

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
AUGUSTUS ENERGY RESOURCES, LLC, <sup>1</sup>	)	Case No. 18-10580
Debtor.	)	

**DEBTOR’S MOTION FOR INTERIM AND FINAL ORDERS (I)  
AUTHORIZING THE DEBTOR TO USE CASH COLLATERAL  
PURSUANT TO 11 U.S.C. § 363, (II) GRANTING ADEQUATE PROTECTION  
TO THE PREPETITION LENDER PURSUANT TO 11 U.S.C.  
§§ 105, 361, 362, 363, 503, 507 AND 552 (III) MODIFYING THE  
AUTOMATIC STAY, (IV) SCHEDULING A FINAL HEARING PURSUANT  
TO BANKRUPTCY RULE 4001(B), AND (V) GRANTING RELATED RELIEF**

Augustus Energy Resources, LLC (“Augustus Resources” or “Debtor”), as debtor and debtor-in-possession in the above-captioned case, respectfully states the following in support of this Motion:

**Relief Requested**

By this Motion, Debtor seeks entry of an interim order, substantially in the form attached hereto as Exhibit A (the “Interim Order”), and a final order to be submitted prior to the Final Hearing (as defined below), pursuant to sections 105, 361, 362, 363, 503, 507 and 552 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”), rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Rules Procedure (the “Bankruptcy Rules”) and Rule 4001-2 of the Local Rules of Bankruptcy Practice and Procedure for the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), authorizing the post-petition use of cash

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<sup>1</sup> The Debtor in this chapter 11 case, along with the last four digits of its federal tax identification number, is Augustus Energy Resources, LLC (6220). The location of the Debtor’s corporate headquarters is: 2016 Grand Avenue, Billings, MT 59102.

Court for the District of Delaware (the “Local Rules”), authorizing the post-petition use of cash collateral (“Cash Collateral”),<sup>2</sup> granting adequate protection to the Debtor’s Pre-Petition Lender (as defined below), modifying the automatic stay, scheduling a final hearing, and granting related relief.

**Jurisdiction and Venue**

1. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference from the United States District Court for the District of Delaware, dated February 29, 2012. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). The Debtor confirms its consent, pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), to the entry of a final order by the Court in connection with this motion to the extent that it is later determined that the Court, absent consent, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

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

3. The grounds for the relief requested herein are sections 105, 361, 362, 363, 506, 507(b) and 552 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy

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<sup>2</sup> Section 363(a) of the Bankruptcy Code defines “cash collateral” as follows:

Cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

Code”), Rule 4001(b) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Local Rules 4001-2 and 9013-1(m).

#### **General Background**

4. Augustus Resources is a privately-owned natural gas exploration, development and production company formed in 2013 and headquartered in Billings, Montana. The Debtor owns operating and non-operating working interests in approximately 1,575 natural gas wells in the eastern portion of the DJ Basin in eastern Colorado, primarily in Yuma County, as well as certain personal property, including buildings, equipment, transportation equipment, machinery, gathering systems, compressors, and a pipeline system (together, the “Debtor’s Assets”). Further background regarding the Debtor, including its business operations, its capital and debt structure, and the events leading to the filing of this bankruptcy case, is set forth in detail in the *Declaration of Steven D. Durrett, President and Chief Executive Officer of Augustus Energy Resources, LLC in Support of Chapter 11 Petition and First Day Motions* (the “First Day Declaration”), which is contemporaneously filed herewith and incorporated by reference.<sup>3</sup>

5. On March 16, 2018 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtor is operating its business and managing its properties as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in this chapter 11 case.

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<sup>3</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the First Day Declaration.

**It Is Imperative That Debtor Be Permitted to Utilize Cash Collateral**

6. In December 2013, the Debtor purchased the Debtor's Assets from Augustus Energy Partners ("AEP") for approximately \$104,000,000, of which the \$73.6 million was paid in cash and the remaining \$31 million was assumed debt from a prior existing secured credit facility.<sup>4</sup> The Debtor financed the acquisition with approximately \$56 million in equity and \$54 million in senior secured debt (the "Senior Secured Credit Facility") pursuant to that certain *Credit Agreement* dated as of December 3, 2013 (as amended, restated, supplemented or otherwise modified from time to time, the "Credit Agreement") among the Debtor, as borrower, and Wells Fargo Bank, N.A., acting in its capacity as the administrative agent and lender (in such capacities, the "Pre-Petition Lender") under the Debtor's pre-petition senior secured credit facility, along with other instruments, agreement, or documents executed in connection therewith (collectively, the "Pre-Petition Claim Documents").<sup>5</sup> To close the acquisition, the Debtor drew down approximately \$54 million of the Senior Secured Credit Facility, which was and is secured by substantially all of the Debtor's Assets (collectively, the "Pre-Petition Collateral"). The Senior Secured Credit Facility has an initial borrowing base of \$75 million and a maximum credit amount of \$200 million.

7. The Debtor's gas properties encompass approximately 148,000 gross acres (102,000 net) in the eastern DJ Basin in Yuma County, Colorado. The 1,575 wells in which the Debtor owns interests draw from shallower zones (1,800' to 3,000' depth) in the Niobrara formation and include long-lived reserves, with consistent production and slow rates of decline.

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<sup>4</sup> The Debtor also purchased AEP's hedge position in various ISDA agreements for approximately \$10 million.

<sup>5</sup> The Pre-Petition Claim Documents are more fully identified in Exhibit 2 attached to the Interim Order.

Recent net production was approximately 12.0 MMcf/d,<sup>6</sup> with approximately 80% of the wells held by production. The Debtor continues to control a significant leasehold position in northeastern Colorado; however, due to the decline in natural gas prices and the Debtor's financial condition, the Debtor has ceased any drilling operations.

6. The Debtor and the Pre-Petition Lender have engaged in good-faith, arms' length negotiation over the proposed terms of the Debtor's use of Cash Collateral during this chapter 11 case. In connection with the Debtor's efforts to sell substantially all the Debtor's Assets through a sale process to be approved by the Court, the Debtor agreed to seek entry of an interim order and a final order permitting its use of Cash Collateral. The Debtor's access to Cash Collateral is critical to effectuate the proposed sale and maximize value for its creditors in this chapter 11 case. Without access to Cash Collateral, the Debtor would be incapable of operating its business, and this estate and all stakeholders thereof would be immediately and irreparably harmed.

7. As discussed in greater detail below, as part of the consensual arrangement for use of Cash Collateral and as adequate protection for any diminution in value during this case, the Debtor has agreed to, among other things:

- a. provide the Pre-Petition Lender with a valid, unavoidable, first-priority lien and/or replacement lien on, and security interest (collectively, the "Adequate Protection Liens") in all of the Debtor's assets, and the products and proceeds thereof, which Adequate Protection Liens shall not be made subject to or subordinated to, or made *pari passu* with, any other lien or security interest;
- b. provide the Pre-Petition Lender with a superpriority administrative claim pursuant to section 507(b) of the Bankruptcy Code, with priority in payment over any and all unsecured claims and administrative expense claims

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<sup>6</sup> "MMcf" is a unit of measurement equaling one million cubic feet, a common measure of gas volume in the gas industry.

against the Debtor and its estate, to the extent of any diminution in value of its interests in the Pre-Petition Collateral and Cash Collateral;

- c. provide the Pre-Petition Lender with adequate protection payments in an amount equal to all accrued and unpaid pre-petition or post-petition interest, and reasonable fees and costs due and payable under the Pre-Petition Claim Documents, including professional fees;
- d. maintain the Debtor's existing cash management systems; and
- e. comply with certain budget and reporting requirements.

8. The path forward for the Debtor is clear and time is of the essence. As of the Petition Date, the Debtor has approximately \$2 million (net of all outstanding checks) in cash on hand, all of which constitutes Cash Collateral. If the Debtor were unable to use Cash Collateral, the Debtor would not have sufficient working capital to: (i) make payments to vendors or suppliers, (ii) satisfy ordinary operating costs, or (iii) fund the administrative costs of this chapter 11 case. Without access to Cash Collateral, the Debtor's ability to sell its assets and maximize value for the creditors will be jeopardized. In such a scenario, the value available for distribution to stakeholders in the chapter 11 case would be significantly reduced. Accordingly, the Debtor has an immediate need to use Cash Collateral to ensure sufficient liquidity throughout the pendency of this chapter 11 case to consummate a sale and an orderly liquidation of assets for the benefit of creditors.

**Concise Statement of the Material Terms of the Interim Order**

9. Pursuant to Bankruptcy Rule 4001(b) and Local Rule 4001-2(a)(ii), the Debtor submits the following concise statement of the material terms of the Interim Order.<sup>7</sup>

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<sup>7</sup> Any summary of any terms of the Interim Order contained in this motion is qualified in its entirety by reference to the provisions of the Interim Order. The Interim Order will control in the event of any inconsistency between this motion and the Interim Order. Unless otherwise defined herein, capitalized terms used in this Motion have the meanings ascribed to them in the Interim Order.

Summary of Material Terms	Location	
<b>Parties with an Interest in Cash Collateral</b> Bankruptcy Rule 4001(b)(1)(B)(i)	Wells Fargo Bank, N.A., acting in its capacity as the administrative agent and lender under the Debtor's pre-petition senior secured credit facility.	¶¶ (i) & 19
<b>Purposes for Use of Cash Collateral</b> Bankruptcy Rule 4001(b)(1)(B)(ii)	In accordance with the terms and conditions of the Interim Order, the Debtor is authorized to use Cash Collateral for: (i) working capital purposes; (ii) other general corporate purposes of the Debtor and (iii) the satisfaction of the costs and expenses of administering the chapter 11 case; provided, that (x) the Pre-Petition Lender is granted the adequate protection as set forth therein and (y) except on the terms and conditions of the Interim Order, the Debtor shall be prohibited from at any time using the Cash Collateral absent consent of the Pre-Petition Lender or further order of the Court.	¶22
<b>Budget</b> Bankruptcy Rule 4001(b)(1)(B)(ii)	The Debtor is authorized to and shall use the Cash Collateral strictly in accordance with the 13-week budget to be attached to the Interim Order and the Final Order (the " <b>Budget</b> "), subject to a permitted negative variance, of (i) 10% per week above the projected aggregate disbursements set forth in the Budget, (ii) 10% per week, on disbursement on a by-line-item basis, and (iii) 10% per four-week period, then ending, on the revenue set forth in the Budget. Any unused amounts in the Budget during any one-week period may be carried forward to future weekly periods and applied to any amount by which that same line-item, and only that same line-item, exceeds its projected use as set forth in the Budget, such that the cumulative-to-date budgeted amount for each line item is available without causing such future weekly periods to exceed the allowable variance.	¶27
<b>Termination/Expiration Date</b> Bankruptcy Rule 4001(b)(1)(B)(iii)	The Debtor's authority to use Cash Collateral extends to and including, without limitation, the earlier of: (a) the continued existence of an Event of Default after the Default Notice Period (the " <b>Expiration Date</b> "); (b) thirty (30) days after the closing of a sale of substantially all of the Debtor's assets pursuant to section 363 of the Bankruptcy Code, provided that the Pre-Petition Agent, for itself and the Pre-Petition Lender, shall have consented in writing to such sale, or (c) forty (40) days after the Petition Date at 5:00 p.m. Eastern Time if the Court has not entered an order approving the use of Cash Collateral on a final basis, at which time all of the Debtor's authority to use Cash Collateral and the Interim Order shall terminate, as shall the Pre-Petition Lender's consent to the Debtor's use of the Cash Collateral, unless extended by written agreement of the parties, a copy of which with an updated Budget shall be promptly filed with the Court	¶80

Summary of Material Terms		Location
	by the Debtor ((b) and (c) of this paragraph, the " <u>Termination Date</u> ").	
<p><b>Adequate Protection</b> Bankruptcy Rule 4001(b)(1)(B)(iv)</p>	<p>The Pre-Petition Agent, on behalf of itself and for the benefit of the Pre-Petition Lender, is granted, solely to the extent of any diminution in value of their interests in the Prepetition Collateral (including the Cash Collateral) from and after the Petition Date, the following claims, liens, rights, and benefits:</p> <ul style="list-style-type: none"> <li>• <u>Adequate Protection Liens</u>. Effective as of the Petition Date, to the extent of the Adequate Protection Obligations, and subject to the Carve Out, pursuant to §§ 361(2) and 363(c)(2) of the Bankruptcy Code, the Pre-Petition Agent, on behalf of the Pre-Petition Lender, is hereby granted a valid, binding, continuing, enforceable, fully-perfected, unavoidable, first-priority lien and/or replacement lien on, and security interest (collectively, the "<u>Adequate Protection Liens</u>") in all of the Debtor's assets and properties of any kind or type, and the products and proceeds of any and all of the foregoing (collectively, the "<u>Adequate Protection Collateral</u>"); provided that the Adequate Protection Liens shall be subject to (x) any valid, perfected, and unavoidable liens in property of the Debtor in existence as of the Petition Date and (y) any valid and unavoidable liens on property of the Debtor in existence for amounts outstanding as of the Petition Date that are perfected after the Petition Date as permitted by § 546(b) of the Bankruptcy Code.</li> <li>• <u>Adequate Protection Claim/Superpriority Administrative Claim</u>. The Adequate Protection Obligations due to the Pre-Petition Agent and the Pre-Petition Lender shall also constitute allowed joint and several superpriority administrative claims against the Debtor and its estate as and to the extent provided in § 507(b) of the Bankruptcy Code, with priority in payment over any and all unsecured claims and administrative expense claims against the Debtor and its estate, now existing or hereafter arising in the Chapter 11 Case (subject to the Carve Out), (the "<u>Adequate Protection Claim</u>").</li> <li>• <u>Adequate Protection Payments</u>: The Debtor shall pay to the Pre-Petition Agent, for the benefit of the Pre-Petition Lender, adequate protection payments in an amount equal to all accrued and unpaid prepetition or post-petition interest and, to the extent invoiced, reasonable fees and costs due and</li> </ul>	¶26



Summary of Material Terms		Location
	payable under the Pre-Petition Claim Documents, including as further set forth herein under the provisions regarding professional fees of the Pre-Petition Agent, attorneys and other professional fees.	
<b>Carve-Out</b> Bankruptcy Rule 4001(b)(1)(B)(iii)	<p>The “<u>Fee Carve Out</u>” means an amount equal to the sum of: (i) all fees required to be paid to the clerk of the Court and to the Office of the U.S. Trustee; (ii) all reasonable fees and expenses of up to \$25,000 incurred by a trustee under section 726(b) of the Bankruptcy Code and (iii) all allowed unpaid fees and expenses (the “<u>Allowed Professional Fees</u>”) incurred by persons or firms retained by the Debtor pursuant to section 327, 328, or 363 of the Bankruptcy Code (the “<u>Debtor Professionals</u>”) and any appointed committee pursuant to section 328 or 1103 of the Bankruptcy Code (the “<u>Committee Professionals</u>” and, together with the Debtor Professionals, the “<u>Professional Persons</u>”) at any time before or on the first business day following delivery by the Pre-Petition Agent of a Carve Out Trigger Notice (as defined below); and (iv) Allowed Professional Fees of Professional Persons in an aggregate amount, after application of all retainers, not to exceed \$150,000 incurred after the first business day following delivery by the Pre-Petition Agent of the Carve Out Trigger Notice.</p> <p>The “<u>Wind Down Carve Out</u>” means the sum of all reasonable expenses necessary for purposes of winding down the Debtor’s estate, including Allowed Professional Fees, not to exceed \$400,000 less the Post-Fee Carve Out Trigger Notice Cap. Provided that no Event of Default shall have occurred, the <u>Wind Down Period</u> shall commence on the day of the closing of the sale of substantially all of the Debtor’s assets pursuant to section 363 of the Bankruptcy Code and continue for an additional six (6) calendar months after such sale (or for any longer period agreed to by the Pre-Petition Lender), during which time the Debtor will, among other things, prepare a final settlement statement as required in any purchase agreement for the sale of Debtor’s assets and take all other necessary steps to wind down Debtor’s business.</p>	¶¶44 -52
<b>Waiver/Modification of Automatic Stay</b> Bankruptcy Rule 4001(b)(1)(B)(iii)	Order The Automatic Stay is vacated and modified to the extent necessary (a) to permit the Debtor, the Pre-Petition Agent, and the Pre-Petition Lender to commit all acts and take all actions necessary to implement the Interim Order, (b) to permit the Debtor, the Pre-Petition Agent, and the Pre-Petition Lender to commit all acts, actions, and transfers contemplated therein, including, without limitation, transfers of Cash	¶37

Summary of Material Terms		Location
	Collateral and other funds to the Pre-Petition Agent, for itself and for and on behalf of the Pre-Petition Lender, by the Debtor as provided therein, and (c) to permit the Pre-Petition Agent and/or the Pre-Petition Lender, at their option, to pursue their rights and remedies as to the Collateral in accordance with the Pre-Petition Claim Documents, the Interim Order, , and applicable law.	
<b>Stipulations of the Debtor</b> Local Rule 4001-2(a)(i)(B)	The Interim Order contains certain stipulations and admissions by the Debtor, among other things, to: <ul style="list-style-type: none"> <li>• the amount of the claims of the Pre-Petition Agent and the Pre-Petition Lender as of the Petition Date;</li> <li>• the validity and priority of the liens and security interests securing the Senior Secured Credit Facility;</li> <li>• the lack of a basis to challenge or avoid the validity, enforceability, priority or perfection of the liens and security interests securing the Senior Secured Credit Facility;</li> <li>• the fact that all cash proceeds, subject to certain exceptions set forth in the Interim Order, are Cash Collateral of the Pre-Petition Lender .</li> </ul>	¶¶10-19 and 76
<b>Binding Effect of the Debtor's Stipulations on Third Parties</b> Bankruptcy Rule 4001(b)(1)(B)(iii); Local Rule 4001-2(a)(i)(B)	The stipulations and admissions contained paragraphs 10 through 19 of the Interim Order shall be binding upon the Debtor and any of its respective successors in all circumstances. The stipulations and admissions contained therein be binding upon all other parties-in-interest, including, without limitation, any chapter 7 or chapter 11 trustee appointed or elected for the Debtor (a " <u>Trustee</u> "), any statutory or non-statutory committees appointed or formed in the Chapter 11 Case and any other person or entity acting on behalf of the Debtor's estate, or otherwise, unless and except to the extent that not later than seventy-five (75) days from the date of entry of the Interim Order (or, in the case of any official committee or trustee appointed in the Chapter 11 Case, if appointed within 30 days of the Petition Date, the latter of seventy-five (75) days from the date of entry of this Cash Collateral Order and sixty (60) days from the date of such appointment) files a complaint pursuant to Bankruptcy Rule 7001 challenging the stipulations contained in paragraphs 10 through 18 of the Interim Collateral Order, asserting a claim or cause of action arising out of the Pre-Petition Claim Documents, or otherwise challenging the extent, priority, validity, perfection, amount, or allowability of the Pre-Petition Agent's or the Pre-Petition Lender's claims or security interests,	¶76

Summary of Material Terms		Location
	arising out of or related to the Pre-Petition Claim Documents or the transactions related thereto.	
<b>506(c) Waiver</b> Local Rule 4001-2(a)(i)(C)	Subject to the entry of a final order, no costs or expenses of administration which have or may at any time be incurred in the Chapter 11 Case (or in any successor chapter 7 case) shall be charged against the Pre-Petition Agent or the Pre-Petition Lender, their claims or the Collateral pursuant to Bankruptcy Code section 506(c) without the prior written consent of the Pre-Petition Agent and the Pre-Petition Lender, and no such consent shall be implied from any other action, inaction, or acquiescence by the Pre-Petition Lender. Subject to entry of a final order, the Pre-Petition Agent and the Pre-Petition Lender shall not be subject in any way whatsoever to the equitable doctrine of “marshaling” or any similar doctrine with respect to the Collateral.	¶57
<b>Provisions Affecting Consideration of the Equities of the Case under Section 552(b)(1)</b> Local Rule 4001-2(a)(i)(H)	Subject to the entry of a Final Order, the Pre-Petition Agent and Pre-Petition Lender shall each be entitled to all of the rights and benefits of section 552(b) of the Bankruptcy Code, and the “equities of the case” exception under section 552(b) of the Bankruptcy Code shall not apply to the Pre-Petition Agent or the Pre-Petition Lender with respect to proceeds, product, offspring, or profits of any of the Collateral.	¶58

**Highlighted Provisions under Local Rule 4001-2(a)(i)**

10. The Interim Order includes certain terms that constitute material provisions requiring explicit disclosure under the Local Rules.<sup>8</sup> The provisions described in Local Rule 4001-2(a)(i), to the extent applicable, are set out at the following sections of the Interim Order:

- a. **Local Rule 4001-2(a)(i)(A) - Cross-Collateralization.** The Interim Order does not provide for cross-collateralization, other than replacement liens as adequate protection.
- b. **Local Rule 4001-2(a)(i)(B) - Validity, Perfection, and Amount of Prepetition Liens.** The Debtor acknowledges, agrees, admits and stipulates to various matters, including the validity, perfection, and priority of the liens

<sup>8</sup> While the Debtor has attempted to highlight the provisions required by the Bankruptcy Rules and Local Rules, as well as certain other material provisions, the Debtor reserves the right to supplement this list at the Interim Hearing.

securing the Pre-Petition Collateral. *See* Interim Order at ¶¶ 10-19. These stipulations are binding on the Debtor and its successors. *See* Interim Order at ¶ 76. In compliance with Local Rule 4001-2(a)(i)(B), parties-in-interest have seventy-five (75) days from the entry of the Interim Order (or, in the case of any official committee or trustee appointed in the Chapter 11 Case, if appointed within 30 days of the Petition Date, the later of seventy-five (75) days from the date of entry of the Interim Order and sixty (60) days from the date of such appointment), to investigate and challenge the stipulations set forth in paragraphs 10 through 19. *See id.*

- c. **Local Rule 4001-2(a)(i)(C) - 506(c) Waiver.** The Interim Order provides that, subject to the entry of a final order, no costs or expenses of estate administration shall be charged against the Pre-Petition Lender, the Pre-Petition Claim, the Adequate Protection Claim, or the Collateral (each as defined in the Interim Order) pursuant to Bankruptcy Code section 506(c) without the prior written consent of the Pre-Petition Lender, and no such consent shall be implied from any other action, inaction, or acquiescence by the Pre-Petition Lender. Subject to entry of a final order, the Pre-Petition Lender shall not be subject in any way whatsoever to the equitable doctrine of “marshaling” or any similar doctrine with respect to the Collateral. *See* Interim Order at ¶ 57.
- d. **Local Rule 4001-2(a)(i)(D) - Liens on Avoidance Actions.** Upon entry of the Final Order, the Adequate Protection Liens shall attach to any Avoidance Actions and proceeds or property recovered in respect thereof. *See* Interim Order at ¶ 26(a).
- e. **Local Rule 4001-2(a)(i)(E) - Provisions Deeming Prepetition Debt to be Post Petition Debt.** The Interim Order does not deem pre-petition secured debt to be post-petition debt.
- f. **Local Rule 4001-2(a)(i)(F) - Disparate Treatment of Professionals Retained by the Committee.** In compliance with Local Rule 4001-2(a)(i)(F), the Interim Order contains no provisions that provide for disparate treatment for professionals retained by any statutory committee, if appointed, with respect to the Carve-Out.
- g. **Local Rule 4001-2(a)(i)(G) - Non-Consensual Priming.** The Interim Order does not provide for non-consensual priming of any existing secured lien. The liens granted to the Pre-Petition Lender as adequate protection expressly shall not prime (i) valid, perfected, and unavoidable liens in existence as of the Petition Date or (ii) valid and unavoidable liens in existence for amounts outstanding as of the Petition Date that are perfected after the Petition Date, as permitted by Bankruptcy Code section 546(b), which valid, perfected, and unavoidable liens are senior in priority to the

security interests and liens in favor of the Pre-Petition Lender. *See* Interim Order at ¶ 26(a).

- h. **Local Rule 4001-2(a)(i)(H) - Provisions Affecting the Court's Power to Consider the Equities of the Case.** Subject to entry of the Final Order, the “equities of the case” exception under section 552(b) of the Bankruptcy Code shall not apply to the Pre-Petition Lender with respect to proceeds, products, offspring, or profits of any of the Collateral. *See* Interim Order at ¶ 58.

#### **The Debtor's Prepetition Secured Indebtedness**

##### **A. Senior Secured Credit Facility and Security**

11. The Debtor is party to a Credit Agreement, dated December 3, 2013, among the Debtor and the Pre-Petition Lender, with an initial borrowing base of \$75 million and a maximum credit amount of \$200 million. The Debtor initially drew down approximately \$54 million under the Senior Secured Credit Facility, which matures on December 3, 2018. As of the Petition Date, approximately \$28 million remains outstanding in principal under the Senior Secured Credit Facility.

12. The Debtor's obligations under the Senior Secured Credit Facility are secured by a valid, enforceable, perfected, first-priority lien on and security interest in substantially all of the Pre-Petition Assets, which includes the Debtor's restricted cash on hand and its natural gas properties, in favor of the Pre-Petition Lender.

#### **The Debtor's Need to Use Cash Collateral**

13. The Debtor uses cash on hand and cash flow from operations to fund its working capital needs, capital expenditures, and other general corporate purposes. An inability to use these funds during the chapter 11 case could cripple the Debtor's business operations. Indeed, without access to Cash Collateral, the Debtor and its estate would suffer immediate and irreparable harm

because without such use, the Debtor would be forced to cease operations prior to the proposed sale of the Debtor's Assets through this chapter 11 case.

14. A significant portion of the collateral includes natural gas properties and related assets (including real property and personal property related thereto) on which the Pre-Petition Lenders have liens. Such liens extend to and cover the natural gas extracted by the Debtor from its natural gas properties, along with all the proceeds generated from the sale thereof. The Debtor's business is to produce natural gas from its properties, and gather and transport such gas, along with the gas from certain other producers, to market. Thus, the orderly continuation of the Debtor's operations and the preservation of its going-concern value is largely dependent upon its ability to regularly convert the Pre-Petition Collateral into Cash Collateral for use in its operations.

15. The Debtor also relies on the encumbered cash generated from its operations to fund working capital, capital expenditures and other general corporate purposes. During this chapter 11 case, the Debtor will need this operating revenue to pay suppliers, pay expenses pursuant to joint operating agreements associated with properties operated by the Debtor, satisfy joint interest billings for properties on which the Debtor is a non-operating working interest holder, and make any other payments that are essential for the continued management, operation and preservation of the Debtor's business. The ability to satisfy these expenses as and when due is essential to the Debtor's continued operation of its business during this bankruptcy to preserve its going-concern value for the benefit of all stakeholders.

16. The Debtor seeks authority to use Cash Collateral in accordance with the Initial Budget (as defined below) for working capital, general corporate purposes, and certain administrative costs and expenses of the chapter 11 case. Pursuant to the Interim Order, the Debtor's authority to use Cash Collateral will commence upon entry of the Interim Order and

through the earlier to occur of the Expiration Date and the Termination Date (each as defined in the Interim Order).

17. The Debtor, with the assistance of its advisors, has formulated a 13-week cash flow budget, in form and substance satisfactory to the Pre-Petition Lender, for the use of Cash Collateral during the interim period (the “Initial Budget”).<sup>9</sup> The Initial Budget also includes the amounts necessary to wind down the Debtor’s business affairs following the sale of substantially all of the Debtor’s assets. The Debtor believes that the Initial Budget will provide the Debtor with adequate liquidity during the interim period. The Initial Budget contains line items for each category of cash flows anticipated to be received or disbursed during the time period for which the Initial Budget is prepared. The Debtor believes that the Initial Budget includes all reasonable, necessary, and foreseeable expenses to be incurred in connection with the operation of its business for the period set forth in the Initial Budget.

#### **Basis for Relief**

**A. The Use of Cash Collateral Is Warranted Under Section 363 of the Bankruptcy Code and Should Be Approved.**

18. The Debtor’s use of property of its estate, including the Cash Collateral, is governed by section 363 of the Bankruptcy Code, which provides, in relevant part, that:

If the business of the debtor is authorized to be operated under section . . . 1108 . . . of this title and unless the court orders otherwise, the [debtor] may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

11 U.S.C. § 363(c)(1). Pursuant to section 363(c)(2) of the Bankruptcy Code, a debtor may not use cash collateral unless “(A) each entity that has an interest in such cash collateral consents; or

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<sup>9</sup> A copy of the Initial Budget is attached as Exhibit 1 to the Interim Order.

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.” 11 U.S.C. § 363(c)(2).

19. It is essential to the Debtor’s successful sale and liquidation and the going-concern value of its business that it have sufficient funds to operate in the ordinary course of business during the chapter 11 case. Absent the use of Cash Collateral, the Debtor will not have sufficient working capital to: (i) make payments to operators, royalty interest holders, working interest holders, vendors or suppliers, (ii) satisfy ordinary operating costs, or (iii) fund the administrative costs of this chapter 11 case. Furthermore, as discussed above, and in accordance with section 363(c)(2) of the Bankruptcy Code, the Pre-Petition Lender, which holds an interest in the Cash Collateral, has consented to the Debtor’s use of Cash Collateral pursuant to the terms of the Interim Order, including the Initial Budget. Accordingly, the Debtor submits that the use of Cash Collateral is in the best interests of the Debtor’s estate and should be approved.

**B. The Debtor’s Proposed Grant of Adequate Protection to Use Cash Collateral Is Appropriate.**

20. Pursuant to section 363(c) of the Bankruptcy Code, the Debtor may only use Cash Collateral of the Pre-Petition Lender subject to its consent or the grant of adequate protection. 11 U.S.C. § 363(c)(2). Section 363(e) of the Bankruptcy Code provides that upon request of an entity that has an interest in property to be used by a debtor, the court shall prohibit or condition such use as is necessary to provide adequate protection of such interest. 11 U.S.C. § 363(e).

21. Generally, what constitutes adequate protection is decided on a case-by-case basis. *See In re Columbia Gas Sys., Inc.*, 1992 WL 79323, at \*2 (Bankr. D. Del. Feb. 18, 1992); *In re Mosello*, 195 B.R. 277, 289 (Bankr. S.D.N.Y. 1996) (“the determination of adequate protection is a fact-specific inquiry . . . left to the vagaries of each case”); *In re Beker Indus. Corp.*, 58 B.R. 725, 736 (Bankr. S.D.N.Y. 1986) (the application of adequate protection “is left to the vagaries of



each case, but its focus is protection of the secured creditor from diminution in the value of its collateral during the reorganization process”) (citation omitted); *see also In re Continental Airlines Inc.*, 154 B.R. 176, 180-181 (Bankr. D. Del. 1993).

22. The Debtor intends to provide the Pre-Petition Lender with adequate protection, which includes, among other things:

- i. providing the Pre-Petition Lender with a valid, unavoidable, first-priority lien and/or replacement lien on, and security interest (collectively, the “Adequate Protection Liens”) in all of the Debtor’s assets, and the products and proceeds thereof, which Adequate Protection Liens shall not be made subject to or subordinated to, or made *pari passu* with, any other lien or security interest;
- j. providing the Pre-Petition Lender with a superpriority administrative claim pursuant to section 507(b) of the Bankruptcy Code, with priority in payment over any and all unsecured claims and administrative expense claims against the Debtor and its estate, to the extent of any diminution in value of its interests in the Pre-Petition Collateral and Cash Collateral;
- k. providing the Pre-Petition Lender with adequate protection payments in an amount equal to all accrued and unpaid pre-petition or post-petition interest, and reasonable fees and costs due and payable under the Pre-Petition Claim Documents, including professional fees;
- l. maintaining the Debtor’s existing cash management systems; and
- m. compliance with certain budget and reporting requirements.

23. The Pre-Petition Lender will benefit from the Debtor’s proposed use of the Cash Collateral, which will prevent avoidable diminution of the value of the Pre-Petition Collateral and Cash Collateral and enhance the likelihood of preserving the Debtor’s overall going-concern value as the Debtor proceeds with its chapter 11 case. Preservation of the Debtor’s business as a going concern in and of itself serves to provide such parties “adequate protection” for Bankruptcy Code purposes. *See 495 Cent. Park Ave. Corp.*, 136 B.R. 626, 631 (Bankr. S.D.N.Y. Feb. 4, 1992) (noting that, in determining whether protection is “adequate,” courts consider “whether the value

of the debtor's property will increase as a result of the" use of collateral or provision of financing); *In re Sky Valley, Inc.*, 100 B.R. 107, 114 (Bankr. N.D. Ga. 1988) ("an increase in the value of the collateral . . . resulting from superpriority financing could result in adequate protection." (citation omitted)), *aff'd*, 99 B.R. 117 (N.D. Ga. 1989).

24. The Debtor believes that the proposed adequate protection is necessary and appropriate to ensure that the Debtor can continue to use Cash Collateral. Accordingly, the Debtor submits that the adequate protection is: (i) fair and reasonable, (ii) necessary to satisfy the requirements of sections 363(c)(2) and 363(e) of the Bankruptcy Code, and (iii) in the best interests of the Debtor and its estate.

**C. The Scope of the Carve-Outs Is Appropriate.**

25. The proposed adequate protection obligations are subject to the Fee Carve Out and Wind Down Carve Out (collectively, the "Carve-Outs"). Without the Carve-Outs, the Debtor and other parties-in-interest may be deprived of certain rights and powers because the services for which professionals may be paid in the chapter 11 case would be restricted. *See In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) (observing that courts insist on carve-outs for professionals representing parties-in-interest because "[a]bsent such protection, the collective rights and expectations of all parties-in-interest are sorely prejudiced"). The Carve-Outs do not directly or indirectly deprive the Debtor's estate or other parties-in-interest of possible rights and powers. Additionally, the Carve-Outs protect against administrative insolvency during the course of this chapter 11 case and any necessary wind-down expenses by ensuring that assets remain for the payment of the Clerk of the Court or U.S. Trustee fees and professional fees of the Debtor and any statutory committee appointed.

**D. The Automatic Stay Should Be Modified on a Limited Basis.**

26. The relief requested in the Interim Order contemplates a modification of the automatic stay to the extent necessary (a) to permit the Debtor and the Pre-Petition Lender to commit all acts and take all actions necessary to implement the Interim Order, (b) to permit the Debtor and the Pre-Petition Lender to commit all acts, actions, and transfers contemplated in the Interim Order, including, without limitation, transfers of Cash Collateral and other funds by the Debtor to the Pre-Petition Lender, and (c) to permit the Pre-Petition Lender, at its option, to pursue its rights and remedies as to the Pre-Petition Collateral and Cash Collateral in accordance with the Pre-Petition Claim Documents, the Interim Order (including the provisions governing remedies following an Event of Default), and applicable law.

**E. Interim Relief Should Be Granted.**

27. Bankruptcy Rule 4001(b) provides that a final hearing on a motion to use cash collateral pursuant to section 363 of the Bankruptcy Code may not be commenced earlier than fourteen (14) days after the service of such motion. Upon request, however, the court is empowered to conduct an interim, expedited hearing on the motion at which it may authorize a debtor to use cash collateral to the extent necessary to avoid immediate and irreparable harm to a debtor's estate. *See* Bankruptcy Rule 4001(b)(2). Section 363(c)(3) of the Bankruptcy Code authorizes the court to conduct a preliminary hearing and to authorize the use of cash collateral "if there is a reasonable likelihood that the [debtor] will prevail at the final hearing under [section 363(e) of the Bankruptcy Code]." 11 U.S.C. § 363(c)(3). Local Rule 4001-2(b) provides that the Court may grant interim relief pending review of interested parties of proposed debtor-in-possession financing arrangements, including use of cash collateral, provided that such relief is only what is necessary to avoid immediate and irreparable harm to

the estate pending a final hearing and, absent extraordinary circumstances, the proposed interim order does not include any of the provisions identified in Local Rule 4001-2(a)(i)(A)(F). Local Rule 4001-2(b).

28. As discussed above, the Debtor has an immediate need to use Cash Collateral to, among other things, fund its operations, and faces an immediate risk of irreparable harm if the Interim Order is not approved. Accordingly, pursuant to section 363(c)(3) of the Bankruptcy Code, Bankruptcy Rule 4001(b) and Local Rule 4001-2(b), the Debtor requests that the Court conduct an expedited hearing on this motion, and enter the Interim Order authorizing the Debtor to use Cash Collateral.

#### **Request for Final Hearing**

29. Pursuant to Bankruptcy Rule 4001(b)(2) and Local Rule 4001-2(c), the Debtor requests that the Court set a date for the Final Hearing that is as soon as practicable and fix the time and date prior to the Final Hearing for parties to file objections to this motion.

#### **Reservation of Rights**

30. Except for the Debtor's stipulations and admissions set forth in the Interim Order, nothing contained herein is intended or should be construed as an admission as to the validity of any claim against the Debtor, a waiver of the Debtor's rights to dispute any claim, or an approval or assumption of any agreement, contract or lease under section 365 of the Bankruptcy Code. The Debtor expressly reserves its rights to contest any claim against the Debtor (other than the Pre-Petition Lender's Pre-Petition Claim and the Adequate Protection Claim, as those terms are defined in the Interim Order). Likewise, if the Court grants the relief sought herein, any payment

made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity of any claim or waiver of the Debtor's rights to dispute such claim subsequently.

Notice

31. Notice of this Motion has been provided to the following parties, or, in lieu thereof, their counsel in accordance with Local Rule 9013-1(m)(iii): (i) the Office of the United States Trustee for the District of Delaware; (ii) each of the Debtor's twenty largest unsecured creditors and/or their counsel; (iii) Vinson & Elkins LLP as counsel to the Pre-Petition Lender; (iv) the United States Attorney's Office for the District of Delaware; (v) the Internal Revenue Service; (vi) all relevant state and local taxing authorities; (vii) the United States Environmental Protection Agency; (viii) all relevant state environmental agencies; (ix) the office of the attorneys general for the states in which the Debtor operates; (x) the Securities and Exchange Commission; and (xi) all parties that have requested special notice pursuant to Bankruptcy Rule 2002. This Motion and any order entered hereon will be served in accordance with Local Rule 9013-1(m)(iii). The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be provided.

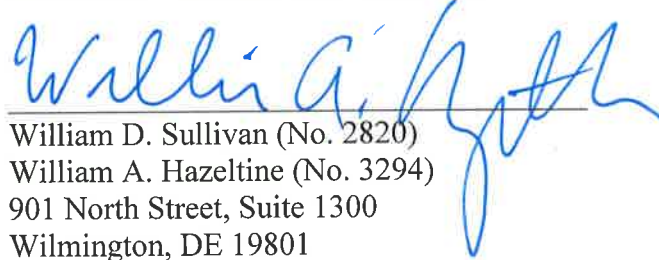
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**Conclusion**

WHEREFORE, for the reasons set forth herein, the Debtor respectfully requests that the Court (i) enter the Interim Order, (ii) schedule a Final Hearing, (iii) enter the Final Order and (iv) grant such other and further relief as is just and proper.

Dated: March 16, 2018  
Wilmington, Delaware

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