidiaries, including operational cash flow forecasts for operating entities, in each case, in substantially the same form as prepared and disclosed to the Lender prior to the Effective Date and (subject to reasonable adjustment to account for intervening transactions) (y) and such other financial information with respect to the Obligors and their Subsidiaries as the Lender may reasonably request; and
- (e) not later than 1:00 p.m. (New York City time) on each Thursday occurring after the Petition Date, commencing with the Thursday of the first full calendar week occurring after the Petition Date (or to the extent such Thursday is not a Business Day, the next Business Day thereafter), (i) a cash flow forecast for the most recently ended Budget Variance Test Period for the subsequent calendar week in form and substance reasonably satisfactory to the Lender and (ii) a matrix/schedule (“**Weekly Payment Matrix**”) of the aggregate amount of payments made during the immediately preceding calendar week with respect to any (x) critical vendors, (y) foreign vendors and (z) administrative expenses under section 503(b)(9) of the Bankruptcy Code, including the following information: (1) the category or type of payment identified in the foregoing clauses (x), (y) and (z), (2) the date and aggregate amount of each payment and (iii) the Debtors that made the payment; *provided* that each such Weekly Payment Matrix shall be in form and substance reasonably acceptable to the Lender.

9.6 Lender Conference Calls

The Company shall host a conference call with representatives of the Lender (including advisors) at least twice each week upon reasonable prior notice to be held at such time as reasonably designated by Company (in consultation with the Lender) (but, in any event, within three Business Days of each delivery of the management reports and financials delivered pursuant to Clause 9.5(d)), at which conference call the Company shall make available the

executive management team and their advisors and there shall be discussed the Budget and the Budget Variance Reports, the Obligors' financial condition, business operations, liquidity, business plan, forecasts and projections and other materials provided pursuant to Clause 9.5.

9.7 Information

- (a) Each Obligor shall supply to the Lender, promptly on request, such documentation or information regarding its financial condition, business and operations, or other information as the Lender may reasonably request, including any such information that is required to enable the Lender, in its sole discretion, to comply with any legal or regulatory requirements, including tax, "know your customer" and anti-money laundering rules and regulations applicable to the Lender (including to make any filings or respond to any information requests).
- (b) Any Obligor must notify the Lender of any Default (and the steps, if any, being taken to remedy it) promptly upon becoming aware of its occurrence.
- (c) Any Obligor must notify the Lender in writing, promptly after obtaining knowledge thereof, of (i) the filing or commencement of, or any threat or notice of intention of any person to file or comment, any action, suit or proceeding, whether at law or in equity or by or before any governmental authority, against the Company or any affiliate thereof that could reasonably be expected to result in a Material Adverse Effect and (ii) any development with respect to any Obligor that has resulted in, or could reasonably be expected to result in, a Material Adverse Effect.

9.8 Compliance with laws and regulations

Except as otherwise excused by the Bankruptcy Code, each Obligor will comply with the requirements of all laws and all orders, writs, injunctions and decrees applicable to it or to its business or property, except to the extent that the failure to do so could not reasonably be expected to have a Material Adverse Effect.

9.9 Preservation of corporate existence

Each Obligor will (a) preserve, renew and maintain in full force and effect its legal existence and good standing under the laws of the jurisdiction of its organization except in a transaction permitted under this Agreement; (b) take all reasonable action to maintain all rights, licenses, permits, privileges and franchises necessary or desirable in the normal conduct of its business, except to the extent that failure to do so could not reasonably be expected to have a Material Adverse Effect; and (c) preserve or renew all of its patents, trademarks, trade names and service marks.

9.10 Keeping of books and records

Each Obligor will maintain proper books of record and account, in which full, true and correct entries in conformity with GAAP consistently applied shall be made of all financial transactions and matters involving the assets and business of the Obligors.

9.11 Maintenance of Properties

Each Obligor will (a) maintain, preserve and protect all of its properties and equipment necessary in the operation of its business in good working order and condition (ordinary wear and tear excepted) and (b) make all necessary repairs and renewals and replacements, except to the extent that the failure to do so could not reasonably be expected to have a Material Adverse Effect.

9.12 Mergers, spin-off, liquidations, dissolution and joint venture

Unless otherwise agreed in writing by the Lender, no Obligor shall (i) consolidate with, merge or amalgamate with or into, or demerge from any other person or undergo any other financial reconstruction or liquidation or dissolution, (ii) transfer to any person all or substantially all of its assets in one or more related transactions, or (iii) enter into any partnership or joint venture.

9.13 Changes in nature of business

No Obligor shall engage to any material extent in any business other than those businesses conducted by the Obligors on the date hereof or any business reasonably related or incidental thereto or representing a reasonable expansion thereof.

9.14 Asset Dispositions

- (a) No Obligor shall Dispose of any of its assets, except to the extent such Disposition is: (i) in relation to obsolete or worn out property, whether now owned or acquired; (ii) in relation to sales of goods and services (other than sale of patents, trademarks, trade names and service marks) to third parties, conducted on arm's length basis and in the ordinary course of business; or (iii) otherwise permitted under the Financing Documents.
- (b) Unless otherwise contemplated under a Financing Document, each Obligor undertakes that it shall not Dispose of any assets which have been acquired using proceeds of the loans.

9.15 Further Assurances.

The Obligors shall: (a) correct any material defect or error that may be discovered in any Financing Document or in the execution, acknowledgment, filing or recordation thereof; and (b) execute, acknowledge, deliver, record, re-record, file, re-file, register and re-register any and all such further acts, deeds, conveyances, pledge agreements, assignments, financing statements and continuations thereof, termination statements, notices of assignment, transfers, certificates, assurances and other instruments as the Lender may reasonably require from time to time in order to (i) carry out more effectively the purposes of the Financing Documents, (ii) to the fullest extent permitted by applicable laws, subject any properties, assets, rights or interests to the liens now or intended to be covered by any of the Security Agreements, (iii) perfect and maintain the validity, effectiveness and priority of any of the Security Agreements and any of the liens intended to be created under the Financing Agreements and (iv) assure, convey, grant, assign, transfer, preserve, protect and confirm more effectively unto the Lender

the rights granted or now or intended to be granted to the Lender under any Financing Document or under any other instrument executed in connection with any Financing Document to which an Obligor is or is to be a party.

9.16 Additional Security

Each Obligor shall, if so requested by the Lender with at least ten (10) Business Days prior notice, enter into a Security Agreement and take all such other actions on such terms as are necessary to create first ranking security in favor of the Lender over its assets.

9.17 Indebtedness

No Obligor shall create, incur, assume or suffer to exist any Indebtedness, except Indebtedness which is:

- (a) (w) owing between the Obligors, (x) created under the Financing Documents, (y) outstanding on the Effective Date under the Pre-Petition Facility and the other Pre-Petition Financing Documents as in effect on the Effective Date *plus* accrued and unpaid interest thereunder or (z) outstanding on the date hereof and disclosed to the Lender in writing prior to the Effective Date.

9.18 Investments

No Obligor shall make any Investment or enter into any agreement to make any Investment, except:

- (a) Investments held by an Obligor in the form of cash and cash equivalents; and
- (b) Investments by any Obligor in any other Obligor

9.19 Burdensome Agreements

No Obligor shall enter into any contractual obligation that limits the ability of any of the Obligors to pay, directly or indirectly, dividends or make any other distributions in respect of its equity interests to the Company or to otherwise transfer property to the Company.

9.20 Additional Subsidiaries

The Obligors shall not create or acquire any Subsidiary except with the prior written consent of the Lender (which may be provided via email to the Borrower).

9.21 Limitations on Upstreaming

Notwithstanding anything herein to the contrary, no Obligor shall permit any of its Subsidiaries that are not Obligors to contribute or transfer (including by way of any Restricted Payments, Investments or Dispositions) any assets or other property, including cash and cash equivalents, to any direct or indirect parent company of the Company.

9.22 Restricted Junior Payments

No Obligor shall directly or indirectly, declare, order, pay, make or set apart, or agree to declare, order, pay, make or set apart, any sum for any Restricted Junior Payment except that any Subsidiary may declare and pay dividends or make other distributions ratably to its equity holders.

9.23 Certain Amendments

The Obligors will not, without the consent of the Lender (such consent not to be unreasonably withheld or delayed), (a) amend, modify or change any provision of their respective organizational documents in a manner that is materially adverse to the Lender or (b) amend, modify or change, or permit the amendment, modification or changing of any documents in respect of the Pre-Petition Facility.

9.24 Transactions with Affiliates

No Obligor shall sell or transfer any property or assets to, or purchase or acquire any property or assets from, or otherwise engage in any other transactions with, any of its affiliates other than (a) transactions on terms and conditions (taken as a whole) not materially less favorable to such Obligor than could be obtained on an arm's-length basis from unrelated third parties; provided that such restriction shall not apply to any transaction between or among Obligors, and (b) to the extent constituting transactions with affiliates that would otherwise be prohibited under this Clause 9.24: (i) [reserved], (ii) the payment of reasonable fees to directors of the Company or any Subsidiary who are not employees of the Company or any Subsidiary, and compensation and employee benefit arrangements paid to, and indemnities provided for the benefit of, directors, officers or employees of the Company or the Subsidiaries in the ordinary course of business and consistent with the Approved Budget, (iii) transactions permitted under Clauses 9.17 and 9.18 and (iv) the Company and the Subsidiaries may perform their respective obligations under the arrangements outstanding on the date hereof and disclosed to the Lender in writing prior to the Effective Date.

9.25 Material Contracts

- (a) Save for any Financing Document, no Obligor shall enter into any material agreement, contract or commitment or incur any additional obligation other than in the ordinary course of business.
- (b) Each Obligor shall not permit any waiver, supplement modification, amendment, termination or release of any agreement with any material vendor.
- (c) Unless otherwise agreed by the Lender in its sole discretion, each Obligor shall not make payments or enter into any payment plans and/or settlements with respect to amounts owing (x) to any critical vendors, (y) to any foreign vendors and (z) in respect of administrative expenses under section 503(b)(9) of the Bankruptcy Code.

9.26 Obligations and Taxes

Each Obligor shall, in accordance with the Bankruptcy Code and subject to any required approval by the Bankruptcy Court in the case of the Debtors (it being understood that no Debtor

shall be obligated to make any payments hereunder that may, in its reasonable judgment, result in a violation of any applicable law, including the Bankruptcy Code, without an order of the Bankruptcy Court authorizing such payments) and any prohibitions set forth in this Agreement, pay its Indebtedness and other obligations promptly and in accordance with their terms and pay and discharge promptly when due all material taxes (in the case of any Debtor, solely to the extent arising after the Petition Date) imposed upon it or upon its income or profits or in respect of its property, before the same shall become delinquent or in default, as well as all lawful claims for labor, materials and supplies or otherwise that, if unpaid, could reasonably be expected to give rise to a lien upon such properties or any part thereof; *provided* that such payment and discharge shall not be required with respect to any such obligation or taxes so long as the validity or amount thereof shall be contested in good faith by appropriate proceedings diligently conducted and the Company or such Obligor shall have set aside on its books adequate reserves with respect thereto in accordance with GAAP and such contest operates to suspend collection of the contested obligation or taxes and enforcement of a lien.

9.27 Use of Proceeds

The Obligors shall use the proceeds of the Loans only for the purposes described in Clause 3.1.

9.28 Financial Covenants

- (a) Commencing with the Thursday of the first full week after the Petition Date and tested on each Thursday thereafter, the Company shall not permit Liquidity to be less than \$1,000,000 as of such testing date.
- (b) On each Budget Variance Test Date, the Company shall not permit actual total disbursements (including professional fees) and actual capital expenditures for such Budget Variance Test Period to be greater than 115% of the forecasted total disbursements (including professional fees) and forecasted total capital expenditures for such Budget Variance Test Period in the applicable Approved Budget; provided that, to the extent any disbursement or capital expenditure was scheduled to be made in any applicable period pursuant to the then applicable Approved Budget and was not made or expended during such period, the amount of such disbursement or capital expenditure may be made in a future period without constituting an “actual” disbursement or capital expenditure for purposes of the budget variance covenant set forth in this Section 9.28(b) in such future period.

9.29 Milestones

The Obligors shall ensure the satisfaction of the following milestones (collectively, the “**Milestones**” and each, a “**Milestone**”), unless waived or extended with the consent of the Lender in its sole discretion (which may be by email):

- (a) no later than one calendar day after the Petition Date, the Obligors shall have filed:
 - (i) a motion, in form and substance acceptable to the Lender, seeking approval of bid procedures in respect of a sale of the Debtors’ assets and approval of the bid protections in the Stalking Horse Purchase Agreement (the “**Bidding**”

Procedures Motion”);

- (ii) a motion in form and substance acceptable to the Lender seeking to establish deadlines to file proofs of claim;
- (iii) a motion, in form and substance acceptable to Anglo, seeking approval of the Facility; and
- (b) no later than the date that is three calendar days after the Petition Date, the Bankruptcy Court shall have entered the Interim DIP Order approving the Facility;
- (c) no later than the date that is five days after the Petition Date, the Obligors shall have filed a plan of reorganization and disclosure statement, each in form and substance acceptable to Anglo, with the Bankruptcy Court;
- (d) no later than the date that is 19 calendar days following the Petition Date the Obligors shall have filed each of the schedules and statements required pursuant to Rule 1007 of the Federal Rules of Bankruptcy Procedure;
- (e) no later than 20 days following the Petition Date, the Bankruptcy Court shall have entered an order in form and substance acceptable to Anglo approving the deadlines by which proofs of claim are required to be filed;
- (f) no later than the date that is 30 calendar days after the Petition Date, the Bankruptcy Court shall have entered an order approving the Bidding Procedures Motion;
- (g) no later than the date that is 35 days after the Petition Date, the Bankruptcy Court shall have approved the Final DIP Order;
- (h) no later than the date that is 36 days after the Petition Date, the deadline for qualified bids submitted pursuant to the Bidding Procedures (the “**Bid Deadline**”) shall occur;
- (i) no later than the date that is 7 days after the Bid Deadline, the Company Entities shall have commenced the Auction;
- (j) no later than the date that is 3 business days after the Auction concludes, the Bankruptcy Court shall have entered the Sale Order in form and substance acceptable to the Lender;
- (k) no later than the date that is 15 days after entry of the Sale Order, all conditions to closing of the Sale Transaction shall have been satisfied and the Sale Transaction shall be consummated;
- (l) no later than the date that is 57 calendar days after the Petition Date, the Bankruptcy Court shall have entered an order approving the disclosure statement for a chapter 11 liquidating plan, each in form and substance acceptable to the Lender;
- (m) no later than 94 days after the Petition Date, or as soon thereafter as the Bankruptcy Court may be available, the Bankruptcy Court shall have entered an order confirming

the Plan (the “**Confirmation Order**”) in form and substance acceptable to the Lender; and

- (n) no later than the seven calendar days after entry of the Confirmation Order, the Plan shall have become effective in accordance with its terms.

9.30 Priority of Liens

Subject to the DIP Orders, each Obligor hereby covenants, represents and warrants that, upon entry of the Interim DIP Order (and when applicable, the Final DIP Order), its Guaranteed Obligations hereunder and under the other Financing Documents:

- (a) pursuant to section 364(c)(1) of the Bankruptcy Code, shall at all times constitute an allowed Superpriority Claim against each of the Obligors on a joint and several basis, which will be payable from and have recourse to all pre- and post-petition property of the Obligors and all proceeds thereof (excluding Avoidance Actions but including, subject to entry of a Final DIP Order, Avoidance Proceeds), subject only to the Carve-Out to the extent provided in the Interim DIP Order or the Final DIP Order, as applicable and any payments or proceeds on account of such Superpriority Claim shall be distributed in accordance herewith;
- (b) pursuant to section 364(c)(2) of the Bankruptcy Code and subject to the Carve-Out to the extent provided in the Interim DIP Order or Final DIP Order, as applicable, shall be secured by a valid, binding, continuing, enforceable, fully-perfected first priority senior security interest and lien on all of the assets of the Obligors, whether currently existing or thereafter acquired, of the same nature, scope and type as the Collateral that are not subject to (x) valid, perfected and non-avoidable liens as of the Petition Date or (y) valid liens in existence as of the Petition Date that are perfected subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code, excluding Avoidance Actions but including, subject to entry of the Final DIP Order, Avoidance Proceeds;
- (c) pursuant to section 364(d)(1) of the Bankruptcy Code and subject only to the Carve-Out to the extent provided in the applicable DIP Order, shall at all times be secured by (i) a valid, binding, continuing, enforceable, fully-perfected first priority priming security interest in and lien upon the property of the Obligors of the same nature, scope and type as the Collateral to the extent that such Collateral is subject to existing liens that secure the obligations under the Pre-Petition Facility and (ii) such priming liens shall be senior in all respects to any Adequate Protection Liens (as defined in the Orders);
- (d) pursuant to section 364(c)(3) of the Bankruptcy Code, subject only to the Carve-Out to the extent provided in the applicable DIP Order and except as provided in clause (c) above, shall be secured by a valid, binding, continuing, enforceable, fully-perfected junior security interest in and lien on the Collateral, which is subject to (A) valid, perfected and non-avoidable senior liens in existence at the time of the commencement of the Cases (other than liens securing the obligations under the Pre-Petition Facility)

and (B) valid senior liens (other than liens securing the obligations under the Pre-Petition Facility) in existence at the time of such commencement that are perfected subsequent to such commencement as permitted by section 546(b) of the Bankruptcy Code, with the priority of the liens in respect of the Facility as set forth in the DIP Orders;

- (e) shall not be subject or subordinate to (i) any lien or security interest that is avoided and preserved for the benefit of the Obligors and their estates under section 551 of the Bankruptcy Code or (ii) unless otherwise provided for in the Financing Documents, any liens arising after the Petition Date including, without limitation, any liens or security interests granted in favor of any federal, state, municipal or other domestic or foreign governmental unit (including any regulatory body), commission, board or court for any liability of the Obligors;
- (f) each Obligor hereby confirms and acknowledges that, pursuant to the Interim DIP Order (and, when entered, the Final DIP Order), the liens in favor of the Lender in all of the assets of the Obligors shall be created and (to the extent the Interim DIP Order (and, when entered, the Final DIP Order) is effective to create and perfect under local law) perfected without the recordation or filing in any land records or filing offices of any mortgage, assignment or similar instrument;
- (g) each Obligor further agrees that, upon the request of the Lender in its reasonable business judgment, such Obligor shall execute and deliver to the Lender, as soon as reasonably practicable following such request but in any event within thirty days following such request, mortgages in recordable form with respect to any material real property and identified by the Lender on terms reasonably satisfactory to the Lenders;
- (h) for the avoidance of doubt, the Collateral shall exclude Avoidance Actions, but shall, subject to entry of the Final DIP Order, include Avoidance Proceeds;
- (i) Subject to and effective only upon entry of the Final DIP Order, except to the extent of the Carve-Out, no costs or expenses of administration of the Cases or any future proceeding that may result therefrom, including a case under chapter 7 of the Bankruptcy Code, shall be charged against or recovered from the Collateral pursuant to sections 105 or 506(c) of the Bankruptcy Code, the enhancement of collateral provisions of section 552 of the Bankruptcy Code, or any other legal or equitable doctrine (including, without limitation, unjust enrichment) or any similar principle of Law, without the prior written consent of Lender, and no consent shall be implied from any action, inaction or acquiescence by the Lender. In no event shall the Lender be subject to (i) the “equities of the case” exception contained in section 552(b) of the Bankruptcy Code (subject only to and effective upon entry of the Final DIP Order), or (ii) the equitable doctrine of “marshaling” or any other similar doctrine with respect to the Collateral; and
- (j) Except for the Carve-Out, the Superpriority Claims shall at all times be senior to the rights of any Obligor, any chapter 11 trustee and, subject to section 726 of the Bankruptcy Code, any chapter 7 trustee, or any other creditor (including, without

limitation, Post-Petition counterparties and other Post-Petition creditors) in the Cases or any subsequent proceedings under the Bankruptcy Code, including, without limitation, any chapter 7 cases (if any of the Cases are converted to cases under chapter 7 of the Bankruptcy Code).

9.31 Bankruptcy-Related Matters

The Obligors shall:

- (a) cause all proposed (i) “first day” orders, (ii) “second day” orders, (iii) orders related to or affecting the Loans, the Financing Documents and the Pre-Petition Financing Documents, any other financing or use of Cash Collateral, any sale or other disposition of Collateral outside the ordinary course, cash management, adequate protection, any plan of reorganization and/or any disclosure statement related thereto, (iv) orders concerning the financial condition of the Company or any of its Subsidiaries or other Indebtedness of the Obligors or seeking relief under section 363, 365, 1113 or 1114 of the Bankruptcy Code or section 9019 of the Federal Rules of Bankruptcy Procedure, (v) orders authorizing additional payments to critical vendors and (vi) orders establishing procedures for administration of the Cases or approving significant transactions submitted to the Bankruptcy Court, in each case, proposed by the Debtors to be in accordance with and permitted by the terms of this Agreement and acceptable to the Lender in its sole discretion in all respects, it being understood and agreed that the forms of orders approved by the Lender prior to the Petition Date are in accordance with and permitted by the terms of this Agreement and acceptable to the Lender in its sole discretion in all material respects;
- (b) comply in all material respects with each order entered by the Bankruptcy Court in connection with the Cases;
- (c) comply in a timely manner with their obligations and responsibilities as debtors-in-possession under the Bankruptcy Code, the Bankruptcy Rules, the Interim DIP Order and the Final DIP Order, as applicable, and any other order of the Bankruptcy Court;
- (d) promptly upon the Lender’s written request, each Obligor shall provide the Lender with copies of any informational packages provided to potential bidders, draft agency agreements, purchase agreements, status reports, and updated information related to the sale or any other transaction and copies of any such bids and any updates, modifications or supplements to such information and materials except as may otherwise be required by the bidding procedures approved by the Bankruptcy Court;
- (e) provide the Lender with reasonable access to non-privileged information (including historical information) and relevant personnel regarding strategic planning, cash and liquidity management, operational and restructuring activities, in each case subject to customary confidentiality restrictions;
- (f) deliver to counsel to the Lender (to the extent practicable) promptly as soon as available but no later than two Business Days prior to filing, copies of all proposed non-

ministerial or administrative pleadings, motions, applications, orders, financial information and other documents to be filed by or on behalf of the Obligors with the Bankruptcy Court in the Cases, or distributed by or on behalf of the Obligors to any official or unofficial committee appointed or appearing in the Cases or any other party in interest, and all press releases or other public announcements to be issued, and shall consult in good faith with the Lender's advisors regarding the form and substance of any such document;

- (g) if not otherwise filed on the Bankruptcy Court's electronic docketing system, as soon as reasonably possible, deliver to the Lender and to counsel to the Lender copies of all final pleadings, motions, applications, orders, financial information and other documents filed by or on behalf of the Obligors with the Bankruptcy Court in the Cases, or distributed by or on behalf of the Obligors to any official or unofficial committee appointed or appearing in the Cases, in each case subject to any confidentiality provisions; and
- (h) the Company shall provide at least two Business Days' (or such shorter notice acceptable to the Lender in their its discretion) prior written notice of any assumption or rejection of any Obligor's or any other Subsidiary's material contracts or material non-residential real property leases pursuant to section 365 of the Bankruptcy Code, and no such contract or lease shall be assumed or rejected if the Lender informs the Company that it objects to such assumption or rejection, as applicable.

9.32 Additional Bankruptcy Matters

The Company shall not, and will not permit any of its Subsidiaries to:

- (a) assert or prosecute any claim or cause of action against the Lender (in its capacity as such), unless such claim or cause of action is in connection with the enforcement of the Financing Documents against the Lender;
- (b) subject to the terms of the Interim DIP Order or the Final DIP Order, as applicable, object to, contest, delay, prevent or interfere with in any material manner the exercise of rights and remedies by the Lender with respect to the Collateral following the occurrence of an Event of Default (provided that any Obligor may contest or dispute whether an Event of Default has occurred); or
- (c) make any payment or distribution on account of any obligations under any Indebtedness or obligation arising prior to the Petition Date except as (i) expressly provided or permitted hereunder (including to the extent pursuant to any "first day" or "second day" orders complying with the terms of this Agreement) or (ii) provided pursuant to any other order of the Bankruptcy Court acceptable to the Lender (1) "consistent with the Approved Budget" or (2) as required by the Stalking Horse Purchase Agreement.

9.33 Wind-Down Support Agreement

The Company shall cause its Subsidiaries (other than Synchronous LLC) to wind-down

their respective businesses pursuant to and in compliance in all material respects with that certain Wind-Down Support Agreement, made and entered into as of December 9, 2024, by and among the Lender, the Obligors and the Subsidiaries.

9.34 Security Agreement and IP Security Agreements

No later than 5 Business Days from the Effective Date, the Lender (or its counsel) shall receive a counterpart of the Security Agreement referred to in clause (a) of the definition of “Security Agreement” and intellectual property security agreements in a form and substance reasonably satisfactory to the Lender.

9.35 U.S. Tax Treatment

Each party hereto hereby acknowledges and agrees to treat any Loan under this Agreement as an equity interest in the Company for U.S. federal and applicable state and local income tax purposes and which does not constitute “preferred stock” within the meaning of section 305 of the Code. The parties hereto agree not to file any tax return, report or declaration or to take any position or action inconsistent with the foregoing except to the extent required pursuant to a change in law after the date hereof or a "determination" (as defined in section 1313 of the Code).

10 DEFAULT

10.1 Event of Default

Each of the events or circumstances set out in this Clause 10.1 (*Event of Default*) is an Event of Default.

(a) Non-payment

An Obligor does not pay on the due date any amount payable by it under any Financing Documents in the manner required under the Financing Documents, provided that, for the avoidance of doubt, any due and unpaid Interest capitalized in accordance with Clause 6.3 (*Capitalization of Interest*) or due and unpaid Commitment Fees capitalized in accordance with Clause 6.4(b) (*Commitment Fee*) or due and unpaid Upfront Premium capitalized in accordance with Clause 6.5(b) (*Upfront Premium*) shall not constitute a non-payment default.

(b) Breach of other obligations

(i) An Obligor does not comply with any covenant or agreement contained in Clauses 9.4, 9.5, 9.7(b), 9.9, 9.12, 9.13, 9.14, 9.17, 9.18, 9.19, 9.20, 9.21, 9.22, 9.23, 9.24, 9.25, 9.27, 9.28, 9.29, 9.31 or 9.32.

(ii) An Obligor does not comply with any other term of a Financing Document, other than any term referred to in Clause 10.1(b)(i) (*Breach of other obligations*) or Clause 10.1(a) (*Non-payment*), unless that non-compliance: (A) is capable of remedy; and (B) is remedied within 15 days of the earlier of (x) the Lender giving notice of the breach to the Company and (y) any Obligor

becoming aware of the non-compliance.

(c) Cross Default

An Obligor fails to make any payment when due (whether by scheduled maturity, required prepayment, acceleration, demand, or otherwise) in respect of any Indebtedness (other than Indebtedness under the Financing Documents) in excess of US\$100,000 (one hundred thousand US Dollars) (other than the Guaranteed Obligations and any Indebtedness of any Debtor that was incurred prior to the Petition Date that is subject to the automatic stay applicable under section 362 of the Bankruptcy Code), or an Obligor fails to observe or perform any other agreement or condition relating to any such Indebtedness or contained in any instrument or agreement evidencing, securing or relating thereto, or any other event occurs, the effect of which default or other event is to cause, or to permit the beneficiary or beneficiaries of such Indebtedness (or a trustee or agent on their behalf) to cause, with the giving of notice if required, such Indebtedness to become due or to be repurchased, prepaid, defeased or redeemed (automatically or otherwise), or an offer to repurchase, prepay, defease or redeem such Indebtedness to be made, prior to its stated maturity.

(d) Misrepresentation

A representation or warranty made or repeated by an Obligor in a Financing Document or in any document delivered by or on behalf of an Obligor under a Financing Document is incorrect or misleading in any material respect when made or deemed to be repeated.

(e) [Reserved]

(f) Insolvency proceedings

(i) The commencement of any Insolvency Proceedings by any Non-US First Mode Parties prior to the consummation of a sale of all or substantially all of the assets of the applicable Non-US First Mode Parties without prior written consent of the Lender.

(A) “Insolvency Proceeding” includes (i) in respect of Australian law, any external administration as defined in section 5-15 of Schedule 2 of the Corporations Act 2001 (Cth), other than the appointment of a liquidator in a members’ voluntary winding up under Division 2 of Part 5.5 of the Corporations Act and (ii) in respect of English law, administration or insolvent liquidation under the Insolvency Act 1986 but shall exclude a members’ voluntary liquidation in accordance with sections 84 – 96 of the Insolvency Act and Part 5 of the Insolvency (England and Wales) Rules 2016.

(g) Material adverse change

Any event or series of events (whether related or not) occurs after the Petition Date

which has or is reasonably likely to have a Material Adverse Effect on an Obligor.

(h) Expropriation

Any seizure, expropriation or nationalisation by or on behalf of any governmental, regulatory or other authority of the whole or the greater part of the assets of an Obligor which has or would be reasonably likely to have a Material Adverse Effect.

(i) Unlawfulness

It is or becomes unlawful for any Obligor to perform or comply with any or all of the obligations expressed to be assumed by it in any Financing Document or all or any of the obligations expressed to be assumed by any Obligor under any Financing Document is not or ceases to be legal, valid, binding and enforceable.

(j) Repudiation

Any Financing Document is repudiated, suspended, cancelled, revoked, forfeited, surrendered or terminated (whether in whole or a part) or has its validity or enforceability (or that of any of its provisions) challenged otherwise than by the Lender or otherwise is not, or ceases to be, of full force or effect (save in accordance with its terms).

(k) Cessation of Security

Any security interest created under any Security Agreement ceases to constitute legal, valid and fully perfected first ranking security interest in favor of the Lender.

(l) Judgments

One or more judgments arising after the Petition Date for the payment of money the aggregate amount is in excess of the US\$100,000 (one hundred thousand US Dollars) (to the extent not covered by insurance provided by an insurer that is not an affiliate of the Company, with respect to which coverage has been acknowledged by such insurer) shall be rendered against any Obligor or any combination thereof and the same shall remain undischarged for a period of forty-five consecutive days during which execution shall not be effectively stayed, or any action shall be legally taken by a judgment creditor to levy upon assets or properties of any Obligor to enforce any such judgment.

(m) Change of Control

Any Obligor ceases to be a direct or indirect Anglo Subsidiary.

(n) Bankruptcy

(i) Any of the following shall occur:

(A) any of the Cases of the Obligors shall be dismissed or converted to a case under chapter 7 of the Bankruptcy Code;

- (B) (A) a trustee, responsible officer or an examiner having expanded powers (beyond those set forth under sections 1106(a)(3) and (4) of the Bankruptcy Code) (other than a fee examiner) is appointed or elected in the any of the Cases, (B) any Obligor applies for, consents to, supports, acquiesces in or fails to promptly oppose, any such appointment or (C) the Bankruptcy Court shall have entered an order providing for such appointment;
 - (C) an order of the Bankruptcy Court shall be entered denying or terminating use of Cash Collateral by the Obligors and the Obligors shall have not obtained use of Cash Collateral pursuant to an order consented to by, and in form and substance acceptable to, the Lender;
 - (D) any Obligor, or any person on behalf of any Obligor, shall file a motion or other pleading seeking, or otherwise consenting to, any of the matters set forth in clauses (A) through (C) above or the granting of any other relief that if granted would give rise to an Event of Default;
 - (E) any Obligor or any of its Subsidiaries, or any person claiming by or through any Obligor or any of its Subsidiaries shall obtain court authorization to commence, or shall commence, join in, assist or otherwise participate as an adverse party in any suit or other proceeding against (A) the Lender relating to the Facility, or (B) the Lender in its capacity as a lender under the Pre-Petition Facility, in each case other than, with respect to an Obligor, in the case of a Person that has obtained an order from the Bankruptcy Court, over the objection of the Obligors, granting such Person derivative standing to commence, join in, assist or otherwise participate as an adverse party;
- (ii) The existence of any claims or charges, or the entry of any order of the Bankruptcy Court authorizing (i) any claims or charges, other than in respect of the Facility and the Carve-Out or as otherwise permitted under the applicable Financing Documents or the DIP Orders, entitled to superpriority administrative expense claim status in any chapter 11 case pursuant to section 364(c)(1) of the Bankruptcy Code that are pari passu with or senior to the claims of the Lender under the Facility, or there shall arise or be granted by the Bankruptcy Court any claim having priority over any or all administrative expenses of the kind specified in clause (b) of section 503 or clause (b) of section 507 of the Bankruptcy Code (other than the Carve-Out), or (ii) any lien on the Collateral having a priority senior to or pari passu with the liens and security interests granted herein, except, in each case, as expressly provided in the Financing Documents or in the DIP Order then in effect (but only in the event specifically consented to by the Lender);
- (iii) The Bankruptcy Court shall enter an order or orders granting relief from any stay of proceeding (including, the automatic stay applicable under section 362

of the Bankruptcy Code to the holder or holders of any security interest) to (x) permit foreclosure (or the granting of a deed in lieu of foreclosure or the like) on any material assets of any of the Obligor or (y) permit other actions that would have a Material Adverse Effect on the Obligor or their estates (taken as a whole);

- (iv) A final order of the Bankruptcy Court shall be entered reversing, amending, supplementing, staying, vacating or otherwise amending, supplementing or modifying the Interim DIP Order or the Final DIP Order, or an Obligor files an application, motion or other pleading seeking such entry of such an order or supports or fails to promptly oppose such an order, in each case without the prior written consent of the Lender;
- (v) The Interim DIP Order (prior to the Final Order Entry Date) or the Final DIP Order (on and after the Final Order Entry Date) shall cease to create a valid and perfected lien on the Collateral or to be in full force and effect, shall have been reversed, modified, amended, stayed, vacated, or subject to stay pending appeal, in the case of modification or amendment, without prior written consent of the Lender;
- (vi) An order shall have been entered by the Bankruptcy Court avoiding or requiring disgorgement by the Lender of any amounts received in respect of the Guaranteed Obligations;
- (vii) An order shall have been entered by the Bankruptcy Court terminating or modifying the exclusive right of any Obligor to file a chapter 11 plan pursuant to section 1121 of the Bankruptcy Code, without the prior written consent of the Required Lender;
- (viii) Any of the Obligor shall fail to comply with a material provision of the Interim DIP Order (prior to the Final Order Entry Date) or the Final DIP Order (on and after the Final Order Entry Date);
- (ix) An order in the Cases shall be entered charging any of the Collateral (as defined herein) or the collateral security the Pre-Petition Facility under section 506(c) of the Bankruptcy Code against the Lender or the Lender in its capacity as the lender under the Pre-Petition Facility, or the commencement of other actions in any of the Cases that are (x) materially adverse to the Lender or inconsistent with any of the Financing Documents or (y) materially adverse to the Lender in its capacity as the lender under the Pre-Petition Facility or inconsistent with any of the Pre-Petition Financing Documents;
- (x) Any order shall be entered which dismisses any of the Cases of the Obligor and which order does not provide for payment in full in cash of the Guaranteed Obligations under the Financing Documents (other than contingent indemnification obligations not yet due and payable), or any of the Obligor and their Subsidiaries shall seek, support or fail to contest in good faith the

entry of any such order;

- (xi) Failure to satisfy any of the Milestones in accordance with the terms relating to such Milestone (unless waived or extended with the consent of the Lender);
- (xii) Any Obligor or any Subsidiary thereof shall take any action in support of any matter set forth in this Clause 10.1 (*Event of Default*) or any other Person shall do so and such action is not contested in good faith by the Obligors and the relief requested is granted in an order that is not stayed pending appeal;
- (xiii) Any Obligor or any Subsidiary thereof shall obtain court authorization to commence, or shall commence, join in, assist or otherwise participate as an adverse party in any suit or other proceeding seeking, or otherwise consenting to (i) the invalidation, subordination or other challenging of the Superpriority Claims and liens granted to secure the Guaranteed Obligations or any other rights granted to the Lender in the DIP Orders or this Agreement or (ii) any relief under section 506(c) of the Bankruptcy Code with respect to any Collateral;
- (xiv) Any Obligor shall challenge, support or encourage a challenge of any payments made to the Lender with respect to the Guaranteed Obligations or the Lender in its capacity as the lender under the Pre-Petition Facility with respect to the Pre-Petition Facility, other than to challenge the occurrence of a Default or Event of Default;
- (xv) Other than the Bidding Procedures Motion, without the consent of the Lender, the filing of any motion by the Obligors seeking approval of (or the entry of an order by the Bankruptcy Court approving) adequate protection to any pre-petition agent, trustee or lender that is inconsistent with the Interim DIP Order (prior to the Final Order Entry Date) or the Final DIP Order (on and after the Final Order Entry Date);
- (xvi) Without the Lender's consent, the entry of any order by the Bankruptcy Court granting, or the filing by any Obligor or any of its Subsidiaries of any motion or other request with the Bankruptcy Court (in each case, other than the DIP Orders and motions seeking entry thereof or permitted amendments or modifications thereto) seeking, authority to use any cash proceeds of any of the Collateral without the Lender's consent or to obtain any financing under section 364 of the Bankruptcy Code other than the facility hereunder unless such motion or order contemplates payment in full in cash of the Guaranteed Obligations immediately upon consummation of the transactions contemplated thereby;
- (xvii) Without the consent of the Lender, the filing of any motion by the Obligors or any person on behalf of any Obligor seeking authority to consummate a sale of assets of the Obligors or the Collateral outside the ordinary course of business and not otherwise permitted hereunder;

- (xviii) If any Obligor or any of its Subsidiaries is enjoined, restrained, or in any way prevented by court order from continuing to conduct all or any part of the business affairs of the Obligors and their Subsidiaries, taken as a whole, which could reasonably be expected to have a Material Adverse Effect; *provided that* the Obligors shall have two Business Days after the entry of such an order to obtain a court order vacating, staying or otherwise obtaining relief from the Bankruptcy Court or another court to address any such court order;
- (xix) Without the consent of the Lender, the making by any Obligor of any payment (whether by way of adequate protection or otherwise) of principal or interest or otherwise on account of any pre-petition Indebtedness or payables other than payments permitted under this Agreement to the extent authorized by one or more “first day” orders, the Interim DIP Order or the Final DIP Order, consistent with the Approved Budget;
- (xx) If, unless otherwise approved by the Lender, an order of the Bankruptcy Court shall be entered providing for a change in venue with respect to the Cases and such order shall not be reversed or vacated within ten days;
- (xxi) Without the Lender’s consent, any Obligor or any Subsidiary thereof shall file any motion or other request with the Bankruptcy Court seeking (i) to grant or impose, under section 364 of the Bankruptcy Code or otherwise, liens or security interests in any Collateral, whether senior, equal or subordinate to the Lender’s liens and security interests; (ii) to use, or seek to use, Cash Collateral; or (iii) to modify or affect any of the rights of the Lender under the DIP Orders or the Financing Documents, by any order entered in the Cases;
- (xxii) Other than the Bidding Procedures Motion, without the Lender’s consent, any Obligor shall file a motion seeking or take any action supporting a motion seeking, or the Bankruptcy Court shall enter an order in any of the Cases authorizing the sale of all or substantially all of the Obligors’ assets (unless such order contemplates payment in full in cash of the Guaranteed Obligations upon the closing of such financing or consummation of such sale, whether pursuant to a plan of reorganization or otherwise); or
- (xxiii) Any termination of the Stalking Horse Purchaser Agreement, other than a termination following the Stalking Horse Purchase not having been selected as the successful bidder or back-up bidder pursuant to the Bidding Procedures.

10.2 Acceleration

Subject to the DIP Orders, an Event of Default has occurred and is continuing, the Lender may, by notice to the Company and without prejudice to any other rights or remedies which the Lender may have under a Financing Document or at law:

- (a) cancel all or any part of the Facility Amount; and/or

- (b) declare that all or part of any amounts outstanding under this Agreement are immediately due and payable; and/or
- (c) declare that all or part of any amounts outstanding under this Agreement are payable on demand by the Lender; and/or
- (d) claim immediate payment of all or part of any amounts outstanding under this Agreement; and/or
- (e) exercise all rights and remedies available to it under the Security Agreements (if any then exist) and applicable law.

Any notice given under this Clause 10.2 (*Acceleration*) will take effect in accordance with its terms.

10.3 Default Interest

If a Default occurs with respect to the payment of any sum due to the Lender under any Financing Document (after the expiration of any applicable grace period), Interest shall accrue on that sum from the date of default until payment (both before and after judgment) at the rate per annum equal to the Default Rate (“**Default Interest**”). Such Interest will be payable on demand.

11 GUARANTY

11.1 Guaranty

- (a) Each Guarantor irrevocably, unconditionally and jointly and severally with the other Guarantors guarantees to the Lender, the due and punctual payment in full in cash of (i) any payments owed by the Company under this Agreement, including principal, capitalized Interest and capitalized Commitment Fees (including, without limitation, Interest accruing after the filing of any petition in bankruptcy, or the commencement of any insolvency, reorganization or like proceeding, whether or not a claim for post-filing or post-petition interest is allowed in such proceeding), and any other amounts due under, the Facility when and as the same shall become due and payable (whether at stated maturity or required by optional or mandatory prepayment or by acceleration or otherwise) and (ii) any other sums which may become due under the terms and provisions of the Financing Documents (all such obligations described in clauses (i) and (ii) above are herein called the “**Guaranteed Obligations**”). The guaranty in the preceding sentence is an absolute, present and continuing guaranty of payment and not of collectability and is in no way conditional or contingent upon any attempt to collect from the Company or any other guarantor of the Guaranteed Obligations (including, without limitation, any other Guarantor) or upon any other action, occurrence or circumstance whatsoever. In the event that the Company shall fail so to pay any of such Guaranteed Obligations, each Guarantor agrees to pay the same when due to the Lender, without demand, presentment, protest or notice of any kind, in lawful money of the United States of America, pursuant to the requirements for payment specified in this Agreement. Each default in payment of any of the Guaranteed Obligations shall

give rise to a separate cause of action and separate suits may be brought under this Agreement as each cause of action arises.

- (b) Each Guarantor agrees to pay and to indemnify and save the Lender harmless from and against any damage, loss, cost or expense (including attorneys' fees) which the Lender may incur or be subject to as a consequence, direct or indirect, of (i) any breach by such Guarantor, by any other Guarantor or by the Company of any warranty, covenant, term or condition in, or the occurrence of any default under, this Agreement or any other agreement referred to therein, together with all expenses resulting from the compromise or defense of any claims or liabilities arising as a result of any such breach or default, (ii) any legal action commenced to challenge the validity or enforceability of this Agreement or any other agreement referred to therein and (iii) enforcing or defending (or determining whether or how to enforce or defend) the provisions of this Agreement.
- (c) Each Guarantor acknowledges and agrees that such Guarantor's liability is joint and several with the other Guarantors and any other person(s) who may guarantee the obligations and Indebtedness under and in respect of the Facility and this Agreement.
- (d) The obligations of each Guarantor shall be primary, absolute, irrevocable and unconditional, irrespective of the validity or enforceability of the Financing Documents or any other document referred to therein, shall not be subject to any counterclaim, setoff, deduction or defense based upon any claim such Guarantor may have against the Company or the Lender or otherwise, and shall remain in full force and effect without regard to, and shall not be released, discharged or in any way affected by, any circumstance or condition whatsoever (whether or not such Guarantor shall have any knowledge or notice), including, without limitation: (i) any amendment to, modification of, supplement to or restatement of the Financing Documents or any other document referred to therein (it being agreed that the obligations of each Guarantor shall apply to the Financing Documents or any other document as so amended, modified, supplemented or restated) or any assignment or transfer of any interest, or any furnishing, acceptance or release of any security for the Facility or the addition, substitution or release of any other Guarantor or any other entity or other person primarily or secondarily liable in respect of the Guaranteed Obligations; (ii) any waiver, consent, extension, indulgence or other action or inaction under or in respect of the Financing Documents or any other document referred to therein; (iii) any bankruptcy, insolvency, arrangement, reorganization, readjustment, composition, liquidation or similar proceeding with respect to the Company or its property; (iv) any merger, amalgamation or consolidation of any Guarantor or of the Company into or with any other person or any sale, lease or transfer of any or all of the assets of any Guarantor or of the Company to any person; (v) any failure on the part of the Company for any reason to comply with or perform any of the terms of any other agreement with any Guarantor; (vi) any failure on the part of the Lender to obtain, maintain, register or otherwise perfect any security; or (vii) any other event or circumstance which might otherwise constitute a legal or equitable discharge or defense of a guarantor (whether or not similar to the foregoing), and in any event however material or prejudicial it may be to any Guarantor or to any subrogation, contribution or reimbursement rights any

Guarantor may otherwise have. Each Guarantor covenants that its obligations under this Agreement will not be discharged except by payment in full in cash of all of the Guaranteed Obligations and all other obligations.

11.2 Waiver of defenses

Each Guarantor unconditionally waives to the fullest extent permitted by law, (a) notice of acceptance hereof, of any action taken or omitted in reliance hereon and of any default by the Company in the payment of any amounts due under the Financing Documents or any other document referred to therein, and of any of the matters referred to in this Clause 11 (*Guaranty*), (b) all notices which may be required by statute, rule of law or otherwise to preserve any of the rights of the Lender against such Guarantor, including, without limitation, presentment to or demand for payment from the Company or any Guarantor with respect to any Loan, notice to the Company or to any Guarantor of default or protest for nonpayment or dishonor and the filing of claims with a court in the event of the bankruptcy of the Company, (c) any right to require the Lender to enforce, assert or exercise any right, power or remedy including, without limitation, any right, power or remedy conferred in the this Agreement or other Financing Document, (d) any requirement for diligence on the part of the Lender and (e) any other act or omission or thing or delay in doing any other act or thing which might in any manner or to any extent vary the risk of such Guarantor or otherwise operate as a discharge of such Guarantor or in any manner lessen the obligations of such Guarantor.

11.3 Obligations unimpaired

Each Guarantor authorizes the Lender, without notice or demand to such Guarantor or any other Guarantor and without affecting its obligations, from time to time: (a) to renew, compromise, extend, accelerate or otherwise change the time for payment of, all or any part of Financing Documents or any other agreement referred to therein; (b) to change any of the representations, covenants, events of default or any other terms or conditions of or pertaining to the Financing Documents or any other agreement referred to therein, including, without limitation, decreases or increases in amounts of principal, rates of interest, or any other obligation; (c) to take and hold security for the payment of the Financing Documents or any other agreement referred to therein, for the performance of this guaranty or otherwise for the Indebtedness guaranteed under this Agreement and to exchange, enforce, waive, subordinate and release any such security; (d) to apply any such security and to direct the order or manner of sale as the Lender in its sole discretion may determine; (e) to obtain additional or substitute endorsers or guarantors or release any other Guarantor or any other person or entity primarily or secondarily liable in respect of the Guaranteed Obligations; (f) to exercise or refrain from exercising any rights against the Company, any Guarantor or any other person; and (g) to apply any sums, by whomsoever paid or however realized, to the payment of the Guaranteed Obligations and all other obligations owed under this Agreement. The Lender shall have no obligation to proceed against any additional or substitute endorsers or guarantors or to pursue or exhaust any security provided by the Company, such Guarantor or any other Guarantor or any other person or to pursue any other remedy available to the Lender.

If an event permitting the acceleration of the maturity of the principal amount of any Loan shall exist and such acceleration shall at such time be prevented or the right of the Lender to receive

any payment on account of the Guaranteed Obligations shall at such time be delayed or otherwise affected by reason of the pendency against the Company, any Guarantor or any other guarantors of a case or proceeding under a bankruptcy or insolvency law, such Guarantor agrees that, for purposes of this guaranty and its obligations, the maturity of such principal amount shall be deemed to have been accelerated with the same effect as if the Lender had accelerated the same in accordance with the terms of this Agreement, and such Guarantor shall forthwith pay such accelerated Guaranteed Obligations.

11.4 Subrogation and Subordination

- (a) Each Guarantor will not exercise any rights which it may have acquired by way of subrogation under this Clause 11 (*Guaranty*), by any payment made or otherwise, or accept any payment on account of such subrogation rights, or any rights of reimbursement, contribution or indemnity or any rights or recourse to any security for the Loans or this guaranty unless and until all of the Guaranteed Obligations shall have been indefeasibly paid in full in cash.
- (b) Each Guarantor subordinates the payment of all Indebtedness and other obligations of the Company or any other guarantor of the Guaranteed Obligations owing to such Guarantor, whether now existing or hereafter arising, including, without limitation, all rights and claims described in paragraph (a) of this Clause 11.4 (*Subrogation and Subordination*), to the indefeasible payment in full in cash of all of the Guaranteed Obligations. If the Lender so requests, any such Indebtedness or other obligations shall be enforced and performance received by such Guarantor as trustee for the Lender and the proceeds shall be paid over to the Lender promptly, in the form received (together with any necessary endorsements) to be applied to the Guaranteed Obligations, whether matured or unmatured, as may be directed by the Lender, but without reducing or affecting in any manner the liability of any Guarantor under this guaranty.
- (c) If any amount or other payment is made to or accepted by any Guarantor in violation of any of the preceding paragraphs (a) and (b) of this Clause 11.4 (*Subrogation and Subordination*), such amount shall be deemed to have been paid to such Guarantor for the benefit of, and held in trust for the benefit of, the Lender and shall be paid over to the Lender promptly, in the form received (together with any necessary endorsements) to be applied to the Guaranteed Obligations, whether matured or unmatured, as may be directed by the Lender, but without reducing or affecting in any manner the liability of such Guarantor under this Agreement.
- (d) Each Guarantor acknowledges that it will receive direct and indirect benefits from the financing arrangements contemplated by the Financing Documents and that its agreements set forth herein are knowingly made in contemplation of such benefits.

11.5 Reinstatement of Guaranty

This guaranty shall continue to be effective, or be reinstated, as the case may be, if and to the extent at any time payment, in whole or in part, of any of the sums due to the Lender on account of the Guaranteed Obligations is rescinded or must otherwise be restored or returned by the

Lender upon the insolvency, bankruptcy, dissolution, liquidation or reorganization of the Company or any other guarantors, or upon or as a result of the appointment of a custodian, receiver, trustee or other officer with similar powers with respect to the Company or any other guarantors or any part of its or their property, or otherwise, all as though such payments had not been made.

11.6 Rank of Guaranty

Each Guarantor will ensure that its payment obligations under this Clause 11 will at all times rank at least *pari passu*, without preference or priority, with all other unsecured and unsubordinated Indebtedness of such Guarantor now or hereafter existing.

11.7 Accession of New Subsidiaries

The parties hereto acknowledge that to the extent that any Obligor acquires or creates any new Subsidiary (the “**New Subsidiary**”) that (a) it shall be a condition to the acquisition, or incorporation of such New Subsidiary, that the relevant New Subsidiary accedes to this Agreement in capacity as Guarantor by execution of a deed of accession substantially in the form set out as Schedule 3 (*Deed of Accession*) hereto and, of so requested by the Lender, provides a copy of board and/or shareholder resolutions approving the grant of the relevant guarantee as being for the corporate benefit of the New Subsidiary, (b) if so requested by the Lender, all assets owned by the New Subsidiary and the shares of the New Subsidiary shall be charged by way of a first ranking, legal, valid and binding security in favor of the Lender, and (c) if so requested by the Lender, the Obligors shall procure delivery to the Lender of a capacity legal opinion (in form and substance and from a counsel satisfactory to the Lender) in respect of the laws of the jurisdiction of domicile of the New Subsidiary regarding its entry into the documents described in (a) and (b), and (d) an enforceability opinion from relevant counsel in respect of the documents described in (a) and (b).

12 CHANGES TO THE PARTIES

12.1 Assignments by the Lender

Subject to this Clause 12 (*Changes to the Parties*), the Lender (the “**Existing Lender**”) may assign to one or more assignees all or a portion of its rights and obligations under this Agreement to any person, including Anglo American plc or any of its Anglo Subsidiaries or any of its affiliates (the “**New Lender**”).

12.2 Conditions of assignment

- (a) The consent of the Company is only required for an assignment which:
 - (i) is to a New Lender other than Anglo American plc or any of its Anglo Subsidiaries or any of its affiliates; or
 - (ii) is determined by the Existing Lender in its reasonable discretion to result in adverse cost consequences for the Company as a result of the identity or circumstances of the New Lender.

- (b) Where required, the consent of the Company to an assignment must not be unreasonably withheld or delayed. The Company will be deemed to have given its consent five Business Days after the Existing Lender has requested it, unless consent is expressly refused by the Company within that time.

12.3 Procedure for assignment

- (a) An assignment may be effected in accordance with paragraph (b) below when the New Lender and the Existing Lender execute a duly completed assignment agreement, in a form proposed by the Existing Lender, acting reasonably.
- (b) On the Transfer Date:
 - a. the Existing Lender will assign absolutely to the New Lender the rights under this Agreement expressed to be the subject of the assignment in the assignment agreement;
 - b. the Existing Lender will be released by each Obligor from the obligations owed by it (the “**Relevant Obligations**”) and expressed to be the subject of the release in the assignment agreement; and
 - c. the New Lender shall become a party as a “Lender” and will be bound by obligations equivalent to the Relevant Obligations.

12.4 Assignments by the Obligors

An Obligor may not assign any of its rights or obligations under this Agreement.

13 PAYMENTS

13.1 No set-off

All payments to be made by an Obligor under this Agreement shall be made in full, without any set-off or counterclaim whatsoever and free and clear of any deductions or withholdings, except deductions or withholdings an Obligor is required by law to make from any amounts due under this Agreement for or on account of any tax, duty, levy or charge (a “**Deduction**”).

13.2 Deductions

Each Obligor shall:

- (a) promptly when due pay to the appropriate taxing authority the amount of any Deduction on behalf of the Lender; and
- (b) provide the Lender with copies of all certificates, receipts and other documents in its possession or control relating to the Deduction.

13.3 Gross-up

If an Obligor is required to make a Deduction from a payment to the Lender in accordance with

Clause 13.1 (*No set-off*) then such payment shall be increased to the extent necessary to ensure that, after the making of such Deduction, the Lender receives and retains (free from any liability in respect of any such Deduction) a net sum equal to the sum which it would have received and so retained had no such Deduction been made or required to be made.

13.4 U.S. Withholding Form

The Lender (a) shall provide to the Company a properly completed and duly executed Internal Revenue Service Form W-8BEN-E (“**U.S. Withholding Form**”) reflecting its exemption from (i) U.S. federal withholding tax under the "dividends" article of the income tax treaty applicable between the United Kingdom and the United States and under the “interest” article of such treaty and (ii) FATCA Withholding; and (b) agrees to update as soon as reasonably practicable such U.S. Withholding Form for any change in circumstances that the Lender determines causes such U.S. Withholding Form to be invalid, incorrect or obsolete.

13.5 Immediately available funds

Payment shall be made in immediately available, freely transferable, cleared funds on the due date to such account of the Lender as it may from time to time notify to the Obligors.

14 NOTICES

14.1 Notices in writing

Every notice or other communication under this Agreement (including requests for any consent of Lender required under this Agreement) shall be in writing and may be delivered personally or by letter or email despatched as follows:

- (a) in the case of the Lender, the Lender contact details for notices, as specified in the Formal Instrument of Agreement;
- (b) in the case of the Company, such Company contact details for notices, as specified in the Formal Instrument of Agreement;
- (c) in the case of an Obligor, such Obligor contact details for notices, as specified in the Formal Instrument of Agreement; or
- (d) (in any case) to such other address or email as may be notified in accordance with this Clause 14 (*Notices*) by the relevant party to the other party for such purpose.

14.2 Receipt of notices

Every notice or other communication shall, except as otherwise provided in this Agreement, be deemed to have been received as follows:

- (a) if sent by recorded priority delivery post, 72 hours after despatch;
- (b) if delivered personally, at the time of delivery if during normal business hours in the place of intended receipt on a Business Day in that place and otherwise at the opening

of business in that place on the next succeeding Business Day; and

- (c) if delivered by email, at the time of dispatch if during normal business hours in the place of intended receipt on a Business Day in that place and otherwise at the opening of business in that place on the next succeeding Business Day.

15 AMENDMENTS

Any provision of this Agreement may be amended or supplemented only if each of the Obligors and the Lender consent in writing, provided that any consent by the Lender must be in writing, may be given subject to any conditions which the Lender shall think fit and shall be effective only in the instance and for the purpose for which it is given.

16 LAW AND JURISDICTION

16.1 GOVERNING LAW

THIS AGREEMENT AND THE OTHER FINANCING DOCUMENTS (OTHER THAN AS EXPRESSLY SET FORTH IN OTHER FINANCING DOCUMENTS) SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK AND TO THE EXTENT APPLICABLE, THE BANKRUPTCY CODE.

16.2 Jurisdiction

Each Obligor irrevocably and unconditionally submits, for itself and its respective property, to the exclusive jurisdiction of the Bankruptcy Court and, if the Bankruptcy Court does not have, or abstains from jurisdiction, of any New York state or federal court located in the Borough of Manhattan in New York City or in any state or federal appellate court from any thereof, in any action or proceeding arising out of or relating to this Agreement or any other Financing Document or for recognition or enforcement of any judgment. Each Obligor irrevocably and unconditionally agrees, to the fullest extent permitted by applicable law, that all claims in respect of any such action or proceeding may be heard and determined in such New York state court or in such federal court, and it will not commence any action, litigation or proceeding of any kind or description, whether in law or equity, whether in contract or in tort or otherwise, against the Lender relating to this Agreement or any other Financing Document or the related transactions, in any forum other than the courts of the State of New York sitting in New York County, and of the United States District Court of the Southern District of New York, and any appellate court. Each of the parties hereto agrees that a final judgment in any such action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law. Nothing in this Agreement or in any other Financing Document shall affect any right that the Lender may otherwise have to bring any action or proceeding relating to this Agreement or any other Financing Document against the Obligors or the Obligors' respective properties in the courts of any jurisdiction.

16.3 Waiver of Venue

Each Obligor irrevocably and unconditionally waives, to the fullest extent permitted by

applicable law, any objection that it may now or hereafter have to the laying of venue of any action or proceeding arising out of or relating to this Agreement or any other Financing Document in any court referred to in this Clause 16 (Law and Jurisdiction). Each of the parties hereto irrevocably waives, to the fullest extent permitted by applicable law, the defense of an inconvenient forum to the maintenance of such action or proceeding in any such court.

16.4 Service of Process

Each party hereto irrevocably consents to service of process in the manner provided for notices in this Agreement. Each Obligor (other than FMH and Synchronous) irrevocably and unconditionally (i) agrees that service of all writs, process and summonses in any such suit, action or proceeding brought in the State of New York may be made upon FMH, presently located at 542 1st Avenue South, Suite 300, Seattle WA 98104, United States (the “**Process Agent**”) and each Obligor confirms and agrees that the process agent has been duly and irrevocably appointed as its respective agent to accept such service for the duration of this Agreement of any and all such writs, processes and summonses, and agrees that the failure of the process agent to give any notice of any such service of process to an Obligor shall not impair or affect the validity of such service or of any judgment based thereon. If the Process Agent shall cease to serve as agent for an Obligor to receive service of process, such Obligor shall promptly appoint a successor agent satisfactory to the Lender. The Obligors further consent to the service of process in any suit, action or proceeding by mailing the same by the Lender by registered or certified mail, postage prepaid, at its notice address set forth in this agreement, and (ii) agree that nothing herein shall affect the right to effect service of process in any other manner permitted by law, or shall limit the right to sue in any other jurisdiction.

16.5 WAIVER OF JURY TRIAL

EACH PARTY HERETO IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OTHER FINANCING DOCUMENT OR THE CONTEMPLATED TRANSACTIONS (WHETHER BASED ON CONTRACT, TORT OR ANY OTHER THEORY). EACH PARTY HERETO (A) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PERSON HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PERSON WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (B) ACKNOWLEDGES THAT IT AND THE OTHER PARTIES HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT AND THE OTHER FINANCING DOCUMENTS BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS CLAUSE 16.5 (WAIVER OF JURY TRIAL).

16.6 Exit Premium

Each party to this Agreement hereby expressly acknowledges and agrees, to the fullest extent it may lawfully do so, that (i) if the payment of the Loans is accelerated or the Loans otherwise become due and payable, in each case, including as a result of any Termination Date (including, but not limited to, upon the occurrence of a bankruptcy or insolvency event (including the

acceleration of claims by operation of law)), the Exit Premium with respect to the Loans will also be due and payable as though the Loans were otherwise redeemed or repaid or prepaid, and in all cases the Exit Premium shall constitute part of the Guarantee Obligations, in view of the impracticability and extreme difficulty of ascertaining actual damages and by mutual agreement of the parties as to a reasonable calculation of the Lender's lost profits as a result thereof, (ii) such Exit Premium (x) shall be presumed to be the liquidated damages sustained by the Lender as the result any redemption (including prior to the Final Maturity Date) and (y) is reasonable under the circumstances currently existing, (iii) such Exit Premium shall also be payable in the event that the Loans are satisfied or released by foreclosure (whether by power of judicial proceeding or otherwise), deed in lieu of foreclosure or by any other means, (iv) THE COMPANY EXPRESSLY WAIVES THE PROVISIONS OF ANY PRESENT OR FUTURE STATUTE OR LAW THAT PROHIBITS OR MAY PROHIBIT THE COLLECTION OF THE EXIT PREMIUM IN CONNECTION WITH ANY SUCH ACCELERATION INCLUDING WITH ANY VOLUNTARY OR INVOLUNTARY ACCELERATION PURSUANT TO ANY INSOLVENCY PROCEEDING PURSUANT TO ANY DEBTOR RELIEF LAW, (v) such Exit Premium is reasonable and is the product of an arm's-length transaction between sophisticated business people, ably represented by counsel, (vi) such Exit Premium shall be payable notwithstanding the then prevailing market rates at the time payment is made, (vii) there has been a course of conduct between the Lender and the Company giving specific consideration in this transaction for such agreement to pay such Exit Premium, (viii) the Company shall be estopped hereafter from claiming differently than as agreed to in this Clause 16.6 and otherwise in this Agreement and (ix) the Company's agreement to pay the Exit Premium to Lender as herein described is a material inducement to the Lender to make the Loans.

17 NO WAIVER

No failure to exercise, nor any delay in exercising, on the part of the Lender, any right or remedy under this Agreement shall operate as a waiver of such right or remedy, nor shall any single or partial exercise of any right or remedy prevent any further or other exercise of such right or remedy, or the exercise of any other right or remedy. The rights and remedies provided in the Agreement are cumulative and not exclusive of any rights or remedies provided by law.

18 PARTIAL INVALIDITY

If, at any time, any provision of this Agreement is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions hereof nor the legality, validity or enforceability of such provision under the law of any other jurisdiction shall in any way be affected or impaired.

19 COUNTERPARTS. ELECTRONIC EXECUTION

19.1 Counterparts.

This Agreement may be executed in counterparts (and by different parties hereto in different counterparts), each of which shall constitute an original, but all of which when taken together shall constitute a single contract. This Agreement and the other Financing Document constitute

the entire contract among the parties relating to the subject matter hereof and supersede any and all previous agreements and understandings, oral or written, relating to the subject matter hereof. Delivery of an executed counterpart of a signature page of this Agreement by facsimile or in electronic (e.g., “pdf” or “tif”) format shall be effective as delivery of a manually executed counterpart of this Agreement.

19.2 Electronic Execution.

The words “execution,” “signed,” “signature,” and words of like import in this Agreement and the other Financing Document shall be deemed to include electronic signatures or electronic records, each of which shall be of the same legal effect, validity or enforceability as a manually executed signature or the use of a paper-based recordkeeping system, as the case may be, to the extent and as provided for in any applicable law, including the Federal Electronic Signatures in Global and National Commerce Act, the New York State Electronic Signatures and Records Act, or any other similar state laws based on the Uniform Electronic Transactions Act.

Schedule 1

Form of Request

To: Anglo American International Holdings Limited

From: First Mode Holdings, Inc.

Date: [_____]

Senior Secured Superpriority Debtor-in-Possession Facility Agreement dated [_____] (as amended from time to time, the “Agreement”)

1 We refer to the Agreement. This is a Request under the Agreement.

2 We wish to borrow a Loan on the following terms:

Amount: []

Utilisation Date: []

Our payment instructions are: []

3 We confirm that:

3.1 each condition to utilisation under the Agreement which must be satisfied on the date of this Request is so satisfied;

3.2 the representations and warranties set out in Clause 8 (*Representations*) of the Agreement are correct in all material respects;

3.3 no Default is continuing or would result from the proposed Loan; and

3.4 the proposed Loan (together with all other Loans) does not exceed the Facility Amount.

This Request is irrevocable.

FIRST MODE HOLDINGS, INC.

By:

#99513594v24
#99513594v24
#99513594v24
#99513594v24
#99513594v24

Schedule 2

[Reserved]

Schedule 3

Deed of Accession

To: [*The Lender*]

From: [*New Subsidiary*]

Date: [_,____]

Accession Agreement

We refer to the Facility Agreement dated [_____,] between, among others, Anglo American International Holdings Limited as the Lender, First Mode Holdings, Inc. as the Company and Synchronous LLC as the Guarantor (the “**Facility Agreement**”). Terms defined in the Facility Agreement shall have the same meanings in this Accession Agreement as appropriate.

1. This Accession Agreement is delivered pursuant to Clause 11.7 (*Accession of New Subsidiaries*) of the Facility Agreement and we confirm that we are a New Subsidiary for the purposes of such clause.
2. We acknowledge and agree that upon and by reason of our delivering this Accession Agreement to the Lender we will become a Guarantor under the Facility Agreement and accordingly shall have liabilities and obligations identical to those expressed to be assumed by a Guarantor under the Facility Agreement and shall be entitled to the rights and benefits of a Guarantor under the Facility Agreement.
3. We make each of the representations and warranties set out in Clause 8.1 (*Representations*) of the Facility Agreement on the date of this Accession Agreement.
4. [If so requested by the Lender, we undertake that on the date of this Accession Agreement we shall enter into one or more Security Agreements as necessary so that all assets owned by us and all of our shares are charged by way of a first ranking, legal, valid and binding security in favour of the Lender.] [If so requested by the Lender, promptly after the date of this Accession Agreement, we shall deliver to the Lender the legal opinions mentioned in Clause 11.7 (*Accession of New Subsidiaries*) of the Facility Agreement.]
5. Our address for delivery of notices and communications pursuant to Clause 14.1(c) (*Notices in writing*) of the Facility Agreement is as follows:

[NEW SUBSIDIARY]

Address:

Email: _____

Attention: _____ Facsimile: _____

6. Clauses 16 (*Law and Jurisdiction*), 17 (*No Waiver*), 18 (*Partial Invalidity*) and 19 (*Counterparts. Electronic Execution*) of the Facility Agreement are incorporated by reference in this Accession Agreement as if fully set forth in this Accession Agreement, with each reference to “this Agreement” being deemed to be a reference to this Accession Agreement.

Yours truly,

[NEW SUBSIDIARY]

By: _____

Name: _____

Title: _____

Acknowledged:

[THE LENDER]