

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

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In re:)	Chapter 11
)	
NSC WHOLESALE HOLDINGS LLC, <i>et al.</i> , ¹)	Case No. 18-12394 (____)
)	
Debtors.)	Joint Administration Requested
)	
)	

**DEBTORS’ MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS
(I) AUTHORIZING DEBTORS TO USE CASH COLLATERAL ON AN
EMERGENCY BASIS PENDING A FINAL HEARING; (II) GRANTING
ADEQUATE PROTECTION TO THE PREPETITION LENDER, (III) MODIFYING
THE AUTOMATIC STAY, (IV) SCHEDULING A FINAL HEARING, AND
(V) GRANTING RELATED RELIEF**

NSC Wholesale Holdings LLC (“NSC”) and certain of its affiliates, as debtors and debtors in possession (collectively, the “**Debtors**”), hereby submit this motion (the “**Motion**”) for entry of an interim order (the “**Interim Order**”), substantially in the form attached hereto as **Exhibit A**, and a final order (the “**Final Order**” and together with the Interim Order, the “**Cash Collateral Orders**”) pursuant to sections 105, 361, 362, 363, and 507(b) of title 11 of the United States Code (the “**Bankruptcy Code**”), Rules 4001, 6004(h), 7062, and 9014 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), and Rule 4001-2 of the Local Rules for the United States Bankruptcy Court for the District of Delaware (the “**Local Rules**”): (i) authorizing the Debtors to use the Cash Collateral (as defined herein) of Capital One, National Association (the “**Prepetition Lender**”); (ii) granting adequate protection to Prepetition Lender for the use of the Cash Collateral; (iii) modifying the automatic stay to the extent necessary to permit the

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: NSC Wholesale Holdings LLC (6210); National Wholesale Liquidators of Lodi, Inc. (4301); NSC Realty Holdings LLC (4779); NSC of West Hempstead, LLC (5582); Top Key LLC (7503); BP Liquor LLC (2059); and Teara LLC (8660). The Debtors’ mailing address is 111 Hempstead Turnpike, West Hempstead, NY 11552.

Debtors and Prepetition Lender to implement the terms of the Interim Order; (iv) scheduling a final hearing on the Motion pursuant to Bankruptcy Rule 4001 (the “**Final Hearing**”); and (v) granting related relief. In support of this Motion, the Debtors respectfully represent as follows:

JURISDICTION

1. The United States Bankruptcy Court for the District of Delaware (the “**Court**”) has jurisdiction over these cases and the Motion pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated February 29, 2012. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of these cases and the Motion in this district is proper under 28 U.S.C. §§ 1408 and 1409.

2. Pursuant to Rule 9013-1(f) of the Local Rules, the Debtors consent to the entry of a final judgment or order with respect to the Motion if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

3. The statutory and legal predicates for the relief requested herein are sections 105, 361, 362, 363, 503 and 507 of the Bankruptcy Code, Bankruptcy Rules 4001, 6004(h), 7062 and 9014, and Local Rule 4001-2.

BACKGROUND

4. On the date hereof (the “**Petition Date**”), each of the Debtors filed a voluntary petition with this Court for relief under chapter 11 of the Bankruptcy Code (the “**Chapter 11 Cases**”). The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No party

has requested the appointment of a trustee or examiner in these Chapter 11 Cases, and no statutory committees have been appointed or designated.

5. The Debtors own and operate a chain of eleven (11) general merchandise close-out stores located in four (4) states. The stores, which operate under the name “National Wholesale Liquidators,” are targeted to lower and lower/middle income customers in densely populated urban and suburban markets. The Debtors employ a unique hybrid merchandising strategy that employs both continuity and close-out products. The Debtors offer customers both an everyday selection of first quality, brand name merchandise and opportunistic and varying special buys.

6. A detailed description of the Debtors and their businesses, and the facts and circumstances supporting this Motion and the above-captioned chapter 11 cases, are set forth in greater detail in the *Declaration of Mark Samson in Support of Chapter 11 Petitions and Requests for First Day Relief* (the “**First Day Declaration**”), filed contemporaneously herewith and incorporated by reference herein.

7. As detailed in the First Day Declaration, the Debtors’ financial performance has suffered over the last few years from a number of factors, including declining sales, rising costs, certain construction-related damages and store opening delays.

8. Notwithstanding these challenges, the Debtors believed their financial challenges could be overcome by access to additional liquidity to acquire more inventory and open additional retail stores. For months prior to the Petition Date, the Debtors were negotiating with a group of industry players for a significant equity investment in the Debtors’ businesses. Unfortunately, after substantially completing due diligence, the potential equity investors informed the Debtors that they were not prepared to move forward with an equity investment.

9. Instead, the potential equity investors expressed interest in purchasing substantially all of the Debtors' assets through a sale under section 363 of the Bankruptcy Code. Similarly, another group, which includes one of the Debtors' insiders, also expressed an interest in purchasing a significant portion of the Debtors' assets and business as a going concern through a section 363 sale.

10. In light of these expressions of interest, the Debtors retained an investment banker, SSG Advisors, LLC ("**SSG**"), to assist them in marketing their Assets, negotiating with interested parties, and facilitating due diligence.

11. Given the time constraints and the Debtors' liquidity issues, and despite SSG's best efforts, the Debtors were unable to convince any interested party to submit an offer for substantially all of the Debtors' assets that would return more value to the Debtors' estates than proceeding with store closing sales or similar themed sales at their stores with the assistance of liquidation consultants (the "**Store Closing Sales**")

12. Accordingly, the Debtors have determined that, under the circumstances, the best way to preserve value for their estates and creditors is to immediately commence Store Closing Sales, and at the same time, market their businesses and remaining assets for sale. The Debtors believe this plan offers the best opportunity to maximize the value to the estates for all creditors and other stakeholders.

I. Prepetition Secured Indebtedness

13. On or about October 26, 2015, NSC, as Borrower, and National Wholesale Liquidators of Lodi, Inc. ("**Lodi**"), as Corporate Guarantor, and Capital One, National Association ("**Prepetition Lender**"), as Lender, entered into an Amended and Restated Credit Agreement (the "**Credit Agreement**"), pursuant to which Prepetition Lender agreed to make available up to a maximum amount of \$20,000,000 through a revolving loan (the "**Revolving**

Loan”), up to \$2,500,000 through a delayed draw term loan (the “**Term Loan**”), and a letter of credit commitment of up to \$2,000,000 (the “**Letters of Credit**” and, collectively with the Revolving Loan and the Term Loan, the “**Loan Facility**”).

14. The Revolving Loan is an asset-based facility, pursuant to which Prepetition Lender loans funds to the Debtors in an amount up to sixty-five percent (65%) of Eligible Inventory (as defined in the Credit Agreement).

15. NSC executed an Amended and Restated Revolving Credit Note (the “**Note**”), in the original principal amount of \$20,000,000, evidencing its obligation to repay any and all amounts loaned to it by Prepetition Lender.

16. Debtors National Wholesale Liquidators of Lodi, Inc., NSC Realty Holdings, LLC, NSC of West Hempstead, LLC, Top Key, LLC, Teara LLC, and BP Liquor LLC (collectively, the “**Guarantors**”) executed an Amended and Restated Guaranty Agreement with respect to the obligations under the Loan Facility.

17. As security for the obligations under the Loan Facility, all of the Debtors also executed an Amended and Restated Security Agreement (the “**Security Agreement**”), whereby each of the Debtors granted to Prepetition Lender a first-position security interest in substantially all of the Debtors’ assets (the “**Pre-Petition Collateral**”), including the Debtors’ cash (the “**Cash Collateral**”).

18. As of October 1, 2018, the Debtors are indebted to Prepetition Lender in the total amount of not less than \$8,575,000 in connection with the Revolving Loan and \$756,000 in connection with the Term Loan. The aggregate amount of all outstanding Letters of Credit is no less than \$125,000. Under the Loan Facility, the Debtors also owe the Prepetition Lender certain fees and costs.

19. In addition to the prepetition secured obligations with Prepetition Lender, on or about September 24, 2014, NSC entered into a Retail Member Agreement with True Value Company (“**True Value**”), a cooperative of independent retailers. NSC granted True Value a security interest in inventory sold, leased or consigned to NSC by True Value, and NSC’s receivables and other rights arising from inventory acquired from True Value. As of the Petition Date, the Debtors’ books and records indicate that NSC is indebted to True Value in the total amount of approximately \$107,516 and that the Debtors have True Value inventory on hand in the amount of approximately \$395,000.

II. Need for Continued Use of Cash Collateral

20. The Debtors have an urgent and immediate need to use Cash Collateral. The Debtors do not have sufficient unencumbered funds on hand or generated from their businesses to fund operations. Without the use of Cash Collateral as requested herein, the Debtors would not be able to implement the sale process, including the Store Closing Sales, for the benefit of their stakeholders.

21. The use of Cash Collateral is necessary for working capital, operating costs and expenses incurred during these Chapter 11 Cases, including funding payroll. The Debtors do not have sufficient sources of working capital, financing or cash to carry on the operation of their businesses through the Store Closing Sales without the use of Cash Collateral. The Debtors’ ability to maintain their businesses pending the outcome of the Store Closing Sales and sale process is dependent on their ability to continue to operate, and the Debtors cannot operate unless they can fund payments for postpetition rent, payroll, goods, services and other operating expenses. The use of Cash Collateral is thus essential to the Debtors’ continued operational viability and will provide the Debtors with the opportunity to maximize value for their stakeholders.

22. Hence, the Debtors determined, in the exercise of their sound business judgment, that they require the use of Cash Collateral under the terms of the Interim Order and Final Order.

RELIEF REQUESTED

23. By this Motion, the Debtors request entry of the Interim Order, which will, among other things: (i) authorize the Debtors to use the Cash Collateral; (ii) provide adequate protection to Prepetition Lender (the “**Adequate Protection Obligations**”) in the form of adequate protection liens and superpriority claims for the Adequate Protection Obligations; (iii) modify the automatic stay to the extent necessary to permit the Debtors and Prepetition Lender to implement the terms of the Cash Collateral Orders; (iv) schedule the Final Hearing; and (v) grant certain related relief.

24. The following chart contains a summary of the essential proposed terms of the Interim Order:

<i>Use of Cash Collateral</i>	The Debtors are authorized to use Cash Collateral, in each case in a manner consistent with the terms and conditions of the Interim Order and in accordance with the budget (as the same may be modified from time to time consistent with the terms of this Interim Order and subject to such variances as permitted and set forth in the Interim Order, the “ Budget ”) for: (a) working capital; (b) other general corporate purposes of the Debtors; (c) permitted payment of costs of administration of the Chapter 11 Cases; (d) payment of such prepetition expenses as set forth in the Budget or as otherwise consented to by the Prepetition Lender, in its sole discretion, and as approved by the Court; (e) payment of interest, fees and expenses (including, without limitation, legal and other professionals’ fees and expenses of the Prepetition Lender); (f) payment of certain adequate protection amounts to the Prepetition Lender, as set forth in paragraph 13 of the Interim Order; and (g) payment of the Carve-Out, in accordance with paragraph 27 of the Interim Order.
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<p><i>Material Terms, Including Duration and Use of Cash Collateral</i></p>	<p><u>Events of Default</u>: The following constitute events of default, unless waived by Prepetition Lender: (i) the failure of the Debtors to perform, in any respect, any of the terms, provisions, conditions, covenants, or obligations under the Interim Order, (ii) any variances from the Budget in excess of the Permitted Variances, (iii) the failure of the Debtors to obtain entry of an interim Liquidation Order on or before October 26, 2018, (iv) the failure of the Debtors to obtain entry of a final Liquidation Order on or before November 15, 2018, (v) the failure of the Debtors to obtain entry of a Bidding Procedures Order approving the bidding process set forth in the Sale and Bidding Procedures Motion on or before November 5, 2018, or (vi) the failure of the Debtors to comply with any of the provisions of any Liquidation Order or Bidding Procedures Order.</p>
<p>Liens, Cash Payments or Adequate Protection Provided for Use of Cash Collateral</p>	<p>The Debtors propose to grant adequate protection to the Prepetition Lender, to the extent of any diminution in value of its interests in the Pre-Petition Collateral, from and after the Petition Date as follows:</p> <p>(a) Adequate Protection Liens: Pursuant to Sections 361, 363(e) and 364(d) of the Bankruptcy Code, as adequate protection of the interests of the Prepetition Lender in the Prepetition Collateral against any diminution in value of such interests in the Prepetition Collateral, the Debtors propose to grant to the Prepetition Lender, to the same extent, validity and priority as existed on the Prepetition Collateral on the Petition Date, continuing valid, binding, enforceable and perfected postpetition security interests in and liens (the “Adequate Protection Liens”) on all Prepetition Collateral and all other prepetition and postpetition collateral existing and after-acquired real and personal, tangible and intangible, assets of the Borrower and the Guarantors, including, without limitation, 100% of the stock of their subsidiaries, cash, cash equivalents, bank accounts, accounts, other receivables, chattel paper, contract rights, inventory, instruments, documents, securities (whether or not marketable), equipment, fixtures, real property interests, proceeds of leasehold interests, franchise rights, patents, tradenames, trademarks, copyrights, intellectual property, general intangibles, capital stock, investment property, supporting obligations, letter of credit rights,</p>

commercial tort claims, causes of action (excluding avoidance actions under Chapter 5 of the Bankruptcy Code but including proceeds of avoidance actions under Chapter 5 of the Bankruptcy Code only upon the entry of the Final Order) and all substitutions, accessions and proceeds of the foregoing, wherever located, including insurance or other proceeds, and all other assets of the Debtors (collectively, the “**Postpetition Collateral**”). For the avoidance of doubt, the term Postpetition Collateral shall not include such inventory subject to any properly perfected, non-avoidable, purchase money security interest of True Value Company and any proceeds thereof;

(b) **Superpriority Claims:** As further adequate protection of the interests of the Prepetition Lender in the Prepetition Collateral against any diminution in value of such interests in the Prepetition Collateral Debtors propose to grant to the Prepetition Lender, subject to the Carve-Out, as and to the extent provided by section 507(b) of the Bankruptcy Code an allowed superpriority administrative expense claim in each of the Chapter 11 Cases and any Successor Cases (the “**Adequate Protection Superpriority Claims**”);

(c) **Adequate Protection Payments and Protections:** As further adequate protection, the Debtors seek authorization to provide adequate protection to the Prepetition Lender in the form of payment in cash (and as to fees and expenses, without the need for the filing of a formal fee application) of (i) interest, at the default rate, (ii) subject to the provisions of paragraph 25 of the Interim Order, within two (2) business days after receipt of an applicable fee and expense statement or invoice (which may be redacted or modified to the extent necessary to delete any information subject to the attorney-client privilege, any information constituting attorney work product, or any other confidential information, and the provision of such invoices shall not constitute any waiver of the attorney client privilege or of any benefits of the attorney work product doctrine), payment of the reasonable fees, expenses, and disbursements (including without limitation, the fees, expenses, and disbursements of counsel and third-party consultants and other vendors, including without limitation, financial advisors and

	<p>auditors) incurred by the Prepetition Lender arising prior to the Petition Date, and (iii) the reasonable fees, expenses, and disbursements (including without limitation, the fees, expenses, and disbursements of counsel and third-party consultants and other vendors, including without limitation, financial advisors and auditors) incurred by the Prepetition Lender arising subsequent to the Petition Date.</p>
<p>Reporting and Budget Compliance</p>	<p>The Cash Collateral Orders provide that (i) for each week set forth in the Budget, the Debtors' actual cash expenditures for each line item of the Budget for such week shall not exceed the corresponding budgeted line item amount in the Budget for such week; provided that the Debtors' actual cash expenditures for any weekly period may exceed the corresponding budgeted amounts for such week and still be considered an authorized expenditure under the Budget (a "Permitted Variance") if and only if such actual expenditures shall not exceed such budgeted amounts by more than the sum of (a) ten percent (10%) of such budgeted amounts for such week plus (b) the positive difference, if any, of the budgeted amounts in the Budget for all weekly periods prior to the first day of such week (the "Prior Budget Periods") minus the actual aggregate expenditures of the Debtors for such week during the Prior Budget Periods; (ii) except to the extent approved in writing by the Prepetition Lender in its sole discretion or as expressly provided in paragraph 4 of the Interim Order, (a) no unused portion of any line item amount for any type of expenditure set forth in the Budget shall be used to pay amounts set forth in any other line item for any time period or to pay amounts set forth in the same line item for any other time periods and (b) no Debtor shall use any Cash Collateral to pay, unless set forth in the Budget, any administrative expense claims arising under section 503(b)(9) of the Bankruptcy Code or any prepetition unsecured claims (including pre-petition priority unsecured claims), in each case whether pursuant to Section 105, 363, 365 or any other provision of the Bankruptcy Code or otherwise. Notwithstanding anything to the contrary in the Interim Order, if the Prepetition Lender permits the use of Cash Collateral in excess of any terms, limits, or conditions set forth in this Order (including, without limitation, the Budget), such uses of Cash Collateral shall be entitled to and</p>

	governed by the rights, priorities, benefits and protections of the Interim Order. Each Debtor shall be deemed to have expended any unencumbered cash that was available to it as of or after the Petition Date before expending any Cash Collateral.
Carve-Out	<p>The Interim Order provides that that all claims and liens granted by the Interim Order shall be subject to the Carve-Out, to the extent provided in the Interim Order. As used in the Interim Order, the term “Carve-Out” shall mean an amount equal to the sum of (a) all fees required to be paid to the clerk of the Court or any claims and noticing agent acting in such capacity and to the Office of the U.S. Trustee under section 1930(a)(6) of title 28 of the United States Code and (b) allowed claims for unpaid fees, costs, and expenses (the “Allowed Fees”) incurred by persons or firms retained by the Debtors or a Creditors’ Committee (if appointed) whose retention is approved by the Bankruptcy Court pursuant to section 327, 328, and 1103 of the Bankruptcy Code (collectively, the “Professional Persons”), subject to the terms of this Interim Order, the Final Order and any other interim or other compensation order entered by the Bankruptcy Court that are incurred or earned (1) at any time before delivery by the Prepetition Lender of a Carve-Out Trigger Notice (as defined below) (the “Pre-Trigger Date Fees”), whether allowed by the Bankruptcy Court prior to or after delivery of a Carve-Out Trigger Notice, strictly subject to and limited by the amounts set forth in the Budget for the payment of such Professional Persons, this Interim Order, or otherwise on fees permitted to be incurred in connection with any permitted investigations of claims and defenses against the Prepetition Lender; and (2) starting the first day after the delivery of written notice (which may be by electronic mail) (the “Carve-Out Trigger Notice”) of an Event of Default (such date on which the Event of Default occurs, the “Trigger Date”) and the continuation thereof to the Debtors, the Debtors’ counsel, the U.S. Trustee, and counsel for any Creditors’ Committee, in an aggregate amount not to exceed \$75,000 (the, “Post-EoD Carve-Out Amount”); provided, that nothing in the Interim Order shall be construed to impair the ability of any party to object to the fees, expenses, reimbursement or</p>

	compensation described in clauses (a), (b), (c)(1) or (c)(2) above, on any grounds.
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COMPLIANCE WITH LOCAL BANKRUPTCY RULE 4001-2

25. The following chart addresses certain terms of the Interim Order and/or Final Order, as applicable, in accordance with Local Bankruptcy Rule 4001-2(a)(i):²

<p>Cross-Collateralization <i>Local Rule 4001-2(a)(i)(A)</i></p>	<p>The Cash Collateral Orders provide replacement liens on certain collateral that was unencumbered prior to the Petition Date, including the proceeds from any disposition of the Debtors’ various leasehold interests. Interim Order, ¶ 9.</p>
<p>Findings of Fact <i>Local Rule 4001-2(a)(i)(B)</i></p>	<p>The Cash Collateral Orders contain provisions or findings of fact that bind the estate or other parties-in-interest with respect to the validity, perfection or amount of Prepetition Lender’s prepetition lien or a waiver of claims against Prepetition Lender. The Cash Collateral Orders provide (a) that a timely proceeding to challenge the Prepetition Lien and Claim Matters (each as defined in the Interim Order, and each such proceeding or appropriate pleading commencing a proceeding or other contested matter, a “Challenge”) must be commenced by no later than the earliest of: (1) 60 calendar days from the date of entry of the appointment of a Creditors’ Committee and (2) 75 calendar days from the Petition Date (the “Challenge Deadline”), as such applicable date may be extended in writing from time to time in the sole discretion of the Prepetition Lender, and (b) this Court enters judgment in favor of the plaintiff or movant in any such timely and properly commenced Challenge proceeding and any such judgment has become a final judgment that is not subject to any further review or appeal. Interim Order, ¶ 29(i).</p>

² This summary is intended solely for informational purposes and is qualified in its entirety by the Interim Order. In the event there is any conflict between this Motion and the Interim Order, the Interim Order will control in all respects. Capitalized terms used in the following chart but not defined therein have the meanings set forth in the Interim Order.

<p>Section 506(c) Waiver <i>Local Rule 4001-2(a)(i)(C)</i></p>	<p>The Cash Collateral Orders contain a provision that seeks to waive the Debtors' estates' rights under section 506(c) of the Bankruptcy Code, but which shall not become effective until entry of the Final Order. Interim Order, ¶ 31.</p>
<p>Liens on Causes of Action <i>Local Rule 4001-2(a)(i)(D)</i></p>	<p>The Cash Collateral Orders do not contain provisions that immediately grant to Prepetition Lender liens on the Debtors' claims and causes of section under sections 544, 545, 547, 548 or 549 of the Bankruptcy Code, but do contain provisions that grant liens to Prepetition Lender on the proceeds of such causes of action, but which shall not become effective until entry of the Final Order. Interim Order, ¶ 9(i)</p>
<p>Prepetition Debt deemed Postpetition Debt <i>Local Rule 4001-2(a)(i)(E)</i></p>	<p>The Cash Collateral Orders do not contain provisions that deem prepetition secured debt to be postpetition debt or that use postpetition loans from Prepetition Lender to pay part or all of such parties' prepetition debt.</p>
<p>Disparate Treatment for Professionals <i>Local Rule 4001-2(a)(i)(F)</i></p>	<p>The Cash Collateral Orders provide disparate treatment for the professionals retained by a creditors' committee from those professionals retained by the Debtors with respect to a professional fee carve-out – the amounts of the carve-out are set forth in the Budget and different amounts are budgeted based on projected fees and expenses.</p>
<p>Priming Liens <i>Local Rule 4001-2(a)(i)(G)</i></p>	<p>The Cash Collateral orders do not contain provisions that prime any secured lien without the consent of that lienor.</p>
<p>Section 552(b)(1) Waiver <i>Local Rule 4001-2(a)(i)(H)</i></p>	<p>The Cash Collateral Orders contain a provision that limits the Court's power to consider the equities of the case under section 552(b)(1) of the Bankruptcy Code, but which shall not become effective until entry of the Final Order. Interim Order, ¶ 33.</p>

APPLICABLE AUTHORITY

I. Use of Cash Collateral Should be Authorized

26. The Debtors' require use of the Cash Collateral, and all other Prepetition Collateral, to (1) permit the orderly continuation of their business, (2) maintain the confidence of

their employees and customers, (3) preserve the value of the Debtors, and (4) implement their sale process, including the Store Closing Sales.

27. Bankruptcy Code section 363(c)(2) provides that the Debtors may not use, sell or lease cash collateral unless “(a) each entity that has an interest in such cash collateral consents; or (b) the court, after notice and hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.” 11 U.S.C. § 363(c)(2). Prepetition Lender has consented to the Debtors’ use of Cash Collateral, and all other prepetition collateral, on the terms and conditions set forth in the Interim Order.

28. Accordingly, based on the foregoing, the Debtors respectfully request that the Court authorize the Debtors to use the Cash Collateral, and all other Pre-Petition Collateral, in accordance with the terms set forth in the Interim Order.

II. The Proposed Adequate Protection Should be Authorized

29. In exchange for the Debtors’ use of the Cash Collateral and all other Pre-Petition Collateral, the Debtors have agreed to provide certain adequate protection to Prepetition Lender. To that end, the Debtors and Prepetition Lender have negotiated, and the Debtors request that the Court approve, as of the Petition Date, certain protections of Prepetition Lender’ interest in the Pre-Petition Collateral from any diminution in value resulting from the Debtors’ use, sale or lease of such collateral or the imposition of the automatic stay.

30. Subject to the Carve-Out, such protections for Prepetition Lender include: (i) Adequate Protection Liens; (ii) superpriority claims as provided in section 507(b) of the Bankruptcy Code; (iii) payment of reasonable and documented fees and expense of Prepetition Lender; (iv) the Debtors’ compliance with providing a budget reconciliation and other financial reporting requirements set forth in the Cash Collateral Orders and compliance with the Budget; and (v) adequate protection payments in the form of interest, at the default rate.

31. In almost all cases, a debtor's use of cash collateral is conditioned on providing secured parties with adequate protection. *See* 11 U.S.C. § 363(e) (allowing entities with an interest in property being used by a debtor to request adequate protection). The specific adequate protection in a particular case is evaluated on a case-by-case basis and may be provided in various forms, including payment of adequate protection fees, payment of interest, or granting of replacement liens or administrative claims. *See Resolution Trust Corp. v. Swedeland Dev. Group, Inc.(In re Swedeland Dev. Group, Inc.)*, 16 F.3d 552 (3d Cir. 1993) (“[A] determination of whether there is adequate protection is made on a case by case basis.”); *In re Mosello*, 195 B.R. 277, 289 (Bankr. S.D.N.Y. 1996) (“[T]he determination of adequate protection is a fact specific inquiry . . . left to the vagaries of each case”) (citation and quotation omitted).

32. The Debtors' requested use of the Cash Collateral and the protection afforded to Prepetition Lender, in light of the circumstances, are reasonable, appropriate, and sufficient to satisfy the legal standard of “adequate protection” and will serve to maintain the value of the prepetition collateral. In particular, the Cash Collateral will be used to sustain the Debtors' business operations, allowing for an orderly sale of its assets in order to maximize the value of the Debtors' estates. If the Cash Collateral is not available for this purpose, the Debtors will be unable to fund payroll obligations or otherwise maintain their operations, thereby dissipating value which could be achieved in connection with the Store Closing Sales and other asset sales. Ultimately, authorizing the use of the Cash Collateral will protect Prepetition Lender' security interests by preserving the value of their collateral. *Constable Plaza Assocs., L.P.*, 125 B.R. 98, 105 (Bankr. S.D.N.Y. 1991) (observing that the debtor's use of rents to maintain and operate property “will serve to preserve or enhance the value of the building which, in turn, will protect the collateral covered by [the secured lender's] mortgage”).

33. The Debtors believe that the proposed adequate protection is fair and reasonable. *See* 11 U.S.C. § 361(1) and (2). Prepetition Lender has agreed that the adequate protection described above is sufficient to allow the Debtors to use the Cash Collateral, and all other Prepetition collateral, as the Debtors move forward with the Store Closing Sales and these Chapter 11 Cases generally. Accordingly, based on the foregoing, the Debtors respectfully request that the Court authorize the Debtors to provide certain adequate protections in accordance with the terms set forth in the Cash Collateral Orders.

INTERIM ORDER AND FINAL HEARING

34. Pursuant to Bankruptcy Rules 4001(b)(2) and 4001(c)(2), the Debtors request that the Court set a date for the Final Hearing that is as soon as practicable, and fix the time and date prior to the Final Hearing for parties to file objections to the Motion.

35. The urgent need to preserve the Debtors' businesses, and thereby avoid immediate and irreparable harm to the Debtors' estates, makes it imperative that the Debtors be authorized to use the Cash Collateral as soon as possible, pending the Final Hearing. Without the ability to obtain access to Cash Collateral, the Debtors would be unable to meet their postpetition obligations while conducting the Store Closing Sales, thus causing irreparable harm to the value of the Debtors' estates and ending the Debtors' efforts to maintain operations through a sale process.

36. Accordingly, the Debtors respectfully request that, pending the hearing on the Final Order, the Interim Order be approved in all respects and that the terms and provisions of the Interim Order be implemented and be deemed binding and that, after the Final Hearing, the Final Order be approved in all respects and the terms and provisions of the Final Order be implemented and be deemed binding.

IMMEDIATE RELIEF IS NECESSARY

37. Bankruptcy Rule 6003 provides that the relief requested in this Motion may be granted if the “relief is necessary to avoid immediate and irreparable harm.” Fed. R. Bankr. P. 6003. The Debtors submit that for the reasons already set forth herein, the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtors and their estates.

WAIVER OF ANY APPLICABLE STAY

38. The Debtors also requests that the Court waive any applicable stay of the Cash Collateral Orders, including any stay that may be imposed by Bankruptcy Rule 4001(a)(3) and Bankruptcy Rule 6004(h). As described above, the relief that the Debtors seek in this Motion is necessary for the Debtors to operate their businesses without interruption and to preserve value for their estates. The exigent nature of the relief sought herein justifies immediate relief.³

NOTICE

39. Notice of this Motion has been provided to: (a) the Office of the United States Trustee; (b) Prepetition Lender, National Association; (c) the Debtors’ twenty (20) largest unsecured creditors on a consolidated basis (excluding insiders); (d) all applicable federal, state and local taxing and regulatory authorities having jurisdiction over the Assets; (f) all parties known to the Debtors who hold any liens or security interest in the Debtors’ Assets who have filed UCC-1 financing statements against the Debtors, or who, to the Debtors’ knowledge, have asserted any liens on any of the Debtors’ Assets; (g) Amalgamated Local 298 AFL-CIO; and (h) all parties who have filed a notice of appearance and request for service of papers pursuant to

³ The Debtors also seek a waiver of the notice requirements of Bankruptcy Rule 6004(a), to the extent applicable.

Bankruptcy Rule 2002. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

NO PRIOR REQUEST

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

CONCLUSION

WHEREFORE, based upon the foregoing, the Debtors requests entry of the Cash Collateral Orders granting the relief requested herein and such other relief the Court deems just and proper.

Dated: October 24, 2018

SAUL EWING ARNSTEIN & LEHR LLP

By: /s/ Mark Minuti
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