

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)	Chapter 11
THE FAIRCHILD CORPORATION, <u>et al.</u> , ¹)	Case No. 09-
Debtors.)	Joint Administration Pending

MOTION OF THE DEBTORS FOR AN ORDER (A) AUTHORIZING THE DEBTORS TO OBTAIN FROM PNC BANK, NATIONAL ASSOCIATION POST-PETITION FINANCING AND GRANTING SECURITY INTERESTS AND SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS PURSUANT 11 U.S.C. §§ 105(a), 364(c), 364(d) AND 507(b) OF THE BANKRUPTCY CODE; (B) TO REFINANCE CERTAIN PREPETITION SECURED INDEBTEDNESS; (C) MODIFYING THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362; (D) GRANTING OTHER RELIEF; AND (E) SCHEDULING A FINAL HEARING PURSUANT TO BANKRUPTCY RULE 4001

The Fairchild Corporation (“Fairchild” and/or “Holdings”), and its affiliated debtors (“Affiliate Debtors”, together with Holdings, collectively the “Debtors” and each individually the “Debtor”), on behalf of the debtor parties to the DIP Financing Documents (as defined below) (collectively, the “Borrowers” and each individually a “Borrower”) and Fairchild, on its own behalf, each as a Debtor and Debtor-in-Possession in the above-captioned chapter 11 cases (the “Chapter 11 Cases”), pursuant to Sections 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d) and 507(b) of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”) and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), through its proposed counsel, hereby brings this motion

¹ The last four digits of Fairchild’s federal tax identification number are 8587. The mailing address for Fairchild is 1750 Tysons Boulevard, Suite 1400, McLean, VA 22102. Due to the large number of Debtors in these cases, for which the Debtors have requested joint administration, a complete list of the Debtors, the last four digits of their federal tax identification numbers and their addresses is not provided herein. A complete list of such information may be obtained on the website of the Debtors’ proposed noticing and claims agent at <http://chapter11.epiqsystems.com/fairchild>.

(the "Motion") for an interim order substantially in the form attached hereto as Exhibit A (the "Interim Order") and a final order substantially in the same form (the "Final Order" and, together with the Interim Order, the "DIP Orders") seeking, among other things:

a) authorization and approval for the Borrowers to obtain post-petition loans, advances and other financial accommodations (the "Post-Petition Financing") on an interim basis for a period through and including the date of the Final Hearing (as defined below) from PNC Bank, National Association ("PNC"), in its capacity as agent (in such capacity, the "Agent") for itself and the other financial institutions from time to time party to the PNC DIP Agreements (as defined below) as lenders (collectively, the "Lenders"), under or in connection with debtor-in-possession revolving credit facilities (the "PNC DIP Facility") in an aggregate amount of up to \$23 million and otherwise in accordance with the Interim Order, secured by first priority perfected security interests in and liens, senior and above all other liens upon all of the DIP Collateral, pursuant to sections 364(c)(2), 364(c)(3) and 364(d) of the Bankruptcy Code senior to all other liens and claims other than the lien in favor of Wells Fargo Financial Leasing on specific equipment of Professional Aircraft Accessories, Inc. ("PAA") evidenced by the UCC filing against PAA filed on December 16, 2008 with the Secretary of State for the State of Florida (the "Wells Fargo Lien") to the extent such lien is a valid, perfected and unavoidable lien or security interest existing as of the Petition Date and otherwise senior to the lien of Lenders in such equipment as of the Petition Date (a "Permitted Lien");

b) authorization for the Borrowers (also known as "DIP Borrowers") and Fairchild (collectively, the "Banner/Holdings Debtors") to enter into (i) the Collateral Pledge Agreement in favor of Agent and Lenders pursuant to which Fairchild pledges and grants a lien on its equity interests in the Borrowers and the Borrowers pledge and grant a Lien on all of their

investment property (the “Pledge Agreement”), (ii) the Guaranty Agreement (“Guaranty”) in favor of Agent and Lenders pursuant to which Fairchild guarantees all Obligations² arising under the PNC DIP Agreements (as defined below), (iii) the DIP Financing Agreement with the Agent and the Lenders, substantially the form attached to the Interim Order as **Exhibit 2** (the “DIP Domestic Credit Agreement”), and (iv) the Export-Import DIP Financing Agreement with Agent and the Lenders, substantially in the form attach to the Interim Order as **Exhibit 3** (the “DIP Ex-Im Credit Agreement”), together with the DIP Domestic Financing Agreement, the “PNC DIP Agreements”), each of which is reflected in all material respects in the terms and conditions set forth in the proposed Interim Order (the Pledge Agreement, the Guaranty, the PNC DIP Agreements, the Interim Order and the Final Order (as defined below) together with all other agreements, documents and instruments to be executed or delivered in connection therewith, collectively, the “DIP Financing Documents”);

c) authorization to borrow upon entry of the Interim Order, up to an aggregate principal amount not to exceed \$23 million to be used in part for working capital and to refinance the outstanding principal balance of the revolving loans and obligations under the Revolving Credit and Security Agreement dated as of June 20, 2008 (as amended, supplemented, extended or otherwise modified from time to time, the “Domestic Prepetition Revolving Credit Agreement”), by and among Banner Aerospace Holding Company I, Inc., DAC International, Inc., Maptech Aerodata, LLC, Matrix Aviation, Inc., NASAM Incorporated, Professional Aircraft Accessories, Inc., Professional Aviation Associates, Inc. and GCCUS, Inc. (jointly and severally the “Prepetition Borrowers”), and under the Export-Import Revolving Credit and

² Capitalized terms used but not otherwise defined in the Interim Order shall have the respective meanings ascribed thereto in the DIP Financing Agreement and the Ex-Im DIP Financing Agreement (as defined below).

Security Agreement dated as of June 20, 2008 by and among Prepetition Borrowers and PNC National Association as Agent and Lenders and guaranteed by the United States Export-Import Bank (as amended, supplemented, extended or otherwise modified from time to time, the “Ex-Im Prepetition Revolving Credit Agreement”, together with the Domestic Prepetition Revolving Credit Agreement, collectively, the “Prepetition Credit Agreements”), which shall indefeasibly satisfy in full the outstanding obligations under the Prepetition Financing Documents (as defined below).³

d) modification of the automatic stay to the extent hereinafter set forth and waiving the ten (10) day stay provisions of Bankruptcy Rule 6004(h);

e) the grant to the Agent, for the benefit of itself and the other Lenders, of superpriority administrative claim status pursuant to sections 364(c)(1) and 507(b) of the Bankruptcy Code in accordance with the terms of the Interim Order in respect of all Obligations (as defined below); and

f) the setting of a final hearing on the Motion (the “Final Hearing”) within twenty (20) days of the Petition Date (as hereinafter defined).

In support of the Motion, the Debtors submit the PNC DIP Agreements and the proposed budget attached to the Interim Order as **Exhibit 1** (the “Budget”), and the Declaration of Donald E. Miller, Chief Restructuring Officer of each of the Debtors in Support of First Day Pleadings

³ The Prepetition Credit Agreements and all other agreements, documents and instruments executed or delivered with, to, or in favor of the Agent and the Lenders, including, without limitation, all security agreements, notes, guarantees, mortgages, Uniform Commercial Code financing statements and all other related agreements, documents and instruments executed and/or delivered in connection with the Prepetition Credit Agreements or related, as all of the same have heretofore been amended, supplemented, modified, extended, renewed, restated or replaced at any time prior to the Petition Date, are collectively referred to as the “Prepetition Financing Documents” and are contained in the **Exhibit Supplement** filed contemporaneously with the Motion.

(the "Miller Declaration") filed contemporaneously with this Motion, and respectfully state as follows:

Jurisdiction

1. On the date hereof (the "Petition Date"), the Debtors commenced the Chapter 11 Cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code. No creditors' committee has been appointed in the Chapter 11 Cases by the United States Trustee. The Debtors are continuing in possession of their respective properties and are operating their respective businesses, as debtors-in-possession, pursuant to sections 1107 and 1108 of the Bankruptcy Code.

2. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

3. The statutory predicates for the relief sought herein are sections 105, 362, 364(c) and (d) and 507(b) of the Bankruptcy Code, the Bankruptcy Rules 2002, 4001 and 9014 and Local Rule 4001-2.

Introduction

A. The Debtors' Businesses.

4. The Debtors are a multi-faceted group of companies with a history dating back to 1961. Until recently, the parent Debtor, Fairchild, was publicly traded on the New York Stock Exchange (the "NYSE"). Over the years the Debtors have acquired and sold a wide variety of businesses. As of the Petition Date, the Debtors' operations are in two distinct divisions: Fairchild Sports and Banner Aerospace each of which has several companies in its

group. In addition to these two operating divisions, Fairchild owns several parcels of real estate in Farmingdale, New York, which it has been in the process of selling or developing.

5. **Fairchild Sports**. Fairchild Sports (“Fairchild Sports”) consists of three businesses: Polo Express (“Polo”), Hein Gericke (“HG”) and Fairchild Sports USA (“FSUSA”), each concentrating primarily on motorcycle protective apparel, helmets and technical accessories for motorcyclists. Polo is a German company which operates 94 retail shops in Germany and Switzerland.⁴ HG is also a German company and operates 139 retail shops in five European countries. FSUSA operates, designs and distributes operations in the United States, supporting the HG stores and independently selling to third-party retailers. While neither Polo nor HG is a Debtor in the Chapter 11 Cases, FSUSA is one of the Debtors.

6. **Banner**. Banner Aerospace Holding Company I, Inc. (“Banner”) is a related group of aerospace businesses consisting of six (6) companies: DAC International, Inc.; GCCUS, Inc.; Matrix Aviation, Inc.; NASAM Incorporated; Professional Aircraft Accessories, Inc.; and Professional Aviation Associates, Inc. Together, the Banner companies provide two basic types of services: (i) distribution of aerospace equipment (avionics, instrumentation, radar systems, King Air or Learjet parts) and (ii) repair/overhaul of Beechcraft, Gulfstream, Embraer, Lockheed, Boeing and Bombardier aircraft (with specializations in pressurization, instrumentation, avionics, aircraft accessories and airframe components). Banner’s distribution operations stock and distribute a wide variety of aircraft parts to commercial airlines, air carriers, fixed-base operators and corporate operators and other aerospace companies. Banner’s repair

⁴ As a result of a transaction in January 2009, Polo is no longer majority-owned by the Debtors. Fairchild nonetheless continues to indirectly own 49% of Polo. The Debtors believe that the commencement of the Chapter 11 Cases will have little effect on the Polo operations. In March 2009, HG’s need for capital and a concern over the potential upstream liability to Fairchild arising in an insolvency by HG, the Debtors entered into a transaction with the Managing Director of HG and other executives, whereby they took ownership of HG in return for securing capital for the company and future cash consideration to Fairchild.

and overhaul services specialize in landing gear, pressurization components and instruments for customers worldwide. Other than certain foreign business shells, each of the Banner companies are Debtors in the Chapter 11 Cases.

7. Fairchild's real estate includes several substantial parcels in Farmingdale, New York, all near Republic Airport, the largest of which, 19.2 acres, is awaiting development permits. Development of these parcels has been stalled by complex litigation with New York State Department of Transportation, the owner of Republic Airport.

B. Economic Performance and Other Challenges.

8. The Debtors as a whole have experienced annual operational losses for more than ten years. While not all of these losses are attributable to present business operations (they are, in part, due to challenges facing operations that were once part of the Debtors), current operations as a whole continue to operate at a loss. Both Polo and Banner have been working to keep pace with recent economic events challenging their businesses worldwide. However, the remainder of the Debtors' operations have been more severely hurt by these economic events.

9. On a stand-alone basis, both Banner and Polo have been profitable. Banner employs over 190 salaried and hourly employees, working primarily in locations throughout the United States. It posted annual revenues exceeding \$85 million and net operating income of \$6.5 million for the fiscal year ended September 30, 2007. In fiscal 2007, Polo posted annual revenues exceeding \$140 million and net operating income of \$12 million. This collective net operating income was offset in 2007 by operational losses at FSUSA and HG combined with substantial Fairchild corporate overhead for losses exceeding \$59 million.

10. Until this year, Fairchild's Class A Common Stock was publicly traded on the NYSE under the symbol "FA." On January 5, 2009, Fairchild was notified by letter that

trading would be suspended before the opening of the trading session on January 9, 2009 as a result of Fairchild's failure to remain above the NYSE's continued listing standard regarding average global market capitalization. The Class A Common Stock was thereafter removed from listing on, and registration with, the NYSE at the opening of business on February 5, 2009. Fairchild remains a registrant with filing requirements under the Securities Exchange Act of 1934.

11. On November 8, 2004, a shareholder derivative action was filed in the Delaware Chancery Court against certain former officers and directors of Fairchild, some of whom continue to serve, alleging, primarily, that Fairchild's former (and now deceased) Chairman and CEO, Jeffrey Steiner, and to a lesser extent, his son, Eric Steiner, had received from Fairchild payments to which they were not entitled and/or were excessive (the "Derivative Action"). The Derivative Action resulted in the entry of a Amended and Supplemental Stipulation of Settlement of The Fairchild Corporation Stockholder Derivative Litigation (the "Consent Decree") approved by the Chancery Court on November 23, 2005. Among other things, the Consent Decree provided that:

- Jeffrey Steiner would reimburse Fairchild for legal expenses and fees incurred in connection with certain specified litigation;
- Both Jeffrey Steiner's and Eric Steiner's employment agreements would be reduced in term and in amount of compensation;
- An 'Oversight Committee' consisting of non-management directors would be established to review and give prior approval for all transactions, compensation or other payments to any executive officer;
- Fairchild would conduct a review and overhaul of the process by which business expenses are approved and reimbursed, including the elimination of corporate credit cards for non-sales employees;

- Fairchild would close its Paris office;
- Fairchild would not lease any aircraft from Steiner-related entities; and
- Changes would be made to the way existing Executive and Compensation Committees were empowered, constituted and conducted.

C. Turnaround Efforts.

12. Beginning in 2006, the Phoenix Group (“Phoenix”) indicated an interest in establishing a position in the companies. Phoenix is a Delaware limited liability company that, through managed funds, has specialized in making privately negotiated equity and equity-related investments in North American small-capitalization public companies with turnaround opportunities. Phoenix is managed by its main principals, Philip S. Sassower and Andrea Goren, who together have over 40 years of experience in turning around publicly-traded companies. The Debtors had a series of negotiations with Phoenix that ultimately resulted in Phoenix, through Phoenix FA Holdings, LLC, acquiring from outside shareholders approximately 30.5% of the outstanding Class A Common Stock of Fairchild in December of 2007.

13. Following the investment by Phoenix, Fairchild underwent a series of changes in management and the composition of the Board of Directors (the “Board”), as follows:

- Following the investment, Messrs. Sassower and Goren were elected by the Board as independent members;
- On May 13, 2008, the Board following an annual meeting of the shareholders of Fairchild asked Mr. Sassower to take on the role as Chairman, with Jeffrey Steiner remaining in his role as Director and Chief Executive Officer and Eric Steiner remaining as Director, President and Chief Operating Officer;
- On October 7, 2008, Jeffrey Steiner resigned from his role as Chief Executive Officer due to illness. On that same date, the Board asked Mr. Sassower to take on the additional role of Chief

Executive Officer, which he agreed to do with Eric Steiner on a shared, acting basis, as Chief Executive Officers;

- On November 1, 2008, Jeffrey Steiner passed away, creating a vacancy on the Board that has not been filled;
- On December 12, 2008, Eric Steiner resigned from his role as Acting Co-Chief Executive Officer, President and Chief Operating Officer. He remains a Director. As a result of Eric Steiner's resignation, Mr. Sassower was asked to and agreed to become sole Acting Chief Executive Officer;
- On December 29, 2008, Warren D. Persavich, President and former Senior Vice President and Chief Financial Officer of Banner, resigned. At the same time, Richard P. Nyren, Fairchild's Controller, left the Debtors for another position; and
- On December 31, 2008, Donald E. Miller, Fairchild's Executive Vice President, General Counsel and Secretary, retired.

14. The net result of these overwhelming changes in management has been that Mr. Sassower, himself new to Fairchild but presently both Chairman of the Board and Acting Chief Executive Officer, has been left with the task of managing the Debtors' operations and finding and implementing a turnaround strategy in the best interest of the Debtors, their estates, and all parties in interest. Despite the unlikelihood that Phoenix's investment in Fairchild will recover anything from the efforts, Mr. Sassower has accepted no compensation from the Debtors in return for Fairchild's ever-increasing demand for his services, and has made extraordinary efforts to find a solution to Fairchild's issues.

15. Among other things, Fairchild's management has significantly reduced corporate overhead, much of which was disproportionately high as a legacy from the Debtors' previous, much larger organization and its former composition. For example, the Debtors currently employ only thirteen salaried employees and consultants in their corporate offices, down from over forty in August 2008. It has also closed two satellite executive offices used

primarily by Jeffrey Steiner, and discharged all personnel associated with those offices. The resulting annual reduction in base salary alone has been nearly \$5 million.

16. Further, in an effort to secure a €20 million working capital facility required to support Polo's business, the Debtors in January 2009 sold 51% of their stake in Polo to Polo's founder, Klaus Esser. The sale, for €15 million, allowed the Debtors to repay Hein Gericke's outstanding loans from Sparkasse and HSBC of approximately €10 million, releasing a related pledge on Polo's equity and allowing Polo to receive urgently required working capital funding from a banking syndicate that also includes Sparkasse and HSBC. The sale further resulted in €1.8 million in much needed funds for the Debtors, with another €2.5 million in funds which is presently held in escrow though may be made available at a later date.

17. Fairchild's Oversight Committee has also begun the process of investigating and, where appropriate, asserting claims against the Estate of Jeffrey Steiner who may have wrongfully extracted value from the Debtors.

18. The Debtors also engaged the independent services of the law firm of Curtis, Mallet-Prevost, Colt & Mosle LLP ("Curtis") and the turnaround advisory firm of CRG Partners Group LLC ("CRG") to assist the Debtors in developing strategies to deal with the Debtors' deteriorating financial and operating condition. Neither Curtis nor CRG had previously worked for the Debtors, Phoenix or any of their respective affiliates.

19. Despite the efforts of Mr. Sassower and the Debtors, it has not been enough. Given the state of the current world economy, drastically changed exchange rates and the overall depression in sales and corresponding revenue reduction all business are presently experiencing, the Debtors have been unable to cope with falling revenues and at the same time address legacy liabilities: while the value of the Debtors' assets are drastically reduced when

marked to the current market, their liabilities have been growing. All of the Debtors' businesses have been hampered with numerous legacy liabilities, including under-funded pension obligations, retiree benefits, environmental claims, tort and other litigation. The development of their real estate assets has been blocked by expensive, obstructionist litigation. For example, the Debtors have been unable to make their last two quarterly pension fund payments of nearly \$1 million each due to insufficient liquidity to make the payments and satisfy operational costs.

20. Without, therefore, the relief afforded by chapter 11, realizing any significant value for the Debtors' businesses and a recovery for its pre-petition creditors, would be impossible.

D. Need for Relief.

21. Given the foregoing factors, the Debtors have determined that chapter 11 affords them the best possible tool to preserve and realize upon the going-concern value of the Banner entities and the equity ownership in Polo, and their real estate ventures, while at the same time addressing the significant impact of the legacy liabilities of the Debtors as a whole. The Debtors further believe that the forum provided in these Chapter 11 Cases will allow them to effectively realize upon their claims against third parties noted above.

22. In consultation with their professionals and after careful examination by the Debtors Board of Directors, the Debtors have determined that chapter 11, combined with an expeditious sale of the Banner companies through an auction process, is the best and most efficient way to maximize a return for the Debtors, their estates, and all parties-in-interest. In making this decision, the Debtors have taken into account the volatility to Banner's primarily service-based companies, the need to provide continuity and stability for Banner's customers and creditors and the further goal of preserving the employment of the Banner employees.

23. To further these efforts, Phoenix offered to the Board that if a buyer for Banner can not be found, Phoenix will purchase the Banner companies and finance the Chapter 11 Cases through the consummation of such a sale. The purpose of the offer was to allow the Debtors to know that both options were available, while having the opportunity to seek higher and/or better offers. In keeping with Phoenix's offer, and, given the inherent conflict presented by Phoenix's offer, the Board and Mr. Miller, who the Board retained to act as Chief Restructuring Officer and to report directly to it, instructed both CRG and Curtis to make a substantial effort to locate an independent buyer for Banner and another source of financing.

24. As set out in further detail in the sale pleadings filed contemporaneously with or shortly after the commencement of the Chapter 11 Cases, despite those efforts, no comparable buyer or source of post-petition financing has been found. The Board, with Messrs. Sassower and Goren not participating, determined in its business judgment that Phoenix's "backstop" offer is in the Debtors' best interests. Given the rapidly deteriorating financial condition of the Debtors, the Board has determined to go forward with the Phoenix offer (subject to a full auction process) while at the same time continuing their search for alternative transactions.

25. Today's filing reflects those decisions. The Debtors have sought protection under chapter 11 to provide themselves with the best platform from which to quickly realize upon the value of the Banner assets, and have contemporaneously filed (or shortly hereafter) motions to establish sale and bidding procedures—with Phoenix as the "stalking horse" buyer—to sell Banner and related assets to Phoenix or such higher and/or better bidder to emerge from the procedures requested. Further, the Debtors are seeking to enter into the short term financing arrangement proposed by Phoenix. The DIP Loan is essentially a bridge loan. In

conjunction with a second debtor-in-possession facility from PNC, the debtor-in-possession facility from Phoenix ensures that the Debtors will have sufficient liquidity to complete the sale of Banner while safeguarding its going-concern value in the interim between the Petition Date and the closing of the sale, and that the projected necessary working capital for the rest of the Debtors to continue the Chapter 11 Cases will be afforded prior to receiving the proceeds from the sale.

26. The Chapter 11 Cases have therefore been instituted to enable the Debtors to effectively take these steps and otherwise maximize the value of their assets

The Banner/Holdings Debtors' Prepetition Financing and Indebtedness

27. Prior to the Petition Date, the operations of the DIP Borrowers were financed by the Lenders pursuant to a \$28 million revolving credit facility under the Prepetition Financing Documents. The Prepetition Financing Documents consisted of two inter-related credit and security agreements, (a) the Domestic Prepetition Revolving Credit Agreement and (b) the Ex-Im Prepetition Revolving Credit Agreements. Amounts outstanding under the Prepetition Credit Agreements as of the Petition Date were approximately \$20 million. All of the obligations of the DIP Borrowers arising under the Prepetition Credit Agreements are referred to herein as the "Prepetition Obligations." The Prepetition Financing Documents provided working capital for the DIP Borrowers.

28. Pursuant to the Prepetition Credit Agreements, the Prepetition Obligations to the Lenders are secured by first-priority liens in and continuing pledges and securities interest of and against substantially all of the Borrowers' assets and Fairchild's equity interest in Banner (the "Prepetition Collateral") in favor of the Agent for the Lenders, subject to the lien in favor of Wells Fargo Lien to the extent it is a Permitted Lien.

29. In addition, the Pension Benefit Corporation (“PBGC”) has filed a Notice of Federal Lien in the amount of \$1,956,870 against Matrix, one of the DIP Borrowers, which lien is dated February 16, 2009. The lien relates to pension payments that the Debtors were unable to make due to their deteriorating financial condition. The Debtors believe that the PBGC lien is both subordinate to the Agent and Lenders’ prepetition liens and is unsecured.

30. As of the Petition Date, the Banner/Holdings Debtors were current on their financial obligations to PNC under the Prepetition Credit Agreements, and the Banner/Holdings Debtors’ business operations are stable.

The Phoenix Subordinated DIP Financing

31. While the Prepetition Financing Documents had historically been sufficient to meet the needs of the DIP Borrowers, additional financing is necessary for the Debtors because the PNC DIP Facility that is the subject of this Motion may not be used for the benefit of the Debtors other than the DIP Borrowers, except as set forth in the Budget. The Debtors do not have sufficient cash and require liquidity to operate their businesses and provide corporate overhead, administrative and professional support necessary to facilitate the sale of the assets of the DIP Borrowers and Fairchild Realty and the further sale, reorganization or winddown of the Debtors’ other operations pursuant to the Phoenix Sale (as defined below). Thus, the Banner/Holdings Debtors and Fairchild Realty LLC (“Realty”) have agreed to enter into a \$4 million subordinated financing facility with Phoenix Banner LLC (the “Subordinated DIP Facility”), for which the Debtors are requesting the Court’s approval under a separate motion filed contemporaneously with this Motion. The Subordinated DIP Facility is to be guaranteed by all the Debtors other than the DIP Borrowers and Realty and subordinated in all respects to the obligations under the PNC DIP Facility. The Subordinated DIP Facility is

essentially a bridge facility to allow the Debtors to fund the costs of pursuing the sale of the DIP Borrowers, the proceeds of which sale will in turn be used to fund the costs of the sale, reorganization or winddown of the Debtors' other operations.

Need for Additional DIP Financing

32. As set forth in the Miller Declaration, the Banner/Holdings Debtors lack sufficient available sources of working capital to operate the DIP Borrowers' businesses in the ordinary course without the financing contemplated by the PNC DIP Facility. The DIP Borrowers' ability to maintain business relationships with their vendors, suppliers and customers, to pay their employees, and to otherwise fund their operations is essential to the DIP Borrowers' continued viability. The ability of the Debtors to obtain sufficient working capital and liquidity through the proposed PNC DIP Facility, on the terms set forth in the PNC DIP Agreements and the Interim Order, is vital to the preservation and maximization of the going concern value of the Debtors' currently operating businesses pending a sale of substantially all of the DIP Borrowers' assets pursuant to the Sale Motion (as defined below). Accordingly, the DIP Borrowers have an immediate need for the financing proposed by the PNC DIP Facility in order to, among other things, permit the orderly continuation of the operation of their businesses, preserve jobs for their employees, maintain vendor support and minimize the disruption of their business operations, and manage and preserve the assets of the Debtors' bankruptcy estates in order to maximize the recoveries to the Debtors' creditors.

33. Contemporaneously with the filing of this Motion, the Debtors have filed with the court a motion (the "Sale Motion") seeking to sell (the "Phoenix Sale") substantially all of the assets of the DIP Borrowers to Phoenix Banner LLC ("Phoenix"), or such higher and/or

better offer obtained by the Debtors' estates as a result of the competitive bidding process outlined in the Sale Motion.

34. The Debtors' ability to pursue and consummate the Phoenix Sale depends heavily upon the timely access the proposed post-petition financing and authorization for the related relief requested herein. In order to continue to operate their businesses, safeguard and preserve the value of their assets through the anticipated sale, and to avoid immediate and irreparable harm to themselves, it is necessary for the Debtors to obtain the financing provided by the Lenders in accordance with terms set forth in the PNC DIP Agreements.

35. Since late January 2009, the Debtors, through their financial advisors CRG, have sought to obtain third party debtor-in-possession financing that would enable them to continue to operate pending the sale of the Banner/Holdings Debtors and Realty. CRG approached more than twenty well-known DIP financing lenders but was unable to find a third party lender to provide debtor-in-possession financing for the Debtors. Of the lenders approached, sixteen rejected the idea of second lien financing for the Debtors under any circumstances; the remaining lenders would only consider discussing financing at interest rates and facility fees significantly higher than those provided in the PNC DIP Facility. The Debtors also requested that PNC extend credit for the benefit of the Debtors' estates generally, but except as set forth in the Budget, PNC was unwilling to increase its funding levels or to permit its loan proceeds to be used other than for the DIP Borrowers, with certain provisions for limited funds to be used for Fairchild.

36. Based on the Debtors' prepetition efforts to obtain financing, the Debtors concluded that they are unable to obtain post-petition financing for the DIP Borrowers from sources other than PNC and Phoenix Banner on terms more favorable than those offered under

the PNC DIP Facility and the Subordinated DIP Facility, respectively. Nor were the Debtors able to obtain post-petition unsecured credit solely under section 503(b)(1) of the Bankruptcy Code, as an administrative expense under section 364(a) or (b) of the Bankruptcy Code, or in exchange for the grant of an administrative expense priority pursuant to section 364(c)(1) of the Bankruptcy Code, without the grant of liens on all or substantially all of the Debtors' assets pursuant to section 364(c) and section 364(d) of the Bankruptcy Code. The DIP Borrowers were unable to secure more favorable financing, including from Phoenix Banner.

37. Moreover, the needed financing is unavailable to the DIP Borrowers without the DIP Borrowers and Fairchild (a) granting to the Agent and Lenders, pursuant to section 364(c)(1) of the Bankruptcy Code, claims having priority over that of administrative expenses of the kind specified in sections 503(b) of the Bankruptcy Code (senior in priority to all other superpriority claims), and (b) securing such loans and other obligations with first priority liens on and security interests in all of the assets, properties and interests in property of the DIP Borrowers pursuant to sections 364(c)(2) – (3) and 364(d) of the Bankruptcy Code, as provided herein and in the PNC DIP Agreements and first priority pledge of all the stock of Banner held by Fairchild. Accordingly, the PNC DIP Facility is essential to provide necessary funding for the DIP Borrowers, it includes the most favorable terms available to the DIP Borrowers and should be approved.

Relief Requested

38. By this Motion, the Debtors seek entry of the Interim Order providing for the following relief:

- (a) authorizing (i) the DIP Borrowers to obtain post-petition financing in an aggregate amount not to exceed \$23 million pursuant to section 364 of the Bankruptcy Code and the PNC DIP Agreements, and (ii) the Fairchild

Corporation to (A) guaranty the DIP Borrowers' obligations under the PNC DIP Facility pursuant to the PNC DIP Guaranty Agreement and (B) pledge its equity interests in Banner;

- (b) authorizing the DIP Borrowers to execute and enter into the PNC DIP Agreements and to perform such other and further acts as may be required in connection with the PNC DIP Facility;
- (c) granting security interests, liens and superpriority claims (including a superpriority administrative claim pursuant to section 364(c)(1) of the Bankruptcy Code and liens and replacement liens pursuant to sections 364(c) and 364(d) of the Bankruptcy Code) to the Lenders to secure all obligations of the DIP Borrowers under and with respect to the PNC DIP Facility (collectively, the "PNC DIP Liens"), but subject in the case of priority to the Wells Fargo Lien to the extent it is a Permitted Lien and the Carve Out (as defined below);
- (d) modifying the automatic stay imposed under section 362 of the Bankruptcy Code to the extent necessary to permit the Debtors and the Lenders to implement the terms of the DIP Orders and upon an event of default on three (3) business days notice, and waiving the ten (10) day stay provision of Bankruptcy Rule 6004(h);
- (e) authorizing the immediate application of a portion of the proceeds of the PNC DIP Facility to satisfy in full the Debtors' obligations under the Prepetition Financing Documents and the other terms specified below;
- (f) authorizing the Debtors to waive and release all claims against the Lenders, including to contest the validity, extent or priority of the Lenders' claims, subject to the rights of a party with requisite standing to challenge same within 45 days of the Petition Date;
- (g) authorizing the Debtors to waive the right to seek to use cash collateral of the Lenders or obtain other post-petition loans or financial accommodations pursuant to section 364(c) or (d) of the Bankruptcy Code without the Lenders' consent;
- (h) prohibiting any other party to foreclose or otherwise seek to enforce any junior lien or claim in any of the collateral that secures the PNC DIP Facility;
- (i) scheduling, pursuant to Bankruptcy Rules 4001(b)(2) and 4001(c)(2), a Final Hearing on the Motion within twenty (20) days of the Petition Date to consider entry of the Final Order;
- (j) approving certain notice procedures for the hearings hereon; and

- (k) upon the issuance of the Final Order, (1) granting the Lenders a security interest in all causes of action and recovery rights under chapter 5 of the Bankruptcy Code, and (2) barring any surcharge of the Lenders' collateral under section 506(c) of the Bankruptcy Code (which would also be effective upon the continuation of the Interim Order beyond 30 calendar days).

39. Pursuant to the PNC DIP Facility, upon entry of the Interim Order, the Interim Borrowing of \$23 million, which is the maximum available credit under the facility, will be authorized in accordance with the Budget.⁵ Under the PNC DIP Facility, the Debtors are entitled to post-petition draws (the "Advances") in accordance with the Budget. All Advances are contingent upon entry of the Interim Order, and, ultimately, entry of the Final Order. The initial Advance will pay the Pre-Petition Obligations in full.

40. The Budget has been thoroughly reviewed by the Debtors' management and sets forth, among other things, the projected cash receipts and disbursements for the periods covered thereby. The Debtors believe in good faith that the Budget is achievable and will allow the Banners Debtors to operate in chapter 11 without the accrual of unpaid administrative expenses during the term of the Budget. The Debtors understand that the Lenders are relying upon the Debtors' compliance with the Budget in determining to enter into the post-petition financing that is contemplated by this Motion.

41. The PNC DIP Agreements were negotiated by the Debtors and the Lenders at arms' length and in good faith (as that term is defined in section 364(e) of the Bankruptcy Code). The Debtors believe that the terms of the PNC DIP Agreements are fair and

⁵ The Budget and the budget for the Subordinated DIP Facility together form a 13-week pro forma cash budget prepared by the Debtors and their professionals in consultation with PNC and Phoenix Banner LLC (the "Budget"). The Budget itemizes and forecasts the Debtors' cash flow and sources and uses of cash over the next 13 weeks. The Debtors believe and will show the Court at the Interim Hearing that the expenses forecast for the first 4 weeks must be paid to avoid immediate and irreparable harm to the Debtors and their estates.

reasonable, reflect the Debtors' exercise of prudent business judgment consistent with their fiduciary duties, and are supported by reasonably equivalent value and fair consideration.

Overview of PNC DIP Facility's Protections

42. Pursuant to the PNC DIP Facility, the DIP Borrowers will receive credit to meet their working capital needs in order to operate their businesses during these Chapter 11 Cases pending the sale of substantially all of their assets pursuant to the Sale Motion. The DIP Borrowers obligations under the PNC DIP Agreements will be secured by the PNC DIP Liens on the DIP Collateral. The PNC DIP Liens, which are to be effective upon the entry of the Interim Order without the necessity of any additional filings, shall be (i) senior to all liens, including existing prepetition and validly perfected liens of prepetition creditors as well as the Subordinated DIP Facility, other than the Wells Fargo Lien to the extent it is a Permitted Lien, and (ii) subject to the Carve Out.

43. Upon the entry of the Final Order, but not the Interim Order, the DIP Collateral shall also include the proceeds of any avoidance actions under chapter 5 of the Bankruptcy Code.

44. In addition, upon the entry of the Interim Order, Phoenix Banner and the PBGC may not enforce their rights, including to foreclose upon the DIP Collateral, until the DIP Borrowers' obligations under the PNC DIP Agreements have been paid in full.

45. Moreover, pursuant to section 364(c)(1) of the Bankruptcy Code, any claims of the Lenders arising under the PNC DIP Agreements will have priority over any and all

administrative expenses of the kind specified in sections 105, 326, 328, 330, 331, 503(b), 506(c), 364(c)(1), 507(b), 546(c), 726 and 1114 of the Bankruptcy Code.⁶

Summary of the PNC DIP Facility⁷

46. In accordance with Local Rule 4001-2(a)(ii), set forth below is a summary of certain significant terms and conditions of the PNC DIP Facility.⁸

- (a) DIP Borrowers. Banner Aerospace Holding Company I, Inc., GCCUS, Inc., Matrix Aviation, Inc., NASAM Incorporated, Professional Aviation Associates, Inc., DAC International, Inc., Professional Aircraft Accessories, Inc.
- (b) PNC DIP Facility. A senior secured, priming super-priority debtor-in-possession credit facility consisting of a revolving credit facility in the maximum aggregate amount equal to \$23 million with a \$12 million sublimit for advances under the DIP Ex-Im Credit Agreement. Availability under the PNC DIP Facility will be reduced dollar for dollar by the amounts outstanding under the DIP Ex-Im Credit Agreement.
- (c) Lenders. PNC Bank, National Association and other financial institutions from time to time party to the PNC DIP Facility.
- (d) Guarantors and Guaranty. The Fairchild Corporation shall guaranty the obligations of the DIP Borrowers and pledge its holdings of Banner's stock to secure its obligations under the Guaranty.
- (e) Designated Purposes. Subject to availability under the Borrowing Base, the proceeds of the PNC DIP Facility shall be used solely for the items, in the amounts and at the times set forth in the Budget to fund pending the sale of DIP Borrowers, the working capital needs of DIP Borrowers and repayment of the Prepetition Obligations.
- (f) Borrowing Base. The facility will include up to a \$23 million revolving credit facility that includes up to a \$12 million sublimit for advances under the DIP Ex-Im Credit Agreement.

⁶ Additional protections for the Lenders are specified in the Interim Order.

⁷ These description contained herein are only a summary of the terms contained in the PNC DIP Agreements and Interim Order and the parties are encouraged to review the agreements and order in their entireties.

⁸ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the PNC DIP Agreements, and all descriptions are subject to the terms and conditions of the PNC DIP Agreements.

- (g) Priority of Security Interests in DIP Collateral. All Obligations of Debtors to Agent and Lenders shall be secured by a first priority, perfected lien on all Prepetition Collateral and Post-Petition Collateral of the DIP Borrowers and the senior lien on the pledge of all the stock of Banner by Holdings (collectively, the “DIP Collateral”), subject only to the Carve Out, pursuant to sections 364(c) and 364(d) of the Bankruptcy Code, including without limitation, all Prepetition Obligations (which are to be paid in full and satisfied following the entry of the Interim Order) and the Post-Petition Obligations. All liens and security interests of the Lenders in the DIP Collateral shall be deemed valid and perfected upon entry of the Interim Order, without further action required by the Lenders. The Lenders shall not be required to marshal the DIP Collateral and may foreclose upon and liquidate any of the DIP Collateral in any order.
- (h) Superpriority. Pursuant to section 364(c)(1) of the Bankruptcy Code, all of the obligations of the DIP Borrowers and Holdings under the PNC DIP Facility shall constitute allowed superpriority administrative expense claims in the DIP Borrowers’ Chapter 11 Cases with priority over any and all administrative expenses of the kind specified or ordered pursuant to sections 105, 326, 328, 330, 331, 503(b), 506(c), 364(c)(1), 507(b), 546(c), 726 and 1114 of the Bankruptcy Code.
- (i) Carveout. The Lenders’ liens and security interests in the DIP Collateral and any proceeds received by the Lenders from the DIP Collateral following an event of default shall be subject to the prior payment of (a) the statutory fees payable to the U.S. Trustee pursuant to 28 U.S.C. § 1930(a)(6) with respect to the Borrowers (the “Statutory Fees”) and (b) the unpaid and outstanding reasonable fees and expenses actually incurred on or after the Petition Date, with respect to services performed solely with respect to the Borrowers and approved by a final order of the Court pursuant to Sections 326, 328, 330 or 331 of the Bankruptcy Code (collectively, the “Allowed Professional Fees”), by attorneys, accountants and other professionals retained by the Borrowers and any committee appointed for the Borrowers under Section 327 or 1103(a) of the Bankruptcy Code, less the amount of any retainers, if any, then held by such persons, in a cumulative, aggregate sum not to exceed in the case of all such Allowed Professional Fees incurred either before or after the Carve Out Termination Date (as defined below), the lesser of (I) the actual amount of such Allowed Professional Fees incurred on or after the Petition Date, and (II) three hundred thousand dollars (\$300,000) less the amount of all payments made by or on behalf of the borrows on account of such Allowed Professional Fees and Statutory Fees through, and including the Carve Out Termination Date and the amount of all payments made by or on behalf of the Borrowers on account of Allowed Professional Fees and Statutory Fees after the Carve Out Termination

Date (hereafter, the “Professional Fee Carve Out” and, together with the Statutory Fees, the “Carve Out”). The term “Carve Out Termination Date” means the date on which the Agent provides written notice to counsel for the Debtors, counsel for the Creditors Committee (if appointed), and the U.S. Trustee that an Event of Default has occurred and is continuing. Borrowers shall not use more than an amount in excess of \$50,000 in the aggregate of the indebtedness incurred pursuant to the PNC DIP Facility and the Subordinated DIP Facility, for parties in interest with the requisite standing to investigate (but not prosecute) claims against and objections with respect to the Prepetition Obligations and Prepetition liens and security interests of the Agent and the Lenders (including, without limitation, issues regarding validity, perfection, priority, or enforceability of the secured claims of the Agent and the Lenders).

- (j) Interest Rate. The sum of (a) the Alternate Base Rate plus three percent (3.0%) with respect to Domestic Rate Loans and (b) the sum of four percent (4.0%) plus the higher of (i) the Eurodollar Rate and (ii) two percent (2%) with respect to Eurodollar Rate Loans.
- (k) Conditions Precedent to Interim Borrowing. Lenders’ obligation to make available the Interim Borrowing is conditioned on a number of factors, including, but not limited to: (i) all of the “first day orders” entered at the time of the commencement of the Cases shall be satisfactory in form and substance to the Agent; (ii) the Budget being satisfactory to the Agent; (iii) entry of the Interim Order approving the Interim Borrowing without appeal, stay or modification; (iv) entry of an order acceptable to the Agent approving on an interim basis the PNC DIP Facility; (v) all PNC DIP Liens shall have been deemed valid and perfected upon entry of Interim Order, without further action required by the Agent, Lenders or any other party; (vi) a cash management order acceptable to the Agent encompassing the cash management arrangements currently in place under the Existing Credit Agreement shall be in full effect; (vii) the entry of an order of the Bankruptcy Court approving the Subordinated DIP Facility, including the execution and delivery of all related documentation in connection with such facility, which order and documentation shall be satisfactory to the Agent and provide financing sufficient to fund DIP Borrowers’ and other Debtors’ post petition expenses, including but not limited to allowed professional fees, commissions and statutory fees due to the United States Trustee; (viii) the DIP Borrowers shall have filed a satisfactory motion to establish bidding procedures and authorizing a sale of the DIP Borrowers’ assets; (ix) the Facility Fee shall have been paid to the Lenders; and (x) Lenders’ expenses and fees shall have been paid and reimbursed simultaneous with Interim Borrowing.

- (l) Termination Date. The Termination Date of the PNC DIP Facility shall be the date which is the earliest of (a) the date that is 100 days after the Petition Date; (b) the effective date of a confirmed plan of reorganization; (c) the date that is twenty-one (21) days after the entry of the Interim Order if the Final Order has not been entered by the Court by such date; (d) the date of the closing of a sale of substantially all of the DIP Borrowers' assets pursuant to section 363 of the Bankruptcy Code; (e) the date of conversion of any of the DIP Borrowers' cases to a case under chapter 7 of the Bankruptcy Code; (f) the date of dismissal of the Case; and (g) such earlier date on which all obligations become due and payable under the terms of the PNC DIP Agreements.
- (m) Fees and Expenses. Commitment Fee of 2%, or \$460,000, which is non-refundable and fully earned upon the entry of the Interim Order and payable as follows: (i) \$230,000 upon the entry of the Interim Order and (ii) \$230,000 on the earlier of the 60th day following the Petition Date or the occurrence of an Event of Default; Collateral Monitoring Fee of \$5,000 per month; an unused line fee of one quarter of one percent (0.25%) on the average unused Advances under the PNC DIP Facility; the Agent's reasonable legal fees and expenses; and a Field Exam Fee \$850 per man-day plus expenses.
- (n) Events of Default. Events of Default include, among other things, the (a) DIP Borrowers' failure to obtain entry of a Final Order which is not subject to any appeal, stay, vacation or reconsideration within twenty-one (21) days after the Petition Date; (b) nonpayment of principal when due; (c) nonpayment of interest, fees or other amounts when due; (d) inaccuracy or breach of representations and warranties arising from facts first occurring on or after the date of the commencement of the Cases (other than the commencement of the Cases); (e) violation of covenants (including covenants contained herein), arising from facts first occurring on or after the commencement of the Cases (other than the commencement of the Cases); (f) the occurrence of certain ERISA events; (g) the existence of judgments not subject to the automatic stay; (h) the entry of an order invalidating any security document, or if the Debtors assert the invalidity of any of the Agent or Lenders' security document; (i) the occurrence of a Change of Control (as defined in the Existing Credit Agreement); (j) the entry of an order dismissing any of the DIP Borrowers' cases or converting any such case to a chapter 7 case, either voluntarily or involuntarily; (k) the entry of an order appointing a trustee in any of the DIP Borrowers' cases; (l) the entry of an order granting any other super-priority claim or lien equal or superior in priority to that granted Agent for the benefit of Lenders; (m) the entry of an order granting relief from the automatic stay so as to allow a third party to proceed against any asset or assets of any DIP Borrowers; (n) the

entry of an order staying, reversing, vacating or otherwise modifying the PNC DIP Facility, the Interim Order or the Final Order; (o) the entry of an order appointing an examiner having enlarged powers (beyond those set forth under Bankruptcy Code §1106(a)(3) and (4)) or any other fiduciary or representative of the estate with decision-making or other management authority; (p) the impairment of any collateral security; (q) the commencement of litigation by any government or regulatory authority against any of the DIP Borrowers; (r) the occurrence of any act, condition or event occurring after the Petition Date that has or would reasonably expect to have a Material Adverse Effect upon the assets of any of the DIP Borrowers, or the Collateral or the rights and remedies of Agent and Lenders under the Prepetition Credit Agreements, the Interim Order or the Final Order or documents approved thereby; (s) the termination or rejection, or the filing by any of the DIP Borrowers of a motion terminating or rejecting, material contracts except those approved by Agent; (t) any change shall occur, or be ordered, with respect to any DIP Borrower's existing, prepetition cash-management system, or existing, prepetition bank accounts; (u) Guarantor shall deny or disaffirm its obligations under its Guaranty Agreement or any Guaranty Agreement shall be cancelled, terminated, revoked or rescinded without the express prior written consent of Agent; (v) proposal or confirmation of a plan of reorganization unless such plan as proposed or confirmed provided for indefeasible payment in full in cash of all Obligations at confirmation and is otherwise acceptable to Agent and Lenders; (w) any order providing for the sale of any assets of any DIP Borrowers shall be entered by the Bankruptcy Court unless, upon the consummation of such sale transaction, all liens for the benefit of the Agent and Lenders are transferred to the proceeds of such sale and, subject to the Permitted Liens, such proceeds are received at closing therein by Agent and applied to permanently and indefeasibly pay the obligations under the PNC DIP Facility and the Prepetition Credit Agreement (to the extent not previously paid); (x) any order providing for the sale of any assets of any DIP Borrowers shall be entered by the Bankruptcy Court unless (A) upon the consummation of such transaction, the Obligations under the PNC DIP Facility and Existing Credit Agreement are permanently and indefeasibly paid in full, in cash, or (B) Agent has consented to such sale; (y) DIP Borrowers suspend or discontinue or are enjoined by any court or governmental agency from continuing to conduct all or any part of their business without Agent's prior written consent, or a trustee, receiver or custodian is appointed for any of the DIP Borrowers or any of their properties; (z) the entry of an order for the obtaining of credit or incurring of debt other than pursuant to the PNC DIP Facility or the Subordinated DIP Facility; or (aa) the filing of any pleading by any DIP Borrower seeking, or otherwise consenting to any of the matters set forth above (each of the foregoing, an "Event of Default"). The Agent and Required

Lenders, may, in their sole discretion, waive any Events of Default under the PNC DIP Facility.

- (o) **Remedies.** Upon an Event of Default, Agent and Lenders shall have customary remedies, including, without limitation, the right (after providing five (5) business days' prior notice to Debtors and any statutory committee of the occurrence of the Termination Date), to realize on all Collateral without the necessity of obtaining any further relief or order from the Bankruptcy Court. The Bankruptcy Court shall retain exclusive jurisdiction with respect to all matters relating to the exercise of rights and remedies hereunder, and under the Interim Order and the Final Order, and with respect to the Collateral. The PNC DIP Agreements contains other terms and conditions customary for agreements of this type.

Provisions To Be Highlighted Pursuant to Local Rule 4001-2

47. Pursuant to Local Rule 4001-2, the Debtors highlight the following provisions of the PNC DIP Facility:

- (a) ***Local Rule 4001-2(a)(i)(A), Provisions Granting Cross-Collateralization Protections (other than replacement liens):*** Paragraph 2.1 of the proposed Interim Order provides for cross-collateralization of DIP Borrowers' pre-petition property, including unencumbered property.
- (b) ***Local Rule 4001-2(a)(i)(B), Provisions or Findings of Fact With Respect to the Validity of Secured Creditors Prepetition Lien or Waive Claims Against Secured Creditor Without 75 Days' Notice from Entry of Order, and the Committee, at Least 60 Days from the Date of Formation:*** Finding of Fact D of the proposed Interim Order contains finding of facts with respect to the Prepetition Obligations and Prepetition Liens and the validity of the Lenders' interest in the Prepetition Collateral. Paragraph 4.1 of the proposed Interim Order provides a 45 day period, starting on the Petition Date, for parties in interest with requisite standing to challenge the Prepetition Obligations and Pre-Petition Claims and any actions or conduct of Lenders. Section 1.5 of the PNC DIP Agreements include a similar acknowledgment.
- (c) In addition, under Section 4.5 of the Interim Order and Section 1.6 of the PNC DIP Agreements, upon the entry of the Interim Order, the Debtors waive all claims against the Agent and Lenders arising under the Pre-Petition Obligations, the Pre-Petition Financing Documents and any Advances, Letters of Credit or other financial accommodations made by the Agent and Lenders to the Debtors pursuant to the Pre-Petition Financing Document, with similar waivers, after payment of the

Obligations, of all claims and causes of action arising or occurring in connection with or related to the DIP Financing Documents or the Interim Order.

- (d) ***Local Rule 4001-2(a)(i)(C), Provisions That Seek To Waive, Without Notice, Whatever Rights the Estate May Have Under 11 U.S.C. §506(c):*** Upon the entry of the Final Order, pursuant to Section 5.08 of the PNC DIP Agreement, no person shall be permitted to surcharge the Collateral under section 506(c) of the Bankruptcy Code. This provision is reflected in the Interim DIP Order at paragraph 4.3 and required by the PNC DIP Agreements pursuant to its Definitions of Interim Order and Final Order.
- (e) ***Local Rule 4001-2(a)(i)(D), Provisions That Immediately Grant to the Prepetition Secured Creditor Liens on the Debtor's Claims and Causes of Action Arising Under 11 U.S.C. §§ 544, 545, 547, 548 and 549:*** Only upon the entry of the Final Order, the DIP Collateral shall include, among other things, all causes of actions available to the bankruptcy estate of the DIP Borrowers pursuant to chapter 5 of the Bankruptcy Code. See PNC DIP Agreement definitions of Collateral including Avoidance Actions (defined as all actions of Borrowers or their estates under Chapter 5 of section 724(a) of the Bankruptcy Code).
- (f) ***Local Rule 4001-2(a)(i)(E), Provisions That Use Postpetition Loans from a Prepetition Secured Creditor to Pay that Secured Creditor's Prepetition Debt, Except as provided by Section 552(b):*** Paragraph 1.4 of the proposed Interim Order provides that the payment of the first advance under the PNC DIP Facility will be used to satisfy all Prepetition Obligations. See Section 2.22 of the DIP Domestic Credit Agreement and Section 2.12 of the DIP Ex-Im Credit Agreement.
- (g) ***Local Rule 4001-2(a)(i)(G), Provisions That Prime any Secured Lien Without the Consent of the Lenders:*** Section 5.1(b) of the PNC DIP Agreements provides that the Lenders' liens and security interests shall be senior to all other parties' security interests or liens in such assets and property existing prior to the Petition Date, including any valid perfected non-avoidable lien of the PBCG existing as of the Petition Date. Paragraph 2.1.2 of the Interim Order contains a similar provision.

The PNC DIP Facility Should Be Authorized

48. Section 364 of the Bankruptcy Code distinguishes among (a) obtaining unsecured credit in the ordinary course of business, (b) obtaining unsecured credit outside of the ordinary course of business, (c) obtaining credit with specialized priority or with security, and (d)

obtaining credit with equal priority or priming liens. If a debtor in possession cannot obtain postpetition credit on an unsecured basis, courts may authorize the obtaining of credit or the incurring of debt, repayment of which is entitled to superpriority administrative expense status or is secured by a lien on unencumbered property or a junior lien on encumbered property, or a combination of the foregoing. See 11 U.S.C. § 364.

49. In addition to authorizing financing under section 364(c) of the Bankruptcy Code, courts also may authorize postpetition credit secured by a senior or equal lien on encumbered property without consent from affected secured parties if the debtor cannot obtain credit elsewhere and the interests of existing lienholders are adequately protected. See 11 U.S.C. § 364(d)(1).

50. Section 364 of the Bankruptcy Code , provides in pertinent part, that:

(c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt—

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

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

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

(d) The Court, after notice and a hearing may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien if –

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

(B) there is adequate protection of the interest of the holder of the lien on the property of the estate on

which such senior or equal lien is proposed to be granted.

11 U.S.C. § 364.

51. Generally, sections 364(c) and (d) of the Bankruptcy Code require a debtor to demonstrate, before the granting of such protection, that alternate sources of credit are not available under sections 364(a) or (b) of the Bankruptcy Code. In order to gain approval for post-petition financing on a secured basis, a debtor must demonstrate that it could not obtain credit on unsecured basis, that the credit transactions are necessary to preserve the assets of the debtor's estate and that the terms of the underlying credit agreements are fair, reasonable and adequate. See In re Ames Dep't Stores, Inc., 115 B.R. 34, 37, 40-41 (Bankr. S.D.N.Y 1990).

52. Given the Debtors' financial condition and existing financial arrangements, the universe of lenders who could commit to meet the Debtors' postpetition financing requirements is extremely limited. As noted above, of the more than twenty well-known DIP financing lenders approached by CRG, no lenders other than PNC and Phoenix Banner were willing to lend to any of the Debtors under section 364(c) protections alone, let alone the lesser protections of sections 364(a) or (b).

53. After this search, the Debtors determined, in consultation with their advisors, that they would not be able to obtain unsecured credit or other financial accommodations allowable as administrative expense under section 503(b)(1) of the Bankruptcy Code and that debtor-in-possession financing is not otherwise available without the Debtors (i) granting, pursuant to section 364(c)(1) of the Bankruptcy Code, claims having priority over any and all administrative expenses of the kinds specified in section 503(b) and 507(b) of the Bankruptcy Code and (ii) securing, pursuant to section 364(c)(2), 364(c)(3) and 364(d) of the Bankruptcy Code, such obligations in the DIP Collateral.

54. The Debtors respectfully submit that the results of CRG's search are sufficient to justify this conclusion. It would be unrealistic and unnecessary to require the debtor to conduct an exhaustive search for financing. In re Sky Valley, Inc., 100 B.R. 107, 113 (Bankr. N.D. Ga. 1988), aff'd sub nom, Anchor Savings Bank FSB. v. Sky Valley, Inc., 99 B.R. 117, 120 n.4 (N.D. Ga. 1989).

55. As with other business decisions, in considering whether to approve a debtor's request to obtain post-petition financing, the courts typically defer to the debtor's business judgment and its determination that the financing is in the best interests of the estate. See, e.g., Group of Institutional Investors v. Chicago Mil. St. P. & Pac. Ry., 318 U.S. 523, 550 (1943); In re Simasko Prod. Co., 47 B.R. 444, 448-49 (D. Colo. 1985) (authorizing interim financing agreement where debtor's business judgment indicated financing was necessary and reasonable for benefit of estates and noting that "[b]usiness judgments should be left to the board room and not to this Court."); In re Ames Dep't Stores, 115 B.R. 34, 38 (Bankr. S.D.N.Y. 1990) (with respect to post-petition credit, courts "permit debtors-in-possession to exercise their basic business judgment consistent with their fiduciary duties."); see also 3 COLLIER ON BANKRUPTCY 364.03, at 364-7-18 (15th ed. rev. 2008).

56. The Debtors negotiated the best financing arrangements they could reasonably expect under the circumstance. They have exercised sound business judgment in determining that the financing pursuant to the PNC DIP Facility is appropriate. In order for the Debtors to achieve the necessary liquidity to administer the Chapter 11 Cases and accomplish an orderly sale of the assets of the DIP Borrowers, they must have access to working capital.

57. The PNC DIP Facility fees and the Interest Rate are customary and reasonable. The alternatives to the PNC DIP Facility are dire; without the liquidity, the Debtors

cannot continue operations and will be forced to dismiss these cases or convert them to chapter 7 cases. Accordingly, the Debtors should be granted authority to enter into the PNC DIP Facility and borrow funds from the Lenders pursuant to the terms described above and take the other actions contemplated by the PNC DIP Facility and as requested herein.

58. In addition to authorizing financing under sections 364(c)(2) and 364(c)(3), courts also may authorize postpetition credit to be secured by a senior or equal lien on encumbered property without consent from affected secured parties if the debtor cannot obtain credit elsewhere and the interests of existing lienholders are adequately protected. See 11 U.S.C. § 364(d)(1).

The Proposed Adequate Protection is Appropriate

59. Because PNC would not provide the necessary funding unless it is granted higher priority liens than all prepetition secured creditors, which is consistent with the Debtor's understanding of PNC's prepetition priority, the Debtors also seek approval of the PNC DIP Facility under section 364(d) of the Bankruptcy Code. As noted above, pursuant to section 364(d), a court may authorize postpetition credit secured by a senior or equal lien on encumbered property (i.e. a "priming" lien) without consent from affected secured parties if the debtor cannot obtain credit elsewhere and the interests of existing lienholders are adequately protected. See 11 U.S.C. § 364(d)(1).

60. Here the DIP Borrowers know of only possibly two prepetition secured creditors other than PNC, one being the PBCG, and the other being Wells Fargo to the extent it holds a Permitted Lien in certain equipment. The proposed Interim Order provides that the PBGC's lien will be adequately protected against any diminution in value in Matrix since the PBCG will be granted a replacement lien. Thus, the PBGC will be in the same post-petition

position as it was as of the Petition Date after the granting of replacement on the assets of Matrix, to the same extent that the PBGC held a valid perfected lien on the assets of Matrix as of the Petition Date. The priority of any lien held by Wells Fargo is undisturbed to the extent it holds a Permitted Lien in certain equipment.

61. Courts in this district and elsewhere have approved debtor in possession financing under section 364(d) of the Bankruptcy Code, including where such financing is provided solely to fund working capital requirements through a section 363 sale process. See, e.g., In re Beechgrove Redevelopment, LLC, 2007 WL 441477 (Bankr. E.D. 2002); CMC, No. 03-12944 (MFW) (Bankr, D. Del. Nov. 25, 2003); Pillowtex, No. 03-12339 (PJW) (Bankr. D. Del. Sept, 25, 2003); In re Tweeter Home Entm't Group, Inc., No. 07-10787 (PJW) (Bankr. D. Del, June 29, 2007).

Lien on Avoidance Action Proceeds

62. The PNC DIP Agreements and the Final Order provide that the Lenders will be granted a lien on the proceeds of chapter 5 avoidance actions (the "Avoidance Actions"). By its terms, section 541(a)(3) of the Bankruptcy Code defines property of the estate to include interests in property avoided under section 550. See 11 U.S.C. § 541(a)(3). Moreover, section 541(a)(4) expressly includes within the definition of "property of the estate" "any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title." 11 U.S.C. § 541(a)(3). Thus, Avoidance Actions proceeds are property of the estate that may be pledged to secure vital postpetition financing and, if and when received, must be paid to creditors in their statutory order of priority in accordance the Bankruptcy Code.

63. Courts in this district and elsewhere have granted liens on avoidance action proceeds. See In re Joan Fabrics Corp., 2007 WL 2321248 (Bankr. D. Del. 2007); In re

Silver Cinemas Int'l, Inc., No, 00-1978 (Bankr. D. Del., Aug. 11, 2000); In re Trans World Airlines, 163 B.R. 964, 974 (Bankr D. Del. 1994) (approving the granting of liens on avoidance actions to postpetition lenders); In re Movie Gallery, Inc., No. 07-33849 (Bankr. ED, Va. Nov. 16, 2007) (secured lenders' collateral includes proceeds and property that is the subject of successful avoidance actions); In re NTELOS Inc., No. 03-32094 (DOT) (Bankr. ED, Va. Mar. 24, 2003) (same); In re AMF Bowling Worldwide, Inc., No. 01-61119 (Bankr. ED, Va. Aug, 8, 2001) (secured lenders' collateral includes avoidance actions and proceeds).

The Lenders Are Entitled to "Good Faith" Protections of Section 364(e)

64. The terms and conditions of the PNC DIP Facility are fair and reasonable. Its terms and conditions were negotiated in good faith and at arm's length at all times by the Debtors, the Agent, Lenders and their respective advisors. The PNC DIP Agreements went through several iterations and reflect material changes from the terms originally proposed. The Debtors and the Lenders also conducted extensive negotiations concerning the Budget and the terms of certain "first-day" pleadings that require the immediate access to interim financing from the Lenders. In light of the foregoing, the Lenders should be accorded the benefits and protections of section 364(e) of the Bankruptcy Code with respect to the PNC DIP Facility; specifically, any loans, advances or other financial accommodations that the Lenders makes or cause to be made from time to time to the DIP Borrowers on the terms and conditions set forth in the PNC DIP Agreements should be deemed to have been made and provided in "good faith," as the term is used in section 364(e) of the Bankruptcy Code, and shall be entitled to the full protection of section 364(e) of the Bankruptcy Code in the event that the DIP Orders or the DIP

Financing Documents or any provisions are hereafter modified, vacated, amended or stayed by subsequent order of the Court or any other court without the express consent of the Lenders.

Modification of the Automatic Stay is Warranted

65. Paragraph 3.4 of the proposed Interim Order provides that the automatic stay provisions of section 362 of the Bankruptcy Code are vacated and modified to the extent necessary to, *inter alia*, permit the Lenders to perform any acts necessary to implement the PNC DIP Agreements. In addition, the proposed Interim Order provides that the automatic stay provisions of section 362 of the Bankruptcy Code are vacated and modified to the extent necessary to exercise, upon the occurrence and during the continuation of any Event of Default, all rights and remedies provided for in the PNC DIP Agreements, and to take various actions without further order of or application to the Court. However, the Lenders must provide the Debtors and various other parties, including the United States Trustee, with three (3) business days written notice prior to exercising any enforcement rights or remedies in respect of the Collateral.

66. Stay modification provisions of this sort are ordinary and usual features of debtor in possession financing facilities and, in the Debtors' business judgment, are reasonable under the present circumstances. Accordingly, the Court should modify the automatic stay to the extent contemplated by the PNC DIP Agreements and the proposed DIP Orders.

The Section 506(c) Waiver in the DIP Orders Should Be Approved

67. The Court should approve the DIP Borrowers' waiver, in the Final Order, of any right to surcharge the DIP Collateral. Such waivers and provisions are standard and customary under financings between sophisticated parties such as the DIP Borrowers and the

Lenders. In re Molten Metal Tech., Inc., 244 B.R. 515, 527 (Bankr. D. Mass 2000); see also In re Nutri/System of Florida Assocs., 178 B.R. 645, 650 (E.D. Pa 1995) (noting that debtor had waived § 506(c) rights in obtaining debtor-in-possession financing); cf In re Telesphere Comms., Inc., 179 B.R. 544, 549 (Bankr. N.D. Ill. 1994) (approving settlement between debtor and certain lenders wherein debtor waived certain rights, including 506(c) rights, against the lenders). Moreover the Lenders have agreed to provide a Carve Out as described in the Interim Order.

Request for Interim and Final Orders and Final Hearing and Notice Procedures

68. Pursuant to Local Rule 4001-2(c), the Final Order may only be entered after notice and a hearing and ordinarily the Debtors may not schedule a hearing to consider the Final Order until at least ten (10) days after the organizational meeting of the creditors' committee. While no such organizational meeting has been scheduled, given the exigencies of the circumstances and the interconnectedness of the relief sought in this Motion and in the Sale Motion, the Debtors respectfully request that the Court schedule the Final Hearing to occur twenty (20) days from the Petition Date, or as soon thereafter as the Debtors may be heard, and coinciding with the hearing on the Sale Motion.

69. The Debtors shall, within three (3) business days of the entry of the Interim Order by the Court, serve by overnight mail a copy of the Interim Order and the notice of the Final Hearing to consider entry of the Final Order on the date established by the Court. Any party in interest objecting to the relief sought at the Final Hearing shall serve and file objections, which objections shall: (i) be in writing; (ii) conform to the Bankruptcy Rules and Local Rules; and (iii) be filed with the Clerk of the Bankruptcy Court for the District of Delaware and served upon the following parties so as to be received not less than three (3) days before the Final Hearing: (a) counsel to the Debtors: Steven J. Reisman, Esq. and Timothy A. Barnes, Esq.,

Curtis, Mallet-Prevost, Colt & Mosle LLP, 101 Park Avenue, New York, New York 10178-0061, and Mark D. Collins, Esq. and Michael J. Merchant, Esq., Richards, Layton & Finger, P.A., One Rodney Square, 920 North King Street, Wilmington, Delaware 19801; (b) counsel to Phoenix Banner, Rick B. Antonoff, Esq., Pillsbury Winthrop, Shaw Pittman LLP, 1540 Broadway, New York, NY 10036-4039 and Robert J. Dehney, Esq., Morris, Nichols, Arsht & Tunnell LLP, 1201 North Market Street, 18th Floor, P.O. Box 1347, Wilmington, Delaware 19899-1347, (c) counsel for the Agent, Blank Rome LLP, One Logan Square, 130 N. 18th Street, Philadelphia, Pennsylvania 19103-6998; Attn: Regina Stango Kelbon, Esq., Fax: (215) 832-5507 and Blank Rome LLP, The Chrysler Building, 405 Lexington Avenue, New York, NY 10174, Attn: Larry Flick, Esq., Fax: (212) 832-5556; (d) counsel to a creditors' committee, if any is appointed; and (e) counsel to the United States Trustee. The Debtors request that the Court schedule the Final Hearing and approve the proposed notice procedures for the Final Hearing set forth herein.

Basis for Emergency Relief

70. As set forth in the Miller Declaration, the Debtors bring this Motion on an expedited basis to avoid the immediate and irreparable harm that will be suffered by these estates if the Debtors do not obtain the liquidity needed to facilitate the sale of the assets of the DIP Borrowers and the further sale, reorganization or winddown of the Debtors' other operations. The Debtors need immediate access to the proposed interim financing.

71. Local Rule 4001(b) provides that the Court may grant interim relief when it is necessary to avoid immediate and irreparable harm to the estate. Bankruptcy Rules 4001(b) and (c) permit a court to approve a debtor's request to obtain post-petition financing during the period following the filing of a motion requesting such relief "to the extent necessary to avoid

immediate and irreparable harm to the estate pending a final hearing.” Fed. R. Bank. P. 4001(b)(2) and (c)(2). Those rules also provide that a final hearing on a motion to obtain financing pursuant to section 364 of the Bankruptcy Code may not be commenced earlier than fifteen (15) days after service of such motion. Id.

72. Upon request, however, a court is empowered to conduct a preliminary expedited hearing on the motion and authorize the obtaining of financing to the extent necessary to avoid immediate and irreparable harm to a debtor’s estate. In examining requests for interim relief under this rule, courts apply the same business judgment standard applicable to other business decisions, and a debtor should be entitled to borrow those amounts that it believes prudent in the operation of its business. See, e.g., Simasko, 47 B.R. at 449; see also Ames Dep’t Stores, 115 B.R. at 36, 38.

73. Pending the Final Hearing, the Debtors require immediate financing. Without immediate access to financing, the Debtors will be unable to pay critical obligations or other costs associated with its continued operation as a going concern. It is imperative that the Debtors have immediate use of the Interim Borrowing to pay their operating costs, and funds are urgently needed to meet all of the Debtors’ liquidity needs and to administer their chapter 11 cases in an orderly manner. In the absence of immediate post-petition financing, the Debtors’ ability to preserve the value of their business and assets will be immediately and irreparably jeopardized, resulting in significant harm to the estate and creditors, as set forth in the Miller Declaration.

74. Thus, the Debtors request that the Court (i) conduct an expedited hearing on the Motion, (ii) grant the Interim Order, (iii) schedule a Final Hearing, and (iv) establish

notice and objection procedures in respect thereof, as proposed herein, in accordance with Bankruptcy Rule 4001(b) and (c).

Notice

75. The Debtors shall have serviced notice of this Motion in accordance with Rule 4001(c) on (i) the Agent and the Lenders, (ii) the United States Trustee for the District of Delaware, (iii) the holders of the twenty (20) largest unsecured claims against the Debtors' estates, (iv) all vendors who have shipped goods to the Debtors within 45 days of the Petition Date; (v) 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; (vi) all landlords of the Debtors; (vii) all guarantors of the Prepetition Obligations; (viii) the Internal Revenue Service and all taxing authorities of states in which the Borrowers are doing business; (ix) the Pension Benefit Guaranty Corporation; and (x) certain other parties identified in the certificates of service filed with the Court. As this Motion is seeking first-day relief, notice of this Motion and any order entered hereon will be served on all parties required by Local Rule 9013-1(m).

No Prior Application

76. No prior application for the relief requested herein has been made to this Court or any other court.

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Conclusion

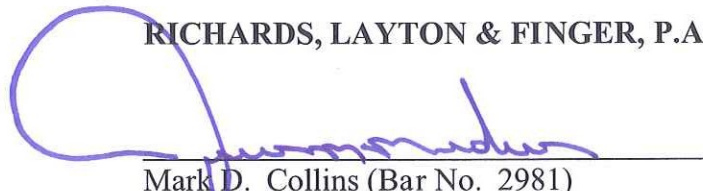
WHEREFORE, the Debtors respectfully request that the Court (i) enter an order substantially in the form of the proposed Interim Order annexed hereto as **Exhibit A**, (ii) schedule the Final Hearing, (iii) after the Final Hearing, enter a Final Order substantially in the form of the Interim Order and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

Dated: March 18, 2009
Wilmington, Delaware

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