

DAVID L. NEALE (SBN 141225)
TODD M. ARNOLD (SBN 221868)
JOHN-PATRICK M. FRITZ (SBN 245240)
ROBERT M. CARRASCO (SBN 334642)
LEVENE, NEALE, BENDER, YOO & GOLUBCHIK L.L.P.
2818 La Cienega Avenue
Los Angeles, California 90034
Telephone: (310) 229-1234
Facsimile: (310) 229-1244
Email: dln@lnbyg.com ; jpf@lnbyg.com; rmc@lnbyg.com

Proposed Attorneys for Debtors and Debtors in Possession

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA, LOS ANGELES DIVISION**

In re: ☐ ITTELLA INTERNATIONAL LLC, a California limited liability company ☐ ITTELLA'S CHEF, LLC, a California limited liability company ☐ TATTOOED CHEF, INC., a Delaware corporation ☐ MYJOJO, INC., a Delaware corporation ☐ NEW MEXICO FOOD DISTRIBUTORS, INC., a New Mexico corporation ☐ KARSTEN TORTILLA FACTORY, LLC, a New Mexico limited liability company ☐ BCI ACQUISITION, INC., a Delaware corporation ☐ TTCF-NM HOLDINGS INC., a New Mexico corporation ☒ All Debtors	) Case No.: 2:23-bk-14154-SK)) Jointly administered with Case Nos. 2:23-bk-14161-WB; 2:23-bk-14159-SK; 2:23-bk-14157-BR; 2:23-bk-14156- NB; 2:23-bk-14158-DS; 2:23-bk-14155-NB; 2:23-bk-14160-BR) Chapter 11 Cases)) DEBTORS' EMERGENCY MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS (I) AUTHORIZING DEBTORS TO OBTAIN POSTPETITION FINANCING, (II) AUTHORIZING DEBTORS TO USE CASH COLLATERAL, (III) GRANTING LIENS AND PROVIDING SUPERPRIORITY ADMINISTRATIVE EXPENSE CLAIMS, (IV) GRANTING ADEQUATE PROTECTION, (V) MODIFYING AUTOMATIC STAY, (VI) SCHEDULING A FINAL HEARING, AND (VII) GRANTING RELATED RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES)) [Omnibus Declaration in Support Hereof Filed Concurrently Herewith])) Date:) Time: [TO BE SET]) Place:
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Debtors and
Debtors-in-Possession.

**TO THE OFFICE OF THE UNITED STATES TRUSTEE, ALL CREDITORS,
PARTIES REQUESTING SPECIAL NOTICE:**

Ittella International LLC (“Ittella”), Ittella’s Chef, LLC (“ICLLC”), Tattooed Chef, Inc. (“TCI”), Myjojo, Inc. (“Myjojo”), New Mexico Food Distributors, Inc. (“NMFD”), Karsten Tortilla Factory, LLC (“Karsten”), BCI Acquisition, Inc. (“BCI”), and TTCF-NM Holdings Inc. (“TTCF,” and, together with Ittella, ICLLC, TCI, Myjojo, NMFD, Karsten, and BCI, the “Debtors”), the Chapter 11 debtors and debtors in possession in the above-captioned Chapter 11 bankruptcy cases, hereby submit their *Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Authorizing Debtors to Use Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense Claims, (IV) Granting Adequate Protection, (V) Modifying Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief* (the “Motion”), pursuant to Local Bankruptcy Rules (“LBR”) 2081-1(a)(9), 4001-2, and 9075-1, Federal Rules of Bankruptcy Procedure (“FRBP”) 2002, 4001, 6004, and 9014, and sections 105, 361, 362, 363, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1), 364(e) and 507 of chapter 11 of title 11 of the United States Code §§ 101, *et seq.* (the “Bankruptcy Code”),¹ for the entry of an interim order, in substantially the form attached as **Exhibit 1** to the concurrently filed omnibus declaration of Edward Bidanset, the Debtors’ Chief Restructuring Officer (the “Bidanset Declaration”) in support of this Motion and other first day motions (the “Interim Order”), among other things²:

- i. authorizing the DIP Borrowers³ to obtain postpetition financing , and for TCI (the “DIP Guarantor” and, together with the DIP Borrowers, the “DIP Loan Parties”) to guarantee unconditionally on a joint and several basis, the DIP Borrowers’ obligations in connection with a superpriority senior secured credit facility (the “DIP Facility”) from

¹ Unless otherwise stated, all Section references herein are to the Bankruptcy Code.

² Unless defined in this section of the Motion, capitalized terms have the meanings subscribed to them in the Motion, below.

³ For purposes of this Motion, “DIP Borrowers” means Ittella, ICLLC, NMFD, Karsten, BCI and TTCF.

1 UMB Bank, N.A. ("Lender") consisting of (a) an aggregate principal amount of up to
2 \$3,000,000 in "new money" revolving loans (the "New Money DIP Loans"), and
3 (b) rolled-up loans under the Prepetition Credit Agreement, as further described in the
4 DIP Credit Agreement, held by the Lender, in an aggregate amount of \$3 million in
5 principal upon entry of the Interim Order (collectively, the "DIP Roll-Up Loans" and,
6 together with the New Money DIP Loans, the "DIP Loans"), in accordance with the
7 terms and conditions set forth in the DIP Credit Agreement, and all other terms and
8 conditions of the DIP Documents;

9 ii. authorizing the DIP Loan Parties to enter into that certain Senior Secured
10 Super-Priority Priming Debtor-In-Possession Loan and Security Agreement among the
11 DIP Loan Parties and Lender, a copy of which is attached as Exhibit 2 to the Bidanset
12 Declaration (as the same may be amended, restated, supplemented, waived, or otherwise
13 modified from time to time, the "DIP Credit Agreement" and, together with the Interim
14 Order, the final order with respect to the Motion (the "Final Order"), and all agreements,
15 documents, and instruments delivered or executed in connection therewith, and other
16 security documentation, collectively, the "DIP Documents"), and to perform such other
17 and further acts as may be required in connection with the DIP Documents;

18 iii. authorizing the Debtors to use the proceeds of the DIP Loans and the
19 Prepetition Collateral, including Cash Collateral, in accordance with the Approved DIP
20 Budget, subject to permitted variances set forth herein and in the DIP Credit Agreement,
21 to provide working capital for, and for other general corporate purposes of, the Debtors,
22 including for payment of any Adequate Protection Payments and reasonable and
23 documented transaction costs, fees, and expenses incurred in connection with any
24 transactions to be implemented through the Chapter 11 Cases subject to approval of any
25 such costs, fees, or expenses as may be required by the Bankruptcy Code;

26 iv. granting adequate protection to the Lender to the extent of any Diminution
27 in Value of its interests in the Prepetition Collateral as set forth in the DIP Orders;
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v. granting valid, enforceable, binding, non-avoidable, and fully perfected first priority priming (as applicable) liens on and senior security interests in substantially all of the property, assets, and other interests in property and assets of the DIP Loan Parties, whether such property is presently owned or after-acquired, and each DIP Loan Party's estate as created by section 541 of the Bankruptcy Code, of any kind or nature whatsoever, real or personal, tangible, intangible, or mixed, now existing or hereafter acquired or created, whether existing before or arising after the Petition Date, subject only to the (a) Carve-Out, (b) certain liens permitted pursuant to the terms of the DIP Credit Agreement, and (c) other valid, perfected, and unavoidable liens, including, without limitation, statutory liens, if any, existing as of the Petition Date (or perfected after the Petition Date to the extent permitted by section 546(b) of the Bankruptcy Code) (the "Permitted Prior Liens"), in each case, that are senior in priority to the Prepetition Lender Liens, on the terms and conditions set forth herein and in the DIP Documents;

vi. granting superpriority administrative expense claims against each of the Debtors' estates to the Lender with respect to the DIP Obligations over any and all administrative expenses of any kind or nature subject and subordinate only to the payment of the Carve-Out on the terms and conditions set forth herein and in the DIP Documents;

vii. subject to and upon entry of the Final Order and to the extent set forth herein and therein, waiving the Debtors' and the estates' right to surcharge against the Prepetition Collateral pursuant to section 506(c) of the Bankruptcy Code;

viii. subject to and upon entry of the Final Order and to the extent set forth herein, for the "equities of the case" exception under section 552(b) of the Bankruptcy Code to not apply to the Prepetition Lender Liens with respect to the proceeds, products, offspring, or profits of any of the Prepetition Collateral or the DIP Collateral, as applicable;

ix. pursuant to Bankruptcy Rule 4001 and LBR 2081-1(a)(9), 4001-2, and 9075-1, holding an interim hearing on an emergency basis (the "Interim Hearing") on the

1 Motion to consider entry of the Interim Order, among other things, (a) authorizing the
2 DIP Loan Parties to, on an interim basis, borrow from the Lender a principal amount of
3 up to \$3,000,000 in New Money DIP Loans, (b) authorizing the incurrence of \$3,000,000
4 of DIP Roll-Up Loans, (c) authorizing the Debtors' use of Prepetition Collateral
5 (including Cash Collateral), (d) granting the adequate protection described in the Interim
6 Order, and (e) authorizing the DIP Loan Parties to execute and deliver the DIP
7 Documents to which they are a party and to perform their respective obligations
8 thereunder and such other and further acts as may be necessary or appropriate in
9 connection therewith;

10 x. scheduling a final hearing (the "Final Hearing") to consider the relief
11 requested in the Motion and the entry of the Final Order, and approving the form of
12 notice with respect to the Final Hearing;

13 xi. waiving any applicable stay, including under FRBP 4001(b) and (c) and
14 providing for the immediate effectiveness of the Interim Order; and

15 xii. granting related relief.

16 As required by LBR 4001-2, concurrently herewith, the Debtors filed a *Statement*
17 *Regarding Cash Collateral Or Debtor In Possession Financing [FRBP 4001; LBR 4001-2]*.

18 Absent granting of the relief sought by this Motion, the Debtors' businesses and estates
19 will suffer immediate and irreparable harm, including, without limitation, the risk of facing
20 immediate cessation of the Debtors' business operations, which, in turn, would greatly reduce the
21 value of the Debtors' assets and thereby reduce, and likely greatly reduce, any potential recovery
22 by secured and unsecured creditors in these cases. The Debtors' ability to maintain business
23 relationships with their vendors, suppliers and customers, and otherwise finance their operations
24 post-petition is essential to maintaining the going-concern value of the Debtors' business and
25 preserving the value of the Debtors' assets and the collateral of the Lender and other secured
26 creditors. The use of Cash Collateral and the DIP Facility contemplated by this Motion are key to
27 the Debtors' path forward. The Debtors urgently require access to the Cash Collateral and the
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1 infusion of new money in order to make the payments authorized by the other first-day orders,
2 conduct a meaningful sale process, and fund their operations worldwide.

3 Using the Cash Collateral and securing additional liquidity by way of the DIP Loans are
4 vital to the preservation of the value of the Debtors' estates as the Debtors pursue an orderly
5 process to support the sale efforts that the Debtors are continuing while in these bankruptcy cases.
6 Substantially all of the cash the Debtors have on hand is the Cash Collateral of the Lender, which
7 the Debtors could not access, absent the Lender's consent, or authorization from this Court. In
8 any event, given the Debtors' current liquidity position, their cash balance is insufficient to fund
9 their businesses for the anticipated duration of these cases. The Debtors' continued use of Cash
10 Collateral and the DIP Loans are essential components of the Debtors' chapter 11 strategy.

11 **WHEREFORE**, the Debtors respectfully request that the Court set a hearing on the
12 Motion on an emergency basis and (i) grant the relief requested in the Motion on an interim basis;
13 (ii) enter an Interim Order in substantially the form attached as **Exhibit 1** to the Bidanset
14 Declaration; (iii) schedule a Final Hearing on the Motion to consider entry of a Final Order
15 granting the relief requested in the Motion on a final basis; and (iv) grant such other and further
16 relief as may be just and proper under the circumstances.

17 Dated: June 2, 2023

LEVENE, NEALE, BENDER, YOO
& GOLUBCHIK L.L.P.

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19 By: /s/ David L. Neale
20 DAVID L. NEALE
21 Proposed Attorneys for Debtors and
22 Debtors in Possession
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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

A. Background

1. The Debtors each filed a voluntary petition under Chapter 11 of the Bankruptcy Code on July 2, 2023 (the “Petition Date”). The Debtors continue to operate their businesses, manage their financial affairs, and operate their bankruptcy estates as debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

2. TCI is a publicly held company (NASDAQ: TTCF) offering a broad portfolio of innovative plant-based frozen foods through the other Debtors, all of which are direct or indirect subsidiaries of TCI. Beginning in 2017, the Debtors have supplied plant-based products to leading retailers in the United States, with signature products such as ready-to-cook bowls, zucchini spirals, riced cauliflower, acai and smoothie bowls, cauliflower crust pizza, wood fire crusted pizza, handheld burritos, bars and quesadillas. The Debtors’ products are available in all 50 states both in private label and through their “Tattooed Chef™” brand mainly in the frozen food section of retail food stores.

3. The Debtors believe their innovative food offerings converge with consumer trends and demands for great-tasting, wholesome, plant-based foods made from sustainably sourced ingredients, including preferences for flexitarian, vegetarian, vegan, organic, and gluten-free lifestyles. As of December 31, 2022, the Debtors’ products were sold in approximately 21,000 retail outlets in the United States. The Debtors’ brand strategy has been to introduce the attributes of a plant-based lifestyle to build a connection with a broad array of consumers that are seeking delicious, sustainably sourced, plant-based foods. The diverse offering of plant-based meals produced by the Debtors includes certified organic, non-GMO, certified Kosher, gluten-free, as well as plant protein elements that the Debtors believe provide health-conscious consumers an affordable, great tasting, clean label food option. As of December 31, 2022, the Debtors had 132 SKUs and over 175 plant-based food concepts and recipes under development and testing

1 4. The Debtors are led by their President and CEO, Salvatore “Sam” Galletti, who
2 has over 35 years of experience in the food industry as both a manager and an investor, and Sarah
3 Galletti, the Chief Creative Officer and the creator of the Tattooed Chef brand. The brand’s
4 tagline, “Serving Plant-Based Foods to People Who Give a Crop,” aims to convey the brand’s
5 mission to deliver plant-based foods to consumers who care about sustainable and ethically
6 sourced foods.

7 5. The Debtors, through their affiliate Ittella Italy SRL (“Ittella Italy”),⁴ operate a
8 100,000 square foot processing facility in Prossedi, Italy located in close proximity to many of the
9 growers that are the Debtors’ primary suppliers of produce. This facility opened in 2017 and
10 manufactures various products, including riced cauliflower (plain and value-added), diced
11 squash/zucchini, and vegetable spirals. Due to the location of the facility, the Debtors are able to
12 transport raw materials to the facility, process them, and manufacture products within a relatively
13 short time. Prior to each growing season, the Debtors obtain written commitments as to quantity
14 and price from various growers, who commit to supply the projected needs, which commitments
15 are then followed by written purchase orders closer to the start of the harvest season. When
16 necessary (whether as a result of greater than anticipated demand from customers, or poor crop
17 yields due to inclement weather, infestation and the like), the Debtors have been able to obtain
18 alternative raw material supply from other sources or on the spot market on satisfactory terms.
19 The Prossedi plant was originally leased from a third party. In April 2021, the Debtors spent
20 approximately \$4.9 million to acquire this facility and its machinery to secure and upgrade the
21 frozen food manufacture capabilities. During the past two years, the Debtors improved their
22 internal cold storage capabilities to better manage inventory and to capitalize on seasonal
23 purchases of raw materials during peak harvest season.

24 6. In May 2021, TCI acquired NMFD and Karsten for a total purchase price of
25 approximately \$34.1 million, and, on December 21, 2021, through BCI, acquired substantially all
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27 ⁴ Concurrently with the commencement of these bankruptcy cases, the Debtors’ Italian affiliate
28 has commenced a restructuring process under Italian law.

1 of the assets and assumed certain liabilities from Belmont Confections, Inc. (located in Ohio) for
2 a total purchase price of \$16.7 million. In August 2022, TCI, through TTCF, entered into an
3 equipment purchase agreement with Desert Premium Group, LLC pursuant to which the Debtors
4 acquired certain manufacturing, production, and storage assets, organized workforce, as well as
5 assumed a lease for an 80,000 square foot manufacturing facility located in Albuquerque, New
6 Mexico, for a purchase price of approximately \$10.4 million.⁵

7 7. The Debtors currently lease processing facilities in Paramount, California,
8 Albuquerque, New Mexico, and Youngstown, Ohio, a storage facility in Vernon, California,
9 approximately 270,000 square feet of cold storage facility in Ceccano, Italy and have a small
10 office suite lease in San Pedro, California. The Paramount facility also serves as the Debtors'
11 headquarters.

12 8. As of December 31, 2022, the Debtors had approximately 800 full-time employees
13 in the United States and 140 full-time employees in Italy. None of the Debtors' employees are
14 represented by a labor union; they are either employed directly through the Debtors or through a
15 staffing agency.

16 9. The Debtors own domestic copyrights and domestic and foreign trademarks,
17 trademark applications, registrations, and other proprietary rights that are important to their
18 business. The Debtors' primary trademarks include the Tattooed Chef® and People Who Give a
19 Crop™. In addition, the Debtors own the domain names: www.ittellafoods.com and
20 www.tattooedchef.com.

21 10. When the Debtors went public in 2020, the brand had household awareness of
22 under 6%, were available in only 4 major retailers nationwide, and were in less than 4,000 stores.
23 Since then, brand awareness has grown to over 26% of households, and the Debtors' products are
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26 ⁵ TCI acquired all of the equity of Myjojo pursuant to an Agreement and Plan of Merger, dated
27 June 11, 2020, as amended on August 10, 2020. Myjojo has no operations, and its only asset is
28 the membership interest in Ittella. In turn, Ittella owns the membership interest in ITLLC, a
California limited liability company, which owns equity interests in Ittella Italy.

1 carried by over 40 retailers in over 23,000 retail stores. The Debtors invested over \$100 million
2 on marketing and in-store promotions to achieve this growth within such a short time period.

3 11. After the corporate acquisitions described above and the substantial outlay of funds
4 to develop the market for the Debtors' products, the Debtors found themselves short on cash. In
5 August 2022, the Debtors engaged a financial advisor to pursue new financing through a "PIPE"⁶
6 transaction whereby an institutional or accredited investor would acquire shares in TCI at a below
7 market price, or through other financing methods that might be available to the Debtors. In
8 October, the Debtors' auditors advised the Debtors that certain adjustments and restatements to
9 their financial statements were required, which affected the Debtors' financial statements for the
10 preceding six financial quarters.

11 12. Over the next 8 months, the Debtors diligently explored alternative financing and
12 funding solutions. However, due to the Debtors' restated financial statements, changes in the
13 capital markets, and the general economic conditions affecting the Debtors' market segment, the
14 Debtors were unable to obtain any new financing. Although the Debtors experienced revenue
15 growth from \$147 million in 2020 to \$230 million in 2022, TCI's share price declined
16 dramatically, particularly over the first quarter of 2023. During this time period, the Debtors'
17 liquidity became constrained and the Debtors fell behind on payments to suppliers and other
18 parties necessary to the continued operation and profitability of their business.

19 13. Although the Debtors have done everything possible to reduce operating expenses
20 over the last 9 months, such reduction in expenses has not resulted in sufficient savings to
21 preserve the Debtors' ability to timely pay its obligations and satisfy customer demand. In
22 addition, the costs of compliance with public company reporting and other requirements have
23 been substantial. As a result of the Debtors' inability to obtain new financing and materially
24 reduce operating and other expenses, the Debtors ultimately decided to commence these
25 bankruptcy cases in order to expeditiously pursue a sale of some or all of their assets.

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28 ⁶ Private investment in public equity.

14. As of the date of this Motion, no official committee(s) of unsecured creditors (a “Committee”) has/have been appointed in these cases.

B. Prepetition Borrowing and Proposed DIP Loan

15. Prior to the Petition Date, the Debtors entered into that certain *Amended and Restated Loan and Security Agreement dated as of June 30, 2022* (“Original Loan Agreement”), as subsequently amended by that certain *Joinder and First Amendment to Amended and Restated Loan and Security Agreement dated as of August 5, 2022* (“First Amendment”) and that certain *Second Amendment to Amended and Restated Loan and Security Agreement dated as of June 17, 2023* (“Second Amendment” and, together with the Original Loan Agreement and First Amendment, the “Prepetition Credit Agreement”), pursuant to which Ittella, as borrower, and ICLLC, NMFD, Karsten and BCI as guarantors⁷, obtained a revolving credit facility subject to the credit limit of \$25 million.⁸

16. The repayment of the Prepetition Credit Parties’ obligations under the Prepetition Credit Agreement was secured by a duly-perfected security interest in and lien upon (the “Prepetition Lender Liens”) substantially all of the Debtors’ assets, of any kind or nature whatsoever, real or personal, tangible, intangible, or mixed, whether presently owned or subsequently acquired, including, without limitation, (1) all accounts, (2) all inventory, (3) all equipment and fixtures, (4) all contract rights, (5) all farm products, (6) all general intangibles, including without limitation payment intangibles and software, (7) all Intellectual Property (as defined in the Prepetition Credit Agreement), (8) all securities accounts, deposit accounts, cash, money, drafts, certificates of deposit, and general and special deposits, (9) all investment property and financial assets (other than margin stock within the meaning of Regulation U of the Board of Governors of the Federal Reserve System), (10) all instruments, (11) all chattel paper, including without limitation, electronic chattel paper, (12) all goods and all accessions thereto, (13) all

⁷ Ittella, ICLLC, NMFD, Karsten and BCI are collectively referred to herein as the “Prepetition Credit Parties.”

⁸ The revolving credit limit was \$25 million, increased to \$40 million pursuant to the First Amendment, and then reduced to \$25 million pursuant to the Second Amendment.

1 healthcare-insurance receivables, (14) all leases, (15) all reporting obligations, (16) all documents,
2 (17) all letter of credit rights, (18) all insurance and certificates of insurance pertaining to any and
3 all items of collateral, (19) all books and records, (20) all files, correspondence, computer
4 programs, tapes, disks and related data processing software and other media which contain
5 information identifying or pertaining to any of the collateral or any account debtor or showing the
6 amounts thereof or payments thereon or otherwise necessary or helpful in the realization thereon
7 or the collection thereof, (21) all cash deposited with any affiliate of Lender, (22) all commercial
8 tort claims, including, without limitation, those described on Schedule 1.1 to the Prepetition
9 Credit Agreement, if any, and (23) any and all products and cash and non-cash proceeds of the
10 foregoing (including, but not limited to, any claims to any items referred to in this definition and
11 any claims against third parties for loss of, damage to or destruction of any or all of the collateral
12 or for proceeds payable under or unearned premiums with respect to policies of insurance) in
13 whatever form (the “Prepetition Collateral”); provided, however, that Prepetition Collateral does
14 not include the Excluded Property (as defined in the Prepetition Credit Agreement) and provided,
15 further, that Lender’s security interest in Equity Interests (as defined in the Prepetition Credit
16 Agreement) of any Foreign Subsidiary (as defined in the Prepetition Credit Agreement) will not
17 exceed 65% of the Equity Interests of such Foreign Subsidiary if such Foreign Subsidiary acting
18 as a Guarantor would cause a Deemed Dividend Problem (as defined in the Prepetition Credit
19 Agreement). Any and all of the Debtors’ cash, including the Debtors’ cash and other amounts on
20 deposit or maintained in any account or accounts by the Debtors, and any amounts generated by
21 the collection of accounts receivable or other disposition of the Prepetition Collateral existing as
22 of the Petition Date, and the proceeds of any of the foregoing is the Lender’s cash collateral
23 within the meaning of Bankruptcy Code section 363(a) (the “Cash Collateral”).

24 17. As of the Petition Date, the amount of Lender’s claim is (a) \$18,180,313.49 in
25 principal, and (b) \$44,284.50 in accrued interest, plus (c) approximately \$50,000 in reimbursable
26 attorneys’ fees, plus (d) \$558,120 in contingent letter of credit reimbursement expenses, plus (d)
27 other fees, costs, indemnities (the “Prepetition Lender Claim”). Lender is entitled to default
28 interest, fees and expenses (including reimbursement of its reasonably, documented, out-of-

pocket attorneys' fees) after the Petition Date pursuant to section 506(b) of the Bankruptcy Code (the "Postpetition Expenses," together with the Prepetition Lender Claim, collectively, the "Lender Allowed Claim").

18. Interest on the principal balance advanced by Lender under the Prepetition Facility is computed on the basis of the Daily Adjusting Term SOFR Rate in effect from time to time plus 3% per annum. The default rate of interest on the unpaid balance of the Prepetition Lender Claim is an additional 2% per annum. Prior to the Petition Date, the Lender was in an overadvance position. Notwithstanding the overadvance, the Lender made a discretionary advance in the amount of \$435,000 on June 30, 2023, pursuant to the Prepetition Credit Agreement to ensure that the Debtors had adequate liquidity to make critical payments, including, without limitation the payment of employee wages.

19. The Debtors have an immediate need to obtain the DIP Facility and to use Cash Collateral (solely to the extent consistent with the Approved DIP Budget, subject to permitted variances as set forth in the Interim Order and the DIP Documents) to, among other things, (a) permit the orderly sale of their business; (b) pay certain Adequate Protection Payments; and (c) pay the costs of administration of their estates and satisfy other working capital and general corporate purposes of the Debtors. The ability of the Debtors to obtain sufficient working capital and liquidity through the incurrence of the new indebtedness for borrowed money and other financial accommodations is vital to the preservation and maintenance of the Debtors' assets. The Debtors will not have sufficient sources of working capital and financing to operate their business throughout the Chapter 11 cases without access to the DIP Facility and authorized use of Cash Collateral.

20. The DIP Facility has been negotiated in good faith and at arm's length among the Debtors and the Lender.

C. Summary of Terms of Proposed DIP Loan

21. The DIP Loans consist of (a) an aggregate principal amount of up to \$3,000,000 in New Money DIP Loans, and (b) DIP Roll-Up Loans, as further described in the DIP Credit Agreement, held by the Lender, in an aggregate amount of \$3,000,000 in principal upon entry of

1 the Interim Order, in accordance with the terms and conditions set forth in the DIP Credit
2 Agreement, and all other terms and conditions of the DIP Documents.

3 22. The DIP Facility allows the Debtors to access up to \$3,000,000 million
4 immediately upon entry of the Interim Order, which will be used to facilitate their operations and
5 pay the amounts authorized by the first-day orders and administrative costs of this case, all in
6 accordance with a budget that the Debtors prepared, and the Lender has approved (subject to
7 permitted variances) (the “Approved DIP Budget”). The interest rates and fees associated with the
8 DIP Facility are described below, as well as in the DIP Credit Agreement.

9 23. In accordance with the terms of the Interim Order and the DIP Documents,
10 proceeds of the DIP Loans shall be used solely for the purposes permitted under the DIP
11 Documents and the Interim Order, and in accordance with the Approved DIP Budget, subject to
12 permitted variances as set forth in the Interim Order and the DIP Documents. Attached as
13 **Exhibit 3** to the Bidanset Declaration and incorporated herein by reference is a budget prepared
14 by the Debtors and approved by the Lender (the “Initial DIP Budget”).

15 24. As security for the DIP Obligations, effective and perfected upon the date of the
16 Interim Order, and without the necessity of the execution, recordation of filings by the Debtors of
17 mortgages, security agreements, control agreements, pledge agreements, financing statements, or
18 other similar documents, or the possession or control by the Lender, or over, any DIP Collateral,
19 the following DIP Liens are hereby granted by the DIP Loan Parties to the Lender:

- 20 a. all assets and properties of each of the DIP Loan Parties and their estates, of
21 any kind or nature whatsoever, whether tangible or intangible, real, personal or
22 mixed, whether now owned or consigned by or to, or leased from or to, or
23 hereafter acquired by, or arising in favor of, any of the DIP Loan Parties
24 (including under any trade names, styles or derivations thereof), whether
25 before or after the Petition Date, and wherever located, including, without
26 limitation, (i) all of the DIP Loan Parties’ rights, title and interests in all
27 “Collateral” (as defined in the DIP Credit Agreement) and Prepetition
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Collateral (including Cash Collateral) to the extent such assets or properties are assets or property, as applicable, of the Debtors under applicable law;

- b. all money, cash and cash equivalents, all funds in any deposit accounts, securities accounts, commodities accounts or other accounts (together with and all money, cash and cash equivalents, instruments and other property deposited therein or credited thereto from time to time), all accounts receivable and other receivables (including those generated by intercompany transactions), all rights to payment, contracts and contract rights, all instruments, documents and chattel paper, all securities (whether or not marketable), all goods, furniture, machinery, plants, equipment, vehicles, inventory and fixtures, all real property interests, all interests in leaseholds, purchase options (including all leasehold interests, purchase options and other interests in certain real property located in the City of Albuquerque, Bernalillo County, New Mexico), all franchise rights, all patents, tradenames, trademarks, copyrights, licenses and all other intellectual property, all general intangibles, tax or other refunds, or insurance proceeds, all equity interests or capital stock (including 100% of all equity interests in Foreign Subsidiaries), limited liability company interests, partnership interests and financial assets, all investment property, all supporting obligations, all letters of credit and letter of credit rights, all commercial tort claims, all books and records (including, without limitation, customers lists, credit files, computer programs, printouts and other computer materials and records), and all rents, products, offspring, profits, and proceeds of each of the foregoing and all accessions to, substitutions and replacements for, each of the foregoing, including any and all proceeds of any insurance (including any business interruption and property insurance), indemnity, warranty or guaranty payable to any DIP Loan Party from time to time with respect to any of the foregoing.

c. Notwithstanding the foregoing, DIP Collateral shall not include the following (“Excluded Assets”): any proceeds of or property recovered, whether by judgment, settlement, or otherwise, on account of all avoidance actions brought pursuant to chapter 5 of the Bankruptcy Code or section 724(a) of the Bankruptcy Code or any other avoidance actions under the Bankruptcy Code or applicable state law or foreign law equivalents (“Avoidance Actions”).

d. Pursuant to section 364(c)(2) of the Bankruptcy Code, a valid, binding, continuing, enforceable, non-avoidable, fully and automatically perfected, first priority liens and security interests in all DIP Collateral, whether existing on the Petition Date or thereafter acquired, that, on or as of the Petition Date is not subject to valid, perfected, and non-avoidable liens (or perfected after the Petition Date to the extent permitted by section 546(b) of the Bankruptcy Code) (subject to the Carve-Out), (collectively, the “Previously Unencumbered Property”).

25. Pursuant to sections 364(c)(3) and 364(d)(1) of the Bankruptcy Code, the DIP Liens shall be valid, binding, continuing, enforceable, non-avoidable, fully and automatically perfected liens and security interests in all DIP Collateral, which DIP Liens shall be (i) subject and subordinate to Permitted Prior Liens and the Carve-Out, and (ii) senior to any and all other liens and security interests in the DIP Collateral, including, without limitation, all Prepetition Lender Liens on the DIP Collateral (including, without limitation, any liens securing the Prepetition Lender Claims and all Adequate Protection Liens), subject to the Challenge Period.

26. Subject only to the Carve-Out, the Permitted Prior Liens, the Challenge Period, and the terms of the Interim Order, and only until the Prepetition Lender Claims are indefeasibly repaid and/or deemed repaid in full under the DIP Facility, including the roll-up and conversion of amounts under the Prepetition Credit Agreement into the DIP Facility, pursuant to sections 361, 363(e), and 364 of the Bankruptcy Code, and in consideration of the stipulations and consents set forth herein, as adequate protection of its interest in the Prepetition Collateral (including Cash Collateral), solely for and equal in amount to the postpetition diminution in value

1 of such interests (each such diminution, a “Diminution in Value”), resulting from, among other
2 things, the imposition of the priming DIP Liens on the Prepetition Collateral, the Carve-Out, the
3 Debtors’ use of the Prepetition Collateral (including Cash Collateral), and the imposition of the
4 automatic stay, the Lender is hereby granted the following (collectively, the “Adequate Protection
5 Obligations”):

6 a. As security for and solely to the extent of any Diminution in Value, additional
7 and replacement, valid, binding, enforceable, non-avoidable, and effective and
8 automatically perfected postpetition security interests in and liens as of the date
9 of the Interim Order (together, the “Adequate Protection Liens”), without the
10 necessity of the execution by the Debtors (or recordation or other filing), of
11 security agreements, control agreements, pledge agreements, financing
12 statements, mortgages, or other similar documents, on all DIP Collateral.
13 Subject to the terms of the Interim Order, the Adequate Protection Liens shall
14 be subordinate only to the (i) Carve-Out, (ii) the DIP Liens, and (iii) Permitted
15 Prior Liens. The Adequate Protection Liens shall otherwise be senior to all
16 other security interests in, liens on, or claims against any of the DIP Collateral
17 (including, for the avoidance of doubt, any lien or security interest that is
18 avoided and preserved for the benefit of the Debtors and their estates under
19 section 551 of the Bankruptcy Code).

20 b. As further adequate protection, and to the extent provided by sections 503(b)
21 and 507(b) of the Bankruptcy Code, allowed administrative expense claims in
22 each of the Chapter 11 Cases ahead of and senior to any and all other
23 administrative expense claims in such Chapter 11 Cases to the extent of any
24 postpetition Diminution in Value (the “Adequate Protection Claims”), but
25 junior to the Carve-Out and the DIP Superpriority Claims. Subject to the
26 Carve-Out and the DIP Superpriority Claims in all respects, the Adequate
27 Protection Claims will not be junior to any claims and shall have priority over
28 all administrative expense claims against each of the Debtors, now existing or

hereafter arising, of any kind or nature whatsoever, including, without limitation, administrative expense claims of the kinds specified in or ordered pursuant to sections 105, 326, 328, 330, 331, 365, 503(a), 506(c) (subject to entry of the Final Order), 507(a), 507(b), 546(c), 726(b), 1113, and 1114 of the Bankruptcy Code.

c. As further adequate protection, the Debtors are seeking authorization to pay from Cash Collateral and/or the DIP Facility proceeds, subject to the Review Period, all reasonable and documented fees and out-of-pocket expenses (the “Adequate Protection Fees”), whether incurred before or after the Petition Date, including all reasonable and documented fees and expenses of counsel and other professionals retained by Lender as provided for in the DIP Documents and the Interim Order, including, for the avoidance of doubt, of the Lender Advisors and, to the extent necessary to exercise and fulfill its obligations under the Prepetition Loan Documents, one counsel to the Lender in each local jurisdiction. None of the Adequate Protection Fees shall be subject to separate approval by the Court, and no recipient of any such payment shall be required to file any interim or final fee application with respect thereto or otherwise seek this Court’s approval of any such payments.

d. As further adequate protection to the Lender, the Prepetition Lender Claim (excluding the portion of such claim that is rolled up as a DIP Rollup Loan) shall be paid interest at the default contract rate set forth in the Prepetition Loan Agreement on the first business day of each month (the “Adequate Protection Payments”).

27. In furtherance of the foregoing and without further approval of the Court, the Debtors are requesting authorization, and consenting to the automatic stay imposed by section 362 of the Bankruptcy Code being lifted to the extent necessary to perform all acts and to make, execute, and deliver all instruments and documents (including, without limitation, the DIP Credit Agreement, any security and pledge agreement, and any mortgage to the extent contemplated

1 thereby, or the DIP Credit Agreement), and to pay all fees (including all amounts owed to the
2 Lender under the DIP Documents and the Prepetition Loan Documents) that may be reasonably
3 required or necessary for the Debtors' performance of their obligations under the DIP Facility,
4 including, without limitation:

- 5 a. the execution, delivery, and performance of the DIP Documents, including,
6 without limitation, the DIP Credit Agreement, any security and pledge
7 agreement, and any mortgage (including, in addition to all Prepetition
8 Collateral, a lien on all leasehold interests, purchase options and other interests
9 in certain real property located in the City of Albuquerque, Bernalillo County,
10 New Mexico and 100% of each Foreign Subsidiary) to the extent contemplated
11 thereby;
- 12 b. the execution, delivery, and performance of one or more amendments, waivers,
13 consents, or other modifications to and under the DIP Documents (in each case
14 in accordance with the terms of the applicable DIP Documents), it being
15 understood that no further approval of this Court shall be required for
16 amendments, waivers, consents, or other modifications to and under the DIP
17 Documents or the DIP Obligations that do not shorten the maturity of the
18 extensions of credit thereunder or modify the commitments or the rate of
19 interest or other amounts payable thereunder;
- 20 c. the non-refundable payment to the Lender of the fees referred to in the DIP
21 Documents, including (x) all fees and other amounts owed to the Lender under
22 the DIP Documents and (y) all reasonable and documented costs and expenses
23 as may be due from time to time, including, without limitation, the reasonable
24 and documented fees and expenses of counsel and other professionals retained
25 as provided for in the DIP Documents and the Interim Order (whether incurred
26 before or after the Petition Date, including, for the avoidance of doubt,
27 Sheppard, Mullin, Richter & Hampton LLP (as counsel) and one counsel to the
28 Lender in each local jurisdiction (collectively, the "Lender Advisors"), which

1 such fees and expenses shall not be subject to the approval of this Court, nor
2 shall any recipient of any such payment be required to file with respect thereto
3 any interim or final fee application with this Court, *provided* that any fees and
4 expenses of a professional shall be subject to the Review Period; and

5 d. the performance of all other acts required under or in connection with the DIP
6 Documents.

7 28. Upon entry of the Interim Order, the DIP Documents, the DIP Obligations, and the
8 DIP Liens shall constitute valid, binding, and non-avoidable obligations of the Debtors
9 enforceable against each Debtor party thereto in accordance with their respective terms and the
10 terms of the Interim Order for all purposes during the Chapter 11 cases, any subsequently
11 converted Chapter 11 case of any Debtor to a case under chapter 7 of the Bankruptcy Code or
12 after the dismissal of any Chapter 11 case. No obligation, payment, transfer, or grant of security
13 under the DIP Credit Agreement, the other DIP Documents, or the Interim Order shall be stayed,
14 restrained, voidable, avoidable, or recoverable under the Bankruptcy Code or under any
15 applicable law (including, without limitation, under sections 502(d), 548, or 549 of the
16 Bankruptcy Code or under any applicable state Uniform Fraudulent Transfer Act, Uniform
17 Fraudulent Conveyance Act, Uniform Voidable Transactions Act or similar statute or common
18 law), or subject to any defense, reduction, setoff, recoupment, or counterclaim. All payments or
19 proceeds remitted to Lender pursuant to the DIP Documents, the provisions of the Interim Order,
20 or any subsequent order of the Court shall be received free and clear of any claim, charge,
21 assessment, or other liability, including, without limitation, any such claim or charge arising out
22 of or based on, directly or indirectly, section 506(c) or the “equities of the case” exception of
23 section 552(b) of the Bankruptcy Code (and, solely in the case of waivers of rights under sections
24 506(c) and 552(b) of the Bankruptcy Code, subject to the entry of the Final Order).

25 29. Not later than 5:00 p.m. prevailing Pacific time on each Friday following the
26 Petition Date (the “Updated Budget Deadline”), the DIP Loan Parties shall deliver to the Lender
27 and Lender Advisors a supplement to the Initial Budget or most-recently delivered updated
28 version of the same (each such supplement, an “Updated Budget”), covering the 13-week period

1 that commences with Friday of the calendar week immediately preceding such Updated Budget
2 Deadline, consistent with the form and level of detail set forth in the Initial Budget and including
3 a forecasted unrestricted cash balance, projected borrowing base, as well as a line-item report
4 setting forth the estimated fees and expenses to be incurred by each professional advisor on a
5 weekly basis; *provided* that the Updated Budget shall be, in each case, subject to the approval of
6 the Lender (which approval may be provided by the Lender Advisors on behalf of the Lender and
7 will be deemed to be given unless an objection by the Lender or the Lender Advisors has been
8 delivered to the Borrowers by no later than 5:00 p.m. prevailing Pacific time on the Wednesday
9 following the applicable Updated Budget Deadline for such Updated Budget (which objection
10 may be provided via email)). Upon (and subject to) the approval, or deemed approval, of any such
11 Updated Budget by the Lender in its sole and absolute discretion (which may be provided by the
12 Lender Advisors), such Updated Budget shall constitute the “Approved Budget”; *provided* that in
13 the event such Updated Budget is not so approved (or deemed approved) by the Lender, the prior
14 Approved Budget shall remain in effect.

15 30. Not later than 5:00 p.m. prevailing Pacific time every Friday (commencing with
16 Friday of the week immediately following the week in which the Petition Date occurs) (each such
17 Friday, a “Variance Report Deadline”), the Debtors shall deliver to the Lender and the Lender
18 Advisors a variance report (each, a “Variance Report”), in form and substance satisfactory to the
19 Lender, showing:

- 20 a. the difference between (x) total budgeted revenue as set forth in the Approved
21 Budget, *minus* (y) total actual revenue, *divided* by (z) total budgeted revenue as
22 set forth in the Approved Budget (the “Sales Variance”);
- 23 b. the difference between (x) total budgeted operating receipts as set forth in the
24 Approved Budget, *minus* (y) total actual operating receipts, *divided* by (z) total
25 budgeted operating receipts as set forth in the Approved Budget (the “Receipts
26 Variance”);
- 27 c. the difference between (x) total actual operating disbursements, *minus* (y) total
28 budgeted operating disbursements as set forth in the Approved Budget, *divided*

by (z) total budgeted operating disbursements as set forth in the Approved Budget (the “Disbursements Variance”); and

- d. the difference between (x) Weekly Fee Estimates (as defined below), *minus* (y) total budgeted professional fees and expenses as set forth in the Approved Budget, *divided* by (z) total budgeted professional fees and expenses as set forth in the Approved Budget (the “Professional Fee Variance”),
- e. in each case, for the Applicable Period,⁹ together with a reasonably detailed explanation of such Sales Variance, Receipts Variance, Disbursements Variance and Professional Fee Variance. Commencing with the third Variance Report, the Debtors shall not permit the Receipts Variance, the Disbursements Variance or the Professional Fee Variance with respect to any Applicable Period to exceed 10%.

31. Not later than the Variance Report Deadline, the Debtors shall deliver to the Lender and the Lender Advisors a Borrowing Base Certificate (as defined in the Prepetition Credit Agreement) including: (i) a detailed calculation of the Borrowing Base; and (ii) all supporting documents and information (including, without limitation, sales journals, credit memos, cash receipts journals, reconciliation of changes from the most recent certificate delivered to Lender).

32. Monthly, not later than the fifteenth (15th) day of each calendar month:

- a. an aging of Debtors’ accounts receivable and accounts payable as of the last day of the preceding calendar month;
- b. inventory reports as of the last day of the preceding calendar month, by category and location, with detail showing additions to and deletions from inventory, together with a reconciliation to the general ledger; and

⁹ “Applicable Period” means, (a) with respect to the first Variance Report, the one-week period beginning on the Petition Date and ending on the Friday of the week immediately preceding the first Variance Report Deadline, (b) with respect to each Variance Report thereafter, the period beginning on the Petition Date and ending on the Friday of the week immediately preceding the applicable Variance Report Deadline.

1 c. upon request, copies of invoices in connection with the Debtors' accounts,
2 customer statements, warehouse receipts, credit memos, remittance advices and
3 reports, deposit slips, shipping and delivery documents in connection with the
4 Debtors accounts and inventory.

5 33. The Debtors shall deposit all Cash Collateral in their possession or hereinafter
6 received into a blocked account established solely for the purpose of receiving and holding such
7 deposits (the "Cash Collateral Account"). The Debtors shall not have access to and shall not be
8 permitted to use funds held in the Cash Collateral Account, except pursuant to the terms of the
9 Interim Order and any Final Order. At the end of each Business Day, all amounts held in the
10 Cash Collateral Account shall be: (a) first applied to reduce the outstanding balance of the DIP
11 Loans, until all such DIP Loans are fully repaid, and (b) thereafter, to the extent the DIP
12 Borrowing Base¹⁰ exceeds the Revolving Loans made under the DIP Facility such funds shall be
13 transferred to the Debtors' primary operating account (the "Operating Account"). The Debtors
14 may only use Cash Collateral after it is transferred to the Operating Account and such use must be
15 in compliance with the Approved Budget. Except on the terms and conditions of the Interim
16 Order, the Debtors shall be enjoined and prohibited from at any time using the Cash Collateral.

17 34. The Debtors shall provide the Lender with all reporting and other information
18 required to be provided to the Lender under the DIP Documents. In addition to, and without
19 limiting, whatever rights to access the Lender has under the DIP Documents, upon reasonable
20 notice to Debtors' counsel (email being sufficient), at reasonable times during normal business
21 hours, the Debtors shall permit representatives, agents, and employees of the Lender to have
22 reasonable access to (a) inspect the Debtors' assets, and (b) all information (including historical
23 information and the Debtors' books and records) and personnel, including regularly scheduled
24 meetings as mutually agreed with senior management of the Debtors and other company advisors
25

26 ¹⁰ "DIP Borrowing Base" means (a) the Borrowing Base (as defined in the DIP Credit
27 Agreement), minus (b) the outstanding Prepetition Obligations and Roll-Up Loans (each as
28 defined in the DIP Credit Agreement), plus the (c) Permitted Overformula Amount (as defined in
the DIP Credit Agreement).

(during normal business hours), and Lender shall be provided with access to all information it shall reasonably request, excluding any information for which confidentiality is owed to third parties, information subject to attorney client or similar privilege, or where such disclosure would not be permitted by any applicable requirements of law.

35. To the extent the Pre-Petition Collateral and DIP Collateral are insufficient to repay the DIP Obligations in full, pursuant to section 364(c)(1) of the Bankruptcy Code, all of the DIP Obligations shall constitute allowed superpriority administrative expense claims against each of the Debtors' estates (the "DIP Superpriority Claims") (without the need to file any proof of claim), jointly and severally, with priority over any and all administrative expenses, adequate protection claims, diminution claims, and all other claims against the Debtors and their estates, now existing or hereafter arising, of any kind whatsoever, including, without limitation, 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(a), 506(c) (subject to entry of a Final Order), 507(a), 507(b), 546(c), 726(b), 1113, or 1114 of the Bankruptcy Code or otherwise, 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 shall for the 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 shall be payable from all prepetition and postpetition property of the Debtors and all proceeds thereof, and the foregoing shall be subject to the Challenge Period, and shall be subject to and subordinated in all respects to payment of the Carve-Out. Except as set forth in the Interim Order or the Final Order, no other superpriority claims shall be granted or allowed in the Chapter 11 cases.

36. Subject to the terms and conditions contained in the Interim Order and any Final Order, each of the DIP Liens, DIP Superpriority Claims, Prepetition Lender Liens, Adequate Protection Liens, and Adequate Protection Claims shall be subject and subordinate to the Carve-Out. As used in the Interim Order, the "Carve-Out" means the sum of (i) all fees required to be paid to the Clerk of this Court and to the Office of the United States Trustee for the District of

Delaware (the “U.S. Trustee”) pursuant to 28 U.S.C. § 1930(a) (without regard to the notice set forth in (iii) below); (ii) all reasonable fees and expenses incurred by a trustee under section 726(b) of the Bankruptcy Code in an amount not exceed \$25,000 (without regard to the notice set forth in (iii) below); (iii) to the extent allowed at any time but incurred at any time before or on the first business day following delivery by the Lender of a Carve-Out Trigger Notice in amounts not to exceed the amounts set forth in the Approved Budget (the “Budget Cap”) through the end of the week in which a Carve-Out Trigger Notice is sent, (A) subject to the Budget Cap, all unpaid fees and expenses (including any restructuring, sale, success, or other transaction fee of any investment bankers or financial advisors of the DIP Loan Parties) (the “Allowed Debtor Professional Fees”) incurred by persons or firms retained by the Debtors pursuant to section 327, 328, or 363 of the Bankruptcy Code (collectively, the “Debtor Professionals”) and (B) subject to the Budget Cap, all unpaid fees and expenses (the “Allowed Committee Professional Fees” and together with the Allowed Debtor Professional Fees, the “Allowed Professional Fees”) incurred by persons or firms retained by a Committee pursuant to section 328 or 1103 of the Bankruptcy Code (the “Committee Professionals” and, together with the Debtor Professionals, the “Professional Persons”) (these clauses (i) through (iii), the “Pre-Carve-Out Trigger Amounts”); and (iv) Allowed Professional Fees not to exceed \$100,000 plus (without duplication) any transaction-based fee of any investment bankers incurred in accordance with the applicable engagement letter approved in writing by Lender in its sole and absolute discretion (the amounts set forth in this clause (iv) being the “Post-Carve-Out Trigger Notice Cap,” and together with the Pre-Carve-Out Trigger Amounts, the “Carve-Out Amount”).

For purposes of the foregoing, “Carve-Out Trigger Notice” shall mean a written notice delivered by email (or other electronic means) by Lender to the Debtors, their lead restructuring counsel, the U.S. Trustee, and counsel to the Committee (if any), which notice may be delivered following the occurrence and during the continuation of an Event of Default (as defined below). Each Professional Person shall apply the amount of any prepetition retainers received by any such Professional Person and not previously returned or applied to fees and expenses before such Professional Person receives any payment out of the Carve-Out.

37. Subject to the Challenge Period (as defined below), the stipulations, admissions, releases, and waivers contained in the Interim Order, including the Debtors' Stipulations (collectively, the "Prepetition Lien and Claim Matters"), shall be binding upon the Debtors, their estates, and any of their respective successors in all circumstances and for all purposes, and the Debtors are deemed to have irrevocably waived and relinquished all Challenges (as defined below) as of the Petition Date. The Prepetition Lien and Claim Matters shall be binding upon all other parties in interest, including any Committee and any other person acting on behalf of the Debtors' estates, unless and to the extent that a party in interest with proper standing granted by order of this Court (or other court of competent jurisdiction) has timely and properly filed an adversary proceeding or contested matter under the Bankruptcy Rules before (i) 75 calendar days after entry of the Interim Order (the "Challenge Period" and the date of expiration of such Challenge Period, the "Challenge Period Termination Date"); *provided, however*, that if, before the end of the Challenge Period, (x) the cases convert to chapter 7, or (y) a chapter 11 trustee is appointed, then, in each such case, the Challenge Period shall be extended by the later of (A) the time remaining under the Challenge Period plus ten days or (B) such other time as ordered by this Court solely with respect to any such trustee, commencing on the occurrence of either of the events discussed in the foregoing clauses (x) and (y), and any such trustee so appointed shall not be bound by the Prepetition Lien and Claim Matters until the Challenge Period, as so extended, has expired; (ii) seeking to avoid, object to, or otherwise challenge the Prepetition Lien and Claim Matters regarding: (a) the validity, enforceability, extent, priority, or perfection of the Prepetition Lender Liens; or (b) the validity, enforceability, allowability, priority, secured status, or amount of the Prepetition Lender Claims (any such challenge, a "Challenge"), and (iii) in which the Court enters a final order in favor of the plaintiff or movant sustaining any such Challenge in any such timely filed adversary proceeding or contested matter. Upon the expiration of the Challenge Period Termination Date without the filing of a Challenge (or if any such Challenge is filed and overruled): (a) any and all such Challenges by any party (including the Committee, any chapter 11 trustee, and/or any examiner or other estate representative appointed or elected in the Chapter 11 Cases, and any chapter 7 trustee and/or examiner or other estate representative appointed or

1 elected in any Successor Case) shall be deemed to be forever barred; (b) the Prepetition Lender
2 Claims shall constitute allowed claims, not subject to counterclaim, setoff, recoupment, reduction,
3 subordination, recharacterization, defense, or avoidance for all purposes in the Debtors' Chapter
4 11 Cases and any successor cases; (c) the Prepetition Lender Liens shall be deemed to have been,
5 as of the Petition Date, legal, valid, binding, and perfected secured claims, not subject to
6 recharacterization, subordination, or avoidance; and (e) all of the Debtors' stipulations and
7 admissions contained in the Interim Order, and all other waivers, releases, affirmations, and other
8 stipulations as to the priority, extent, and validity as to the Prepetition Secured Parties' claims,
9 liens, and interests contained in the Interim Order shall be of full force and effect and forever
10 binding upon the Debtors, the Debtors' estates, and all creditors, interest holders, and other parties
11 in interest in the Chapter 11 cases and any successor cases. If any such adversary proceeding or
12 contested matter is timely and properly filed under the Bankruptcy Rules and remains pending
13 and the Chapter 11 Cases are converted to chapter 7, the chapter 7 trustee may continue to
14 prosecute such adversary proceeding or contested matter on behalf of the Debtors' estates.
15 Furthermore, if any such adversary proceeding or contested matter is timely and properly filed
16 under the Bankruptcy Rules, the stipulations and admissions contained in the Interim Order,
17 including the Debtors' Stipulations, shall nonetheless remain binding and preclusive on any
18 Committee and any other person or entity except to the extent that such stipulations and
19 admissions were expressly challenged in such adversary proceeding or contested matter before
20 the Challenge Period Termination Date. Nothing in the Interim Order vests or confers on any
21 person (as defined in the Bankruptcy Code), including, without limitation, any Committee
22 appointed in the Chapter 11 cases, standing or authority to pursue any cause of action belonging
23 to the Debtors or their estates, including, without limitation any challenges (including a
24 Challenge) with respect to the Prepetition Loan Documents, the Prepetition Lender Liens, the
25 Prepetition Lender Claims and a separate order of this Court conferring such standing on any
26 Committee or other party-in-interest shall be a prerequisite for the prosecution of a Challenge by
27 such Committee or such other party-in-interest.

38. Subject to the Challenge Period, Lender and each of its attorneys, accountants, consultants, agents, servants, members, officers, directors, shareholders, employees, predecessors, parents, subsidiaries, affiliates, successors and assigns, and all persons acting by, through, under, or in concert with any of them (the foregoing individuals and entities herein referred to as the “Releasees”) shall be released from all charges, complaints, claims, and liabilities of any kind which any Debtor currently has against Releasees (whether known or unknown) against any one or more of the Releasees, including, without limitation, claims under Chapter 5 of the Bankruptcy Code or other Avoidance Actions, including all attorneys’ fees, interest, expenses, and costs actually incurred or of any nature whatsoever, known or unknown, suspected or unsuspected.

39. Each of the following events constitutes a termination event (each a “Termination Event”) unless waived by the Lender:

- a. The date that is forty-five (45) days after the Petition Date unless a Final Order (as defined in the DIP Loan Agreement) is entered;
- b. The failure of Debtors to file a motion to establish bid procedures for the sale of assets in form acceptable to Lender within thirty (30) days after the Petition Date;
- c. The occurrence of an “Event of Default” as defined in the DIP Loan Agreement and the passage of any applicable cure period set forth therein;
- d. The failure of Debtors to comply with the budget and reporting requirements of the Interim Order;
- e. Any other material breach by the Debtor of any other obligations, representations, warranties or covenants in the Interim Order, which material breach is not cured on or within three (3) business days after written notice of such breach is given to the Debtor; or
- f. reversal, vacatur, or modification (without consent of the Lender) of the Interim Order.

40. 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

1 application, motion, or notice to, hearing before, or order from this Court, but subject to the terms
2 of the Interim Order, subject to the Remedies Notice Period (defined below), (a) the Lender may
3 declare (any such declaration shall be referred to herein as a “Termination Declaration”) (i) all
4 DIP Obligations owing under the DIP Documents to be immediately due and payable, (ii) the
5 termination, reduction, or restriction of any further commitment to extend credit to the Debtors to
6 the extent any such commitment remains under the DIP Facility, (iii) termination of the DIP
7 Facility and the DIP Documents as to any future liability or obligation of the Lender, but without
8 affecting any of the DIP Liens or the DIP Obligations, and (iv) that the Carve-Out is triggered,
9 through the delivery of the Carve-Out Trigger Notice to the Borrowers and (b) subject to the
10 Carve-Out, the Lender may declare a termination, reduction or restriction on the ability of the
11 Debtors to use Cash Collateral (the date on which a Termination Declaration is delivered to
12 counsel to the Debtors, counsel to any Committee, and the U.S. Trustee,
13 the “DIP Termination Date”). The automatic stay in the Chapter 11 cases otherwise applicable to
14 the Lender shall be modified so that five business days after the DIP Termination Date (the
15 “Remedies Notice Period”): (x) the Lender shall be entitled to exercise its rights and remedies in
16 accordance with the DIP Documents and the Interim Order to satisfy the DIP Obligations, DIP
17 Superpriority Claims, and DIP Liens, subject to the Carve-Out; (y) subject to the foregoing clause
18 (x), the Lender shall be entitled to exercise its rights and remedies to the extent available in
19 accordance with the applicable Prepetition Loan Documents and the Interim Order with respect to
20 the Debtors’ use of Cash Collateral. During the Remedies Notice Period, the Debtors, the
21 Committee (if appointed), and/or any party in interest shall be entitled to seek an emergency
22 hearing within the Remedies Notice Period with the Court for the sole purpose (unless this Court
23 orders otherwise) of contesting whether an Event of Default has occurred or is continuing. Unless
24 the Court orders otherwise before the expiration of the Remedies Notice Period, the automatic
25 stay, as to Lender shall automatically be terminated at the end of the Remedies Notice Period
26 without further notice or order. Upon expiration of the Remedies Notice Period, the Lender shall
27 be permitted to exercise all remedies set forth in the Interim Order, and in the DIP Documents,
28

1 and as otherwise available at law without further order of or application or motion to the Court
2 consistent with the Interim Order.

3 41. The Debtors shall be jointly and severally obligated to pay all fees and expenses
4 described above and in the DIP Loan Documents, which obligations shall constitute DIP
5 Obligations. The Debtors shall pay the reasonable and documented professional fees, expenses,
6 and disbursements of Lender Advisors no later than five (5) business days (the “Review Period”)
7 after the receipt by counsel for the Debtors, any Committee and the U.S. Trustee of each of the
8 invoices therefor (the “Invoiced Fees”) and without the necessity of filing formal fee applications,
9 including such amounts arising before the Petition Date. Invoiced Fees shall be in the form of a
10 one-page summary invoice for professional fees and expenses incurred during the Chapter 11
11 Cases, and such invoice summary shall not be required to contain time entries, and if additional
12 fee detail is requested, may be redacted or modified to the extent necessary to delete any
13 information subject to the attorney-client privilege, any work product doctrine, privilege or
14 protection, common interest doctrine privilege or protection, any other evidentiary privilege or
15 protection recognized under applicable law, or any other confidential information, and the
16 provision of such invoices shall not constitute any waiver of the attorney-client privilege, work
17 product doctrine, privilege or protection, common interest doctrine privilege or protection, or any
18 other evidentiary privilege or protection recognized under applicable law. The Debtors, any
19 Committee, or the U.S. Trustee may dispute the payment of any portion of the Invoiced Fees (the
20 “Disputed Invoiced Fees”) if, within the Review Period, a Debtor, any Committee that may be
21 appointed in the Chapter 11 cases, or the U.S. Trustee notifies the submitting party in writing
22 setting forth the specific objections to the Disputed Invoiced Fees (to be followed by the filing
23 with this Court, if necessary, of a motion or other pleading, with at least ten days prior written
24 notice to the submitting party of any hearing on such motion or other pleading). For avoidance of
25 doubt, the Debtors shall promptly pay in full all Invoiced Fees other than the Disputed Invoiced
26 Fees

27 42. Subject to section 363(k) of the Bankruptcy Code, the Challenge Period, and entry
28 of the Final Order, the Lender shall have the right to credit bid (either directly or through one or

more acquisition vehicles), up to the full amount of the Lender's claims, including, for the avoidance of doubt, Adequate Protection Claims, in any sale of all or any portion of the Prepetition Collateral or the DIP Collateral including, without limitation, sales occurring pursuant to section 363 of the Bankruptcy Code or included as part of any chapter 11 plan subject to confirmation under Bankruptcy Code section 1129(b)(2)(A)(ii)-(iii).

43. Subject to entry of the Final Order and the Carve Out, in the event of any sale, lease, transfer, license or other disposition of property of the Debtors that constitutes DIP Collateral outside the ordinary course of business (to the extent permitted by the Interim Order or any other order of this Court), the Debtors are authorized to pay, without further notice or order of this Court, such amount (if any) of net cash proceeds resulting therefrom to the Lender, up to the amount which indefeasibly pays in full, in cash, the DIP Obligations. Any amounts in excess of the DIP Obligations shall be deposited in the Cash Collateral Account and may be used in accordance with the terms of the Interim Order.

II. DISCUSSION

A. THE COURT SHOULD AUTHORIZE THE DEBTORS TO OBTAIN THE PROPOSED DIP FINANCING

Pursuant to 11 U.S.C. § 364(c), a debtor may, in the exercise of its business judgment, incur secured debt if the debtor has been unable to obtain unsecured credit and the borrowing is in the best interest of the estate. *See, e.g., In re Simasko Production Co.*, 47 B.R. 444, 448-9 (D. Colo. 1985) (authorizing interim financing agreement where debtor's business judgment indicated financing was necessary and reasonable for benefit of estate); *In re Ames Dept. Stores*, 115 B.R. 34, 38 (Bankr. S.D.N.Y. 1990) (with respect to postpetition credit, courts "permit debtors-in-possession to exercise their basic business judgment consistent with their fiduciary duties"). 11 U.S.C. § 364(c) provides, in pertinent part, that:

(c) If the trustee [or debtor in possession] is unable to obtain unsecured credit allowable-under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may

authorize the obtaining of credit or the incurring of debt –

(1) with priority over any and all administrative expenses of
the kind specified in section 503(b) or 507(b) of this title:

(2) secured by a lien on property of the estate that is not
otherwise subject to a lien; or

(3) secured by a junior lien on property of the estate that is
subject to a lien.

11 U.S.C. § 364(c).

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 In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) (“[C]ases consistently reflect that the court’s discretion under section 364 [of the Bankruptcy Code] is to be utilized on grounds that permit [a debtor’s] reasonable business judgment to be exercised so long as the financing agreement does not contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit a party-in-interest.”); *accord In re Farmland Indus., Inc.*, 294 B.R. 855, 881 (Bankr. W.D. Mo. 2003) (noting that the first factor considered by bankruptcy courts is whether the “proposed financing is an exercise of sound and reasonable business judgment”).

Specifically, to determine whether the business judgment standard is met, a court need only “examine whether a reasonable businessperson would make a similar decision under similar circumstances,” which “is not a difficult standard to satisfy.” *In re AbitibiBowater Inc.*, 418 B.R. 815, 831 (Bankr. D. Del. 2009); *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”).

Section 364 of the Bankruptcy Code is structured with an escalating series of inducements which a debtor in possession may offer to attract credit during the postpetition period. *In re*

1 *Photo Promotion Associates, Inc.*, 87 B.R. 835, 839 (Bankr. S.D.N.Y. 1988), *aff'd*, 881 F.2d 6
2 (2d. Cir. 1989). Where a trustee or debtor in possession cannot otherwise obtain unsecured
3 postpetition credit, such credit may be obtained under certain carefully proscribed conditions. *In*
4 *re T.M. Sweeney & Sons LTL Services, Inc.*, 131 B.R. 984, 989 (Bankr. N.D. Ill. 1991). For
5 example, if creditors are unwilling to extend unsecured credit to a debtor in possession, further
6 inducements are offered, with court approval after notice and a hearing, including, without
7 limitation, liens equal to or senior to existing liens on encumbered property in accordance with 11
8 U.S.C. § 364(d). *In re Photo Promotion Associates, Inc.*, 87 B.R. at 839.

9 Section 364(c) of the Bankruptcy Code also enumerates certain incentives that a court may
10 grant to postpetition lenders. However, the list set forth in Section 364(c) is not exhaustive.
11 Courts have frequently authorized the use of inducements not specified in the statute. *See, e.g., In*
12 *re Ellingsen MacLean Oil Co.*, 834 F.2d 599 (6th Cir. 1987) (affirming financing order which
13 prohibited any challenges to the validity of already existing liens); *In re Defender Drug Stores*,
14 126 B.R. 76 (Bankr. D. Ariz. 1991) (authorizing enhancement fee to postpetition lender), *aff'd*
15 145 B.R. 312, 316 (Bankr. 9th Cir. 1992) (“[b]ankruptcy courts . . . have regularly authorized
16 postpetition financial arrangements containing lender incentives beyond the explicit priorities and
17 liens specified in section 364”).

18 Two factors courts consider in determining whether to authorize postpetition financing
19 which contemplates the granting of a security interest in favor of the lender are (1) whether the
20 debtor is unable to obtain unsecured credit per Section 364(b), *i.e.*, by allowing a lender only an
21 administrative claim per Section 364(b)(1)(A); and (2) whether the terms of the transaction are
22 fair, reasonable and adequate, given the circumstances of the debtor-borrower and the proposed
23 lender. *In re Crouse Group, Inc.*, 71 B.R. 544, 549 (Bankr. E.D.Pa. 1987); *see also In re Aqua*
24 *Assoc.*, 123 B.R. 192, 195 (Bankr. E.D.Pa. 1991). The Debtor submits that all of these standards
25 have been satisfied in this case.

26 **(1) The Debtors Are Unable To Obtain Unsecured Credit.**

27 In satisfying the standards of 11 U.S.C. § 364, a debtor need not seek credit from every
28 available source, but should make a reasonable effort to seek other sources of credit available

1 under § 364(a) and (b). *See, e.g., In re Snowshoe Co.*, 789 F.2d 1085, 1088 (4th Cir. 1986)
2 (trustee had demonstrated by good faith effort that credit was not available without senior lien by
3 unsuccessfully contacting other financial institutions in immediate geographic area; “the statute
4 imposes no duty to seek credit from every possible lender before concluding that such credit is
5 unavailable”); *Ames, supra*, 115 B.R. at 40 (finding that debtors demonstrated the unavailability
6 of unsecured financing where debtors approached four lending institutions).

7 A debtor need only demonstrate “by a good faith effort that credit was not available
8 without” the protections afforded to potential lenders by section 364(c) of the Bankruptcy Code.
9 *In re Snowshoe Co., Inc.*, 789 F.2d 1085, 1088 (4th Cir. 1986); *see also In re LATAM Airlines*
10 *Group S.A.*, 620 B.R. 722, 767 (Bankr. S.D.N.Y. 2020) (quoting *In re Ames*, 115 B.R. at 37)
11 (finding that “[t]o demonstrate that it qualifies to seek secured financing . . . a debtor need only
12 demonstrate that that ‘it has reasonably attempted, but failed, to obtain unsecured credit’”). Courts
13 have made clear that in circumstances where only a few lenders likely can or will extend the
14 necessary credit to a debtor, as here, “it would be unrealistic and unnecessary to require [the
15 debtor] to conduct such an exhaustive search for financing.” *In re Sky Valley, Inc.*, 100 B.R. 107,
16 113 (Bankr. N.D. Ga. 1988), *aff’d sub nom. Anchor Sav. Bank FSB v. Sky Valley, Inc.*, 99 B.R.
17 117, 120 n.4 (N.D. Ga. 1989); *see also In re Snowshoe Co.* at 1088 (demonstrating that credit was
18 unavailable absent the senior lien by establishment of unsuccessful contact with other financial
19 institutions in the geographic area); *Matter of Stanley Hotel, Inc.*, 15 B.R. 660, 663 (D. Colo.
20 1981) (holding that bankruptcy court’s finding that two national banks refused to grant unsecured
21 loans was sufficient to support conclusion that section 364 requirement was met); *In re Ames*
22 *Dep’t Stores*, 115 B.R. at 37–39 (approving secured loan where debtor approached four potential
23 lenders).

24 As explained herein and in the Bidanset Declaration, given the Debtors’ existing defaults
25 under the Prepetition Facility and the unavailability of unencumbered assets to use as collateral
26 for a loan from a new lender, the Debtors are not able to obtain alternative financing on terms and
27 conditions that would be better than those offered by the Lender. The Debtors have a good
28

1 working relationship with the Lender, and the Lender has offered concessions and extensions to
2 the Debtors as the Debtors' financial health deteriorated.

3 The Debtors have determined to move forward with the DIP Facility in a sound exercise
4 of their business judgment following a market check and a careful evaluation of alternatives.
5 Specifically, the Debtors and their advisors determined that the Debtors would require significant
6 postpetition financing to support the administration of this case and the Debtors' ongoing
7 operations. The terms of the DIP Facility are necessary to secure postpetition financing, and to
8 accomplish the Debtors' comprehensive restructuring. The Debtors negotiated the DIP Loan
9 Documents with the Lender in good faith, at arm's length, and with the assistance of their
10 advisors, and believe that they have obtained the best financing available under the circumstances.
11 Accordingly, the Court should authorize the Debtors' entry into the DIP Loan Documents as a
12 reasonable exercise of the Debtors' business judgment.

13 Agreement to the proposed DIP Roll-Up Loans is also an exercise of the Debtors' sound
14 business judgment. Section 363(b) of the Bankruptcy Code permits a debtor to use, sell, or lease
15 property, other than in the ordinary course of business, with court approval. Courts have
16 recognized that it is appropriate to authorize the payment of prepetition obligations where
17 necessary to protect and preserve the estate, including an operating business's going-concern
18 value. *See, e.g., In re Just For Feet, Inc.*, 242 B.R. 821, 824–25 (D. Del. 1999) (noting that
19 Bankruptcy Code permits courts to “authorize the payment of pre-petition claims if such payment
20 was essential to the continued operation of the debtor”) (citing cases). The Lender's willingness to
21 provide the DIP Facility was conditioned expressly upon the DIP Roll-Up Loans. Absent the DIP
22 Facility, the Debtors' ability to continue operating will be jeopardized to the detriment of all
23 parties in interest. Roll-ups are increasingly common features in DIP financing packages when it
24 is necessary to induce incumbent lenders to participate in a loan to a debtor with high levels of
25 secured indebtedness, especially where the incumbent lenders have provided funding in the lead-
26 up to a bankruptcy filing. Moreover, the business judgment rule shields a debtor's management
27 from judicial second-guessing. *See In re Johns-Manville Corp.*, 60 B.R. 612, 615–16 (Bankr.
28 S.D.N.Y. 1986) (noting that “the [Bankruptcy] Code favors the continued operation of a business

1 by a debtor and a presumption of reasonableness attaches to a debtor's management decisions").
2 The appropriateness of a proposed financing facility should also be considered in light of current
3 market conditions.

4 The proposed DIP Facility provides desperately needed liquidity to the Debtors without a
5 value-destructive, and ultimately uncertain, fight with the Lender concerning any alternative loan
6 obtained with an expectation from a new lender of a priming lien, and the Debtors have
7 determined that the DIP Facility provides the best opportunity available under the circumstances
8 to fund these Chapter 11 cases. The Debtors, therefore, submit that the requirement of section 364
9 of the Bankruptcy Code that alternative credit on more favorable terms be unavailable to the
10 Debtors is satisfied.

11 **(2) The Terms Of The Proposed DIP Loan Are Fair, Reasonable, and Adequate.**

12 In considering whether the terms of postpetition financing are fair and reasonable, courts
13 consider the terms in light of "the relative circumstances" of both the debtor and the potential
14 lender. *In re Farmland Indus.* 294 B.R. at 886; *see also Unsecured Creditors' Comm. Mobil Oil*
15 *Corp. v. First Nat'l Bank & Trust Co. (In re Elingsen McLean Oil Co., Inc.)*, 65 B.R. 358, 365 n.7
16 (W.D. Mich. 1986) (recognizing a debtor may have to enter into "a hard bargain" to acquire funds
17 for its reorganization).

18 Without DIP financing, the Debtors lack sufficient funds to operate their business continue
19 paying their debts as they come due, and pursue a restructuring through these Chapter 11 cases.
20 Absent the DIP Facility, which will provide the Debtors with sufficient liquidity to administer the
21 cases through the sale or reorganization process, the value of the Debtors' estate would be
22 impaired significantly, to the detriment of all stakeholders. In light of the current circumstances,
23 the Debtors believe that the terms of the DIP Facility, as set forth in the DIP Loan Documents, are
24 fair, reasonable, and adequate. For all these reasons, the Debtors submit that they have met the
25 standard for obtaining postpetition financing.

26 **(3) The Lender Should Be Afforded Good Faith Protection Under Section 364(e).**

27 Section 364(e) of the Bankruptcy Code protects a good-faith lender's right to collect on
28 loans extended to a debtor, and its right in any liens 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.

11 U.S.C. § 364(e).

As explained herein and in the Bidanset Declaration, the DIP Loan Documents are the result of (i) the Debtors' reasonable and informed determination that the Lender offered the most favorable terms on which to obtain vital postpetition financing, and (ii) vigorous, arm's-length, and good-faith negotiations between the Debtors and the DIP Lenders. The Debtors submit that the terms and conditions of the DIP Loan Documents are reasonable and appropriate under the circumstances, and the proceeds of the DIP Facility will be used only for purposes that are permissible under the Bankruptcy Code. Accordingly, the Court should find that the obligations arising under the DIP Facility and other financial accommodations made to the Debtors have been extended by the Lender in "good faith" within the meaning of section 364(e) of the Bankruptcy Code and therefore the Lender is entitled to all of the protection afforded thereby.

B. THE DEBTORS MUST BE AUTHORIZED TO USE CASH COLLATERAL TO OPERATE, MAINTAIN AND PRESERVE THEIR ASSETS IN ACCORDANCE WITH THE BUDGET.

The Debtors' use of property of the estate is governed by Section 363 of the Bankruptcy Code. Section 363(c)(1) provides in pertinent part:

If the business of the debtor is authorized to be operated under section . . . 1108. . . of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of

property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

11 U.S.C. § 363(c)(1). A debtor in possession has all of the rights and powers of a trustee with respect to property of the estate, including the right to use property of the estate in compliance with section 363. 11 U.S.C. § 1107(a).

“Cash collateral” is defined as “cash, negotiable instruments, documents of title, securities, deposit accounts or other cash equivalents in which the estate and an entity other than the estate have an interest [.]” 11 U.S.C. § 363(a). Section 363(c)(2) establishes a special requirement with respect to “cash collateral,” providing that the trustee or debtor in possession may use “cash collateral” under subsection (c)(1) if:

- (A) each entity that has an interest in such cash collateral consents;
- or
- (B) the court, after notice and a hearing, authorizes such use, sale or lease in accordance with the provisions of this section.

11 U. S.C. §363(c)(2)(A) and (B).

It is well settled that it is appropriate for a Chapter 11 debtor to use cash collateral for the purpose of maintaining and operating its property. 11 U.S.C. § 363(c)(2)(B); *In re Oak Glen R-Vee*, 8 B.R. 213, 216 (Bankr. C.D. Cal. 1981); *In re Tucson Industrial Partners*, 129 B.R. 614 (9th Cir. BAP 1991). In addition, where the debtor is operating a business, it is extremely important that the access to cash collateral be allowed in order to facilitate the goal of reorganization: “the purpose of Chapter 11 is to rehabilitate debtors and generally access to cash collateral is necessary to operate a business.” *In re Dynaco Corporation*, 162 B.R. 389 (Bankr. D.N.H. 1993), *quoting In re Stein*, 19 B.R. 458, 459. (Bankr. E.D. Pa. 1982).

The Debtors have no ability to maintain their business operations or to preserve the going-concern value of their assets unless they have the ability to use Cash Collateral as part of its DIP financing to enable the Debtor to pay its projected expenses in accordance with the Initial DIP Budget (and subsequent budgets). The Debtors’ inability to pay such critical expenses would

1 cause immediate and irreparable harm to the Debtor's bankruptcy estate and would result in the
2 risk of facing an immediate shutdown of the Debtors' businesses and the decimation of the going-
3 concern value of the Debtors' assets. The preservation and maintenance of the value of the
4 Debtors' businesses are of the utmost significance and importance to the Debtors' efforts to locate
5 a suitable purchaser or purchasers for their assets in an orderly fashion, repay the Lender and
6 deliver a recovery for their general unsecured creditors.

7 **C. THE LENDER HAS CONSENTED TO USE OF CASH COLLATERAL.**

8 Pursuant to 11 U.S.C. § 363(c)(2), the Court may authorize a debtor in possession to use a
9 secured creditor's cash collateral if the secured creditor consents to the use of cash collateral or is
10 adequately protected. *In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984). *See also In re*
11 *O'Connor*, 808 F.2d 1393, 1398 (10th Cir. 1987); *In re McCombs Properties VI, Ltd.*, 88 B.R.
12 261, 265 (Bankr. C.D. Cal. 1988) ("McCombs"). In this case, the Lender has consented to the use
13 of Cash Collateral on the terms set forth in the Interim Order. The Debtors submit that the
14 requirements of 11 U.S.C. § 363(c)(2) have therefore been satisfied and that the Debtors should
15 be authorized to use cash collateral in accordance with the terms and conditions set forth in the
16 proposed order.

17 **IV. PROCEDURAL REQUIREMENTS REGARDING APPROVAL OF**
18 **THE MOTION HAVE BEEN SATISFIED**

19 Bankruptcy Rule 4001(c) and (d) set forth procedural requirements for obtaining post-
20 petition credit, and Bankruptcy Rule 4001(b) of the sets forth the procedural requirements for
21 obtaining authority to use cash collateral. The Debtors submit that they have complied with these
22 procedural requirements. First, the Motion must contain a copy of the proposed form of order
23 granting the Motion, which has been done by attaching the proposed Order as **Exhibit 1** to the
24 Bidanset Declaration. Second, the Motion must provide a concise statement of the relief
25 requested, which was done above. Third, the Motion is required to be served on any entity with
26 an interest in the Debtor's cash collateral, any committee appointed or the twenty largest
27 unsecured creditors if there is no committee, and on such other parties as the Court directs. Here,
28 the Debtor has served the Motion and all supportive papers upon the Office of the United States

Trustee, the Debtor's twenty largest unsecured creditors (as no committee exists), all secured creditors, and all parties who have requested special notice via overnight mail. Accordingly, the Debtor has complied with the procedural requirements of Bankruptcy Rules 4001 (b)-(d).

Bankruptcy Rule 6003 empowers a court to grant relief within the first 21 days after the Petition Date "to the extent that relief is necessary to avoid immediate and irreparable harm." Fed. R. Bankr. P. 6003. As set forth in this Motion, the Debtors believe that an immediate and orderly transition into chapter 11 is critical to the viability of their operations and any delay in granting the relief requested could hinder the Debtors' operations and cause irreparable harm. Furthermore, the failure to receive the requested relief during the first 21 days of these Chapter 11 cases would severely disrupt the Debtors' operations at this critical juncture and imperil the Debtors' chapter 11 process. Accordingly, the Debtors submit that they have satisfied the "immediate and irreparable harm" standard of Bankruptcy Rule 6003 to support the relief requested herein.

V. REQUEST FOR WAIVER OF BANKRUPTCY RULE 6004(h)

Pursuant to Bankruptcy Rule 6004(h), "[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6004(h). As set forth throughout this Motion, any delay in obtaining the funding provided by the DIP Facility would be detrimental to the Debtors, their estates, and their creditors, as the Debtors' ability to manage and run their business without any unexpected or inopportune interruptions requires such funding. In light of the foregoing, the Debtors submit that ample cause exists to justify a waiver of the 14-day stay imposed by Bankruptcy Rule 6004(h), to the extent applicable to the orders requested hereby.

VI. REQUEST FOR FINAL HEARING

Pursuant to Bankruptcy Rules 4001(b)(2) and 4001(c)(2), the Debtors request that the Court set a date for the Final Hearing within approximately 21 days after the entry of the Interim Order and fix the time and date prior to the Final Hearing for parties to file objections to this Motion.

VII. CONCLUSION

WHEREFORE, the Debtors respectfully request that the Court set a hearing on the Motion on an emergency basis and (i) grant the relief requested in the Motion on an interim basis; (ii) enter an Interim Order in substantially the form attached as **Exhibit 1** to the Bidanset Declaration; (iii) schedule a Final Hearing on the Motion to consider entry of a Final Order granting the relief requested in the Motion on a final basis; and (iv) grant such other and further relief as may be just and proper under the circumstances.

Dated: July 2, 2023

LEVENE, NEALE, BENDER, YOO
& GOLUBCHIK L.L.P.

By: /s/ David L. Neale
DAVID L. NEALE
Proposed Attorneys for Debtors and
Debtors in Possession