

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

In re	:	Chapter 11
	:	
DISTINCTIVE CALL RESPONSE, INC., <i>et al.</i> , ¹	:	Case No. 09-14153 (____)
	:	
	:	Joint Administration Pending
	:	

**DEBTORS' MOTION FOR ORDERS (A) AUTHORIZING DEBTORS
(I) TO OBTAIN POST-PETITION FINANCING AND GRANTING SECURITY
INTERESTS AND SUPERPRIORITY ADMINISTRATIVE EXPENSE
STATUS PURSUANT TO 11 U.S.C. § 364; (II) TO USE CASH COLLATERAL
PURSUANT TO 11 U.S.C. § 363; (III) TO PROVIDE ADEQUATE PROTECTION
PURSUANT TO 11 U.S.C. § 361; AND (B) SCHEDULING A FINAL HEARING
AND ESTABLISHING RELATED NOTICE REQUIREMENTS**

Each of the above-captioned debtors, each as a debtor and debtor-in-possession (collectively the "Borrowers" or the "Debtors") in the above-captioned cases (collectively with any successor cases, the "Cases") hereby move (the "DIP Motion"), pursuant to sections 105, 361, 362, 363, 364(c)(1), 364(c)(2), 364(c)(3), 364(d), and 507 of title 11 of the United States

¹ The Debtors are the following entities: Distinctive Call Response, LLC, a Delaware limited liability company ("Distinctive Call Response") (Tax ID NO. 26-4289306), 113 Barksdale Professional Center, Newark, DE 19711; Boost Credit, LLC, a Delaware limited liability company ("Boost Credit") (Tax ID NO. 26-4808482), 1000 N. West Street, Suite 1200, Wilmington, DE 19801; BlueHippo Funding, LLC, a Maryland limited liability company ("BlueHippo Funding") (Tax ID NO. 02-0684619); 7000 Security Boulevard, Suite 200, Baltimore, MD 21244, BlueHippo Capital, LLC, a Virginia limited liability company ("BlueHippo Capital, VA") (Tax ID NO. 20-4997420); 8000 Towers Crescent Drive, 13th Floor, Vienna, VA 22182, BlueHippo Capital, LLC, a Nevada limited liability company ("BlueHippo Capital, NV") (Tax ID NO. 20-4997420), 3960 Howard Hughes Parkway, Las Vegas, NV 89109; Digital Boulevard, LLC, a Virginia limited liability company ("Digital Boulevard") (Tax ID NO. 20-5361464), 8000 Towers Crescent Drive, 13th Floor, Vienna, VA 22182; Interactive Call Response, LLC, a Delaware limited liability company ("Interactive Call Response") (Tax ID NO. 26-4785035), 113 Barksdale Professional Center, Newark, DE 19711; Strategic Call Response, LLC, a Delaware limited liability company ("Strategic Call Response") (Tax ID NO. 26-4758508), 113 Barksdale Professional Center, Newark, DE 19711; Instant Call Response, LLC ("Instant Call Response") (Tax ID NO. 27-0372357) 113 Barksdale Professional Center, Newark, DE 19711; Alliance Call Response, LLC ("Alliance Call Response") (Tax ID NO. 27-1326088) 113 Barksdale Professional Center, Newark, DE 19711; Reliable Call Response, LLC ("Reliable Call Response") (Tax ID NO. 27-1326137) 113 Barksdale Professional Center, Newark, DE 19711; Omega Call Response, LLC ("Omega Call Response") (Tax ID NO. 27-1326199) 113 Barksdale Professional Center, Newark, DE 19711; Rapid Call Response, LLC ("Rapid Call Response") (Tax ID NO. 27-0372286) 113 Barksdale Professional Center, Newark, DE 19711, and Dynamic Call Response, LLC, a Maryland limited liability company (f/k/a Edison Response) ("Dynamic Call Response") (Tax ID NO. 20-5268404), 7000 Security Boulevard, Suite 200, Baltimore, MD 21244.

Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”), Rules 2002, 4001, and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Rule 4001-2 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), for entry of an interim order (the “Interim Order”), *inter alia*,

(i) authorizing the Debtors to obtain secured postpetition financing on a superpriority basis (the “DIP Facility”) pursuant to the terms and conditions of that certain Debtor in Possession Credit Agreement (as amended, supplemented, restated, or otherwise modified from time to time, the “DIP Agreement”) by and between the Borrowers and Five Guys Capital, LLC (“DIP Lender”), substantially in the form attached hereto as Exhibit “A”;

(ii) authorizing the Debtors to execute and deliver the DIP Agreement and the other related credit documents (the “DIP Documents”) by and between the Borrowers and the DIP Lender, and to perform such other acts as may be necessary or desirable in connection with the DIP Documents;

(iii) granting the DIP Facility and all obligations owing thereunder and under the DIP Documents to the DIP Lender (collectively, and including all “Obligations” as described in the DIP Agreement, the “DIP Obligations”) allowed superpriority administrative expense claim status in each of the Cases and any Successor Cases (as defined herein);

(iv) granting to the DIP Lender, automatically perfected security interests in and liens upon all of the DIP Collateral (as defined herein), including, without limitation, all property constituting “Cash Collateral,” as defined in Section 363(a) of the Bankruptcy Code, which liens shall be subject to the priorities set forth herein;

(v) authorizing and directing the Debtors to pay the principal, interest, fees, expenses, and other amounts payable under the DIP Documents as such become due, including, without limitation, closing fees and the reasonable fees and disbursements of the attorneys, advisers, accountants, and other consultants of the DIP Lender, all to the extent provided in and in accordance with the terms of the DIP Documents;

(vi) authorizing the use of Cash Collateral of the

Prepetition Secured Lender under the Prepetition Credit Documents (each as defined herein), and providing adequate protection to the Prepetition Secured Lender for any Diminution in Value of its interests in the Prepetition Collateral, including the Cash Collateral (each as defined herein);

(vii) vacating and modifying the automatic stay imposed by Section 362 of the Bankruptcy Code to the extent necessary to implement and effectuate the terms and provisions of the DIP Documents and this Interim Order, as limited pursuant hereto; and

(viii) scheduling a final hearing (the “Final Hearing”) to consider the relief requested in the DIP Motion and approving the form of notice with respect to the Final Hearing.

In support of the DIP Motion, the Debtors, by and through their undersigned counsel, respectfully represent:

PRELIMINARY STATEMENT

1. The Debtors hereby seek, through approval of the Interim Order, authorization to obtain the post-petition financing provided by the DIP Facility to provide the Debtors with the liquidity necessary to operate during Chapter 11. With access to the liquidity provided by the DIP Facility, the Debtors will have the ability to maintain their business as a going concern, retain the ability to operate, maintain business relationships with their vendors, suppliers, and customers, pay their employees, and pursue a plan of reorganization. By this motion, the Debtors will demonstrate that they have met the Bankruptcy Code’s standards for approval of debtor-in-possession financing on the terms required by the DIP Facility and the DIP Agreement. Accordingly, the DIP Motion should be approved.

JURISDICTION

2. The Court has jurisdiction over the DIP Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of these proceedings and the DIP Motion in this Court is proper under 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief sought herein are sections 105, 361, 362, 363, and 364 of the Bankruptcy Code.

BACKGROUND

4. On November 23, 2009 (the “Petition Date”), the Debtors commenced their respective bankruptcy cases by filing voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. No trustee, examiner or creditors’ committee has been appointed in these cases. The Debtors are operating their respective businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

5. The events leading up to the Petition Date and the facts and circumstances supporting the relief requested herein are set forth in the Declaration of John Delta in Support of First Day Pleadings (the “Delta Declaration”) filed contemporaneously herewith and incorporated herein by reference.²

SUMMARY OF THE DEBTORS’ PREPETITION INDEBTEDNESS

(a) Equity

6. Joseph K. Rensin is the sole owner and shareholder of BlueHippo Funding. In turn, BlueHippo Funding is the sole member and shareholder of the remaining Debtors.

7. As of September 30, 2009, the Company’s consolidated balance sheet reflected total assets of approximately \$10 million. Of this amount, approximately \$147,000.00 was comprised of cash and cash equivalents, \$250,000.00 was comprised of property and equipment, \$1.5 million was comprised of intellectual property, \$2.5 million was comprised of accounts receivables, \$1.66 million was comprised of intangibles and approximately \$3.8 million was

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Interim Order or DIP Agreement. To the extent that there is any conflict between the definitions contained in either the Interim Order or the DIP Agreement, the definitions in the DIP Agreement shall control.

comprised of other assets. The Company's consolidated balance sheet also reflected total liabilities of approximately \$12.1 million for the third quarter 2009.

8. As of the Petition Date, the Company estimates that it had approximately \$147,000.00 of cash collateral in an account with the Bank of America.

(b) Debt Structure

9. The Debtors' financing consists of one secured credit facility. They have no unsecured credit facilities or letters of credit and have not issued any notes or bonds.

10. The Debtors' secured credit facility is a Secured Promissory Note (the "Note") entered into as of May 30, 2008. BlueHippo Funding, BlueHippo Capital, NV and BlueHippo Capital, VA are the borrowers under the Note and Five Guys Capital, LLC ("Five Guys")³ is the lender under the Note. The Note provides for a loan in the principal sum of \$500,000.00 with interest at a rate of ten percent per annum, payable in two annual installments as follows: (a) the first installment payment of interest accrued was due on June 1, 2009; and (b) the second and final installation payment of the outstanding principal amount plus interest accrued is due on June 1, 2010. The Note is secured by liens and security interests on all of the Debtors' assets.

11. As of the Petition Date, the Debtors owe approximately \$500,000.00 plus accrued interest on the Note. The Debtors did not make the first annual installment payment that was due on June 1, 2010, and are in default under the Note.

THE DEBTORS' NEED FOR POST-PETITION FINANCING

12. As a consequence of the factors described in the Delta Declaration, the Debtors have insufficient cash to maintain business relationships with their vendors, suppliers, and

³ Five Guys is solely owned by Joseph K. Rensin, the sole owner of BlueHippo Finance. Other than the common ownership and the Note, there is no legal relationship between the Debtors and Five Guys. Five Guys is not a debtor in these proceedings.

customers, and, in the event that any or all of those relationships are adversely affected by the commencement of these Cases, the Debtors could face the prospect of having insufficient cash to finance their operations and to pay their employees.

13. The Debtors urgently need credit and additional capital to mitigate any negative effect of these Cases and to continue their businesses and operations. Absent availability of new credit, the going-concern value of the Debtors' business will be severely negatively impacted.

14. Accordingly, the Debtors require the availability of working capital from the DIP Facility and the use of cash collateral. The DIP Facility will instill a sense of confidence in the Debtors' customers, vendors, and other important stakeholders. The Debtors critically need the support of these stakeholders at this time, as the loss of their support could severely impair the Debtors' ability to maximize the value of their estates.

15. In sum, without the immediate access to post-petition financing, the Debtors expect to suffer immediate and irreparable harm to their estates and creditors. The Debtors' ability to preserve the value of their estates for the benefit of their creditors depends upon the interim and final relief requested in the DIP Motion.

SUMMARY OF THE DEBTORS' PROPOSED DIP FINANCING⁴

16. The Debtors have determined, in the exercise of their sound business judgment, that to meet their working capital needs they require a post-petition credit facility in substantially

⁴ The summaries and descriptions of the terms and conditions of the DIP Agreement and the proposed Interim Order set forth in the DIP Motion are intended solely for informational purposes to provide the Court and parties in interest with an overview of significant terms thereof and should only be relied upon as such. The summaries and descriptions are qualified in their entirety by the DIP Agreement and the Interim Order. In the event there is a conflict between the DIP Motion and the DIP Agreement or the Interim Order, the DIP Agreement and/or the Interim Order, as applicable, shall control in all respects.

the form described herein. Accordingly, subject to the Court's approval, the Debtors have determined to enter in the DIP Agreement with the DIP Lender.

17. The terms of the DIP Facility are more specifically set forth in the DIP Agreement attached hereto as Exhibit "A". The key provisions of the DIP Agreement are as follows:

Lender. Five Guys Capital, LLC

Borrowers: Dynamic Call Response, LLC, Boost Credit, LLC, BlueHippo Funding, LLC, BlueHippo Capital, LLC (Virginia), BlueHippo Capital, LLC (Nevada), Digital Boulevard, LLC, Interactive Call Response, LLC, Strategic Call Response, LLC, Instant Call Response, LLC, Alliance Call Response, LLC, Reliable Call Response, LLC, Omega Call Response, LLC, Rapid Call Response, LLC, and Distinctive Call Response, LLC

Authorized Borrowings – Line of Credit. The Debtors are also authorized to borrow from the Lender up to the principal outstanding amount of \$750,000.00 on an interim basis and final basis in the aggregate as required to pay expenses in compliance with the Budget. The Debtors shall be authorized to borrow money and spend money solely in compliance with the Budget and as expressly set forth in the Interim Order. Compliance with the Budget shall be measured monthly on a cumulative basis.

Borrowers shall (a) conduct their business in the ordinary course and consistent with past practice and (b) use their reasonable efforts, in the ordinary course and consistent with past practice, to preserve their business and the goodwill and business of the customers, advertisers, suppliers and others having business relations with Borrowers or any of their Subsidiaries.

Terms of Borrowings (Interest; Attorneys' Fees; and Maturity). The DIP Financing shall bear interest at a per annum rate of 10%. The Debtors are required to pay the Lender's professional fees. The Debtors' authority to use cash collateral and to borrow funds under the DIP Order shall continue until the Termination Date, which is defined as the earlier of (a) thirty days after the entry of the Interim Order by the Bankruptcy Court, unless a Final Order is entered before such thirty day period expires, (b) 150 days after the Petition Date, or (c) the acceleration of the Loan and the termination of the commitments made in the DIP Financing Agreement (subject to the payment of Permitted Fee Expenses (as defined below) incurred prior to the Termination Date). The face amount of the line of credit will be reduced in an amount equal to any recovery by the Debtors of Debtors funds currently being held by their former payment processor, Check Gateway (Check Gateway"), or Check Gateway's originating depository financial institution, First Regions Bank ("FRB"). The granting of the line of credit is conditioned on the Debtors seeking such recovery at the First Day Hearing.

“Carve-Out” means, upon the occurrence of the Termination Declaration Date, the following expenses: (i) all statutory fees payable to the clerk of the Court or the U.S. Trustee pursuant to 28 U.S.C. § 1930(a)(6); and (ii) the allowed and unpaid professional fees, expenses and disbursements incurred up to and including the Termination Declaration Date by the Debtors and the Creditors Committee or any other statutory committee appointed in the Cases pursuant to Section 1102 of the Bankruptcy Code (each, a “Statutory Committee”) in accordance with the Budget for any professionals retained by final order of the Court (which order has not been vacated or stayed, unless the stay has been vacated) by the Debtors or any Statutory Committee under Sections 327, 328 or 1103(a) of the Bankruptcy Code (the “Case Professionals”) (including the reimbursement of expenses allowed by the Bankruptcy Court incurred by any Statutory Committee member in the performance of its duties, but excluding fees and expenses of third party professionals employed by such members), but solely to the extent incurred up to the Termination Declaration Date subject to the Budget and incurred in accordance with the Budget, plus such fees, expenses and disbursements incurred prior to the Termination Declaration Date, but which remain unpaid as of the Termination Declaration Date, but solely to the extent incurred in accordance with the Budget, excluding any fees and costs associated with prosecuting claims against the Lender or the Debtors, including officers or directors of the Lender or the Debtors (collectively, the “Allowed Professional Fees”).

Priority and Liens. Pursuant to 11 U.S.C. §§ 364(c)(2), (c)(3) and (d), as security for the DIP Financing, the Lender is granted liens (the "Post-Petition Liens") in all assets of the Debtors, including without limitation, all currently owned or after-acquired property and assets of the Debtors of any kind or nature (excluding Avoidance Actions, except for claims under 11 U.S.C. § 549 and the proceeds thereof) (the "Post-Petition Collateral") subject and subordinate only to (i) liens that are valid, binding, enforceable and perfected in the Pre-Petition Collateral existing on the Petition Date (the "Permitted Liens") other than the Pre-Petition Liens of the Lender; and (ii) the Permitted Fee Expenses. The Post-Petition Liens shall be senior to the Adequate Protection Liens and the Pre-Petition Liens. As additional security, the Post-Petition Loans shall, in accordance with 11 U.S.C. § 364(c)(1), have priority over all administrative expenses of the kind specified in Section 503(b) or 507(b) of the Bankruptcy Code (such priority, "Superpriority"), subordinate only to the Permitted Fee Expenses.

As adequate protection of the Pre-Petition Lender's interests in the Pre-Petition Collateral (the "Pre-Petition Liens"), including Cash Collateral, pursuant to 11 U.S.C. §§ 361, 363 and 552(b), the Pre-Petition Lender is granted additional and replacement liens in all property of the Debtors' estate (excluding Avoidance Actions, except for claims under 11 U.S.C. § 549 and the proceeds thereof), including the Post-Petition Collateral, only to the extent of any decrease in value of the Pre-Petition Lender's interests in the Pre-Petition Collateral occurring subsequent to the Petition Date (the "Adequate Protection Liens"). The Adequate Protection Liens are subject and subordinate only to (i) Permitted Liens other than the Pre-Petition Liens of the Pre-Petition Lender; (ii) the Permitted Fee Expenses; and (iii) the Post-Petition Liens. To the extent that the Adequate Protection Liens do not provide adequate protection of the Pre-Petition Liens in the Pre-Petition

Collateral, the Pre-Petition Lender shall have a 507(b) Claim entitled to priority over all other claims allowable under 11 U.S.C. § 507(a), but subordinate to the Permitted Fee Expenses and the Lender's Superpriority claims.

Application of Proceeds. All proceeds resulting from the sale, collection or other disposition of the Debtors' assets shall be applied to toward the prepayment of the DIP Financing Obligation, in accordance with the Interim Order and any Final Order.

On the Termination Date, all Obligations of the Debtors to the Lender shall become due and payable without further notice. Any obligation of the Lender to make any loans or advances shall be terminated. The Lender may terminate the DIP Financing upon the earliest to occur of any of the following events (any such event shall be referred to as a "Event of Default"):

- (a) If any representation or warranty made by Debtors to Lender under or in connection with this Agreement, shall prove to have been false or misleading in any material respect when made or delivered; or
- (b) If any default shall be made in the payment of any (i) interest on the Loans or other amounts payable hereunder when due or (ii) principal of the Loans, when and as the same shall become due and payable, whether at the due date thereof or at a date fixed for prepayment thereof or by acceleration thereof or otherwise; or
- (c) If the Debtors default in the due observance or performance of any covenant, condition or agreement; or
- (d) If Debtors shall fail to deliver the Budget when due and such default shall continue unremedied for more than three (3) Business Days; or
- (e) If Debtors default in the due observance or performance of any other covenant, condition or agreement to be observed or performed pursuant to the terms of the Credit Agreement, any of the Bankruptcy Orders or any of the other Loan Documents and such default shall continue unremedied for more than three (3) Business Days; or
- (f) If the Case shall be dismissed or converted to a case under Chapter 7 of the Bankruptcy Code or if Debtors file a motion or other pleading seeking the dismissal of the Case under Section 1112 of the Bankruptcy Code or otherwise;; or an application shall be filed by Debtors for the approval of any other Superpriority Claim or other charge of any kind in the Case which is *pari passu* with or senior to the claims of Lender against Debtors hereunder, or there shall arise or be granted any such *pari passu* or senior Superpriority Claim or other charge of any kind or the Bankruptcy Court shall enter an order terminating the use of cash collateral under the Existing Agreements; or

- (g) If the Bankruptcy Court shall enter an order or orders granting relief from the automatic stay applicable under Section 362 of the Bankruptcy Code, as may be extended from time to time, granting relief, to the holder or holders of any security interest to permit foreclosure (or the granting of a deed in lieu of foreclosure or the like) or any other enforcement of security on any assets of Debtors which have a value in excess of \$100,000 in the aggregate; or
- (h) If a Change of Control shall occur; or
- (i) If any material provision of any Loan Document or Order shall, for any reason, cease to be valid and binding on the Debtors, or if the Debtors shall so assert in any pleading filed in any court; or
- (j) If an order of the Bankruptcy Court shall be entered reversing, staying for a period in excess of 10 days, vacating or (without the written consent of the Lender) otherwise amending, supplementing or modifying any of the Bankruptcy Orders in a manner that is adverse to Lender, or terminating the use of cash collateral by Debtors pursuant to the Bankruptcy Orders or amending or modifying the adequate protections granted to the Lender pursuant to any of the Bankruptcy Orders; or
- (k) If any judgment or order in excess of \$100,000 (exclusive of any judgment or order the amounts of which are fully covered by insurance (less any applicable deductible) and as to which the insurer has acknowledged its responsibility to cover such judgment or order) as to any post-petition or post-filing obligation shall be rendered against Debtors and the enforcement thereof shall not have been stayed; or
- (l) If any non-monetary judgment or order with respect to a post-petition or post-filing event shall be rendered against Debtors which has or could reasonably be expected to have a Material Adverse Effect; or
- (m) If the Debtors are enjoined, restrained, or in any way prevented by court order from continuing to conduct all or any material part of their business, and the enforcement thereof shall not have been stayed; or
- (n) If Debtors shall file, support or fail to oppose a motion seeking, or the Bankruptcy Court shall enter, an order in the Case (i) approving additional financing under Section 364(c) or (d) of the Bankruptcy Code not otherwise permitted pursuant to this Agreement, (ii) granting any lien (other than liens permitted the Bankruptcy Orders) upon or affecting any Collateral which are pari passu or senior to the liens on the Collateral in favor of Lender, (iii) granting any claim priority senior to or pari passu with the claims of Lender under the Loan Documents (other than to the extent permitted pursuant to the terms of the Bankruptcy Orders) or any other claim having priority over any or all administrative expenses of the kind specified in Section 503(b) or Section 507(b) of the Bankruptcy Code, or (iv) granting any other relief that is

adverse to Lender's interests under any Loan Document or its rights and remedies hereunder or their interest in the Collateral; or

- (o) If the Official Creditors' Committee or any party in interest shall commence, or the Debtors or any officer or employee of Debtors commences or joins with or actively supports any Official Creditors' Committee or any other party in interest in the Case, a suit, action or contested matter against Lender or affecting the Collateral, or joins or actively supports a suit, action or contested matter against the Lender or that affects the Collateral, that sets forth (a) a claim in excess of \$10,000, (b) a claim or legal or equitable remedy which seeks reduction, setoff, subordination or any recharacterization of the claim or lien of Lender; or (c) a claim that could reasonably be expected to have a Material Adverse Effect (it being understood that reclamation claims shall not be deemed to have a Material Adverse Effect) or could reasonably be expected to have a material adverse effect on the rights and remedies of Lender under any Loan Documents or the collectability of all or any portion of the Obligations or the Existing Indebtedness; or
- (p) If the entry of an order in the Case confirming a plan of reorganization or a plan of liquidation that does not contain a provision for termination of all Loan commitments under this Agreement and repayment in full of the Obligations under this Agreement and the Existing Indebtedness on or before the effective date of such plan; or
- (q) If the Final Order is not entered immediately following the expiration of the Interim Order and, in any event, within 30 days following the Petition Date; or
- (r) If other than payments permitted pursuant to this Agreement, the Interim Order or the Final Order, as applicable, the Debtors shall make any payment (whether by way of adequate protection or otherwise) of principal or interest or otherwise on account of any Indebtedness incurred prior to the Petition Date; or
- (s) If there is a payment of, or application for authority to pay, any prepetition claim without Lender's prior written consent or pursuant to an order of the Bankruptcy Court after notice and a hearing unless otherwise permitted under this Agreement; or
- (t) If any claim or claims under Section 506(c) of the Bankruptcy Code against or with respect to any Collateral other than Permitted Fee Expenses is allowed; or
- (u) If absent the written consent of Lender, the Bankruptcy Court enters an order under Section 363 or 365 of the Bankruptcy Code authorizing or approving the sale or assignment of a material portion of any of Borrowers' assets; or

- (v) If an order is entered in the Case avoiding or requiring repayment of any portion of the payments made on account of the Obligations owing under this Agreement; or
- (w) The Debtors do not operate after the Petition Date in the ordinary course or fail to use their reasonable efforts, in the ordinary course and consistent with past practice, to preserve their businesses and the goodwill and business of the customers, advertisers, suppliers and others having business relations with the Debtors or any of their subsidiaries.
- (x) Debtors' Funds held by Check Gateway or FRB are not released within twenty (20) days of the Petition Date.

Notwithstanding the occurrence of an Event of Default, the Lender may elect not to terminate the Debtors' authority to borrow funds hereunder, to waive defaults hereunder, to forbear from the exercise of rights and remedies hereunder and under the Pre-Petition Loan Agreement and, subject to Court approval and the approval of the Lender, to modify the Termination Events described herein. Any such continued extension of financial accommodations shall be without prejudice to the Lender's ability to terminate funding and shall not constitute a course of dealing obligating the Lender to make or continuing making financial accommodations at any time in the future. Notwithstanding the foregoing, the Debtors' right to borrow Post-Petition Loans and to use Cash Collateral under this Interim Order or any Final Order shall terminate (the "Termination Date") upon: (i) the Maturity Date (as defined in the Interim DIP Order); (ii) the occurrence of Termination Event, or (iii) the expiration of the fourth (4th) business day following the Lender's transmission to counsel for the Debtors and counsel for any official statutory committee of a notice (by email or facsimile) stating that a Termination Event has occurred (during which five (5) business day period the Debtors may cure any default and/or the Debtors or any official statutory committee may seek an order finding that no such Termination Event has occurred).

Remedies Upon Termination Date. Upon a Termination Date, the Lender shall be entitled to exercise all of its rights and remedies under the Interim Order or applicable law in order to effect repayment of the Pre-Petition Indebtedness or the DIP Financing, including without limitation, foreclosing upon and selling all or a portion of the Pre-Petition Collateral or Post-Petition Collateral. The Lender shall have the right, without any further action or approval of this Court, including, without limitation, any further action to lift the automatic stay provided by section 362 or the discharge injunction under section 524 of the Bankruptcy Code, to exercise such rights and remedies as to all or such part of the Pre-Petition Collateral and the Post-Petition Collateral as the Lender shall, in its sole discretion, elect.

Admissions; Investigations. The Debtors make certain admissions regarding the amount, validity, perfection, enforceability and unavailability of the Pre-Petition Indebtedness and the Pre-Petition Loans. Absent a timely Challenge, and to the extent such Challenge

is unsuccessful, the Debtors' admissions will bind their estates and parties in interest. Any such Challenge must be asserted no later than (i) 75 days after the Petition Date, and (ii) 60 days after the appointment of such Committee.

18. Local Rule 4001-2(a) of the United States Bankruptcy Court for the District of Delaware requires that all financing motions highlight whether the proposed form of order or underlying stipulation or loan agreement contains any of certain disfavored provisions.

19. Local Rule 4001-2(a)(i)(C) requires the Debtors to disclose provisions that seek to waive, without notice, whatever rights the estate may have under 11 U.S.C. § 506(c). Although the proposed Final DIP Order will provide for a waiver of rights under Section 506(c), such rights are not waived in the Interim Order. The proposed waiver of the Debtors and estates' rights under Section 506(c) will be effective only after notice to parties in interest and entry of the Final Order granting such relief.

20. Local Rule 4001-2(a)(i)(F) requires the disclosure of any provisions in the Interim DIP Order providing disparate treatment for the professionals retained by a creditors' committee from those professionals retained by the debtor with respect to a professional carve-out. The carve-out being provided for in the Interim Order and Budget is applicable to both the Debtors' and any committee's professionals. (See Interim Order ¶ 30) Accordingly, all professionals retained by this estate will be treated fairly.

21. Local Rule 4001-2(a)(i)(G) requires the disclosure of provisions that prime any secured lien without the consent of the primed lienor. The Debtors note that, although the Interim DIP Order grants priming liens pursuant to Section 364(d) of the Bankruptcy Code, the only liens primed under the Interim Order are the Pre-Petition Liens held by the same Lender that will hold the Post-Petition Liens. Accordingly, the Interim DIP Order does not affect any priming without the consent of the primed lienor.

22. The justification for the provisions of the DIP Facility for which disclosure is required pursuant to Local Rule 4001-2 is the immediate and critical need for this financing. As discussed above, the Debtors were unable to secure postpetition financing on terms more favorable than that obtained from the DIP Lender and such financing is critical to the maximization of recoveries for the Debtors' creditors. Indeed, without this financing, the Debtors' ability to maximize the value of their estates for all stakeholders will be compromised. Accordingly, the facts and circumstances of these cases justify the inclusion of the terms that require disclosure under Local Rule 4001-2, and these terms of the DIP Agreement should be approved.

REQUEST FOR APPROVAL OF DIP FACILITY

23. As described above, it is essential to the success of these cases that the Debtors immediately obtain access to sufficient post-petition financing, without which the Debtors' ability to maintain their business operations will be compromised. The Debtors' continuing ability to maximize the value of their estates for the benefit of their creditors, and their ability to pursue the Proposed Sale at the Auction thus depend heavily upon the expeditious approval of the DIP Facility and the related actions requested herein.

24. Section 364 of the Bankruptcy Code distinguishes among (a) obtaining unsecured credit in the ordinary course of business, (b) obtaining unsecured credit out of the ordinary course of business and (c) obtaining credit with specialized priority or with security. If a debtor-in-possession cannot obtain post-petition credit on an unsecured basis, pursuant to Section 364(c) of the Bankruptcy Code,⁵ a court may authorize a debtor-in-possession to obtain credit or incur

⁵ Section 364(c) of the Bankruptcy Code provides as follows:

If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the

debt, repayment of which is entitled to superpriority administrative expense status or is secured by a senior lien on unencumbered property or a junior lien on encumbered property, or combination of the foregoing. Pursuant to section 364(d) of the Bankruptcy Code,⁶ a court may authorize a debtor-in-possession to obtain credit or incur debt secured by a senior or equal lien on property of the estate that is already subject to a lien.

25. As a condition to entering into the DIP Agreement and obtaining the Debtors' needed liquidity, the Debtors must obtain authorization, pursuant to sections 364(c) and (d) of the Bankruptcy Code, (a) to grant the DIP Lender automatically perfected security interests in and liens upon all of the DIP Collateral, including, without limitation, all property constituting Cash Collateral, and (b) grant the DIP Obligations allowed superpriority administrative expense claim status in each of the Cases and any Successor Cases.

Approval Under Section 364(c) of the Bankruptcy Code.

court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt—

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

11 U.S.C. § 364(c).

⁶ Section 364(d) of the Bankruptcy Code provides as follows:

- (1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if—
 - (A) the trustee is unable to obtain such credit otherwise; and
 - (B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

11 U.S.C. § 364(d).

26. The statutory requirement for obtaining post-petition credit under section 364(c) of the Bankruptcy Code is a finding, made after notice and hearing, that the debtors-in-possession are “unable to obtain unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense.” See *In re Garland Corp.*, 6 B.R. 456, 461 (B.A.P. 1st Cir. 1980) (secured credit under section 364(c)(2) is authorized, after notice and hearing, upon showing that unsecured credit cannot be obtained); *In re Ames Dep’t Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) (noting that “although a debtor is not required to seek credit from every possible source, a debtor must show that it has made a reasonable effort to seek other sources of credit available under section 364(a) & (b)”); *In re Crouse Group, Inc.*, 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987) (debtor seeking secured credit under section 364(c) of the Bankruptcy Code must prove that it was unable to obtain unsecured credit pursuant to section 364(b) of the Bankruptcy Code).

The Debtors Were Unable to Obtain Necessary Post-Petition Financing on an Unsecured Basis Under 11 U.S.C. § 364(a) or (b)

27. As set forth in the Delta Declaration, and as the evidence at the Final Hearing will show, the Debtors could not have obtained a working capital facility of the type and magnitude required in these cases on an unsecured basis.

28. To show that the credit required is not obtainable on an unsecured basis, a debtor need only demonstrate “by good faith effort that credit was not available without” the protections of section 364(c) of the Bankruptcy Code. *Bray v. Shenandoah Fed. Sav. & Loan Ass’n (In re Snowshoe Co.)*, 789 F.2d 1085, 1088 (4th Cir. 1986). Thus, “[t]he statute imposes no duty to seek credit from every possible lender before concluding that such credit is unavailable.” *Id* at 1088; see also *Ames*, 115 B.R. at 40 (holding that debtor made a reasonable effort to secure financing where it approached four lending institutions, was rejected by two, and selected the

least onerous financing option from the remaining two lenders). Moreover, where few lenders are likely to be able and willing to extend the necessary credit to the debtor, “it would be unrealistic and unnecessary to require [the debtor] to conduct an exhaustive search for financing.” *In re Sky Valley, Inc.*, 100 B.R. 107, 113 (Bankr. N.D. Ga. 1988), *aff’d sub nom. Anchor Savings Bank FSB v. Sky Valley, Inc.*, 99 B.R. 117, 120 n.4 (N.D. Ga. 1989).

29. The Debtors submit that, other than the DIP Facility, there are no financing alternatives available under the circumstances. As this Court is undoubtedly aware, in the current economic environment, the financing options for a wide variety of companies, particularly those involved in sub-prime financing, are extremely limited.

30. Moreover, as noted above, virtually all of the Debtors’ assets are encumbered by liens and security interests. Alternative financing in an amount sufficient to repay those creditors and provide additional liquidity is simply not available given the current state of the financial markets, the nature and state of the Debtors’ business operations and the size of the financing required. Even if alternative debtor-in-possession financing were available on favorable terms and conditions and could be consummated in a time frame required to address the Debtors’ liquidity needs, obtaining such financing would likely result in a difficult and protracted priming contest with the Prepetition Secured Lender, the results of which could not be predicted with certainty. Any uncertainty occasioned by protracted financing litigation would be extremely damaging to the Debtors, immediately jeopardizing their Chapter 11 cases at the outset.

Approval of Priming Liens.

31. If a debtor-in-possession is unable to obtain credit under the provisions of section 364(c) of the Bankruptcy Code, the debtor-in-possession may obtain credit secured by a senior or equal lien on property of the estate that is already subject to a lien, commonly referred to as a “priming lien.” 11 U.S.C. § 364(d). Section 364(d) of the Bankruptcy Code, which governs the

incurrence of postpetition debt secured by priming liens, provides that the court, after notice and hearing, may authorize the debtor-in-possession to obtain credit or incur debt secured by a senior or equal lien on property of the estate that is subject to a lien only if –

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

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

11 U.S.C. § 364(d)(1).

32. As discussed above, the Debtors have explored alternatives and lack alternative financing options. In light of that, and given the state of the credit markets, the Debtors have concluded that financing comparable to that provided by the DIP Lender under the DIP Facility is currently unobtainable without the priming of the prepetition liens. *See In re Utah 7000, L.L.C.*, 2008 WL 2654919, *2 (Bankr. D. Utah July 3, 2008) (finding that the debtor unable to obtain financing without priming of prepetition liens); *In re Mosello*, 195 B.R. 277, 287 (Bankr. S.D.N.Y. 1996) (same); *In re 495 Central Park Ave. Corp.*, 136 B.R. 626, 630-31 (Bankr. S.D.N.Y. 1992) (same); *In re Beker Indus. Corp.*, 58 B.R. 725, 736 (Bankr. S.D.N.Y. 1986) (same).

33. Thus, the Debtors are unable to obtain alternative post-petition financing through credit allowable on an unsecured basis and without granting priming liens. In these circumstances, the Debtors, in the exercise of their considered business judgment and in consultation with their professional advisors, have determined that the financing provided by the DIP Facility is the most favorable under the circumstances and provides the Debtors the liquidity necessary to maintain the going concern value of their business pending the conclusion of the Debtors' proposed sale process.

34. In addition, the Debtors submit that the adequate protection to be provided to the Prepetition Secured Lender, as detailed below, is sufficient to approve the priming of their liens under section 364(d) of the Bankruptcy Code.

The Post-Petition Loan is Necessary to Preserve Assets of the Debtors' Estates

35. As stated above, the DIP Facility is essential so that the Debtors can continue to purchase inventory, keep their operations running, and immediately instill their employees, suppliers and customers with confidence in the Debtors' ability meet their obligations to these important stakeholders. Absent such confidence, the Debtors will not have the resources or support necessary to maintain operations and preserve their values as a going concern.

36. The success of these cases thus depends on the confidence of the Debtors' employees, vendors, and customers. If the DIP Motion is denied or delayed, that confidence may be destroyed, and the success of these Chapter 11 cases might be irreparably damaged. In contrast, once the DIP Facility is approved, the Debtors' ability to provide employees (through a third-party management agreement to be funded under the DIP facility), vendors, customers, and other important stakeholders with the necessary confidence will be assured. The Debtors' need for access to the DIP Facility is, therefore, immediate.

The Terms of the DIP Facility are Fair, Reasonable, and Appropriate

37. In the Debtors' considered business judgment, the DIP Facility is the best financing option available in the circumstances of these cases. The purpose of the facility is to enable the Debtors to maintain the value of their estates while pursuing a going concern sale of the Debtors' business for the benefit of all stakeholders.

38. The proposed DIP Facility provides, generally, that the security interests and administrative expense claims granted to the DIP Lender are subject to, among other items, a carve-out (the Carve Out) for (i) all statutory fees payable to the clerk of the Court or the U.S.

Trustee pursuant to 28 U.S.C. § 1930(a)(6); and (ii) the allowed and unpaid professional fees, expenses and disbursements incurred on or after the Termination Declaration Date by the Debtors and the Creditors Committee or any other statutory committee appointed in the Cases pursuant to Section 1102 of the Bankruptcy Code (each, a “Statutory Committee”) for any professionals retained by final order of the Court (which order has not been vacated or stayed, unless the stay has been vacated) by the Debtors or any Statutory Committee under Sections 327, 328 or 1103(a) of the Bankruptcy Code (the “Case Professionals”) (including the reimbursement of expenses allowed by the Bankruptcy Court incurred by any Statutory Committee member in the performance of its duties, but excluding fees and expenses of third party professionals employed by such members), but solely to the extent incurred in accordance with the Budget, plus such fees, expenses and disbursements incurred prior to the Termination Declaration Date, but which remain unpaid as of the Termination Declaration Date, but solely to the extent incurred in accordance with the Budget. In *Ames Department Store*, the bankruptcy court found that such “carve-outs” are not only reasonable but are necessary to insure that official committees and debtors’ estates are adequately assisted by counsel. *Ames*, 115 B.R. at 40.

Application of the Business Judgment Standard

39. After appropriate and extensive investigations and analysis, and robust, good faith, and arm’s length negotiations among the Debtors and the DIP Lender, the Debtors’ management concluded that the DIP Facility and the use of Cash Collateral is the best alternative available in the circumstances of these cases. Bankruptcy courts routinely defer to a debtor’s business judgment on most business decisions, including the decision to borrow money, unless such decision is arbitrary and capricious. See *In re Trans World Airlines, Inc.*, 163 B.R. 964, 974 (Bankr. D. Del. 1994) (noting that the interim loan, receivables facility and asset based facility were approved because they “reflect[ed] sound and prudent business judgment on behalf of

TWA . . . [were] reasonable under the circumstances and in the best interest of TWA and its creditors"); *In re TM Carlton House Partners, LTD*, 91 B.R. 349, 357 (Bankr. E.D. Pa. 1988) (holding that due to the debtor's distinct awareness of its own financial needs, the court would not second-guess its business judgment to put aside cash to effectuate a refinancing of its debts); *cf. Group of Institutional Investors v. Chicago Mil. St. P. & Pac. Ry.*, 318 U.S. 523, 550 (1943) (holding that decisions regarding the rejection or assumption of a lease is left to the business judgment of the debtor); *In re Simasko Prod. Co.*, 47 B.R. 444, 449 (D. Colo. 1985) ("Business judgments should be left to the board room and not to this Court."); *In re Lifeguard Indus. Inc.*, 37 B.R. 3, 17 (Bankr. S.D. Ohio 1983) (same); *In re Curlew Valley Assocs.*, 14 B.R. 506, 513-14 (Bankr. D. Utah 1981) (holding that courts generally will not second-guess a debtor-in-possession's business decisions when those decisions involve "a business judgment made in good faith, upon a reasonable basis, and within the scope of his authority under the Code"). In fact, "[m]ore exacting scrutiny would slow the administration of the Debtor's estate and increase its cost, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially." *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985).

40. The Debtors have exercised sound business judgment in determining that a post-petition credit facility is appropriate and have satisfied the legal prerequisites to incur debt under the DIP Facility. The terms of the DIP Agreement are fair and reasonable and are in the best interests of the Debtors' estates. Accordingly, the Debtors should be granted authority to enter into the DIP Agreement and obtain funds from the DIP Lender on the secured, administrative "superpriority" basis described above, pursuant to sections 364(c) and (d) of the Bankruptcy Code.

REQUEST FOR CONSENSUAL USE OF CASH COLLATERAL

41. The Debtors will require the ability to use cash and the proceeds of existing accounts receivable and inventory to maintain the operation of their businesses and preserve their value as going concerns. These essential items, however, constitute part of the Prepetition Collateral (the “Cash Collateral”) and, therefore, may not be used in support of the Debtors’ ongoing business activities absent compliance with section 363(c)(2) of the Bankruptcy Code.

1. Section 363(c)(2) of the Bankruptcy Code provides that:

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents[.]

11 U.S.C. § 363(c)(2).

42. In the instant cases, the Prepetition Secured Lender has consented to the Debtors’ use of Cash Collateral. As a result, and because the such use is essential to the preservation of the Debtors’ estates, the Court should approve the Debtors’ use of Cash Collateral under section 363(c)(2) of the Bankruptcy Code.

APPROVAL OF ADEQUATE PROTECTION

43. In exchange for the Debtors’ use of Prepetition Collateral, including Cash Collateral, and its priming of the prepetition liens, the Prepetition Secured Lender is entitled to receive adequate protection pursuant to sections 361, 363, and 364 of the Bankruptcy Code, for any diminution in the value of each of their respective interests in the Prepetition Collateral (including Cash Collateral) resulting from the Debtors’ use, sale, or lease (or other decline in value) of such collateral, the imposition of the automatic stay, the priming of prepetition liens on Prepetition Collateral (collectively, and solely to the extent of any such diminution in value. the “Diminution in Value”).

44. The Debtors propose to provide the Prepetition Secured Lender with adequate protection in accordance with sections 361, 363, and 364 of the Bankruptcy Code. To that end, the Debtors and the Prepetition Secured Lender have negotiated, and the Debtors request the Court approve, as of the Petition Date, certain protections of the Prepetition Secured Lender's interest in Prepetition Collateral from any Diminution in Value of each of their respective interests in the Prepetition Collateral. Such adequate protection, as described more fully in the Interim Order, is summarized below.

- A. Adequate Protection Liens. Pursuant to sections 361, 363(e) and 364(d) of the Bankruptcy Code, as adequate protection of the interests of the Prepetition Secured Lender in the Prepetition Collateral against any Diminution in Value of such interests in the Prepetition Collateral, the Debtors propose to grant to the Prepetition Secured Lender, a continuing valid, binding, enforceable, and perfected postpetition security interests in and lien on the DIP Collateral (the "Adequate Protection Liens").
- B. Superpriority Claim. As further adequate protection of the interests of the Prepetition Secured Lender in the Prepetition Collateral against any Diminution in Value of such interests in the Prepetition Collateral, the Debtors propose to grant, to the extent provided by section 507(b) of the Bankruptcy Code, an allowed superpriority administrative expense claim in each of the Cases and any Successor Cases (the "Superpriority Claim").

C. Adequate Protection Payments and Protections. As further adequate protection, subject to the reservation of rights set forth in paragraph 32 of the Interim Order, the Debtors have agreed to provide adequate protection in the form of: (a) payments of interest, fees, and other amounts due under the Prepetition Secured Lender's loan documents, at the times specified therein, to the Prepetition Secured Lender and (b) continued maintenance and insurance of the Prepetition Collateral and the DIP Collateral in amounts and for the risks, and by the entities, as required under the Prepetition Credit Documents, the DIP Documents, and the Interim Order.

45. The Debtors believe that the proposed adequate protection is fair and reasonable. The Prepetition Secured Lender has agreed that the adequate protection summarized above and provided for in the Interim Order is sufficient to allow the Debtors to use Cash Collateral. Furthermore, the priming of the Prepetition Liens will enable the Debtors to obtain the DIP Facility. As a result, the Prepetition Secured Lender consents to such priming liens and is entitled to receive adequate protection of its interest in the Prepetition Collateral.

46. Accordingly, based on the foregoing, the Debtors respectfully request that the Court authorize the Debtors to provide certain adequate protections in accordance with the terms set forth in the Interim Order.

GOOD FAITH

47. The Debtors submit that the terms and conditions of the DIP Facility and the DIP Agreements, and the fees paid and to be paid thereunder, are fair, reasonable, and the best

available to the Debtors under the circumstances. As stated above, the Debtors, the DIP Lender and the Prepetition Secured Lender negotiated the terms and conditions of the DIP Agreement and the use of Cash Collateral in good faith and at arm's length. Moreover, the Debtors' decision to enter into the DIP Agreement was an exercise of the Debtors' prudent business judgment. Therefore, the DIP Lender and the Prepetition Secured Lender should be accorded the benefits of section 364(e) of the Bankruptcy Code to the extent any or all of the provisions of the DIP Agreements, or any interim or final order of this Court pertaining thereto, are hereafter modified, vacated, stayed or terminated by subsequent order of this or any other court.

REQUEST FOR MODIFICATION OF THE AUTOMATIC STAY

48. The Interim Order contemplates a modification of the automatic stay established pursuant to section 362 of the Bankruptcy Code, to the extent necessary, to effectuate all of the terms and provisions of the Interim Order, including, without limitation, to (a) permit the Debtors to grant the DIP Liens, the Adequate Protection Liens, the DIP Superpriority Claim, and the Adequate Protection Superpriority Claims; (b) permit the Debtors to perform such acts as the DIP Lender or any Prepetition Secured Lender may request in its sole discretion to assure the perfection and priority of the liens granted herein; (c) permit the Debtors to incur all liabilities and obligations to the DIP Lender and the Prepetition Secured Lender under the DIP Documents, the DIP Facility, and the Interim Order; and (d) authorize the Debtors to pay and the DIP Lender and the Prepetition Secured Lender to retain and apply payments made in accordance with the terms of the Interim Order.

49. Stay modification provisions of this type are customary features of post-petition debtor-in-possession financing facilities and, in the Debtors' business judgment, are reasonable under the circumstances. Accordingly, the Court should modify the automatic stay to the extent contemplated by the Interim Order.

REQUEST TO WAIVE BANKRUPTCY RULES 6003(b), 6004(a) AND 6004(h)

50. In order to successfully implement the foregoing, the Debtors respectfully request that the Court waive the notice requirements provided for by Bankruptcy Rule 6004(a), the twenty-day stay provided for by Bankruptcy Rule 6003(b), and the ten-day stay provided for by Bankruptcy Rule 6004(h). The Debtors believe, for the reasons set forth above, that ample justification exists for the Court to waive Bankruptcy Rule 6003(b), 6004(a), and 6004(h).

REQUEST FOR FINAL HEARING

51. Pursuant to Bankruptcy Rule 4001(c)(2), the Debtors request the Court to set a date for the Final Hearing that is no later than 25 days from the Petition Date.

NOTICE

52. Notice of the DIP Motion has been provided by the Debtors, whether by facsimile, email, overnight courier, or hand delivery, to certain parties in interest, including: (i) the U.S. Trustee; (ii) the Internal Revenue Service; (iii) those parties listed on the consolidated list of creditors holding the twenty (20) largest unsecured claims against the Debtors, as identified in their chapter 11 petitions; (iv) counsel to the DIP Lender and Prepetition Secured Lender; and (v) any other entity or individual that has asserted a security interest or lien in any of the DIP Collateral. The parties have made reasonable efforts to afford the best notice possible under the circumstances and such notice is good and sufficient to permit the interim relief set forth in the Interim Order.

NO PRIOR REQUEST

53. No prior request for the relief sought in the DIP Motion has been made to this or any other court.

WHEREFORE, the Debtors respectfully request that the Court (i) enter an order substantially in the form of the Interim Order annexed hereto as Exhibit "B"; (ii) schedule the Final Hearing, (iii) after the Final Hearing, enter a Final Order substantially in the form of the Interim Order and as filed with the Court prior to the Final Hearing; and (iv) grant such other and further relief as is just and proper.

Dated: November 23, 2009

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