

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION**

In re:

Chapter 11

CARDINAL HOMES, INC.,

Case No. 19-36275-KRH

Debtor.<sup>1</sup>

**DEBTOR'S MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS  
AUTHORIZING THE DEBTOR TO OBTAIN POST-PETITION FINANCING**

The above captioned debtor and debtor in possession (the “Debtor”) hereby files this Motion (the “Motion”), pursuant to sections 105(a), 361, 362, 363, 364 and 507 of title 11 of the United States Code (the “Bankruptcy Code”) and Rules 2002 and 4001 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), for entry of interim and final orders authorizing the Debtor to obtain post-petition secured, super-priority financing (the “DIP Financing”) from Kituwah, LLC, a limited liability company formed as a wholly-owned subsidiary of the Eastern Band of the Cherokee Indians (“Lender”), on the terms and conditions of that certain *Debtor-In-Possession Loan and Security Agreement* dated November 21, 2019, between the Debtor, its

---

<sup>1</sup> The Debtor in this Chapter 11 Case and the last four digits of its taxpayer identification number are as follows: Cardinal Homes, Inc. (9112). The Debtor’s headquarters are located at 525 Barnesville Highway, Wylliesburg, VA 23976.

---

Michael E. Hastings (Virginia Bar No. 36090)  
Brandy M. Rapp (Virginia Bar No. 71385)  
WHITEFORD, TAYLOR & PRESTON LLP  
Two James Center  
1021 E. Cary St., Suite 1700  
Richmond, Virginia 23219  
T: (804) 799-7859  
F: (804) 977-3295  
[mhastings@wtplaw.com](mailto:mhastings@wtplaw.com)  
[brapp@wtplaw.com](mailto:brapp@wtplaw.com)

*Proposed Counsel for the Debtor and  
Debtor in Possession*

parent company, Alouette Holdings, Inc. (“Alouette”), and the Lender (the “DIP Financing Agreement”), attached hereto as **Exhibit A**. In support of this Motion, the Debtor respectfully states as follows:

### **JURISDICTION**

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b), and the Court may enter a final order consistent with Article III of the United States Constitution. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief requested herein are sections 105(a), 361, 362, 363, 364 and 507 of the Bankruptcy Code and Bankruptcy Rules 2002 and 4001.

### **BACKGROUND**

#### **PARENT COMPANY BANKRUPTCY FILING**

3. On November 20, 2019, Alouette, the Debtor’s parent company, filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division, commencing Case No. 19-36126-KRH.

4. On November 21, 2019, Alouette filed its *Motion for Entry of Interim and Final Orders Authorizing the Debtor to Obtain Post-Petition Financing* (Docket No. 4) seeking authority to enter into the DIP Financing Agreement with the Lender.

5. On November 22, 2019, the Court entered the *Interim Order Authorizing the Debtor to Obtain Post-Petition, Secured Financing* (Docket No. 14)(the “Alouette Interim DIP Order”) granting Alouette authority to obtain post-petition, secured, super-priority financing from the Lender on the terms and conditions set forth in the DIP Financing Agreement and

scheduling a final hearing for December 10, 2019 at 2:00 p.m. at the United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division.

**OPERATING COMPANY BANKRUPTCY FILING**

6. On December 2, 2019 (the “Petition Date”), the Debtor commenced this case by filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

7. The Debtor has continued in possession of its property and has continued to operate and manage its business as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

8. No request has been made for the appointment of a trustee or an examiner in this case, and no official committee has yet been appointed by the Office of the United States Trustee.

**RELIEF REQUESTED**

9. By this Motion, the Debtor seeks entry of interim and final orders authorizing and/or approving:

(a) The Debtor to obtain post-petition financing consisting of \$750,000.00 senior revolving credit facility from Lender, with funds available thereunder for use in accordance with the budget attached hereto as **Exhibit B** (the “Budget”) pursuant to sections 364(c)(2), (c)(3), and (e) of the Bankruptcy Code;

(b) Subject to the Carve Out (as defined in the DIP Financing Agreement), the grant of a superpriority claim status to the claims of Lender pursuant to Bankruptcy Code section 364(c)(1);

(c) As security for the repayment of the borrowings and all other obligations arising under the DIP Financing, the Debtor grants to Lender a security interest in and liens upon

substantially all of the property and assets of the Debtor and Alouette, including a lien on the proceeds of the avoidance of the prepetition lien of Benson Howard (the “Howard Lien”) (the “Collateral”), subject to the Prepetition Liens (as Defined in section 2.4 of the DIP Financing Agreement, as well as any liens or security interests of Newtek Small Business Finance, LLC (“Newtek”) against any of the assets of the Debtor or Alouette existing or determined to exist) and the Carve-Out, not including avoidance actions arising under Sections 502(d), 544, 547, 548, 549, 550, 551 or 553 of the Bankruptcy Code other than the Howard Lien, and pursuant to Bankruptcy Code sections 364(c)(2) and (c)(3);

(d) The modification of the automatic stay to the extent set forth in the Alouette Interim DIP Order pursuant to Bankruptcy Code section 362; and

(e) A waiver of the right, pursuant to section 506(c) of the Bankruptcy Code, to charge expenses of administration of the Debtor’s Bankruptcy Case against the Lender’s Collateral (as defined in the DIP Financing Agreement).

Except to the extent that the Budget has been modified subsequent to the entry of the Alouette Interim DIP Order with the express written consent of the Lender and Newtek, the Debtor’s largest pre-petition lender, the relief requested in this Motion is the same relief awarded to Alouette in the Alouette Interim DIP Order<sup>2</sup>.

### **BASIS FOR RELIEF**

10. To fund the administration of the Debtor’s and Alouette’s bankruptcy cases and to fund the continued operation of the Debtor, including without limitation paying its employees and maintaining business operations during the Debtor’s and Alouette’s bankruptcy cases, the

---

<sup>2</sup> On November 27, 2019, the Debtor, pursuant to the terms of the Alouette Interim DIP Order, requested certain changes to the Budget (replacing a lost job with two jobs from existing backlog, including material purchases in week three budget and exchanging budgeted labor in week 2 budget for material purchases). Newtek approved the requested changes on November 28, 2019. The Lender also approved the requested changes. The Budget attached hereto as **Exhibit B** contains the requested changes.

Debtor and Alouette must have immediate access to continued and additional financing in the form of the DIP Financing. The Debtor has concluded that, in addition to preserving the value of the Debtor's assets for the benefit of its creditors, such financing will also enable it to fund restoration of critical relationships, retention of employees and maintenance or restoration of trade terms for the purpose of continuing its business operations, which will inure to the benefit of the Debtor and its creditors. Moreover, access to the DIP Financing is necessary to avoid immediate and irreparable harm to the Debtor and Alouette.

11. The relevant terms of the DIP Financing are as follows:<sup>3</sup>

Borrower	Alouette Holdings, Inc. and Cardinal Homes, Inc.
DIP Lender	Kituwah, LLC
Commitment	A secured revolving credit financing of \$750,000.00
Borrowing Availability	Advances to the Debtor from time to time, pursuant to the terms of the DIP Financing Agreement.
Use of Loan Proceeds	The proceeds will be used (a) to pay fees and expenses incurred in connection with this bankruptcy case and the bankruptcy case of Alouette Holdings, Inc., including the Carve-Out; (b) for general corporate purposes; and (c) for payments permitted to be made by Lender and approved by the Bankruptcy Court.
Term	The DIP Financing Agreement shall be effective as of the date that the DIP Financing Agreement is approved by the Bankruptcy Court and shall continue in full force and effect until such time as the Debtor's loan with Lender has been paid in full.
Priority and Liens	Lender shall have a Security Interest on the Collateral as defined in the DIP Financing

---

<sup>3</sup> This summary refers to the provisions and the defined terms contained in the DIP Financing Agreement. The DIP Financing Agreement shall control in the event of any inconsistencies between the provisions of this Motion and the DIP Financing Agreement.

Agreement under sections 364(c)(2) and (c)(3) of the Bankruptcy Code. All Obligations shall constitute administrative expenses of the Debtor in the Bankruptcy Court, with priority under section 364(c)(1) of the Bankruptcy Code over any and all other administrative expenses of the kind under any provision of the Bankruptcy Code, but subject to the Carve-Out.

Fees and Expenses

The Debtor is required to have paid Lender all fees, costs and expenses specified in the DIP Financing Agreement as they are due and payable.

Interest Rate

8.00% *per annum*

Events of Default

The DIP Financing Agreement contains usual and customary events of default for facilities of this type, including, but not limited to, the following events of default:

(a) The Borrowers' failure to make any payment when due under the DIP Financing Agreement;

(b) The Borrowers' failure to comply with or to perform any other term, obligation, covenant or condition contained in the DIP Financing Agreement;

(c) Any of the Borrowers' representations and warranties in the DIP Financing Agreement or the DIP Loan Documents fail to be true in any material respect.

(d) The occurrence of any of the following: (i) the conversion of the Bankruptcy Cases to a proceeding under any provision of the Bankruptcy Code other than Chapter 11, or dismissing the Bankruptcy Cases; (ii) the appointment of a trustee in the Bankruptcy Cases for any reason, including without limitation, under Chapter 11 of the Bankruptcy Code, or otherwise; (iii) Borrowers shall file or commence any proceeding to surcharge Lender pursuant to Sections 105, 364 or 506(c) of the Bankruptcy Code; (iv) Except in connection with a Bankruptcy Court-approved sale by Borrowers of Borrowers' assets, the Bankruptcy Court enters an

order allowing for the assumption or rejection of an executory contract or unexpired lease with which the Lender does not consent, which consent may be given or withheld in the exercise of Lender's sole opinion and discretion; (v) Borrowers file any plan of reorganization without Lender's approval or any other party in interest and/or creditor shall propose any plan of reorganization that seeks to vary, amend, modify, or change in any respect the terms, covenants, and conditions of the DIP Loan Documents or provides for the reorganization of Borrowers without the prior written consent of Lender, which consent may be given or withheld in the exercise of Lender's sole opinion and discretion; (vi) Borrowers shall file or commence any proceeding in any court of competent jurisdiction to challenge the validity, enforceability or priority of the payment and performance obligations of Borrowers to Lender with respect to the DIP Financing, including, without limitation, any adversary proceeding in the Bankruptcy Cases or with respect to the terms, covenants, and conditions contained in any proposed plan of reorganization, which proceeding is not dismissed or withdrawn within sixty (60) days of the filing thereof; (vii) Any other party in interest and/or creditor shall file or commence any proceeding in any court of competent jurisdiction to challenge the validity, enforceability or priority of the payment and performance obligations of Borrowers to Lender with respect to the DIP Financing, including, without limitation, any adversary proceeding in the Bankruptcy Case or with respect to the terms, covenants, and conditions contained in any proposed plan of reorganization, which claim or relief sought is granted; (viii) Any act, condition, or event occurring after the Petition Date that has or could reasonably be expected to have a material adverse effect and it is reasonably foreseeable that an Event of Default would occur as a result of such material adverse change; (ix) The grant or recognition of a lien on or other interest in any property of any Lender other than a lien or encumbrance permitted by the Interim Order and the Final Order, which is superior to or ranks in parity with Lender's security interest in or lien upon

the Collateral; (x) The grant of an administrative expense claim in the Bankruptcy Case that is superior to or ranks in parity with the claims and rights of Lender subject only to the Prepetition Liens and the Carve Out; (xi) The Interim Order and the Final Order is modified, reversed, vacated, or amended by the Bankruptcy Court or on appeal without the prior written consent of Lender; (xii) The filing of a plan of reorganization or liquidation that does not provide for payment in full of all Obligations on the effective date thereof in accordance with the terms and conditions contained herein, unless otherwise consented to by Lender; (xiii) The entry of an order by the Bankruptcy Court authorizing the sale of substantially all of Borrowers' assets under §§ 363 or 365 of the Bankruptcy Code (or otherwise) that does not provide for payment in full of the Obligations to Lender upon the closing of such sale, unless otherwise consented to by Lender; and (xiv) Any provision of the DIP Agreement or any of the DIP Loan Documents ceases, for any reason, to be valid and binding on Borrowers;

(e) Any judgments or arbitration awards are entered against Borrowers in an aggregate amount of Fifty Thousand and 00/Dollars (\$50,000.00) or more in excess of any insurance coverage, or Borrowers enter into any settlement agreements with respect to any litigation or arbitration, without Lender's prior written consent, which consent may be given or withheld in the exercise of Lender's sole opinion and discretion; and

(f) The occurrence of any "Event of Default" as that term is defined in any other DIP Loan Document.

12. The Debtor is unable to obtain unsecured and/or other secured financing similar to the DIP Financing. Additionally, the Debtor's cash flow and capital structure render futile any effort to obtain unsecured and/or other secured financing similar to the DIP Financing with Lender.



**AUTHORITY FOR THE REQUESTED RELIEF**

13. If a debtor is unable to obtain unsecured credit allowable as an administrative expense under Bankruptcy Code section 503(b)(1), then the Court, after notice and a hearing, may authorize the debtor to obtain credit or incur debt (a) with priority over any or all administrative expenses of the kind specified in Bankruptcy Code section 503(b) or 507(b); or (b) secured by a lien on property of the estate that is not otherwise subject to a lien; or (c) secured by a junior lien on property of the estate that is subject to a lien. See 11 U.S.C. § 364(c).

14. Bankruptcy Rule 4001(c)(2) governs the procedures for obtaining authorization to obtain post-petition financing and provides, in relevant part:

The court may commence a final hearing on a motion for authority to obtain credit no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a hearing before such 14 day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

Fed. R. Bankr. P. 4001(c)(2).

15. Bankruptcy Rule 4001(d) provides in relevant part that (i) a motion for approval to modify or terminate the automatic stay shall be served on any official creditors' committee, on the creditors included on the list filed under Bankruptcy Rule 1007(d), and on such other entities as the court may direct, and (ii) objections may be filed within fourteen (14) days of the mailing of the notice of the motion and the time for filing objections thereto. See Fed. R. Bankr. P. 4001(d).

**A. The DIP Financing Agreement Should Be Approved.**

16. The Debtor negotiated the DIP Financing Agreement with Lender in good faith, at arm's length, and pursuant to the Debtor's sound business judgment. Provided that this judgment does not run afoul of the provisions of and policies underlying the Bankruptcy Code,

courts grant a debtor considerable deference in acting in accordance with its business judgment. See, e.g., Bray v. Shenandoah Fed. Sav. & Loan Ass'n (In re Snowshoe Co.), 789 F.2d 1085, 1088 (4th Cir. 1986) (approving debtor in possession financing necessary to sustain seasonal business); see also, In re Ames Department Stores, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) (“[C]ases consistently reflect that the court's discretion under section 364 is to be utilized on grounds that permit reasonable business judgment to be exercised so long as the financing agreement 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”); In re Toys “R” Us, Inc., et al., Case No. 17-34665 (KLP) (jointly administered), Doc. 98 (Sept. 20, 2017) (authorizing the debtors to obtain post-petition financing); In re The Gymboree Corporation, et al., Case No. 17-32986 (KLP) (jointly administered), Doc. 86 (June 12, 2017) (same); In re Health Diagnostic Laboratory, Inc., et al., Case No. 15-32919 (KRH) (jointly administered), Doc. 359 (Aug. 7, 2015) (same).

17. The financing under the DIP Financing Agreement provides significant liquidity to the Debtor and Alouette and thus will enable the Debtor, *inter alia*: (a) to minimize disruption to the Debtor's businesses and on-going operations; (b) enhance the value of the Debtor's estate and Alouette's estate for the benefit of all the Debtor's and Alouette's creditors; (c) avoid immediate and irreparable harm to the Debtor and Alouette, their creditors, employees, and assets; and (d) permit the Debtor and Alouette to pursue the sale of substantially all of their assets.

18. Such financing is the sole means of sustaining the Debtor's and Alouette's ongoing operations, thus preserving and enhancing the Debtor's and Alouette's going concern value. Without the financing provided by the DIP Financing, the Debtor will not be able to meet

its operating expenses (including payroll), will suffer irreparable harm, and its entire liquidation process will be severely jeopardized.

19. The terms and conditions of the DIP Financing Agreement are fair and reasonable and were negotiated by the parties in good faith and at arm's length. Accordingly, Lender should be accorded the benefits of Bankruptcy Code section 364(e) in respect of the DIP Financing Agreement.

20. Based upon the foregoing, the Debtor respectfully requests that the Court approve the DIP Financing Agreement in accordance with the terms set forth in Interim and Final Orders and the DIP Financing Agreement.

**B. Modification of the Automatic Stay Is Appropriate**

21. Section 362 of the Bankruptcy Code provides for an automatic stay upon the filing of a bankruptcy petition. The proposed Interim and Final Orders contemplate a modification of the automatic stay (to the extent applicable), to the extent necessary to: (a) file mortgages, deeds of trust, security agreements, pledge agreements, financing statements, notices of lien or similar instruments to evidence the DIP Lien and to give the Debtor any notice provided for in the DIP Financing Agreement; (b) permit the Lender, in the event that an Event of Default has occurred and is continuing and has not been waived by the Lender, without further hearing or order, to exercise the Lender's right to terminate its commitment to lend and to accelerate the outstanding Obligations under the DIP Financing Agreement; and (c) permit the Debtor to incur all liabilities and obligations under the DIP Financing. The proposed Interim and Final Orders require the Lender to obtain relief from the automatic stay of Bankruptcy Code § 362 to exercise all other rights and remedies under the DIP Financing Agreement and applicable law; provided, however, that the Lender may request a hearing on such relief from the automatic stay on an expedited

basis (no less than five (5) business days' notice).

22. Stay modification provisions of this kind are ordinary and standard features of post-petition, debtor in possession financing facilities and, in the Debtor's business judgment, are reasonable under the present circumstances. In addition, the stay modification provisions are the same provisions contained in the Alouette Interim DIP Order. Accordingly, the Debtor respectfully requests that the Court authorize the modification of the automatic stay in accordance with the terms set forth in the Interim and Final Orders and the DIP Financing Agreement.

**C. The Debtor Should be Granted Authority to Make Interim Borrowings Under the DIP Financing Agreement and Final Approval of the DIP Financing Agreement Should be Granted.**

23. Pursuant to Bankruptcy Rule 4001(b), the Debtor requests that the Court conduct an interim hearing and authorize the Debtors' use of the DIP Financing.

24. Bankruptcy Rule 4001(c) provides that a final hearing on a motion to obtain credit pursuant to section 364 of the Bankruptcy Code may not be commenced earlier than fourteen (14) days after the service of such motion. Fed. R. Bankr. P. 4001(c). Upon request, however, the Court is empowered to conduct a preliminary expedited hearing on the motion and authorize the obtaining of credit to the extent necessary to avoid immediate and irreparable harm to a debtor's estate. In examining requests for interim relief under this rule, courts apply the same business judgment standard applicable to other business decisions. See, e.g., In re Simasko, 47 B.R. 444, 449 (Bankr. D. Colo. 1985); see also In re Ames Dep't Stores, 115 B.R. at 38.

25. After the fourteen (14)-day period, the request for financing is not limited to those amounts necessary to prevent disruption of the debtor's business, and the debtor is entitled

to borrow those amounts that it believes prudent in the operation of its business. See, e.g., In re Simasko, 47 B.R. at 449; In re Ames Dep't Stores, 115 B.R. at 36.

26. Pursuant to Bankruptcy Rule 4001(c), the Debtor respectfully requests that the Court conduct a preliminary hearing on the Motion and authorize the Debtor, from the entry of the Interim Order until the Final Hearing, to obtain access to interim borrowing under the terms contained in the DIP Financing Agreement.

27. As set forth above, Bankruptcy Rules 4001(b) and (c) provide that a final hearing on a motion to obtain credit under Bankruptcy Code section 364, may not be commenced earlier than fourteen (14) days after the service of such motion.

28. The Debtor requests that the Court schedule and conduct a final hearing on the Motion on or about December 19, 2019, which is seventeen (17) days after the service of this Motion, and set a deadline to object to entry of the Final Order as set forth in the proposed Interim Order.

29. Accordingly, based upon the foregoing, the Debtor respectfully requests that the Court grant final approval of the DIP Financing Agreement in accordance with the terms set forth in the Final Order and the DIP Financing Agreement.

**D. Waiver of the Ten-Day Stay Provided by Bankruptcy Rule 6004 is Appropriate.**

30. Bankruptcy Rule 6004(h) provides: "An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise." The Debtor requests that the Court waive this ten-day stay. For the reasons discussed above, initial funding of amounts under the DIP Financing is critical to the continuing operations of the Debtor.

31. Notice of this Motion will be given to: (i) the Office of the United States Trustee; (ii) the Office of the United States Attorney for the Eastern District of Virginia, (iii) Internal Revenue Service, (iv) counsel for Lender; (v) the Debtor's twenty (20) largest unsecured creditors; (vi) the Debtor's pre-petition secured lenders and its counsel, if known; (vii) all parties that have filed a financing statement asserting a lien in any of the Debtor's assets; and (viii) any party that has filed a request for notice with the Court. The Debtor submits that, under the circumstances, no other or further notice of the Motion is required.

**NO PRIOR REQUEST**

32. Except to the extent that Alouette previously obtained this Court's approval of the DIP Financing Agreement in the Alouette Interim DIP Order, no previous motion for the relief sought herein has been made to this or any other court.

WHEREFORE, the Debtor respectfully requests that the Court (a) enter an Interim Order, substantially in the form attached hereto as **Exhibit C**; (b) set a date for a hearing to consider entry of the Final Order; (c) enter a final order, substantially in the form attached hereto as **Exhibit D**; and (d) granting such other and further relief as the Court deems appropriate.

Dated: December 2, 2019

CARDINAL HOMES, INC.

/s/ Michael E. Hastings

Michael E. Hastings (Virginia Bar No. 36090)  
Brandy M. Rapp (Virginia Bar No. 71385)  
WHITEFORD, TAYLOR & PRESTON LLP  
Two James Center  
1021 E. Cary St., Suite 1700  
Richmond, Virginia 23219  
T: (804) 799-7859  
F: (804) 977-3295  
[mhastings@wtplaw.com](mailto:mhastings@wtplaw.com)  
[brapp@wtplaw.com](mailto:brapp@wtplaw.com)

*Proposed Counsel for the Debtor and  
Debtor in Possession*

## **DEBTOR-IN-POSSESSION LOAN AND SECURITY AGREEMENT**

This Debtor-In-Possession Loan and Security Agreement (“DIP Agreement”) is dated this 21st day of November, 2019, by and between CARDINAL HOMES, INC. (“Cardinal”) and ALOUETTE HOLDINGS, INC. (“Alouette” and collectively with Cardinal the “Borrowers”) and Kituwah LLC, a limited liability company formed as a wholly-owned subsidiary of the Eastern Band of Cherokee Indians, in its capacity as lender (“Lender”).

WHEREAS, Alouette has commenced a case under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court being administered under Case No.: 19-36126 (the “Bankruptcy Case”), and Alouette has retained possession of its assets and is authorized under the Bankruptcy Code to continue operation of its business as debtor in possession;

WHEREAS, prior to the commencement of the Bankruptcy Case, Lender made loans and advances and provided other financial or credit accommodations to Borrowers secured by substantially all assets of Borrowers as set forth in the Prepetition Loan Documents (as defined herein);

WHEREAS, Borrowers are requesting that the Bankruptcy Court approve postpetition financing pursuant to which Lender may make postpetition loans and advances, and provide other financial accommodations, to Alouette secured by substantially all of Alouette’s assets as set forth in the Interim Order, the Final Order, and the Loan Documents (as defined herein);

WHEREAS, Borrowers have requested that Lender make postpetition loans and advances and provide other financial or credit accommodations to Borrowers and Lender is willing to do so, subject to the terms and conditions contained herein; and

NOW, THEREFORE, in consideration of the foregoing, the mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Lender and Borrowers mutually covenant, warrant, and agree as follows:

### **1. LOAN AMOUNT AND TERMS.**

1.1 Loan Amount. Lender will provide a line of credit (the “Loan”) to the Borrowers in the principal amount not to exceed Seven Hundred Fifty Thousand Dollars (\$750,000.00) (the “Loan”).

1.2 Promissory Note. The obligation of the Borrowers to repay the outstanding principal balance of all advances made under this Agreement, plus interest accrued thereon, shall be evidenced by a secured promissory note (the “Note”) in the original principal amount of the Loan, payable to the order of Lender, duly executed by Borrowers of even date herewith. The interest rate is eight percent (8.0%) per annum. The terms of repayment are as set forth in the Note.

1.3 Availability Period. The Loan Amount is available between the date of this Agreement and the earliest of (i) the Maturity Date (as defined in the Note), or (ii) the occurrence of an Event of Default (as defined below) (hereinafter, the “Availability Period”).

## 2. GRANT OF SECURITY INTEREST.

2.1 Security Interest. As security for the prompt and full payment and complete performance of the Note and this Agreement, pursuant to Sections 364(c)(2) and (3) of the Bankruptcy Code, Borrowers hereby grant, pledge, convey and assign to Lender a continuing security interest in all real property and personal property of, and all of the assets of the business of, Borrowers, whether now existing or hereafter acquired or arising, including but not limited to:

- (a) all Accounts;
- (b) all As-extracted collateral;
- (c) all Chattel paper;
- (d) all Deposit accounts, cash, cash equivalents, Securities Accounts and Commodity Accounts;
- (e) all Documents;
- (f) all Equipment;
- (g) all Fixtures;
- (h) all General intangibles, including without limitation goodwill and IP Collateral;
- (i) all Goods;
- (j) all Instruments;
- (k) all Inventory;
- (l) all Investment property;
- (m) all Letter-of-credit rights;
- (n) all Money;
- (o) all Commercial tort claims;
- (p) all books, records, ledger cards, files, correspondence, customer lists, blueprints, technical specifications, manuals, computer software, computer printouts, tapes, disks and other electronic storage media and related data processing software and similar items that at any time evidence or contain information relating to any of the Collateral or are otherwise necessary or helpful in the collection thereof or realization thereupon; and
- (q) to the extent not otherwise included, all other personal property of Borrowers and all proceeds and products of all of the foregoing, including without limitation, all insurance proceeds, products, accessions, rents and profits of any and all of the foregoing (collectively the "Collateral").

Provided however, the Collateral shall not include rights and actions arising under Sections 502(d), 544, 547, 548, 549, 550, 551 or 553 of the Bankruptcy Code; and further provided, the security interest granted herein by Borrowers shall be subject to the existing Prepetition Liens granted by Borrowers as set forth below.

2.2 IP Collateral. IP Collateral means (a) all state (including common law), federal and foreign trademarks, service marks and trade names, and applications for registration of such trademarks, service marks and trade names (but excluding any application to register any trademark, service mark or other mark prior to the filing under applicable law of a verified statement of use (or the equivalent) for such trademark, service mark or other mark to the extent the creation of a security interest therein or the grant of a mortgage thereon would void or invalidate such trademark, service mark or other mark), patents, patent applications, all licenses



relating to any of the foregoing and all income and royalties with respect to any licenses, whether registered or unregistered and wherever registered, all rights to sue for past, present or future infringement or unconsented use thereof, all rights arising therefrom and pertaining thereto and all reissues, extensions and renewals thereof, (b) the entire goodwill of or associated with the businesses now or hereafter conducted by Grantor and its affiliates connected with and symbolized by any of the aforementioned properties and assets and (c) all intangible intellectual or other similar property of Grantor of any kind or nature, associated with or arising out of any of the aforementioned properties and assets and not otherwise described above.

2.3 Real Property. Borrowers shall execute a deed of trust on all real property owned by them for the benefit of Lender. Borrowers acknowledge that the real property owned by Alouette is subject to a deed of trust of Benson Howard in the original principal amount of \$700,000.00 ("Howard Deed of Trust"). Because the Howard Deed of Trust was recorded within ninety (90) days of the Petition Date of Alouette, it is subject to an avoidance action as a preferential transfer. Upon avoidance of the Howard Deed of Trust, Alouette as debtor-in-possession shall grant to Lender a senior security interest in all real property preserved for the estate by the avoidance of the Howard Deed of Trust. In addition, Newtek Small Business Finance LLC ("Newtek") has three deeds of trust on one of the six parcels owned by Alouette consisting of 0.333 acres (collectively, "Newtek Deeds of Trust").

2.4 Prepetition Liens. As of the Petition Date, Borrowers had the following liens on its property:

Personal Property:

1. Newtek – substantially all personal property
2. Lender – substantially all personal property

Real Property:

1. Howard Deed of Trust – all real property
2. Lender – all real property
3. Newtek Deeds of Trust – one parcel consisting of 0.333 acres

2.5 Prepetition Loan Documents. Borrowers have executed the following documents evidencing of loan in the original principal amount of \$250,000.00 dated October 11, 2019, and a second loan in the original principal amount of \$50,000.00 dated November 15, 2019:

- (a) Note for \$250,000.00 dated October 11, 2019;
- (b) Security Agreement dated October 11, 2019;
- (c) Deed of Trust recorded October 11, 2019;
- (d) Note for \$50,000.00 dated November 15, 2019;
- (e) Security Agreement dated November 15, 2019; and
- (f) Amended and Restated Deed of Trust recorded November 15, 2019.

In addition, Lender filed fixture filings and UCC-1 Financing Statements to perfect its liens on personal property of Borrowers.

### **3. DISBURSEMENTS AND PAYMENTS.**

#### **3.1 Advance Requests; Disbursements.**

(a) All weekly requests for funding shall be in writing to Lender at the notice address set forth on Schedule A. Lender may, but shall not be obligated to, honor telephone, telefax or electronic mail instructions for advances given, or purported to be given, by Borrowers (each an "Advance Request"). Borrowers shall submit an Advance Request at least two (2) business days prior to the week of the requested Advance (as defined below).

(b) Each Advance Request shall set forth the amount of Loan funds being requested (the "Advance"), the date requested for funding such Advance, and shall be accompanied by a use of funds statement that itemizes the request for funds in accordance with the Budget (as defined below). To the extent any such expenditure is not in conformity with the Budget, Lender in its sole discretion can refuse to fund that portion of the Advance allocated to such expenditure.

(c) Subject to the satisfaction of all conditions precedent to any Advance hereunder, each disbursement by Lender to Borrowers shall be promptly made to Borrowers in U.S. Dollars and in immediately available funds by direct deposit to the deposit account as specified in writing by Borrowers to Lender.

(d) Each payment by Borrowers will be made in U.S. Dollars and in immediately available funds to Lender at the notice address of Lender as set forth below or such other location as designated by Lender in writing from time to time.

(e) Each disbursement by Lender and each payment by Borrowers will be evidenced by records kept by Lender, which records shall be deemed true, accurate and binding on Borrowers absent manifest error.

(f) Borrowers' delivery of an Advance Request shall constitute a reaffirmation of all representations and warranties of a continuing nature set forth herein and in any other Loan Documents (as defined below) and a further representation and warranty that no Event of Default exists nor does any fact or circumstance exist that would constitute an Event of Default after notice and/or the passage of time.

(g) Lender shall be entitled to rely on any Advance Request submitted by Borrowers without investigation or inquiry as to its validity, authority or accuracy and Borrowers will indemnify and hold Lender harmless from all liability, loss, and costs arising or related to any action taken by Lender in connection therewith, including without limitation, disbursement of funds in accordance therewith. This paragraph will survive termination of this Agreement, and will benefit Lender and its officers, employees, and agents.

3.2 Interest Calculation. Except as otherwise stated in this Agreement, all interest and fees, if any, will be computed on the basis of a 365-day year and the actual number of days elapsed. Installments of principal that are not paid when due under the Note shall continue to bear interest until paid.

3.3 Default Rate. At any time an Event of Default has occurred and is continuing, interest shall accrue on all principal amounts outstanding under this Agreement at a rate which is four percentage points (4%) higher than the rate of interest otherwise being charged under the terms of the Note (“Default Rate”).

**4. CONDITIONS PRECEDENT.** The following conditions shall have been satisfied, and Lender must have received the following items, in form and content acceptable to Lender, in its sole and absolute discretion, before Lender is required to extend any credit or make any Advance to the Borrowers under this Agreement.

4.1 Authorizations. Evidence that the execution, delivery and performance by the Borrowers of this Agreement, the Note and all other related loan documents (collectively, the “Loan Documents”) have been duly authorized.

4.2 Loan Documents. Delivery to Lender of the following fully executed original Loan Documents:

- (a) this Agreement;
- (b) the Note;
- (c) an initial Advance Request (the “Initial Draw”) in an amount up to, but not exceeding Ninety Nine Thousand, Nine Hundred Ninety Nine Dollars (\$99,999.00), together with wiring instructions for such disbursements; and
- (d) such other Loan Documents as may be reasonably required by Lender as a condition of closing.

4.3 Budget. “Budget” means the thirteen (13) week budget delivered to Lender (such initial Budget is attached to the DIP Agreement as Exhibit A, in form and substance approved by Lender), together with any subsequent or amended budgets thereto delivered to Lender, in form and substance satisfactory to Lender (each such subsequent budget, a “Budget”), in accordance with the terms and conditions of the DIP Agreement.

4.4 Bankruptcy Court Approval.

(a) The Bankruptcy Court in the Bankruptcy Case shall have entered an initial interim order (the “Interim Order”) under the Bankruptcy Code (i) approving the Borrowers obtaining the Initial Draw, approving the Loan Documents on an interim basis, and granting the collateral described in this Agreement, which Interim Order shall be in form and content acceptable to Lender and (ii) setting a final hearing within twenty (20) days of the entry of the Interim Order to enter a final order approving the Loan and the Loan Documents (the “Final Order”). The Interim Order and Final Order shall be in a form acceptable to Lender and provide, among other things, that: (i) the Loan Documents shall have been approved by the Bankruptcy Court in their present form without revision (except as may be consented to by Lender prior to such approval but without any obligation to do so), with fully executed copies attached to the Interim Order and Final Order; (ii) the Bankruptcy Court shall have found that the Loan Documents constitute valid and enforceable obligations of Borrowers and that the payment and performance obligations of

Borrowers under the Loan Documents shall constitute except as otherwise provided in the Final Order (y) an unsecured credit obtained pursuant to Section 364(c)(1) of the Bankruptcy Code, allowable under Section 503(b)(1) of the Bankruptcy Code and having priority over any and all administrative expenses of the kind specified in Section 503(b) of the Bankruptcy Code, provided however, that the priority of the Loan shall be subject to the Carve Out (defined below), and (z) a secured credit pursuant to Sections 364(c)(2) and (c)(3) of the Bankruptcy Code with a priority over all liens except those described in Section 2.4 above; (iii) that Borrowers shall not be entitled to seek other or further financing under Section 364 of the Bankruptcy Code, whether having priority, subordinated, unsecured or secured, unless either (A) the payment and performance obligations to Lender under the Loan and the Loan Documents have been paid and performed in full or (B) Lender has consented thereto in writing (but without any obligation to do so); (iv) the validity, enforceability and priority of the payment and performance obligations to Lender by Borrowers with respect to the Loan and the Loan Documents shall not be impaired or otherwise adversely affected in any manner, with the Court finding that Lender is entitled to the protections of Section 364(e) of the Bankruptcy Code as Lender has negotiated with the Borrowers, has entered into the Loan Documents and has agreed to extend credit hereunder in good faith; and (v) Advance Requests, including the Initial Draw may be consummated immediately upon the entry of the Interim Order and all other Advance Requests may be consummated immediately upon entry of the Final Order unless an order of stay is entered prior to any such Initial Draw or Advance Request is consummated.

(b) Lender in its sole and absolute discretion shall not be required to make any further Advance to the Borrowers beyond the Initial Draw unless and until Cardinal files a petition for bankruptcy (the “Cardinal Case”) and the Bankruptcy Court enters an order approving the DIP Agreement and Interim Order in the jointly-administered Cardinal Case. After entry of such order, Lender shall make an Advance of up to Two Hundred Thousand Dollars (\$200,000.00) to Borrowers pursuant to the Budget and the terms of this Agreement.

(c) Lender shall have approved the form and substance of the motion and the Loan Documents filed in the Bankruptcy Case and the Cardinal Case seeking this DIP financing.

(d) After making the Advances described above in subparagraphs 4.2(e) and 4.4(b), Lender in its sole and absolute discretion shall not make any further Advances until such time as the Bankruptcy Court has determined the priority of Lender’s lien on all of the real property of the Borrowers (excluding one parcel of 0.333 acres subject to the prior liens of Newtek) as junior only to the Howard Deed of Trust (so long as it has not been avoided) and to Lender’s existing deeds of trust.

4.5 No Defaults. Lender shall have determined that no Event of Default has occurred and is continuing and that no event or circumstance has occurred and is continuing that would give rise to an Event of Default upon the passage of time and/or notice as applicable hereunder.

4.6 Other Items. Any other items that Lender reasonably requires.

**5. REPRESENTATIONS AND WARRANTIES.** Upon executing this Agreement, and until Lender is repaid in full, Borrowers make the following representations and warranties (each Advance Request constitutes a renewal of these representations and warranties as of the date of such Advance Request).

5.1 Formation. Borrowers are duly formed and existing under the laws of the State of Virginia.

5.2 Authorization. Subject to entry of the Interim Order and Final Order, this Agreement, the other Loan Documents, and any other instrument or agreement required hereunder, are within the Borrowers' powers, have been duly authorized, including authorization by the Bankruptcy Court, and do not conflict with any of its organizational documents.

5.3 Enforceable Agreement. Subject to entry of the Interim Order and Final Order, this Agreement is a legal, valid and binding agreement of Borrowers, enforceable against Borrowers in accordance with its terms, and the other Loan Documents and any other instrument or agreement required hereunder, when executed and delivered, will be similarly legal, valid, binding and enforceable. Borrowers do not have any claims, counterclaims, defenses, or set-offs with respect to the Loan Documents.

5.4 Good Standing. Borrowers are properly licensed, in good standing and authorized to do business in each state in which Borrowers operate and, where required, in compliance with fictitious name statutes.

5.5 No Conflicts. This Agreement does not conflict with any law, agreement, or obligation by which Borrowers are bound.

5.6 Financial Information. All financial and other information that has been or will be supplied to Lender is sufficiently complete to give Lender accurate knowledge of the financial condition of Borrowers, including all material contingent liabilities. Since the date of the most recent financial statement provided to Lender, there has been no material adverse change in the financial condition or business of Borrowers.

5.7 Lawsuits. There is no lawsuit, tax claim or other dispute pending or threatened against Borrowers which, if lost, would impair in any material respect the Borrowers' financial condition or ability to repay the Loan, except as have been disclosed in the Schedules filed with the Bankruptcy Court (together with any and all amendments thereto, the "Schedules") and the Statement of Financial Affairs (together with any and all amendments thereto, the "SOFA", and together with the Schedules, the "Bankruptcy Disclosures") or in writing to Lender.

5.8 Regulatory Compliance. Borrowers are in compliance in all material respects with all applicable laws and regulations of applicable governmental entities required for Borrowers to operate its businesses.

5.9 Borrowers Not a "Foreign Person." Neither Borrower is a "foreign person" within the meaning of Section 1445 of the Internal Revenue Code of 1986, as amended from time to time.

**6. COVENANTS.** Borrowers agree during the Availability Period and until the Loan is repaid and satisfied in full:

6.1 Use of Proceeds. To use the proceeds of the Loan solely in accordance with the approved Budget for general corporate purposes of the Borrowers and working capital, including without limitation, payment and reimbursement of (a) Borrowers' operating expenses, and (b) the fees, costs and expenses incurred by Borrowers as debtors-in-possession in the Bankruptcy Case, which fees and expenses include, but are not limited to, payment of the fees and expenses of professionals of Borrowers and of any committee appointed in the Bankruptcy Case ("Professionals") retained pursuant to Section 327 and 328 of the Bankruptcy Court, approved in accordance with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the Bankruptcy Court's Local Rules, the rules, regulations and requirements of the Office of the United States Trustee and any order, ruling or judgment entered by the Bankruptcy Court in the Bankruptcy Case (collectively, the "Bankruptcy Laws").

6.2 Notices. To promptly notify Lender in writing of:

(a) Any notice that Borrowers fail in any material respect to comply with any applicable law, regulation or court order, including without limitation, any provisions of the Bankruptcy Code or order of the Bankruptcy Court;

(b) Any litigation commenced by or against Borrowers;

(c) Any material adverse change in the Borrowers' financial condition or business operations, or ability to repay the Loan; and

(d) The occurrence of any Event of Default or any event or circumstance that would give rise to an Event of Default upon the passage of time and/or notice as applicable hereunder.

6.3 Books and Records; Audits. To maintain adequate books and financial records and to allow Lender and its agents to inspect its properties and examine, audit, and make copies of such books and records at any reasonable time. If any of Borrowers' books or records are in the possession of a third party, Borrowers authorize that third party to permit Lender or its agents to have access to perform inspections or audits and to respond to Lender's requests for information concerning such properties, books and records.

6.4 Budget; Operating Revenue.

(a) Except as otherwise provided herein or approved by Lender in its sole and absolute discretion, Borrowers will not directly or indirectly use any cash or the proceeds of the Loan in a manner or for a purpose other than those materially consistent with this Agreement, the Loan Documents, the Interim Order and Final Order and the Budget.

(b) Borrowers shall provide to Lender on a bi-weekly basis and in no event later than three (3) business days from the end of each bi-weekly period (based on the weekly periods set forth in the Budget) (i) bi-weekly operating reports in a form acceptable to Lender in its sole and absolute discretion; and (ii) a budget to actual report which shows an accounting of

each receipt and expenditure, in categories which correspond to the Budget, which include the total receipts and expenditures per each Budget line item and the variance from the Budget.

(c) Borrowers shall operate in accordance with the Budget, subject to a ten percent (10%) variance for total expenses incurred on a cumulative basis pursuant to those periods set forth in the Budget. Borrowers shall not permit a disbursement causing any variance for any line item under the Budget in excess of ten percent (10%) of such line item during any such cumulative period without the written consent of Lender.

6.5 Compliance with Interim Order and Final Order; No Other Debt. Borrowers shall be in compliance with the Interim Order and Final Order at all times and shall not incur or obtain any other financing or debt except in the ordinary course of its business and operations and otherwise in a manner consistent with the Budget approved by Lender in Lender's sole discretion.

6.6 No Other Liens. Borrowers shall not create, assume, or allow any security interest or lien (including judicial liens) on property the Borrowers now or later own, except: (a) liens for taxes not yet due; and (b) any liens outstanding as of the date of this Agreement, which have been disclosed to Lender in writing and accepted by Lender prior to the closing of the Loan.

6.7 Compliance with Laws. Borrowers shall comply in all material respects with all applicable laws, regulations and court orders, including without limitation, all federal, state and local laws with respect to the ownership and operation of Borrowers' businesses.

6.8 Additional Negative Covenants. Not to, without Lender's written consent, which shall be in Lender's sole discretion:

(a) Enter into any consolidation, merger, or other combination, or become a partner in a partnership, a member of a joint venture, or a member of a limited liability company unless a condition precedent to the closing thereof is the payment and satisfaction in full of all obligations of Borrowers under the Loan and this Agreement.

(b) Acquire or purchase a business or its assets.

(c) Engage in any business activities substantially different from the Borrowers' present businesses and operations.

(d) Liquidate or dissolve Borrowers' businesses.

(e) Voluntarily suspend its businesses.

6.9 Insurance. Borrowers shall maintain such insurance policies and amounts as required by the Bankruptcy Laws and otherwise as is usual and customary for the ownership, maintenance, operation and development of Borrowers' businesses and assets, including without limitation, any real property, fixtures and/or equipment of Borrowers. Upon the request of Lender, to deliver to Lender a copy of each insurance policy, or, if permitted by Lender, a certificate of insurance listing all insurance in force.

6.10 Cooperation. To take any action reasonably requested by Lender to carry out the intent of this Agreement.

6.11 Change of Ownership. Not to cause, permit, or suffer any change in capital ownership of Borrowers without the prior written consent of Lender.

6.12 Capital Expenditures. Not to, without Lender's prior written consent, spend or incur obligations to acquire or lease fixed assets except as may be permitted in the Budget.

## **7. HAZARDOUS SUBSTANCES.**

7.1. Indemnity Regarding Hazardous Substances. Borrowers will indemnify and hold harmless Lender from any loss or liability Lender incurs in connection with or as a result of this Agreement, which directly or indirectly arises out of the use, generation, manufacture, production, storage, release, threatened release, discharge, disposal or presence of a hazardous substance. This indemnity will apply whether the hazardous substance is on, under or about Borrowers' property or operations or property leased to Borrowers. This indemnity includes, but is not limited to, attorneys' fees. This indemnity extends to Lender and all of Lender's directors, officers, employees, agents, successors, attorneys and assigns.

7.2. Definition of Hazardous Substances. "Hazardous Substances" means any substance, material or waste that is or becomes designated or regulated as "toxic," "hazardous," "pollutant," or "contaminant" or a similar designation or regulation under any federal, state or local law (whether under common law, statute, regulation or otherwise) or judicial or administrative interpretation of such, including without limitation petroleum or natural gas. This indemnity will survive repayment of Borrowers' obligations to Lender.

## **8. DEFAULT.** Each of the following shall constitute an "Event of Default":

8.1 Payment Default. The failure to pay (i) any interest or principal as and when due under this Agreement or pursuant to the terms and conditions of the Note, (ii) any other fees, costs, expenses or other amounts as and when required pursuant to this Agreement, the Note or the other Loan Documents or, in the event no time is specified, within (10) ten days of written demand therefore by Lender, and (iii) on the Maturity Date, all outstanding amounts under the Note and this Loan Agreement, including all outstanding principal, all accrued but unpaid interest and all outstanding fees, costs, expenses and other amounts due under the Loan Documents.

8.2 Specified Defaults. Borrowers fail to comply with, are in default with respect to or there is otherwise a failure of condition with respect to any of the terms, conditions, covenants and provisions set forth in: (i) Section 6.1 (Use of Proceeds); (ii) Section 6.4 (Budget; Operating Revenue); (iii) Section 6.5 (Compliance with Interim Order and Final Order; No Other Debt); (iv) Section 6.6 (No Other Liens); (v) Section 6.7 (Compliance with Laws); (vi) Section 6.8 (Additional Negative Covenants); (vii) Section 6.9 (Insurance); and (viii) Section 6.11 (Change of Ownership).

8.3 Failure of Representations and Warranties. Any representation or warranty set forth herein or in any other Loan Document shall fail to be true and correct in all material respects or it is determined by Lender that Borrowers have given Lender materially false or misleading information.



8.4 Other Defaults; Failure of Conditions. Borrowers fail to comply with, are in default with respect to or there is otherwise a failure of condition with respect to any of the terms, conditions, covenants and provisions set forth herein or in any other Loan Document which is not otherwise specifically referred to in this Section 8, which is not cured to the satisfaction of Lender within thirty (30) days of written demand by Lender or, in the event such cure is not feasible within such thirty (30) day period, then, so long as (i) such default or failure does not constitute an immediate, irreparable material adverse change, and (ii) Borrowers are at all times diligently pursuing such cure, Borrowers shall have up to an additional thirty (30) days to effect such cure.

8.5 Bankruptcy.

(a) Any order shall be entered in the Bankruptcy Case converting the Bankruptcy Case to a proceeding under any provision of the Bankruptcy Code other than Chapter 11, or dismissing the Bankruptcy Case.

(b) Any Trustee shall be appointed in the Bankruptcy Case for any reason, including without limitation, under Chapter 11 of the Bankruptcy Code, or otherwise.

(c) Borrowers shall file or commence any proceeding to surcharge Lender pursuant to Sections 105, 364 or 506(c) of the Bankruptcy Code.

(d) Except in connection with a Bankruptcy Court-approved sale by Borrowers of Borrowers' assets, the Bankruptcy Court enters an order allowing for the assumption or rejection of an executory contract or unexpired lease with which the Lender does not consent, which consent may be given or withheld in the exercise of Lender's sole opinion and discretion.

(e) Borrowers files any plan of reorganization without Lender's approval or any other party in interest and/or creditor shall propose any plan of reorganization that seeks to vary, amend, modify, or change in any respect the terms, covenants, and conditions of the Loan Documents or provides for the reorganization of Borrowers without the prior written consent of Lender, which consent may be given or withheld in the exercise of Lender's sole opinion and discretion.

(f) Borrowers shall file or commence any proceeding in any court of competent jurisdiction to challenge the validity, enforceability or priority of the payment and performance obligations of Borrowers to Lender with respect to this Loan, including, without limitation, any adversary proceeding in the Bankruptcy Case or with respect to the terms, covenants, and conditions contained in any proposed plan of reorganization, which proceeding is not dismissed or withdrawn within sixty (60) days of the filing thereof.

(g) Any other party in interest and/or creditor shall file or commence any proceeding in any court of competent jurisdiction to challenge the validity, enforceability or priority of the payment and performance obligations of Borrowers to Lender with respect to this Loan, including, without limitation, any adversary proceeding in the Bankruptcy Case or with respect to the terms, covenants, and conditions contained in any proposed plan of reorganization, which claim or relief sought is granted.

(h) Any act, condition, or event occurring after the Petition Date that has or could reasonably be expected to have a material adverse effect and it is reasonably foreseeable that an Event of Default would occur as a result of such material adverse change;

(i) The grant or recognition of a lien on or other interest in any property of any Lender other than a lien or encumbrance permitted by the Interim Order and the Final Order, which is superior to or ranks in parity with Lender's security interest in or lien upon the Collateral;

(j) The grant of an administrative expense claim in the Bankruptcy Case that is superior to or ranks in parity with the claims and rights of Lender subject only to the Prepetition Liens and the Carve Out;

(k) The Interim Order and the Final Order is modified, reversed, vacated, or amended by the Bankruptcy Court or on appeal without the prior written consent of Lender;

(l) The filing of a plan of reorganization or liquidation that does not provide for payment in full of all Obligations on the effective date thereof in accordance with the terms and conditions contained herein, unless otherwise consented to by Lender;

(m) The entry of an order by the Bankruptcy Court authorizing the sale of substantially all of Borrowers' assets under §§ 363 or 365 of the Bankruptcy Code (or otherwise) that does not provide for payment in full of the Obligations to Lender upon the closing of such sale, unless otherwise consented to by Lender; and

(n) Any provision of this DIP Agreement or any of the Loan Documents ceases, for any reason, to be valid and binding on Borrowers.

8.6 Judgments. Any judgments or arbitration awards are entered against Borrowers in an aggregate amount of Fifty Thousand and 00/Dollars (\$50,000.00) or more in excess of any insurance coverage, or Borrowers enter into any settlement agreements with respect to any litigation or arbitration, without Lender's prior written consent, which consent may be given or withheld in the exercise of Lender's sole opinion and discretion.

8.7 Default Under Related Documents. The occurrence of any "Event of Default" as that term is defined in any other Loan Document.

8.8 Remedies. Upon the occurrence of an Event of Default, automatically and without further notice by or action of Lender or any other person, and without the necessity of notice to, the consent of or the approval of the Bankruptcy Court or any other person: (a) any obligation of Lender to make further Advances under the Loan and the Availability Period shall be deemed terminated; (b) the outstanding balance of the Loan, including all outstanding principal, accrued but unpaid interest and all other fees, costs, expenses and other amounts required to be paid under the Loan Documents, shall become immediately due and payable in full, with interest accruing thereon at the Default Rate at all times thereafter until paid in full; and (c) Lender shall be entitled to an expedited hearing on any motion for relief from stay to exercise any of its rights and remedies as against the Borrowers under the Loan Documents, applicable federal, state and local law, including without limitation, the Bankruptcy Laws, and in equity.

## **9. BANKRUPTCY CASE ADMINISTRATION.**

9.1 Administrative Claim Super Priority. To the extent not adequately protected by the liens conferred and contemplated hereunder, Lender shall be granted an administrative priority claim pursuant to Section 364(c) of the Bankruptcy Code, that is subject to the payment of the Carve Out (defined below), with regard to the payment and performance by Borrowers of all terms, covenants, and conditions under the Loan Documents, including, without limitation, repayment of all Loan amounts advanced by Lender to Borrowers, and such administrative claim shall have priority over all administrative expenses of the kind specified in Sections 503(b) of the Bankruptcy Code; provided however, this Section 364(c) administrative claim shall not include rights and actions arising under Sections 502(d), 544, 547, 548, 549, 550, 551 or 553 of the Bankruptcy Code except as provided by section 4.4(d) of this DIP Agreement describing Lender's senior security interest in substantially all of Borrowers' real property. Any term in this Agreement or the other Loan Documents to the contrary notwithstanding, the "Carve Out" is an amount not to exceed Three Hundred Thousand Dollars (\$300,000.00) for the administrative professional fees for Professionals as approved and allowed by the Bankruptcy Court pursuant to Sections 330 and 331 of the Bankruptcy Code, which Three Hundred Thousand Dollars (\$300,000.00) shall include those amounts being held by Borrowers' professionals as retainers as of the Petition Date.

9.2 Postpetition Requests. Without Lender's written consent, no postpetition financing requests shall be made, including without limitation, under Section 364 of the Bankruptcy Code, unless the same is to pay Lender in full as a condition to any such financing.

## **10. GENERAL TERMS.**

10.1 Heirs, Successors and Assigns. The terms of this Agreement shall bind and benefit the heirs, legal representatives, successors and assigns of the parties; provided, however, that Borrowers may not assign this Agreement without the prior written consent of Lender. Lender has the right to assign or participate in the Loan to any other persons or entities without the consent of or notice to Borrowers. Without the consent of or notice to Borrowers, Lender may disclose to any prospective assignee or participant (or if Lender is an entity, purchaser of any ownership interests in Lender), any financial or other information relating to the Loan, Borrowers, or the assets of Borrowers.

10.2 Waivers. No alleged waiver by Lender is effective unless in writing, and no waiver may be construed as a continuing waiver. No waiver is implied from any delay or failure by Lender to take action on account of any default of Borrowers. Consent by Lender to any act or omission by Borrowers may not be construed as a consent to any other or subsequent act or omission.

10.3 Attorneys' Fees. In addition to the reimbursement of costs set forth elsewhere herein, Borrowers shall reimburse Lender for any reasonable costs and attorneys' fees incurred by Lender in connection with the enforcement or preservation of any rights, claims or remedies under this Agreement, any other Loan Document, the Interim Order and Final Order and in connection with any amendment, waiver, "workout" or restructuring under this Agreement. In the event of a lawsuit or arbitration proceeding, the prevailing party is entitled to recover costs and reasonable attorneys' fees incurred in connection with the lawsuit or arbitration proceeding, as determined by

the court or arbitrator. Lender is entitled to recover costs and reasonable attorneys' fees incurred by Lender related to any actions taken by Lender with respect to the Bankruptcy Case, including without limitation, the preservation, protection, or enforcement of any rights of Lender in the Bankruptcy Case. Any such reimbursement under this Section 10.3 shall not be limited to any specified amounts set forth elsewhere in this Agreement.

10.4 Indemnification. Borrowers will indemnify and hold Lender harmless from any loss, liability, damages, judgments, and costs of any kind relating to or arising directly or indirectly out of (a) this Agreement or any document required hereunder, (b) any credit extended or committed by Lender to Borrowers hereunder, and (c) any litigation or proceeding related to or arising out of this Agreement, any such document, or any such credit. This indemnity includes but is not limited to attorneys' fees. This indemnity extends to Lender and all of Lender's directors, officers, managers, members, employees, agents, successors, attorneys, and assigns. This indemnity will survive repayment of Borrowers' obligations to Lender. All sums due to Lender hereunder shall be obligations of Borrowers, due and payable immediately without demand.

10.5 Limit of Liability of Lender; Waiver of Special Damages. In exercising rights and remedies, neither Lender, nor any stockholder, director, officer, manager, member, employee, agent, or representative of Lender shall have any liability for any injury to the assets, business, operations, or property of Borrowers or any other liability to Borrowers, other than for its own gross negligence or willful misconduct; provided that notwithstanding any such gross negligence or willful misconduct, Borrowers waive, to the maximum extent not prohibited by law, any right of Borrowers to seek, claim or recover from Lender any special, exemplary, punitive or consequential damages.

10.6 Rescission or Return of Payments. If at any time or from time to time, whether before or after payment and performance of the obligations of Borrowers in full, all or any part of any amount received by Lender in payment of, or on account of, any such obligation is or must be, or is claimed to be, avoided, rescinded, or returned by Lender to Borrowers or any other person for any reason whatsoever (including, without limitation, bankruptcy, insolvency, or reorganization of Borrowers or any other person), such obligation and any liens and encumbrances that secured such obligation at the time such avoided, rescinded, or returned payment was received by Lender shall be deemed to have continued in existence or shall be reinstated, as the case may be, as though such payment had not been received.

10.7 Integration, Entire Agreement, Change, Discharge, Termination, Waiver, Approval, Consent, etc. This Agreement and the other Loan Documents contain the complete understanding and agreement of Borrowers and Lender with respect to the subject matter set forth herein and therein and supersede all prior representations, warranties, agreements, arrangements, understandings, and negotiations. No provision of the Loan Documents may be changed, discharged, supplemented, terminated, or waived except in a writing signed by the parties thereto. Delay or failure by Lender to insist on performance of any obligation when due or compliance with any other term or condition in the Loan Documents shall not operate as a waiver thereof or of any other obligation, term, or condition or of the time of the essence provision. Acceptance of late payments or performance shall not be a waiver of the time of the essence provision, the right of Lender to require that subsequent payments or performance be made when due, or the right of

Lender to declare an Event of Default if subsequent payments or performance are not made when due. Any approval, consent, or statement that a matter is satisfactory by Lender under the Loan Documents must be in writing executed by Lender and shall apply only to the Person(s) and facts specifically set forth in the writing. To the extent there are any inconsistencies between or among any of the Loan Documents, Interim Order, Final Order and this Agreement, this Agreement shall control.

10.8 Severability. If any provision or any part of any provision contained in the Loan Documents is determined by the Bankruptcy Court to be unenforceable, the enforceability of the other provisions or the other provisions and the remainder of the subject provision, respectively, shall not be affected and they shall remain in full force and effect.

10.9 No Construction Against Lender or Borrowers. The Loan Documents are the result of negotiations between Borrowers and Lender. Accordingly, the Loan Documents shall not be construed for or against Borrowers or Lender regardless of which party drafted the Loan Documents or any part thereof.

10.10 Headings. The headings at the beginning of each section of this Agreement and the other Loan Documents are solely for convenience and shall not be deemed to be a substantive part thereof.

10.11 Number and Gender. Wherever provided in the Loan Documents, the singular shall include the plural and vice versa and each gender shall include the other genders.

10.12 Choice of Law; Consent to Jurisdiction. Except to the extent expressly governed or preempted by the Bankruptcy Laws, the Loan Documents shall be governed by the laws of the State of North Carolina, without giving effect to conflict of laws principles. Borrowers and Lender hereby irrevocably submit and consent to the jurisdiction of the Bankruptcy Court for all matters relating to this DIP Agreement. Except as expressly consented to herein, nothing contained in the DIP Agreement shall be construed as a waiver of any of the Eastern Band of Cherokee Indians' sovereign rights nor sovereign immunity or the Lender as its wholly owned subsidiary.

10.13 Jury Waiver. Borrowers, to the extent not expressly prohibited by applicable law, hereby agrees to waive any right to a trial by jury with respect to any claims or actions arising out of, on account of or otherwise relating to the loan, the loan documents or any transactions contemplated thereby.

10.14 Time Is of the Essence. Time is of the essence with regard to each provision of the Loan Documents as to which time is a factor.

10.15 Notice Addresses. Except as otherwise provided in Section 3.1 above, any notices or demands of any kind that any party hereunder is required or desires to give or make upon others in connection with this Agreement or any other Loan Document shall be in writing and shall be deemed to be delivered as of the date sent if sent via facsimile and/or email; provided that it is also deposited in the United States mail, postage prepaid, with all such notices being addressed to the other parties at the addresses set forth in Schedule A attached hereto. Each notice shall be deemed delivered on the date delivered if by personal delivery or by overnight delivery service, seventy-two (72) hours after deposit in the United States mail (postage prepaid) if by registered or certified

mail or upon receipt if by email or facsimile transmission. By giving to the other parties written notice, the parties to this Agreement and their respective successors and assigns shall have the right from time to time and at any time to change their respective addresses and each shall have the right to specify a new address for notice purposes.

10.16 Counterparts. This Agreement and the Loan Documents may be executed in one or more counterparts, each of which is deemed an original and all of which together constitute a single agreement. Each executed counterpart may be delivered by personal delivery, overnight, mail or electronically, whether in the form of a photocopy, facsimile, or scanned document, each of which shall have the same legal force and effect as delivery of an original. The signature page of any counterpart may be detached therefrom by Lender or its counsel and attached to a document which is identical thereto (except for any de minimus, non-substantive typographical and formatting corrections) without impairing the legal and binding effect of the signature(s) thereto,

10.17 Acknowledgment. Borrowers acknowledge and represent to Lender that: (a) Borrowers have been afforded the necessary time and opportunity to carefully read, and have carefully read, the Loan Documents and to review same with counsel of Borrowers' choice and have either done so or have elected not to do so and (b) have, prior to Borrowers' execution thereof, fully understood the nature and legal effect and consequences of entering into the Loan Documents, as well as Borrowers' obligations arising out of and related thereto.

[Signature Page Follows.]



This Agreement is executed as of the date stated at the top of the first page.

BORROWERS:

ALOUETTE HOLDINGS, INC., a Virginia Corporation

By:

B.A. Berneche

Its:

President

Print Name:

Bret A. Berneche

CARDINAL HOMES, INC., a Virginia Corporation

By:

B.A. Berneche

Its:

President

Print Name:

Bret A. Berneche

LENDER:

KITUWAH, LLC, a limited liability company

By:

\_\_\_\_\_

Its:

\_\_\_\_\_

Print Name:

\_\_\_\_\_

This Agreement is executed as of the date stated at the top of the first page.

BORROWERS:

ALOUETTE HOLDINGS, INC., a Virginia Corporation

By: \_\_\_\_\_

Its: \_\_\_\_\_

Print Name: \_\_\_\_\_

CARDINAL HOMES, INC., a Virginia Corporation

By: \_\_\_\_\_

Its: \_\_\_\_\_

Print Name: \_\_\_\_\_

LENDER:

KITUWAH LLC, a limited liability company

By:  \_\_\_\_\_

Its: CEO \_\_\_\_\_

Print Name: Mark A. Hubble \_\_\_\_\_



SCHEDULE A

NOTICE ADDRESSES

If to Lender:

Mark Hubble  
Kituwah, LLC  
1158 Seven Clans Lane  
PO Box 366  
Cherokee, NC 28719

If to Borrowers:

Bret A. Berneche, CEO  
Cardinal Homes, Inc.  
525 Barnesville Hwy  
Wylliesburg, VA 23976

Bret A. Berneche, CEO  
Alouette Holdings, Inc.  
307 Palomino Road  
Buffalo Junction, VA 24529

With a copy to:

John H. Small  
Brooks Pierce  
P.O. Box 26000  
Greensboro, NC 27420-6000

With a copy to:

Michael E. Hastings  
Whiteford, Taylor & Preston LLP  
10 S. Jefferson Street, Suite 1110  
Roanoke, Virginia 24011

EXHIBIT B

**Alouette Holdings, Inc. and Cardinal Homes, Inc**  
**Summary of Weekly Cash Flow and DIP Funding Activity**  
**Revised November 27, 2019**  
\$ in 000s

		Cardinal Chapter 11	for the Weeks Ending, Friday											Cardinal Auction	
		Wk 1 11/29	Wk 2 12/6	Wk 3 12/13	Wk 4 12/20	Wk 5 12/27	Wk 6 1/3	Wk 7 1/10	Wk 8 1/17	Wk 9 1/24	Wk 10 1/31	Wk 11 2/7	Wk 12 2/14	Wk 13 2/21	Total
I.	Cash Receipts	\$ -	\$ -	\$ -	\$ -	\$ 255	\$ 52	\$ 5	\$ 3	\$ 123	\$ 70	\$ 108	\$ 119	\$ 80	\$ 815
II.	Operating Disbursements														
	Materials	-	29	53	49	65	57	55	44	36	30	13	6	6	444
	Payroll, Benefits, and Taxes	20	12	49	60	35	49	35	35	35	35	49	35	35	482
	Other Non-Labor Operating Disb	3	13	40	8	15	31	9	9	14	11	19	13	29	213
	Total Operating Disbursements	22	54	141	117	115	137	99	88	85	77	81	54	69	1,139
	Cash Flow from Operations	(22)	(54)	(141)	(117)	140	(85)	(94)	(84)	37	(7)	28	65	11	(324)
	DIP Interest	-	-	-	-	2	-	-	-	3	-	-	-	4	10
	Professional Fees	75	-	-	-	-	-	-	-	-	75	-	-	150	300
	Trustee Fees	-	-	-	-	-	-	15	-	-	-	-	-	-	15
	Approved Critical Vendor Pmts.	-	35	35	10	-	10	-	-	-	10	-	-	-	100
III.	Net Cash Flow	(97)	(89)	(176)	(127)	138	(95)	(110)	(84)	34	(92)	28	65	(144)	(749)
IV.	Beginning Cash - Book Balance	-	-	10	10	10	10	10	10	10	10	10	10	10	-
	Net Cash Flow	(97)	(89)	(176)	(127)	138	(95)	(110)	(84)	34	(92)	28	65	(144)	(749)
	DIP Facility - Draws/(Paydowns)	97	99	176	127	(138)	95	110	84	(34)	92	(28)	(65)	144	759
V.	Ending Cash - Book Balance	\$ -	\$ 10	\$ 10	\$ 10	\$ 10	\$ 10	\$ 10	\$ 10	\$ 10	\$ 10	\$ 10	\$ 10	\$ 10	\$ 10
Debtor-In-Possession ("DIP") Financing															
	Beginning Balance	\$ -	\$ 97	\$ 196	\$ 373	\$ 500	\$ 360	\$ 455	\$ 564	\$ 648	\$ 611	\$ 703	\$ 675	\$ 610	\$ -
	Draws	(97)	(99)	(176)	(127)	138	(95)	(110)	(84)	34	(92)	28	65	(144)	(759)
	Payments	-	-	-	-	-	-	-	-	-	-	-	-	-	-
	Interest - DIP ( 8% APR)	-	-	-	-	2	-	-	-	3	-	-	-	4	10
	Ending Balance	\$ 97	\$ 196	\$ 373	\$ 500	\$ 360	\$ 455	\$ 564	\$ 648	\$ 611	\$ 703	\$ 675	\$ 610	\$ 749	\$ 749

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION**

In re:

Chapter 11

CARDINAL HOMES, INC.,

Case No. 19-36275-KRH

Debtor.<sup>1</sup>

**INTERIM ORDER AUTHORIZING THE DEBTOR  
TO OBTAIN POST-PETITION, SECURED FINANCING**

Upon the Motion (the “Motion”)<sup>2</sup> of the above-captioned debtor and debtor-in-possession (the “Debtor”) for, among other things, entry of an interim order pursuant to sections 105, 362, 363, 364 and 507 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1532 (as amended, the “Bankruptcy Code”), and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) (i) granting the Debtor authority to obtain post-petition, secured, super-priority financing (the “DIP Financing”) from Kituwah, LLC, a limited liability company formed as a wholly-owned subsidiary of the Eastern Band of the Cherokee Indians (the “Lender”), on the terms and conditions of that certain *Debtor-In-Possession Loan and Security*

---

<sup>1</sup> The Debtor in this Chapter 11 Case and the last four digits of its taxpayer identification number are as follows: Cardinal Homes, Inc. (9112). The Debtor’s headquarters are located at 525 Barnesville Highway, Wylliesburg, VA 23976.

<sup>2</sup> Capitalized terms not defined herein shall have the meanings ascribed to them in the DIP Financing Agreement.

---

Michael E. Hastings (Virginia Bar No. 36090)  
Brandy M. Rapp (Virginia Bar No. 71385)  
WHITEFORD, TAYLOR & PRESTON LLP  
Two James Center  
1021 E. Cary St., Suite 1700  
Richmond, Virginia 23219  
T: (804) 799-7859  
F: (804) 977-3295  
[mhastings@wtplaw.com](mailto:mhastings@wtplaw.com)  
[brapp@wtplaw.com](mailto:brapp@wtplaw.com)

*Proposed Counsel for the Debtor and  
Debtor in Possession*

*Agreement* dated November 21, 2019, between the Debtor, its parent company, Alouette Holdings, Inc. (“Alouette”)<sup>3</sup> and Lender, as amended among the parties consistent with the terms of the Alouette Interim DIP Order, a copy of which is annexed hereto as Exhibit A (the “DIP Financing Agreement”), and notice of the Motion having been given to: (i) the Office of the United States Trustee; (ii) the Office of the United States Attorney for the Eastern District of Virginia, (iii) Internal Revenue Service, (iv) counsel for Lender; (v) the Debtor’s twenty (20) largest unsecured creditors; (vi) the Debtor’s pre-petition secured lenders and its counsel, if known; (vii) all parties that have filed a financing statement asserting a lien in any of the Debtor’s assets; and (viii) any party that has filed a request for notice with the Court; and the Court having conducted a hearing on December 3, 2019, to consider the interim relief requested in the Motion (the “Interim Hearing”); and it appearing that granting the relief requested in the Motion on an interim basis is necessary to avoid immediate and irreparable harm to the Debtor pending the Final Hearing, and is otherwise fair and reasonable and in the best interest of the Debtor, its estate and its creditors, and is essential for the preservation of the value of the Debtor’s assets; and all objections, if any, to the entry of this Interim Order having been withdrawn, resolved or overruled by the Court; and upon the entire record of this case, including any evidence presented or statements of counsel at the Interim Hearing; and after due deliberation thereon; and good and sufficient cause appearing therefor;

---

<sup>3</sup> Alouette filed for chapter 11 relief on November 20, 2019 in the United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division, commencing Case No. 19-36126-KRH. On November 22, 2019, the Court entered the *Interim Order Authorizing the Debtor to Obtain Post-Petition, Secured Financing* (Docket No. 14)(the “Alouette Interim DIP Order”) granting Alouette authority to obtain post-petition, secured, super-priority financing from the Lender on the terms and conditions set forth in the DIP Financing Agreement and scheduling a final hearing for December 10, 2019 at 2:00 p.m. at the United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division.

IT IS HEREBY FOUND AND DETERMINED THAT:<sup>4</sup>

A. The Debtor filed for chapter 11 relief on December 2, 2019 (the “Petition Date”) and continues to manage its business and property as a debtor-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108 in this case (the “Bankruptcy Case”).

B. The notice given by the Debtor of the Motion and the Interim Hearing constitutes adequate and sufficient notice and complies with section 102(1) of the Bankruptcy Code, Bankruptcy Rule 2002 and 4001(b), (c) and (d).

C. The DIP Financing is necessary to allow the Debtor to fund the administration of the Debtor’s Bankruptcy Case and to fund its continued operation, including without limitation paying its employees and maintaining business operations during the Debtor’s and Alouette’s bankruptcy cases.

D. Given the Debtor’s current financial condition and capital structure, the Debtor is unable to obtain sufficient unsecured credit, allowable under Bankruptcy Code § 503(b) as an administrative expense, to allow it to continue to operate its business.

E. A secured financing facility on terms comparable or superior to those of the DIP Financing is not available to the Debtor.

F. The DIP Financing has been negotiated by the Debtor and the Lender in good faith within the meaning of section 364(e) of the Bankruptcy Code, and any credit extended and loans made to the Debtor pursuant to the DIP Financing Agreement shall be deemed to have been extended, issued or made, as the case may be, in good faith by the Lender as required by, and within the meaning of, Bankruptcy Code § 364(e).

---

<sup>4</sup> Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate.

G. The terms of the DIP Financing are fair and reasonable, are ordinary and appropriate for secured financing to a debtor-in-possession, reflect the Debtor's prudent exercise of business judgment consistent with its fiduciary duties, and are supported by reasonably equivalent value and fair consideration.

H. This Court concludes that entry of this Interim Order is in the best interests of the Debtor's estate and creditors and its implementation is necessary to avoid immediate and irreparable harm to the Debtor and Alouette.

It is accordingly hereby **ORDERED, ADJUDGED, AND DECREED** that:

1. The Motion is **GRANTED** on an interim basis in accordance with the terms and conditions set forth in this Interim Order and the DIP Financing Agreement. Any objections to the Motion with respect to entry of this Interim Order to the extent not withdrawn, waived or otherwise resolved, and all reservations of rights included therein, are hereby denied and overruled on the merits.

2. This Court has jurisdiction over these proceedings and the parties and property affected hereby pursuant to 28 U.S.C. §§ 157(b) and 1334. This is a core proceeding under 28 U.S.C. § 157(b). This Court may enter a final order consistent with Article III of the United States Constitution.

3. The terms and conditions of the DIP Financing Agreement are approved as set forth herein.

4. The Debtor is authorized to obtain credit and borrow from the Lender, in accordance with the terms of this Interim Order, the DIP Financing Agreement, as amended, and the Budget, a copy of which is annexed hereto as Exhibit B. The Budget may be amended by the Debtor, but only with the consent of the Lender as provided in the DIP Financing Agreement

after seven (7) days' notice to the Notice Parties<sup>5</sup> absent written consent of Newtek Small Business Finance, LLC ("Newtek") or further order of the Court. Unless otherwise expressly agreed to in writing by the Lender, the proceeds of the DIP Financing shall be used exclusively for the purposes identified in the Budget.

5. The Lender's liens on the Collateral (as defined in section 2.1 of the DIP Financing Agreement) and claims, including any superpriority administrative expense claims as specified in the DIP Financing Agreement, are subject to the Carve Out as defined in the DIP Financing Agreement.

6. No portion of the DIP Financing or the Carve Out shall be used or be available to pay any fees, disbursements, costs or expenses incurred by any party in connection with the investigation (including discovery proceedings), initiation or prosecution of any other claims, causes of action, adversary proceedings or other litigation against the Lender, including, without limitation, their respective officers, directors, agents, employees, successors and assigns.

7. The Debtor is authorized and empowered to execute, deliver and perform, and do all acts that are required or contemplated by or in connection with this Interim Order and the DIP Financing Agreement and any other documents to be executed and delivered in connection therewith or contemplated thereby (collectively, the "Loan Documents").

8. All obligations under this Interim Order and the DIP Financing Agreement that the Debtor owes to the Lender (collectively, the "Obligations") shall constitute obligations that are valid, binding, and enforceable against the Debtor in accordance with their terms.

9. Subject to the rights of the pre-petition secured creditors and the rights of the Professionals secured by the Carve Out, pursuant to Bankruptcy Code § 364(c)(1), the

---

<sup>5</sup> The "Notice Parties" shall include the Debtor, Newtek, Lender, Office of the United States Trustee, Official Committee of Unsecured Creditors (if any) and the holders of the Prepetition Liens.

Obligations shall constitute administrative expense claims pursuant to Bankruptcy Code §§ 503(b)(1) and 507 with priority over any and all administrative expenses of the type specified in Bankruptcy Code §§ 503(b) and 507(b) (the “Superpriority Claims”), subject and subordinate only to the Prepetition Liens<sup>6</sup> and the Carve Out, which Superpriority Claims shall, subject to the foregoing rights of the pre-petition secured creditors and the Professionals, be payable from and have recourse to all prepetition and postpetition property of the Debtor and all proceeds thereof, including, without limitation, all proceeds and other amounts received in respect of the Debtor’s claims, causes of action and rights arising under state or federal law in connection with Chapter 5 of the Bankruptcy Code.

10. Other than as expressly described herein, no claim, cost or expense of administration under Bankruptcy Code §§ 105, 364(c)(1), 503(b), 506(c), 507(b) or otherwise, including those resulting from the conversion of the Bankruptcy Case to a case under chapter 7, shall be senior to, or *pari passu* with, the Superpriority Claims of the Lender while any of the Obligations remain outstanding.

11. Subject to the rights of the holders of the Prepetition Liens and the rights of the Professionals secured by the Carve Out, pursuant to Bankruptcy Code §§ 364(c)(2) and 364(c)(3), as collateral security for the timely and full payment and performance of all of the Obligations approved herein, the Lender is hereby granted effective immediately a valid and perfected security interest in and lien upon, all present and after-acquired property of the Debtor of any nature whatsoever (both real and personal) including a lien on the proceeds of the avoidance of the prepetition lien of Benson Howard (the “Howard Lien”), junior only to the Prepetition Liens (other than the Howard Lien) and the Carve Out as set forth in the DIP

---

<sup>6</sup> The term “Prepetition Liens” shall have the meaning ascribed to it in section 2.4 of the DIP Financing Agreement as well as any liens or security interests of Newtek against any of the assets of the Debtor or Alouette existing or deemed or determined to exist.



Financing Agreement, including, without limitation, all proceeds and products, all proceeds and other amounts received in respect of the Debtor's claims, causes of action and rights arising under state or federal law in connection with Chapter 5 of the Bankruptcy Code (the "DIP Lien"). The Lender shall not be required to file or record mortgages, deeds of trust, security agreements, pledge agreements, financing statements, notices of lien or similar instruments, or take any other action in order to validate and perfect the DIP Lien. If the Lender shall, in its sole discretion, choose to file such mortgages, deeds of trust, security agreements, pledge agreements, financing statements, notices of lien or similar instruments with respect to the Collateral in connection with validating or perfecting the DIP Lien, it is authorized to do so, and all such documents shall be deemed to have been filed or recorded at the time and on the date of entry of this Interim Order.

12. Pursuant to Bankruptcy Code §§ 364(c)(2) and/or 364(c)(3), the DIP Lien shall have priority over any and all other security interests, liens and other claims except for the Prepetition Liens and the Carve Out, all in accordance with the terms of the DIP Financing Agreement.

13. Notwithstanding anything in this Interim Order, the Motion or the DIP Financing Agreement to the contrary, no liens or security interests granted to the Lender shall prime any liens or security interests of Newtek against the assets of the Debtor or Alouette that are determined by order of the Court to exist and enjoy priority that is superior to the interest of a trustee or debtor in possession pursuant to applicable Virginia law and § 544(a) of the Bankruptcy Code.

14. The DIP Lien granted to the Lender pursuant to the DIP Financing Agreement and this Interim Order shall not be (i) subject to any lien or security interest that is avoided and preserved for the benefit of the Debtor's estate under § 551 of the Bankruptcy Code or otherwise

except as provided in paragraph 11 above, (ii) subordinated to or made *pari passu* with any other lien or security interest under § 364(d) of the Bankruptcy Code or otherwise, or (iii) subject to marshalling or any similar remedy.

15. The automatic stay provisions of Bankruptcy Code § 362 are vacated and modified without further hearing or order to permit the Lender to file mortgages, deeds of trust, security agreements, pledge agreements, financing statements, notices of lien or similar instruments to evidence the DIP Lien and to give the Debtor any notice provided for in the DIP Financing Agreement. The automatic stay provisions of Bankruptcy Code § 362 are vacated and modified to permit the Lender, in the event that an Event of Default has occurred and is continuing and has not been waived by the Lender, without further hearing or order, to exercise the Lender's right to terminate its commitment to lend and to accelerate the outstanding Obligations under the DIP Financing Agreement. The Lender must obtain relief from the automatic stay of Bankruptcy Code § 362 to exercise all other rights and remedies under the DIP Financing Agreement and applicable law; provided, however, that the Lender may request a hearing on such relief from the automatic stay on an expedited basis (no less than five (5) business days' notice).

16. The DIP Financing Agreement and the provisions of this Interim Order shall be binding upon the Lender and the Debtor and their respective successors and assigns (including any trustee hereinafter appointed for the estate of the Debtor to the extent allowed under applicable law) and shall inure to the benefit of the Debtor, the Lender, and the Lender's successors and assigns.

17. All credit extended and Loans made to the Debtor by the Lender shall be deemed to have been extended in good faith, as that term is used in § 364(e) of the Bankruptcy Code, and the Lender shall be entitled to the full protection of § 364(e) of the Bankruptcy Code with respect

to the DIP Financing Agreement and all matters related thereto. If any or all of the provisions of this Interim Order are hereafter modified, vacated or stayed, such stay, modification or vacation shall not affect (i) the validity, priority, or enforceability of any of the Obligations incurred by the Debtor to the Lender prior to the Lender's receipt of written notice of the effective date of such stay, modification or vacation or (ii) the validity, priority, or enforceability of the Superpriority Claims or of the DIP Lien granted hereby. Notwithstanding any such stay, modification or vacation, any of the Obligations incurred by the Debtor to the Lender prior to the Lender's receipt of written notice of the effective date of such stay, modification or vacation shall be governed in all respects by the original provisions of this Interim Order and the DIP Financing Agreement, and the Lender shall be entitled to all of the rights, remedies, privileges and benefits granted herein and pursuant to the DIP Financing Agreement with respect to all such Obligations. Additionally, and without limitation, in the event this Interim Order is stayed, vacated, reversed or modified on appeal, then upon such an event, an event of default under the DIP Financing Agreement shall have occurred, and the Lender's obligations thereunder and hereunder, at the Lender's sole discretion, shall cease. The Obligations shall not be discharged by the entry of an order confirming a plan of reorganization in the Bankruptcy Case and, pursuant to Bankruptcy Code § 1141(d)(4), the Debtor has irrevocably and absolutely waived such discharge.

18. Except to the extent of the Carve Out, no expenses of administration of the Debtor's Bankruptcy Case shall be charged against or recovered from the Lender's Collateral pursuant to section 506(c) of the Bankruptcy Code.

19. The provisions of this Interim Order and the DIP Financing Agreement shall survive entry of any order that may be entered converting or dismissing this case, and the DIP Lien and Superpriority Claims granted herein shall maintain their priority as provided herein.

20. In the event of any inconsistency between the provisions of this Interim Order and the provisions of the DIP Financing Agreement or any other Loan Documents, the provisions of this Interim Order shall govern.

21. Notwithstanding anything to the contrary in the DIP Financing Agreement, the Lender shall not be entitled to the payment of any fees or expenses from the Debtor or Alouette except for fees and expenses directly related to the issuance and servicing of the DIP Financing, including any fees and expenses following an Event of Default. For the avoidance of doubt, fees and expenses related to litigation, case monitoring, asset sales and matters regarding the chapter 11 plan(s) of the Debtor and Alouette shall not be reimbursable from the Debtor or Alouette or included as obligations owing under the DIP Financing Agreement, except to the extent that the fees and expenses are incurred after an Event of Default.

22. The Lender consents to the jurisdiction of the Court with regard to all matters relating to the DIP Financing Agreement. Except as expressly consented to herein, nothing contained in this Interim Order or the DIP Financing Agreement shall be construed as a waiver of any of Eastern Band of Cherokee Indians' sovereign rights nor sovereign immunity or the Lender as its wholly owned subsidiary.

23. This Interim Order shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and shall take effect and be fully enforceable *nunc pro tunc* to the Petition Date immediately upon entry of this Interim Order. Notwithstanding Bankruptcy Rules 4001(a)(3), 6004(h), 6006(d), 7062, 9024, or any other Bankruptcy Rule, or Rule 62(a) of the Federal Rules of Civil Procedure, this Interim Order shall be immediately effective and enforceable upon its entry and there shall be no stay of execution or effectiveness of this Interim Order. The rights of all parties in interest to object to the terms of the Final Order, the DIP Financing Agreement at the Final Hearing are expressly reserved.

24. The Final Hearing to consider entry of the Final Order and final approval of the DIP Financing Agreement is scheduled for December \_\_, 2019 at \_\_\_\_ .m. at the United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division. If no objections to the relief sought in the Final Hearing are filed and served in accordance with this Interim Order, no Final Hearing may be held, and a separate Final Order may be presented by the Debtor and entered by this Court.

25. Any party in interest objecting to the entry of the proposed Final Order shall file written objections with the Clerk of the Bankruptcy Court no later than December \_\_, 2019 at 5:00 p.m. prevailing Eastern Time which objections shall be served so that the same are received on or before such date by: (a) bankruptcy counsel for the Debtor, Whiteford, Taylor & Preston LLP, Two James Center, 1021 E. Cary St., Suite 1700, Richmond, Virginia 23219, Attn: Michael E. Hastings, Esq.; (b) counsel for the Lender, Brooks Pierce, P.O. Box 26000, Greensboro, NC 27420, Attn: John H. Small; (c) co-counsel for the Lender, Gentry Locke, P.O. Box 40013, Roanoke, VA 24022-0013, Attn: William E. Callahan, Jr., Esq.; and (d) the Office of the United States Trustee for the Eastern District of Virginia, 701 East Broad Street, Suite 4304, Richmond, VA 23219, Attn: Robert Van Arsdale.

26. Within two (2) business days following entry of this Interim Order, the Debtor shall serve, by United States mail, first-class postage prepaid, a copy of this Interim Order on: (i) the Office of the United States Trustee; (ii) the Office of the United States Attorney for the Eastern District of Virginia, (iii) Internal Revenue Service, (iv) counsel for Lender; (v) the Debtor's twenty (20) largest unsecured creditors; (vi) the Debtor's pre-petition secured lenders and its counsel, if known; (vii) all parties that have filed a financing statement asserting a lien in any of the Debtor's assets; and (viii) any party that has filed a request for notice with the Court.

27. The Bankruptcy Court has and will retain jurisdiction to enforce this Interim Order.

Dated: \_\_\_\_\_

UNITED STATES BANKRUPTCY JUDGE

Entered on Docket \_\_\_\_\_

WE ASK FOR THIS:

/s/ Michael E. Hastings

Michael E. Hastings (Virginia Bar No. 36090)

Brandy M. Rapp (Virginia Bar No. 71385)

WHITEFORD, TAYLOR & PRESTON LLP

Two James Center

1021 E. Cary St., Suite 1700

Richmond, Virginia 23219

T: (804) 799-7859

F: (804) 977-3295

[mhastings@wtplaw.com](mailto:mhastings@wtplaw.com)

[brapp@wtplaw.com](mailto:brapp@wtplaw.com)

*Proposed Counsel for the Debtor and Debtor in Possession*

SEEN AND \_\_\_\_\_:

Michael A. Condyles (Virginia Bar No. 23807)

KUTAK ROCK LLP

901 East Byrd Street, Suite 1000

Richmond, Virginia 23219-4071

T: (804) 644-1700

[michael.condyles@kutakrock.com](mailto:michael.condyles@kutakrock.com)

*Counsel for Newtek Small Business Finance, LLC*

SEEN AND \_\_\_\_\_:

William E. Callahan, Jr. (Virginia Bar No. 37432)

Gentry Locke

P.O. Box 40013

Roanoke, VA 24022-0013

T: (540) 983-9309

[callahan@gentrylocke.com](mailto:callahan@gentrylocke.com)

*Counsel for Lender*

Local Rule 9022-1(C) Certification

The foregoing Order was endorsed by and/or served upon all necessary parties pursuant to Local Rule 9022-1(C).

/s/ Michael E. Hastings  
Michael E. Hastings

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION**

In re:

Chapter 11

CARDINAL HOMES, INC.,

Case No. 19-36275-KRH

Debtor.<sup>1</sup>

**FINAL ORDER AUTHORIZING THE DEBTOR  
TO OBTAIN POST-PETITION, SECURED FINANCING**

Upon the Motion (the “Motion”)<sup>2</sup> of the above-captioned debtor and debtor-in-possession (the “Debtor”) for, among other things, entry of an interim and final orders pursuant to sections 105, 362, 363, 364 and 507 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1532 (as amended, the “Bankruptcy Code”), and Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) (i) granting the Debtor authority to obtain post-petition, secured, super-priority financing (the “DIP Financing”) from Kituwah, LLC, a limited liability company formed as a wholly-owned subsidiary of the Eastern Band of the Cherokee

---

<sup>1</sup> The Debtor in this Chapter 11 Case and the last four digits of its taxpayer identification number are as follows: Cardinal Homes, Inc. (9112). The Debtor’s headquarters are located at 525 Barnesville Highway, Wylliesburg, VA 23976.

<sup>2</sup> Capitalized terms not defined herein shall have the meanings ascribed to them in the DIP Financing Agreement.

---

Michael E. Hastings (Virginia Bar No. 36090)  
Brandy M. Rapp (Virginia Bar No. 71385)  
WHITEFORD, TAYLOR & PRESTON LLP  
Two James Center  
1021 E. Cary St., Suite 1700  
Richmond, Virginia 23219  
T: (804) 799-7859  
F: (804) 977-3295  
[mhastings@wtplaw.com](mailto:mhastings@wtplaw.com)  
[brapp@wtplaw.com](mailto:brapp@wtplaw.com)

*Proposed Counsel for the Debtor and  
Debtor in Possession*



Indians (the “Lender”), on the terms and conditions of that certain *Debtor-In-Possession Loan and Security Agreement* dated November 21, 2019, between the Debtor, its parent company, Alouette Holdings, Inc. (“Alouette”)<sup>3</sup> and Lender, as amended among the parties consistent with the terms of the Alouette Interim DIP Order, a copy of which is annexed hereto as Exhibit A (the “DIP Financing Agreement”), and the Court having conducted a hearing on December 3, 2019, to consider the interim relief requested in the Motion (the “Interim Hearing”); and the *Interim Order Authorizing the Debtor to Obtain Post-Petition, Secured Financing* having been entered on December \_\_\_, 2019 (Docket No. \_\_\_ ) (the “Interim Order”); and copies of the Interim Order having been delivered to: (i) the Office of the United States Trustee; (ii) the Office of the United States Attorney for the Eastern District of Virginia, (iii) Internal Revenue Service, (iv) counsel for Lender; (v) the Debtor’s twenty (20) largest unsecured creditors; (vi) the Debtor’s pre-petition secured lenders and its counsel, if known; (vii) all parties that have filed a financing statement asserting a lien in any of the Debtor’s assets; and (viii) any party that has filed a request for notice with the Court; and the Court having conducted a hearing on December \_\_\_, 2019 to consider entry of this Final Order (the “Final Hearing”); and notice of the Final Hearing having been given in accordance with Bankruptcy Rules 2002, 4001(b), (c) and (d) and 9014; and the Final Hearing having been held and concluded; and it appearing that granting the relief requested in the Motion is necessary and is otherwise fair and reasonable and in the best interest of the Debtor, its estate and its creditors, and is essential for the preservation of the value of the

---

<sup>3</sup> Alouette filed for chapter 11 relief on November 20, 2019 in the United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division, commencing Case No. 19-36126-KRH. On November 22, 2019, the Court entered the *Interim Order Authorizing the Debtor to Obtain Post-Petition, Secured Financing* (Docket No. 14)(the “Alouette Interim DIP Order”) granting Alouette authority to obtain post-petition, secured, super-priority financing from the Lender on the terms and conditions set forth in the DIP Financing Agreement and scheduling a final hearing for December 10, 2019 at 2:00 p.m. at the United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division.

Debtor's assets; and all objections, if any, to the entry of this Final Order having been withdrawn, resolved or overruled by the Court; and upon the entire record of this case, including any evidence presented or statements of counsel at the Final Hearing; and after due deliberation thereon; and good and sufficient cause appearing therefor;

IT IS HEREBY FOUND AND DETERMINED THAT:<sup>4</sup>

A. The Debtor filed for chapter 11 relief on December 2, 2019 (the "Petition Date") and continues to manage its business and property as a debtor-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108 in this case (the "Bankruptcy Case").

B. On December \_\_, 2019, the Court approved the Debtor's entry into and performance under the DIP Financing Agreement on an interim basis and entered the Interim Order, pursuant to which the Debtor was authorized to borrow from the Lender in accordance with the terms of the Interim Order and the Budget, a copy of which is annexed hereto as Exhibit B.

C. Notice of the Final Hearing has been provided by the Debtor to: (i) the Office of the United States Trustee; (ii) the Office of the United States Attorney for the Eastern District of Virginia, (iii) Internal Revenue Service, (iv) counsel for Lender; (v) the Debtor's twenty (20) largest unsecured creditors; (vi) the Debtor's pre-petition secured lenders and its counsel, if known; (vii) all parties that have filed a financing statement asserting a lien in any of the Debtor's assets; and (viii) any party that has filed a request for notice with the Court. Under the circumstances, such notice of the Final Hearing constitutes adequate and sufficient notice and complies with section 102(1) of the Bankruptcy Code, Bankruptcy Rule 2002 and 4001(b), (c) and (d).

D. The DIP Financing is necessary to allow the Debtor to fund the administration of the Debtor's Bankruptcy Case and to fund its continued operation, including without limitation

---

<sup>4</sup> Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate.

paying its employees and maintaining business operations during the Debtor's and Alouette's bankruptcy cases.

E. Given the Debtor's current financial condition and capital structure, the Debtor is unable to obtain sufficient unsecured credit, allowable under Bankruptcy Code § 503(b) as an administrative expense, to allow it to continue to operate its business.

F. A secured financing facility on terms comparable or superior to those of the DIP Financing is not available to the Debtor.

G. The DIP Financing has been negotiated by the Debtor and the Lender in good faith within the meaning of section 364(e) of the Bankruptcy Code, and any credit extended and loans made to the Debtor pursuant to the DIP Financing Agreement shall be deemed to have been extended, issued or made, as the case may be, in good faith by the Lender as required by, and within the meaning of, Bankruptcy Code § 364(e).

H. The terms of the DIP Financing are fair and reasonable, are ordinary and appropriate for secured financing to a debtor-in-possession, reflect the Debtor's prudent exercise of business judgment consistent with its fiduciary duties, and are supported by reasonably equivalent value and fair consideration.

I. Good cause has been shown for the relief requested in the Motion and as provided in the Interim Order and this Final Order and such relief is necessary, essential and appropriate for the preservation of the Debtor's assets, business and property. It is in the best interest of the Debtor's estate to be allowed to enter into the DIP Financing Agreement and to perform in accordance with the DIP Financing Agreement.

It is accordingly hereby **ORDERED, ADJUDGED, AND DECREED** that:

1. The Motion is **GRANTED** in accordance with the terms and conditions set forth in this Final Order and the DIP Financing Agreement. Any objections to the Motion with respect to entry of this Final Order to the extent not withdrawn, waived or otherwise resolved, and all reservations of rights included therein, are hereby denied and overruled on the merits.

2. This Court has jurisdiction over these proceedings and the parties and property affected hereby pursuant to 28 U.S.C. §§ 157(b) and 1334. This is a core proceeding under 28 U.S.C. § 157(b). This Court may enter a final order consistent with Article III of the United States Constitution.

3. The terms and conditions of the DIP Financing Agreement are approved as set forth herein.

4. The Debtor is authorized to obtain credit and borrow from the Lender, in accordance with the terms of this Final Order, the DIP Financing Agreement, as amended, and the Budget, a copy of which is annexed hereto as Exhibit B. The Budget may be amended by the Debtor, but only with the consent of the Lender as provided in the DIP Financing Agreement after seven (7) days' notice to the Notice Parties<sup>5</sup> absent written consent of Newtek Small Business Finance, LLC ("Newtek") or further order of the Court. Unless otherwise expressly agreed to in writing by the Lender, the proceeds of the DIP Financing shall be used exclusively for the purposes identified in the Budget.

5. The Lender's liens on the Collateral (as defined in section 2.1 of the DIP Financing Agreement) and claims, including any superpriority administrative expense claims as specified in

---

<sup>5</sup> The "Notice Parties" shall include the Debtor, Newtek, Lender, Office of the United States Trustee, Official Committee of Unsecured Creditors (if any) and the holders of the Prepetition Liens.

the DIP Financing Agreement, are subject to the Carve Out as defined in the DIP Financing Agreement.

6. No portion of the DIP Financing or the Carve Out shall be used or be available to pay any fees, disbursements, costs or expenses incurred by any party in connection with the investigation (including discovery proceedings), initiation or prosecution of any other claims, causes of action, adversary proceedings or other litigation against the Lender, including, without limitation, their respective officers, directors, agents, employees, successors and assigns.

7. The Debtor is authorized and empowered to execute, deliver and perform, and do all acts that are required or contemplated by or in connection with this Final Order and the DIP Financing Agreement and any other documents to be executed and delivered in connection therewith or contemplated thereby (collectively, the “Loan Documents”).

8. All obligations under this Final Order and the DIP Financing Agreement that the Debtor owes to the Lender (collectively, the “Obligations”) shall constitute obligations that are valid, binding, and enforceable against the Debtor in accordance with their terms.

9. Subject to the rights of the pre-petition secured creditors and the rights of the Professionals secured by the Carve Out, pursuant to Bankruptcy Code § 364(c)(1), the Obligations shall constitute administrative expense claims pursuant to Bankruptcy Code §§ 503(b)(1) and 507 with priority over any and all administrative expenses of the type specified in Bankruptcy Code §§ 503(b) and 507(b) (the “Superpriority Claims”), subject and subordinate only to the Prepetition Liens<sup>6</sup> and the Carve Out, which Superpriority Claims shall, subject to the foregoing rights of the pre-petition secured creditors and the Professionals, be payable from and have recourse to all prepetition and postpetition property of the Debtor and all proceeds thereof, including, without

---

<sup>6</sup> The term “Prepetition Liens” shall have the meaning ascribed to it in section 2.4 of the DIP Financing Agreement as well as any liens or security interests of Newtek against any of the assets of the Debtor or Alouette existing or deemed or determined to exist.

limitation, all proceeds and other amounts received in respect of the Debtor's claims, causes of action and rights arising under state or federal law in connection with Chapter 5 of the Bankruptcy Code.

10. Other than as expressly described herein, no claim, cost or expense of administration under Bankruptcy Code §§ 105, 364(c)(1), 503(b), 506(c), 507(b) or otherwise, including those resulting from the conversion of the Bankruptcy Case to a case under chapter 7, shall be senior to, or *pari passu* with, the Superpriority Claims of the Lender while any of the Obligations remain outstanding.

11. Subject to the rights of the holders of the Prepetition Liens and the rights of the Professionals secured by the Carve Out, pursuant to Bankruptcy Code §§ 364(c)(2) and 364(c)(3), as collateral security for the timely and full payment and performance of all of the Obligations approved herein, the Lender is hereby granted effective immediately a valid and perfected security interest in and lien upon, all present and after-acquired property of the Debtor of any nature whatsoever (both real and personal) including a lien on the proceeds of the avoidance of the prepetition lien of Benson Howard (the "Howard Lien"), junior only to the Prepetition Liens (other than the Howard Lien) and the Carve Out as set forth in the DIP Financing Agreement, including, without limitation, all proceeds and products, all proceeds and other amounts received in respect of the Debtor's claims, causes of action and rights arising under state or federal law in connection with Chapter 5 of the Bankruptcy Code (the "DIP Lien"). The Lender shall not be required to file or record mortgages, deeds of trust, security agreements, pledge agreements, financing statements, notices of lien or similar instruments, or take any other action in order to validate and perfect the DIP Lien. If the Lender shall, in its sole discretion, choose to file such mortgages, deeds of trust, security agreements, pledge agreements, financing statements, notices of lien or similar instruments with respect to the Collateral in connection with validating or perfecting the DIP Lien,

it is authorized to do so, and all such documents shall be deemed to have been filed or recorded at the time and on the date of entry of this Final Order.

12. Pursuant to Bankruptcy Code §§ 364(c)(2) and/or 364(c)(3), the DIP Lien shall have priority over any and all other security interests, liens and other claims except for the Prepetition Liens and the Carve Out, all in accordance with the terms of the DIP Financing Agreement.

13. Notwithstanding anything in this Final Order, the Motion or the DIP Financing Agreement to the contrary, no liens or security interests granted to the Lender shall prime any liens or security interests of Newtek against the assets of the Debtor or Alouette that are determined by order of the Court to exist and enjoy priority that is superior to the interest of a trustee or debtor in possession pursuant to applicable Virginia law and § 544(a) of the Bankruptcy Code.

14. The DIP Lien granted to the Lender pursuant to the DIP Financing Agreement and this Final Order shall not be (i) subject to any lien or security interest that is avoided and preserved for the benefit of the Debtor's estate under § 551 of the Bankruptcy Code or otherwise except as provided in paragraph 11 above, (ii) subordinated to or made *pari passu* with any other lien or security interest under § 364(d) of the Bankruptcy Code or otherwise, or (iii) subject to marshalling or any similar remedy.

15. The automatic stay provisions of Bankruptcy Code § 362 are vacated and modified without further hearing or order to permit the Lender to file mortgages, deeds of trust, security agreements, pledge agreements, financing statements, notices of lien or similar instruments to evidence the DIP Lien and to give the Debtor any notice provided for in the DIP Financing Agreement. The automatic stay provisions of Bankruptcy Code § 362 are vacated and modified to permit the Lender, in the event that an Event of Default has occurred and is continuing and has not been waived by the Lender, without further hearing or order, to exercise the Lender's right to

terminate its commitment to lend and to accelerate the outstanding Obligations under the DIP Financing Agreement. The Lender must obtain relief from the automatic stay of Bankruptcy Code § 362 to exercise all other rights and remedies under the DIP Financing Agreement and applicable law; provided, however, that the Lender may request a hearing on such relief from the automatic stay on an expedited basis (no less than five (5) business days' notice).

16. The DIP Financing Agreement and the provisions of this Final Order shall be binding upon the Lender and the Debtor and their respective successors and assigns (including any trustee hereinafter appointed for the estate of the Debtor to the extent allowed under applicable law) and shall inure to the benefit of the Debtor, the Lender, and the Lender's successors and assigns.

17. All credit extended and Loans made to the Debtor by the Lender shall be deemed to have been extended in good faith, as that term is used in § 364(e) of the Bankruptcy Code, and the Lender shall be entitled to the full protection of § 364(e) of the Bankruptcy Code with respect to the DIP Financing Agreement and all matters related thereto. If any or all of the provisions of this Final Order are hereafter modified, vacated or stayed, such stay, modification or vacation shall not affect (i) the validity, priority, or enforceability of any of the Obligations incurred by the Debtor to the Lender prior to the Lender's receipt of written notice of the effective date of such stay, modification or vacation or (ii) the validity, priority, or enforceability of the Superpriority Claims or of the DIP Lien granted hereby. Notwithstanding any such stay, modification or vacation, any of the Obligations incurred by the Debtor to the Lender prior to the Lender's receipt of written notice of the effective date of such stay, modification or vacation shall be governed in all respects by the original provisions of this Final Order and the DIP Financing Agreement, and the Lender shall be entitled to all of the rights, remedies, privileges and benefits granted herein and pursuant to the DIP Financing Agreement with respect to all such Obligations. Additionally, and without



limitation, in the event this Final Order is stayed, vacated, reversed or modified on appeal, then upon such an event, an event of default under the DIP Financing Agreement shall have occurred, and the Lender's obligations thereunder and hereunder, at the Lender's sole discretion, shall cease. The Obligations shall not be discharged by the entry of an order confirming a plan of reorganization in the Bankruptcy Case and, pursuant to Bankruptcy Code § 1141(d)(4), the Debtor has irrevocably and absolutely waived such discharge.

18. Except to the extent of the Carve Out, no expenses of administration of the Debtor's Bankruptcy Case shall be charged against or recovered from the Lender's Collateral pursuant to section 506(c) of the Bankruptcy Code.

19. The provisions of this Final Order and the DIP Financing Agreement shall survive entry of any order that may be entered converting or dismissing this case, and the DIP Lien and Superpriority Claims granted herein shall maintain their priority as provided herein.

20. In the event of any inconsistency between the provisions of this Final Order and the provisions of the DIP Financing Agreement or any other Loan Documents, the provisions of this Final Order shall govern.

21. Notwithstanding anything to the contrary in the DIP Financing Agreement, the Lender shall not be entitled to the payment of any fees or expenses from the Debtor or Alouette except for fees and expenses directly related to the issuance and servicing of the DIP Financing, including any fees and expenses following an Event of Default. For the avoidance of doubt, fees and expenses related to litigation, case monitoring, asset sales and matters regarding the chapter 11 plan(s) of the Debtor and Alouette shall not be reimbursable from the Debtor or Alouette or included as obligations owing under the DIP Financing Agreement, except to the extent that the fees and expenses are incurred after an Event of Default.

22. The Lender consents to the jurisdiction of the Court with regard to all matters relating to the DIP Financing Agreement. Except as expressly consented to herein, nothing contained in this Final Order or the DIP Financing Agreement shall be construed as a waiver of any of Eastern Band of Cherokee Indians' sovereign rights nor sovereign immunity or the Lender as its wholly owned subsidiary.

23. This Final Order shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and shall take effect and be fully enforceable *nunc pro tunc* to the Petition Date immediately upon entry of this Final Order. Notwithstanding Bankruptcy Rules 4001(a)(3), 6004(h), 6006(d), 7062, 9024, or any other Bankruptcy Rule, or Rule 62(a) of the Federal Rules of Civil Procedure, this Final Order shall be immediately effective and enforceable upon its entry and there shall be no stay of execution or effectiveness of this Final Order.

24. The Bankruptcy Court has and will retain jurisdiction to enforce this Final Order.

Dated: \_\_\_\_\_

\_\_\_\_\_  
UNITED STATES BANKRUPTCY JUDGE

Entered on Docket \_\_\_\_\_

WE ASK FOR THIS:

/s/ Michael E. Hastings  
Michael E. Hastings (Virginia Bar No. 36090)  
Brandy M. Rapp (Virginia Bar No. 71385)  
WHITEFORD, TAYLOR & PRESTON LLP  
Two James Center  
1021 E. Cary St., Suite 1700  
Richmond, Virginia 23219  
T: (804) 799-7859  
F: (804) 977-3295  
[mhastings@wtplaw.com](mailto:mhastings@wtplaw.com)  
[brapp@wtplaw.com](mailto:brapp@wtplaw.com)

*Proposed Counsel for the Debtor and Debtor in Possession*

SEEN AND \_\_\_\_\_:

\_\_\_\_\_  
Michael A. Condyles (Virginia Bar No. 23807)  
KUTAK ROCK LLP  
901 East Byrd Street, Suite 1000  
Richmond, Virginia 23219-4071  
T: (804) 644-1700  
[michael.condyles@kutakrock.com](mailto:michael.condyles@kutakrock.com)  
*Counsel for Newtek Small Business Finance, LLC*

SEEN AND \_\_\_\_\_:

\_\_\_\_\_  
William E. Callahan, Jr. (Virginia Bar No. 37432)  
Gentry Locke  
P.O. Box 40013  
Roanoke, VA 24022-0013  
T: (540) 983-9309  
[callahan@gentrylocke.com](mailto:callahan@gentrylocke.com)  
*Counsel for Lender*

Local Rule 9022-1(C) Certification

The foregoing Order was endorsed by and/or served upon all necessary parties pursuant to Local Rule 9022-1(C).

/s/ Michael E. Hastings  
Michael E. Hastings