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Electronically Filed March 1, 2012

8 **UNITED STATES BANKRUPTCY COURT**
9 **DISTRICT OF NEVADA**

10 In re
11 AMERICAN WEST DEVELOPMENT,
INC., a Nevada corporation,
12
13 Debtor.

Case No. BK-S-12-12349-MKN
Chapter 11

**MOTION FOR ORDER PURSUANT TO
11 U.S.C. § 364 AND FED. R. BANKR. P.
4001(c): (I) AUTHORIZING DEBTOR
TO OBTAIN POSTPETITION
FINANCING; AND (II) GRANTING
RELATED RELIEF**

Hearing Date: April 10, 2012
Hearing Time: 9:30 a.m.

18 American West Development, Inc. ("Debtor"), debtor and debtor in possession in the above-
19 captioned chapter 11 case (the "Chapter 11 Case"), respectfully submits this motion (the "Motion") for
20 entry of a final order (the "Final Order") pursuant to section 364 of title 11 of the United States Code,
21 §§ 101 *et. seq.* (the "Bankruptcy Code"), Rule 4001(c) of the Federal Rules of Bankruptcy Procedure
22 (the "Bankruptcy Rules"), and Rules 4001(b) and (c) of the Local Rules of Bankruptcy Practice for the
23 United States Bankruptcy Court, District of Nevada ("Local Rules") authorizing and approving, among
24 other things, Debtor to obtain postpetition financing (the "Postpetition Financing") from
25 AWH Ventures, Inc. (the "Lender") on a non-priming secured and superpriority basis pursuant to a
26 Debtor-In-Possession Revolving Credit Agreement (the "DIP Agreement").

27 Debtor seeks authorization for the Postpetition Financing in order to provide funding and
28 liquidity for the ongoing operation of Debtor's business and to fund the expenses of the Chapter 11

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Case. A copy of the DIP Agreement¹ is attached as **Exhibit “C”** to the Declaration of Robert M. Evans (the “Omnibus Declaration”) filed in support of Debtor’s First Day Motions. Debtor is seeking to use the Postpetition Financing pursuant to a Cash Budget, a copy of which (pertaining to the first 13-week period following the Petition Date) is attached to the DIP Agreement as **Exhibit “A”** thereto (the “Initial Cash Budget”).

In compliance with Bankruptcy Rule 4001(c)(1)(B), Debtor provides the following additional information regarding the proposed Postpetition Financing. Nothing in the following summary alters or amends the terms of the DIP Agreement or the proposed Final Order, and to the extent of any conflict between the following summary and the DIP Agreement or the proposed Final Order, the DIP Agreement or the Final Order, as applicable, shall control:

CITATION TO DIP AGREEMENT/ FINAL ORDER ²	MATERIAL PROVISIONS OF POSTPETITION FINANCING
DIP Agreement, § 2.5	Interest Rate: Each Revolving Loan shall bear interest at a rate <i>per annum</i> of fifteen percent (15.0%). Interest shall accrue and compound monthly. Notwithstanding the foregoing, in the event an Event of Default has occurred and is continuing, the Revolving Loan shall bear interest at a rate per annum equal to the rate set forth above plus three percent (3.0%) from the date of occurrence of such Event of Default until the date such Event of Default is cured or waived.
DIP Agreement, § 1.1	Maturity: Fifteen (15) months from the Petition Date, unless otherwise agreed in writing by Debtor and Lender (for which no Bankruptcy Court approval, other than approval of the DIP Agreement, will be required).
DIP Agreement, § 7.1	Events of Default: consist of the following (for purpose of items (i) through (vi) by way of a final order, the effectiveness of which has not been stayed): (i) appointment of a chapter 11 trustee with respect to the Chapter 11 Case; (ii) appointment of an examiner with expanded powers with respect to the Chapter 11 Case; (iii) conversion of the Chapter 11 Case to one under chapter 7 of the Bankruptcy Code; (iv) dismissal of the

¹ Capitalized terms used, but not defined, herein shall have the meaning ascribed to such terms in the DIP Agreement.

² The proposed Final Order is attached hereto as **Exhibit “1.”**

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<p>1 CITATION TO 2 DIP AGREEMENT/ 3 FINAL ORDER²</p>	<p>MATERIAL PROVISIONS OF POSTPETITION FINANCING</p>
	<p>Chapter 11 Case; (v) approval of a motion granting a party a superpriority claim which is senior or pari passu with the DIP Superpriority Claim; (vi) granting of relief from the automatic stay to permit the Pre-Petition Lenders to exercise rights or remedies regarding the Pre-Petition Lenders' Collateral; (vii) use of Revolving Loan advances to make a payment that is not in compliance with the Cash Budget or the DIP Agreement; (viii) failure of the Final Order to have been entered by the Bankruptcy Court by the date that is forty-five (45) days (or such longer period as Lender and Debtor agree) after the date on which this Motion is filed; (ix) Debtor's breach of any other provision of the Final Order and such breach remains uncured for a period of ten (10) days after notice is provided to Debtor of such breach; and (x) the commencement of any lawsuit seeking monetary relief against Lender on behalf of Debtor or Debtor's estate, other than for a breach of the DIP Agreement.</p>
<p>11 DIP Agreement, § 2.11 12 13 Final Order, ¶ 7(b)</p>	<p><u>DIP Financing Liens:</u> Pursuant to Bankruptcy Code sections 364(c)(2) and (c)(3), the Obligations of Debtor under the DIP Agreement and under the Loan Documents shall be secured by (i) a valid and duly perfected first priority Lien on Avoidance Actions and any other previously unencumbered assets of Debtor, and (ii) a valid and duly perfected junior Lien on the Pre-Petition Lenders' Collateral and any other assets of Debtor that are subject to a valid and perfected lien as of the Petition Date; provided that the DIP Lien shall be subject and subordinate to the lien and security interest of the Pre-Petition Lenders in and to the Pre-Petition Lenders' Collateral and Lender agrees to execute and deliver to the Pre-Petition Lenders such additional subordination agreements as the Pre-Petition Lenders may require to evidence such subordination. The DIP Lien shall be subject to the Carve-Out. In no event will the DIP Lien attach to any property constituting collateral pursuant to the Pre-Petition Credit Agreement other than the Pre-Petition Lenders' Collateral.</p>
<p>22 DIP Agreement, §2.10 23 Final Order, ¶ 7(a)</p>	<p><u>DIP Superpriority Claim:</u> Pursuant to Bankruptcy Code section 364(c)(1), the Obligations of Debtor under the DIP Agreement and under the Loan Documents shall at all times constitute allowed administrative expense claims in the Chapter 11 Case having priority over all claims against Debtor now existing or hereafter arising, of any kind whatsoever, including, without limitation, the Pre-Petition Lenders' Superpriority Claims and all other administrative expenses of the kinds and over any and all administrative expenses or other claims arising under Bankruptcy Code sections 105, 326, 328, 330, 331, 503(b), 506(c), 507(a), 507(b), 726, 1113 or 1114, which DIP Superpriority Claim shall be (a) subject to the Carve-Out, (b) subject to the Subordination Agreement between Lender and the Pre-Petition Lenders, and (c) applicable to any Avoidance</p>

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<p>1 CITATION TO 2 DIP AGREEMENT/ 3 FINAL ORDER²</p>	<p>MATERIAL PROVISIONS OF POSTPETITION FINANCING</p>
	<p>Actions.</p>
<p>4 DIP Agreement, §§ 1.1, 5 2.13</p>	<p>Maximum Commitment Amount: Ten million dollars (\$10,000,000). Lender agrees to convert the lesser of (x) three million dollars (\$3,000,000) in Obligations, and (y) the amount of Obligations outstanding on the effective date of a Reorganization Plan (other than Debtor’s Reorganization Plan), to equity in the reorganized Debtor, provided that the Reorganization Plan (i) provides for any remaining balance of the Loans to be paid in full to Lender, and (ii) is otherwise reasonably acceptable to Lender. Lender further agrees to convert the full amount of Obligations outstanding on the effective date of Debtor’s Reorganization Plan (up to the Maximum Commitment Amount) to equity in the Reorganized Debtor as provided in Debtor’s Reorganization Plan.</p>
<p>12 DIP Agreement, §§ 4.1- 13 4.2</p>	<p>Borrowing Conditions: All Borrowings are subject to the following conditions: (a) the Final Order shall be in full force and effect and shall not have been reversed, modified, amended or stayed (or application therefor made), except for modifications and amendments that are reasonably acceptable to Lender; (b) representations and warranties in the DIP Agreement, shall be true and correct in all material respects at the date each Revolving Loan is made as if made on such date (except if such representation or warranty specifically relates only to a prior date, in which case it shall be true and correct in all material respects as of such earlier date); (c) no administrative claim that is senior to or pari passu with the DIP Superpriority Claim, shall exist, except the Carve-Out; (d) Lender shall have received the DIP Agreement, the Revolving Notes and all other Loan Documents, and each other agreement, document and instrument relating to the loan and other credit transactions contemplated by the DIP Agreement, each duly executed where appropriate and in form and substance reasonably satisfactory to Lender.</p>
<p>22 DIP Agreement, § 1.1 23 24 Final Order, ¶ 9</p>	<p>Carve-Out: DIP Lien and DIP Superpriority Claim are subject to a carve-out for (i) all fees required to be paid to the Clerk of the Bankruptcy Court and to the Office of the United States Trustee pursuant to 28 U.S.C. § 1930, and (ii) an amount not exceeding three million dollars (\$3,000,000) in the aggregate, which amount may be used after the occurrence and during the continuation of an Event of Default, to pay the fees and expenses of professionals retained by Debtor and any Committee and allowed (or allowable) by the Bankruptcy Court (as to which allowed or allowable fees and expenses Lender waives any right to seek disgorgement); provided, however, that Debtor shall be permitted to pay compensation and reimbursement of expenses allowed, allowable or otherwise authorized by the Bankruptcy Court and payable under</p>

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1	CITATION TO DIP AGREEMENT/ FINAL ORDER²	MATERIAL PROVISIONS OF POSTPETITION FINANCING
2		
3		Bankruptcy Code sections 330 and 331 in accordance with the Cash
4		Budget, the Carve-Out shall not be reduced by the amount of any
5		compensation and reimbursement of expenses paid or incurred (to the
6		extent ultimately allowed or allowable by the Bankruptcy Court) prior to
7		the occurrence of an Event of Default in respect of which the Carve-Out
8		is invoked, and Lender waives any right to seek disgorgement thereof;
9		and provided, further, that nothing herein shall be construed to impair the
10		ability of Lender to object to the reasonableness of any of the fees,
11		expenses, reimbursement or compensation sought by the professionals
12		retained by Debtor or any Committee.
13		
14		<i>Types of Provisions Identified in Bankruptcy Rules 4001(c)(1)(B)(i) through (xi)</i>
15		
16	DIP Agreement, §2.11 Final Order, ¶ 7(b)	<u>(i) Grant of priority/lien under 11 U.S.C. § 364(c) or (d):</u> Yes-- see above (no priming liens).
17		
18	N/A	<u>(ii) Adequate protection for pre-petition claims:</u> None.
19		
20	N/A	<u>(iii) Determination re: pre-petition lien/claim:</u> None.
21		
22	DIP Agreement, § 7.2 Final Order, ¶ 12	<u>(iv) Waiver/modification of the automatic stay:</u> requires three (3) business days notice upon uncured Event of Default and is subject to (x) the opportunity for Debtor/Committee to seek hearing before Bankruptcy Court (stay continues pending such hearing), and (y) the Subordination Agreement between Lender and the Pre-Petition Lenders.
23		
24	DIP Agreement, Art. V	<u>(v) Waiver/modification of rights re: chapter 11 plan, cash collateral or post-petition financing:</u> covenant not to propose, file, solicit votes for, support, or prosecute, a Reorganization Plan or disclosure statement that is not otherwise reasonably acceptable to Lender, unless such Reorganization Plan provides for payment in full of the Obligations on the effective date thereof.
25		
26	N/A	<u>(vi) Confirmation/disclosure statement deadlines:</u> None.
27		
28	DIP Agreement, § 1.1 Final Order, ¶ 13	<u>(vii) Wavier/modification of lien rights under non-bankruptcy law:</u> Final Order must provide that Lender shall not be subject to the doctrine of marshalling.

CITATION TO DIP AGREEMENT/ FINAL ORDER ²	MATERIAL PROVISIONS OF POSTPETITION FINANCING
N/A	<u>(viii) Release of estate cause of action</u> : None.
N/A	<u>(ix) Indemnification</u> : None.
DIP Agreement, § 1.1 Final Order, ¶ 13	<u>(x) 506(c) waiver</u> : Final Order must approve Debtor’s waiver of any rights to seek a surcharge against Lender under Bankruptcy Code section 506(c).
DIP Agreement, § 2.11 Final Order, ¶ 7(b)	<u>(xi) Lien/claim on avoidance actions</u> : Yes— <u>see</u> above.

This Motion is made and based upon the following memorandum of points and authorities, the Omnibus Declaration, the papers and pleadings on file with the Court in the Chapter 11 Case, and any oral arguments the Court may entertain at the hearing on the Motion.

DATED this 1st day of March, 2012.

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MEMORANDUM OF LAW
POINTS AND AUTHORITIES

I.

JURISDICTION

1. This Court has jurisdiction to consider and determine this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b).

2. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory bases for the relief requested herein are Bankruptcy Code section 364, Bankruptcy Rule 4001(c) and Local Rules 4001(b) and (c).

II.

FACTUAL BACKGROUND

A. General Background.

4. On March 1, 2012 (the “Petition Date”), Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

5. Debtor is continuing in possession of its property and is operating and managing its business, as a debtor in possession, pursuant to Bankruptcy Code sections 1107 and 1108.

See generally Chapter 11 Case Docket.

6. No request has been made for the appointment of a trustee or examiner, and no statutory committee has been appointed. See id.

7. The factual background relating to Debtor’s commencement of this Chapter 11 Case is set forth in detail in the Omnibus Declaration and is incorporated for all purposes herein by this reference.

B. Debtor’s Need for the Postpetition Financing.

8. As described in greater detail in the Omnibus Declaration, Debtor faces a continuous need to compensate its various subcontractors for work in developing lots and constructing homes for sale, yet Debtor is not paid by its affiliated home seller entities for its services until the closing of each sale. Prior to the Petition Date, AWDI relied on advances from Lender (funded with borrowings from the Pre-Petition Lenders under the Pre-Petition Credit Agreement and advances from affiliated entities)

1 to provide the liquidity necessary to bridge the gaps between outlaying expenses for
 2 development/construction and receiving payment for these services at home sale closings. With the
 3 added expenses associated with its Chapter 11 Case, Debtor requires additional financing in order
 4 maintain its operations and remain current on expenses. Operationally, Debtor requires financing to
 5 ensure uninterrupted payment of expenses for the operation of its business, including payroll,
 6 marketing, leasing services, utilities and all other operational needs. The bulk of Debtor's expenses are
 7 related to payments to subcontractors for vertical and horizontal construction. Debtor also needs to pay
 8 expenses associated with regulatory licenses and fees.

9 9. As set forth in the Initial Cash Budget, Debtor will need to borrow \$260,000 by May 25,
 10 2012 in order to meet its operating expenses, make interest-only adequate protection payments to the
 11 Pre-Petition Lenders and fund expenses for the administration of the Chapter 11 Case. The Initial Cash
 12 Budget includes projected Postpetition Financing draws for any week in which Debtor's projected
 13 revenue and expenses would cause its total cash balance to drop below one million dollars
 14 (\$1,000,000). The Initial Cash Budget revenues are based on Debtor's internally-prepared projections
 15 of home sales—if actual home sales do not meet projections, then Debtor will need to increase
 16 borrowings under the Postpetition Financing above the amounts set forth in the Initial Cash Budget.
 17 Therefore, in order to ensure that Debtor will have sufficient liquidity to withstand fluctuations in the
 18 home buying market, and to fund the costs of administering the Chapter 11 Case, Debtor believes that
 19 it may require up to ten million dollars (\$10,000,000) in postpetition financing. With these funding
 20 requirements in mind, Debtor negotiated the DIP Agreement with Lender, which provides for up to ten
 21 million dollars (\$10,000,000) in Postpetition Financing borrowings on a revolving basis.

22 III.

23 RELIEF REQUESTED

24 10. By this Motion, Debtor seeks authorization to obtain the Postpetition Financing from
 25 Lender pursuant to the DIP Agreement. Debtor is seeking to use Postpetition Financing pursuant to the
 26 Initial Cash Budget. In order to keep Debtor's business operational, Debtor must be able to pay its
 27 subcontractors for work performed in the construction of homes (the sale of which is Debtor's chief
 28 source of revenue), satisfy other ongoing working capital needs and expenses of operation, including,

1 without limitation, employee payroll expenses, and fund the costs of administering Debtor’s estate,
2 including without limitation, fees assessed by the Office of the United States Trustee and the Clerk of
3 Court and fees and expenses of estate professionals. As indicated by the Initial Cash Budget, Debtor
4 projects that it will need to incur \$260,000 in Postpetition Financing borrowings by May 25, 2012.
5 Accordingly, timely approval of the proposed DIP Financing is critical to preserving the going concern
6 vale of Debtor’s estate from the outset of the Chapter 11 Case.

7 11. Moreover, obtaining certainty regarding Debtor’s ability to use Postpetition Financing
8 will enable Debtor and its professionals to focus complete attention on the implementation of Debtor’s
9 plan of reorganization. In addition, the DIP Agreement provides that an Event of Default will occur if
10 the Final Order is not entered within forty-five (45) days of the date that the Motion to approve the DIP
11 Agreement is filed (unless otherwise agreed by Debtor and Lender).

12 IV.

13 LEGAL ARGUMENT

14 Debtor Has Satisfied the Legal Requirements for Approval of the Postpetition Financing.

15 A. Debtor Cannot Obtain Financing on Terms More Favorable than Those of the DIP
16 Agreement.

17 12. As a debtor in possession, Debtor is authorized to operate its business under the
18 Bankruptcy Code. See 11 U.S.C. § 1108. Bankruptcy Code section 364(a) provides that a debtor in
19 possession may obtain unsecured credit as an administrative expense in the ordinary course of business
20 without court approval. 11 U.S.C. § 364(a). Bankruptcy Code section 364(b) provides that a debtor in
21 possession may obtain unsecured credit as an administrative expense outside of the ordinary course of
22 business with Court authorization after notice and a hearing. 11 U.S.C. § 364(b).

23 13. If credit on an administrative expense basis is not available, then pursuant to section
24 364(c) of the Bankruptcy, upon court approval after notice and a hearing, a debtor in possession may
25 obtain credit:

- 26 (1) with priority over any or all administrative expenses of the kind
specified in section 503(b) or 507(a) of [the Bankruptcy Code];
- 27 (2) secured by a lien on property of the estate that is not otherwise
28 subject to a lien; or

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

3 11 U.S.C. § 364(c). Parties who extend credit are protected under section 364(e) from the effects of a
4 reversal on appeal of the authorization to incur debt as long as they have acted in good faith. 11 U.S.C.
5 § 364(e).

6 14. Other than the requirement of notice and a hearing, the only statutory prerequisite under
7 Bankruptcy Code section 364(c) for obtaining credit on a secured basis and superpriority basis is that
8 the debtor in possession must be unable to obtain unsecured credit allowable as an administrative
9 expense under section 503(b)(1). 11 U.S.C. § 364(c); see also, In re Garland Corp., 6 B.R. 456,
10 461 n. 11 (B.A.P. 1st Cir. 1980) (secured credit under section 364(c)(2) is authorized, after notice and a
11 hearing, upon showing that unsecured credit cannot be obtained); In re Ames Dept. Stores, Inc.,
12 115 B.R. 34, 37-39 (Bankr. S.D.N.Y. 1990) (debtor must show that it has made a reasonable effort to
13 seek other sources of financing under Bankruptcy Code sections 364(a) and (b)).

14 15. To demonstrate that the requisite credit is not obtainable on an unsecured basis, the
15 debtor need only demonstrate “by good faith effort that credit was not available” without the protections
16 afforded to potential lenders by Bankruptcy Code section 364(c). Bray v. Shenandoah Fed. Sav. &
17 Loan Ass’n (In re Snowshoe Co.), 789 F.2d 1085, 1088 (4th Cir. 1986). Thus, “[t]he statute imposes no
18 duty to seek credit from every possible lender before concluding that such credit is unavailable.”
19 Id. at 1088; see also In re Ames, 115 B.R. at 40 (holding that debtor made a reasonable effort to secure
20 financing when it selected the least onerous financing option from the two remaining lenders);
21 In re Reading Tube Indus., 72 B.R. 329, 332 (Bankr. E.D. Pa. 1987) (“Given the ‘time is of the essence’
22 nature of this type of financing, we would not require this or any debtor to contact a seemingly infinite
23 number of possible lenders.”). Where few lenders are likely to be able and willing to extend the
24 necessary credit to a debtor, “it would be unrealistic and unnecessary to require [the debtor] to conduct
25 such an exhaustive search for financing.” In re Sky Valley, Inc., 100 B.R. 107, 113 (Bankr. N.D. Ga.
26 1988), aff’d sub nom., Anchor Savings Bank FSB v. Sky Valley, Inc., 99 B.R. 117, 120 n. 4 (N.D. Ga.
27 1989).

28 16. Debtor’s particular financial circumstances make it exceedingly unlikely that it could

1 obtain credit without offering the protections of a superpriority claim and a lien on available collateral.
2 As of the Petition Date, all of Debtor's assets (other than Avoidance Actions) were encumbered by liens
3 in favor of the Pre-Petition Lenders. Accordingly, there are no unencumbered assets (other than
4 Avoidance Actions) nor any readily available funds that could be used to secure or repay post-petition
5 financing on an unsecured administrative expense claim basis. Moreover, the debt owed to the Pre-
6 Petition Lenders under the Pre-Petition Credit Agreement is undersecured. In addition, Debtor's chief
7 source of revenue to service or repay postpetition financing is the proceeds of accounts receivable owed
8 by affiliated home seller entities, which proceeds (in addition to being part of the Pre-Petition Lenders'
9 Collateral) are only paid upon the closing of a home sale and, therefore, are entirely dependent on the
10 fluctuations and vagaries of the current residential real estate market.

11 17. Under these circumstances, the price of "new money" postpetition financing would have
12 been prohibitive for Debtor. Even if a previously uninvolved party could get comfortable with the level
13 of risk attendant to financing the Chapter 11 Case, it undoubtedly would demand a hefty cost premium
14 as part of any financing proposal in order to compensate for such risk. While an existing lender often
15 will be a viable option for postpetition financing, the Pre-Petition Lenders were not interested in
16 increasing their credit exposure beyond the current scope of borrowings under the Credit Agreement
17 (and certainly not on an unsecured administrative claim basis). Therefore, Debtor had few options
18 when it came to locating a cost-effective source of funding for its Chapter 11 Case. See Omnibus
19 Declaration.

20 18. Fortunately, Lender is willing to provide the Postpetition Financing on eminently
21 reasonable terms under the circumstances. Although Lender was not willing to provide the Postpetition
22 Financing on an unsecured administrative claim basis, Lender did not demand a priming lien and
23 instead is willing to accept a first priority lien on Avoidance Actions and a junior lien on previously
24 encumbered assets. The interest rate and other terms of the Postpetition Financing are favorable in
25 today's market. See § C, infra. And perhaps most importantly, Lender has agreed to convert the full
26 balance of the Postpetition Financing (up to the Maximum Commitment Amount of ten million dollars
27 (\$10,000,000) including all unpaid principal and accrued interest) to equity in the reorganized Debtor
28

1 pursuant to Debtor's plan.¹ Debtor canvassed the market and was not able to find any other readily
 2 available funding source willing to provide credit to Debtor on an unsecured administrative expense
 3 claim basis, much less on terms as favorable as the Postpetition Financing. See Omnibus Declaration.

4 19. Therefore, the Postpetition Financing satisfies the requirements of Bankruptcy Code
 5 section 364(c) because Debtor could not obtain the necessary credit solely on the basis of an
 6 administrative expense claim under Bankruptcy Code section 503(b).

7 **B. Debtor's Decision to Enter into the DIP Agreement Is Supported by Sound**
 8 **Business Judgment.**

9 20. Courts generally give broad deference to the business decisions of a debtor. See, e.g.,
 10 Stephens Indus., Inc. v. McClung, 789 F.2d 386, 390 (6th Cir. 1986); In re Continental Air Lines, Inc.,
 11 780 F.2d 1223, 1226 (5th Cir. 1986); In re Lionel Corp., 722 F.2d 1063, 1070 (2d Cir. 1983); Walter v.
 12 Sunwest Bank (In re Walter), 83 B.R. 14, 19-20 (B.A.P. 9th Cir. 1987). In particular, a bankruptcy
 13 court should defer to a debtor's reasonable business judgment regarding the need for funds, so long as
 14 the proposed financing agreement does not contain terms that either leverage the bankruptcy process or
 15 that benefit a third party rather than the bankruptcy estate. See, e.g., In re Trans World Airlines, Inc.,
 16 163 B.R. 964, 974 (Bankr. D. Del. 1994) (noting that an interim loan, receivables facility and asset-
 17 based facility were approved because they "reflect[ed] sound and prudent business judgment ..., [were]
 18 reasonable under the circumstances and in the best interest of [the debtor] and its creditors"). This was
 19 explained by the bankruptcy court in In re Ames Department Stores, Inc., 115 B.R. 34 (Bankr. S.D.N.Y.
 20 1990):

21 [A] court's discretion under section 364 is to be utilized on grounds that permit
 22 reasonable business judgment to be exercised so long as the financing agreement
 23 does not contain terms that leverage the bankruptcy process and powers or its
 purpose is not so much to benefit the estate as it is to benefit a party-in-interest.

24 Id. at 40.

25 ¹ Even under an alternative plan, Lender has committed to convert three million dollars
 26 (\$3,000,000) of the Postpetition Financing (or the full amount of Postpetition Financing if less than
 27 three million dollars (\$3,000,000) is outstanding) to equity in the reorganized Debtor pursuant to any
 28 plan (other than Debtor's plan) that (i) provides for any remaining balance of the Loans to be paid in
 full to Lender, and (ii) is otherwise reasonably acceptable to Lender.

1 21. Here, Debtor's decision to enter into the Postpetition Financing represents a reasonable
2 exercise of business judgment. As demonstrated by the Initial Cash Budget, Debtor has an immediate
3 need for the Postpetition Financing in order to fund its operations and the expenses of the Chapter 11
4 Case. Debtor and Lender negotiated the terms of the proposed DIP Financing at arms' length in good
5 faith, and Lender was represented by independent counsel. Lender is willing to provide the Postpetition
6 Financing on very favorable terms due to its existing affiliation with Debtor. See § C, infra. Lender
7 also has agreed to convert the full balance of the Postpetition Financing (up to the Maximum
8 Commitment Amount) into equity in the reorganized Debtor pursuant to Debtor's chapter 11 plan.

9 22. Without the Postpetition Financing, Debtor would not be able to fund operations and
10 proceed with its chapter 11 plan. Instead, Debtor would be faced with the potential for administrative
11 insolvency followed by a liquidation. Given the choice between these two alternatives, Debtor
12 prudently negotiated the DIP Agreement with Lender to ensure that Debtor would have the necessary
13 funding to bring the Chapter 11 Case to a successful conclusion. Therefore, the Court should approve
14 Debtor's decision to enter into the DIP Agreement as an exercise of sound business judgment.

15 **C. The Terms of the Postpetition Financing are Reasonable Under The Circumstances And**
16 **Should Be Approved.**

17 23. The terms of the DIP Agreement are similar to those often included in complex financing
18 arrangements. Indeed, the DIP Agreement and the proposed Final Order reflect the give and take that
19 result from complex financing negotiations. See Omnibus Declaration. Courts have recognized that a
20 debtor often must make significant concessions in exchange for financing. See, e.g., In re Ellingsen
21 MacLean Oil Co., 65 B.R. 358, 365 (Bankr. W.D. Mich. 1986), aff'd, 834 F.2d 599 (6th Cir. 1987)
22 (chapter 11 postpetition financing is "fraught with dangers for creditors . . ."). Accordingly, courts
23 recognize that a debtor may need to "enter into a hard bargain with a creditor in order to acquire the
24 needed funds to complete reorganization." Id. at 365.

25 24. Similarly, lenders often agree to subordinate or "carve-out" from their collateral funds to
26 pay professionals. See Harvis Trien & Beck, P.C. v. Federal Home Mortgage Corp. (In re Blackwood
27 Assocs., L.P.), 187 B.R. 856, 860 (Bankr. E.D.N.Y. 1995) (court advised that if professionals really
28

1 want to be paid they had best insist upon a “real carve out”); In re Ames, 115 B.R. at 40 (noting practice
2 of district to insist on carve-out for fees in order to preserve adversary system).

3 25. As noted above, the terms of the DIP Agreement are very favorable under the
4 circumstances. Lender negotiated for a lien on Avoidance Actions, the only assets of Debtor’s estate
5 not subject to a the Pre-Petition Lenders’ prior security interest. Thus, this is not a case where an over-
6 reaching (and/or oversecured) pre-petition lender seeks to enhance its collateral package at the expense
7 of unsecured creditors. Instead, Lender simply requested reasonable protections to secure repayment
8 of the Postpetition Financing.

9 26. Similarly, the interest rate of fifteen percent (15%) is reflective of the competitive rates
10 available in the market for financing secured by assets like the Avoidance Actions that are not readily
11 convertible to cash. See Omnibus Declaration. Indeed, Debtor spoke with a number of sophisticated
12 lenders who quoted interest rates in excess of 15% plus additional up-front commitment fees.
13 See Omnibus Declaration.

14 27. Furthermore, the DIP Agreement provides for a generous Carve-Out, which covers fees
15 and expenses of professionals employed by a statutory committee (if appointed) as well as professionals
16 employed by Debtor. The Events of Default and conditions to borrowing are customary in postpetition
17 financings, and Lender’s ability to exercise remedies upon the occurrence of an Event of Default
18 expressly allows for a hearing before the Bankruptcy Court on shortened notice to resolve any dispute.
19 Lender does not unduly seek to control or restrict Debtor’s ability to prosecute the Chapter 11 Case with
20 limitations or prohibitions on Debtor’s ability to use cash collateral or propose a plan. Therefore, the
21 Court should approve the Postpetition Financing based on its fair and reasonable terms.

22 **V.**

23 **NOTICE**

24 28. Notice of this Motion is being given by electronic mail, U.S. Mail or the Court’s ECF
25 noticing to the following parties or their counsel: (a) the Office of the United States Trustee for the
26 District of Nevada, Attn: Athanasios Agelakopoulos; (b) counsel to Lender; (c) counsel to Pre-Petition
27 Lenders; (d) Debtor’s known twenty largest unsecured creditors; and (e) all other parties requesting
28 notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, Debtor

1 respectfully submits that no further notice is necessary.

2 **VI.**

3 **CONCLUSION**

4 WHEREFORE, based upon all the foregoing, as set forth in this Memorandum, the Motion, the
5 Omnibus Declaration, the Omnibus Declaration, and all other papers, documents, or other evidence
6 submitted in support of the Motion, Debtor respectfully requests that the Court grant the Motion in its
7 entirety and: (1) approve the Postpetition Financing on a final basis; (2) enter the Final Order, in
8 substantially the form attached hereto as **Exhibit "1;"** (3) authorize Debtor to borrow on a final basis
9 under the terms of the Loan Documents and the Final Order; (4) grant Lender the security, liens and
10 superpriority claims provided for under the Final Order; and (5) grant to Debtor such other relief as the
11 Court deems necessary and appropriate.

12 DATED this 1st day of March, 2012.

13 **FOX ROTHSCHILD LLP**

14 By /s/Brett A. Axelrod

15 BRETT A. AXELROD, ESQ.

Nevada Bar No. 5859

16 MICAELA RUSTIA MOORE, ESQ.

Nevada Bar No. 9676

17 3800 Howard Hughes Parkway, Suite 500

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19 *[Proposed] Counsel for Debtor*

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EXHIBIT "1"

PROPOSED FINAL ORDER

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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re

AMERICAN WEST DEVELOPMENT,
INC., a Nevada corporation,

Debtor.

Case No. BK-S-12-12349-MKN
Chapter 11

**FINAL ORDER PURSUANT TO 11 U.S.C.
§ 364 AND FED. R. BANKR. P. RULE
4001(C): (I) AUTHORIZING DEBTOR TO
OBTAIN POSTPETITION FINANCING;
AND (II) GRANTING RELATED RELIEF**

Hearing Date:
Hearing Time:

The Court, having reviewed and considered the Motion (the "Motion") filed by American West Development, Inc. ("Debtor") for entry of a final order (the "Final Order") pursuant to section 364 of title 11 of the United States Code, §§ 101 *et. seq.* (the "Bankruptcy Code"), Rule 4001(c) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rules 4001(b) and (c) of the Local Rules for the U.S. Bankruptcy Court, District of Nevada ("Local Rules") authorizing and approving, among other things, Debtor to obtain postpetition financing (the "Postpetition Financing") from AWH Ventures, Inc. (the "Lender") on a non-priming secured and superpriority basis pursuant to a

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1 Debtor-In-Possession Revolving Credit Agreement (the “DIP Agreement”); and it appearing that the
2 relief requested is in the best interests of Debtor’s estate, its creditors and all other parties in interest;
3 and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to
4 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a
5 core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper in this Court pursuant to
6 28 U.S.C. §§ 1408 and 1409; and the Court having reviewed and considered all other pleadings and
7 evidence submitted by the parties in connection with the Motion; and due and proper notice of the
8 Motion having been provided; and it appearing that no other or further notice need be provided; and the
9 Court having determined that the legal and factual bases set forth in the Motion establish just cause for
10 the relief granted herein; and the Court having considered the oral arguments of counsel at the hearings
11 held on _____, 2012 (the “Hearing”); and the Court having made findings of fact and
12 conclusions of law on the record, which (to the extent not expressly set forth below) are incorporated
13 herein pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable to these
14 proceedings by Bankruptcy Rule 7052; and good and sufficient cause appearing therefor,

15 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that:

16 **I. Background, Jurisdiction and Notice.**

17 A. On March 1, 2012 (the “Petition Date”), Debtor commenced its bankruptcy case (the
18 “Chapter 11 Case”) by filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code.
19 Debtor is continuing to operate its business as a debtor-in-possession pursuant to Bankruptcy Code
20 sections 1107(a) and 1108. No trustee, examiner, or statutory committee has been appointed.

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

24 C. Debtor has complied with applicable Bankruptcy Rules and Local Rules by serving the
25 Motion and providing notice of the Hearing to: (i) the Office of the United States Trustee; (ii) Debtor’s
26 twenty (20) largest unsecured creditors; (iii) counsel to Lender; (iv) counsel to the Pre-Petition Lenders;
27 and (v) all other parties requesting notice pursuant to Bankruptcy Rule 2002. Given the nature of the
28

1 relief sought in the Motion, the Court concludes that the foregoing notice was sufficient and adequate
2 under the circumstances and complies with Bankruptcy Rule 4001 in all respects.

3 **II. Findings Regarding the Postpetition Financing Based on the Record at the Hearing.**

4 D. Debtor has an immediate and critical need to obtain the Postpetition Financing.
5 Debtor's ability to obtain the Postpetition Financing is critical to its ability to continue as a going
6 concern during the course of this Chapter 11 Case. The proceeds of the Postpetition Financing will be
7 used to fund the costs of administering Debtor's estate, including, without limitation, (i) funding the
8 operations of Debtor's business and properties, (ii) making adequate protection payments to the
9 Pre-Petition Lenders, (iii) paying expenses incurred for the administration of the Chapter 11 Case,
10 including paying reasonable compensation of professional fees and expenses, (iv) paying any
11 contractual obligations, and (v) repaying Revolving Loans. Debtor's access to sufficient liquidity
12 through the incurrence of the Postpetition Financing under the terms of this Final Order is vital to the
13 preservation and maintenance of the going concern value of Debtor's estate and to Debtor's successful
14 reorganization.

15 E. The use of cash collateral alone would be insufficient to meet Debtor's postpetition
16 liquidity needs. Debtor is unable to obtain adequate unsecured credit allowable under Bankruptcy Code
17 sections 364(b) and 503(b)(1). The Postpetition Financing reflects the most favorable terms available to
18 Debtor. Debtor requires the Postpetition Financing, in addition to the use of cash collateral, to satisfy
19 its postpetition liquidity needs.

20 F. Lender has indicated a willingness to provide Debtor with the Postpetition Financing, but
21 solely on the terms and conditions set forth in this Final Order and in the Loan Documents (as defined
22 in the DIP Agreement). After considering all of its alternatives, Debtor has concluded, in an exercise of
23 its sound business judgment, that the financing to be provided by Lender pursuant to the terms of this
24 Final Order and the Loan Documents represents the best financing presently available to Debtor.

25 G. The security interests and liens granted pursuant to this Final Order to Lender are
26 appropriate under Bankruptcy Code sections 364(c)(2) and (c)(3) because, among other things, such
27 security interests and liens do not impair the interests of any holder of a valid, binding, continuing,
28 enforceable and fully-perfected prepetition security interest or lien in the property of Debtor's estate.

1 H. Entry of this Final Order is in the best interest of Debtor, its estate and creditors. The
2 terms of the Loan Documents are fair and reasonable under the circumstances, reflect Debtor's exercise
3 of prudent business judgment consistent with its fiduciary duties, and are supported by reasonably
4 equivalent value and fair consideration.

5 I. Debtor and Lender have negotiated the terms and conditions of the Loan Documents and
6 this Final Order in good faith and at arm's-length, and any credit extended and loans made to Debtor
7 pursuant to this Final Order shall be, and hereby are, deemed to have been extended, issued or made, as
8 the case may be, in "good faith" within the meaning of Bankruptcy Code section 364(e).

9 J. Based on the foregoing, and upon the record made before this Court at the Hearing, and
10 good and sufficient cause appearing therefor;

11 **III. Disposition.**

12 1. The Motion is granted on a final basis on the terms and conditions set forth in this Final
13 Order. This Final Order shall become effective immediately upon its entry. To the extent the terms of
14 the Loan Documents differ in any material respect from the terms of this Final Order, this Final Order
15 shall control.

16 **IV. Authorization of the Postpetition Financing and Entry Into the Loan Documents.**

17 2. The terms and conditions of the DIP Agreement are hereby approved. Debtor is hereby
18 authorized to enter into the Loan Documents, including the DIP Agreement and such additional
19 documents, instruments and agreements as may be reasonably required by Lender to implement the
20 terms or effectuate the purposes of this Final Order. Immediately upon entry of this Final Order, Debtor
21 is hereby authorized to borrow under the Revolving Loan up to ten million dollars (\$10,000,000), in
22 accordance with this Final Order, the DIP Agreement, and the other Loan Documents.

23 3. Debtor hereby is authorized to incur the Obligations solely in accordance with the terms
24 and conditions set forth in the DIP Agreement and this Final Order.

25 **V. Loan Obligations.**

26 4. Upon execution and delivery of the Loan Documents, the Loan Documents shall
27 constitute valid, binding and continuing obligations of Debtor, enforceable against Debtor in accordance
28 with the terms thereof. No obligation, payment, transfer or grant of security under the Loan Documents

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1 or this Final Order shall be stayed, restrained, voided, voidable or recoverable under the Bankruptcy
2 Code or under any applicable non-bankruptcy law, or subject to any defense, reduction, setoff,
3 recoupment or counterclaim.

4 5. The Loans: (i) shall bear interest payable at the rates set forth in the DIP Agreement;
5 (ii) shall be secured in the manner specified in Paragraph 7 below; (iii) shall be payable in accordance
6 with the terms of the Loan Documents; and (iv) shall otherwise be governed by the terms set forth
7 herein and in the Loan Documents.

8 **VI. Use of Loan Proceeds.**

9 6. Debtor may use the Loans pursuant to the terms and conditions set forth in this Final
10 Order and in the Loan Documents.

11 **VII. Grant of Superpriority Claims and Liens.**

12 7. As security for the full and timely payment of the Obligations, Lender is hereby granted,
13 subject to the Carve-Out:

14 (a) pursuant to Bankruptcy Code sections 364(c)(1), an allowed administrative expense
15 claim in the Chapter 11 Case having priority over all claims against Debtor now existing or
16 hereafter arising, of any kind whatsoever, including, without limitation, the Pre-Petition
17 Lenders' Superpriority Claims and all other administrative expenses of the kinds and over any
18 and all administrative expenses or other claims arising under Bankruptcy Code sections 105,
19 326, 328, 330, 331, 503(b), 506(c), 507(a), 507(b), 726, 1113 or 1114, which DIP Superpriority
20 Claim shall be (i) subject to the Carve-Out (as defined in Paragraph 9 below), (ii) subject to the
21 Subordination Agreement (as defined in Paragraph 14 below), and (iii) applicable to any
22 Avoidance Actions; and

23 (b) pursuant to Bankruptcy Code sections 364(c)(2) and (c)(3), (i) a valid and duly
24 perfected first priority Lien on Avoidance Actions, and any other previously unencumbered
25 assets of Debtor, and (ii) a valid and duly perfected junior Lien on the Pre-Petition Lenders'
26 Collateral and any other assets of Debtor that are subject to a valid and perfected lien as of the
27 Petition Date (collectively, the liens to be granted to Lender are referred to herein as the "DIP
28 Lien" and the collateral subject to such DIP Lien is referred to herein as the "DIP Collateral");

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1 provided that the DIP Lien shall be subject and subordinate to the lien and security interest of
2 the Pre-Petition Lenders in and to the Pre-Petition Lenders' Collateral and Lender agrees to
3 execute and deliver such additional subordination agreements as the Pre-Petition Lenders may
4 require to evidence such subordination. In no event will the DIP Lien attach to any property
5 constituting collateral pursuant to the Pre-Petition Credit Agreement other than the Pre-Petition
6 Lenders' Collateral.

7 8. The DIP Liens shall not be subject to challenge and shall attach and become valid,
8 binding, continuing, enforceable, fully-perfected and non-avoidable by operation of law as of the
9 Petition Date without any further action by Debtor, Lender, or any other person, and without the
10 necessity of execution by Debtor, or the filing or recordation, of any financing statements, security
11 agreements, vehicle lien applications, mortgages, deeds of trust, assignment of rents, filings with the
12 U.S. Patent and Trademark Office, or other documents. Debtor, upon the request of Lender (i) shall
13 authorize Lender to file and record such financing statements and fixture filings with respect to any DIP
14 Collateral identified by Lender, and (ii) shall take any such other action as required by Lender with
15 respect to DIP Collateral identified by Lender in order to perfect the DIP Liens granted herein. Lender
16 is authorized to file or record such documents in its discretion, in which event all such documents shall
17 be deemed to have been filed or recorded at the time and on the date of entry of this Final Order.

18 **VIII. Carve-Out.**

19 9. The DIP Lien and the DIP Superpriority Claims shall be subject to the payment of the
20 Carve-Out. For purposes of this Final Order, the "Carve-Out" shall mean (i) all fees required to be
21 paid to the Clerk of the Bankruptcy Court and to the Office of the United States Trustee pursuant to
22 28 § U.S.C. 1930, and (ii) an amount not exceeding three million dollars (\$3,000,000) in the aggregate,
23 which amount may be used after the occurrence and during the continuation of an Event of Default, to
24 pay the fees and expenses of professionals retained by Debtor and any Committee and allowed (or
25 allowable) by the Bankruptcy Court (as to which allowed or allowable fees and expenses Lender
26 waives any right to seek disgorgement); provided, however, that Debtor shall be permitted to pay
27 compensation and reimbursement of expenses allowed, allowable or otherwise authorized by the
28 Bankruptcy Court and payable under Bankruptcy Code sections 330 and 331 in accordance with the

1 Cash Budget, the Carve-Out shall not be reduced by the amount of any compensation and
2 reimbursement of expenses paid or incurred (to the extent ultimately allowed or allowable by the
3 Bankruptcy Court) prior to the occurrence of an Event of Default in respect of which the Carve-Out is
4 invoked, and the Lender waives any right to seek disgorgement thereof; and provided, further, that
5 nothing herein shall be construed to impair the ability of Lender to object to the reasonableness of any
6 of the fees, expenses, reimbursement or compensation sought by the professionals retained by Debtor or
7 any Committee.

8 **IX. 11 U.S.C. § 364(e) Protections.**

9 10. If any or all of the provisions of this Final Order are hereafter reversed, modified,
10 vacated or stayed, such reversal, modification, vacation or stay shall not affect (i) the validity of any
11 Obligations incurred pursuant to this Final Order or the Loan Documents, or (ii) the validity or
12 enforceability of any claim, lien, security interest or priority authorized or created hereby or pursuant to
13 the Loan Documents with respect to any Obligations. Notwithstanding any such reversal, modification,
14 vacation or stay, any incurrence of Obligations by Debtor shall be governed in all respects by the
15 provisions of this Final Order and the Loan Documents, and Lender shall be entitled to all of the rights,
16 remedies, protections and benefits granted under Bankruptcy Code section 364(e), this Final Order, and
17 the Loan Documents with respect to incurrence of the Obligations by Debtor.

18 **X. Vacation of the Automatic Stay.**

19 11. Notwithstanding Bankruptcy Code section 362, the automatic stay is hereby vacated and
20 modified to the extent necessary to permit Lender, upon the occurrence and during the continuance of
21 an Event of Default and following three (3) business days' prior notice thereof to Debtor (with a copy to
22 counsel for any Committee, and to the United States Trustee for the District of Nevada), and without
23 further order of or application to the Bankruptcy Court to: (i) terminate the Revolving Loan
24 Commitments, (ii) immediately cease any obligation to provide funding of Revolving Loans,
25 (iii) declare the Obligations immediately due and payable, (iv) declare the Loans or any portion thereof
26 then outstanding to be forthwith due and payable, whereupon the principal of such Loans together with
27 accrued interest thereon and any unpaid accrued fees and all other liabilities of Debtor accrued
28 hereunder and under any other Loan Document, shall become forthwith due and payable, without

1 presentment, demand, protest or any other notice of any kind, all of which are hereby expressly waived
2 by Debtor, anything contained herein or in any other Loan Document to the contrary notwithstanding,
3 and (v) after three (3) business days' prior notice (the "Stay Notice Period") to Debtor and any
4 Committee, and absent order of the Bankruptcy Court to the contrary, exercise any and all remedial
5 rights with respect to the DIP Collateral; provided that Lender consents to a hearing before the
6 Bankruptcy Court with respect to the foregoing on such shortened time as may be available according to
7 the Bankruptcy Court's calendar and the stay shall remain in effect pending such a hearing if requested
8 by Debtor prior to the expiration of the Stay Notice Period.

9 **XI. No Marshalling/506(c) Waiver.**

10 12. Lender shall not be subject to the doctrine of marshalling. Debtor has waived any right
11 to seek a surcharge against Lender under Bankruptcy Code section 506(c), and such waiver hereby is
12 approved.

13 **XII. Miscellaneous Provisions.**

14 13. The provisions of this Final Order shall be binding upon and inure to the benefit of
15 Lender, Debtor, and their respective successors and assigns. The provisions of this Final Order and any
16 actions taken pursuant thereto (a) shall survive the entry of any order: (i) confirming any plan of
17 reorganization in the Chapter 11 Case unless otherwise provided therein; (ii) converting the Chapter 11
18 Case to one under chapter 7 of the Bankruptcy Code; or (iii) dismissing the Chapter 11 Case; and
19 (b) shall continue in full force and effect notwithstanding the entry of any such order, and the claims,
20 liens, and security interests granted pursuant to this Final Order shall maintain their priority as provided
21 by this Final Order until all of the Obligations are indefeasibly paid in full and discharged in accordance
22 with the terms of this Final Order and the DIP Agreement.

23 14. Lender's rights and Borrower's obligations under this Final Order and the Loan
24 Documents are subject to the Subordination and Intercreditor Agreement (the "Subordination
25 Agreement") executed by Lender and the administrative agent on behalf of the Pre-Petition Lenders
26 (the "Subordination Agreement") providing for, among other things, confirmation of lien and payment
27 priorities. All provisions, rights, remedies and terms under the DIP Agreement are subject to the
28 Subordination Agreement. In the event of any conflict between the DIP Agreement, the other Loan

1 Documents, and the Subordination Agreement, the Subordination Agreement shall control and each
2 Revolving Note (as defined in the DIP Agreement) shall include a legend (the contents of which to be
3 agreed upon by Lender and the Pre-Petition Lenders pursuant to the Subordination Agreement) that the
4 Revolving Note is subject to the Subordination Agreement.

5 15. The rights of Lender and the obligations of Debtor under the DIP Agreement and the
6 other Loan Documents are subordinate to the claims and obligations incurred by U.S. Bank from
7 ordinary course transactions under Borrower’s cash management system and/or bank accounts with
8 U.S. Bank (collectively, the “Cash Management Claims”).

9 16. Debtor hereby is authorized, without further order of this Court, to enter into agreements
10 with Lender providing for (a) non-material modifications to the DIP Agreement, or (b) any other
11 modifications to the DIP Agreement necessary to conform the DIP Agreement to this Final Order.

12 17. To the extent applicable, this Final Order is not subject to the 14-day stay provision of
13 Bankruptcy Rule 4001(a)(3).

14
15 DATED: _____, 2012.

16
17 Prepared and respectfully submitted by:

18 **FOX ROTHSCHILD LLP**

19 By _____
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21 Nevada Bar No. 5859
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APPROVED/DISAPPROVED:

OFFICE OF THE UNITED STATES TRUSTEE

BY _____
Athanasios Agelakopoulos
Trial Attorney for Acting U.S. Trustee, August B. Landis

CERTIFICATION OF COUNSEL PURSUANT TO LOCAL RULE 9021

In accordance with Local Rule 9021, counsel submitting this document certifies that the order accurately reflects the court’s ruling and that:

- The Court has waived the requirement set forth in LR 9021(b)(1).
- No party appeared at the hearing or filed an objection to the motion.
- I have delivered a copy of this proposed order to all counsel who appeared at the hearing, and any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order, or failed to respond, as indicated below:

ATHANASIOS
AGELAKOPOULOS, OFFICE OF
THE UNITED STATES TRUSTEE

[INSERT, AS APPLICABLE]

Approved / Disapproved

- I certify that this is a case under Chapter 7 or 13, that I have served a copy of this order with the motion, pursuant to LR 9014(g), and that no party has objected to the form or content of the order.

###

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