

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	:	Chapter 11
FIRSTRAIN, INC.,	:	Case No. 17-
Debtor. <sup>1</sup>	:	
	:	

**DECLARATION OF VIVIE LEE IN SUPPORT OF DEBTOR’S  
CHAPTER 11 PETITION AND FIRST DAY MOTIONS<sup>2</sup>**

I, Vivie Lee, under penalty of perjury, hereby declare that the following is true to the best of my knowledge, information, and belief:

1. I am the Chief Executive Officer of FirstRain, Inc. (“FirstRain” or the “Debtor”), a corporation organized under the laws of the State of Delaware, and the debtor and debtor in possession in the above-captioned chapter 11 case (the “Chapter 11 Case”).

2. I have over two decades of experience in leading technology teams, startups and global technology businesses. I have been working at the intersection of math and software my entire professional career; applying software and optimization techniques to enterprise solutions.

3. Before becoming FirstRain’s CEO in November 2015, I managed FirstRain’s engineering and analytics development teams as Chief Operating Officer. I led FirstRain’s data science and software evolution, building from its strong technology roots to a world class SaaS<sup>3</sup> solution for global Fortune 500 customers. Prior to joining FirstRain, I was general manager of

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<sup>1</sup> The last four digits of the Debtor's federal tax identification number are 6970. The Debtor's principal place of business is located at 1500 Fashion Island, Boulevard Suite 200, San Mateo, CA.

<sup>2</sup> Capitalized terms not defined in this section have the meanings given them in the applicable First Day Motion.

<sup>3</sup> Software as a service (SaaS) is a software distribution model in which a third-party provider hosts applications and makes them available to customers over the Internet. SaaS is one of three main categories of cloud computing, alongside infrastructure as a service (IaaS) and platform as a service (PaaS).

worldwide services for Cadence Design Systems. Before that I co-founded an enterprise software company, Aqueduct Software which was acquired by NetManage, and earlier I held product and technical leadership roles at Synopsys and 8x8. I hold an A.B. in mathematics from Harvard University.

4. On this date (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Delaware (the “Court”).

5. In my capacity as the Debtor’s Chief Executive Officer, I am generally familiar with the day-to-day operations, business and financial affairs, and books and records of the Debtor. I submit this declaration (the “Declaration”) to assist the Court and other parties in interest in understanding the circumstances that led to the commencement of this Chapter 11 Case, and in support of (i) the Debtor’s voluntary petition for relief under chapter 11 of the Bankruptcy Code, and (ii) relief, in the form of motions and applications, that the Debtor has requested of the Court on the Petition Date (the “First Day Motions”).

6. Except as otherwise indicated herein, all facts set forth in this Declaration are based upon my personal knowledge, my discussions with other members of Debtor’s senior management, receiving input from ATG (later defined), my review of relevant documents, or my opinion based upon my experience and knowledge of Debtor’s operations and financial condition. Unless otherwise indicated, the financial information contained herein is unaudited.

7. This Declaration is intended to provide a summary overview of the Debtor and this Chapter 11 Case. Part I of this Declaration provides an overview of the Debtor’s business and corporate history. Part II provides a description of the Debtor’s capital structure. Part III

provides a discussion of the events leading to the commencement of this Chapter 11 Case. Part IV sets forth relevant facts in support of the Debtor's First Day Motions.

8. If I were called to testify, I would testify competently to the facts set forth in this Declaration and I am authorized to submit this Declaration on behalf of the Debtor.

## **PART I**

### **The Debtor's Formation, Its Locations, Its Subsidiary and Its Current Business**

9. FirstRain was founded in 2000, and is headquartered in San Mateo, California. It also leases space in New York City and leases a data center in Santa Clara, California. The space in New York City is fully sublet. It operates at a small financial deficit and serves no continuing business purpose. It is the Debtor's intention to reject both the lease and sublease as of the effective date of the Plan (as defined below). The space in San Mateo is partially sub-let.

10. The Debtor has twelve regular employees, all located in the United States. Payroll and related benefits for the FirstRain employees is handled by ADP, LLC ("ADP").

11. The Debtor has a wholly-owned subsidiary in India, FirstRain Software Centre Private Limited ("FirstRain India"), that provides support and development services to the Debtor (its sole customer) on a cost plus basis. Payroll and related benefits for the FirstRain India employees is handled by ADP of India, separate and apart from payroll of FirstRain.

12. FirstRain is an enterprise software company, whose core IP is in data science and software algorithms that can discover, read, discern and summarize useful insights about companies and markets from a vast universe of content across the global web and social media. FirstRain's customers are typically Fortune 1000 enterprises, whose Sales and Marketing teams use FirstRain to track their customers, competitors and markets in a very detailed and highly

personalized way as part of their go to market and sales processes. FirstRain's analytics-driven applications, software and information services are licensed as a subscription service.

### **Key Product Lines**

13. FirstRain's platform is built around a powerful data science engine that generates smart and simple insights for business professionals. FirstRain's core technology pipeline discovers, reads and derives meaning from the high volumes of dispersed and varied content across the global web, social media and internal company data – essentially the “digital exhaust” that exists around companies, businesses and markets. Layered algorithms extract meaning and derive relationships that result in FirstRain's “Business Web Graph”, a continually refreshed and highly detailed map of the both explicit and implicit developments and relationships across millions of companies, in every sector and market. The FirstRain platform uses this multi-faceted information set to power families of business analytics that deliver in-depth, real-time analytics revealing developments, opportunities, risks and other critical insights unfolding within companies and markets. FirstRain's solution is deployed to enterprise customers via FirstRain's modular and flexible suite of web and mobile applications, email subscriptions and mobile alerts, programmatic application programming interfaces (“API”) and web services.

### **Customer Base**

14. FirstRain's customers are leading global business-to-business enterprises across almost every sector including financial services, technology, healthcare and pharmaceuticals, hospitality, and industrials. FirstRain's highly adaptive platform provides each customer with highly business-specific information experiences based on their organization's particular business definitions, goals and initiatives. Furthermore, FirstRain automatically provides each individual user with their own unique and continually evolving x-ray into their specific

customers, markets, strategy and competition. Enterprise sales and marketing teams use FirstRain in their go-to-market workflows, sales methodologies and marketing campaigns to surface patterns for customer engagement, identify opportunities, determine risk and drive action.

15. FirstRain's customers generally pay annually in advance for its services.

16. FirstRain has a very selectively developed patent portfolio of twelve (12) issued patents and one trademark that represent critical intellectual property innovations within the platform and solution FirstRain has to offer. FirstRain's patents cover an important range of software, data science and analytics techniques spanning: discovery, crawl and extraction of unstructured data and web content; information processing techniques for relevance scoring, entity identification and derivation of business lines of companies; and language processing and analytics for event identification and fact extraction. FirstRain's patents are core to its highly differentiated data science capabilities and information quality, which is critical for meeting the enterprise-quality information standards of FirstRain's customer base.

## **PART II**

### **The Debtor's Prepetition Capital Structure**

17. As of the Petition Date, the Debtor's aggregate funded and matured secured debt obligations were approximately \$5,542,292.50, which includes exposure under issued but undrawn letters of credit and the maximum availability under credit cards, plus attorney's fees. This amount is owed to the Debtor's sole pre-petition secured lender, Pacific Western Bank, successor-by-merger to Square 1 Bank (the "Pre-Petition Lender").

18. On December 13, 2013, FirstRain and the Pre-Petition Lender entered into that Loan and Security Agreement (the "Credit Agreement") providing for a revolving credit limit in

the aggregate principal amount not to exceed the *lesser* of \$7,500,000 or an amount derived from a specific borrowing base formula. The Credit Agreement thereafter was amended five times:

- First Amendment (March 23, 2015) (extend loan availability to the lesser of \$9,000,000 or a specific borrowing base; acknowledge that amount owed exceeds \$5,000,000 and that Lender has a security interest in Debtor's intellectual property);
- Second Amendment (August 5, 2015) (modify variables in borrowing base formula);
- Third Amendment (September 29, 2015) (modify variables in borrowing base formula);
- Fourth Amendment (December 14, 2015) (reduce loan availability to lesser of \$7,000,000 and specific borrower base; extend loan maturity to February 13, 2016); and
- Fifth Amendment (February 26, 2016) (extend loan maturity to February 25, 2017; revise financial covenants).

19. The Debtor's obligations under the Credit Agreement are matured and became due and payable on February 25, 2017. Thereafter, the Debtor and the Pre-Petition Lender entered into a forbearance agreement.

20. To secure repayment of the Bank Obligations (as defined below), FirstRain granted the Pre-Petition Lender a first lien upon and security interest in, *inter alia*, accounts receivable, inventory, equipment, deposit accounts, general intangibles, investment property and all of its Other Property (as defined in the Credit Agreement). Additionally, FirstRain maintains its bank accounts with the Pre-Petition Lender. On June 15, 2014, FirstRain also entered into an Intellectual Property Security Agreement whereby it granted the Pre-Petition Lender a security interest in certain intellectual property (including certain patents, trademarks and copyrights).

21. Prior to the Petition Date, and pursuant to the RSA (later defined), the Debtor paid the Pre-Petition Lender the amount of \$750,000. Accordingly, as of the Petition Date, the

principal amount due and owing under the Credit Agreement, including principal and non-default interest is \$5,542,292.50, which includes exposure under issued but undrawn letters of credit and the maximum availability under credit cards, plus attorney's fees (the "Bank Obligation").

### **PART III**

#### **Events Leading to the Filing of the Chapter 11 Case**

22. Like many advanced technology SaaS enterprise businesses, FirstRain has consistently strived to stay competitive with its peers by developing new technology capabilities, solution offerings and business initiatives, all of which require significant R&D as well as marketing and sales expenditures. At the same time, FirstRain has had to mitigate the effects of competition, including from very large market players with far greater technology and operating resources, marketing investments and sales reach. Over the course of late-2015 to the end of 2016, FirstRain was able to transform its business from a significant P&L loss in prior years to achieve positive EBITDA at the end of 2016, going into 2017. During that time, the Debtor also improved the profile and quality of customers and revenue, by focusing on strategic business with its top enterprise customers.

23. Despite relatively healthy operations, and significant improvements in the company's P&L and strategic customer base during the course of 2016, FirstRain was unable to refinance the Pre-Petition Lender's first lien secured obligation with a maturity date of February 28, 2017.

### **Cost-Cutting Initiatives**

24. FirstRain has aggressively attacked industry wide challenges to bring stability to its operations and mitigate declines in revenue. In late 2015, the company executed a significant 40% reduction in expenses, which in addition to stabilizing revenues and focusing on the strategic customer business, set the financial foundation for achieving P&L profitability over 2016. The Debtor further incrementally reduced expenses and resourcing in line with its more focused business profile through 2016 and early 2017. In the week leading up to this filing, FirstRain further reduced its workforce by seven personnel and First India reduced its workforce by twenty.

### **Exploration of Restructuring Alternatives and Sale Efforts**

25. On April 27, 2015, the Debtor retained Atlas Technology Group, LLC (“ATG”) to render the following professional services: review the business, operations and financial condition of the Debtor, assist the Debtor in identifying and evaluating candidates for a potential transaction and/or a financing, coordinate with the Debtor to prepare and implement a marketing plan for distribution to potential parties to a transaction or financing, advise the Debtor regarding the desirability of effecting a transaction and/or financing, and advise and assist the Debtor in the course of negotiating with potential acquirers and managing associated due diligence process.

26. Commencing on April 27, 2015, ATG sought to sell the Debtor and/or all the assets of the Debtor. ATG contacted and sent teasers to sixty-seven (67) parties that ATG and the Debtor determined were potential candidates for a transaction or financing. Of those sixty-seven (67) parties, thirteen (13) executed non-disclosure agreements (the “Interested Parties”). The Interested Parties that executed non-disclosure agreements then were given the opportunity to gain access to confidential information related to the Debtor and to participate in management



meetings, either in person or telephonically, with ATG and the Debtor's management team. During the course of this two-year process, Interested Parties were invited to submit letters of intent (each an "LOI") to purchase the Debtor or all of the assets of Debtor. Seven (7) separate LOIs were received during the process from four (4) separate Interested Parties, and all focused on acquiring the entirety of Debtor's assets. Accordingly, the Debtor devoted its attention and focus to pursuing a sale of its assets. The four Interested Parties that submitted LOIs were: ESW Capital, LLC ("ESW"), and three other entities.

27. On behalf of the Debtor, I also directly initiated strategic discussions and presentations with at least eight additional possible buyers. Five of these parties engaged in due diligence and three LOIs were received in that management lead marketing process.

28. The ATG marketing process included the development, in conjunction with Debtor's management team, of a marketing presentation to provide to potential candidates for a transaction. After familiarizing itself with the business, operations and financial condition of the Debtor, ATG prepared the presentation. Based on ATG's relationship within and deep knowledge of the software industry, ATG then assisted the Debtor in identifying and evaluating candidates for a potential transaction. Thereafter ATG coordinated with the Debtor to prepare and implement a marketing plan, and to distribute a management presentation to all Interested Parties. ATG worked with Debtor throughout the two-year process, including as the Debtor secured interim financing in fall of 2015 to sustain operations and ATG continued to run its sales process. ATG ran multiple sales processes during the two-year term of its engagement, and advised and assisted the Debtor in the course of evaluating and negotiating with the four Interested Parties that had submitted LOIs, including managing and assisting all associated due diligence.

29. Of the LOIs submitted during the process, I was advised by ATG that the ESW proposal represents the highest, best and most viable offer received by ATG on behalf of Debtor. I am advised by ATG that the DIP Facility offered by ESW at this time represents the best source of financing available to the Debtor under the circumstances, and the resulting terms that the Debtor submits are reasonable and appropriate to meet the Debtor's financing needs during the Chapter 11 case.

30. I am advised by ATG that it does not believe the Debtor can obtain financing to fund and preserve its assets on terms more favorable than those offered by ESW under the DIP Facility and the Debtor is (and has been) unable to obtain unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense. ATG also does not believe that the Debtor is likely to obtain secured credit under section 364(c) of the Bankruptcy Code on equal or more favorable terms than those offered by ESW under the DIP Facility.

31. At the same time, FirstRain engaged in restructuring discussions with the Pre-Petition Lender. Ultimately, following four months of evaluating and negotiating restructuring alternatives, FirstRain reached an agreement on a restructuring transaction that addresses its capital structure challenges, as memorialized in the RSA (as defined below).

### **The Restructuring Support Agreement**

32. The Debtor negotiated with the Pre-Petition Lender, as well as the ESW, as plan sponsor (the "Plan Sponsor"), to secure support for a consensual restructuring. After extensive negotiations conducted at arm's-length, with separate counsel, and in good faith, the Debtor, the Pre-Petition Lender, and the Plan Sponsor entered into the Restructuring Support Agreement (the "RSA") to memorialize the agreements reached in those discussions. Through the RSA, among

other commitments, the Pre-Petition Lender has committed to support the Debtor's restructuring efforts.

33. The Debtor seeks expedited approval from the Court to assume the RSA with the Plan Sponsor and the Pre-Petition Lender. The RSA provides a framework for the Plan Sponsor and the Pre-Petition Lender to support the Debtor in its restructuring through the Chapter 11 Case.

34. The Restructuring Support Agreement represents a significant achievement for the Debtor because, among other things, it provides for a comprehensive restructuring of the Debtor. The RSA includes a significant deleveraging of the Debtor's balance sheet and permits the Debtor to maintain and continue to develop its valuable business, and to maximize its enterprise value on a going-forward basis. Overall, the proposed plan of reorganization, attached to the RSA (the "Plan"), would (a) eliminate the Debtor's secured indebtedness, (b) improve cash flows by eliminating debt service, and (c) potentially provide additional capital to facilitate the successful implementation of the Debtor's business plan.

35. The Plan contemplates entry into a proposed post-petition debtor-in-possession financing facility (the "DIP Facility") by ESW as lender under the DIP Facility (the "DIP Lender") providing for (a) a commitment to provide up to \$4,000,000 in financing under the DIP Facility ("DIP Financing") in an amount necessary to fund (i) the Debtor's post-petition operations, including payment of a KERP plan or severance payments for certain employees of the Debtor, (ii) the administrative costs of the Chapter 11 Case, and (iii) the pursuit of confirmation of the Plan.

36. The Plan also contemplates, among other things, total plan consideration (the "Consideration") of up to \$7,500,000, which shall be allocated as follows:

(a) payment in full of (i) Allowed Administrative Claims, including the DIP Lender's claims under the DIP Facility, as described in the Plan; (ii) Allowed Priority Unsecured Non-Tax Claims; and (iii) Allowed Other Secured Claims (if any), each as described in the Plan;

(b) prior to any recovery to the Pre-Petition Lender on account of its allowed pre-petition secured claim, payment in full of all General Unsecured Claims (the "Guaranteed Unsecured Recovery") from the Consideration;

(c) following payment of the Guaranteed Unsecured Recovery, the Pre-Petition Lender shall receive its recovery from the remaining Consideration on account of its allowed pre-petition secured claim, representing principal and non-default interest owed to the Pre-Petition Lender under the Pre-Petition Credit Agreement (the "Secured Lender Recovery");

(d) FirstRain India, on account of its Intercompany Claims (as defined in the Plan) shall receive, on account of and in full and complete settlement, release and discharge of, and in exchange for its Allowed Subordinated Claim, its Pro Rata Share of the Consideration remaining after payment in full of all Allowed Administrative Claims, Allowed Priority Tax Claims, Allowed Priority Unsecured Non-Tax Claims, Allowed General Unsecured Claims; the Allowed Pre-Petition Lender Secured Claim, and Allowed Other Secured Claims;

(e) any remaining Consideration following payment of all Plan-related expenses and recoveries contemplated above shall be provided to the reorganized Debtor to be used for working capital purposes; and

(f) all equity interests shall be cancelled and any obligations of the Debtor thereunder or in any way related thereto shall be deemed cancelled, discharged, and of no force or effect.

37. Pursuant to the Plan, ESW shall receive 100% of the New Equity (as defined in the Plan) on account of ESW being the Plan Sponsor and the DIP Lender. ESW, in its capacity as the DIP Lender, shall have the option, on account of being the holder of the Allowed DIP Lender Claim (as defined in the Plan), to exchange a total of up to 100% in satisfaction of such amount of the Allowed DIP Lender Claim for up to a total of 60% of the New Equity (as defined in the Plan), at a rate of 1% of its Allowed DIP Lender Claim for .6% of the New Equity (the "Subscription Option"). Further, the DIP Lender, on account of being the holder of the Allowed DIP Lender Claim, shall receive from the Consideration, payment in Cash of the remaining amount of the Allowed DIP Lender Claim after the DIP Lender has exercised the Subscription Option to receive its share of the New Equity. ESW, in its capacity as the Plan Sponsor, will receive the remainder of the New Equity, subject to the New Equity provided to the DIP Lender pursuant to the Subscription Option

38. It is currently expected that approximately \$2,000,000 will be drawn under the DIP Facility pursuant to the Approved Budget attached to the DIP Motion, and that this amount will be sufficient to satisfy all administrative costs during the Chapter 11 Case. The remainder of any unused portion of the DIP Financing commitment shall comprise Consideration (as defined herein) that may be used by the Debtor to fund the Plan (including payment of administrative expenses and priority wage claims and taxes).

39. The RSA requires the Pre-Petition Lender to timely vote in favor of, and all Parties under the RSA to support and take all actions appropriate and necessary to facilitate

implementation and consummation of, the Plan, including the filing of a Plan, an accompanying disclosure statement, and other documents required to be filed in connection with the solicitation of votes on the Plan and to negotiate in good faith each of the Definitive Documents. RSA §§ 2(a), 3(a).

40. The RSA requires the DIP Lender to enter into the DIP Facility as set forth in the Plan. In exchange, the Debtor agreed to be bound by several obligations in connection with implementation of its restructuring, including the following case milestones<sup>4</sup>:

<u>Deadline</u>	<u>Event</u>
June 5, 2017	Deadline to file a motion to approve the RSA reasonably acceptable to the Plan Sponsor Deadline to file the Plan and the Disclosure Statement
June 9, 2017	Deadline to obtain entry of the Proposed DIP Order on an interim basis
June 21, 2017	Deadline to obtain entry of an order approving the RSA on terms reasonably acceptable to the Plan Sponsor Deadline to obtain entry of an order conditionally approving the Disclosure Statement
July 26, 2017	Deadline to obtain entry of an order confirming the Plan

41. Additionally, the Debtor agreed to support the Plan and not to support, directly or indirectly, any other restructuring alternatives or take any action inconsistent with the Plan and

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<sup>4</sup> While the failure to hit any of these milestones is a “Termination Event” under the RSA, the RSA also provides, “the Parties agree to negotiate in good faith reasonable extensions of the dates and milestones set forth herein.”

RSA unless doing so would be inconsistent with the Debtor's fiduciary duties to its creditors and other stakeholders. RSA § 4(c).

#### **PART IV**

##### **Summary of First Day Motions**

42. To enable the Debtor to operate effectively and to avoid the adverse effects of the chapter 11 filing, the Debtor has filed the motions (the "First Day Motions") described below.

43. In connection with the preparation for this bankruptcy case, I have reviewed each of the First Day Motions referenced below. The First Day Motions were prepared with my input and assistance or the input and assistance of employees working under my supervision and bankruptcy counsel. I believe the information contained in the First Day Motions is accurate and correct. As set forth more fully below, I believe that the entry of orders granting the relief requested in these motions and applications is critical to Debtor's reorganization efforts.

##### **A. Debtor's Application for an Order to Retain and to Employ JND Corporate Restructuring ("JND") as Claims, Noticing And Balloting Agent *Nunc Pro Tunc* to the Petition (the "Claims Agent Motion")**

44. In connection with the Claims Agent Motion, the Debtor evaluated several potential candidates to serve as Claims, Noticing, and Balloting Agent. Following that review, and in consideration of the confirmation milestones, the nature of the Debtor's business, and the scope of the tasks for which the Debtor will require the assistance of a claims, noticing, and balloting agent, the Debtor believes, and I agree, that the appointment of JND is in the best interests of the Debtor's estate, its creditors, parties-in-interest, and this Court.

45. Based on JND's considerable experience in providing similar services in chapter 11 cases, the Debtor's believes, and I concur, that JND is qualified to serve as Claims/Noticing Agent in this chapter 11 case. A detailed description of the services that JND has agreed to render and the compensation and other terms of the engagement are described in the engagement

latter and declaration of Travis K. Vandell, attached as exhibits to the Claims Agent Motion. Based upon these terms and representations, the Debtor believes, and I agree, that the Debtor's estate, creditors, parties-in-interest, and this Court will benefit as a result of JND's experience and cost-effective methods.

**B. Debtor's Motion for Interim and Final Orders (I) Prohibiting Utility Companies from Altering, Refusing, or Discontinuing Services; (II) Deeming Utility Companies Assured of Future Performance; and (III) Establishing Procedures for Determining Adequate Assurance of Payment (the "Utility Motion")**

46. In the normal conduct of their business, the Debtor has relationships with approximately two (2) utility companies (collectively, the "Utility Companies") for the provision of internet, electric, and other services (the "Utility Services").

47. Continued and uninterrupted Utility Service is vital to the Debtor's ability to sustain its operations during this chapter 11 case. Because of the nature of the Debtor's operations, termination or interruption of the Utility Service would dramatically impair the Debtor's ability to conduct business and cause considerable damage and inconvenience to the Debtor's customers and employees. If utility providers are permitted to terminate or disrupt service to the Debtor, the Debtor's primary revenue source would be threatened.

48. To ensure the continued provision of Utility Services to the Debtor, the Debtor seeks entry of an order prohibiting the Utility Companies from altering, refusing, or discontinuing services to, or discriminating against the Debtor on account of prepetition invoices, determining that Utility Companies are adequately assured of future payment, and establishing procedures for determining adequate assurance of payment. The Debtor proposes to establish a segregated account into which Debtor will deposit the sum of approximately \$3,000, which is equal to approximately half a month of Utility Services calculated on a historical basis and,



additionally, have proposed determination procedures to address any request made by Utility Companies for additional adequate assurance.

49. For the forgoing reasons, the Debtor submits, that the relief requested in the Utilities Motion is in the best interest of the Debtor, its estate and its creditors, and therefore should be approved.

**C. Debtor's Motion for Interim and Final Orders Pursuant to 11 U.S.C. §§ 105(a), 345(b), 363, 1107 and 1108 Authorizing: (a) Continued Maintenance of Existing Bank Accounts, (b) Continued Use of Existing Business Forms and (c) Waiver of Section 345(b) Deposit and Investment Requirements and Certain United States Trustee Guidelines (the "Bank Account Motion")**

50. FirstRain maintains two (2) bank accounts with the Pre-Petition Lender: (a) a Checking Account and (b) a FSA Checking Account (together, the "Bank Accounts"). The Pre-Petition Lender is located at 406 Blackwell Street, Suite 240, Durham, NC 27701.

51. The Checking Account is used for all of the Debtor's receipts and disbursements. All of the Debtor's customer pre-payments and other payments are received and deposited into the Checking Account. The FSA Account or "Flexible Spending Account" is used for the Debtor's 125 flexible spending accounts (Healthcare, Dependent Care and Commuter). Employee payroll deductions for these programs are transferred into this account at each payroll and the Debtor's 125 plan administrator, Wageworks, submits disbursement activity to the Debtor and debits the Flexible Spending Account for the amounts disbursed to employees. The balance in the Flexible Spending Account represents employee withholding's not yet disbursed by Wageworks.

52. The Debtor needs to maintain its Bank Accounts in order to maintain normal business operations collections and disbursements in the ordinary course. Accordingly, to ensure as smooth a transition into chapter 11 as possible with minimal disruption, the Debtor seeks authority to continue to maintain its Bank Accounts.

**D. Motion for Entry of an Order (I) Authorizing the Debtor to Pay Certain Pre-Petition Taxes and (II) Authorizing the Bank to Honor and Process the Payment of Such Amounts (the “Tax Motion”)**

53. In the ordinary course of business, the Debtor collects and reports sales tax (the “Taxes”) to various taxing authorities including New York, Connecticut, Washington and Texas (collectively, the “Authorities”) because the services it provides are taxable in those states. The Debtor generally has a very small sales tax liability because most of the Debtor’s larger customers pay the sales tax directly. The Debtor’s service is not taxable in California or Massachusetts.

54. As of Petition Date, there is no more than \$6,000 owing on sales tax for prepetition sales. \$3,307 will be sent to the State of Connecticut in a January 2018 annual filing and \$1,507 will be sent to the State of Texas in a July quarterly filing.

55. The Debtor believes that it is substantially current on all of its Taxes that have become due as of the Petition Date. The only obligations outstanding represent Taxes that may have accrued, but are not yet legally due or have not yet been billed. In many instances there may be a lag between the time when the Debtor incurs an obligation to pay the Taxes and the date such Taxes become due and payable under applicable laws or regulations. Therefore, there may be claims against the Debtor for Taxes that have accrued but remain unpaid as of the Petition Date, and for certain other Taxes that will come due during the pendency of this Chapter 11 Case.

56. The Debtor seeks entry of an order authorizing and directing its Bank to honor pre-petition checks and wires issued by the Debtor in payment of pre-petition Taxes that, as of the Petition Date, has not cleared or been transferred. In addition, to the extent the Debtor has not yet sought to remit payment with respect to certain Taxes, the Debtor seeks entry of an order

authorizing, but not directing, the issuance of checks or providing for other means of payment as necessary to pay the Taxes.

**E. Motion for Interim and Final Orders Pursuant to Sections 105(a), 363(b), 363(c), 507(a), 541(b)(7), 541(d), 1107(a) And 1108 of the Bankruptcy Code and Fed. R. Bankr. P. 6003 and 6004 (I) Authorizing the Debtor to (A) Pay Certain Prepetition Severance, Variable Commissions, Wages, Compensation, and Employee Benefits, (B) Continue Payment of Severance, Variable Commissions, Wages, Compensation, and Employee Benefits in the Ordinary Course of Business and (C) Continue Payment of Employment, Unemployment, Social Security and Other Taxes Incident to the Employee Obligations; and (II) Authorizing and Directing the Debtor's Third-Party Payroll Administrator and Debtor's Bank to Receive, Process, Honor, and Pay Checks Issued and Electronic Payment Requests Relating to the Foregoing (the "Wages Motion")**

57. As of the Petition Date, FirstRain's workforce is comprised of twelve (12) regular employees (the "Employees").

58. By the Wages Motion, the Debtor seeks authority, but not direction to, among other things, to: (a) pay certain pre-petition claims for severance, variable commissions, wages, commissions and salaries to its current employees (the "Employees"); (b) continue withholding from Employee Salaries and Wages, the Employee's share of costs for certain benefit programs and tax obligations and remitting such withholdings to the appropriate benefits provider or taxing authority, along with any obligations owed directly by the Debtor to such benefit provider and taxing authority; (c) continue to use ADP as the Debtor's payroll administration and to pay the pre-petition amount owed to ADP in the approximate amount of \$1,500; (d) reimburse Employees for prepetition expenses incurred on behalf of the Debtor, if any; (e) continue the Debtor's Corporate Credit Card to permit where the Debtor's CFO to can use the Debtor's Credit Card for company expenses and to pay all pre-petition amounts owed on such Credit Card; and (f) pay any amounts due and owing under Employee Benefit Programs (as defined in the Wages Motion) (collectively, "Employee Obligations"); and an order authorizing the Debtor's third-

party payroll administrator, ADP, and bank to receive, process, honor, and pay all checks issued and electronic payment requests made related to the foregoing.

59. I believe that any delay in paying pre-petition Employee Obligations will adversely impact the Debtor's relationship with its Employees and irreparably impair the Employees' morale, dedication, confidence and cooperation in with the chapter 11 process. At this early stage in the case, the Debtor simply cannot risk the substantial damage to its business that would inevitably result from a decline in the Employees' morale and cooperation attributable to the Debtor's failure to honor its pre-petition Employee Obligations.

**F. Motion for Entry of an Order Authorizing the Debtor to Continue and Renew Its General Business Insurance Policies and Honor All Obligations and Financing Agreement in Respect Thereof (the "Insurance Motion")**

60. In the ordinary course of its business, the Debtor maintains the following types of insurance: (a) Fiduciary Liability, (b) Errors & Omissions, (c) Directors & Officers Liability (creditor exclusion), (d) Crime (collectively, (a) – (d) referred to as "General Business Insurance" and with (e) and (f) the "Policies"), (e) workers compensation ("Worker's Comp.") and (f) property package ("Property Package Ins.") policy. The General Business Insurance is essential to the preservation of the Debtor's business, and assets, and in many cases coverage is required by various laws and contracts that govern the Debtor's business conduct.

61. The Debtor seeks the entry of an order authorizing it to maintain, continue and renew the Policies and to honor all of its obligations under and in connection with the Policies and the Financing Agreements on an uninterrupted basis and in accordance with the same practices and procedures as were in effect before the Petition Date.<sup>3</sup> This would include (a)

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<sup>3</sup> Nothing in the Insurance Motion should be construed as an assumption of any executory contract or unexpired lease between the Debtor and any other party, nor should it be construed as a rejection of any executory contract or unexpired lease with any creditor. The Debtor reserves the right to contest the amount claimed to be due by any person or entity.

continuing make payments under the Financing Agreements, (b) renewing or obtaining new insurance policies as needed in the ordinary course of business and (c) paying all prepetition amounts arising under the Policies (including commissions to the Debtor's insurance broker) in an amount not to exceed \$7,133.00 in the aggregate.

**G. Debtor's Motion for Entry of Interim and Final Orders Pursuant to 11 U.S.C. §§ 105(a) and 362 Establishing Notification and Hearing Procedures for Trading in Equity Securities (the "Stock Trading Motion")**

62. Pursuant to the Stock Trading Motion, the Debtor seeks entry of interim and final orders establishing notification procedures and approving restrictions on certain transfers of interest in the Debtor.

63. The Debtor has certain favorable attributes for U.S. federal income tax purposes (the "Tax Attributes"), which include, as of the Petition Date, roughly \$110,000,000 in estimated, consolidated net operating loss carryforwards ("NOLs"), which start to expire in the beginning of 2019.

64. The Tax Attributes are valuable assets of these estates, as I understand title 26 of the United States Code (the "Tax Code") generally permits corporations to carry forward their NOLs to reduce future taxable income. See Tax Code § 172. The Tax Attributes are available to offset any income realized through the taxable year that includes the effective date of a chapter 11 plan, and potentially thereafter. Accordingly, absent any intervening limitations and depending upon the Debtor's future operating results, the Tax Attributes could translate into future tax savings over time and any such savings could enhance the Debtor's cash position for the benefit of all parties in interest and contribute to the Debtor's efforts toward a successful reorganization.

65. The Debtor's ability to use the NOLs to reduce future tax liability is subject to certain statutory limitations. I understand that sections 382 and 383 of the Tax Code limit a corporation's use of its tax attributes to offset future income after that corporation has undergone an "ownership change" within the meaning of section 382 of the Tax Code ("Section 382" and such ownership change, an "Ownership Change"). Pursuant to Section 382, I understand that an Ownership Change generally occurs when the percentage of a corporation's equity held by its "5-percent shareholders" (within the meaning of Section 382) increases by more than 50 percentage points above the lowest percentage of ownership owned by such shareholder(s) at any time during the relevant testing period (usually three years). In addition, an Ownership Change can occur where a "50-percent shareholder" (within the meaning of section 382(g)(4)(D) of the Tax Code) claims a worthlessness deduction in respect of its direct or indirect ownership of the corporation.

66. An Ownership Change *prior to* the consummation of a sale of the Debtor's assets or the effective date of a chapter 11 plan would effectively eliminate the Debtor's ability to use their Tax Attributes, thereby resulting in a significant loss of potential value.

67. Unrestricted trading of the Stock or options or similar interests to acquire the Stock could adversely affect the Debtor's Tax Attributes if too many 5% or greater blocks of Stock are created or too many shares are added to or sold from such blocks, such that, together with previous trading by any person holding five percent or more of the Stock ("5% Shareholders") at any time during the preceding three-year or shorter period, as applicable (the "Testing Period"), an Ownership Change is triggered prior to consummation and outside of the terms of a confirmed chapter 11 plan or a bankruptcy court order confirming the sale of the Debtor's assets.

68. The Tax Attributes are of significant value to the Debtor and its estate because the Debtor generally can carry forward its NOLs to offset its future taxable income for up to 20 taxable years,<sup>5</sup> thereby potentially reducing their future aggregate tax obligations and freeing up funds to meet working capital requirements and service debt. Such NOLs may also be available to the Debtor to offset taxable income generated by transactions completed during the Chapter 11 Case.

69. It is, therefore, in the best interests of the Debtor and its stakeholders to restrict trading that could result in an Ownership Change before the effective date of a chapter 11 plan or applicable bankruptcy court order. This would protect the Debtor's ability to use the Tax Attributes during the pendency of this chapter 11 case or, potentially, in the event of a future transaction, to offset gain or other income recognized in connection with the Debtor's sale or ownership of their assets, which may be significant in amount.

70. For these reasons, the Debtor seeks entry of interim and final orders establishing procedures designed to ensure the preservation of the Tax Attributes. I believe that the relief requested in the Stock Trading Motion is in the best interests of the Debtor's estates, its creditors, and all other parties in interest, and will enable the Debtor to preserve a valuable asset of this estate. Accordingly, on behalf of the Debtor, I respectfully submit that the Stock Trading Motion should be approved.

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<sup>5</sup> See 26 U.S.C. §172.

**H. Motion of Debtor for Entry of Interim and Final Orders Pursuant to Sections 105, 361, 362, 363(c), 364(c)(1), 364(c)(2), 364(d)(1), 364(e) and 507 of the Bankruptcy Code (I) Authorizing Debtor to (A) Obtain Post-Petition Secured Financing from ESW Capital, LLC; (B) Utilize Cash Collateral; and (C) Pay Certain Related Fees and Charges; (II) Granting Adequate Protection to the Pre-Petition Lender; and (III) Scheduling A Final Hearing (the “DIP Financing Motion”)**

71. The Debtor immediately needs to obtain post-petition financing in order to pay its employees and continue its business operations. Without access to debtor in possession financing, the Debtor has limited cash on hand, and does not expect to be able to generate sufficient levels of cash flow through operation of the Debtor’s business to cover cash needs and the projected costs of the Chapter 11 Case.

72. During the period from and after October 2016, the Debtor, its advisors and ATG examined a variety of options for resolving its liquidity issues without resorting to a chapter 11 filing. The Debtor explored raising capital and selling the company. Despite these efforts, no feasible alternatives to chapter 11 were available, the Debtor’s liquidity position continued to deteriorate and its senior secured indebtedness to the Pre-Petition Lender matured.

73. Recognizing the need to access cash, in advance of this chapter 11 filing, the Debtor engaged in good faith, arms-length negotiations with the Pre-Petition Lender, its existing lender, and also solicited proposed DIP financing from other sources. Pursuant to the RSA, ESW was willing to provide DIP Financing to the Debtor on agreeable terms.

74. ESW has agreed to provide post-petition financing to cover the costs associated with preserving the Debtor’s operations and running a chapter 11 process through a plan effective date (the “DIP Facility”). The DIP Facility provides for funding up to \$700,000 on an interim basis and up to \$2,000,000 (inclusive of amounts previously borrowed on an interim basis) on a final basis through July 31, 2017 via an approved budget. To the extent the Chapter



11 Case extends beyond July 31, 2017, the approved budget may be further amended to permit draws up to the aggregate maximum principal amount of \$4,000,000.

75. As more fully set forth in the DIP Motion, absent an Event of Default (as defined in the DIP Motion), the DIP Facility provides for a 0% interest rate and no costs. The DIP Facility contains important milestones including, provisionally approving the Disclosure Statement on or before June 21, 2017 and confirming the Plan by July 26, 2017. While the DIP Facility contemplates a priming of the Pre-Petition Lender's security interests, the Pre-Petition Lender has consented to the priming in the context of the global resolution of this case as reflected in the RSA.

76. The DIP Facility represents the best source of financing available to the Debtor under the circumstances, and was negotiated at arm's length with both the Pre-Petition Lender and the DIP Lender, resulting in terms that the Debtor submits are reasonable and appropriate to meet the Debtor's financing needs during the Chapter 11 Case.

77. I am advised by ATG that it does not believe that the Debtor can obtain financing to fund and preserve its assets on terms more favorable than those offered by the DIP Lender under the DIP Facility and that the Debtor is (and has been) unable to obtain unsecured credit allowable under section 503(b)(1) of the Bankruptcy Code as an administrative expense. I also do not believe that the Debtor is likely to obtain secured credit under section 364(c) of the Bankruptcy Code on equal or more favorable terms than those offered by the DIP Lender under the DIP Facility. As discussed above the DIP Facility, is tied into the RSA.

78. Accordingly, the relief requested in the DIP Financing Motion is in the best interest of the Debtor's estate, creditors, and other parties in interest, and the Debtor requests approval thereof.

**CONCLUSION**

79. In furtherance of the reorganization efforts, the Debtor respectfully requests that the orders granting the relief requested in the First Day Motions be entered.

Dated: June 5, 2017

*/s/ Vivie Lee* \_\_\_\_\_

Vivie Lee  
Chief Executive Officer  
FirstRain, Inc.