IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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| In re: | Chapter 11 |
| EDDIE BAUER HOLDINGS, INC., *et al.*, | Case No. 09-12099 (MFW) |
| | Jointly Administered |
| Debtors. | **Related Docket No. 14** |
| | **Hearing Date: July 7, 2009 at 9:30 a.m.** |

**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' MOTION FOR FINAL ORDER (I) AUTHORIZING DEBTORS TO OBTAIN POSTPETITION FINANCING PURSUANT TO 11 U.S.C. §§ 105, 362, 363 AND 364; (II) AUTHORIZING USE OF CASH COLLATERAL PURSUANT TO 11 U.S.C. § 363; (III) GRANTING LIENS AND SUPERPRIORITY CLAIMS; (IV) GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED PARTIES PURSUANT TO 11 U.S.C. §§ 361, 362, 363 AND 364; AND (V) SCHEDULING FINAL HEARING ON THE DEBTORS' MOTION TO INCUR SUCH FINANCING ON A PERMANENT BASIS PURSUANT TO BANKRUPTCY RULE 4001**

**TO THE HONORABLE MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE:**

The Official Committee of Unsecured Creditors (the "Committee") of Eddie Bauer Holdings, Inc. and its affiliated debtors and debtors-in-possession in the above-captioned chapter 11 cases (collectively, the "Debtors" or "Eddie Bauer"), by and through its proposed counsel Cooley Godward Kronish LLP and Benesch, Friedlander, Coplan & Aronoff LLP, hereby submits this objection (this "Objection") to the Debtors' motion (the "DIP Financing Motion") for a final order (i) authorizing the Debtors to obtain postpetition financing pursuant to that certain agreement (the "DIP Credit Agreement") among the Debtors, Bank of America, N.A. and other lenders and agents party thereto (collectively, the "DIP Lenders"), (ii) authorizing the Debtors to use the cash collateral of (a) the Revolving Lenders (defined below) and (b) Wilmington Trust FSB and other lenders and agents party to the Prepetition Term Credit



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Agreement (defined below) (collectively, the "Term Lenders" and together with the Revolving Lenders, the "Prepetition Lenders"), and (iii) granting certain liens, superpriority claims and other adequate protection to the Prepetition Lenders, dated June 17, 2009 (Doc. No. 14). In support of its Objection, the Committee respectfully represents as follows:[1]

## PRELIMINARY STATEMENT

1. The Debtors filed these chapter 11 cases with a stalking horse bidder for substantially all of their assets at a cash purchase price that is insufficient to pay the asserted claims of the Prepetition Lenders,[2] the expenses of preserving and disposing of their collateral and the other estimated costs of administering these cases. The 45-day bridge financing proposed in the DIP Financing Motion is sufficient only to fund the expedited sale process for the benefit of the Prepetition Lenders. Pursuant to procedures approved by this Court on June 29, 2009, an auction for the sale of the Debtors' assets will be held on July 16, 2009 and a hearing to approve that sale is scheduled for July 22, 2009. At the closing of the sale, the DIP Lenders will be paid the full amount of their "rolled up" prepetition and postpetition indebtedness.

2. Since its appointment on June 25, 2009, the Committee has worked tirelessly to ensure that the interests of general unsecured creditors are not sold short in the three-week sale process proposed by the Debtors and the Prepetition Lenders and approved by this Court. Despite the restrictive bidding and auction procedures requested by the stalking horse bidder and proposed by the Debtors, the Committee successfully argued for flexible procedures that provide

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[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Interim DIP Order.

[2] The Debtors have acknowledged approximately $240 million in collective prepetition secured claims asserted by the Prepetition Lenders and have valued the stalking horse bid at approximately $202 million.

the best opportunity for these estates to (i) maximize the value of the Debtors' assets, including the assets which are not the Prepetition Lenders' collateral; (ii) minimize the remaining administrative and priority claims, and (iii) produce a return to general unsecured creditors. With these critical goals in mind, the Committee submits this present Objection.

3. The excessive benefits and protections proposed for the Term Lenders in the Final DIP Order (defined below) are unwarranted and offensive. Unlike their prepetition counterparts, the Term Lenders are merely consenting to the Debtors' use of cash collateral to liquidate the Term Lenders' collateral at a bankruptcy approved auction to be conducted in 10 days. They are not providing any additional funding postpetition. Moreover, based on information provided by the Term Lenders, their claim increased by more than $22,000,000 within the 90-days prior to the Petition Date through an amendment (the "Term Amendment") to the Prepetition Term Credit Agreement executed on April 2, 2009. In addition to other consideration received by the Term Lenders under the Term Amendment (described below), the Debtors paid the Term Lenders an "amendment fee" of approximately $1,900,000 on April 3, 2009,[3] without new funding or waivers being provided by the Term Lenders. Rather, in exchange for the minimal relaxation of certain financial covenants under the Prepetition Term Credit Agreement at a time when (a) Eddie Bauer's prepetition sale efforts were well under way and (b) Eddie Bauer was not suffering liquidity problems, the Term Lenders received at least $24,000,000 in value comprised of the following:

- a cash amendment fee of approximately **$1,900,000** (the "1% Fee"), earned and paid on April 3, 2009, representing the amount equal to 1% of

[3] The $1.9 million "amendment fee" paid to the Term Lenders was in addition to other fees paid by the Debtors in connection with the Term Amendment, including, without limitation, a $500,000 fee paid to Peter J. Solomon, Eddie Bauer's investment banker, for "obtaining" the Term Amendment.

the outstanding principal balance due under the Prepetition Term Credit Agreement as of April 3, 2009;

- another cash amendment fee of approximately **$3,800,000** (the "2% Fee"), earned as of April 3, 2009 and payable on November 30, 2009, representing the amount equal to 2% of the outstanding principal balance due under the Prepetition Term Credit Agreement as of April 3, 2009;

- an initial PIK fee of approximately **$9,471,699.19** (the "First PIK Fee"), representing the sum of (i) an amount equal to 5% of the outstanding principal balance due under the Prepetition Term Credit Agreement as of April 3, 2009, and (ii) PIK interest accruing initially at the Eurodollar Rate for a six-month interest period. The First PIK Fee is deemed earned on April 3, 2009 and payable April 1, 2014 under the Term Amendment;

- a second PIK fee of approximately **$9,221,551.57** (the "Second PIK Fee")[4], representing the sum of (i) an amount equal to 5% of the outstanding principal balance due under the Prepetition Term Credit Agreement (inclusive of the First PIK Fee) as of July 2, 2009, and (ii) PIK interest initially accruing at the Eurodollar Rate for a six-month interest period. The Second PIK Fee is deemed earned and payable on July 2, 2009 under the Term Amendment; and

- interest rates were increased 3.5% or more per annum on the outstanding principal balance due under the Prepetition Term Credit Agreement.[5]

Despite the fact that the Debtors have acknowledged the validity and amount of the Term Lenders' claims, the Committee has a duty to fully investigate these transfers and all other

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[4] The Second PIK Fee, deemed payable on July 2, 2009 under the Term Amendment, has not been paid to the Term Lenders by the Debtors. The Term Lenders seek the inclusion of language in the Final DIP Order deeming the Second PIK Fee "made and earned on the Petition Date" and "included as part of the Prepetition Term Obligations," so as to ensure that the amount of the Second PIK Fee will be (a) included in their secured claim and (b) paid directly from the proceeds of the sale of the Debtors' assets. For the reasons set forth herein, the Court should prohibit any form of allowance and payment of these purported obligations as part of the Final DIP Order. Final DIP Order ¶ 4(g).

[5] In addition to the foregoing, the Term Amendment also provided for: (i) Eddie Bauer's agreement to issue warrants to the Term Lenders for the aggregate purchase of 19.9% of Eddie Bauer Holdings, Inc.'s common stock (as of April 3, 2009) at $.01 per share; (ii) the Term Lenders' right to appoint up to three directors to sit on Eddie Bauer's board of directors; and (iii) a decrease in Eddie Bauer's permitted capital expenditures from (a) $60,000,000 to $20,000,000 for 2009 and (b) $70,000,000 to $20,000,000 for 2010.

potential causes of action against the Term Lenders and, to the extent necessary, will prosecute such claims for the benefit of the Debtors' estates and creditors.

4. The expedited sale process benefits the Term Lenders and adequately protects them against any diminution in value of their collateral. Even if the Debtors granted them relief from the automatic stay, the Term Lenders could not force a faster sale outside of bankruptcy or obtain the protections that a section 363 sale of their collateral provides them. The Committee respectfully requests this Court to deem the Term Lenders adequately protected by the expedited section 363 sale of their collateral, to find that no other or additional protection is necessary to preserve the value of their collateral, and to expressly deny the Term Lenders' proposed adequate protection in the form of:

- a final claim allowance, with such claim to be paid directly from the proceeds of the sale of the Debtors' assets and which claim (a) includes more than $22,000,000 arising from the Term Amendment executed in April 2009 and (b) extends to the proceeds of previously unencumbered assets by virtue of the other forms of adequate protection sought by the Term Lenders;[6]

- additional liens on, and a superpriority claim to, previously unencumbered assets of the Debtors, including, without limitation, (i) the Debtors' Chicago IT Center and other owned real property, (ii) real estate lease proceeds, (iii) one third of the equity in the Canadian Debtors and (iv) avoidance actions and the proceeds thereof;

- a section 506(c) waiver; and

- reimbursement of the fees and expenses of five professionals, including four separate law firms and an investment banking firm, which firm would stand to collect a transaction fee of more than $2,000,000 in the event the Term Lenders are paid in full.

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[6] As discussed herein, not only do the Term Lenders seek to bring the Debtors' previously unencumbered assets within the purview of their secured claim through blanket replacement/additional liens and superpriority claims, but they also seek to avoid their affirmative burden to prove any actual diminution in value of their collateral before pocketing the proceeds of the Debtors' assets.

5. To the extent the Court finds that the Term Lenders are entitled to protections beyond those inherently conferred by the truncated sale process, the Court should strike the broad forms of adequate protection proposed for the Term Lenders in the Final DIP Order and craft narrow protections that are appropriate under the circumstances of these cases, provided that the Term Lenders meet their burden to prove actual diminution in value of their prepetition collateral. The inappropriate and offensive protections currently proposed for the Term Lenders seek to both insulate them from attack on their prepetition liens and claims and broaden the scope of their collateral to include unencumbered assets of the Debtors. The Term Lenders, who are not funding these chapter 11 cases and whose prepetition liens, claims and conduct are the subject of Committee scrutiny, must not be permitted to marginalize the possibility of a recovery for general unsecured creditors through unwarranted benefits and protections.

## BACKGROUND

6. On June 17, 2009 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware. Pursuant to sections 1107 and 1108 of the Bankruptcy Code, the Debtors continue to operate their businesses and properties as debtors-in-possession. No trustee or examiner has been appointed in these cases.

7. On the Petition Date, the Debtors filed the DIP Financing Motion.

8. Following a hearing held on June 18, 2008, the Court entered an interim order (the "Interim DIP Order") approving the DIP Financing Motion with certain modifications and scheduled a hearing to consider approval of the DIP Financing Motion on a final basis (a "Final DIP Order") for July 7, 2009.

9. On June 25, 2009, the Committee was appointed in these cases by the Office of the United States Trustee for the District of Delaware, consisting of the following seven members: (i) The Bank of New York Mellon, as Indenture Trustee; (ii) Tara Hill, c/o Marc Primo, Esq., Initiative Legal Group LLP; (iii) RR Donnelley & Sons Company; (iv) Simon Property Group; (v) GGP Limited Partnership; (vi) AQR Capital; and (vii) Highbridge International LLC. On that same day, the Committee selected Cooley Godward Kronish LLP as its proposed lead counsel, Benesch, Friedlander, Coplan & Aronoff LLP as its proposed local counsel, and Capstone Advisory Group, LLC as its proposed financial advisors.

## DEBTORS' PREPETITION CAPITAL STRUCTURE

### A. Prepetition Revolving Credit Facility

10. The Debtors, as borrowers and guarantors, are party to that certain Loan and Security Agreement, dated June 21, 2005 (as amended and in effect, the "Prepetition Revolving Credit Agreement") with Bank of America, N.A. as agent for certain lenders party thereto (collectively, the "Revolving Lenders"). According to the Debtors, as of the Petition Date, the outstanding principal amount owing under the Prepetition Revolving Credit Agreement was approximately $41,550,999.99 and outstanding letter of credit issued pursuant thereto totaled approximately $9,689,362.11. According to the Debtors, the Revolving Lenders hold first priority liens on the Revolving Lender Priority Collateral (as defined in the Intercreditor Agreement) and second priority liens on the Term Lender Priority Collateral (as defined in the Intercreditor Agreement).

### B. Prepetition Term Credit Facility

11. The Debtors, as borrowers and guarantors, are party to that certain Amended and Restated Term Loan Agreement, dated as of June 21, 2005 and as amended and restated on April

4, 2007 (as amended by that certain First Amendment, dated as of April 2, 2009, and as further amended and in effect, the "Prepetition Term Credit Agreement") with the Term Lenders. According to the Debtors, as of the Petition Date, the outstanding principal amount owing under the Prepetition Term Credit Agreement was approximately $191,404,503.59. According to the Debtors, the Term Lenders hold first priority liens on the Term Lender Priority Collateral and second priority liens on the Revolving Lender Priority Collateral.

**C. The Intercreditor Agreement**

12. The Prepetition Lenders entered into that certain Intercreditor Agreement, dated June 21, 2005 (as amended and in effect, the "Intercreditor Agreement"), which governs the respective rights, interests, obligations, priority and positions of the Prepetition Lenders with respect to the Debtors' assets. Pursuant to the Intercreditor Agreement, the Revolving Lenders hold liens senior to the Term Lenders on the Revolving Lender Priority Collateral and the Term Lenders hold liens senior to the Revolving Lenders on the Term Lender Priority Collateral.

**THE DIP FACILITY**

13. On the Petition Date, the Debtor filed the DIP Financing Motion seeking, among other things, immediate use of cash collateral and authority to enter into the DIP Financing Agreement with the DIP Lenders providing for a senior revolving credit facility with a maximum borrowing amount of $100,000,000.00 (the "DIP Facility").

14. The obligations under the DIP Facility (the "DIP Obligations") are secured by a first priority lien on substantially all of the Debtors' assets (the "Collateral"). Each of the DIP Lenders is also a Revolving Lender.

15. The Interim DIP Order provides, *inter alia*, that upon entry of the Final DIP Order (as defined below) the proceeds of (i) the DIP Facility are to be used to pay the Revolving

Lenders' prepetition indebtedness in full, and (ii) the sale of the Debtors' assets are to be used, in order of priority and subject to the respective rights in the Collateral as set forth in the Intercreditor Agreement, to pay the Prepetition Lenders' indebtedness in full, to fund a $250,000 indemnity account for each of the Prepetition Lenders, and to pay the DIP Obligations in full.

16. The Debtors now move for approval of an order (the "Final DIP Order") authorizing, on a final basis, substantially all of the relief granted in the Interim Order, including the unwarranted and offensive forms of proposed adequate protection for the Term Lenders that are the subject of this Objection.

## OBJECTION[7]

### I. THE TERM LENDERS ARE ADEQUATELY PROTECTED BY THE EXPEDITED SECTION 363 SALE AND NO FURTHER ADEQUATE PROTECTION IS NECESSARY OR WARRANTED TO PRESERVE THE VALUE OF THEIR COLLATERAL

17. The excessive benefits and protections proposed for the Term Lenders in the Final DIP Order are unwarranted and offensive. The Term Lenders, as opposed to the Revolving Lenders, are not providing any additional funding postpetition and are merely consenting to the Debtors' use of cash collateral to liquidate their collateral at a bankruptcy approved auction to be conducted in 10 days. The expedited sale process benefits the Term Lenders and adequately protects them against any diminution in value of their collateral. Even if the Debtors granted the Term Lenders relief from the automatic stay to liquidate their collateral, the Term Lenders could not force a faster sale outside of bankruptcy or obtain the protections that a section 363 sale of their collateral provides to them. The Committee respectfully requests this Court to deem the Term Lenders adequately protected by the expedited section 363 sale of their collateral in these

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[7] A redline comparing the proposed Final DIP Order against the modifications requested by the Committee herein is annexed hereto as **Exhibit A**.

chapter 11 cases, and to find that no other or additional protection is necessary to preserve the value of their collateral.

### A. The Final DIP Order Should Not Provide The Term Lenders With A Final Claim Allowance

18. The Term Lenders demand a final allowance of their prepetition claim, within the meaning of section 502 of the Bankruptcy Code, which claim includes more than $24,000,000 in potentially actionable transfers from the Debtors pursuant to the Term Amendment executed in April 2009. A final allowance at this time would preempt the Committee's right to investigate and challenge the Term Lenders' prepetition liens, claims and conduct. Allowing the Term Lenders' potentially inflated claim three weeks into these chapter 11 cases is unnecessary, and certainly not appropriate before the Committee investigates the Term Lenders' claims.

### B. The Final DIP Order Should Not Provide The Term Lenders With A Section 506(c) Waiver

19. The Term Lenders demand a full waiver from the Debtors of their rights, under section 506(c) of the Bankruptcy Code, to seek reimbursement from the Term Lenders of the costs of preserving and disposing of their collateral. Such a waiver is particularly inappropriate here, where the Debtors will incur substantial costs related to this expedited sale process, and the Term Lenders – who are not providing new funding to the Debtors – will receive the benefit, at these estates' expense, of selling their collateral more quickly and effectively than they could outside of a bankruptcy proceeding. The Debtors should not be compelled to waive their section 506(c) surcharge rights in cases such as these where, "absent the costs expended, the property would yield less to the creditor than it does as a result of the expenditure." *Brookfield Prod. Credit Ass'n v. Borron*, 738 F.2d 951, 952 (8th Cir. 1984) (citations omitted).

20. Congress's intent in enacting section 506(c) was to ensure that the debtor-in-possession would be entitled to recover expenses from its secured lender to the extent those expenses are necessarily and reasonably associated with preserving or disposing of the lender's collateral. *In re Visual Industries, Inc.*, 57 F.3d 321, 326 (3d Cir. 1995) (discussing the Congressional Record, 124 Cong.Rec. 32,398 (cum. ed. Sept. 28, 1978) (statement of Rep. Edwards)). Section 506(c) is thus designed to prevent "a windfall to the secured creditor at the expense of the claimant." *Id.* (citing *IRS v. Boatmen's First Nat'l Bank of Kan. City*, 5 F.3d 1157, 1159 (8th Cir. 1993)). Section 506(c) waivers have been found unenforceable in cases, such as these, where they "operate as a windfall to the secured creditor at the expense of the administrative claimants." *In re Lockwood Corp.*, 223 B.R. 170 (8th Cir. BAP 1998) *see also In re Brown Brothers, Inc.*, 136 B.R. 470, 474 (W.D. Mich. 1991) (holding a 506(c) waiver "is not enforceable in light of the congressional mandate that a trustee have the authority to use a portion of secured collateral for its preservation or proper disposal"); *In re Ridgeline Structures, Inc.,* 154 B.R. 831, 832 (Bankr. D.N.H. 1993) (holding 506(c) waiver in cash collateral order applicable regardless of any "action inaction, or acquiescence" by secured lender to be "against public policy and unenforceable per se").

21. The Debtors' rights under section 506(c) must be preserved and the proceeds of the Term Lenders' collateral must be made available to pay the costs and expenses of preserving and disposing of their collateral and to ensure the administrative solvency of these estates.

### C. The Final DIP Order Should Not Provide The Term Lenders With Liens On Previously Unencumbered Assets Or A Superpriority Claim To The Proceeds Thereof

22. The Term Lenders demand automatically valid and perfected additional and replacement liens on all of the Debtors' assets – irrespective of whether the Term Lenders even

held liens in such assets prepetition or whether the liens were valid and properly perfected. Not only does the proposed Final DIP Order extend additional and replacement liens to assets of the Debtors that were not part of Term Lenders' prepetition collateral or subject to validly perfected liens, including, without limitation, the Debtors' Chicago IT Center and other owned real property, real estate lease proceeds and one third of the equity in the Canadian Debtors, but it also provides the Term Lenders with liens on preference action proceeds – including, as presently drafted, proceeds of a recovery ***against the Term Lenders***. Proposed Final DIP Order ¶ 2(e), 4(e). Similarly, the Term Lenders demand a superpriority administrative expense claim with recourse to all of the Debtors' assets and the proceeds thereof, including causes of action under chapter 5 of the Bankruptcy Code.

23. Accordingly, the proposed Final DIP Order not only provides the Term Lenders with a lien on the proceeds of estate causes of action, a form of adequate protection generally frowned upon by courts, but it also subsumes any preference liability on the part of the Term Lenders by granting them liens on "Specified Bankruptcy Recoveries," which term is defined to include "any and all recoveries or proceeds of any such [section 547 or 549] claims or causes of action." Proposed Final DIP Order ¶ 2(e). Nothing in the proposed Final DIP Order should deprive general unsecured creditors of their *meaningful* challenge rights against the Term Lenders, nor should it allow an undersecured creditor, who is providing no financing to the Debtors, protections that are customarily and narrowly reserved for lenders who provide postpetition financing. The Term Lenders are not providing such financing and should not be permitted to so enhance their collateral position through new liens and superpriority claims.

24. The Term Lenders are, in effect, asking this Court to authorize a form of *de facto* cross-collateralization to secure their prepetition claims. See *In re Saybrook Mfg. Co.*, 963 F.2d

1490, 1495 (11th Cir. 1992) (cross-collateralization is incompatible with bankruptcy law because it is directly contrary to the fundamental priority scheme established by the Bankruptcy Code). This relief is unwarranted given that the Term Lenders (a) have not agreed to provide a single dollar of postpetition financing in these cases, and (b) are adequately protected through this expedited sale process because they could not force a faster or more beneficial sale of their collateral if the Debtors granted them relief from the automatic stay. *In re Gallegos Research Group, Corp.*, 193 B.R. 577, 586 n.2 (Bankr. D. Col. 1995) ("[i]t is even more objectionable to allow cross collateralization where no new funds are advanced").

25. Accordingly, the Court should (i) prohibit the Term Lenders from receiving any new liens on, or superpriority claims to, unencumbered assets, including avoidance actions and their proceeds, (ii) restrict any replacement liens granted to only those assets of the Debtors in which the Term Lenders held valid, fully perfected security interests prior to the Petition Date, and (iii) force the Term Lenders to meet their burden to prove actual diminution in value of their collateral before the grant of any replacement liens takes effect.

### D. The Final DIP Order Should Not Require These Estates To Pay The Unconscionable Fees And Expenses Of The Term Lenders' Professionals

26. Despite the fact that they are woefully undersecured based on the stalking horse bid, the Term Lenders nevertheless have the gall to demand that their **five** professionals, including two law firms and an investment banking firm retained to represent the "Prepetition Term Agent" and two law firms retained to represent the "Term Lender Group," be paid millions of dollars in fees by the Debtors without any requirement that the Term Lenders look to the proceeds of their collateral for such payment or prove that it has actually diminished in value. As if this abuse is not enough, the Term Lenders further demand that these estates agree to pay

Lazard Freres & Co. LLC ("Lazard"), the Prepetition Term Agent's investment banking firm, monthly payments of $150,000, plus a "Transaction Fee" equal to the sum of (a) $1,500,000 plus (b) 2% of the portion of any "Consideration" in excess of an amount equal to 80% of the aggregate face value of the Term Lenders' indebtedness.[8]

27. Thus, notwithstanding the fact that the Debtors have sought to retain their own investment banking firm, the Term Lenders would have these estates assume the obligation to pay a *second* investment banking firm a *second* Transaction Fee that would exceed **$2,000,000** if the sale of the Debtors' assets pays the Term Lenders in full. To add insult to injury, if the Term Lenders were to receive a section 506(c) waiver, then these outrageous fees would not be paid from the proceeds of the Term Lenders' collateral, but rather from the proceeds of the Debtors' unencumbered assets. Moreover, the Term Lenders also demand that the Debtors indemnify Lazard – who are not retained professionals of these estates – for, among other things, any and all losses, claims, damages, liabilities or expenses arising out of or connection with its engagement.

28. This Court should not permit the Term Lenders to saddle these estates with such excessive and unreasonable obligations. If this Court determines that the professional fees of the Term Lenders should be paid after the section 506(c) expenses of these estates are paid in full, then the Court should (i) subject the Term Lender Group and Prepetition Term Agent to a collective cap on professional fees and expenses that can be reimbursed by these estates, (ii) require the Term Lender Group and Prepetition Term Agent to submit copies (and not "summaries") of invoices for reimbursement of reasonable professional fees and expenses to the Debtors, the US Trustee, and the Committee prior to receiving such payment from the Debtors,

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[8] A copy of Lazard's engagement letter is annexed hereto as **Exhibit B**.

and (iii) eliminate any obligation of these estates to indemnify or pay any kind of success, transaction or restructuring fee to Lazard.

## II. ANY FURTHER ADEQUATE PROTECTION PROVIDED TO THE TERM LENDERS, INCLUDING THE PAYMENT OF SALE PROCEEDS, SHOULD BE CONDITIONED ON THE TERM LENDERS PROVING ACTUAL DIMINUTION IN VALUE OF THEIR COLLATERAL

29. The Term Lenders will no doubt argue that each of the aforementioned benefits and protections will be triggered only in the event there is actual diminution in value of their prepetition collateral and, therefore, the Committee's concerns are premature. This Court should not be persuaded by any such attempt to shift the Term Lenders' burden of proof to the Debtors. Indeed, the Term Lenders do not intend to satisfy their burden to demonstrate an actual diminution in value of their collateral. The Court need look no further than ¶ H of the proposed Final DIP Order (Application of Proceeds of Collateral to Prepetition Obligations) for evidence of this manifest injustice.

30. Paragraph H of the proposed Final DIP Order provides that all proceeds of the sale or other disposition of the "Collateral" (defined in ¶ 2(e) to include the "DIP Collateral" in which the Term Lenders demand automatically valid, perfected and blanket liens on superpriority claims) shall be first applied to permanently reduce the prepetition indebtedness of the Revolving Lenders and the Term Lenders. The proposed Final DIP Order is devoid of any affirmative requirement for the Term Lenders to substantiate their adequate protection claims before receiving the gross proceeds of the Collateral, and the proposed definition of "Collateral" allows the Term Lenders to receive the proceeds of assets that were previously unencumbered and within their reach *only* by virtue of the proposed adequate protection. The proposed language shifts the burden away from the Term Lenders to prove actual diminution in value of

their collateral and places it upon the Debtors' estates to prove the *absence* of such diminution and seek affirmative "clawback" relief.

31. The Term Lenders have failed to demonstrate that they are entitled to *any* adequate protection in theses cases. The purpose of adequate protection "is to insure that the creditor receives the value for which he bargained prebankruptcy." *See In re O'Connor*, 808 F.2d 1393, 1396 (10th Cir. 1987). Adequate protection is, therefore, a protection for the creditor to assure its collateral is not depreciating or diminishing in value and is made on a case-by-case basis. *Id.* at 1397; *see also United Savings Ass'n v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 370 (1988) (an "interest is not adequately protected if the security is depreciating during the term of the stay."); *In re Saypol*, 31 B.R. 796, 800 (Bankr. S.D.N.Y. 1983) ("In the context of the automatic stay, Congress believed the existence *vel non* of such a decline [in the value of the secured creditor's interest] to be almost decisive in determining the need for adequate protection.").

32. For these reasons, the secured creditor "must, therefore, prove this decline in value – or the threat of a decline – in order to establish a prima facie case." *In re Gunnison Ctr. Apts., LP*, 320 B.R. 391, 396 (Bankr. D. Colo. 2005); *In re Elmira Litho, Inc.*, 174 B.R. 892, 902 (Bankr. S.D.N.Y. 1994). Secured creditors are only entitled to adequate protection to the extent of the anticipated or actual decrease in value of the secured collateral during the bankruptcy case. *See In re First South Savings Assoc.*, 820 F.2d 700, 710 (5th Cir. 1987); *In re Gallegos Research Group, Corp.*, 193 B.R. 577, 584 (Bankr. D. Col. 1995). A corollary to that rule is that "the adequate protection provided must not substantially exceed that to which the secured creditor is entitled." *In re Blehm Land & Castle Co.,* 859 F.2d 137 (10th Cir. 1988).

33. Here, the Term Lenders have not offered a shred of proof of any actual or threatened diminution in the value of their collateral and, in fact, the proposed Final DIP Order is devoid of any affirmative requirement for the Term Lenders to substantiate their adequate protection claims before receiving the gross proceeds of the sale of their collateral and previously unencumbered assets of the Debtors. Because the Term Lenders have not established even a *prima facie* case for adequate protection, this Court should deny the requested adequate protection.

34. Moreover, no provision of the Bankruptcy Code provides for the payment of prepetition claims before confirmation of a plan of reorganization and the Term Lenders, who are not providing the Debtors with postpetition financing and are the beneficiaries of a truncated section 363 sale process, certainly do not warrant exception to the general rule. *See, e.g., Chiasson v. Matherne & Assoc. (In re Oxford Mgmt., Inc.)*, 4 F.3d 1329, 1334 (5th Cir. 1993) (holding bankruptcy court improperly allowed the payment of post-petition funds to satisfy pre-petition claims and noting that "[n]either the appellees nor the bankruptcy court cited a specific provision of the Code that would allow the payment of post-petition funds to satisfy prepetition claims"); *Crowe & Assocs., Inc. v. Bricklayers & Masons Union Local No. 2 (In re Crowe & Assocs.)*, 713 F.2d 211, 216 (6th Cir. 1983) (bankruptcy courts do not have the power to authorize debtors to pay prepetition claims prior to a plan of reorganization); *In re Allegheny Intl, Inc.*, 118 B.R. 282, 296 (W.D. Pa. 1990) ("It is beyond dispute that a debtor may not pay creditors outside of a plan of reorganization.").

35. Shifting the Term Lenders' burden to these estates is particularly inappropriate under the circumstances of these cases. These estates should not be forced to waste precious resources chasing the Term Lenders for the return of sale proceeds that they were not entitled to

in the first place. The Committee submits that the Court should stay any distribution of sale proceeds to the Term Lenders until the earlier of (i) the date the Committee waives its right to challenge the Term Lenders' liens, claims and conduct, (ii) the date by which any such challenge is fully and finally resolved by agreement of the parties or order of this Court, and (iii) the date this Court allows the Term Lenders' claims on a final basis. Under all circumstances, the Court should stay any distribution to the Term Lenders until the section 506(c) expenses are paid in full and further stay any distribution to the Term Lenders of sale proceeds allocated to previously unencumbered assets of the Debtors until such time as the Term Lenders meet their affirmative burden to prove actual diminution in value of their collateral.

## III. THE COMMITTEE'S OBJECTIONS TO OTHER PROVISIONS OF THE DIP FACILITY AND RESERVATION OF RIGHTS

36. The Committee recognizes that the Debtors require DIP financing and would be willing to support a DIP Facility that adequately protects the Prepetition Lenders' interests in their collateral while reasonably safeguarding the interests of general unsecured creditors. However, the proposed DIP Facility, without appropriate modification, unfairly disadvantages general unsecured creditors. In addition to the foregoing, the specific grounds for the Committee's objection are as follows:[9]

(a) The Second PIK Fee: The Final DIP Order should not contain a provision conclusively deeming the Second PIK Fee as made and earned on the Petition Date and included as part of the Term Lenders' claim. (Final DIP Order at ¶4(g)). Nothing in the Final DIP Order should provide the Term Lenders with an allowed claim for the Second PIK Fee. As discussed above, the Second PIK Fee, as well as the facts, circumstances and other provisions of the Term Amendment, will be the subject of intense scrutiny and

[9] The Committee understands that the Debtors and the DIP Lenders have submitted a revised proposed Final DIP Order that would resolve certain of the objections set forth below. To the extent the Court accepts those modifications in the Final DIP Order, the Committee will withdraw its corresponding objections.

investigation by the Committee and the Final DIP Order must not prejudice those critical rights.

(b) Postpetition Interest to Term Lenders: The Debtors should not be required to pay any postpetition interest to the Term Lenders prior to the confirmation of a plan of reorganization (Final DIP Order ¶ 4(g)). Such payments should only be made after a plan of reorganization has been confirmed and this Court determines that the Term Lenders are oversecured. This restriction is particularly appropriate here, given the Debtors' capital structure and stalking horse bid. Unless there is a robust auction for the sale of substantially all of the Debtors' assets, the Term Lenders are undersecured by a significant margin.[10]

(c) Adequate Protection: The Term Lenders are not entitled to adequate protection for a "change in market value of the Collateral." (DIP Credit Agreement at Section 4). As discussed herein, the Term Lenders could not have forced a faster sale of their collateral if the Debtors granted them relief from the automatic stay. The speedy sale of their collateral is sufficient adequate protection for the Term Lenders. Any additional adequate protection provided to the Term Lenders should be limited to actual diminution in value – that is proved by the Term Lenders – arising out of the automatic stay or the Debtors' use, sale or lease of their collateral.

(d) Indemnity Account: The Term Lenders are not entitled to a $250,000 Indemnity Account (Final Order at ¶¶ 4(h). The Term Lenders should be responsible for the fees of their numerous professionals in the event of a successful Committee challenge. In the event the Committee's challenge to the Term Lenders' liens, claims or conduct is unsuccessful, then the Term Lenders can simply add the amount of the fees and expenses of their professionals to their secured claim.

(e) Section 552(b): The Term Lenders should not be excused from the "equities of the case" exception under section 552(b) of the Bankruptcy Code (Final DIP Order at ¶ 20(k)). These estates should not be forced to waive their rights under section 552(b) before the Committee investigates the Term Lenders' prepetition liens, claims and conduct.

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[10] Although section 506(b) of the Bankruptcy Code allows for payment of postpetition interest to an oversecured creditor, it is well settled that such payments cannot be made prior to the confirmation of a plan or its effective date, whichever is earlier. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd. (In re Timbers of Inwood Forest Assocs., Ltd.)*, 484 U.S. 365, 108 S.Ct. 626 (1988) ("The timing of the payment of accrued interest to an oversecured creditor [at the conclusion of the proceeding] is doubtless based on the fact that it is not possible to compute the amount of the §506(c) recovery . . . until the end of the proceeding."); see also *Fin. Sec. Assurance Inc. v. T-H New Orleans Ltd. P'ship (Matter of T-H New Orleans Ltd. P'ship)*, 116 F.3d 790, 799 (5th Cir. 1997) (bankruptcy court erred by ordering the payment of interest on a secured claim before confirmation).

(f) Litigation Carve Out: The Carve Out is insufficient to ensure an investigation of the Term Lenders' prepetition liens, claims and conduct (Final DIP Order at ¶ 8). At the Committee's request, and as consideration for the Committee's agreement to support the expedited timeline to sell the Debtors' assets on July 16, 2009, the DIP Lenders agreed, and the Debtors consented, to cash collateralize the lesser of (a) the aggregate amount of the fees and expenses incurred by the Committee's professionals in these cases, and (b) $1,500,000, which may be used by the Committee to fund the investigation and/or challenge of the Term Lenders' prepetition liens, claims and conduct and other estate causes of action (the "Litigation Carve Out"). The Committee submits that this agreement is appropriate under the circumstances and language memorializing this agreement with the DIP Lenders and the Debtors should be included in the Final DIP Order.

(g) Carve Out: The Committee should be permitted to look to the Carve Out and the Litigation Carve Out for the payment of professional fees and expenses incurred in connection with a challenge of the Term Lenders' prepetition liens, claims and conduct (Final DIP Order at ¶ 8(b)).

(h) Committee Member Expense Reimbursement: The Carve Out should be available to reimburse the reasonable out-of-pocket expenses incurred by members of the Committee in furtherance of their statutory duties (Final DIP Order at ¶ 8(ii) and (iii)).

(i) Challenge Period: No time bar (other than any applicable statutory limit) should be imposed to bring claims or causes of action against the Term Lenders, including, without limitation, causes of action based on theories of preference, fraudulent conveyance, recharacterization and equitable subordination. (Final DIP Order at ¶ 7).

(j) Automatic Standing and Authority: The Final DIP Order should include language granting the Committee (i) authority under Rule 2004 of the Federal Rules of Bankruptcy Procedure to investigate the liens, claims and conduct of the Prepetition Lenders, and (ii) automatic standing to challenge such liens, claims and conduct (Final DIP Order at ¶ 7). These important protections are particularly appropriate here, where the Debtors have already acknowledged the claims of the Prepetition Lenders and the Term Lenders are attempting to impose timing and funding restrictions on the Committee's investigation and challenge rights.

(k) Committee Investigation: The Final DIP Order should include language clarifying that, notwithstanding any provision of the DIP Credit Agreement to the contrary, the Committee's investigation and challenge of the Prepetition Lenders' liens, claims and conduct, as provided in the Final DIP Order, shall not constitute an Event of Default under the DIP Credit Agreement (Final DIP Order ¶ 16).

(l) Remedies for Prepetition Lenders: The Final DIP Order should include language clarifying that, notwithstanding any provision of the Prepetition Revolving Credit Agreement or the Prepetition Term Credit Agreement to the contrary, the Prepetition Lenders (i) may not foreclose upon any assets of the Debtors, or the proceeds thereof, in which they did not hold a valid, fully perfected lien prior to the Petition Date, and (ii) shall be subject to disgorgement in the event of a successful challenge by the Committee with respect to any assets or proceeds foreclosed upon in which the Prepetition Lenders did not hold a valid, fully perfected lien prior to the Petition Date (Final DIP Order ¶ 17(a)).

(m) Credit Bidding: The Term Lenders should not be permitted to credit bid any portion of their claims arising from the Term Amendment. (Final DIP Order ¶ 20(j)). The Court's final bid procedures order includes important modifications and limitations to the Term Lenders' credit bidding rights and should not be diluted by any provision of the Final DIP Order.

37. Additionally, in the event that any further changes to the order are proposed, the Committee reserves all of its rights to object to any and all such provisions and otherwise supplement this Objection.

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**WHEREFORE**, the Committee respectfully requests that this Court enter an order denying the relief requested by the DIP Financing Motion or, alternatively, modifying the proposed Final DIP Order in accordance with the recommendations set forth herein, and granting such additional relief as is just and proper.

Dated: July 6, 2009
Wilmington, Delaware

Respectfully Submitted,

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*Proposed Local and Lead Counsel For The Official Committee Of Unsecured Creditors Of Eddie Bauer Holdings, Inc., et al.*

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| In re: | : | Chapter 11 |
| EDDIE BAUER, INC., et al, | : | Case No. 09-12099 (MFW) |
| Debtors.[1] | : | Jointly Administered |
| | : | **Docket Ref. No. 14** |

**FINAL ORDER PURSUANT TO 11 U.S.C. SECTIONS 105, 361, 362, 363 AND 364 AND RULES 2002, 4001 AND 9014 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE (1) AUTHORIZING INCURRENCE BY THE DEBTORS OF POST-PETITION SECURED INDEBTEDNESS WITH PRIORITY OVER CERTAIN SECURED INDEBTEDNESS AND WITH ADMINISTRATIVE SUPERPRIORITY, (2) GRANTING LIENS, (3) AUTHORIZING USE OF CASH COLLATERAL BY THE DEBTORS PURSUANT TO 11 U.S.C. SECTION 363 AND PROVIDING FOR ADEQUATE PROTECTION, AND (4) MODIFYING THE AUTOMATIC STAY**

THIS MATTER having come before the United States Bankruptcy Court for the District of Delaware (the "**Court**") upon the Motion (the "**DIP Motion**") of Eddie Bauer, Inc. ("**EB**") and each of the other the above-captioned debtors, each as debtor and debtor-in-possession (collectively, the

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Eddie Bauer Holdings, Inc., a Delaware corporation (2352); Eddie Bauer, Inc., a Delaware corporation (9737); Eddie Bauer Fulfillment Services, Inc., a Delaware corporation (0882); Eddie Bauer Diversified Sales, LLC, a Delaware limited liability company (1567); Eddie Bauer Services, LLC, an Ohio limited liability company (disregarded); Eddie Bauer International Development, LLC, a Delaware limited liability company (1571); Eddie Bauer Information Technology, LLC, a Delaware limited liability company (disregarded); Financial Services Acceptance Corporation, a Delaware corporation (7532); and Spiegel Acceptance Corporation, a Delaware corporation (7253). The mailing address for Eddie Bauer Holdings, Inc. is 10401 N.E. 8th Street, Suite 500, Bellevue, WA 98004. On or about the Petition Date, Eddie Bauer of Canada, Inc. and Eddie Bauer Customer Services, Inc., affiliates of the Debtors, commenced a proceeding before the Superior Court of Justice, Commercial List, for the Judicial District of Ontario, for a plan of compromise or arrangement under the Companies' Creditors Arrangement Act.

"**Debtors**", and individually, a "**Debtor**") in the above captioned Chapter 11 Cases (the "**Cases**") seeking, among other things, the entry of an interim order (the "**Interim Order**") and a final order (this "**Final Order**") authorizing the Debtors to:

(i) Obtain credit and incur debt pursuant to Sections 363, 364(c) and 364(d) of Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq*., as amended (the "**Bankruptcy Code")**, on an interim basis for a period (the "**Interim Period**") from the commencement of the Cases through and including the date of the "Final Hearing" (as defined below) up to a maximum amount of $90,000,000 on an interim basis, and up to a maximum committed amount of $100,000,000.00 on a final basis upon entry of the Final Order (in each case on terms and conditions more fully described herein[2]) secured by first priority, valid, priming, perfected, and enforceable liens (as defined in Section 101(37) of the Bankruptcy Code) on property of the Debtors' estates pursuant to Sections 364(c)(2), 364(c)(3) and 364(d) of the Bankruptcy Code, and with priority, as to administrative expenses, as provided in Section 364(c)(1) of the Bankruptcy Code, subject to the terms and conditions contained herein;

(ii) (a) Establish on a final basis that financing arrangement (the "**DIP Facility**") pursuant to: (I) that certain Senior Secured, Super-Priority Debtor-In-Possession Loan and Security Agreement, substantially in the form filed of record in the Cases, by and among the Debtors, as Borrowers, Bank of America, N.A., as agent (in its capacity as agent, together with any successor in such capacity, the "**DIP Agent**") for the Lenders (as defined in the DIP Credit Agreement, the "**DIP Lenders**"), Banc of America Securities LLC, as sole lead arranger and book manager, Bank of America, N.A. and The CIT

[2] The DIP Credit Agreement also includes the ability under certain terms and conditions for the maximum committed amount to be increased by an additional $20,000,000.00. See, Section 2.5 of the DIP Credit Agreement.

Group/Business Credit, Inc., as co-syndication agents, General Electric Capital Corporation and The CIT Group/Business Credit, Inc., as co-collateral agents (in such capacity, the "**Co-Collateral Agents**") and General Electric Capital Corporation, as documentation agent (the DIP Agent, the DIP Lenders, and the Co-Collateral Agents, collectively, the "**DIP Secured Parties**"); and (II) all other agreements, documents, notes, certificates, and instruments executed and/or delivered with, to, or in favor of the DIP Secured Parties, including, without limitation, security agreements, notes, guaranties, mortgages, and Uniform Commercial Code ("**UCC**") financing statements and all other related agreements, documents, notes, certificates, and instruments executed and/or delivered in connection therewith or related thereto (collectively, as may be amended, modified, or supplemented in accordance with the terms of this Final Order) and in effect from time to time, the "**DIP Credit Agreement**");[1] and (b) incur the "Obligations" under and as defined in the DIP Credit Agreement (collectively, the "**DIP Obligations**");

(iii) Authorize on a final basis the use of the proceeds of the DIP Facility (net of any amounts used to pay fees, costs, and expenses under the DIP Credit Agreement) in a manner consistent with the terms and conditions of the DIP Credit Agreement and in accordance with the "Budget" (as defined below and attached hereto as Exhibit 1) with the variations permitted in Paragraph 3 hereof solely for (a) general corporate purposes, (b) payment of costs of administration of the Cases and certain pre-petition claims against the Debtors approved by the Bankruptcy Court, in each case to the extent set forth in the Budget with the variations permitted in Paragraph 3 hereof, and subject to the terms of the Interim Order and this

[1] Except as otherwise defined herein, all defined terms used herein shall have the meanings as defined in the DIP Credit Agreement.

Final Order, (c) upon entry of the Interim Order, the deemed re-issuance of all pre-petition "Letters of Credit" (as defined in the Pre-Petition Revolving Credit Agreement referred to below) previously issued under the Pre-Petition Revolving Credit Agreement so as to be issued under the DIP Credit Agreement, and (d) upon entry of this Final Order, payment in full in cash of the "Pre-Petition Revolving Obligations" (as defined below);

(iv) Grant on a final basis, pursuant to Sections 364(c)(2), 364(c)(3) and 364(d) of the Bankruptcy Code, to the DIP Agent (for the benefit of itself and the other DIP Secured Parties) first priority priming, valid, perfected and enforceable liens, subject only to the Carve-Out and the "Permitted Prior Encumbrances" (as defined below), upon all of the Debtors' real and personal property as provided in and as contemplated by the Interim Order and this Final Order, the DIP Facility, and the DIP Credit Agreement;

(v) Grant on a final basis, pursuant to Section 364(c)(1) of the Bankruptcy Code, to the DIP Agent (for the benefit of itself and the other DIP Secured Parties) superpriority administrative claim status in respect of all DIP Obligations, subject only to the Carve-Out as provided herein;

(vi) Authorize on a final basis the use of "cash collateral" as such term is defined in Section 363 of the Bankruptcy Code (the "**Cash Collateral**") in which the Pre-Petition Revolving Agent, the Pre-Petition Term Agent, and the other Pre-Petition Secured Parties (each as defined below) have an interest;

(vii) (A) grant on a final basis the Pre-Petition Revolving Agent (for the benefit of the Pre-Petition Revolving Secured Parties) (each as defined below) Pre-Petition Replacement Revolving Liens and Pre-Petition Revolving Lien Superpriority Claims (each as defined below), solely to the extent of any

"Diminution in Value" (as defined below) of the Pre-Petition Revolving Agent's interest in the "Pre-Petition Revolving Collateral" (as defined below) as adequate protection for the granting of the "DIP Liens" (as defined below) to the DIP Agent, the use of Cash Collateral, the subordination to the Carve-Out, and for the imposition of the automatic stay, (B) grant on a final basis the Pre-Petition Term Agent (for the benefit of the Pre-Petition Term Secured Parties) (each as defined below) Pre-Petition Replacement Term Liens ~~and Pre-Petition Term Lien Superpriority Claims (each~~ (as defined below), solely to the extent of any actual Diminution in the Value of the Pre-Petition Term Agent's interest in the "Pre-Petition Term Collateral" (as defined below) as adequate protection for the granting of the DIP Liens to the DIP Agent, the use of Cash Collateral, the subordination to the Carve-Out, and for the imposition of the automatic stay, and (C) make on a final basis the Adequate Protection Payments;

(viii) Terminate and modify 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 Facility, the Interim Order, and this Final Order; and

(ix) Waive any applicable stay (including under Rule 6004 of the Federal Rules of Bankruptcy Procedure) and provide for the immediate effectiveness of this Final Order.

The Court having considered the DIP Motion, the Declaration of Marvin Edward Toland of Eddie Bauer Holdings, Inc. in Support of First Day Motions (the "**First Day Affidavit**"), in support of the Debtors' first day motions and orders, the exhibits attached thereto, the DIP Facility and the DIP Credit Agreement, and the evidence submitted at the hearing (the "**Interim Hearing**") conducted on June 18, 2009, the Court having entered the Interim Order, Docket No. 64, and in accordance with Rules 2002, 4001(b), (c), and (d), 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 for the United States Bankruptcy Court for the District of Delaware (the "**Local Rules**"), notice of the DIP Motion and the final hearing (the "**Final Hearing**") having been given; the Final Hearing having been held and concluded on July 7, 2009; and it appearing that approval of the relief requested in the DIP Motion on a final basis is necessary and appropriate to avoid immediate and irreparable harm to the Debtors and otherwise is fair and reasonable and in the best interests of the Debtors, their creditors, their estates, and equity holders, and is essential for the continued operation of the Debtors' business; and it further appearing that the Debtors are unable to obtain (i) unsecured credit for money borrowed allowable as an administrative expense under Section 503(b)(1) of the Bankruptcy Code, (ii) credit for money borrowed with priority over any or all administrative expenses of the kind specified in Sections 503(b) or 507(b) of the Bankruptcy Code, (iii) credit for money borrowed secured solely by a lien on property of the estate that is not otherwise subject to a lien, or (iv) credit for money borrowed secured by a junior lien on property of the estate which is subject to a lien; and there is adequate protection of the interests of holders of Encumbrances on the property of the estate on which Encumbrances are to be granted; and all objections, if any, to the entry of this Final Order having been withdrawn, resolved, or overruled by this Court; and after due deliberation and consideration, and for good and sufficient cause appearing therefor:

BASED UPON THE RECORD ESTABLISHED AT THE INTERIM HEARING AND THE FINAL HEARING BY THE DEBTORS, THE COURT HEREBY MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

A. Petition Date. On June 17, 2009 (the "**Petition Date**"), the Debtors each filed a voluntary petition under Chapter 11 of the Bankruptcy Code with the Court. The Debtors have continued in the management and operation of their respective business and property as debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these Cases, and on June 25, 2009, an official committee of unsecured creditors (the "**Creditors' Committee**") was appointed and has selected Cooley Godward Kronish LLP as proposed counsel to the Creditors' Committee, subject to approval of the Court.

B. Jurisdiction and Venue. Pursuant to 28 U.S.C. § 1334, this Court has jurisdiction over this proceeding and over the persons and property affected hereby. Consideration of the DIP Motion constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B), (C), (D), (G), (K), and (O). Venue for the Cases and proceedings on the DIP Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

C. Notice. The Final Hearing is being held pursuant to the authorization of Bankruptcy Rule 4001 and Local Rule 9013-1. Notice of the Final Hearing and the relief requested in the DIP Motion has been provided by the Debtors, whether by telecopy, email, overnight courier or hand delivery on June __, 2009 to certain parties in interest, including: (i) the Office of the United States Trustee, (ii) the Debtors' forty (40) largest unsecured creditors, (iii) counsel to the "Pre-Petition Revolving Agent" (as defined below), (iv) counsel to the "Pre-Petition Term Agent" (as defined below), (v) counsel to the proposed DIP Agent, (vi) all parties asserting a security interest in the assets of the Debtors to the extent reasonably known to the Debtors, (viii) the Office of the United States Attorney General for the District of Delaware; (ix) counsel to the Creditors' Committee, and (x) the Internal

Revenue Service. Notice of the Final Hearing and the relief requested in the DIP Motion has been given pursuant to Sections 102(1), 364(c) and 364(d) of the Bankruptcy Code, Bankruptcy Rules 2002, 4001(c), 4001(d) and the Local Rules.

D. Debtors' Acknowledgments and Agreements. Without prejudice to the rights of the Creditors' Committee as set forth in Paragraph 7 below, each Debtor admits, stipulates, acknowledges, and agrees to the following (collectively, the "**Debtors' Stipulations**")[1]:

(i) Pre-Petition Revolving Credit Agreement. Prior to the Petition Date, the Debtors entered into a certain Loan and Security Agreement dated June 21, 2005 (as amended and in effect, the "**Pre-Petition Revolving Credit Agreement**") with, among others, Bank of America, N.A., as Agent (in such capacity, the "**Pre-Petition Revolving Agent**") for certain "Lenders" (as defined therein) (the "**Pre-Petition Revolving Lenders**", and together with the Pre-Petition Revolving Agent, collectively, the "**Pre-Petition Revolving Secured Parties**") pursuant to which the Pre-Petition Revolving Secured Parties extended a working capital facility providing for revolving credit loans and letters of credit.

(ii) Pre-Petition Revolving Obligations Amount. Each Debtor stipulates and agrees that as of the Petition Date, the Debtors were indebted to the Pre-Petition Revolving Secured Parties in the approximate principal sum of $53,576,295.59 in "Revolving Loans" (as defined in the Pre-Petition Revolving Credit Agreement, including the Early Termination Amount set forth below), issued and outstanding "Letters of Credit" (as defined in the Pre-Petition Revolving Credit Agreement) in the amount of $9,689,362.11, together with all other financial accommodations or services (including, without limitation, any obligations relating to "Bank Products" (as defined in the Pre-Petition Revolving Credit Agreement provided by the Pre-Petition Revolving Secured Parties or their affiliates) accrued interest, costs, fees, reimbursement obligations, Attorney Costs and other professional fees and expenses, and all other "Obligations" (as defined in the Pre-Petition Revolving Credit Agreement) (collectively, hereinafter the "**Pre-Petition Revolving Obligations**"). In particular, each Debtor acknowledges and agrees that as provided in the Interim Order (i) the 2002 Master Agreement dated as of October 14, 2005 between Bank of America, N. A. and the Debtor, the Schedule to the Master Agreement dated as of October 14, 2005, and the Confirmation (as defined in the Master

1 All capitalized terms used in this Finding D shall have the meanings as defined in the Pre-Petition Revolving Credit Agreement and the Pre-Petition Term Credit Agreement, respectively.

Agreement) dated April 6, 2007, Ref. No. 5148853 (collectively, the "**Hedge Agreement**") have been terminated in accordance with the terms and provisions of Sections 5 and 6 of the Hedge Agreement, (ii) Bank of America, N.A. has calculated the Early Termination Amount (as such term is defined in the Hedge Agreement) in respect of such termination in accordance with the terms and provisions of the Hedge Agreement (and, for the avoidance of any doubt, Bank of America, N.A. may, as permitted by the definition of the term "Close-out Amount" set out in the Hedge Agreement, determined such amount with reference to quotations for replacement transactions obtained by Bank of America, N.A. from one or more third parties) and has established the Early Termination Amount to be $8,360,600.00 in accordance with the terms and provisions of Section 6(d) of the Hedge Agreement, and such Early Termination Amount is due and payable by the Debtors to Bank of America, N.A. in accordance with the terms and provisions of Section 6(d) of the Hedge Agreement, and (iii) the Early Termination Amount so due under the Hedge Agreement is and shall be included in the principal balance of the Pre-Petition Revolving Obligations set forth above.

(iii) Pre-Petition Revolving Collateral. To secure the Pre-Petition Revolving Obligations, the Debtors granted security interests and Liens (as defined in the Pre-Petition Revolving Credit Agreement) (collectively, the "**Pre-Petition Revolving Liens**") to the Pre-Petition Revolving Secured Parties upon substantially all of the Debtors' assets and personal property, including, without limitation, (a) all Accounts, (b) all Inventory, (c) all contract rights, (d) all Chattel Paper, (e) all Documents, (f) all Instruments, (g) all Supporting Obligations and Letter of Credit Rights, (h) all General Intangibles [2], (i) all Payment Intangibles, (j) all Equipment, (k) all Investment Property (other than the equity interests in SAC and FSAC owned by Holdings as of the Closing Date) [3], (l) all money, cash, cash equivalents, securities and other property

[2] Pursuant to that certain Intellectual Property Security Agreement dated as of June 21, 2005 (as amended, restated, supplemented or otherwise modified and in effect, the "**Revolving IP Security Agreement**") by and between EB and certain of its subsidiaries and the Pre-Petition Revolving Agent, EB and such subsidiaries granted to the Pre-Petition Revolving Agent, for the benefit of the Pre-Petition Revolving Secured Parties, security interests and Liens in the "IP Collateral" (as such term is defined in the Revolving IP Security Agreement), which constitutes Pre-Petition Revolving Collateral hereunder. A copy of the Revolving IP Security Agreement is on file with the Pre-Petition Revolving Agent and is available upon request.

[3] Pursuant to (i) that certain Pledge Agreement dated as of June 21, 2005 (as amended, restated, supplemented or otherwise modified and in effect, the "**Holdings Revolving Pledge Agreement**") by and between Eddie Bauer Holdings, Inc. and the Pre-Petition Revolving Agent, Eddie Bauer Holdings, Inc. granted to the Pre-Petition Revolving Agent, for the benefit of the Pre-Petition Revolving Secured Parties, security interests and Liens in outstanding capital stock of EB and other "Pledged Collateral" (as such term is defined in the Holdings Revolving Pledge Agreement), which constitute Pre-Petition Revolving Collateral hereunder, and (ii) that certain Pledge Agreement dated as of June 21, 2005 (as amended, restated, supplemented or otherwise modified and in effect, the "**EB Revolving Pledge Agreement**" and, together with the Holdings Revolving Pledge Agreement, collectively, the "**Revolving Pledge Agreements**") by and between EB and the Pre-Petition Revolving Agent, EB granted to the Pre-Petition Revolving Agent, for the benefit of the Pre-Petition Revolving Secured Parties, security interests and Liens

of any kind held directly or indirectly by the Pre-Petition Revolving Agent or any of the Pre-Petition Secured Parties, (l) all deposit accounts, credits, and balances with and other claims against the Pre-Petition Revolving Agent or any of the Pre-Petition Secured Parties or any of their affiliates or any other financial institution with which the Debtors maintain deposits, including any Payment Accounts, (m) certain specified commercial tort claims as set forth in the Pre-Petition Revolving Credit Agreement, (n) all other assets and properties of the Debtors, (o) all books, records and other property related to or referring to any of the foregoing, including, without limitation, books, records, account ledgers, data processing records, computer software and other property and General Intangibles at any time evidencing or relating to any of the foregoing; and (p) all accessions to, substitutions for and replacements, products and proceeds of any of the foregoing, including, but not limited to, proceeds of any insurance policies, claims against third parties, and condemnation or requisition payments with respect to all or any of the foregoing (collectively, the "**Pre-Petition Revolving Collateral**") , however, the Pre-Petition Revolving Collateral does not include any of the assets of Eddie Bauer Diversified Sales, LLC ("**EB Diversified**") or Eddie Bauer International Development, LLC ("**EB International**").

(iv) Pre-Petition Term Credit Agreement. Prior to the Petition Date, the Debtors entered into a certain Amended and Restated Term Loan Agreement dated April 4, 2007 (as amended and in effect, the "**Pre-Petition Term Credit Agreement**") with, among others, Wilmington Trust FSB (as successor by assignment to JPMorgan Chase Bank, N.A.), as Agent (in such capacity, the "**Pre-Petition Term Agent**", and together with the Pre-Petition Revolving Agent, collectively, the "**Pre-Petition Agents**") for certain "Lenders" (as defined therein) (the "**Pre-Petition Term Lenders**") (together with the Pre-Petition Term Agent, collectively, the "**Pre-Petition Term Secured Parties**", and together with the Pre-Petition Revolving Secured Parties, collectively, the "**Pre-Petition Secured Parties**") pursuant to which the Pre-Petition Term Secured Parties provided a term loan to the Debtors.

(v) Pre-Petition Term Obligations Amount. Each Debtor stipulates and agrees that as of the Petition Date, the Debtors were indebted to the Pre-Petition Term Secured Parties in the approximate principal sum of $200,607,947.43, together with all other financial accommodations or services, accrued interest, costs, fees, and professional fees

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in outstanding capital stock of Eddie Bauer Services, LLC, Eddie Bauer Information Technology, LLC and Distribution Fulfillment Services, Inc. (DFS) and other "Pledged Collateral" (as such term is defined in the EB Revolving Pledge Agreement), which constitute Pre-Petition Revolving Collateral hereunder. Copies of the Revolving Pledge Agreements are on file with the Pre-Petition Revolving Agent and are available upon request.

and expenses, and all other "Obligations" (as defined in the Pre-Petition Term Credit Agreement) (collectively, hereinafter the "**Pre-Petition Term Obligations**", and together with the Pre-Petition Revolving Obligations, collectively, the "**Pre-Petition Obligations**").

(vi) Pre-Petition Term Collateral. Pursuant to (w) a certain Amended and Restated Guarantee and Collateral Agreement dated April 4, 2007 (the "**Pre-Petition Term Loan Security Agreement**") and (x) that certain Amended and Restated Open-End Mortgage, Security Agreement, Assignment of Leases and Rents and Fixture Filing, dated April 4, 2007 (the "**Term Loan Mortgage**"), (y) that certain Grant of Security Interest in Trademark Rights, effective as of April 4, 2007 (the "**Trademark Security Agreement**"), and (z) that certain Grant of Security Interest in Copyright Rights, effective as of April 4, 2007 (the "**Copyright Security Agreement**") to secure the Pre-Petition Term Obligations, the Debtors granted security interests and Liens (as defined in the Pre-Petition Term Credit Agreement) (collectively, the "**Pre-Petition Term Liens**", and together with the Pre-Petition Revolving Liens, collectively, the "**Pre-Petition Liens**") to the Pre-Petition Term Secured Parties upon substantially all of the Debtors' assets and personal property, including, without limitation, (a) all Accounts, (b) all Chattel Paper, (c) all Contracts, (d) all Deposit Accounts, (e) all Documents (other than title documents with respect to Vehicles), (f) all Equipment, (g) all Fixtures, (h) all General Intangibles, (i) all Instruments, (j) all Intellectual Property, (k) all Inventory, (l) all Investment Property other than the "Capital Stock" (as defined in the Pre-Petition Term Loan Security Agreement") of the "Securitization Subsidiaries" (as defined in the Pre-Petition Term Loan Security Agreement") and any dividends from the Securitization Subsidiaries payable to Eddie Bauer Holdings, Inc. in respect of the "Securitization Note" (as defined in the Pre-Petition Term Loan Security Agreement"), (m) all Letter-of-Credit Rights, (n) certain specified commercial tort claims as set forth in the Pre-Petition Term Loan Security Agreement, (o) all other property not otherwise described above (except for any property specifically excluded from any clause above, and any property specifically excluded from any defined term used in any clause above), (p) all books and records pertaining to the foregoing, (q) to the extent not otherwise included, all Proceeds, Supporting Obligations and products of any and all of the foregoing, and (r) certain Real Estate (as defined in the Term Loan Mortgage) and all collateral security and guarantees given by any Person with respect to any of the foregoing, and (s) substantially all of the assets of EB Diversified and EB International (collectively, the "**Pre-Petition Term Collateral**", and together with the Pre-Petition Revolving Collateral, collectively, the "**Pre-Petition Collateral**").

(vii) Intercreditor Agreement. Prior to the Petition Date, the Pre-Petition Revolving Agent and the Pre-Petition Term Agent entered into that certain Intercreditor Agreement dated June 21, 2005 (as amended and in effect, the "**Intercreditor**

**Agreement**" and, together with the Pre-Petition Revolving Credit Agreement and the Pre-Petition Term Credit Agreement, the "**Pre-Petition Credit Documents**"), which governs the respective rights, interests, obligations, priority, and the positions of the Pre-Petition Revolving Secured Parties and Pre-Petition Term Secured Parties with respect to, among other things, the assets and properties of the Debtors. Pursuant to the Intercreditor Agreement, and except as set forth therein, among other things, (a) the Pre-Petition Revolving Liens are senior and prior in right to the Pre-Petition Term Liens on the "Revolving Lender Priority Collateral" (as defined in the Intercreditor Agreement), and (b) the Pre-Petition Term Liens are senior and prior in right to the Pre-Petition Revolving Liens on the "Term Lender Priority Collateral" (as defined in the Intercreditor Agreement), in each case as provided therein. The Intercreditor Agreement shall remain in full force and effect and be enforceable according to its terms, provided, however, that for purposes of the Intercreditor Agreement, the DIP Facility shall be deemed a refinancing of the Pre-Petition Revolver Obligations and the DIP Agent and DIP Lenders, and the Pre-Petition Term Agent and the Pre-Petition Term Lenders, shall be entitled to all the benefits and subject to all conditions of the Intercreditor Agreement.

(viii) Pre-Petition Liens. (a) As of the Petition Date, (i) the Pre-Petition Liens[4] are valid, binding, enforceable, and perfected first-priority and second priority liens, subject only to any valid, properly perfected liens that were senior to the Pre-Petition Revolving Liens as of the Petition Date and are not subject to avoidance, recharacterization or subordination pursuant to the Bankruptcy Code or applicable non-bankruptcy law (referred to herein as the "**Permitted Prior Encumbrances**"), and, (ii) the Pre-Petition Obligations constitute legal, valid and binding obligations of the Debtors, enforceable in accordance with the terms of the Pre-Petition Revolving Credit Agreement or the Pre-Petition Term Credit Agreement, as applicable (other than in respect of the stay of enforcement arising from Section 362 of the Bankruptcy Code), and no offsets, defenses, or counterclaims to any of the Pre-Petition Obligations exists, and no portion of the Pre-Petition Obligations is subject to avoidance, recharacterization or subordination pursuant to the Bankruptcy Code or applicable non-bankruptcy law, and (iii) the Pre-Petition Obligations constitute allowable secured claims, and (b) the Debtors do hereby and have waived, discharged and released the Pre-Petition Secured Parties, together with their affiliates, agents, attorneys, officers, directors and employees, of any right the Debtors may have (x) to challenge or object to any of the Pre-Petition Obligations, (y) to challenge or object to the security for the Pre-Petition Obligations, and (z) to bring or pursue any and all claims, objections, challenges, causes of action and/or choses in action arising out of, based upon or in any way related to the Pre-Petition Revolving Credit Agreement, the Pre-Petition Term Credit Agreement (including with respect to any payments made by the Debtors pursuant thereto prior to the Petition Date), or otherwise.

[4] Other than with respect to Leasehold Interests, as to which the Debtors make no admission, stipulation, acknowledgment or agreement. The Debtors' Stipulations made in clauses (iii), (vi), and (viii) do not apply with respect to any security interests and Encumbrances on the Leasehold Interests.

For the avoidance of doubt, the term "Permitted Prior Encumbrances" shall not include, and specifically excludes, the Pre-Petition Revolving Liens, which pre-petition liens are to be subordinate and junior to the liens granted to the DIP Secured Parties.

The Debtors do not possess and shall not assert any claim, counterclaim, setoff or defense of any kind, nature or description which would in any way affect the validity, enforceability and non-avoidability of any of the Pre-Petition Revolving Credit Agreement, the Pre-Petition Term Credit Agreement, or the Pre-Petition Liens, or any claim of the Pre-Petition Secured Parties pursuant to the Pre-Petition Revolving Credit Agreement or the Pre-Petition Term Credit Agreement, as applicable.

(ix) Cash Collateral. The Pre-Petition Secured Parties have a security interest in Cash Collateral, including all amounts on deposit in the Debtors' banking, checking, or other deposit accounts and all proceeds of Pre-Petition Collateral, to secure the Pre-Petition Obligations and to the same extent and order of priority as that which was held by such party prior to the commencement of these Cases.

(x) No Priming of DIP Facility. In entering into the DIP Credit Agreement, and as consideration therefor, each Debtor hereby agrees that until such time as all DIP Obligations have been indefeasibly paid in full in cash and the DIP Credit Agreement has been terminated in accordance with the terms thereof, each Debtor shall not in any way prime or seek to prime the security interests and DIP Liens provided to the DIP Secured Parties under this Interim Order by offering a subsequent lender or a party-in-interest a superior or *pari passu* lien or claim pursuant to Section 364(d) of the Bankruptcy Code or otherwise.

E. Findings Regarding the Post-Petition Financing.

(i) Need for Post-Petition Financing. An immediate need exists for the Debtors to obtain funds from the DIP Facility in order to continue their operations and to engage in a process for the sale of their assets (the "**Sale Process**") in order to preserve and maximize the value of their estates. The ability of the Debtors to finance their operations, to pursue the Sale Process, to preserve and maintain the value of the Debtors' assets, and maximize a return for all creditors requires the availability of working capital from the DIP Facility, the absence of which would immediately and irreparably harm the Debtors, their estates, their creditors, and their equity holders.

(ii) No Credit Available on More Favorable Terms. The Debtors have been unable to obtain (A) unsecured credit allowable under Section 503(b)(1) of the Bankruptcy Code as an administrative expense, (B) credit for money borrowed with priority over any or all administrative expenses of the kind specified in Sections 503(b) or 507(b) of the Bankruptcy Code, (C) credit for money borrowed secured solely by an Encumbrance on property of the estate that is not otherwise subject to an Encumbrance, or (D) credit for money borrowed secured by a junior Encumbrance on property of the estate which is subject to an Encumbrance, in each case, on more favorable terms and conditions than those provided in the DIP Credit Agreement, the Interim Order, and this Final Order. The Debtors are also unable to obtain secured credit, allowable only under Sections 364(c)(2), 364(c)(3), and 364(d) of the Bankruptcy Code on more favorable terms and conditions than those provided in the DIP Credit Agreement, the Interim Order, and this Final Order. The Debtors are unable to obtain credit for borrowed money without granting to the DIP Secured Parties the "DIP Protections" (as defined below).

(iii) Prior Liens. Nothing herein shall constitute a finding or ruling by this Court that any Pre-Petition Liens or Permitted Prior Encumbrances are valid, senior, perfected, and unavoidable. Moreover, nothing shall prejudice (A) the rights of any party in interest including, but not limited to, the Debtors (other than with respect to the Pre-Petition Secured Parties), the DIP Secured Parties (other than with respect to the Pre-Petition Term Secured Parties), the Pre-Petition Term Secured Parties (other than with respect to the Pre-Petition Revolving Secured Parties), or the Creditors' Committee to challenge the validity, priority, perfection and extent of any such Pre-Petition Lien, Permitted Prior Encumbrance, and/or security interest, or (B) the rights of the Creditors' Committee to challenge the validity, priority, perfection, and extent of the Pre-Petition Liens as set forth in this Final Order.

F. Section 506(c) Waiver. As a further condition of the DIP Facility and any obligation of the DIP Lenders to make credit extensions pursuant to the DIP Credit Agreement, and in light of the Pre-Petition Revolving Secured Parties' consent to subordinate their liens and superpriority claims to the Carve-Out and the DIP Liens (to the extent provided for herein) and allowing the Debtors' continued use of Cash Collateral, the Debtors, and each of them (and any successors thereto or any representatives thereof, including any trustees or examiners appointed in the Cases or any Successor Cases) shall be deemed to have waived, relative to the Pre-Petition revolving Secured Parties (but not the Pre-Petition Term Secured Parties) any rights or benefits of Section 506(c) of the Bankruptcy Code[5].

G. 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 Credit Agreement) shall be used, in each case in a manner consistent with the terms and conditions of the DIP Credit Agreement, and in accordance with the "Budget" (as defined below) with the variations permitted in Paragraph 3 hereof and this Final Order, solely for (a) working capital and general corporate purposes, (b) payment of costs of administration of the Cases and certain pre-petition claims against the Debtors approved by the Bankruptcy Court, in each case to the extent set forth in the Budget with the variations permitted in Paragraph 3 hereof, and (c) upon entry of the Interim Order, all pre-petition "Letters of Credit" (as defined in the Pre-Petition Revolving Credit Agreement) issued under the Pre-Petition Revolving Credit Agreement have been deemed issued under the DIP Credit Agreement. Upon entry of this Final Order the Debtors are

~~5 In the event the Pre-Petition Term Secured Parties are unwilling to agree to permit unpaid administrative and priority claims to be paid out of the proceeds of a 363 sale on terms and conditions acceptable to the Debtors, the Debtors reserve the right to seek approval of a form of Final Order that does NOT grant a Section 506(c) waiver to the Pre-Petition Term Secured Parties.~~

authorized to repay in full any then remaining outstanding balance of the Pre-Petition Revolving Obligations with the first advance made under the DIP Facility after entry of this Final Order.

H. Application of Proceeds of Collateral to Pre-Petition Revolving Obligations. All proceeds of the sale or other disposition of the "Collateral" (as defined below) whether in the ordinary course of business or otherwise (except as provided in Paragraph 8(d) hereof) shall be applied first, to permanently reduce the Pre-Petition Revolving Obligations, to fund the "Pre-Petition Revolving Indemnity Account" (as defined below) in accordance with the terms of this Interim Order, and second, to reduce the DIP Obligations, each in accordance with the terms and conditions of the Pre-Petition Revolving Credit Agreement, the Intercreditor Agreement, the DIP Credit Agreement, and to the extent applicable, this Final Order. Payment of the Pre-Petition Revolving Obligations in accordance with this Final Order is necessary as the Pre-Petition Revolving Secured Parties will not otherwise consent to the priming of the Revolving Lender Priority Collateral. Such payment will not prejudice the Debtors or their estates because payment of such amounts is subject to the rights of the Creditors' Committee under Paragraph 7 below.

I. Adequate Protection for Pre-Petition Secured Parties. As a result of the grant of the DIP Liens, the subordination to the Carve-Out, the use of Cash Collateral authorized herein, and any Diminution in Value of their respective interest in the Pre-Petition Collateral (including Cash Collateral), the Pre-Petition Secured Parties are entitled to receive adequate protection pursuant to Sections 361, 362, 363 and 364 of the Bankruptcy Code. As adequate protection, the Pre-Petition Revolving Agent (for the benefit of the Pre-Petition Revolving Secured Parties) will receive, subject in each case to the Intercreditor Agreement: (1) "Revolving Lien Adequate Protection Payments" (as defined below), (2)

the Pre-Petition Replacement Revolving Liens, (3) the Pre-Petition Revolving Lien Superpriority Claim, and (4) the Pre-Petition Revolving Indemnity Account. As adequate protection, the Pre-Petition Term Agent (for the benefit of the Pre-Petition Term Secured Parties) will receive, subject ~~in each case~~ to the Intercreditor Agreement~~: (1) "Term Lien Adequate Protection Payments" (as defined below), (2)~~ the Pre-Petition Replacement Term Liens~~, (3) the Pre-Petition Term Lien Superpriority Claim, and (4) the Pre-Petition Term Lien Indemnity Account~~.

J. Section 552. In light of their agreement to subordinate their liens and superpriority claims (i) to the Carve-Out in the case of the DIP Secured Parties, and (ii) the Carve-Out and the DIP Liens as provided herein in the case of the Pre-Petition Secured Parties, the DIP Secured Parties and the Pre-Petition Revolving Secured Parties are each 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.

K. Extension of Financing. The DIP Secured Parties have indicated a willingness to provide financing to the Debtors in accordance with the DIP Credit Agreement and subject to (i) the entry of this Final Order, and (ii) findings by this Court that such financing is essential to the Debtors' estates, that the DIP Secured Parties are good faith financiers, and that the DIP Secured Parties' claims, superpriority claims, security interests and liens, and other protections granted pursuant to this Final Order and the DIP Facility will not be affected by any subsequent reversal, modification, vacatur or amendment of this Final Order or any other order, as provided in Section 364(e) of the Bankruptcy Code.

L. Assent of Pre-Petition Secured Parties. The Pre-Petition Revolving Secured Parties have indicated a willingness to assent to the entry of this Final Order in good faith and the superpriority claims, security interests and liens, and other protections granted to the Pre-Petition Revolving Secured Parties pursuant to this Final Order will not be affected by any subsequent reversal, modification, vacatur

or amendment of this Final Order or any other order, as provided in Section 364(e) of the Bankruptcy Code.

M. Business Judgment and Good Faith Pursuant to Section 364(e). The terms and conditions of the DIP Facility and the DIP Credit Agreement, 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 fair consideration. The DIP Credit Agreement was negotiated in good faith and at arms' length among the Debtors and the DIP Secured Parties. Credit to be extended under the DIP Facility and the use of Cash Collateral will be so extended and used in good faith, and for valid business purposes and uses, the consequence of which is that the DIP Secured Parties are entitled to the protection and benefits of Section 364(e) of the Bankruptcy Code.

N. Relief Essential; Best Interest. The relief requested in the DIP Motion (and as provided in this Interim Order) is necessary, essential, and appropriate for the continued operation of the Debtors' business and to avoid immediate and irreparable harm to the Debtors' estates, in order to pursue the Sale Process, and to preserve and maximize the Debtors' assets and personal property. It is in the best interest of the Debtors' estate to be allowed to establish the DIP Facility contemplated by the DIP Credit Agreement.

O. Entry of Final Order. For the reasons stated above, the Debtors have requested immediate entry of this Final Order pursuant to Bankruptcy Rule 4001(c)(2).

NOW, THEREFORE, on the DIP Motion of the Debtors and the record before the Court with respect to the DIP Motion, and with the consent of the Debtors, the Pre-Petition Secured Parties, the DIP

Secured Parties, and the Creditors' Committee to the form and entry of this Final Order, and good and sufficient cause appearing therefor,

IT IS ORDERED AND ADJUDGED that:

1. **Motion Granted**. The DIP Motion is granted on a final basis pursuant to the provisions of this Final Order.

2. **DIP Credit Agreement**.

(a) Approval of Entry into DIP Credit Agreement. The authorization of the Debtors to execute and deliver the DIP Credit Agreement and to incur and perform the DIP Obligations in accordance with, and subject to, the terms of the Interim Order and the DIP Credit Agreement, and to execute and deliver all instruments, certificates, agreements, and documents which may be required or necessary for the performance by the Debtors under the DIP Facility and the creation and perfection of the DIP Liens described in and provided for by the Interim Order and the DIP Credit Agreement are hereby approved on a final basis. The Debtors prior authorization on an interim basis to do and perform all acts, pay the principal, interest, fees, expenses, and other amounts described in the DIP Credit Agreement and all other documents comprising the DIP Facility as such become due, including, without limitation, closing fees, administrative fees, commitment fees, letter of credit fees and reasonable attorneys', financial advisors' and accountants' fees and disbursements as provided for in the DIP Credit Agreement, which amounts shall not otherwise be subject to approval of this Court is hereby confirmed on a final basis; provided, however, that copies of any such invoices (which may be redacted as

necessary to protect confidential or privileged information or communication) for attorneys', financial advisor's, or accountant's fees and disbursements shall be provided to the United States Trustee, counsel to the Creditors' Committee, counsel to the Pre-Petition Term Agent, and counsel to the Term Lender Group, and shall be subject to a ten (10) day review and objection period for such parties. The DIP Credit Agreement shall and does represent valid and binding obligations of the Debtors, enforceable against the Debtors in accordance with its terms.

(b) Authorization to Borrow. In order to enable the Debtors to continue to operate their business, subject to the terms and conditions of this Final Order, the DIP Credit Agreement, all documents comprising the DIP Facility, and the Budget (with the variations permitted in Paragraph 3 hereof), the Debtors are hereby authorized under the DIP Facility to borrow up to $100,000,000 at any one time outstanding during the period commencing on the date on which this Final Order has been entered by this Court and continuing until the "Termination Date" (as defined in the DIP Credit Agreement).

(c) Application of DIP Proceeds. The proceeds of the DIP Facility (net of any amounts used to pay fees, costs and expenses under the DIP Credit Agreement) shall be used, in each case in a manner consistent with the terms and conditions of the DIP Credit Agreement, and in accordance with the Budget with the variations permitted in Paragraph 3 hereof solely: (a) for working capital and general corporate purposes, to the extent set forth in the Budget with the variations permitted in Paragraph 3 hereof, (b) to repay, with the first advance under the DIP Facility after entry of this Final Order, all remaining Pre-Petition Revolving Obligations, (c) to confirm that upon entry of this Final Order, all pre-petition "Letters of Credit" (as defined in the

Pre-Petition Revolving Credit Agreement) issued under the Pre-Petition Revolving Credit Agreement have been deemed issued under the DIP Credit Agreement on a final basis, and (d) for the payment of costs of administration of the Cases and certain pre-petition claims against the Debtors approved by the Bankruptcy Court, to the extent set forth in the Budget with the variations permitted in Paragraph 3 hereof.

(d) Conditions Precedent. The DIP Secured Parties shall have no obligation to make any loan or advance under the DIP Credit Agreement unless the conditions precedent to make such loan under the DIP Credit Agreement have been satisfied in full or waived in accordance with the DIP Credit Agreement.

(e) Post-Petition Liens. Effective immediately upon the entry of the Interim Order on an interim basis, and on a final basis upon the entry of this Final Order, the DIP Secured Parties are hereby granted pursuant to Sections 361, 362, 364(c)(2), 364(c)(3), and 364(d) of the Bankruptcy Code, but subject to the Carve-Out and the Permitted Pre-Petition Liens, (i) priming first priority, continuing, valid, binding, enforceable, non-avoidable and automatically perfected post-petition security interests and liens, senior and superior in priority to all other secured and unsecured creditors of the Debtors' estates on all Revolving Lender Priority Collateral; and (ii) priming priority, continuing, valid, binding, enforceable, non-avoidable and automatically perfected post-petition security interests and liens senior and superior in priority to the Pre-Petition Revolving Liens and unsecured creditors of the Debtors' estates, but junior to the Pre-Petition Term Liens, whether or not fully perfected on all Term Lender Priority Collateral

(collectively, the "**DIP Liens**") upon and to all presently owned and hereafter acquired assets and real and personal property of the Debtors, including, without limitation, the following:

a. All Accounts;

b. All Inventory;

c. All contract rights;

d. All Chattel Paper;

e. All Documents;

f. All Instruments;

g. All Supporting Obligations and Letter of Credit Rights;

h. All General Intangibles;

i. All Payment Intangibles;

j. All Equipment;

k. All Investment Property;

l. All money, cash, cash equivalents, securities and other property of any kind of any Debtor held directly or indirectly by the DIP Secured Parties;

m. All Specified Bankruptcy Recoveries (as defined below);

n. All of the Debtors' deposit accounts, credits, and balances with and other claims against the DIP Secured Parties or any of their affiliates or any other financial institution with which any Debtor maintains deposits;

o. All Commercial Tort Claims, to the extent described on Schedule 6.1(a)(xiv) of the DIP Credit Agreement and all future Commercial Tort Claims in which a security interest is granted to the DIP Agent pursuant to Section 9.27 of the DIP Credit Agreement;

p. The proceeds of all interests in any real property, including, without limitation, proceeds of all leasehold interests (but excluding the leasehold interests themselves);

q. all other assets and properties of the Debtors;

r. all books, records and other property related to or referring to any of the foregoing, including, without limitation, books, records, account ledgers, data processing records, computer software and other property and General Intangibles at any time evidencing or relating to any of the foregoing;

s. all accessions to, substitutions for and replacements, products and proceeds of any of the foregoing, including, but not limited to, proceeds of any insurance policies, claims against third parties, and condemnation or requisition payments with respect to all or any of the foregoing; and

t. all obligations now or hereafter owing to the Debtors, or any of them, by any one or more of the "Canadian Subsidiaries" (as defined in the DIP Credit Agreement), as well as all property of any one or more of the Canadian Subsidiaries which constitutes collateral security for those obligations and which is subject to a lien, encumbrance, security interest, or charge granted to the Debtors, or any of them;

(collectively, the "**DIP Collateral**" and, together with the Pre-Petition Collateral, the "**Collateral**"). As used herein, "**Specified Bankruptcy Recoveries**" shall mean any claims and causes of action to which the Borrower may be entitled to assert by reason of any avoidance or other power vested in or on behalf of the Borrower or the estate of the Borrower under Chapter 5 of the Bankruptcy Code, but solely to the extent (a) arising under Section 549 of the Bankruptcy Code, or (b) solely to the extent that the DIP Obligations and/or the Pre-Petition Revolving Obligations have not been paid in full in cash and the Pre-Petition Revolving Indemnity Account has not been fully funded in cash, constituting proceeds of avoidance actions under Section 547 of the Bankruptcy Code actually received by the Debtors or their estates to the extent necessary to

reimburse the DIP Secured Parties or the Pre-Petition Revolving Secured Parties for the amount that any Carve-Out under this Interim Order funded the Borrower's expenses in investigating such actions, commencing such actions, and conducting the litigation and/or settlement discussions that resulted in the receipt of such proceeds.

(f) Subject to the rights afforded the Creditors' Committee under Paragraph 7 of this Final Order, the DIP Liens to be created and granted to the DIP Agent and the DIP Secured Parties, as provided herein, (i) are created pursuant to Sections 364(c)(2), 364(c)(3) and 364(d) of the Bankruptcy Code, (ii) are first, valid, prior, perfected, unavoidable, and superior to any security, mortgage, or collateral interest or lien or claim to the DIP Collateral, subject only to (i) the Carve-Out and Permitted Prior Encumbrances, and (ii) the liens and claims of the Pre-Petition Term Agent in the Term Lender Priority Collateral. The DIP Liens shall secure all DIP Obligations and shall not be made subject to or *pari passu* with any lien or security interest by any court order heretofore or hereafter entered in the Cases, and shall be valid and enforceable against any trustee or examiner appointed in the Cases, upon the conversion of these Cases to cases under Chapter 7 of the Bankruptcy Code or in any other proceedings related to any of the foregoing (any "**Successor Case**"), and/or upon the dismissal of the Cases. The DIP Liens shall not be subject to Sections 506(c), 510, 549, 550 or 551 of the Bankruptcy Code or the "equities of the case" exception of Section 552(b) of the Bankruptcy Code.

(g) Enforceable Obligations. The DIP Credit Agreement 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, in accordance with the terms and conditions of the DIP Credit Agreement.

(h) Protection of DIP Secured Parties 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, the Interim Order, and this Final Order, and in compliance with the Budget with the variations permitted in Paragraph 3 hereof.

(i) Superpriority Administrative Claim Status. Subject to the Carve-Out, ~~the Pre-Petition Term Lien Super Priority Claim (solely with respect to any Diminution in Value of the interests of the Pre-Petition Secured Parties in the Term Lender Priority Collateral),~~ and to the rights afforded the Creditors' Committee under Paragraph 7 of this Final Order, all DIP Obligations shall be an allowed superpriority administrative expense claim (the "**DIP Superpriority Claim**", and, together with the DIP Liens, the "**DIP Protections**") with priority 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, arising, or ordered pursuant to Sections 105, 326, 328, 330, 331, 503(a), 503(b), 506(c), 507(a), 507(b), 546(c), 546(d), 552(b), 726, 1113, and 1114 of the Bankruptcy Code, whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment. Other than the Carve-Out, ~~and the Pre-Petition Term Lien Superpriority Claims (solely with respect to any Diminution in Value of the interests of the Pre-Petition Term Secured Parties in the Term Lender Priority Collateral),~~

no costs or expenses of administration, including, without limitation, professional fees allowed and payable under Sections 328, 330, and 331 of the Bankruptcy Code, or otherwise, that have been or may be incurred in this proceeding, or in any Successor Cases, and no priority claims are, or will be, senior to, prior to, or on a parity with the DIP Protections or the DIP Obligations, or with any other claims of the DIP Secured Parties arising hereunder.

(j) Allowance of Claim. Subject to the rights afforded the Creditors' Committee under Paragraph 7 of this Final Order The Pre-Petition Secured Obligations are hereby deemed "allowed claims" within the meaning of Section 502 of the Bankruptcy Code.

3. **Authorization to Use Cash Collateral and Proceeds of DIP Credit Agreement**.

(a) Pursuant to the terms and conditions of this Final Order, the DIP Facility and the DIP Credit Agreement, and in accordance with the budget (as the same may be modified, supplemented or updated from time to time consistent with the terms of the DIP Credit Agreement and this Final Order, the "**Budget**"), filed on record in the Cases, the Debtors are authorized to use Cash Collateral and to use the advances under the DIP Credit Agreement during the period commencing immediately after the entry of this Final Order and terminating (except as set forth in Paragraph 17 hereof) upon the earlier to occur of: (i) notice being provided to the Debtors that an "Event of Default" (as defined below) has occurred as provided in Paragraph 17(b) hereof, or (ii) the Termination Date. Nothing in this Final Order shall authorize the disposition of any assets of the Debtors or their estates outside the ordinary course of business or other proceeds resulting therefrom, except as permitted in the DIP Facility and the DIP Credit Agreement and in

accordance with the Budget with the permitted variations set forth in this Paragraph 3(a). Without limiting the Debtors' obligations under Section 9.31 of the DIP Credit Agreement, but subject to Paragraph 20(b) hereof, in no event shall the Debtors request any transfer, nor use any of the Cash Collateral, nor use the advances under the DIP Credit Agreement, to pay any disbursement item in excess of 110% of the cumulative amount set forth for such disbursement item in the Budget for the period from the Petition Date through the week in which the Debtors use such Cash Collateral or advances (x) by line item, or (y) in the aggregate. Further, any unused portion of a line item in the Budget may not be reallocated to another line item in the Budget.

(b) No Cash Collateral or advances under the DIP Credit Agreement may be used by the Debtors, the Creditors' Committee, or any other person or entity to object to or contest in any manner, or raise any defenses to the validity, extent, perfection, priority or enforceability of the Pre-Petition Obligations, or any liens or security interests with respect thereto or any other rights or interests of the Pre-Petition Secured Parties, or to assert any claims or causes of action, including, without limitation, any actions under Chapter 5 of the Bankruptcy Code, against the Pre-Petition Secured Parties, or for any other purpose prohibited by the terms of the DIP Credit Agreement; provided that nothing in this Paragraph 3(b) shall limit the Creditors' Committee from using the Carve-Out to fund its investigative work as and to the extent provided for in Paragraph 8(b) below.

(c) The DIP Agent shall consult with and provide prior written notice of no less than five (5) business days to the Pre-Petition Term Agent, the Term Lender Group, and the Creditors' Committee prior to agreeing to any material changes to the Budget (any such change, a "**Budget**

**Change**"); provided, however, that in no event shall the Pre-Petition Term Agent, the Term Lender Group, or the Creditors' Committee have a consent right regarding any Budget Change whatsoever, except to the extent, if any, that the Pre-Petition Term Agent is expressly granted a consent right under the terms of the Intercreditor Agreement, until such time as the Pre-Petition Revolving Obligations and the DIP Obligations have been paid in full. For the avoidance of doubt, nothing contained in this subparagraph (i) shall be deemed to limit, restrict, or constitute a waiver of any of the respective rights and remedies of the DIP Agent, the Pre-Petition Term Agent, or the Creditors' Committee under the Bankruptcy Code or other applicable law, including, without limitation, any right of the Pre-Petition Term Agent or the Term Lender Group (as such right may be limited by the terms and conditions of the Intercreditor Agreement) or the Creditors' Committee to file an objection or other appropriate pleading with this Court in the event that it does not agree with any Budget Change to which the DIP Agent has consented or the DIP Agent's and Debtors' respective rights to contest such objection. The Debtors, Pre-Petition Term Agent, the Term Lender Group, and the Creditors' Committee shall have a right to be heard on an objection to a Budget Change (or an updated Budget) or a failure to consent to a Budget Change by the Court on an expedited basis (not to exceed three (3) business days, subject to the availability of the Court).

4. **Adequate Protection for Pre-Petition Obligations**. Subject to the rights afforded the Creditors' Committee under Paragraph 7 of this Final Order, as adequate protection for the interest of the Pre-Petition Secured Parties in the Pre-Petition Collateral (including Cash Collateral) for (a) any ~~D~~diminution in ~~V~~value of the Pre-Petition Collateral ~~for any reason, including, without limitation,~~

resulting from (a) the priming of the Pre-Petition Liens, to the extent provided for herein, (b) subordination to the Carve-Out, (c) the Debtors' use of Cash Collateral, (d) other decline in value arising out of the automatic stay or the Debtors' use, sale, lease, depreciation, or disposition of the Pre-Petition Collateral (including Cash Collateral), and (e) with respect to the Pre-Petition Revolving Secured Parties only, change in market value of the Collateral (collectively, the "**Diminution in Value**"), the Pre-Petition Secured Parties shall receive adequate protection as follows:

(a) Pre-Petition Replacement Revolving Liens. Solely to the extent of the Diminution in Value of the interests of the Pre-Petition Revolving Secured Parties in the Pre-Petition Revolving Collateral, the Pre-Petition Revolving Secured Parties shall have, subject to the terms and conditions set forth below and subject to the Intercreditor Agreement, pursuant to Sections 361, 363(e), and 364 of the Bankruptcy Code additional and replacement security interests and liens in the DIP Collateral (the "**Pre-Petition Replacement Revolving Liens**"), which shall be junior only to (i) the DIP Liens, (ii) the Carve-Out, (iii) the Permitted Prior Encumbrances, and (iv) the Pre-Petition Term Liens and the Pre-Petition Replacement Term Liens solely with respect to the Term Lender Priority Collateral (except to the extent set forth in the Intercreditor Agreement) as provided herein. The Pre-Petition Replacement Revolving Liens herein granted: (i) are and shall be in addition to all security interests, liens, and rights of set-off existing in favor of the Pre-Petition Revolving Secured Parties on the Petition Date; (ii) are and shall be valid, perfected, enforceable, and effective as of the Petition Date without any further action by the Debtors or the Pre-Petition Revolving Secured Parties and without the necessity of the execution, filing, or recordation of any financing statements, security agreements, filings with the United States Patent

and Trademark Offices, mortgages or other document, obtaining control agreements over bank accounts or possession of stock certificates; and (iii) shall secure the payment of indebtedness to the Pre-Petition Revolving Secured Parties in amount equal to the extent of any Diminution in Value of the Pre-Petition Revolving Secured Parties' interest in the Collateral from and after the Petition Date. Notwithstanding the foregoing, the Pre-Petition Revolving Agent may, in its sole discretion, file such financing statements, mortgages, leasehold mortgages, notices of liens, and other similar documents, and is 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, leasehold mortgages, notices, and other documents shall be deemed to have been filed or recorded as of the Petition Date.

(b) Pre-Petition Revolving Lien Superpriority Claim. Solely to the extent of the Diminution in Value of the interests of the Pre-Petition Revolving Secured Parties in the Pre-Petition Revolving Collateral, the Pre-Petition Revolving Secured Parties shall have an allowed superpriority administrative expense claim (the "**Pre-Petition Revolving Lien Superpriority Claim**") which shall have priority (except with respect to (a) the DIP Liens, (b) the DIP Superpriority Claim, (c) the Carve-Out, and (d) Permitted Prior Encumbrances~~, and (e) the Pre-Petition Term Lien Superpriority Claims (solely with respect to any Diminution in Value of the interests of the Pre-Petition Term Secured Parties in the Term Lender Priority Collateral~~) in these 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 and 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, 503(a), 503(b), 506(c), 507(a), 507(b), 546(c), 546(d), 552, 726, 1113, and 1114 of the Bankruptcy Code, whether or not such expenses or claims may become secured by a judgment lien or other non consensual lien, levy or attachment, which allowed claims shall be payable from and have recourse to all Collateral and all proceeds thereof. Other than the DIP Liens, the DIP Superpriority Claim~~, the Carve-Out, and the Pre-Petition Term Lien Superpriority Claims (solely with respect to any Diminution in Value of the interests in the Pre-Petition Term Secured Parties in the Term Lender Priority Collateral)~~ and the Carve-Out, no costs or expenses of administration, including, without limitation, professional fees allowed and payable under Sections 328, 330, and 331 of the Bankruptcy Code, or otherwise, that have been or may be incurred in this proceeding, or in any Successor Cases, and no priority claims are, or will be, senior to, prior to or on a parity with the Pre-Petition Revolving Lien Superpriority Claim.

(c) Revolving Lien Adequate Protection Payments. The Pre-Petition Revolving Secured Parties shall receive adequate protection in the form of (i) repayment in full in cash of the outstanding amount of the Pre-Petition Revolving Obligations (including, principal, interest, fees, costs, expenses), (ii) all "Letters of Credit" (as defined in the Pre-Petition Revolving Credit Agreement) issued under the Pre-Petition Revolving Credit Agreement and all obligations on account of cash management services and bank products shall be deemed issued and "Obligations" under the DIP Credit Agreement, and (iii) payment of costs, expenses, indemnities and other amounts with respect to the Pre-Petition Revolving Obligations hereafter arising in accordance with the Pre-Petition Revolving Credit Agreement, the Interim Order, and this Final

Order (including without limitation, any such payments from the Pre-Petition Revolving Indemnity Account) (collectively, the "**Revolving Lien Adequate Protection Payments** ").

(d) Pre-Petition Revolving Indemnity Account. Contemporaneously with the payment in full in cash of the Pre-Petition Revolving Obligations in accordance with the terms of the Interim Order and this Final Order, the Debtors shall establish an account in the "control" (as defined in the UCC) of the Pre-Petition Revolving Agent (the "**Pre-Petition Revolving Indemnity Account**"), into which the sum of $250,000.00 shall be deposited as security for any reimbursement, indemnification or similar continuing obligations of the Debtors in favor of the Pre-Petition Revolving Secured Parties under the Pre-Petition Revolving Credit Agreement (the "**Pre-Petition Revolving Indemnity Obligations**"); provided, however, that the Pre-Petition Revolving Indemnity Account shall terminate and all remaining amounts held therein shall be released to the Debtors if the Pre-Petition Revolving Obligations have been indefeasibly paid in full in cash upon the earliest to occur of: (i) the "Challenge Period Termination Date" (as defined below) if, as of such date, the Creditors' Committee has not filed or asserted an adversary proceeding, cause of action, objection, claim, defense, or other challenge as contemplated in Paragraph 7 hereof providing for such release; or (ii) the date this Court enters a final order closing the Cases. The Pre-Petition Revolving Indemnity Obligations shall be secured by a first priority lien on the Pre-Petition Revolving Indemnity Account. The Pre-Petition Revolving Indemnity Account and the amounts therein shall remain property of the Debtors and the Debtors' estates under Section 541 of the Bankruptcy Code, subject to the lien granted herein.

(e) Pre-Petition Replacement Term Liens. Solely to the extent of the Diminution in Value of the interests of the Pre-Petition Term Agent and the Pre-Petition Term Secured Parties in the Pre-Petition Term Collateral, the Pre-Petition Term Agent and the Pre-Petition Term Secured Parties shall have, subject to the terms and conditions set forth below and subject to the Intercreditor Agreement, pursuant to Sections 361, 363(e), and 364 of the Bankruptcy Code additional and replacement security interests and liens in the DIP Collateral, but only to the extent that the Pre-Petition Term Secured Parties held valid, fully-perfected security interests in such assets prior to the Petition Date (the "**Pre-Petition Replacement Term Liens**", and together with the Pre-Petition Replacement Revolving Liens, collectively, the "**Pre-Petition Replacement Liens**"[6]), and junior only to (x) the DIP Liens and the Pre-Petition Revolving Liens, each solely on the Revolving Lender Priority Collateral (to the extent set forth in the Intercreditor Agreement), (y) the Carve-Out and (z) Permitted Prior Encumbrances. The Pre-Petition Replacement Term Liens herein granted: (i) are and shall be in addition to all security interests, liens, and rights of set-off existing in favor of the Pre-Petition Term Secured Parties on the Petition Date; (ii) are and shall be valid, perfected, enforceable, and effective as of the Petition Date without any further action by the Debtors or the Pre-Petition Term Secured Parties and without the necessity of the execution, filing, or recordation of any financing statements, security agreements, filings with the United States Patent and Trademark Offices, mortgages or other document, obtaining control agreements over bank accounts or possession of stock certificates;

[6] For the avoidance of doubt, the Pre-Petition Replacement Liens shall not encumber (i) any of the Debtors' causes of action under chapter 5 of the Bankruptcy Code, (ii) any of the Debtors' leasehold interests, (iii) the Debtors' owned IT Center in Chicago, Illinois, (iv) the unencumbered 35% of the equity interest of the Debtors in their "Canadian Subsidiaries" (as defined in the DIP Credit Agreement), or (v) any proceeds of the foregoing.

and (iii) shall secure the payment of indebtedness to the Pre-Petition Term Secured Parties, as the case may be, in an amount equal to the extent of any actual Diminution in Value of the Pre-Petition Term Secured Parties' interest in the Pre-Petition Term Collateral from and after the Petition Date. Notwithstanding the foregoing, the Pre-Petition Term Agent may, in its sole discretion, file such financing statements, mortgages, leasehold mortgages, notices of liens, and other similar documents, and is 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, leasehold mortgages, notices, and other documents shall be deemed to have been filed or recorded as of the Petition Date.

~~(f) Pre-Petition Term Lien Superpriority Claim. Solely to the extent of the Diminution in Value of the interests of the Pre-Petition Term Secured Parties in the Pre-Petition Term Collateral, Pre-Petition Term Secured Parties shall have an allowed superpriority administrative expense claim (the "**Pre-Petition Term Lien Superpriority Claim**" and together with the Pre-Petition Revolving Lien Superpriority Claim, collectively, the "**Pre-Petition Superpriority Claims**") which shall be subject to the Intercreditor Agreement and shall have priority (except with respect to (a) each of (i) the DIP Liens, (ii) the DIP Superpriority Claim, and (iii) the Pre-Petition Revolving Lien Superpriority Claim (each solely with respect to any Diminution in Value of the interests of the Pre-Petition Revolving Secured parties in the Revolving Lender Priority Collateral), (b) the Carve-Out and (c) Permitted Prior Encumbrances) in these 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 and 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, 503(a), 503(b), 506(c)[7], 507(a), 507(b), 546(c), 546(d), 552, 726, 1113, and 1114 of the Bankruptcy Code, whether or not such expenses or claims may become secured by a judgment lien or other non consensual lien, levy or attachment, which allowed claims shall be payable from and have recourse to all Collateral and all proceeds thereof. Other than (a) each of (i) the DIP Liens, (ii) the DIP Superpriority Claim, and (iii) the Pre-Petition Revolving Lien Superpriority Claim (solely with respect to any Diminution in Value of the interests of the Pre-Petition Revolving Secured Parties in the Revolving Lender Priority Collateral), and (b) the Carve-Out, no costs or expenses of administration, including, without limitation, professional fees allowed and payable under Sections 328, 330, and 331 of the Bankruptcy Code, or otherwise, that have been or may be incurred in this proceeding, or in any Successor Cases, and no priority claims are, or will be, senior to, prior to or on a parity with the Pre-Petition Term Lien Superpriority Claim.

(g) Term Lien Adequate Protection Payments. The Debtors (i) agree that, notwithstanding anything to the contrary set forth in that certain First Amendment to the Amended and Restated Term Loan Agreement, dated as of April 2, 2009, among the Pre-Petition Term Agent, the Pre-Petition Term Lenders and the Debtors (the "**First Amendment to Pre-Petition Term Credit Agreement**"), the 90-Day Extension PIK Fee (as defined in the First Amendment to the Pre-Petition Term Credit Agreement) shall be deemed to have been made and

7 In the event the Pre-Petition Term Secured Parties are unwilling to agree to permit unpaid administrative and priority claims to be paid out of the proceeds of a 363 sale on terms and conditions acceptable to the Debtors, the Debtors reserve the right to seek approval of a form of Final Order that does NOT grant a Section 506(c) waiver to the Pre-Petition Term Secured Parties.

~~earned on the Petition Date and shall be included as part of the Pre-Petition Term Obligations, and (ii) shall pay the Pre-Petition Term Agent, for the benefit of itself and the Pre-Petition Term Secured Parties, adequate protection in the form of payment of costs, expenses, indemnities, and other amounts (excluding interest, which shall accrue post-petition at the non-default rate and be payable upon the earlier to occur of the closing of the 363 Sale or the occurrence of an Event of Default) with respect to the Pre-Petition Term Obligations hereafter arising in accordance with the Pre-Petition Term Credit Agreement and this Final Order, and all such costs and expenses as set forth in Paragraph 20(b) incurred by the "Term Lender Group" (as referred to in Paragraph 20(b) hereof) (the "**Term Lien Adequate Protection Payments**", and together with the Revolving Lien Adequate Protection Payments, collectively, the "**Adequate Protection Payments**"); provided, however, that in the event the Pre-Petition Term Secured Parties are determined by this Court to be undersecured, payments made hereunder may be recharacterized and recredited to the principal balance of the Pre-Petition Term Obligations.~~

~~(h) Pre-Petition Term Lien Indemnity Account. Contemporaneously with the payment in full in cash of the Pre-Petition Term Obligations in accordance with the terms of this Final Order, the Debtors shall establish an account in the "control" (as defined in the UCC) of the Pre-Petition Term Agent (the "**Pre-Petition Term Lien Indemnity Account**", and together with the Pre-Petition Revolving Indemnity Account, collectively, the "**Pre-Petition Indemnity Accounts**"), into which the sum of $250,000.00 shall be deposited as security for any reimbursement, indemnification or similar continuing obligations of the Debtors in favor of the Pre-Petition Term Secured Parties under the Pre-Petition Term Credit Agreement (the "**Pre-Petition Term Lien**~~

~~**Indemnity Obligations**", and together with the Pre-Petition Revolving Indemnity Obligations, collectively, the "**Pre-Petition Indemnity Obligations**"); provided, however, that the Pre-Petition Term Lien Indemnity Account shall terminate and all remaining amounts held therein shall be released to the Debtors if the Pre-Petition Term Obligations have been indefeasibly paid in full in cash upon the earliest to occur of: (i) the Challenge Period Termination Date if, as of such date, the Creditors' Committee has not filed or asserted an adversary proceeding, cause of action, objection, claim, defense, or other challenge as contemplated in Paragraph 7 hereof providing for such release; or (ii) the date this Court enters a final order closing the Cases. The Pre-Petition Term Lien Indemnity Obligations shall be secured by a first priority lien on the Pre-Petition Term Lien Indemnity Account. The Pre-Petition Term Lien Indemnity Account and the amounts therein shall remain property of the Debtors and the Debtors' estates under Section 541 of the Bankruptcy Code, subject to the lien granted herein.~~

5. **Section 507(b) Reservation**. Nothing herein shall impair or modify the Pre-Petition Secured Parties' rights under Section 507(b) of the Bankruptcy Code in the event that the adequate protection provided to the Pre-Petition Secured Parties hereunder is insufficient to compensate for the Diminution in Value of the interest of such Pre-Petition Secured Parties in the applicable Pre-Petition Collateral during the Cases or any Successor Cases, provided, however, that (i) any claim granted in the Cases to the Pre-Petition Secured Parties pursuant to Section 507(b) of the Bankruptcy Code shall be junior in right of payment to all DIP Obligations (other than with respect to the Term Lender Priority Collateral) and subject to the Carve-Out and the Intercreditor Agreement. Nothing contained herein shall be deemed a finding by the Court,

or an acknowledgment by any of the Pre-Petition Revolving Agent, Pre-Petition Term Agent, or other Pre-Petition Secured Parties that the adequate protection granted herein does in fact adequately protect the Pre-Petition Secured Parties against any Diminution in Value of their respective interests in the Pre-Petition Collateral (including Cash Collateral), subject to the Intercreditor Agreement.

6. **Post-Petition Lien Perfection**. The Interim Order and this Final Order shall be sufficient and conclusive evidence of the validity, perfection, and priority of the DIP Liens and the Pre-Petition Replacement 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 or securities account control agreement) to validate or perfect the DIP Liens and the Pre-Petition Replacement Liens or to entitle the DIP Liens and the Pre-Petition Replacement Liens to the priorities granted herein. Notwithstanding the foregoing, the DIP Agent, the Pre-Petition Revolving Agent and the Pre-Petition Term Agent (collectively, the "**Agents**") may, each in their sole discretion, file such financing statements, mortgages, security agreements, notices of liens and other similar documents, and is 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, security agreements, notices and other agreements or documents shall be deemed to have been filed or recorded at the time of and on the Petition Date. The Debtors shall execute and deliver to the Agents all such security agreements, financing statements, mortgages, notices and other documents as the Agents may reasonably request to evidence, confirm, validate or perfect, or to insure the contemplated priority of, the DIP Liens

and the Pre-Petition Replacement Liens granted pursuant hereto. The DIP Agent, in its discretion, may file a photocopy of this Final Order as a financing statement with any recording officer designated to file financing statements or with any registry of deeds or similar office in any jurisdiction in which the Debtors have real or personal property, and in such event, the subject filing or recording officer shall be authorized to file or record such copy of this Final Order. The DIP Agent shall, in addition to the rights granted to the DIP Agent under the DIP Credit Agreement, be deemed to be the successor in interest to the Pre-Petition Revolving Secured Parties with respect to all third party notifications in connection with the Pre-Petition Revolving Credit Agreement, all Blocked Account Agreements (as defined in the Pre-Petition Revolving Credit Agreement) and all other agreements with third parties (including any agreement with a landlord, warehouseman, customs broker, freight forwarder, or credit card processor) relating to, or waiving claims against, any Pre-Petition Revolving Collateral, including without limitation, each collateral access agreement executed and delivered by any landlord of the Debtors and including, for the avoidance of doubt, all deposit account control agreements, securities account control agreements, and credit card agreements, provided that the Pre-Petition Revolving Agent shall continue to have all rights pursuant to each of the foregoing.

7. **Reservation of Certain Third Party Rights and Bar of Challenges and Claims**.

(a) Nothing in the Interim Order, this Final Order, or the DIP Credit Agreement shall prejudice whatever rights the Creditors' Committee may have (a) to file an adversary proceeding or contested matter or otherwise to object to or challenge (i) the validity, extent, perfection, enforceability or priority of the mortgage, security interests and liens of the Pre-Petition Secured Parties in and to the Pre-Petition Collateral, or (ii) the

validity, allowability, priority, status, enforceability or amount of the Pre-Petition Obligations, or (b) to bring suit against any of the Pre-Petition Secured Parties in connection with or related to the Pre-Petition Obligations, or the actions or inactions of any of the Pre-Petition Secured Parties arising out of or related to the Pre-Petition Obligations.

(b) Notwithstanding the foregoing, unless the Creditors' Committee commences a contested matter or adversary proceeding raising such filing or other objection or challenge, including without limitation any claim against the Pre-Petition Secured Parties in the nature of a setoff, counterclaim, defense, or other claim of avoidance to the Pre-Petition Obligations (including but not limited to, those under Sections 506, 510, 544, 547, 548, 549, 550, and/or 552 of the Bankruptcy Code, or by way of suit against any of the Pre-Petition Secured Parties), during the seventy-five (75) day period following the appointment of the Creditors' Committee (the "**Challenge Period**," with the date that is the next calendar day after the termination of the Challenge Period, in the event that no objection or challenge is raised during the Challenge Period, being referred to as the "**Challenge Period Termination Date**"), then upon the Challenge Period Termination Date, any and all such challenges and objections by any party (including, without limitation, the Creditors' Committee, any Chapter 11 or Chapter 7 trustee appointed herein or in any Successor Cases, receiver, administrator, trustee, examiner, responsible officer, other estate representative and any other creditor, interest

holder, or party in interest) shall be deemed to be forever waived and barred, and (i) the Pre-Petition Obligations shall be deemed to be allowed in full and shall be deemed to be allowed as a fully secured claim within the meaning of Section 506 of the Bankruptcy Code for all purposes in connection with these Cases and any Successor Cases, and the Debtors' Stipulations shall be binding on all creditors, interest holders, and parties in interest (including, any Creditors' Committee, any creditor, or Chapter 11 or Chapter 7 trustee appointed herein or in any Successor Cases, receiver, administrator, trustee, examiner, responsible officer, and other estate representative), (ii) the Pre-Petition Agents' and other Pre-Petition Secured Parties' security interests and Encumbrances upon the Pre-Petition Collateral shall be deemed to have been, as of the Petition Date, legal, valid, binding, enforceable, and perfected security interests and Encumbrances, not subject to recharacterization, subordination, or otherwise avoidable, and (iii) the payment of the Pre-Petition Obligations in accordance with the Interim Order and this Final Order (whether prior or subsequent to the Petition Date) shall be deemed final and indefeasible, not subject to subordination or disgorgement and otherwise unavoidable.

(c) The Challenge Period may be extended upon the written agreement between (x) counsel to the Pre-Petition Revolving Secured Parties and counsel to the Creditors' Committee, with respect to any Challenge relating to the Pre-Petition Revolving Secured Parties, or (y) counsel to the Pre-Petition Term Secured Parties and counsel to the Creditors' Committee, with respect to any Challenge relating to the Pre-

Petition Term Secured Parties, or, without limiting the Pre-Petition Secured Parties' right to object thereto, by further order of this Court.

(d) The Creditors' Committee ~~(i)~~ is hereby granted (i) authority pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure to investigate the liens and claims of the Pre-Petition Secured Parties, including authority to compel production of documents and issue subpoenas for oral examination (nothing contained herein being deemed a waiver of any objections that the Pre-Petition Secured Parties may have with respect thereto), and (ii) ~~ten (10) days after having delivered a written statement in reasonable and specific detail setting forth the nature and substance of a potential Challenge to the Pre-Petition Revolving Secured Parties or the Pre-Petition Term Secured Parties, as applicable, which may be objected to by the Pre-Petition Revolving Secured Parties or the Pre-Petition Term Secured Parties, respectively, in that ten (10) day period, in which event a hearing shall be conducted before the Bankruptcy Court to determine whether a Challenge shall be brought), is hereby granted~~ automatic standing to pursue any Challenge it determines appropriate against the Pre-Petition Secured Parties without the need to file a motion with the Court seeking authority to bring such action on behalf of the Debtor's estate.

(e) To the extent any such Challenge is filed, the Pre-Petition Secured Parties shall be entitled to include such costs and expenses, including but not limited to

reasonable attorneys' fees, incurred in defending the objection or complaint as part of the Pre-Petition Obligations. In the event these cases are converted to Chapter 7 on or prior to expiration of the Challenge Termination Date, the Challenge Termination Date shall be abrogated and of no further force and effect.

8. **Carve-Out**.

(a) Notwithstanding anything in the Interim Order, this Final Order, or the DIP Credit Agreement to the contrary, subject only to the terms and conditions contained in Paragraph 8(b), the DIP Liens, DIP Superpriority Claims, the Pre-Petition Replacement Liens, the Pre-Petition Indemnity Accounts, and the Pre-Petition Superpriority Claims are subordinate to the sum of the amounts described in subparagraphs (i), (ii), (iii), and (iv) below (with the sum of those amounts hereinafter referred to as the "**Carve-Out**"):

(i) Allowed administrative expenses pursuant to 28 U.S.C. Section 1930(a)(6);

(ii) The sum of (A) and (B), where (A) is the lesser of (I) the aggregate amount of the Debtors' professional fees and disbursements which have been incurred, accrued, or invoiced (but remain unpaid) prior to the date on which the DIP Agent provides written notice that an Event of Default has occurred and the DIP Agent has triggered the Carve-Out (a "**Carve Out Trigger Notice**") for any professional retained by a final order of the Court under Section 327 of the Bankruptcy Code (which order has not been vacated, stayed, or appealed), or (II) the cumulative amount set forth in the Budget for professional fees of the Debtors' professionals for the period from the Petition

Date through the earlier of the Termination Date or the date of receipt by the Debtors and the Debtors' counsel of a Carve-Out Trigger Notice, and (B) is $3,000,000;

(iii) The sum of (A) and (B) where (A) is the lesser of (I) aggregate amount of the Creditors' Committee's professional fees and disbursements which have been incurred, accrued, or invoiced (but remain unpaid) for any professional retained by a final order of the Court by the Creditors' Committee under Section 1103 of the Bankruptcy Code (which order has not been vacated, stayed, or appealed), plus the actual amount of all reasonable out-of-pocket expenses of the members of the Creditors' Committee, prior to receipt by the Creditors' Committee's counsel of a Carve Out Trigger Notice, or (II) the cumulative amount set for the in the Budget for professional fees of the Creditors' Committee professionals for the period from the Petition Date through the earlier of the Termination Date or the receipt by the Creditors' Committee's counsel of a Carve-Out Trigger Notice; and (B) is $500,000; and

(iv) The lesser of (A) the aggregate amount of the Creditors' Committees' professional fees and disbursements which have been incurred, accrued, or invoiced (but remain unpaid) for any professional retained by a final order of the Court by the Creditors' Committee under Section 1103 of the Bankruptcy Code (which order has not been vacated, stayed or appealed), and (B) $1,500,000 (the "**Litigation Carve-Out**"), which may be used by the Creditors' Committee (a) to fund the investigation, prosecution, and settlement of any challenge to the (i) the validity, extent, perfection, enforceability or priority of the mortgage, security interests, and liens of the Pre-Petition Term Secured Parties in and to the Pre-Petition Term Collateral, or (ii) the validity, allowability, priority, status, enforceability, or amount of the Pre-Petition Term Obligations, or

(b) to bring suit against any of the Pre-Petition Term Secured Parties in connection with or related to the Pre-Petition Term Obligations, or the actions or inactions of any of the Pre-Petition Term Secured Parties arising out of or related to the Pre-Petition Term Obligations, and to litigate any adversary proceeding or contested matter with regard to the foregoing. Without limiting the rights of the Creditors' Committee under Paragraph 7 of this Final Order, the Creditors' Committee ~~(i)~~ is hereby granted (i) authority pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure to investigate the liens and claims of the Pre-Petition Term Secured Parties, including authority to compel production of documents and issue subpoenas for oral examination (nothing contained herein being deemed a waiver of any objections that the Pre-Petition Term Secured Parties may have with respect thereto), and (ii) ~~ten (10) days after having delivered a written statement in reasonable and specific detail setting forth the nature and substance of a potential Challenge to the Pre-Petition Term Secured Parties, which may be objected to by the Pre-Petition Term Secured Parties in that ten (10) day period, in which event a hearing shall be conducted before the Bankruptcy Court to determine whether a Challenge shall be brought), is hereby granted~~ automatic standing to pursue any Challenge it determines appropriate against the Pre-Petition Term Secured Parties without the need to file a motion with the Court seeking authority to bring such action on behalf of the Debtor's estate.

(b) The Carve-Out (other than the Litigation Carve-Out) shall exclude any fees and expenses (x) incurred in connection with 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 (A) invalidating, setting

aside, avoiding, or subordinating, in whole or in part, (i) the DIP Obligations, (ii) the Pre-Petition Obligations, (iii) the Pre-Petition Liens in the Pre-Petition Collateral, (iv) the DIP Agent's or the DIP Secured Parties' Liens in the DIP Collateral, or (v) the Pre-Petition Replacement Liens in the DIP Collateral, or (B) preventing, hindering or delaying, whether directly or indirectly, the DIP Agent's, the DIP Secured Parties', or the Pre-Petition Secured Parties' assertions or enforcement of their Encumbrances, security interests, or their realization upon any DIP Collateral, the Pre-Petition Collateral, the Pre-Petition Replacement Liens, or the Pre-Petition Indemnity Accounts, and no Cash Collateral or proceeds from the DIP Facility may be used to accomplish any of the foregoing, provided, however, that such exclusion in subsection (x) does not apply to the Litigation Carve-Out nor encompass any investigative work conducted by attorneys and financial advisors employed by the Creditors' Committee pursuant to Sections 327 and 1103 of the Bankruptcy Code prior to bringing any action relating to the foregoing to the extent such fees and expenses do not exceed $50,000.00 in the aggregate, (y) in using Cash Collateral of the DIP Secured Parties, selling or otherwise disposing of any other DIP Collateral, or incurring any indebtedness not permitted under the DIP Credit Agreement, without the DIP Agent's express written consent or (z) arising after the conversion of these Chapter 11 Cases to cases under Chapter 7 of the Bankruptcy Code.

(c) Except as otherwise provided in this paragraph, nothing contained in the Interim Order or this Final Order shall be deemed a consent by the Pre-Petition Secured Parties or the DIP Secured Parties to any charge, lien, assessment, or claim against any of them or the DIP Collateral, the Pre-Petition Collateral, the Pre-Petition Replacement Liens, or the Pre-Petition Indemnity

Accounts under Section 506(c) of the Bankruptcy Code or otherwise[8]. Nothing herein shall be construed to obligate the Pre-Petition Secured Parties, or the DIP Secured Parties, in any way, to pay the Debtors' or the Creditors' Committee's professional fees or disbursements, or to assure that the Debtors have sufficient funds on hand or "Combined Availability" (as defined in the DIP Credit Agreement) to pay any of those professional fees and disbursements. So long as no Event of Default exists that has not been waived in writing, the Debtors shall be permitted to pay compensation and reimbursement of expenses allowed and payable under Sections 330 and 331 of the Bankruptcy Code and in accordance with the Budget with the variations permitted in Paragraph 3 hereof, as the same may be due and payable and the same shall not reduce the Carve-Out.

(d) For the avoidance of any doubt, no success fee, transaction fee, or bonus due incurred by Peter J. Solomon Company, L.P., the Debtors' investment banker, or any financial advisor retained by the Creditors' Committee, shall be paid from the Carve-Out unless and until all other allowed hourly and monthly professional fees and disbursements have been paid in full in cash on a final basis.

(e) The Carve-Out shall be funded upon the earlier to occur of (x) the closing on the 363 Sale out of the first proceeds thereof, or (y) from the first proceeds realized from the disposition of the Collateral, as provided in Paragraph 17(b) hereof. In either circumstance, in the event that there

~~8 In the event the Pre-Petition Term Secured Parties are unwilling to agree to permit unpaid administrative and priority claims to be paid out of the proceeds of a 363 sale on terms and conditions acceptable to the Debtors, the Debtors reserve the right to seek approval of a form of Final Order that does NOT grant a Section 506(c) waiver to the Pre-Petition Term Secured Parties.~~

are not sufficient proceeds of the Revolving Lender Priority Collateral to satisfy and pay in full in cash all Pre-Petition Revolving Obligations (to the extent any then remain outstanding) and all DIP Obligations, then the Carve-Out shall be re-allocated between, and paid out of proceeds of, the Revolving Lender Priority Collateral and the Term Lender Priority Collateral on a 50%/50% basis.

(f) Nothing herein shall limit the rights of the Creditors' Committee to object to the reasonableness of any professional fees in the Debtors' bankruptcy cases.

9. **Payment of Compensation**. Nothing herein shall be construed as consent to the allowance of any professional fees or expenses of the Debtors, the Creditors' Committee, or of any person, or shall affect the right of the Agents to object to the allowance and payment of such fees and expenses or to permit the Debtors to pay any such amounts not set forth in the Budget after taking into account the variations permitted in Paragraph 3 hereof.

10. **Section 506(c) Claims**. No costs or expenses of administration which have been or may be incurred in the Cases at any time shall be charged against the DIP Secured Parties, the Pre-Petition Revolving Secured Parties, their respective claims, or, until the DIP Obligations and the Pre-Petition Revolving Obligations have been paid in full in cash, the Pre-Petition Revolving Collateral, or the DIP Collateral, pursuant to Sections 105, and 506(c) of the Bankruptcy Code, or otherwise, without the prior written consent of the ~~Agents~~[9] Pre-Petition Revolving Agent or the DIP Agent, as applicable.

~~9 In the event the Pre-Petition Term Secured Parties are unwilling to agree to permit unpaid administrative and priority claims to be paid out of the proceeds of a 363 sale on terms and conditions acceptable to the Debtors, the Debtors reserve the right to seek approval of a form of Final Order that does NOT grant a Section 506(c) waiver to the Pre-Petition Term Secured Parties.~~

Nothing contained in the Interim Order or this Final Order shall be deemed a consent by the Pre-Petition Secured Parties or the DIP Secured Parties to any charge, lien, assessment, claim, or other Encumbrance against any of them or the DIP Collateral, the Pre-Petition Collateral, the Pre-Petition Replacement Liens, or the Pre-Petition Indemnity Accounts under Section 506(c) of the Bankruptcy Code or otherwise~~10~~.

11. **Collateral Rights**. Unless (x) the DIP Agent and the Pre-Petition Revolving Agent have provided their prior written consent or all Pre-Petition Revolving Obligations and 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), all commitments to lend (including, without limitation, all "Commitments" (as defined in each of the Pre-Petition Revolving Credit Agreement and the DIP Credit Agreement, as applicable)) have irrevocably terminated, all Letters of Credit have been cash collateralized as required by the DIP Credit Agreement, all fixed and liquidated indemnification obligations under the DIP Credit Agreement have been cash collateralized and the Pre-Petition Revolving Indemnity Account has been established and fully funded, and (y) the Pre-Petition Term Agent has provided its written consent or all Pre-Petition Term Obligations have been paid in full in cash~~ and the Pre-Petition Term Indemnity Account has been established and fully funded~~, there shall not be entered in this proceeding, or in any Successor Cases, any order which authorizes any of the following:

(a) the obtaining of credit or the incurring of indebtedness that is secured by a security, mortgage, lien, collateral interest or other Encumbrance on all or any portion of the DIP

~~10 In the event the Pre-Petition Term Secured Parties are unwilling to agree to permit unpaid administrative and priority claims to be paid out of the proceeds of a 363 sale on terms and conditions acceptable to the Debtors, the Debtors reserve the right to seek approval of a form of Final Order that does NOT grant a Section 506(c) waiver to the Pre-Petition Term Secured Parties.~~

Collateral, the Pre-Petition Collateral, or the Pre-Petition Indemnity Accounts and/or entitled to priority administrative status which is equal or senior to that granted to the Pre-Petition Secured Parties or the DIP Secured Parties herein; or

(b) relief from stay by any person other than of the DIP Agent or other the DIP Secured Parties on or with respect to all or any portion of the Collateral with a value in excess of $250,000 (which for purposes of clarity shall constitute an Event of Default hereunder); or

(c) the Debtors' return of goods constituting Collateral pursuant to Section 546(h) of the Bankruptcy Code.

12. **Proceeds of Subsequent Financing**. Without limiting the provisions and protections of Paragraph 11, above, if at any time prior to the indefeasible payment in full in cash of all Pre-Petition Obligations and all DIP Obligations and the termination of the DIP Agent's and the DIP Lenders' obligations to make loans and advances under the DIP Credit Agreement (including, without limitation, in respect of the Commitments), including subsequent to the confirmation of any Chapter 11 plan or plans (singly and collectively, the "**Plan**") any or all of the Debtors, their estates, any trustee, any examiner, or any responsible officer subsequently appointed, obtains credit or incur debt pursuant to Sections 364(b), 364(c) or 364(d) of the Bankruptcy Code in violation of the DIP Credit Agreement, then all of the cash proceeds and all Cash Collateral derived from such credit or debt shall immediately be turned over to the Pre-Petition Revolving Agent or the DIP Agent, as applicable, for application in reduction of the Pre-Petition Obligations and the DIP Obligations in accordance with the terms of the DIP Credit Agreement, the Intercreditor Agreement, and this Final Order.

13. **Termination Date**. Immediately upon the Termination Date, all (i) DIP Obligations shall be immediately due and payable, and (ii) the Debtors' authority to use the proceeds of the DIP Credit Agreement and to use Cash Collateral (except as provided in Paragraph 17 hereof), shall cease.

14. **Payment from Proceeds of Collateral**. All products and proceeds of the Collateral (including, for the avoidance of doubt, proceeds from receivables and sales in the ordinary course of business or from the 363 Sale, insurance proceeds, and proceeds of all dispositions of Collateral, whether or not in the ordinary course) regardless of whether such Collateral came into existence prior to the Petition Date, shall be remitted to the DIP Agent for application in accordance with the terms of this Final Order, the DIP Credit Agreement, and the Intercreditor Agreement; provided, however, that in no event shall any such proceeds of the Collateral from the 363 Sale or otherwise be distributed to the Pre-Petition Term Agent (for the benefit of the Pre-Petition Term Secured Parties) or applied to the Pre-Petition Term Obligations absent further order of this Court.

15. **Disposition of Collateral**. The Debtors shall not (a) sell, transfer, lease, encumber or otherwise dispose of any portion of the DIP Collateral or Pre-Petition Collateral, without the prior written consent of the requisite DIP Secured Parties and Pre-Petition Secured Parties (and no such consent shall be implied, from any other action, inaction or acquiescence by the DIP Secured Parties, the Pre-Petition Secured Parties, or an order of this Court), except (i) for sales of the Debtors' inventory in the ordinary course of business, (ii) for sale(s) of assets in connection with the 363 Sale, so long as the proceeds thereof are paid in cash to the DIP Secured Parties and the Pre-Petition Revolving Secured Parties at closing on the 363 Sale for application as provided in this Final Order, or (iii) as otherwise provided for in

the DIP Credit Agreement and this Final Order and approved by the Court, or (b) assume, reject, or assign any lease, except as otherwise provided for in the DIP Credit Agreement.

16. **Events of Default**. The occurrence of any Event of Default (as defined in the DIP Credit Agreement) shall constitute an Event of Default under this Final Order; provided, however, that notwithstanding any provision in the DIP Credit Agreement to the contrary, (i) an Event of Default under Section 11.1(n) of the DIP Credit Agreement shall not constitute an Event of Default hereunder, and (ii) the investigative activities of the Creditors' Committee contemplated by Paragraphs 7 and 8 of this Final Order shall not constitute an Event of Default hereunder or under the DIP Credit Agreement. Unless and until the Pre-Petition Obligations and the DIP Obligations have been repaid in full in cash, all commitments to lend have irrevocably terminated (including, without limitation, the Commitments), all Letters of Credit have been cash collateralized in accordance with the DIP Credit Agreement, all fixed and liquidated DIP Obligations that survive termination of the obligations have been cash collateralized to the reasonable satisfaction of the Pre-Petition Revolving Agent and the DIP Agent, and the Pre-Petition Indemnity Accounts have been established and fully funded, the protections afforded to the Pre-Petition Secured Parties and the DIP Secured Parties pursuant to the Interim Order, this Final Order, and under the DIP Credit Agreement, and any actions taken pursuant thereto, shall survive the entry of any order confirming a Plan or converting these Cases into Successor Cases, and the DIP Liens, the DIP Superpriority Claim, the Pre-Petition Replacement Liens, and the Pre-Petition Superpriority Claims shall continue in this proceeding and in any Successor Cases, and such DIP Liens, DIP Superpriority Claim, Pre-Petition Replacement Liens, and the Pre-Petition Superpriority Claims shall maintain their priority as provided by this Final Order.

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

(a) Any automatic stay otherwise applicable to the Pre-Petition Secured Parties and the DIP Secured Parties is hereby modified so that after the occurrence of any Event of Default or the Termination Date and at any time thereafter, upon five (5) business days prior written notice of such occurrence, in each case given by the DIP Agent, the Pre-Petition Revolving Agent, or the Pre-Petition Term Agent to each of (i) the Debtors, (ii) counsel to the Debtors, (iii) counsel to the Pre-Petition Term Agent, counsel to the Pre-Petition Revolving Agent, and/or the DIP Agent, as the case may be, (iv) counsel to the Creditors' Committee, and (v) the United States Trustee, the Pre-Petition Secured Parties and the DIP Secured Parties shall be entitled to exercise their rights and remedies in accordance with the Pre-Petition Revolving Credit Agreement, the Pre-Petition Term Credit Agreement, and the DIP Credit Agreement, as applicable, in each case subject to the Intercreditor Agreement. Immediately following the giving of notice by the DIP Agent, the Pre-Petition Revolving Agent, or the Pre-Petition Term Agent of the occurrence of an Event of Default or the Termination Date, as the case may be: (i) the Debtors shall continue to deliver and cause the delivery of the proceeds of Collateral to the DIP Agent as provided in the DIP Credit Agreement and this Final Order; and (ii) the DIP Agent shall continue to apply such proceeds in accordance with the provisions of this Final Order, the DIP Credit Agreement and the Intercreditor Agreement. Following the giving of written notice by the DIP Agent or the Pre-Petition Term Agent of the occurrence of an Event of Default or the Termination Date, the Debtors and/or the Creditors' Committee shall be entitled to an emergency hearing before this Court solely for the purpose of contesting whether an Event of Default or the Termination Date has occurred (such

hearing, an "**Emergency Stay Hearing**"). If the Debtors do not within the time period specified above contest the right of the Pre-Petition Secured Parties and the DIP Secured Parties to exercise their remedies based upon whether an Event of Default or the Termination Date has occurred, or if the Debtors do timely contest the occurrence of an Event of Default and this Court, after notice and hearing, declines to stay the enforcement thereof, the automatic stay as to the Pre-Petition Secured Parties and the DIP Secured Parties shall automatically terminate at the end of such notice period. After the applicable Emergency Stay Hearing, unless this Court shall have entered an order to the contrary: (i) the Debtors shall have no right to use any of such proceeds, nor any other Cash Collateral other than towards the satisfaction of the Pre-Petition Obligations, the DIP Obligations, and the Carve-Out; and (ii) any obligation otherwise imposed on the DIP Agent or the other DIP Secured Parties to provide any loan or advance to the Debtors pursuant to the DIP Facility shall be suspended. For avoidance of doubt, the service of any notice of the occurrence of an Event of Default shall be subject to the Intercreditor Agreement. Further, and notwithstanding the foregoing, the Pre-Petition Term Agent may not serve a notice of an Event of Default with respect to matters that are exclusively within the domain of the DIP Credit Agreement. For the avoidance of doubt, a violation of the terms of Paragraph 3(a~~), Paragraph 20(j~~) or Paragraph 20(l) hereof shall entitle the Pre-Petition Term Agent to provide notice of an Event of Default.

(b) Subject to the provisions of Paragraph 17(a), upon the occurrence of an Event of Default that has not been waived in writing by the DIP Agent, the Pre-Petition Revolving Agent, or the Pre-Petition Term Agent, as applicable, or upon the Termination Date, and unless this Court shall have entered an order to the contrary, the DIP Secured Parties shall be and are authorized to

exercise their remedies and proceed under or pursuant to the DIP Credit Agreement, and, to the extent that any Pre-Petition Term Obligations remain outstanding, the Pre-Petition Term Agent shall be and is entitled to exercise its rights and remedies under the Pre-Petition Credit Agreement and under the Pre-Petition Term Liens. All proceeds realized pursuant to this Paragraph 17(b) shall be applied first, to fund the Carve-Out (provided that any application of such proceeds to the Carve-Out shall not reduce the DIP Obligations or the Pre-Petition Obligations), and second, to the DIP Obligations and the Pre-Petition Obligations under, and in accordance with the provisions of, the DIP Credit Agreement, the Pre-Petition Revolving Credit Agreement, the Pre-Petition Term Credit Agreement, the Intercreditor Agreement, and this Final Order. In exercising their rights and remedies, the Pre-Petition Secured Parties and the DIP Secured Parties may not take possession of any of the Debtors' leased premises, except with the agreement of the subject landlord or upon entry of an order of the Bankruptcy Court after notice and a hearing, or otherwise in compliance with applicable state or local law. Notwithstanding anything in this Final Order, in the Pre-Petition Revolving Credit Agreement, or in the Pre-Petition Term Credit Agreement to the contrary, in exercising the remedies provided for herein and therein, the Pre-Petition Secured Parties may not foreclose upon any Pre-Petition Collateral unless they held a valid, fully perfected lien on such property prior to the Petition Date, and any Pre-Petition Collateral foreclosed upon by the Pre-Petition Secured Parties, as well as all proceeds thereof, shall be subject to disgorgement in the event of a successful challenge by the Creditors' Committee or any other party in interest to (i) the validity, extent, perfection, enforceability, or priority of the mortgage, security interests, and liens of any of the Pre-Petition Secured Parties in and to the Pre-Petition Collateral, or (ii) the

validity, allowability, priority, status, enforceability, or amount of any of the Pre-Petition Obligations.

(c) The automatic stay imposed under Section 362(a) of the Bankruptcy Code is hereby modified pursuant to the terms of the DIP Credit Agreement as necessary to (i) permit the Debtors to grant the Pre-Petition Replacement Liens, and the Pre-Petition Indemnity Accounts and the DIP Liens, and to incur all Obligations and obligations to the Pre-Petition Secured Parties, the DIP Secured Parties under the DIP Credit Agreement, the DIP Facility and this Final Order, and (ii) authorize the DIP Secured Parties and the Pre-Petition Secured Parties to retain and apply payments in accordance with the terms of the DIP Credit Agreement and this Final Order.

(d) Nothing included herein shall prejudice, impair, or otherwise affect the Pre-Petition Secured Parties' or the DIP Secured Parties' rights to seek any other or supplemental relief in respect of the Debtors nor the DIP Agent's or DIP Lenders' rights, as provided in the DIP Credit Agreement, to suspend or terminate the making of loans under the DIP Credit Agreement.

18. **Rights with Respect to Certain Pre-Petition Agreements**. The DIP Agent and the other the DIP Secured Parties shall have all the rights and benefits with respect to each Blocked Account Agreement (as defined in the Pre-Petition Revolving Credit Agreement), each other agreement with a third party (including any agreement with a landlord, warehouseman, customs broker, freight forwarder, or credit card processor), and each other notification or agreement received or furnished in connection with the Pre-Petition Revolving Credit Agreement, and all depository banks, blocked account banks, landlords, warehousemen, customs brokers, freight forwarders, credit card processors, and other third

parties shall continue to comply for the benefit of the DIP Secured Parties, with the terms and conditions of each such agreement or notification, in each such case whether or not, and as if, an additional agreement or notification has been executed or furnished in connection with the DIP Credit Agreement.

19. **Proofs of Claim**. Each Debtor acknowledges and agrees that both the Pre-Petition Obligations and the DIP Obligations, and the related liens, rights priorities and protections granted to or in favor of the applicable Pre-Petition Secured Parties and DIP Secured Parties, respectively, as set forth herein and in the Pre-Petition Credit Agreement, the Pre-Petition Term Credit Agreement, and the DIP Credit Agreement, as applicable, shall each constitute a proof of claim on behalf of the applicable Pre-Petition Secured Parties or DIP Secured Parties in the Cases. Neither the Pre-Petition Secured Parties nor the DIP Secured Parties are required to file proofs of claim in the Cases or in any Successor Cases, however, each are hereby authorized and entitled to file (and amend and/or supplement) proofs of claim (including the proofs of claim provided for by this Paragraph 19) in the Cases or any Successor Cases.

20. **Other Rights and Obligations**

(a) Good Faith Under Section 364(e) of the Bankruptcy Code. No Modification or Stay of this Final Order. Based on the findings set forth in the Interim Order and this Final Order and in accordance with Section 364(e) of the Bankruptcy Code, which is applicable to the DIP Facility contemplated by this Final Order, in the event any or all of the provisions of this Final Order are hereafter modified, amended, or vacated by a subsequent order of this or any other Court, the DIP Secured Parties are entitled to the protections provided in Section 364(e) of the Bankruptcy Code, and no such appeal, modification, amendment or vacation shall affect the

validity and enforceability of any advances made hereunder or the liens or priority authorized or created hereby. Notwithstanding any such modification, amendment or vacation, any claim granted to the DIP Secured Parties hereunder arising prior to the effective date of such modification, amendment, or vacation of any DIP Protections granted to the DIP Secured Parties shall be governed in all respects by the original provisions of this Final Order, and the DIP Secured Parties 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 Final Order, the obligations owed the DIP Secured Parties prior to the effective date of any stay, modification, or vacation of this Final Order shall not, as a result of any subsequent order in the 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 Secured Parties under this Final Order and/or the DIP Credit Agreement.

~~(b) Expenses. As provided in the Pre-Petition Revolving Credit Agreement, the Pre-Petition Term Credit Agreement, the DIP Credit Agreement, and Paragraph 4(g) hereof, all costs and expenses of the DIP Secured Parties and the Pre-Petition Secured Parties in connection with the DIP Credit Agreement, the Pre-Petition Revolving Credit Agreement, and the Pre-Petition Term Credit Agreement, including, without limitation, reasonable, legal, accounting, collateral examination, monitoring and appraisal fees, financial advisory fees, fees and expenses of other consultants, indemnification and reimbursement of fees and expenses, and other out-of-pocket~~

~~expenses (including, without limitation, the reasonable expenses of the so called "Term Lender Group"), including the following professionals, without limitation:~~

~~(i) Paul, Hastings, Janofsky & Walker, LLP ("PHJ&W"), legal counsel to the Pre-Petition Term Agent;~~

~~(ii) Morris, Nichols, Arsht & Tunnell LLP, legal counsel to the Pre-Petition Term Agent;~~

~~(iii) Lazard Frères & Co. LLC ("Lazard"), as financial advisors (as provided for in the engagement letter among Lazard, the Pre-Petition Term Agent, and PHJ&W, dated as of June 1, 2009 (the "**Lazard Engagement Letter**") to the Pre-Petition Term Agent, which is hereby approved subject to the limitations set forth herein;~~

~~(iv) Kasowitz, Benson, Torres & Friedman LLP legal counsel to the Term Lender Group; and~~

~~(v) Saul Ewing, legal counsel to the Term Lender Group,~~

(b) ~~which~~Expenses. As provided in the Pre-Petition Revolving Credit Agreement and the DIP Credit Agreement, all costs and expenses of the DIP Secured Parties and the Pre-Petition Revolving Secured Parties in connection with the DIP Credit Agreement and the Pre-Petition Revolving Credit Agreement, including, without limitation, reasonable, legal, accounting, collateral examination, monitoring and appraisal fees, financial advisory fees, fees and expenses of other consultants, indemnification and reimbursement of fees and expenses, and other out of pocket expenses shall be paid by the Debtors, whether or not the transactions contemplated hereby,

including the 363 Sale, are consummated; provided, however, that prior to the earlier to occur of (a) the occurrence of an Event of Default which has not been waived in writing by the DIP Agent~~,~~ or the Pre-Petition Revolving Agent, ~~or the Pre-Petition Term Agent,~~ as applicable, (b) the closing of the 363 Sale, or (c) September 1, 2009 (each a "**Trigger Event**"), payment of such fees and expenses shall be limited to the amounts and at the times set forth in the Budget and, upon the closing of the 363 Sale, the DIP ~~Agent and the Pre-Petition Term~~ Agent shall reserve an amount for such unpaid fees and expenses ~~(and any indemnification obligations under the Lazard Engagement Letter)~~ from the distributions otherwise payable to the DIP Lenders and Pre-Petition Revolving Lenders ~~in the case of the DIP Agent and the Pre-Petition Term Lenders in the case of the Pre-Petition Term Agent and the Term Lender Group~~.

Upon a Trigger Event (subject to compliance with the procedures above), all such fees and expenses ~~(and indemnification obligations under the Lazard Engagement Letter)~~ shall be paid to the DIP Agent~~,~~ and the Pre-Petition ~~Term~~Revolving Agent~~, and the Term Lender Group, as applicable,~~ notwithstanding any limitations in the Budget. In the event that the Debtors do not timely pay such fees and expenses ~~(and indemnification obligations under the Lazard Engagement Letter)~~, the DIP Agent ~~and the Pre-Petition Term Agent, as applicable,~~ shall pay same from proceeds of the Collateral ~~in accordance with the Intercreditor Agreement~~.

Payment of such fees shall be subject to the rights of the Creditors' Committee under Paragraph 7 hereof, but shall not be subject to allowance by the Court. Under no circumstances shall professionals for the DIP Secured Parties or the Pre-Petition Secured Parties be required to comply with the United States Trustee fee guidelines; provided, however, that copies of any such

invoices (which may be redacted as necessary to protect confidential or privileged information or communication) for attorneys', financial advisor's, or accountant's fees and disbursements shall be provided to the United States Trustee, counsel to the Creditors' Committee, counsel to the Debtors, counsel to the DIP Agent, counsel to the Pre-Petition Term Agent, and counsel to the Term Lender Group, and shall be subject to a ten (10) day review and objection period for such parties.

(c) Continuing Effect of Intercreditor Agreement. Each of the Pre-Petition Revolving Secured Parties, the Pre-Petition Term Secured Parties, and the Debtors shall continue to be bound by and subject to all the terms, provisions and restrictions of the Intercreditor Agreement, and the Intercreditor Agreement shall apply and govern respective rights, obligations, and priorities of each of the DIP Agent, the DIP Lenders, the Debtors, the Pre-Petition Revolving Secured Parties, and the Pre-Petition Term Secured Parties in these Cases. All loans made by the DIP Lenders which constitute part of the DIP Facility and all other Obligations arising thereunder shall be included in the definition of "Revolving Loan Debt" (as such term is defined in the Intercreditor Agreement). The Intercreditor Agreement shall govern the respective rights of the DIP Agent's and the Pre-Petition Term Loan Agent's interests in the Collateral (including, without limitation, with respect to the timing and manner of the disposition of any such Collateral by either of them). For the avoidance of doubt, in no instance shall the DIP Liens prime any of the Pre-Petition Term Liens on the Term Lender Priority Collateral (as provided for by the Intercreditor Agreement). The Intercreditor Agreement is a "subordination agreement" under Section 510(a) of the Bankruptcy Code and shall continue to be effective during and after the pendency of the Cases and

any Successor Cases. Nothing in this Final Order is meant to or shall be deemed to alter or otherwise modify the rights, including consent rights, contained in the Intercreditor Agreement as between and among each of the Pre-Petition Revolving Secured Parties, the Pre-Petition Term Secured Parties, and the Debtors.

(d) No Duty to Monitor Compliance. Except as set forth herein, the Pre-Petition Agents and Pre-Petition Lenders may assume that the Debtors will comply with all terms and conditions of this Final Order and the Budget, and the Pre-Petition Agents and Pre-Petition Lenders shall not (i) have any obligation with respect to the Debtors' use of Cash Collateral or the proceeds of loans or other extensions of credit under the DIP Credit Agreement, (ii) be obligated to ensure or monitor the Debtors' compliance with any financial covenants, formulae, or other terms and conditions of this Final Order, the DIP Credit Agreement, or the Pre-Petition Credit Documents, (iii) be obligated to pay (directly or indirectly from Cash Collateral or otherwise) any expenses incurred or authorized to be incurred pursuant to this Final Order or in connection with the operation of the Debtors' business, or (iv) be obligated to ensure or monitor that Cash Collateral or "Combined Availability" (as defined in the DIP Credit Agreement) exists to pay such expenses.

(e) Monitoring of Collateral. The Debtors shall permit representatives, agents, and/or employees of the Pre-Petition Agents and the DIP Agent to have reasonable access to their premises and their records during normal business hours (without unreasonable interference with the proper operation of the Debtors' business) and shall cooperate, consult with, and provide to such persons all such non-privileged public information as they may request. The Debtors shall

provide the Pre-Petition Term Agent copies of all financial reports and financial information provided to the DIP Agent pursuant to the DIP Credit Agreement.

(f) Binding Effect of Final Order. The provisions of this Final Order shall be binding upon and inure to the benefit of the DIP Secured Parties and the Pre-Petition Secured Parties, the Debtors, and their successors and assigns (including any examiner, 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 Cases, in any Successor Cases, or upon dismissal of any such Chapter 11 or Chapter 7 Cases.

(g) No Waiver. The failure of the Pre-Petition Secured Parties or the DIP Secured Parties to seek relief or otherwise exercise their rights and remedies under the DIP Credit Agreement, the DIP Facility, this Final Order, the Pre-Petition Revolving Credit Agreement, or the Pre-Petition Term Credit Agreement, as applicable, shall not constitute a waiver of any of the Pre-Petition Secured Parties' and the DIP Secured Parties' rights hereunder, thereunder, or otherwise. Notwithstanding anything herein, the entry of this Final Order is without prejudice to, and does not constitute a waiver of, expressly or implicitly, or otherwise impair the Pre-Petition Secured Parties or the DIP Secured Parties under the Bankruptcy Code or under non-bankruptcy law, including without limitation, the rights of the Pre-Petition Secured Parties or the DIP Secured Parties to: (i) request conversion of any one or more of the Cases to Cases under Chapter 7, dismissal of any one or more of the Cases, or the appointment of a trustee or examiner in any one or more of the Cases, or (ii) propose, subject to the provisions of Section 1121 of the Bankruptcy Code, a Plan or (iii)

exercise any of the rights, claims or privileges (whether legal, equitable or otherwise) of the DIP Secured Parties or the Pre-Petition Secured Parties.

(h) No Third Party Rights. Except as specifically provided for herein, this Final Order does not create any rights for the benefit of any third party, creditor, equity holders, or any direct, indirect, or incidental beneficiary.

(i) No Marshaling. Neither the DIP Secured Parties nor the Pre-Petition Secured Parties shall be subject to the equitable doctrine of "marshaling" or any similar doctrine with respect to any of the Collateral.

(j) 363 Sale . Any proposed order approving the sale of the Debtors' assets or procedures for bidding on such sale, shall be in a form and in substance reasonably acceptable to the Pre-Petition Term Agent and the Term Lender Group and shall provide consultation and notice rights to the Pre-Petition Term Agent and the Term Lender Group. ~~All documents implementing the 363 Sale shall permit the Pre-Petition Term Secured Parties' to "credit bid" all or part of their claims to the extent permitted pursuant to Section 363(k) of the Bankruptcy Code.~~ An order approving the sale of substantially all of the Debtors' assets shall be entered on or prior to July 31, 2009.

(k) Section 552(b). In light of their agreement to subordinate their liens and superpriority claims (i) to the Carve-Out in the case of the DIP Secured Parties, and (ii) to the Carve-Out and DIP Liens in the case of the Pre-Petition Revolving Secured Parties, the DIP Secured Parties and the Pre-Petition Revolving Secured Parties shall each be entitled to all of the

rights and benefits of Section 552(b) of the Bankruptcy Code and the "equities of the case" exception under Section 552(b) of the Bankruptcy Code shall not apply to the DIP Secured Parties or the Pre-Petition Revolving Secured Parties with respect to proceeds, product, offspring or profits of any of the Pre-Petition Collateral or the DIP Collateral.

(l) Amendment. The Debtors and the DIP Agent may amend, modify, supplement, or waive any provision of the DIP Facility, provided that (a) the amendment, modification, or supplement is (i) in accordance with the DIP Documents, (ii) in the judgment of the Debtors and the DIP Agent, beneficial to the Debtors, and (iii) not adverse in any material respect to the rights of third parties; (b) a copy (which may be provided through electronic mail or facsimile) of the amendment, modification, or supplement is provided to counsel for the Term Lender Group, the Pre-Petition Term Agent, the Creditors' Committee, and the U.S. Trustee two days prior to execution thereof (absent exigent circumstances, in which case a copy shall be provided as soon as practicable); and (c) the amendment, modification, or supplement is filed with the Court; provided, however, that consent of the Term Lender Group, the Pre-Petition Term Agent, the Creditors' Committee, or the U.S. Trustee, and approval of the Court is not necessary to effectuate any such amendment, modification, or supplement. Nothing herein shall limit the right of the Creditors' Committee to object to any such amendment. Except as otherwise provided herein, no material waiver, modification, or amendment of any of the provisions hereof shall be effective unless set forth in writing, signed by the Debtors and the DIP Agent and approved by the Court.

(m) Survival of Final Order. The terms of this Final Order and any actions taken pursuant hereto, shall survive the entry of any order which may be entered: (a) confirming any Plan in the Cases; (b) dismissing the Cases; (c) converting the Cases to any other Chapter under the Code; (d) withdrawing of the references of the Cases from the Court; and (e) providing for abstention from handling or retaining of jurisdiction of these Cases in the Court. The terms and provisions of this Final Order as well as the DIP Protections granted pursuant to this Final Order and the DIP Credit Agreement, 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 Final Order until all the obligations of the Debtors to the DIP Secured Parties pursuant to the DIP Credit Agreement, and all obligations of the Debtors to the Pre-Petition Secured Parties under the Pre-Petition Revolving Credit Agreement and Pre-Petition Term Credit Agreement have been indefeasibly paid in full in cash and discharged (such payment being without prejudice to any terms or provisions contained in the DIP Facility which survive such discharge by their terms). The Adequate Protection granted to and conferred upon the Pre-Petition Secured Parties shall continue in full force and effect and shall maintain their priorities as provided in this Final Order and the Intercreditor Agreement until such Adequate Protection has been satisfied. The DIP Obligations shall not be discharged by the entry of an order confirming a Plan, the Debtors having waived such discharge pursuant to Section 1141(d)(4) of the Bankruptcy Code. The Debtors shall not propose or support any Plan that is not conditioned upon the indefeasible payment in full in cash of all of the DIP Obligations and the termination of any ability of the Debtors to borrow under the DIP Credit Agreement, and the payment in full in cash of the Pre-Petition Revolving

Obligations, on or prior to the earlier to occur of (i) the effective date of such Plan and (ii) the Termination Date.

(n) Inconsistency. In the event of any inconsistency between the terms and conditions of the DIP Credit Agreement and of this Final Order, the provisions of this Final Order shall govern and control.

(o) Enforceability. This Final 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 execution hereof.

(p) Objections Overruled. All objections to the DIP Motion to the extent not withdrawn or resolved, are hereby overruled.

(q) No Waivers or Modification of Final Order. Each Debtor irrevocably waives any right to seek any modification or extension of this Final Order without the prior written consent of the Agents, and no such consent shall be implied by any other action, inaction or acquiescence of the Agents.

(r) Waiver of any Applicable Stay. Any applicable stay (including, without limitation, under Bankruptcy Rule 6004(h)) is hereby waived and shall not apply to this Final Order.

21. **Retention of Jurisdiction**. The Court has and will retain jurisdiction to enforce this Final Order according to its terms.

SO ORDERED by the Court this ___ day of July, 2009.

_____
MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

# Exhibit 1

## DIP Budget

1157066.4

Document comparison by Workshare Professional on Monday, July 06, 2009 9:02:05 AM

| **Input:** | |
|---|---|
| Document 1 ID | PowerDocs://NY/1554254/1 |
| Description | NY-#1554254-v1-Revised_DIP_Order |
| Document 2 ID | PowerDocs://NY/1554165/2 |
| Description | NY-#1554165-v2-CGK_Commets_to_Revised_DIP_Order |
| Rendering set | Cooley |

| **Legend:** | |
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| Insertion | |
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| Style change | |
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| Inserted cell | |
| Deleted cell | |
| Moved cell | |
| Split/Merged cell | |
| Padding cell | |

| **Statistics:** | |
|---|---|
| | Count |
| Insertions | 41 |
| Deletions | 59 |
| Moved from | 7 |
| Moved to | 7 |
| Style change | 0 |
| Format changed | 0 |
| Total changes | 114 |

LAZARD

LAZARD FRÈRES & CO. LLC
30 ROCKEFELLER PLAZA
NEW YORK, NY 10020
PHONE 212-632-6000
www.lazard.com

As of June 1, 2009

Paul, Hastings, Janofsky & Walker LLP
Park Avenue Tower
75 E. 55th Street, First Floor
New York, NY 10022
Attention: Luc Despins, Esq.

Wilmington Trust FSB
50 South Sixth Street, Suite 1290
Minneapolis, MN 55402

Ladies and Gentlemen:

This letter and the accompanying exhibit confirm the terms under which Lazard Frères & Co. LLC ("Lazard") has been engaged by Paul, Hastings, Janofsky & Walker LLP ("PHJW"), as counsel to and acting on behalf of Wilmington Trust FSB, as Administrative Agent (the "Agent") under the Loan Agreement (as defined below), to act as investment banker to the Agent and to advise the Agent in connection with the matters set forth herein. Lazard has been retained on behalf of, and will report solely to, the Agent, notwithstanding that, except as provided in paragraph XII hereof, all of Lazard's fees and expenses payable under this agreement will be paid by the Company.[1] For purposes hereof, (i) the term "Company" means Eddie Bauer Holdings, Inc., Eddie Bauer, Inc. and their respective controlled subsidiaries collectively, and shall also include any successor to or assignee of all or substantially all of the assets and/or business of such entities and (ii) the term "Loan Agreement" means that certain Amended and Restated Term Loan Agreement, dated as of June 21, 2005 and amended and restated as of April 4, 2007, as further amended, among Eddie Bauer Holdings, Inc., Eddie Bauer, Inc. as borrower, the lenders from time to time party thereto (the "Lenders"), the Agent, and certain other parties thereto. If appropriate in connection with performing its services for the Agent hereunder, Lazard may utilize the services of one or more of its affiliates, in which case references herein to Lazard shall include such affiliates. Any such entity so employed shall be entitled to all of the benefits afforded to Lazard hereunder and shall be entitled to be reimbursed for its costs and expenses on the same basis as Lazard.

I. Scope of Services. Lazard shall assist PHJW in order to perform the following investment banking services for the Agent, in each case as necessary and if requested by the Agent:

a. review and analyze the business, operations, and financial projections of

[1] It is expressly understood and agreed that all references to obligations and undertakings of the Company under the terms of this agreement, including the provisions attached hereto as Exhibit A, shall be obligations and undertakings of the Company pursuant to an order entered by the Bankruptcy Court as contemplated by Section XI hereof.

the Company;

b. evaluate the Company's debt capacity in light of its projected cash flows;

c. review and provide to the Agent and PHJW an analysis of any proposed capital structure for the Company;

d. review and provide to the Agent and PHJW an analysis of any valuation of the Company or its assets;

e. assist the Agent and PHJW in connection with preparing any potential bid, offer or proposal for all or a significant portion of the Company's assets;

f. advise and attend meetings of the Agent as well as meetings with the Company or other third parties as appropriate in connection with the matters set forth herein;

g. advise and assist the Agent and PHJW in evaluating the financial aspects of any potential DIP loan or other financing by the Company;

h. review and provide to the Agent and PHJW an analysis of any restructuring plan proposed by any party;

i. assist the Agent and PHJW in connection with the financial aspects of negotiations with the Company; and

j. provide such other financial advisory services as the Agent may from time to time reasonably request and which are customarily provided by financial advisors in similar situations.

In rendering its services to the Agent hereunder, Lazard is not assuming any responsibility for the Agent's, the Company's, any Lender's or any other person's underlying business decision to pursue (or not to pursue) any business strategy or to effect (or not to effect) any other transaction(s) or decision(s). Lazard shall not have any obligation or responsibility to provide accounting, audit, "crisis management," or business consultant services for the Company, the Agent or any other person or entity and shall have no responsibility for designing or implementing operating, organizational, administrative, cash management or liquidity improvements. Nothing in this agreement is intended to obligate or commit Lazard or any of its affiliates to provide any services other than those set forth above. The Agent confirms that it will rely on its own counsel, accountants and other similar expert advisors for legal, accounting, tax and other specialist advice.

The Agent shall use commercially reasonable efforts to assist Lazard in obtaining from the Company all information concerning the business, assets, liabilities, operations, cash flows, properties, financial condition and prospects of the Company that Lazard reasonably requests in connection with the services to be performed for the Agent hereunder. The Agent acknowledges that at all times during Lazard's engagement Lazard will be assuming that all information furnished to Lazard (i) is accurate and complete in all material respects and (ii) does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein not misleading in light of the circumstances under which such statements are made. The Agent further recognizes and confirms that in advising the Agent pursuant to its engagement hereunder, Lazard will be using and relying on publicly available information and on data, material and other information furnished to Lazard by the Company, the Agent and other parties. It is understood that in performing its services under this engagement, Lazard is not assuming any responsibility for independent verification of such information. Lazard will not, as part of its engagement, undertake any independent valuation or appraisal of any of the assets or liabilities of the Company or of any third party, or opine or give advice to the Agent or any other person or entity with respect thereto or with respect to any issues of solvency.

II. Compensation. Lazard's compensation for services rendered under this agreement shall be paid by the Company and will consist of the following cash fees

A. Monthly Fee. A monthly fee (the "Monthly Fee") of $150,000, payable upon execution of this agreement and on the first day of each month thereafter until the termination of Lazard's engagement pursuant to Section V. Fifty percent (50%) of all Monthly Fees paid after the third month shall be credited (without duplication) against any Transaction Fee (as defined below) payable.

B. Transaction Fee. A fee (the "Transaction Fee"), payable upon, or within ten days following, consummation of a Transaction[2], equal to the sum of (i) $1,500,000, plus (ii) two percent (2%) of the portion of any Consideration[3] in excess of an amount equal to eighty percent (80%) of the aggregate face value of the secured indebtedness (including without limitation principal, accrued and unpaid interest and fees) under the Loan Agreement; provided, however, that if a Transaction is to be completed through a "pre-packaged" or "pre-arranged" plan of reorganization, the Transaction Fee shall be earned and shall be payable upon the earlier of (i) execution of definitive agreements with respect to such plan and (ii) delivery of binding consents to such plan by a sufficient number of creditors and/or bondholders, as the case may be, to bind the creditors and/or bondholders, as the case may be, to the plan; provided, further, that in the event that Lazard is paid a fee in connection with a "pre-packaged" or "pre-arranged" plan and such plan is not consummated, Lazard shall return such fee to the Company.

---

[2] As used in this Agreement, the term "Transaction" shall mean, collectively, (i) any restructuring, reorganization (whether or not pursuant to chapter 11 of the Bankruptcy Code) and/or recapitalization of all or a significant

portion of the Company's outstanding indebtedness (including bank debt, bond debt, and other on and off balance sheet indebtedness), trade claims, leases (both on and off balance sheet), litigation-related claims and obligations, or other liabilities (collectively, "Obligations") that is achieved, without limitation, through a solicitation of waivers and consents from the holders of Obligations; rescheduling of the maturities of Obligations; repurchase, settlement or forgiveness of Obligations; conversion of Obligations into equity; an exchange offer involving the issuance of new securities in exchange for Obligations; the issuance of new securities, sale or disposition of assets, sale of debt or equity securities or other interests or other similar transaction or series of transactions, and/or (ii) any transaction or series of transactions involving (a) an acquisition, merger, consolidation, or other business combination pursuant to which the business or assets of the Company are, directly or indirectly, combined with another company; (b) the acquisition, directly or indirectly, by a buyer or buyers (which term shall include a "group" of persons as defined in Section 13(d) of the Securities Exchange Act of 1934, as amended), of equity interests or options, or any combination thereof constituting a majority of the then outstanding stock of the Company or possessing a majority of the then outstanding voting power of the Company; (c) any other purchase or acquisition, directly or indirectly, by a buyer or buyers of significant assets, securities or other interests of the Company or (d) the formation of a joint venture or partnership with the Company or direct investment in the Company for the purpose of effecting a transfer of an interest in the Company to a third party.

[3] As used in this Agreement, the term "Consideration" shall mean all payments, distributions and other consideration paid and payable to the Lenders or their respective affiliates or securityholders in connection with any Transaction or otherwise on account of the Company's indebtedness under the Loan Agreement, including, but not limited to, cash, debt securities or obligations, whether newly issued or reinstated, equity securities and any other property of any kind or nature. The value of debt securities or obligations issued or reinstated shall be determined on the basis of the average closing price of such securities, obligations or indebtedness according to Secondary Market Intelligence, or any other mutually agreed source, for the ten trading days after the closing of a Transaction or, if such information is not readily available, an amount otherwise agreed among the parties hereto in good faith. Equity securities or other similar interests shall be valued by reference to the greater of (i) the implied equity value of the Company (on a pre-money basis) determined by reference to any actual or proposed investment made by a third party in the Company, (ii) the implied equity value of the Company determined by reference to the aggregate value of all amounts paid and payable, or proposed to be paid, by a third party in connection with any acquisition of, or any bona fide bid, offer or proposal to acquire, all or a substantial portion of the business or assets of the Company, (iii) the aggregate market value of the Company's secured indebtedness under the Loan Agreement determined on the basis of the average closing price of such indebtedness according to Secondary Market Intelligence, or any other mutually agreed source, for the ten trading days prior to the closing of a Transaction (less the face value of debt securities and any cash distributed to the Lenders or their respective affiliates or securityholders in connection with such Transaction, the value of which shall be otherwise included in Consideration pursuant to the other provisions of this paragraph), and (iv) an amount otherwise agreed among the parties hereto in good faith. Notwithstanding the foregoing, (x) Consideration shall be subject to a minimum amount equal to the aggregate market value of the Company's secured indebtedness under the Loan Agreement determined on the basis of the average closing price of such indebtedness according to Secondary Market Intelligence, or any other mutually agreed source, for the ten trading days prior to the closing of a Transaction, and (y) the ten-day period referenced in this sentence and in clause (iii) of the previous sentence shall be reduced by each day (up to a maximum of five days) during such ten-day period that the material economic terms of a Transaction are not reasonably available to the Lenders generally or are not otherwise publicly available or known.

C. Expense Reimbursement. In addition to any fees that may be payable to Lazard, the Company shall promptly reimburse Lazard for all expenses (including expenses of counsel, if any), travel and lodging, data processing and communications charges, courier services and other expenditures incurred in connection with, or arising out of Lazard's activities under or contemplated by, this engagement.

D. No fee payable to any other person, by the Company, the Agent or any other party, shall reduce or otherwise affect any fee payable hereunder.

III. Limitation of Liability of Agent and PHJW. Except as provided in paragraph XII, neither the Agent nor PHJW shall have any liability for, and shall not be obligated to make, any fee or expense payments to Lazard under, in connection with, or with respect to, this agreement, including, but not limited to paragraph II and paragraph IV hereof. Lazard acknowledges and agrees that the work product provided by Lazard pursuant to this agreement will be produced for the use and benefit of the Agent, and Lazard will not disclose or deliver the same to any other person (including the Company) except (a) to Lazard's counsel or other agents, (b) to such other person as the Agent or PHJW approves or directs, or (c) if required to do so under any applicable law, rule or regulation of any competent authority (in which event, Lazard shall, to the extent reasonably practicable and permitted by law or regulation, provide the Agent with prompt written notice so that the Agent may seek appropriate relief, including a protective order). All obligations as to non-disclosure shall cease as to any part of such information to the extent that such information is or becomes public other than other than as a result of acts by Lazard in violation of this paragraph.

IV. Indemnification. As a material part of the consideration for Lazard to furnish its services under this agreement, Lazard requires that the Company and certain related persons indemnify, reimburse and provide contribution to Lazard in accordance with the provisions attached hereto as Exhibit A. The provisions of Exhibit A are an integral part of this agreement, and the terms thereof are incorporated in entirety by reference herein. The terms of Exhibit A shall survive any termination or expiration of this agreement or Lazard's engagement.

V. Termination. This agreement and Lazard's engagement hereunder may be terminated by either the Agent or Lazard at any time, provided, however, that (a) termination or expiration of Lazard's engagement hereunder shall not affect the Company's continuing obligations pursuant to Exhibit A, and the Company's and the Agent's continuing obligations and agreements under paragraphs I, II, III, IV, this paragraph V, VI, VII, VIII, IX, X, XI, XII and XIII hereof, (b) notwithstanding any such termination or expiration, Lazard shall remain entitled to any fees accrued pursuant to paragraph II but not yet paid prior to such termination or expiration and to reimbursement of expenses pursuant to paragraph II incurred prior to such termination or expiration, and (c) in the case of termination by the Agent or any expiration of this agreement, Lazard shall remain entitled to full payment of all fees contemplated by paragraph II hereof in respect of any Transaction announced or resulting from negotiations occurring during the period from the date hereof until one year following such termination or expiration.

VI. Independent Contractor. Lazard has been retained under this agreement as an independent contractor solely to the Agent; nothing herein is intended to create or shall be construed as creating a fiduciary relationship between Lazard, on the one hand, and the Agent, PHJW, the Company, any Lender or any other person or entity, on the other hand. The Agent acknowledges that Lazard is not the agent of and is not authorized to bind the Agent in any action or decision. Lazard has been retained by PHJW only in its capacity as counsel to the Agent to act as investment banker to the Agent and to advise the Agent in connection with the matters set forth herein, and Lazard's engagement hereunder is not deemed to be on behalf of, and is not intended to confer any rights upon, PHJW. Notwithstanding anything to the contrary herein, the advice (oral or written) rendered by Lazard pursuant to this agreement is intended solely for the benefit and use of the Agent solely in its capacity as Agent in considering the matters to which this agreement relates, and such advice may not be relied upon by any other person or entity (including the Company, PHJW and any Lender), used for any other purpose or reproduced, disseminated, quoted or referred to at any time, in any manner for any purpose, nor shall any public references to Lazard be made by the Agent, PHJW or the Company, without the prior consent of Lazard. Notwithstanding the foregoing, nothing herein shall prohibit any party hereto from disclosing to any and all persons the tax treatment and tax structure of any transaction and the portions of any materials that relate to such tax treatment or tax structure.

VII. Limitation of Liability. The Agent agrees that neither Lazard nor any Indemnified Persons (as defined in Exhibit A) shall have any liability (whether direct or indirect, in contract or tort or otherwise) to the Agent, the Lenders or their respective members, partners, employees or agents or their respective affiliates or securityholders for or in connection with this engagement or any transactions or conduct in connection therewith except to the extent that any losses, claims, damages, liabilities or expenses incurred by the Agent are found by a court of competent jurisdiction in a judgment which has become

final in that it is no longer subject to appeal or review to have resulted primarily from such Indemnified Person's bad faith or gross negligence. In addition, PHJW agrees that neither Lazard nor any Indemnified Persons shall have any liability (whether direct or indirect, in contract or tort or otherwise) to PHJW or its members, partners, employees or agents or their respective affiliates or securityholders for or in connection with this engagement or any transactions or conduct in connection therewith except to the extent that any losses, claims, damages, liabilities or expenses incurred by PHJW are found by a court of competent jurisdiction in a judgment which has become final in that it is no longer subject to appeal or review to have resulted primarily from such Indemnified Person's bad faith or gross negligence.

VIII. Successors and Assigns. This agreement (including Exhibit A hereto) shall be binding upon Lazard, the Agent, PHJW and the Company and their respective successors and assigns. Each party hereto recognizes that, notwithstanding anything to the contrary herein, Lazard has been engaged only on behalf of the Agent and that Lazard's engagement is not deemed to be on behalf of and is not intended to confer any rights upon the Company, PHJW, any Lender, any shareholder, creditor, owner or partner of the Company, or any other person or entity not a party hereto other than the Indemnified Persons. The Company's obligations hereunder are joint and several.

IX. Authority. Each party hereto represents and warrants that it has all requisite power and authority to enter into this agreement and the transactions contemplated hereby. Each party hereto further represents and warrants that this agreement has been duly and validly authorized by all necessary corporate or other action on the part of such party, has been duly executed and delivered by such party and constitutes a legal, valid and binding agreement of such party, enforceable in accordance with its terms.

X. Miscellaneous. This agreement and Exhibit A constitute the entire understanding of the parties hereto as to the matters set forth herein and in Exhibit A, and shall supersede all prior understandings and proposals, whether written or oral, relating to any of the matters contemplated herein or in Exhibit A. This agreement may by executed in counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument. This agreement may only be amended or waived by a writing signed by the parties hereto. It is understood and agreed by each party hereto that nothing contained in this agreement shall affect the right of the Agent to retain professionals and to have the Company reimburse the Agent for the fees and expenses of such professionals pursuant to Section 9.5 of the Credit Agreement.

XI. Insolvency. Upon commencement of any proceeding under Chapter 11 of the Bankruptcy Code, the Agent shall use its commercially reasonable efforts to (i) ensure that any order approving the use of cash collateral, post-petition financing and/or any plan of reorganization involving the Company provides for the Company's payment of

amounts due and payable hereunder and the Company's agreement and continuing performance with respect to all provisions of this Agreement (including, without limitation, the provisions of Exhibit A) as, among other things, adequate protection for use of cash collateral, and (ii) ensure that any such plan of reorganization (or similar document or instrument) includes provisions reasonably acceptable to Lazard that exculpate Lazard with respect to, and release Lazard from, liabilities and claims in respect of such proceedings and Lazard's engagement hereunder. In the event of any such proceedings, Lazard shall be under no obligation to provide any services under this agreement prior to entry of an order that is acceptable to Lazard in its sole discretion.

XII. Amounts Due. In the event that the Company does not make prompt payment to Lazard of amounts due and payable by the Company under this Agreement (including, without limitation, pursuant to the provisions of Exhibit A), the Agent shall use its commercially reasonable efforts to require the Company to do so pursuant to Section 9.5 of the Loan Agreement. In the event that any amounts paid as a result of efforts described in the foregoing sentence are insufficient to fully pay any amounts due and payable to Lazard hereunder, the Agent shall be jointly and severally liable for such unpaid amounts; provided, however, that, to the extent that the Agent uses its commercially reasonable efforts to recover such unpaid amounts from the Lenders pursuant to Section 8.7 of the Loan Agreement and any other rights or remedies reasonably available to the Agent, and the Agent is unable to recover such amounts from the Lenders, the Agent shall have no further obligation to Lazard to pay such amounts. The provisions of this paragraph XII shall not limit the Company's obligations under this agreement in any respect and shall survive any termination or expiration of this agreement.

XIII. Choice of Law. This agreement and any claim related directly or indirectly to this agreement (including any claim concerning advice provided pursuant to this agreement) shall be governed by and construed in accordance with the laws of the State of New York without regard to the principle of conflicts of law. No such claim shall be commenced, prosecuted or continued in any forum other than the courts of the State of New York located in the City and County of New York or in the United States District Court for the Southern District of New York, and each of the parties hereby submits to the jurisdiction of such courts. Each party hereto hereby waives on behalf of itself and its successors and assigns any and all right to argue that the choice of forum provision is or has become unreasonable in any legal proceeding. ANY RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY CLAIM OR ACTION ARISING OUT OF THIS AGREEMENT OR CONDUCT IN CONNECTION WITH THIS ENGAGEMENT IS HEREBY WAIVED BY EACH PARTY HERETO.

If the foregoing agreement is in accordance with your understanding of the terms of our engagement, please sign and return to us the enclosed duplicate hereof.

Very truly yours,

LAZARD FRERES & CO. LLC

By: _____
Eric Mendelsohn
Managing Director

AGREED TO AND ACCEPTED
as of the date first
above written:

PAUL, HASTINGS, JANOFSKY & WALKER LLP

By: _____
Name:
Title:

WILMINGTON TRUST FSB, as Agent

By._____
Name:
Title:

If the foregoing agreement is in accordance with your understanding of the terms of our engagement, please sign and return to us the enclosed duplicate hereof.

Very truly yours,

LAZARD FRERES & CO. LLC

By: _____
Eric Mendelsohn
Managing Director

AGREED TO AND ACCEPTED
as of the date first
above written:

PAUL, HASTINGS, JANOFSKY & WALKER LLP

By: _____
Name:
Title:

WILMINGTON TRUST FSB, as Agent

By. _____
Name: Jeffery Rose
Title: Vice President

If the foregoing agreement is in accordance with your understanding of the terms of our engagement, please sign and return to us the enclosed duplicate hereof.

Very truly yours,

LAZARD FRERES & CO. LLC

By:_____
Eric Mendelsohn
Managing Director

AGREED TO AND ACCEPTED
as of the date first
above written:

PAUL, HASTINGS, JANOFSKY & WALKER LLP

By:_____
Name:
Title:

WILMINGTON TRUST FSB, as Agent

By._____
Name:
Title:

LAZARD

LAZARD FRÈRES & CO. LLC
30 ROCKEFELLER PLAZA
NEW YORK, NY 10020
PHONE 212-632-6000
www.lazard.com

# EXHIBIT A

In connection with our engagement by PHJW, as counsel to and acting on behalf of the Agent, to advise and assist the Agent with the matters set forth in the engagement letter of even date herewith (the "Engagement Letter") attached hereto, and for good and valuable consideration, receipt of which is acknowledged, the Company will be subject to the terms of this Exhibit A. Capitalized terms used herein without definition shall have the meanings assigned to them in the Engagement Letter. It is understood and agreed that in the event that Lazard Frères & Co. LLC or any of our affiliates, or any of our or their respective directors, officers, members, employees, agents or controlling persons, if any (each of the foregoing, including Lazard Frères & Co. LLC, being an "Indemnified Person"), become involved in any capacity in any action, claim, proceeding or investigation brought or threatened by or against any person, including the Company's securityholders or creditors, related to, arising out of or in connection with our engagement, the Company will promptly reimburse each such Indemnified Person for its legal and other expenses (including the cost of any investigation and preparation) as and when they are incurred in connection therewith. The Company will indemnify and hold harmless each Indemnified Person from and against any losses, claims, damages, liabilities or expenses to which any Indemnified Person may become subject under any applicable federal or state law, or otherwise, related to, arising out of or in connection with our engagement, whether or not any pending or threatened action, claim, proceeding or investigation giving rise to such losses, claims, damages, liabilities or expenses is initiated or brought by the Company or on its behalf and whether or not in connection with any action, claim, proceeding or investigation in which the Company or any such Indemnified Person are a party, except to the extent that any such loss, claim, damage, liability or expense is found by a court of competent jurisdiction in a judgment which has become final in that it is no longer subject to appeal or review to have resulted primarily from such Indemnified Person's bad faith or gross negligence. The Company also agrees that no Indemnified Person shall have any liability (whether direct or indirect, in contract or tort or otherwise) to the Company or its securityholders or creditors related to, arising out of or in connection with our engagement except to the extent that any loss, claim, damage or liability is found by a court of competent jurisdiction in a judgment which has become final in that it is no longer subject to appeal or review to have resulted primarily from such Indemnified Person's bad faith or gross negligence. If multiple claims are brought against any Indemnified Person in an arbitration related to, arising out of or in connection with our engagement, and indemnification is permitted under applicable law with respect to at least one such claim, the Company agrees that any arbitration award shall be conclusively deemed to be based on claims as to which indemnification is permitted and provided for hereunder, except to the extent the arbitration award expressly states that the award, or any portion thereof, is based solely on a claim as to which indemnification is not available.

If for any reason the foregoing indemnification is held unenforceable (other than due to a failure to meet the standard of care set forth above), then the Company shall contribute to the loss, claim, damage, liability or expense for which such indemnification is held unenforceable in

such proportion as is appropriate to reflect the relative benefits received, or sought to be received, by the Company and its securityholders and creditors on the one hand and the Indemnified Persons on the other hand in the matters contemplated by our engagement as well as the relative fault of the Company and such persons with respect to such loss, claim, damage, liability or expense and any other relevant equitable considerations. The Company agrees that for the purposes hereof the relative benefits received, or sought to be received, by the Company and its securityholders and creditors and the Indemnified Persons shall be deemed to be in the same proportion as (i) the total value paid or proposed to be paid by or to the Company and its securityholders and creditors, as the case may be, pursuant to any transaction (whether or not consummated) in connection with which we have been engaged to perform investment banking services bears to (ii) the fees paid or proposed to be paid to us in connection with such engagement; provided, however, that, to the extent permitted by applicable law, in no event shall we or any other Indemnified Person be required to contribute an aggregate amount in excess of the aggregate fees actually paid to us for such investment banking services. The Company's reimbursement, indemnity and contribution obligations under this agreement shall be joint and several, shall be in addition to any liability which the Company may otherwise have, shall not be limited by any rights we or any other Indemnified Person may otherwise have and shall be binding upon and inure to the benefit of any successors, assigns, heirs and personal representatives of the Company, ourselves, and any other Indemnified Persons.

The Company agrees that, without our prior written consent (which will not be unreasonably withheld), the Company will not settle, compromise or consent to the entry of any judgment in any pending or threatened claim, action, proceeding or investigation in respect of which indemnification or contribution could be sought hereunder (whether or not we or any other Indemnified Persons are an actual or potential party to such claim, action, proceeding or investigation), unless such settlement, compromise or consent includes an unconditional release of each Indemnified Person from all liability arising out of such claim, action, proceeding or investigation. No waiver, amendment or other modification of this agreement shall be effective unless in writing and signed by each party to be bound thereby. This agreement and any claim related directly or indirectly to this agreement shall be governed and construed in accordance with the laws of the State of New York (without giving regard to the conflicts of law provisions thereof). No such claim shall be commenced, prosecuted or continued in any forum other than the courts of the State of New York located in the City and County of New York or the United States District Court for the Southern District of New York, and each of us hereby submits to the jurisdiction of such courts. The Company hereby waives on behalf of itself and its successors and assigns any and all right to argue that the choice of forum provision is or has become unreasonable. The Company (on its own behalf and, to the extent permitted by applicable law, on behalf of its securityholders and creditors) waives all right to trial by jury in any action, proceeding or counterclaim (whether based upon contract, tort or otherwise) related to, arising out of or in connection with this agreement. The provisions of this Exhibit A shall remain in effect indefinitely, notwithstanding any termination or expiration of our engagement.