

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

WELDED CONSTRUCTION, L.P., *et al.*,¹

Debtors.

Chapter 11

Case No. 18-12378 (KG)

Jointly Administered

Ref. Docket No. 17, 44, 228, 242 & 243

**SECOND INTERIM ORDER (I) AUTHORIZING THE DEBTORS TO OBTAIN
POSTPETITION SECURED FINANCING, (II) AUTHORIZING THE USE OF CASH
COLLATERAL, (III) GRANTING LIENS AND SUPERPRIORITY ADMINISTRATIVE
EXPENSE STATUS, (IV) GRANTING ADEQUATE PROTECTION, (V) MODIFYING
THE AUTOMATIC STAY, AND (VI) SCHEDULING A FINAL HEARING**

Upon the motion (the “**DIP Motion**”) dated October 22, 2018 of Welded Construction, L.P. (“**Welded**” or the “**DIP Borrower**”) and Welded Construction Michigan, LLC (the “**DIP Guarantor**”), as debtors and debtors in possession (together, the “**Debtors**”) in the above-referenced chapter 11 cases (collectively, the “**Chapter 11 Cases**”), pursuant to sections 105, 361, 362, 363, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1), 364(e), and 507 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the “**Bankruptcy Code**”), Rules 2002, 4001, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”) and the corresponding local rules of this District (the “**Local Rules**”), for entry of interim and final orders authorizing the Debtors to, among other things:

- (i) Obtain senior secured postpetition financing (the “**DIP Financing**”) pursuant to the terms and conditions of the DIP Financing Documents (as defined below), the First Interim Order, and the Final Order (as defined below);

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: Welded Construction, L.P (5008) and Welded Construction Michigan, LLC (9830). The mailing address for each of the Debtors is 26933 Eckel Road, Perrysburg, OH 43551.



(ii) Enter into (a) a \$20,000,000 Senior Secured, Superpriority Debtor in Possession Term Loan, Guaranty and Security Agreement (the “**DIP Credit Agreement**”), substantially in the form attached as Exhibit A to the First Interim Order (as defined herein), as may be amended by this order (the “**Second Interim Order**” and, together with the First Interim Order, the “**Interim Orders**”), by and among each of the DIP Borrower and the DIP Guarantor, and North American Pipeline Equipment Company, LLC, as Lender (the “**DIP Lender**”) and (b) all other loan documents (together with the DIP Credit Agreement, the “**DIP Financing Documents**”);

(iii) Borrow, on an interim basis, pursuant to the DIP Financing Documents and the Interim Orders, postpetition financing in an aggregate principal amount of up to \$10,000,000 (the “**Interim DIP Loan**”) and obtain other financial accommodations from the DIP Lender pursuant to the DIP Credit Agreement, the other DIP Financing Documents, and the Interim Orders;

(iv) Borrow, on a final basis, pursuant to the DIP Financing Documents and the Final Order (as defined below), postpetition financing in an aggregate principal amount of up to \$20,000,000 (the “**DIP Loan**”, together with the Interim DIP Loan, the “**DIP Facility**”) and obtain other financial accommodations from the DIP Lender pursuant to the DIP Credit Agreement, the other DIP Financing Documents, and the Final Order (as defined below);

(v) Authorize the DIP Borrower and the DIP Guarantor to execute and deliver and to perform under the DIP Credit Agreement and the other DIP Financing Documents;

(vi) Grant to the DIP Lender allowed superpriority administrative expense claims in each of the Chapter 11 Cases and any Successor Cases (as defined below) for the DIP Financing and all obligations of the Debtors owing under the DIP Financing Documents (collectively, and including all “Obligations” of the Debtors as defined and described in the DIP

Credit Agreement, the “**DIP Obligations**”) subject to the priorities set forth in paragraph 2(i) below;

(vii) Grant to the DIP Lender automatically perfected security interests in and liens on all of the DIP Collateral (as defined below), including all property constituting “cash collateral” as defined in section 363(a) of the Bankruptcy Code (“**Cash Collateral**”), which liens shall be subject to the priorities set forth herein;

(viii) Use the proceeds of the DIP Financing in accordance with the DIP Credit Agreement, the DIP Financing Documents and the Second Interim Order, in all cases in accordance with the Budget (as defined in the DIP Credit Agreement), a copy of which is attached to the First Interim Order as Exhibit B thereto, and as otherwise provided in the DIP Financing Documents;

(ix) Use any prepetition collateral, including the Cash Collateral, and provide adequate protection to the parties that may have an interest in such prepetition collateral, including Cash Collateral, for any diminution in value of their interests therein; and

(x) Vacate and modify the automatic stay imposed by section 362 of the Bankruptcy Code solely to the extent necessary to implement and effectuate the terms of the DIP Financing Documents and this Second Interim Order;

(xi) Schedule a final hearing (the “**Final Hearing**”) to consider entry of an order (the “**Final Order**”) granting the relief requested in the DIP Motion on a final basis and approving the form of notice with respect to the Final Hearing; and

(xii) Waive, to the extent applicable, any stay of the immediate effectiveness of this Second Interim Order imposed by the Bankruptcy Code or the Bankruptcy Rules, such that this Second Interim Order shall be immediately effective upon its entry on the Court’s docket.

The Court having considered the DIP Motion, the *Declaration of Frank Pometti in*

Support of Debtors' Chapter 11 Petitions and First Day Motions and Applications (the “**First Day Declaration**”), the exhibits attached thereto, the DIP Credit Agreement, and the evidence submitted or adduced and the arguments of counsel made at the hearing (the “**First Interim Hearing**”) in support of entry of the *Interim Order (I) Authorizing the Debtor to Obtain Postpetition Secured Financing, (II) Authorizing the Use of Cash Collateral, (III) Granting Liens and Superpriority Administrative Expense Status, (IV) Granting Adequate Protection, (V) Modifying the Automatic Stay, and (VI) Scheduling a Final Hearing* [D.I. 44] (the “**First Interim Order**”), and at the hearing (the “**Second Interim Hearing**”) to consider entry of this Second Interim Order; and notice of the DIP Motion and the Second Interim Hearing having been given in accordance with Bankruptcy Rules 2002, 4001(b), (c) and (d), and 9014; and the Second Interim Hearing having been held and concluded; and it appearing that granting the relief requested in the DIP Motion on an interim basis is necessary to avoid immediate and irreparable harm to the Debtors pending the Final Hearing, and is otherwise fair and reasonable and in the best interests of the Debtors, their estates and their creditors, and is essential for the preservation of the value of the Debtors’ assets; and all objections, if any, to the entry of this Second Interim Order having been withdrawn, resolved or overruled by the Court; and after due deliberation and consideration, and good and sufficient cause appearing therefor:

IT IS FOUND AND DETERMINED that²:

A. **Petition Date**. On October 22, 2018 (the “**Petition Date**”), the Debtors filed voluntary petitions under chapter 11 of the Bankruptcy Code with this Court.

² The findings and conclusions set forth herein constitute the court’s findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

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

C. **Committee Formation.** On October 30, 2018, the Office for the United States Trustee for the District of Delaware (the “**U.S. Trustee**”) appointed an official committee of unsecured creditors (the “**Committee**”) in the Chapter 11 Cases.

D. **Interim DIP Order.** On October 23, 2018, the Court approved the Debtors’ entry into and performance under the DIP Financing Documents on an interim basis and entered the First Interim Order, pursuant to which the Debtors were authorized to borrow up to \$10,000,000 on an interim basis (the “**Interim DIP Loan**”).

E. **Notice.** Notice of the Second Interim Hearing and notice of DIP Motion has been provided by the Debtors to (i) the U.S. Trustee; (ii) the United States Securities and Exchange Commission; (iii) the Office of the United States Attorney for the District of Delaware; (iv) the Internal Revenue Service; (v) the Debtors’ thirty (30) largest unsecured creditors (excluding insiders); and (vi) counsel to the DIP Lender, by telecopy, email, overnight courier and/or hand delivery. Under the circumstances, such notice of the Interim Hearing and the DIP Motion constitutes adequate and sufficient notice and complies with section 102(1) of the Bankruptcy Code, Bankruptcy Rules 2002 and 4001(b), (c), and (d), and the Local Rules.

F. **Findings Regarding the DIP Financing.**

(i) **Need for DIP Financing and to Use Cash Collateral.** The Debtors need access to funds from the Interim DIP Loan and to use Cash Collateral to continue operations, fund payroll and operating expenses, and to administer and preserve the value of their estates pending the Final Hearing. The ability of the Debtors to finance their operations through the incurrence of the Interim DIP Loan and use of Cash Collateral is vital to the preservation and maintenance of the going concern value of the Debtors' estates and to maximize the value of the Debtors' assets for the benefit of their creditors.

(ii) **Priming of the Prepetition Liens.** Upon the entry of the Final Order, the priming of any liens on the DIP Collateral, as contemplated by the DIP Financing Documents and as further described below, will enable the Debtors to obtain the DIP Facility and to continue to operate their businesses to the benefit of their estates and creditors. Solely in the event and to the extent that there are obligations outstanding whose interests are primed, the parties holding such obligations are each entitled to receive adequate protection as set forth in paragraph 5 below pursuant to sections 361, 363, and 364 of the Bankruptcy Code for any diminution in value of each of their respective interests.

(iii) **No Credit Available on More Favorable Terms.** The Debtors have been unable to obtain (a) unsecured credit allowable under Bankruptcy Code section 503(b)(1) as an administrative expense, or (b) credit for money borrowed secured by a lien on property of the estate on more favorable terms and conditions than those provided in the DIP Credit Agreement and this Second Interim Order. The Debtors are unable to obtain credit for borrowed money without granting to the DIP Lender the DIP Protections (as defined below).

G. **Sections 506(c) and 552 Waivers.** Subject to and effective upon entry of the Final Order, the Debtors shall be deemed to have waived the provisions of section 506(c) of the Bankruptcy Code as part of the DIP Facility. Further, subject to and effective upon entry of the Final Order, no expenses of administration of the Chapter 11 Cases or Successor Cases shall be charged against or recovered from the DIP Collateral pursuant to section 506(c) of the Bankruptcy Code, the enhancement of collateral provisions of section 552 of the Bankruptcy Code, or any other legal or equitable doctrine (including, without limitation, unjust enrichment) or any similar principle of law, without the prior written consent of the DIP Lender, and no consent shall be implied from any action, inaction or acquiescence by the DIP Lender.

H. **Use of Proceeds of the DIP Facility.** Proceeds of the DIP Facility (net of any amounts used to pay fees, costs and expenses under the DIP Financing Documents) shall be used, in each case in a manner consistent with the terms and conditions of the DIP Credit Agreement and this Second Interim Order and in accordance with the Budget.

I. **Application of Proceeds of DIP Collateral.** All proceeds of any sale or other disposition of the DIP Collateral (as defined below) shall be applied in accordance with the Budget and the terms and conditions of the DIP Financing Documents.

J. **Effect of Reversal, Good Faith.** The DIP Lender has indicated a willingness to provide financing to the Debtors in accordance with the DIP Credit Agreement and this Second Interim Order, and provided that the DIP Obligations, DIP Liens and other protections granted by this Second Interim Order and the DIP Financing Documents will not be affected by any subsequent reversal or modification of this Interim Order as provided in section 364(e) of the Bankruptcy Code. The DIP Lender has acted in good faith in agreeing to provide the DIP Financing approved by this Second Interim Order.

K. **Business Judgment and Good Faith Pursuant to Section 364(e).**

(i) The terms and conditions of the DIP Facility and the DIP Financing Documents, and the fees paid and to be paid thereunder are fair, reasonable, and the best available under the circumstances, reflect the Debtors' exercise of prudent business judgment consistent with their fiduciary duties, and are supported by reasonably equivalent value and consideration;

(ii) the DIP Financing Documents and use of Cash Collateral were negotiated in good faith and at arms' length between the Debtors and the DIP Lender; and

(iii) the proceeds to be extended under the DIP Facility will be so extended in good faith, and for valid business purposes and uses, as a consequence of which the DIP Lender is entitled to the protection and benefits of section 364(e) of the Bankruptcy Code.

L. **Relief Essential; Best Interest; Good Cause.** Good cause has been show for the relief requested in the DIP Motion (and as provided in this Second Interim Order) and such relief is necessary, essential, and appropriate for the preservation of the Debtors' assets, business and property. It is in the best interest of the Debtors' estates to be allowed to enter into the DIP Facility contemplated by the DIP Credit Agreement and to perform in accordance with the DIP Financing Documents.

NOW, THEREFORE, based upon the foregoing findings, and upon consideration of the DIP Motion and the record made before this Court with respect to the DIP Motion, including the record created during the First Interim Hearing and the Second Interim Hearing, and with the consent of the Debtors and the DIP Lender to the form and entry of this Second Interim Order, and good and sufficient cause appearing therefor,

IT IS HEREBY ORDERED AND DECREED:

1. **Motion Granted.** The DIP Motion is granted in accordance with the terms and conditions set forth in this Second Interim Order and the DIP Credit Agreement. Any objections to the DIP Motion with respect to entry of this Second Interim Order to the extent not withdrawn, waived or otherwise resolved, and all reservations of rights included therein, are hereby denied and overruled on the merits.

2. **DIP Financing Documents.**

(a) **Approval of Entry Into DIP Financing Documents.** The Debtors are authorized and empowered to execute and deliver the DIP Financing Documents and to incur and to perform the DIP Obligations in accordance with, and subject to, the terms of this Second Interim Order and the DIP Financing Documents, and to execute and deliver all instruments and documents which may be required or necessary for the performance by the Debtors under the DIP Financing Documents and the creation and perfection of the DIP Liens described in and provided for by this Second Interim Order and the DIP Financing Documents. The Debtors are hereby authorized to use Cash Collateral. The Debtors are hereby authorized to do and perform all acts, pay the principal, interest, fees, expenses, indemnities and other amounts described in the DIP Credit Agreement and all other DIP Financing Documents as such become due, including, without limitation, reasonable attorneys' fees and disbursements as provided for in the DIP Credit Agreement, which amounts shall not otherwise be subject to approval of this Court; *provided, however,* that prior to its receipt of any cash payment from the Debtors, the DIP Lender shall deliver copies of summary professional fee and expense invoices to the Office of the U.S. Trustee and the Committee on ten (10) days' notice at the same time such invoices are forwarded to the Debtors for payment. Such parties shall have ten (10) days to review such invoices and notify counsel for the Debtors and the DIP Lender of any objection to the payment

or allowance of any of the professional fees and expenses. If no objection is received by such parties during such ten (10) day period, then such amounts shall be payable by the Debtors. To the extent either party notifies counsel to Debtors and the DIP Lender of any objection to the payment or allowance of any of the professional fees and expenses during the ten-day review period, the objectionable amount of such fees and expenses shall not be paid until such objection is resolved by the parties; if the parties are unable to resolve any objection within ten (10) days after the objecting party notifies counsel to Debtors and the DIP Lender, the objecting party shall file its objection with this Court, which shall be heard on the next available omnibus hearing date.

(b) **Interim Authorization to Borrow/and or Guarantee.** To enable them to continue to preserve the value of their estates during the period prior to entry of the Final Order (the “**Interim Period**”) and subject to the terms and conditions of this Second Interim Order and the DIP Financing Documents, upon the execution of the DIP Credit Agreement and the other DIP Financing Documents, the Debtors are hereby authorized to borrow and/or guarantee, as applicable, the Interim DIP Loan up to a total committed amount of \$10,000,000 under the DIP Financing Documents.

(c) **Conditions Precedent.** The DIP Lender shall have no obligation to make any loan or advance under the DIP Credit Agreement during the Interim Period unless the conditions precedent to making such loan under the DIP Credit Agreement have been satisfied in full or waived by the DIP Lender in its sole discretion.

(d) **DIP Liens.** Effective immediately upon the entry of this Second Interim Order (and without in any way modifying the relief granted to the DIP Lender in the First Interim Order), pursuant to section 364(c)(2) of the Bankruptcy Code, on account of the Interim

DIP Loan, except with respect to the Carve Out (as defined below) and subject to any prior valid, unavoidable, perfected liens and security interests in existence as of the Petition Date (or as such lien may be perfected after the Petition Date to the extent permitted by Section 546 of the Bankruptcy Code), the DIP Lender is hereby granted first-priority postpetition security interests and liens (which shall immediately be valid, binding, permanent, continuing, enforceable and non-avoidable) on all of the real, personal and mixed property, whether now owned or hereafter acquired of the Debtors, including, without limitation, any cash, any investments of such cash, deposit accounts, inventory, equipment, goods, general intangibles, accounts receivable, other rights to payment whether arising before or after the Petition Date, contracts, properties, plants, equipment, general intangibles, documents, instruments, interest in leaseholds, real property, patents, copyrights, trademarks, trade names, other intellectual property, Equity Interests (as defined in the DIP Credit Agreement), the proceeds of all of the foregoing, and, subject to entry of the Final Order, the proceeds of the Debtors' claims and causes of action arising under sections 502(d), 544-549, 550 and 553 of the Bankruptcy Code (the "**Avoidance Actions**") whether received through judgement, avoidance, settlement, or otherwise (collectively, the "**DIP Collateral**," and all such liens and security interests granted on or in the DIP Collateral pursuant to this Interim Order and the DIP Financing Documents, the "**DIP Liens**"); PROVIDED HOWEVER, in no event shall the DIP Collateral include the "**Transco Cash**." For all purposes with respect to the DIP Financing, "Transco Cash" means any and all post-petition payments (other than any such payments allocated to cover overhead costs as set forth in the Order Approving Third Commitment Letter From Transcontinental Gas Pipe Line Company, LLC) made by Transcontinental Gas Pipe Line Company, LLC ("**Transco**") to one or more of the Debtors pursuant to the Order Approving Commitment Letter From Transcontinental Gas Pipe

Line Company, LLC (D.I. 45), the Order Approving Second Commitment Letter From Transcontinental Gas Pipe Line Company, LLC (D.I. 111), and the Order Approving Third Commitment Letter From Transcontinental Gas Pipe Line Company, LLC (D.I. 172) (collectively, the “**Transco Orders**”) in connection with the work, material and labor to be provided by Debtors or their agents on Transco’s Atlantic Sunrise Pipeline Project. The Transco Cash shall be used by the Debtors solely in accordance with the Transco Orders and shall at all times be free of and not encumbered by any liens or claims under any post-petition financing or any other liens or claims of any other party. For avoidance of doubt, any payments made by Transco to cover overhead costs as set forth in the Order Approving Third Commitment Letter From Transcontinental Gas Pipe Line Company, LLC shall be included in the DIP Collateral. The Debtors, the DIP Lenders and Transco reserve all rights with respect to amounts the Debtors contend are owed by Transco that are not subject to the terms of the Transco Orders.

(e) Subject to the Carve Out (as defined below), pursuant to section 364(c)(2) of the Bankruptcy Code, the DIP Lender is hereby granted a perfected, first priority lien on all DIP Collateral not otherwise subject to any valid, unavoidable, perfected liens and security interests.

(f) **DIP Lien Priority**. The DIP Liens securing the DIP Obligations shall be junior and subordinate to the Carve Out (as defined below) and pursuant to section 364(c)(3), until the entry of the Final Order (pursuant to which the DIP Obligations will be secured by a priming lien pursuant to section 364(d) of the Bankruptcy Code unless otherwise provided in the Final Order), any valid, unavoidable, perfected liens and security interests on the DIP Collateral, and shall otherwise be senior in priority and superior to any security, mortgage, collateral interest, lien or claim on or to any of the DIP Collateral. Other than as expressly set forth herein,

the DIP Liens shall not be made subject to or *pari passu* with any lien or security interest by any court order heretofore or hereafter granted in the Chapter 11 Cases. The DIP Liens shall be valid and enforceable against any trustee appointed in the Chapter 11 Cases, upon the conversion of any of the Chapter 11 Cases to a case under Chapter 7 of the Bankruptcy Code or in any other proceedings related to any of the foregoing (any “**Successor Cases**”), or upon the dismissal of any of the Chapter 11 Cases or Successor Cases.

(g) **Enforceable Obligations**. The DIP Financing Documents shall constitute and evidence the valid and binding obligations of the Debtors, which obligations shall be enforceable against the Debtors, their estates and any successors thereto and their creditors or representatives thereof, in accordance with their terms and the terms hereof.

(h) **Protection of DIP Lender’s and Other Rights**. From and after the Petition Date, the Debtors shall use the proceeds of the extensions of credit under the DIP Facility only for the purposes specifically set forth in the DIP Credit Agreement and this Second Interim Order and in strict compliance with the Budget (subject to any variances thereto permitted by the DIP Credit Agreement).

(i) **Superpriority Administrative Claim Status**. Subject to the Carve Out (as defined below), all DIP Obligations shall constitute an allowed superpriority administrative expense claim (the “**DIP Superpriority Claim**” and, together with the DIP Liens, the “**DIP Protections**”) with priority in each of the Chapter 11 Cases under sections 364(c)(1), 503(b) and 507(b) of the Bankruptcy Code and otherwise over all administrative expense claims and unsecured claims against the Debtors or their estates, now existing or hereafter arising, of any kind or nature whatsoever, including, without limitation, administrative expenses of the kinds specified in or ordered pursuant to sections 105, 326, 328, 330, 331, 365, 503(a), 503(b), 506(c)

(subject to entry of a final order), 507(a), 507(b), 546(c), 546(d), 726 (to the extent permitted by law), 1113 and 1114 of the Bankruptcy Code and pursuant to any other provision of the Bankruptcy Code except as otherwise set forth herein, whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment. The DIP Superpriority Claim shall be payable from and have recourse to all prepetition and postpetition property of the Debtors and all proceeds thereof, subject to the Carve Out (as defined below) and subject to the rights of Prepetition Lienholders (as defined below) with respect to the Prepetition Lienholders' rights in prepetition property of the Debtors, provided that the DIP Superpriority Claim shall be payable from the proceeds of the Avoidance Actions only upon entry of the Final Order.

(j) **Equipment Leases.** Notwithstanding anything to the contrary herein, with respect to the Debtors' executory contracts and/or unexpired leases of equipment and/or other personal property ("**Leased Equipment**"), any liens and/or security interests granted to the DIP Lender herein shall attach to the Debtors' interest or interests in the executory contracts and/or unexpired leases corresponding to such Leased Equipment, and no such liens and/or security interests shall attach to or against the underlying Leased Equipment. All right, title and ownership of such Leased Equipment is, and shall remain, exclusively held by the non-Debtor lessors of the Leased Equipment and the Debtors and the estates of the Debtors in these Chapter 11 Cases neither hold nor shall obtain hereunder any interest or interests in the underlying Leased Equipment, except as explicitly provided for in such corresponding executory contracts and/or unexpired leases; provided, however, that to the extent any such Leased Equipment is determined in a final, nonappealable order entered by this Court to be property of the Debtors, rather than property of the lessors, any liens and/or security interests granted to the DIP Lender

herein shall be junior in priority only to prior valid, unavoidable, perfected liens and security interests in such Leased Equipment held by the lessor as of the Petition Date.

3. **Authorization to Use Proceeds of DIP Facility and Cash Collateral.** Pursuant to the terms and conditions of this Second Interim Order, the DIP Credit Agreement and the other DIP Financing Documents, and in accordance with the Budget and the variances thereto set forth in the DIP Credit Agreement, the Debtors are authorized to use the advances under the DIP Credit Agreement and to use Cash Collateral during the period commencing immediately after the entry of the Second Interim Order and terminating upon the occurrence of an Event of Default (as defined below) and the termination of the DIP Credit Agreement in accordance with its terms and subject to the provisions hereof. The Debtors and the DIP Lender may agree in writing to modify the Budget in their discretion at any time that the DIP Financing remains outstanding.

4. **Postpetition Lien Perfection.** This Second Interim Order shall be sufficient and conclusive evidence of the validity, perfection, and priority of the DIP Liens without the necessity of filing or recording any financing statement, deed of trust, mortgage, or other instrument or document which may otherwise be required under the law of any jurisdiction or the taking of any other action (including, for the avoidance of doubt, entering into any deposit account control agreement) to validate or perfect the DIP Liens or to entitle the DIP Liens to the priorities granted herein. Notwithstanding the foregoing, the DIP Lender may, in its sole discretion, file such financing statements, mortgages, notices of liens and other similar documents, and are hereby granted relief from the automatic stay of section 362 of the Bankruptcy Code in order to do so, and all such financing statements, mortgages, notices and

other documents shall be deemed to have been filed or recorded at the time and on the date of the commencement of the Chapter 11 Cases.

The Debtors shall execute and deliver to the DIP Lender all such financing statements, mortgages, notices and other documents as the DIP Lender may reasonably request to evidence, confirm, validate or perfect, or to insure the contemplated priority of, the DIP Liens granted pursuant hereto. The DIP Lender, in its discretion, may file a photocopy of this Second Interim Order as a financing statement with any recording officer designated to file or record financing statements or with any registry of deeds or similar office in any jurisdiction in which any Debtor has real or personal property, and in such event, the recording officer shall be authorized to file or record such copy of this Interim Order.

5. **Adequate Protection Liens for Prepetition Lienholders.** Solely in the event and to the extent that the Debtors have obligations to any party that remain outstanding that are subject to valid, perfected and non-avoidable prepetition liens on the Debtors' property, such parties (each a "**Prepetition Lienholder**" and collectively the "**Prepetition Lienholders**") shall receive and are hereby granted, as adequate protection against any diminution in the value of such Prepetition Lienholder's interest caused by the imposition of the automatic stay, pursuant to sections 361 and 363(e) of the Bankruptcy Code, continuing, valid, binding, enforceable, and perfected postpetition security interests in and liens on the DIP Collateral (the "**Adequate Protection Liens**"). The Adequate Protection Liens shall be subject to the Carve Out as set forth in this Second Interim Order and shall otherwise be junior to the DIP Liens. Subject to and effective upon the entry of the Final Order, the Adequate Protection Liens shall be otherwise senior to all security interests in, liens on, or claims against any of the DIP Collateral other than the DIP Liens.

6. **Carve Out**. The DIP Liens are subordinate only to the following (the “**Carve Out**”): (i) quarterly fees required to be paid pursuant to 28 U.S.C. § 1930(a)(6) (the “**U.S. Trustee Fees**”), together with interest payable thereon pursuant to applicable law and any fees payable to the Clerk of the Bankruptcy Court; (ii) until the issuance of a Carve Out Notice (as defined in the DIP Credit Agreement) (which the DIP Lender may only issue upon an Event of Default), the allowed and reasonable fees and expenses of professionals employed by the Debtors and the Committee pursuant to Sections 327 and 1103 of the Bankruptcy Code (the “**Case Professionals**”) in the amounts set forth in the Budget (inclusive of any permitted variances); and (iii) following delivery of a Carve Out Notice, an aggregate amount (the “**Residual Carve Out**”) not to exceed \$300,000, provided that (a) any payments made to Case Professionals for services rendered prior to the delivery of the Carve Out Notice and in accordance with the Budget and (b) any fees and expenses of Case Professionals accrued prior to the delivery of the Carve Out Notice in the amounts set forth in the Budget and subsequently allowed, shall not reduce the Residual Carve Out.

7. Notwithstanding anything set forth herein, the Carve Out shall exclude any fees and expenses incurred in connection with initiating or prosecuting any claims, causes of action, adversary proceedings, or other litigation against the DIP Lender, including, without limitation, the assertion or joinder in any claim, counterclaim, action, proceeding, application, motion, objection, defenses or other contested matter, the purpose of which is to seek any order, judgment, determination or similar relief (i) invalidating, setting aside, disallowing, avoiding, challenging or subordinating, in whole or in part, (a) the DIP Obligations or (b) the DIP Liens, or (ii) preventing, hindering or delaying, whether directly or indirectly, the DIP Lender’s assertion

or enforcement of their liens or security interests or realization upon any DIP Collateral, or (iii) prosecuting any Avoidance Actions against the DIP Lender.

8. Nothing herein shall be construed to obligate the DIP Lender to pay any professional fees, or to assure that a Debtor has sufficient funds on hand to pay any professional fees.

9. **Payment of Compensation.** Nothing herein shall be construed as consent to the allowance of any professional fees or expenses of any of the Debtors or the Committee or shall affect the right of the DIP Lender to object to the allowance and payment of such fees and expenses or to permit the Debtor to pay any such amounts not set forth in the Budget.

10. **Section 506(c) Claims.** Nothing contained in this Second Interim Order shall be deemed a consent by the DIP Lender to any charge, lien, assessment or claim against the DIP Collateral under Section 506(c) of the Bankruptcy Code or otherwise. Upon entry of the Final Order, no costs or expenses of administration which have been or may be incurred in the Chapter 11 Cases or any Successor Cases at any time may be charged against the DIP Lender or any of its claims or the DIP Collateral pursuant to sections 105 or 506(c) of the Bankruptcy Code, or otherwise.

11. **Collateral Rights.** Unless the DIP Lender has provided its prior written consent or all DIP Obligations have been paid in full in cash (or will be paid in full in cash upon entry of an order approving indebtedness described in subparagraph (a) below), and all commitments to lend have terminated:

(a) The Debtors shall not seek entry, in these cases or proceedings, or in any Successor Case, of any order which authorizes the obtaining of credit or the incurring of indebtedness that is secured by a security, mortgage, or collateral interest or other lien on all or

any portion of the DIP Collateral and/or entitled to priority administrative status which is senior or *pari passu* to those granted to the DIP Lender pursuant to this Second Interim Order, unless such credit or indebtedness is sufficient to pay all of the DIP Obligations in full in cash; and

(b) The Debtors shall not consent to relief from the automatic stay by any person other than the DIP Lender with respect to all or any portion of the DIP Collateral with a value greater than \$100,000 without the express written consent of the DIP Lender.

12. **Commitment Termination Date.** All DIP Obligations of the Debtors to the DIP Lender shall be immediately due and payable, and the Debtors' authority to use the proceeds of the DIP Facility shall cease, both on the date that is the earliest to occur of: (i) the date that is one hundred and eighty (180) days after the Petition Date, (ii) the date on which the maturity of the DIP Obligations is accelerated and the commitments under the DIP Facility are irrevocably terminated in accordance with the DIP Credit Agreement, and (iii) November 30, 2018 if the Debtors have not obtained entry of a Final Order on or before such date (the "**Commitment Termination Date**").

13. **Disposition of Collateral.** The Debtors shall not sell, transfer, lease, encumber or otherwise dispose of any portion of the DIP Collateral, without the prior written consent of the DIP Lender (and no such consent shall be implied, from any other action, inaction or acquiescence by the DIP Lender or an order of this Court), except as provided in the DIP Credit Agreement and this Second Interim Order and approved by the Court to the extent required under applicable bankruptcy law; provided, however, that nothing herein shall prevent the Debtors from making sales in the ordinary course of business to the extent consistent with their prior practice and the Budget.

14. **Events of Default.** The occurrence of an “Event of Default” pursuant to Section 12.1 the DIP Credit Agreement shall constitute an event of default under this Second Interim Order, unless expressly waived in writing in accordance with the consents required in the DIP Financing Documents (collectively, the “**Events of Default**”); provided, however, that deadline by which the Debtors must obtain entry of the Final Order contained in Section 12.1(h) of the DIP Credit Agreement shall be hereby extended to November 30, 2018.

15. **Further Amendments to the DIP Credit Agreement.** The DIP Lender and the Debtors have consented to certain amendments to Sections 25 (“Indemnification”) and 26 (“Release”) of the DIP Credit Agreement. Accordingly, the DIP Credit Agreement is hereby amended as set forth in the changed pages attached hereto as **Exhibit A.**

16. **Rights and Remedies Upon Event of Default.**

(a) Any otherwise applicable automatic stay is hereby modified so that after the occurrence of any Event of Default and at any time thereafter during the continuance of such Event of Default, upon five (5) business day’s prior written notice of such occurrence (the “**Remedies Notice Period**”), in each case given to each of the Debtors and counsel thereto, counsel for the Committee, if any, and the U.S. Trustee, the DIP Lender shall be entitled to exercise its rights and remedies with respect to the Debtors in accordance with the DIP Financing Documents. Nothing in this Second Interim Order shall limit the ability of any party to immediately exercise rights and remedies with respect any non-Debtors.

(b) Notwithstanding the preceding paragraph, immediately following the giving of notice by the DIP Lender of the occurrence of an Event of Default: (i) the Debtors shall continue to deliver and cause the delivery of the proceeds of DIP Collateral to the DIP Lender as provided in the DIP Credit Agreement and this Second Interim Order; (ii) the DIP Lender shall

continue to apply such proceeds in accordance with the provisions of this Second Interim Order and of the DIP Credit Agreement; (iii) the Debtors shall have no right to use any of such proceeds other than towards the satisfaction of the DIP Obligations and the Carve Out; and (iv) any obligation otherwise imposed on the DIP Lender to provide any loan or advance to the Debtors pursuant to the DIP Financing Documents shall immediately be suspended. Following the giving of notice by the DIP Lender of the occurrence of an Event of Default, the Debtors shall be entitled to an emergency hearing before this Court. If the Debtors do not contest the right of the DIP Lender to exercise its remedies within such five (5) day period, or if an emergency hearing is held that does not result in the Court preventing the DIP Lender from exercising its rights and remedies, then the automatic stay, as to the DIP Lender, shall automatically terminate at the end of the Remedies Notice Period.

(c) Nothing included herein shall prejudice, impair, or otherwise affect the DIP Lender's rights to seek any other or supplemental relief in respect of the DIP Lenders' rights, as provided in the DIP Credit Agreement.

17. **Proofs of Claim.** The DIP Lender will not be required to file proofs of claim in the Chapter 11 Cases or any Successor Case.

18. **Other Rights and Obligations.**

(a) **Good Faith Under Section 364(e) of the Bankruptcy Code. No Modification or Stay of this Second Interim Order.** The DIP Lender has acted in good faith in connection with negotiating the DIP Financing Documents, and extending credit under the DIP Facility, and its reliance on this Second Interim Order is in good faith. Based on the findings set forth in this Second Interim Order and the record made during the Interim Hearing and the Second Interim Hearing, and in accordance with section 364(e) of the Bankruptcy Code, in the

event any or all of the provisions of this Second Interim Order are hereafter reversed, modified amended or vacated by a subsequent order of this or any other Court, the DIP Lender is entitled to all the benefits and protections provided in section 364(e) of the Bankruptcy Code. Any such reversal, modification, amendment or vacatur shall not affect the validity and enforceability of any advances made pursuant to this Second Interim Order or the liens or priority authorized or created hereby. Any claims, liens or DIP Protections granted to the DIP Lender hereunder arising prior to the effective date of such reversal, modification, amendment or vacatur shall be governed in all respects by the original provisions of this Interim Order, and the DIP Lender shall be entitled to all of the rights, remedies, privileges and benefits, including the DIP Protections granted herein, with respect to any such claim. Since the loans made pursuant to the DIP Credit Agreement are made in reliance on this Second Interim Order, the obligations owed to the DIP Lender prior to the effective date of any reversal or modification of this Second Interim Order cannot, as a result of any subsequent order in the Chapter 11 Cases or in any Successor Cases, be subordinated, lose their lien priority or superpriority administrative expense claim status, or be deprived of the benefit of the status of the liens and claims granted to the DIP Lender under this Second Interim Order and/or the DIP Financing Documents.

(b) Binding Effect. The provisions of this Second Interim Order shall be binding upon and inure to the benefit of the DIP Lender, the Debtors and each of their respective successors and assigns (including any trustee or other fiduciary hereinafter appointed as a legal representative of the Debtors or with respect to the property of the estates of the Debtors) whether in the Chapter 11 Cases, in any Successor Cases, or upon dismissal of any such chapter 11 or chapter 7 Case.

(c) No Waiver. The failure of the DIP Lender to seek relief or otherwise exercise their rights and remedies under the DIP Financing Documents, the DIP Facility, this Second Interim Order or otherwise, as applicable, shall not constitute a waiver of the DIP Lender's rights hereunder, thereunder, or otherwise. Notwithstanding anything herein, the entry of this Second Interim Order is without prejudice to, and does not constitute a waiver of, expressly or implicitly, or otherwise impair the DIP Lender under the Bankruptcy Code or under non-bankruptcy law, including without limitation, the rights of the DIP Lender to (i) request conversion of the Chapter 11 Cases to cases under Chapter 7, dismissal of the Chapter 11 Cases, or the appointment of a trustee in the Chapter 11 Cases, or (ii) propose, subject to the provisions of section 1121 of the Bankruptcy Code, a plan of reorganization or (iii) exercise any of the rights, claims or privileges (whether legal, equitable or otherwise) the DIP Lender may have pursuant to this Second Interim Order, the DIP Financing Documents, or applicable law. Nothing in this Second Interim Order shall interfere with the rights of any party with respect to any non-Debtors.

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

(e) No Marshaling. The DIP Lender shall not be subject to the equitable doctrine of "marshaling" or any other similar doctrine with respect to any of the DIP Collateral.

(f) Section 552(b). In light of the DIP Lender's agreement to subordinate its liens and superpriority claims to the Carve Out, and subject to entry of the Final Order, the DIP Lender is entitled to all of the rights and benefits of section 552(b) of the Bankruptcy Code and

the “equities of the case” exception shall not apply with respect to proceeds, product, offspring or profits of any of the DIP Collateral.

(g) Amendment. The Debtors and the DIP Lender may amend or waive any provision of the DIP Financing Documents, provided that, to the extent such amendment or waiver impairs the Debtors or DIP Collateral or otherwise constitutes a material modification of the DIP Financing Documents, such amendment or waiver must be on notice to the U.S. Trustee and the Committee, each of whom shall have five (5) business days from the date of such notice within which to object in writing to such amendment or waiver. If the U.S. Trustee or the Committee timely objects to any such amendment or waiver to the DIP Financing Documents, such amendment or waiver shall only be permitted pursuant to an order of this Court.

19. Customer Project Completion Agreements. Notwithstanding anything to the contrary contained in this Second Interim Order, with the prior written consent of the DIP Lender, a Court-approved order in connection with a Customer Project Completion Agreement (as such term is defined in *Debtors’ Motion for Entry of an Order, Pursuant to Sections 105(a), 363(b), 503(b)(1), 1107(a) and 1108 of the Bankruptcy Code, Authorizing, but Not Directing, (I) the Debtors to Pay Certain Prepetition Claims, Conditioned upon Prior Customer Payment, (II) the Debtors to Honor Customer Obligations, (III) the Debtors to Implement Control Procedures for Customer Project Funding and Completion, and (IV) Granting Related Relief* [D.I. 12] can amend provisions of this Second Interim Order, the Final Order, and any DIP Financing Document, if and as applicable, that would require amendment to implement such Customer Project Completion Agreement.

20. No Priming of Sureties’ Rights. Notwithstanding any provision of this Second Interim Order, the First Interim Order, or the DIP Financing Documents: (1) entry of this Second

Interim Order is without prejudice to, and does not constitute a waiver of, any of the rights and priorities of Federal Insurance Company and its affiliates and Berkshire Hathaway (each, a “Surety” and collectively, the “Sureties”) under their respective indemnity agreements and applicable law, including the Sureties’ rights of equitable subrogation, trust fund rights, and rights in bonded contract proceeds; (2) unless otherwise expressly agreed by the Sureties in writing, all bonded contract proceeds paid or to be paid will be used solely for payment of claims of subcontractors, vendors, material suppliers and related job costs (including direct labor costs) that would otherwise be a liability of the Surety under any applicable surety bond and that were incurred with respect to the specific bonded contract from which such proceeds derived (unless any applicable Customer Project Completion Agreement approved by the Court designates that such customer will pay for a portion of the Debtors’ overhead and costs, in which case the amount paid toward such overhead and costs shall be limited to the designated amount as funded by the customer pursuant to the applicable Customer Project Completion Agreement; provided, however, that, notwithstanding the expedited approval procedures under the first-day Customers Order, the Sureties shall be provided notice and opportunity to object to Court approval with respect to any Customer Project Completion Agreement that contemplates funding of Debtor’s overhead and costs), and any other rights regarding such proceeds are not prejudiced or waived by entry of this Second Interim Order; (3) the Debtors shall provide information reasonably related to the bonded contracts and any payments thereunder and proceeds thereof as is reasonably requested by the Sureties; (4) entry of this Second Interim Order is without prejudice to, and does not constitute a waiver of, any rights of the Sureties in any collateral for the obligations arising under the applicable indemnity agreement, whether in the form of cash, letter

of credit, or otherwise; and (5) the Debtors reserve all rights with respect to the Sureties and their respective indemnity agreements and applicable law.

21. **Survival of Interim Order and Other Matters.** The provisions of this Second Interim Order and any actions taken pursuant hereto shall survive entry of any order which may be entered (i) confirming any Plan in the Chapter 11 Cases, (ii) converting any of the Chapter 11 Cases to a case under chapter 7 of the Bankruptcy Code or any Successor Cases, (iii) to the extent authorized by applicable law, dismissing any of the Chapter 11 Cases, (iv) withdrawing of the reference of any of the Chapter 11 Cases from this Court, or (v) providing for abstention from handling or retaining of jurisdiction of any of the Chapter 11 Cases in this Court. The terms and provisions of this Second Interim Order, including the DIP Protections granted pursuant to this Second Interim Order and the DIP Financing Documents, shall continue in full force and effect notwithstanding the entry of such order, and such DIP Protections shall maintain their priority as provided by this Second Interim Order until all the obligations of the Debtors to the DIP Lender pursuant to the DIP Financing Documents have been indefeasibly paid in full in cash and discharged (such payment being without prejudice to any terms or provisions contained in the DIP Financing Documents which survive such discharge by their terms).

(a) **Inconsistency.** In the event of any inconsistency between the terms and conditions of the DIP Financing Documents and of this Second Interim Order, the provisions of this Second Interim Order shall govern and control.

(b) **Enforceability.** This Second Interim Order shall constitute findings of fact and conclusions of law pursuant to the Bankruptcy Rule 7052 and shall take effect and be fully enforceable *nunc pro tunc* to the Petition Date immediately upon entry of this Second Interim Order. Notwithstanding Bankruptcy Rules 4001(a)(3), 6004(h), 6006(d), 7062, 9024, or any

other Bankruptcy Rule, or Rule 62(a) of the Federal Rules of Civil Procedure, this Interim Order shall be immediately effective and enforceable upon its entry and there shall be no stay of execution or effectiveness of this Second Interim Order. The rights of the Committee to object to the terms of the Final Order, the DIP Credit Agreement and any other DIP Financing Document at the Final Hearing are expressly reserved.

(c) Objections Overruled. All objections to the DIP Motion to the extent not withdrawn or resolved, are hereby overruled on an interim basis.

(d) No Waivers or Modification of Interim Order. The Debtors irrevocably waive any right to seek any modification or extension of this Second Interim Order without the prior written consent of the DIP Lender and no such consent shall be implied by any other action, inaction or acquiescence of the DIP Lender.

22. Governmental Consents. Except as otherwise provided herein, the execution, delivery and performance by the Debtors of the DIP Financing Documents and the consummation of the transactions contemplated by the DIP Financing Documents do not and will not require any registration with, consent or approval of, or notice to, or other action to, with or by, any Governmental Authority (as defined in the DIP Credit Agreement).

23. Final Hearing.

(a) The Final Hearing to consider entry of the Final Order and final approval of the DIP Facility is scheduled for November 30, 2018 at 10:00 a.m. prevailing Eastern time at the United States Bankruptcy Court for the District of Delaware. If no objections to the relief sought in the Final Hearing are filed and served in accordance with this Interim Order, no Final Hearing may be held, and a separate Final Order may be presented by the Debtors and entered by this Court.

(b) Within two (2) business days following entry of this Second Interim Order, the Debtors shall serve, by United States mail, first-class postage prepaid, notice of the entry of this Interim Order and of the Final Hearing (the “**Final Hearing Notice**”), together with copies of this Second Interim Order, the proposed Final Order and the DIP Motion, on: (a) the parties having been given notice of the Interim Hearing; (b) any party which has filed prior to such date a request for notices with this Court; (c) counsel for the Committee; (d) the U.S. Trustee, (e) the Internal Revenue Service, (f) counsel to the DIP Lender, and (g) the Securities and Exchange Commission. The Final Hearing Notice shall state that any party in interest objecting to the entry of the proposed Final Order shall file written objections with the Clerk of the Bankruptcy Court no later than November 27, 2018 at 12:00 p.m. prevailing Eastern time which objections shall be served so that the same are received on or before such date by: (a) bankruptcy counsel for the Debtors, Young Conaway Stargatt & Taylor, LLP, Rodney Square, 1000 North King Street, Wilmington, DE 19801, Attn: Michael R. Nestor, Esq. and Sean M. Beach, Esq.; (b) counsel for the DIP Lender, Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, NY 10166, Attn: Michael A. Rosenthal, Esq. and Matthew K. Kelsey, Esq.; (c) counsel to the Committee; and (d) the Office of the United States Trustee for the District of Delaware, Attn: Jaclyn Weissgerber, Esq. and Jane M. Leamy, Esq. and shall be filed with the Clerk of the United States Bankruptcy Court for the District of Delaware, in each case to allow actual receipt of the foregoing no later than November 27, 2018, at 12:00 p.m. prevailing Eastern time. Notwithstanding the terms of this Second Interim Order, this Court is not precluded from entering a Final Order containing provisions that are inconsistent with, or contrary to any of the terms in this Second Interim Order, subject to the protections under Section 364(e) and the rights of the DIP Lender to terminate the DIP Credit Agreement if such Final Order is not acceptable to

them. In the event this Court modifies any of the provisions of this Second Interim Order or the DIP Financing Documents following such further hearing, such modifications shall not affect the rights and priorities of DIP Lender pursuant to this Second Interim Order with respect to the DIP Collateral, and any portion of the DIP Obligations which arises or is incurred, advanced or paid prior to such modifications (or otherwise arising prior to such modifications), and this Second Interim Order shall remain in full force and effect except as specifically amended or modified at such Final Hearing.

(c) Retention of Jurisdiction. The Bankruptcy Court has and will retain jurisdiction to enforce this Second Interim Order.



KEVIN GROSS
UNITED STATES BANKRUPTCY JUDGE
29

Exhibit A

Amendments to the DIP Credit Agreement

relieve or discharge the obligation or liability of any Person not an express party to this Agreement; or (c) give any Person not an express party to this Agreement any right of subrogation or action against any party to this Agreement.

24. Expenses

Whether or not the transactions contemplated hereby are consummated, the Debtors agree to pay promptly (a) all the actual and reasonable costs and expenses of the Lender incurred in connection with the negotiation, preparation and execution of the Loan Documents, the Interim Order, the Final Order, the “first day orders” and any other documents in connection with the Bankruptcy Cases and any consents, amendments, waivers or other modifications thereto (whether or not any of the transactions contemplated hereby or thereby shall be consummated); (b) all the actual and reasonable fees, costs and expenses of counsel to the Lender (in each case including allocated costs of internal counsel) in connection with the negotiation, preparation, execution and administration of the Loan Documents and any consents, amendments, waivers or other modifications thereto and any other documents or matters requested by Debtors; (c) all the actual and reasonable costs and expenses of creating, perfecting, recording, maintaining and preserving Liens in favor of the Lender, including filing and recording fees, expenses and taxes, stamp or documentary taxes, search fees, title insurance premiums and reasonable fees, expenses and disbursements of counsel to the Lender; (d) all the actual and reasonable costs and expenses (including the reasonable fees, expenses and disbursements of any appraisers, consultants, advisors and agents employed or retained by the Lender and its counsel) in connection with the custody or preservation of any of the Collateral; (e) all other actual and reasonable costs and expenses incurred by the Lender in connection with the transactions contemplated by the Loan Documents and any consents, amendments, waivers or other modifications thereto; and (f) all the actual and reasonable costs and expenses, including reasonable attorneys’ fees and costs of settlement, incurred by the Lender in enforcing any Obligations of or in collecting any payments due from any Debtor hereunder or under the other Loan Documents, including fees and expenses incurred by such parties in connection with the monitoring and participating in the Bankruptcy Cases. Notwithstanding the foregoing, with respect to the actual and reasonable costs and expenses of the Lender incurred prior to the Closing Date in connection with the negotiation, preparation and execution of the Loan Documents (including the actual and reasonable fees, costs and expenses of counsel to the Lender), the Debtors shall only be required to pay an aggregate amount up to \$200,000.

25. Indemnification

In addition to the payment of expenses pursuant to Section 24, whether or not the transactions contemplated hereby are consummated, each Debtor, jointly and severally with the other Debtors, agrees to defend (subject to Indemnitees’ selection of counsel), indemnify, pay and hold harmless, (x) the Lender and the officers, partners, members, directors, trustees, advisors, employees, agents, sub-agents and Affiliates of the Lender solely in its role and capacity as the Lender hereunder, and (y) each officer, partner, member, director, trustee, advisor or employee of the Lender, solely in the role and capacity of each such Person as an officer, partner, member, director, trustee, advisor

or employee of the Lender in its role and capacity as the Lender hereunder) (each, an “**Indemnitee**”), from and against any and all Indemnified Liabilities; provided, no Debtor shall have any obligation to any Indemnitee hereunder with respect to any Indemnified Liabilities to the extent such Indemnified Liabilities arise from the gross negligence or willful misconduct of that Indemnitee, in each case, as determined by a final, non-appealable judgment of a court of competent jurisdiction. To the extent that the undertakings to defend, indemnify, pay and hold harmless set forth in this Section 25 may be unenforceable in whole or in part because they are violative of any law or public policy, the applicable Debtor shall contribute the maximum portion that it is permitted to pay and satisfy under applicable law to the payment and satisfaction of all Indemnified Liabilities incurred by Indemnitees or any of them.

26. Release

No Debtor has any defense, counterclaim, offset, recoupment, cross-complaint, claim or demand of any kind or nature whatsoever that can be asserted to reduce or eliminate all of any part of the Debtors’ liability to repay the Lender as provided in this Agreement, or to seek affirmative relief or damages of any kind or nature from the Lender relating to this Agreement. Subject to entry of the Financing Order, the Debtors, each in their own right and with respect to the Debtors, on behalf of their bankruptcy estates, and on behalf of all their successors, assigns, Subsidiaries and any Affiliates and any Person acting for and on behalf of, or claiming through them, (collectively, the “**Releasing Parties**”), hereby fully, finally and forever release and discharge (x) the Lender ~~and all of the Lender’s past and present officers, directors, servants, agents, attorneys, assigns, parents, subsidiaries, and each Person acting for or on behalf of any of them~~ solely in its role and capacity as the Lender hereunder, and (y) each officer, partner, member, director, trustee, advisor or employee of the Lender, solely in the role and capacity of each such Person as an officer, partner, member, director, trustee, advisor or employee of the Lender in its role and capacity as the Lender hereunder) (collectively, the “**Released Parties**”) of and from any and all past, present and future actions, causes of action, demands, suits, claims, liabilities, Liens, lawsuits, adverse consequences, amounts paid in settlement, costs, damages, debts, deficiencies, diminution in value, disbursements, expenses, losses and other obligations of any kind or nature whatsoever, whether in law, equity or otherwise (including, without limitation, those arising under Sections 541 through 550 of the Bankruptcy Code and interest or other carrying costs, penalties, legal, accounting and other professional fees and expenses, and incidental, consequential and punitive damages payable to third parties), whether known or unknown, fixed or contingent, direct, indirect, or derivative, asserted or unasserted, foreseen or unforeseen, suspected or unsuspected, now existing, heretofore existing or which may heretofore accrue against any of the Released Parties, whether held in a personal or representative capacity, and which are based on any act, fact, event or omission or other matter, cause or thing occurring at or from any time prior to and including the date hereof in any way, directly or indirectly arising out of, connected with or relating to this Agreement, the other Loan Documents, the Financing Order and the transactions contemplated hereby, and all other agreements, certificates, instruments and other documents and statements (whether written or oral) related to any of the foregoing, provided that solely in the case of attorneys, the provisions of this Section 26 shall be limited to the extent that any such

release would violate any professional disciplinary rules, including Disciplinary Rule 6-102 of the Code of Professional Conduct, to the extent applicable, and, for the avoidance of doubt, all Parties hereto expressly agree and acknowledge that nothing provided for herein or in any other Loan Document (including, without limitation, in any Financing Order) shall entitle any Person (including any Person who is also the Lender) to any release with respect to any actions, causes of action, demands, suits, claims, liabilities, Liens, lawsuits, adverse consequences, amounts paid in settlement, costs, damages, debts, deficiencies, diminution in value, disbursements, expenses, losses and other obligations relating to such Person's role or capacity as the direct or indirect holder of any Equity Interest in either Debtor (or as any officer, partner, member, director, trustee, advisor or employee acting for or on behalf of any of them, of such Person in its role and capacity as direct or indirect holder of any Equity Interest in either Debtor).

27. Specific Performance

The Parties agree that irreparable damage would occur in the event that any of the provisions of this Agreement were not performed in accordance with their specific terms. It is accordingly agreed that the parties shall be entitled to an injunction or injunctions to prevent breaches of this Agreement and to specific performance of the terms hereof, this being in addition to any other remedy to which they are entitled at law or in equity.

28. No Marshalling; Payments Set Aside

The Lender shall not be under any obligation to marshal any assets in favor of any Debtor or any other Person or against or in payment of any or all of the Obligations. To the extent that any Debtor makes a payment or payments to the Lender, or the Lender enforces any security interests or exercise their rights of setoff, and such payment or payments or the proceeds of such enforcement or setoff or any part thereof are subsequently invalidated, declared to be fraudulent or preferential, set aside and/or required to be repaid to a trustee, receiver or any other party under any bankruptcy law, any other state or federal law, common law or any equitable cause, then, to the extent of such recovery, the obligation or part thereof originally intended to be satisfied, and all Liens, rights and remedies therefor or related thereto, shall be revived and continued in full force and effect as if such payment or payments had not been made or such enforcement or setoff had not occurred.

29. Parties Including Trustees; Bankruptcy Court Proceedings

This Agreement, the other Loan Documents, and all Liens and other rights and privileges created hereby or pursuant hereto or to any other Loan Document shall be binding upon each Debtor, the estate of each Debtor, and any trustee, other estate representative or any successor in interest of any Debtor in any Bankruptcy Case or any case under Chapter 7 of the Bankruptcy Code, and shall not be subject to Section 365 of the Bankruptcy Code. This Agreement and the other Loan Documents shall be binding upon, and inure to the benefit of, the successors of the Lender and its respective assigns, transferees and endorsees. The Liens created by this Agreement and the other Loan Documents shall be and remain valid and perfected in the event of the substantive consolidation or