THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

In re:	)	**Chapter 11**
	)	
DAN RIVER INC., *et al.*	)	**Case Nos. 04-__ through 04-__**
	)	
	)	**Jointly Administered**
Debtors.	)	
	)	

EMERGENCY MOTION FOR INTERIM ORDER (I) AUTHORIZING DEBTORS (A) TO OBTAIN POST-PETITION FINANCING PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1) AND 364(e) AND (B) TO UTILIZE CASH COLLATERAL PURSUANT TO 11 U.S.C. § 363, (II) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED PARTIES PURSUANT TO 11 U.S.C. §§ 361, 362, 363 AND 364 AND (III) SCHEDULING A FINAL HEARING PURSUANT TO BANKRUPTCY RULES 2002, 4001 AND 9014

Dan River Inc. ("Dan River"), The Bibb Company LLC ("Bibb"), Dan River International Ltd. ("Dan River International"), and Dan River Factory Stores, Inc. ("Dan River Stores") (collectively, the "Debtors" or the "Company"), hereby move this Court, pursuant to sections 105, 361, 362, 363 and 364 of title 11 of the United States Code, 11 U.S.C. §101 *et seq*. as amended (the "Bankruptcy Code"), and Rules 2002, 4001 (b) and (c) and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") for the entry of interim and final orders, *inter alia*:[1]

(a) (i) authorizing, pursuant to section 364 of the Bankruptcy Code and Bankruptcy Rules 4001(c)(1) and 4001(b)(1) for the Debtors to obtain post-petition financing (the "DIP Financing") pursuant to the terms and provisions of that certain Post-Petition Credit Agreement**,** dated as of March 31, 2004 (as the same may be amended, supplemented or otherwise modified from time to time) (the "DIP Financing Agreement") a draft of which is attached hereto as Exhibit "A", by and among the Debtors, Deutsche Bank Trust Company Americas and the other lenders party to the DIP Financing Agreement (collectively and together with their respective

[1] Capitalized terms which are not defined herein shall have the meaning ascribed to such terms in the DIP Financing Agreement.

successors and assigns, the "DIP Lenders") and Deutsche Bank Trust Company Americas (as "Agent"); Fleet Capital Corporation (as "Syndication Agent"); and Wachovia Bank, National Association (as "Documentation Agent"); (ii) granting the DIP Lenders, pursuant to section 364(d) of the Bankruptcy Code, a security interest in and lien upon all of the Debtors' currently owned and after acquired property which liens and security interest will be senior in priority to any existing liens except certain permitted liens to secure the Debtors' obligations under the DIP Financing Agreement and related documents, and (iii) granting the DIP Lenders priority in payment over any and all administrative expenses of the kinds specified in sections 503(b) of the Bankruptcy Code except for the Carve-Out (as defined herein and in the attached Interim Order) pursuant to section 364(c)(1) of the Bankruptcy Code;

(b) (i) authorizing, pursuant to section 363 of the Bankruptcy Code and Bankruptcy Rule 4001(b), the Debtors' use of cash collateral pursuant to the DIP Financing Agreement and attached Interim Order; and (ii) providing the Secured Parties (as defined in the Pre-Petition Loan Agreement referred to below), and their successors and permitted assigns with adequate protection for the Debtors' use of cash collateral and on account of the pre-petition debt of the Debtors to the DIP Lenders (the "Pre-Petition Obligations") arising from, *inter alia*, that certain Credit Agreement, dated as of April 15, 2003, as amended and restated from time to time through the date hereof (the "Pre-Petition Loan Agreement"), by and among Dan River, Deutsche Bank Trust Company Americas, as agent, Fleet Capital Corporation, as syndication agent, and Wachovia Bank, National Association as documentation agent, and certain Lenders party thereto, pursuant to sections 361 and 363 of the Bankruptcy Code;

(c) pending the final hearing on the Motion (the "Final Hearing") and entry of a final order on the Motion (the "Final Order"), authorizing emergency post-petition loans under the DIP Financing Agreement up to an aggregate amount of $40,000,000, plus accrued interest on the aggregate principal amount and emergency use of cash collateral from and including the date of an interim order on the Motion (the "Interim Order") upon the terms and conditions set forth in the Interim Order, a copy of which is attached hereto as Exhibit "B"; and

(d) in accordance with Bankruptcy Rules 4001(c)(2) and 4001(b)(2), scheduling the Final Hearing and approving notice with respect thereto.

In support of this Motion, the Debtors respectfully represent as follows:

Background

1. On the date hereof (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code. The Debtors are authorized to operate their businesses as debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

A. Company Background.

2. Dan River was founded in 1882 and is a leading designer, manufacturer and marketer of products for the home fashions and apparel fabrics markets. Dan River operates three business segments: home fashions, apparel fabrics, and engineered products.

3. During fiscal 2003, Dan River's home fashions division produced approximately 72 percent of the Company's revenues, generating $342 million in net sales. Dan River's home fashions products include bedroom furnishings such as comforters, sheets, pillowcases, shams, bed skirts, decorative pillows and draperies. Dan River is an innovator in merchandising home fashions products and introduced the "Bed-in-a-Bag" complete bed ensemble that consists of a comforter with matching sheets, pillowcases, shams, and a dust ruffle. The home fashions products are marketed under the "Dan River" name as well as under private labels of the Company's major retail customers and under licenses from, among others, "Colours by Alexander Julian" and "Lilly Pulitzer." Dan River also markets home fashions products for the juvenile market under a number of licensed names and trademarks, including "Barbie," "Looney Tunes," "Spiderman," and "Scooby Doo" among others.

4. During fiscal 2003, Dan River's apparel fabrics division produced approximately 21 percent of Dan River's total revenues, generating $102 million in net sales. Dan River's apparel fabrics products include a broad range of high quality woven cotton and cotton-blend fabrics that are marketed primarily to clothing manufacturers.

5. During fiscal 2003, the engineered products division was Dan River's smallest division, and produced 7 percent of Dan River's gross revenue, generating $34 million in net sales. Dan River's engineered products include coated yarns and woven fabrics that are manufactured to customer specifications for use in such products as high pressure hoses for the automotive industry, conveyer belts and other industrial applications.

6. The remaining debtors, Bibb, Dan River International, and Dan River Stores are wholly-owned subsidiaries of Dan River. Bibb was acquired by Dan River in 1998, and substantially all of its assets were subsequently transferred to Dan River. In 2001, Bibb was converted to a single member Delaware limited liability company, wholly owned by Dan River. The only remaining assets of Bibb are its environmentally impaired Abbeville facility, and small parcels of raw land with nominal value. Dan River International is a holding company for the Company's international operations.[2] Dan River Stores was formed in 1992. In 2001, Dan River Stores transferred substantially all of its assets to Dan River. The only remaining material assets of Dan River Stores are intercompany receivables and inconsequential leases.

[2] The Company's international operations include the following Mexican entities: Dan River de Mexico, S. de R.L. de C.V. ("DRMEX"), Maquilas Pinnacle, S. de R.L. de C.V. and Adsercorp, S. de R.L. de C.V. (collectively, the "Mexico Companies"). The Mexico Companies are the equivalent of limited liability companies. However, Mexico does not allow single member limited liability companies. Therefore, Dan River owns a one peso interest in DRMEX. The remaining Mexico Companies own a one peso interest in each other. Dan River International owns all remaining interests in the Mexico Companies. Dan River B.V. is a Netherlands corporation that was formed in 2000 as a wholly-owned subsidiary of Dan River International to hold Dan River International's interests in the Mexico Companies. However, those interests were never transferred to Dan River B.V., and Dan River B.V. has nominal assets. Neither Dan River B.V. nor any of the Mexico Companies are debtors in these proceedings.

B. The Debtors' Long-Term Debt Structure.

7. On April 15, 2003, Dan River completed the refinancing of substantially all of its outstanding long-term debt. The refinancing included the sale, at 95.035 percent of par, of 12-3/4 percent senior notes due 2009 in the aggregate principal amount of $157 million.

8. In addition, the Debtors entered into the Pre-Petition Credit Agreement.

C. Events Leading to the Debtors' Chapter 11 Cases.

9. In fiscal 2003, the Debtors experienced a significant drop in revenues beginning in the second quarter. Retail sales of the Debtors' products began to weaken in the second quarter due to a lackluster retail environment in general and inventory adjustments by some of its customers, including its largest customer, Kmart. For fiscal 2003, total revenues were down 22.1 percent compared to the previous year.

10. During the second, third and fourth quarters of fiscal 2003, in response to the drop in sales, the Debtors initiated plans to eliminate approximately $18 million in annual expenses through the closure and consolidation of manufacturing facilities and a reduction of workforce. Four manufacturing facilities were closed, which eliminated over 850 positions for a total estimated annual savings of $13.6 million. Approximately 80 managerial and administrative positions were eliminated which reduced annual expenses by over $4 million. The benefits of these cost-cutting efforts were not expected to be realized until fiscal 2004, too late to mitigate a continued reduction in gross profit caused by the poor economic environment. The Debtors' gross profit for fiscal 2003 was approximately $61 million less than their gross profit for the previous year.

11. The Debtors are not the only domestic textile company which has encountered financial problems. Numerous other domestic textile companies such as Burlington Industries,

Cone Mills, WestPoint Stevens, Pillowtex, and others have already filed for bankruptcy protection.

12. As a result of the Debtors' financial performance, they failed to meet the maximum leverage ratio covenant contained in the Pre-Petition Credit Agreement for the third quarter of 2003. The Debtors and the Lenders entered into an amendment of the Pre-Petition Credit Agreement that waived the covenant violation and imposed new requirements for minimum levels of excess availability and monthly operating EBITDA. An additional amendment and waiver to the Pre-Petition Credit Agreement was executed in December 2003, waiving certain anticipated defaults resulting from the Debtors' financial performance and imposing additional requirements on the Debtors. Another amendment was executed in January 2004 modifying certain terms of the Pre-Petition Credit Agreement. Among other things, the Pre-Petition Credit Agreement, as amended, requires the Debtors to deliver to the Agent on March 31, 2004 satisfactory evidence that the Debtors will be in compliance with the financial covenants in the Pre-Petition Credit Agreement for the fiscal quarter ending April 3, 2004.

13. The Debtors' sales and profitability have not sufficiently improved to be in compliance with all of the Pre-Petition Credit Agreement's financial covenants. As a result, commencing April 1, 2004, the Debtors will be in default under the Pre-Petition Credit Agreement. Accordingly, the Company will no longer have access to the funds necessary to meet its operating expenses and will be faced with a loss of enterprise value if it cannot restructure its debt and obtain additional financing. Therefore, the Debtors have concluded, after consultation with their advisors, that their interests and the interests of their creditors and employees will be best served by a reorganization under Chapter 11 of the Bankruptcy Code.

The Pre-Petition Financing Facility

A. The Pre-Petition Loan Agreement

14. Prior to the Petition Date, Dan River financed its working and other capital needs and that of the other Debtors under the Pre-Petition Credit Agreement pursuant to which it borrowed $40,000,000 in the form of a term loan and was able to borrow up to $160 million in revolving loans.

15. The Pre-Petition Loan Agreement and all other agreements, notes, security agreements, instruments, and other documents executed in connection therewith are hereafter collectively referred to as the "Pre-Petition Loan Documents".

16. The loans, advances and other indebtedness owed by Dan River to the Secured Parties under the Pre-Petition Loan Documents are secured by valid liens, security interests and mortgages granted by Dan River to or for the benefit of the Secured Parties upon substantially all the assets of Dan River, including, but not limited to all goods, accounts, inventory, real property, general intangibles, documents, instruments and chattel paper, equipment, intellectual property, deposit accounts and books and records, together with the products and proceeds thereof, except as set forth below. (The assets of Dan River subject to the liens, security interests and mortgages of the Secured Parties are hereafter collectively referred to as the "Pre-Petition Collateral"). The Pre-Petition Collateral includes a pledge by Dan River of the equity interests in the other Debtors and a pledge of equity interests owned by Dan River International. The Debtors believe and therefore stipulate that such liens, security interests and mortgages have been duly perfected against the Pre-Petition Collateral.

B. Current Status of Pre-Petition Facility

17. As of the Petition Date, the aggregate amount of all loans, advances and other indebtedness owed by the Debtors to the Secured Parties under the Pre-Petition Loan Documents was approximately (a) $34,300,000 in principal on term loans, (b) $80,000,000 in principal on revolving credit loans, and (c) $5,100,000 in standing letters of credit, plus interest thereon and fees and expenses under the Pre-Petition Loan Documents.

18. All cash generated by the Debtors' businesses as of the Petition Date constitutes "cash collateral," as such term is defined in section 363(a) of the Bankruptcy Code, and is subject to the interest of the Secured Parties; provided, however, that nothing contained herein or elsewhere shall prejudice the rights of an official committee of unsecured creditors from challenging the validity, nature, extent and priority of the Secured Parties' liens, claims, security interests and mortgages, to the extent set forth in the Interim Order.

19. The Debtors do not have any currently available sources of funds other than the cash collateral of the Secured Parties and the proposed DIP Financing to carry on the operation of their businesses. More specifically, the Debtors' ability to maintain business relationships with their vendors and suppliers, to purchase new inventory and otherwise finance their operations is dependent on their ability to use the cash collateral of the Secured Parties and obtain the funds made available by the Secured Parties under the DIP Financing.

Relief Requested

20. By this Motion, the Debtors seek the authority to obtain the DIP Financing and use of cash collateral under the terms set forth in the DIP Financing Agreement and all

documents to be executed therewith ("DIP Loan Documents"). The principal terms and conditions of the DIP Financing are summarized below:[3]

a. **Borrowers**. Dan River.

b. **Guarantors**. The Debtors, other than Dan River.

c. **Amount of DIP Financing**. In accordance with the terms of the DIP Loan Documents, Debtors may obtain Credit Extensions (as defined under the DIP Financing Agreement) under the DIP Financing Agreement only to the extent necessary to avoid immediate and irreparable harm to Debtors, which, for purposes hereof, shall mean (i) to obtain term loans and revolving credit loans, ("DIP Loans"), the proceeds of which shall be used (a) to pay the fees and expenses due under the DIP Financing Agreement, (b) for purposes specified (and in amounts not to exceed those shown) in the budget attached to the DIP Financing Agreement (the "Budget"), (c) for such period of time that any Pre-Petition Obligations are outstanding, to make adequate protection payments to Secured Parties pursuant to this or any other order of the Court, and (d) for payments pursuant to the Carve-Out; and (ii) to obtain letters of credit to enable Debtors to procure necessary goods or services. The maximum amount of the DIP Loans are as follows: (a) up to a maximum amount of $110,000,000 in the aggregate (which facility shall be subject to a limit of $40,000,000 and an availability reserve in an amount equal to $15,000,000 at all times until the Final Order shall have been duly entered) and (b) a debtor in possession term credit facility of up to $35,000,000, in each case.

d. **Interest Rate**. Interest shall accrue on the outstanding principal balance of the DIP Financing as follows: (i) each LIBOR Rate Loan shall bear interest on its unpaid principal amount at a rate per annum equal to the applicable Adjusted LIBOR Rate plus the Applicable

[3] This is only a summary of certain terms of the DIP Financing and shall not be deemed to modify the terms thereof.

Margin; and (ii) each Prime Rate Loan shall bear interest on its unpaid principal at a rate per annum equal to the Prime Lending Rate plus the Applicable Margin. Applicable Margin shall mean: (i) with respect to any Revolving Loan that is LIBOR Rate Loan, 3.50%, (ii) with respect to any Revolving Loan that is a Prime Rate Loan, 2.50%, (iii) with respect to any Term Loan that is a LIBOR Rate Loan, 3.75% and (iv) with respect to any Term Loan that is a Prime Rate Loan, 2.75%. After the occurrence and during the continuation of and Event of Default (as defined in the DIP Financing Agreement) interest shall accrue at the otherwise applicable interest rate, plus two percent (2.00%).

e. **Term of Loan**. The DIP Financing shall become due and payable in full pursuant to the DIP Loan Documents on the earliest to occur of: (i) the date that is the first anniversary of the Closing Date; (ii) the date on which an order of the Bankruptcy Court confirming a plan of reorganization or liquidation with respect to the Debtors shall have been entered in the Bankruptcy Cases; and (iii) the date of the termination (whether voluntary or involuntary) or reduction to zero of the Commitments.

f. **Priority and Liens**. The Post-Petition Obligations shall at all times:

(i) pursuant to section 364(c)(1) of the Bankruptcy Code, be entitled to superpriority claim status in these cases and in any future chapter 7 case subject only to the Carve-Out;

(ii) pursuant to section 364(c)(2) of the Bankruptcy Code, be secured by a first priority lien senior to all other liens on all property of the Debtors, real and personal, whether now owned or hereafter acquired, in each case, to the extent that such property is not subject to valid and perfected liens in existence on the Petition Date;

(iii) pursuant to section 364(c)(3) of the Bankruptcy Code, be secured by a perfected lien upon all property of the Debtors, real and personal, whether now owned or hereafter acquired, in each case, to the extent that such property is subject to a Permitted Priority Lien (as defined in the DIP Financing Agreement), subject and junior only to such Permitted Priority Lien and senior to all other liens; and

(iv) pursuant to section 364(d)(1) of the Bankruptcy Code, be secured by a perfected priming lien upon all of the property of the Debtors, real and personal, whether now owned or hereafter acquired, in each case, to the extent that such property is subject to existing liens other than Permitted Priority Liens, senior in priority to all such Liens (other than Permitted Priority Liens). Existing liens other than the Permitted Priority Liens shall be primed by and made subject and subordinate to the perfected first priority senior liens to be granted to the DIP Lenders.

g. **Carve-Out**. The Secured Parties and DIP Lenders shall "carve-out" of their respective liens and administrative priority claims (the "Carve Out") as follows: (i) subject to the remaining provisions of this paragraph, the Secured Parties' liens on and security interests in the DIP Collateral and their administrative claims under section 364(c)(1) of the Bankruptcy Code shall be subject only to (a) the payment of any unpaid fees payable pursuant to 28 U.S.C. § 1930 and (b) the payment of allowed, unpaid claims for fees and expenses incurred by professionals retained by an order of the Court, including fees and expenses incurred prior to, and after, the occurrence of an Event of Default, not to exceed $1,000,000 in the aggregate (the "Professional Expense Cap"), provided further, that any payments actually made to such professionals under sections 330 and 331 of the Bankruptcy Code after the occurrence of an Event of Default (and during the continuance of such an Event of Default) shall reduce the amount of the Professional

Expense Cap on a dollar-for-dollar basis. In no event shall any of the Carve-Out (x) be paid from amounts on deposit in the Cash Collateral Account as of the Event of Default date or (y) include any fees or expenses arising from any Successor Case other than those fees set forth in clause (i)(a) of this paragraph.

(ii) Notwithstanding anything to the contrary in the Interim Order or the DIP Loan Documents, the pre-petition and post-petition liens and security interests and the administrative priority claims of the Secured Parties shall be senior to, and after the date hereof, no proceeds of Indebtedness or Cash Collateral (including any pre-petition retainer funded by the Lenders pursuant to the Pre-Petition Loan Documents) nor any Pre-Petition Collateral or DIP Collateral (or proceeds thereof) may be used to pay, any and all claims for services rendered by any of the professionals retained by the Debtors or by the Committee in connection with the investigation of, assertion of or joinder in any claim, counterclaim, action, proceeding, application, motion, objection, defense or other contested matter against the Secured Parties including, without limitation, any claim, action, proceeding or motion, the purpose of which is to seek or the result of which would be to obtain any order, judgment, determination, declaration or similar relief: (a) invalidating, setting aside, avoiding, or subordinating, in whole or in part, the Indebtedness or the liens and security interest of the Secured Parties in the Pre-Petition Collateral or the DIP Collateral; or (b) preventing, hindering or otherwise delaying, whether directly or indirectly, the exercise by the Secured Parties of any of their rights and remedies under the Pre-Petition Credit Agreement, the Pre-Petition Loan Documents, this Order and/or the DIP Loan Documents or the Secured Parties' enforcement or realization upon any of the liens on or security interests in any Pre-Petition Collateral or DIP Collateral; provided, however, that the foregoing limitations shall not apply to claims for services rendered by the professionals retained by the Committee in an

amount not to exceed $10,000 in connection with the investigation of the validity, extent, priority, avoidability or enforceability of the Pre-Petition Indebtedness or the Secured Parties' pre-petition liens and security interests on the Pre-Petition Collateral. The Secured Parties shall retain their rights as a party in interest to object to any of the fee applications or other claims of any of the professionals retained by the Debtors or the Committee.

h. **Section 506(c) Waiver.** The DIP Lenders and Secured Parties seek a waiver under section 506(c) of the Bankruptcy Code as follows: except to the extent of the Carve-Out, no expenses of administration of these cases or any future proceeding or cases which may result therefrom, including liquidation in bankruptcy or other proceedings under the code, shall be charged pursuant to section 506(c) of the Bankruptcy Code or otherwise against the collateral without the prior written consent of the Lenders and no such consent shall be implied from any other action, inaction, or acquiescence by the Secured Parties.

i. **Lenders' Costs and Expenses**. The Lenders and the Agent shall be entitled to recover all of their reasonable out-of-pocket expenses, including reasonable consultants', attorneys' fees, costs and expenses incurred in connection with the Indebtedness to the extent provided in the Pre-Petition Credit Agreement or the DIP Loan Documents including any fee letters, as applicable.

j. **Lender's Fees**.

(i) Closing Fee. Equal to one percent (1.0%) of the aggregate Revolving Loan Commitment (as defined in the DIP Financing Credit Agreement).

(ii) Unused Line Fee: Equal to 0.50% per annum of the unused portion of the Line of Credit. The Unused Line Fee shall be payable to the Agent, for the ratable benefit of the DIP Lenders, monthly in arrears, on the first Business Day of each month and on the Expiration Date (as defined in the DIP Loan Agreement).

(iii) Collateral Management Fee: Equal to $10,500.00 per month during the term of the DIP Financing. The Collateral Management Fee shall be payable to the Agent on the Initial Borrowing Date and on the corresponding calendar day (or, if such day is not a Business Day, the immediately succeeding Business Day) in each calendar month thereafter (as defined in the DIP Loan Agreement).

(iii) Letter of Credit Fees:

(a) The Debtors shall pay to the Agent, for the ratable benefit of the DIP Lenders, in an amount equal to the Applicable Margin applicable to Revolving Loans that are LIBOR Rate Loans during the term of each Letter of Credit and computed on the daily undrawn amount of all Letters of Credit; provided that from the date on which any Event of Default occurs, and at times thereafter until the earlier of the date upon which (x) all obligations have been paid and satisfied in full or (y) such Event of Default (and other Events of Default) shall not be continuing, such fee shall be equal to two percent (2.0%) per annum above the Applicable Margin applicable to Revolving Loans that are LIBOR Rate Loans; and

(b) Additionally, the Debtors shall pay to each Issuing Bank, not for the ratable benefit of the DIP Lenders, a facing fee of 0.25% of the face amount of each Letter of Credit issued by each Issuing Bank, payable upon the issuance of the Letter of Credit, plus the standard fees and charges of each Issuing Bank for issuing, transferring, paying or amending Letters of Credit, as and when assessed.

(iv) Structuring Fee: A structuring fee payable to the Agent.

(v) Payment of Pre-Petition Indebtedness: The interim order will provide for payment in part of the Pre-Petition Obligations with proceeds of the DIP Financing. The Pre-Petition Revolver will be reduced by the proceeds of certain Pre-Petition Collateral collected

post-petition. In addition, the Final Order being sought will provide for the payment in full of the Pre-Petition Indebtedness with proceeds of the DIP Financing. Prior to the Final Hearing, the Pre-Petition Term Loan will be reduced only through the realization of Pre-Petition Collateral which secures the Term Loan such as asset sales or insurance proceeds and by scheduled amortization payments.

REQUEST FOR APPROVAL OF THE DIP FACILITY AND USE OF CASH COLLATERAL

21. The Debtors do not have sufficient available sources of working capital and financing to carry on the operation of their business without the DIP Financing and use of cash collateral. The ability of the Debtors to finance their operations, and the availability of sufficient working capital and liquidity through the incurrence of new indebtedness for borrowed money and use of cash collateral, is essential to the Debtors' ability to operate their businesses. In the absence of such financing and use of cash collateral, the operation of the Debtors' businesses would not be possible and serious and irreparable harm to the Debtors and their estates would occur.

A. Approval Under Section 364 of the Bankruptcy Code

22. The Debtors propose to obtain financing under the DIP Financing by providing security interests in and liens as set forth above pursuant to section 364(c)(2) of the Bankruptcy Code. The statutory requirement for obtaining post-petition credit under section 364(c)(2) is a finding, made after notice and hearing, that the debtors are "unable to obtain unsecured credit allowable under section 503(b)(1) of the [the Bankruptcy Code]." Section 364(c) financing is appropriate when the trustee or debtor-in-possession is unable to obtain unsecured credit allowable as an ordinary administrative claim. In re Crouse Group, Inc., 71 B.R. 544, 549, *modified on other grounds* 75 B.R. 553 (Bankr. E.D. Pa. 1987) (secured credit under section

364(c)(2) is authorized, after notice and hearing, upon showing that unsecured credit cannot be obtained).

23. Courts have articulated a three-part test to determine whether a debtor is entitled to section 364(c) financing:

(a) the debtor is unable to obtain unsecured credit under section 364(b), *i.e.*, by allowing a lender only an administrative claim;

(b) the credit transaction is necessary to preserve the assets of the estate; and

(c) the terms of the transaction are fair, reasonable and adequate, given the circumstances of the debtor-borrower and the proposed lender.

B. The Debtors Do Not Have An Alternative to the DIP Facility

24. The evidence at the Interim Hearing will show that a working capital facility of the type and magnitude needed in these cases could not have been obtained on an unsecured basis. As will be shown, potential sources of the proposed DIP Financing for the Debtors, obtainable on an expedited basis and on reasonable terms, were practically nonexistent. In these circumstances, "[t]he statute imposes no duty to seek credit from every possible lender before concluding that such credit is unavailable." Bray v. Shenandoah Federal Sav. and Loan Ass'n. (In re Snowshoe Co.), 789 F.2d 1085, 1088 (4th Cir. 1986).

25. A debtor need only demonstrate "by a good faith effort that credit was not available without" the protections of section 364(c). Id.; *see also* In re Plabell Rubber Prods., Inc., 137 B.R. 897, 900 (Bankr. N.D. Ohio 1992). Where there are few lenders likely to be able and/or willing to extend the necessary credit to the debtor, "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 Sav. Bank FSB v. Sky Valley, Inc., 99 B.R. 1997, 120 N.4 (N.D. Ga. 1989). Thus, the evidence introduced at the

Interim Hearing will satisfy the requirement of section 364(c) of the Bankruptcy Code that unsecured credit was unavailable to the Debtors.

26. Prior to the Petition Date, the Debtors contacted eleven lending institutions, seeking alternative financing sources. Nine of those institutions signed confidentiality agreements and received information regarding the Debtors' financial status to evaluate lending proposals. Three of the financial institutions submitted financing proposals to the Debtor. The DIP Financing proposed by the DIP Lenders represents the best alternative available to the Debtors.

C. Application of the Business Judgment Standard

27. As described above, after appropriate investigation and analysis and given the exigencies of the circumstances, the Debtors' management has concluded that the DIP Financing was the only alternative available in the circumstances of these cases. Bankruptcy courts routinely defer to the debtor's business judgment on most business decisions, including the decision to borrow money. *See* 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, 449 (D. Colo. 1985) ("Business judgments should be left to the board room and not to this Court."); In re Lifeguard Indus., Inc. 37 B.R. 3, 17 (Bankr. S.D. Ohio 1983) (same). "More exacting scrutiny would slow the administration of the debtor's estate and increase its costs, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially." Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303, 1311 (5th Cir. 1985).

28. In general, a bankruptcy court should defer to a debtor-in-possession's business judgment regarding the need for and the proposed use of funds, unless such decision is arbitrary

and capricious. In re Curlew Valley Assoc., 14 B.R. 506, 511-13 (Bankr. D. Utah 1981). Courts generally will not second-guess a debtor-in-possession's business decisions when those decisions involve "a business judgment made in good faith, upon a reasonable basis, and within the scope of [its] authority under the Code." Id. at 513-14 (footnotes omitted).

29. The Debtors have exercised sound business judgment in determining that a post-petition credit facility is appropriate and have satisfied the legal prerequisites to borrow under the DIP Financing. The terms of the DIP Financing are fair and reasonable and are in the best interests of the Debtors' estates. Accordingly, the Debtors should be granted authority to enter into the DIP Financing and borrow funds from the Post-Petition Lenders on the secured, administrative superpriority basis described above, pursuant to section 364(c) of the Bankruptcy Code, and take the other actions contemplated by the DIP Financing Agreement and as requested herein.

30. Without the liquidity provided by the DIP Financing, the Debtors will be unable to pay suppliers, employees and other constituencies that are essential to the orderly operation of their businesses. The Debtors' management exercised their best business judgment in negotiating the DIP Financing that is presently before the Court.

D. The DIP Facility is Necessary to Effectively Preserve the Assets of the Debtors' Estates and to Operate Their Businesses.

31. No party in interest can seriously contend that the Debtors do not need immediate access to a working capital facility. As with most other large businesses, the Debtors have significant cash needs. Particularly critical in these cases is that it is impossible to forecast collections of accounts receivable for a business in a chapter 11 proceeding. Accordingly, access to substantial credit is necessary to meet the substantial day-to-day costs associated with maintaining business relationships with the Debtors' vendors and suppliers, purchasing new

inventory and otherwise financing their operations. Access to sufficient cash is therefore critical to the Debtors. In the absence of immediate access to cash and credit, the Debtors' suppliers will refuse to sell critical supplies and services to the Debtors, and the Debtors will be unable to operate their businesses. The inability to meet payments to vendors, fulfill deliveries scheduled and collect accounts receivable – already a source of concern prior to the Petition Date – would likely grow worse.

32. For these reasons, access to credit under the DIP Financing is critical. The Debtors cannot wait for the beneficial effects of the DIP Financing; any substantial delay could have the same impact as denial of the Motion. The Debtors' need for access to the DIP Financing therefore is immediate.

E. <u>The Terms of the DIP Facility Are Fair, Reasonable and Appropriate</u>

33. The Debtors are unable to obtain unsecured credit allowable solely as an administrative expense. The proposed DIP Financing reflects the exercise of sound and prudent business judgment. The Debtors would not have been able to obtain financing on an unsecured basis, or otherwise. In the Debtors' business judgment, the DIP Financing is the best financing option available in the circumstances in these cases.

34. The proposed terms of the DIP Financing are fair, reasonable and adequate in that these terms neither (a) tilt the conduct of these cases and prejudice the powers and rights that the Bankruptcy Code confers for the benefit of all creditors, nor (b) prevent motions by parties in interest from being decided on their merits. The purpose of the DIP Financing is to enable the Debtors to meet ongoing operational expenses.

35. The Debtors believe the Interim Order represents a fair and reasonable interim arrangement for DIP Financing pending a final hearing. The Interim Order does not purport to

make any findings with regard to the amount of the Secured Parties' Pre-Petition Obligations or the validity, extent and priority of the Lenders' liens and security interests that binds the Committee.

36. The proposed DIP Financing provides that the security interests and administrative expense claims granted to the DIP Lenders are subject to the Carve-Out. In Ames Dep't Stores, 115 B.R. 346 (Bankr. S.D.N.Y. 1990), the bankruptcy court found that such "carve-outs" are not only reasonable, but are necessary to insure that official committees and the debtor's estate will be assured of the assistance of counsel. Id. at 40.

37. Likewise, the various fees and charges required by the DIP Lenders under the DIP Financing are reasonable and appropriate under the circumstances. Indeed, courts routinely authorize similar lender incentives beyond the explicit liens and other rights specified in section 364 of the Bankruptcy Code. *See* In re Defender Drug Stores, Inc., 145 B.R. 312, 316 (9th Cir. BAP 1992) (authorizing credit arrangement under section 364, including a lender "enhancement fee").

38. The fairness and reasonableness of the terms of the DIP Financing will be shown at the Interim and Final Hearings.

F. Request for Modification of Automatic Stay

39. As set forth more fully in the proposed Interim Order, the proposed DIP Financing Agreement contemplates a modification of the automatic stay established pursuant to section 362 of the Bankruptcy Code to permit the DIP Lenders, in their sole discretion, to: (a) file financing statements, deeds of trust, mortgages or other similar documents to evidence the DIP Lenders' security interests under the DIP Financing; (b) give the Debtors any notice provided for in the DIP Financing Agreement; (c) execute upon their security interests or

exercise other remedies under the DIP Loan Documents in the event of an Event of Default; and (d) take such other actions required or permitted by the DIP Loan Documents. Stay modification provisions of this sort are ordinary and usual features of post-petition debtor-in-possession financing facilities and, in the Debtors' business judgment, are reasonable under the present circumstances. The Court accordingly should modify the automatic stay to the extent contemplated by the DIP Financing Agreement and the Interim Order.

G. Request for Adequate Protection

40. As set forth more fully in the proposed Interim Order, the proposed DIP Financing Agreement contemplates granting the Secured Parties adequate protection for, *inter alia*, any diminution in value of the Secured Parties' interests in the Pre-Petition Collateral resulting from: (a) the use by the Debtors of the cash collateral and any other Pre-Petition Collateral; (b) the priming of the Secured Parties' security interests and liens in the Pre-Petition Collateral by the DIP Lenders pursuant to the DIP Financing and the Interim Order; and (c) the imposition of the automatic stay pursuant to section 362 of the Bankruptcy Code. Accordingly, the Secured Parties: (x) are to be granted (effective upon the date of the Interim Order and without the necessity of the execution by the Debtors of mortgages, security agreements, pledge agreements, financial statements or other agreements) a replacement security interest in and lien upon all the Collateral, subject and subordinate to only, (i) the security interests and liens to be granted in favor of the DIP Lenders in the DIP Financing; and (ii) the Carve-Out; (y) are granted superpriority allowed claims pursuant to section 507(b) of the Bankruptcy Code, immediately junior to the claims under section 364(c)(1) of the Bankruptcy Code held by the DIP Lenders; and (z) shall receive current cash payment from the Debtors of interest at the Non-Default Rate on all Pre-Petition Indebtedness and reasonable fees and expenses (including, but not limited to,

the reasonable fees and disbursements of counsel and internal and third-party consultants, including financial consultants, and auditors) incurred by the Pre-Petition Agent under the Pre-Petition Loan Documents (including any unpaid pre-petition fees and expenses) and certain amortization payments and proceeds of asset sales and insurance proceeds.

H. Request for Immediate Interim Relief

41. Pending the Final Hearing, the Debtors require immediate use of cash collateral and financing for, among other things, maintenance of their facilities and other working capital needs. It is essential that the Debtors immediately stabilize their operations and resume paying for ordinary, post-petition operating expenses, as well as the pre-petition expenses approved in the first day orders, to minimize the damage occasioned by their cash flow problems. The Debtors seek authority to borrow from the DIP Lenders under the DIP Financing Credit Agreement an amount up to $40,000,000.

42. Absent immediate use of cash collateral and financing, the Debtors will be unable to pay ongoing operational expenses. Consequently, if interim relief is not obtained, the Debtors' assets will be immediately and irreparably jeopardized, to the detriment of their estates, their creditors and other parties in interest.

43. Accordingly, the Debtors request that, pending the Final Hearing, the Court schedule the Interim Hearing as soon as practicable to consider the Debtors' request for authorization to use cash collateral and obtain emergency interim credit under the DIP Financing, which shall not exceed the amounts required during such period pursuant to the Budget, in accordance with and pursuant to the terms and conditions contained in the DIP Financing Agreement and the Interim Order.

44. Bankruptcy Rules 4001(b) and 4001(c) permit a court to approve a debtor's request for financing during the 15-day period following the filing of a motion requesting authorization to obtain post-petition financing, "only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing." Bankruptcy Rule 4001(c)(2). In examining requests for interim relief under this rule, courts apply the same business judgment standard applicable to other business decisions. *See e.g.* In re Simasko Prod. Co., 47 B.R. at 449; *see also* Ames Dep't Stores, 115 B.R. at 38. After the 15-day period, the request for financing is not limited to those amounts necessary to prevent destruction of the debtor's business. A debtor is entitled to borrow those amounts that it believes prudent in the operation of its business. *See e.g.* Simasko Prod. Co., 47 B.R. at 449; Ames Dep't Stores, 115 B.R. at 36.

GROUNDS FOR REQUESTED RELIEF

45. As more fully set forth in the Affidavit of Barry F. Shea, Vice President and Chief Financial Officer of the Debtors, submitted concurrently herewith in support of, among other things, this motion, the Debtors submit that the entry of the Interim Order and Final Order is in the best interests of their creditors and the estates. Most importantly, the Interim Order will enable the Debtors to have immediate access to the funds critically required to continue the operation of their businesses. Absent immediate access to such funds, the Debtors would be unable to pay their current expenses, would be forced to terminate all employees, and would be left with no choice but to seek relief under Chapter 7. In such case, a rapid and inefficient liquidation of the Debtors" assets at firesale prices would most likely ensue and creditor recoveries would deteriorate severely. Thus, entry of the Interim Order is necessary to avoid immediate and irreparable harm to these estates pending a final hearing on the motion.

NOTICE

46. Pursuant to sections 102(1), 363(c) and 364(c) of the Bankruptcy Code and Bankruptcy Rules 2002, 4001(b) and 4001(c), notice of this Motion has been provided via facsimile, overnight delivery service, electronic transmission or same-day messenger service to: the Office of the United States Trustee, counsel for Agent of the Debtors' pre-petition credit facility, the indenture trustee for Debtors' senior note holders, counsel to the Agent for the Debtors' proposed debtor-in-possession lenders, known holders of pre-petition liens against the Debtors' property, the Debtors' thirty largest unsecured creditors on a consolidated basis, and parties to the collateral access agreements, license consents, blocked account agreements and assignment of factoring credit balances agreement. Notice of the Final Hearing shall be given to: the Office of the United States Trustee, counsel for the Debtors' pre-petition secured lenders, the indenture trustee for Debtors' senior note holders, counsel to the Agent for the Debtors' proposed debtor-in-possession lenders, known holders of pre-petition liens against the Debtors' property, state and local taxing authorities, parties to blocked account agreements, collateral access agreements and other documents and any other party which theretofore has filed in the Chapter 11 Cases a request for special notice with this Court and served such upon Debtors' counsel, and the Debtors' thirty largest unsecured creditors on a consolidated basis, parties to the collateral access agreements, license consents, blocked account agreements and assignment of factoring credit balances agreement, and other parties as directed by the Court.

NO PRIOR REQUEST

47. No prior motion for the relief requested herein has been made to this or any other court.

Conclusion

WHEREFORE the Debtors respectfully request entry of an order granting the relief requested herein, and granting the Debtors such other and further relief as may be just.

Dated: Atlanta, Georgia
March 31, 2004

Respectfully submitted,

KING & SPALDING LLP

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