



ENTERED
09/10/2015

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re

DIVERSE ENERGY SYSTEMS, LLC
d/b/a LEAN TECHNOLOGIES, LLC,

Debtor.

CHAPTER 11 CASE

CASE NO. 15-34738
36

(Joint Administration Pending)

**STIPULATION RE ADEQUATE PROTECTION – NATIONS FUND I, LLC; AND
ORDER THEREON**

To the Honorable David R. Jones, Chief United States Bankruptcy Judge:

The above-captioned Debtor (the “**Debtor**”) and Nations Fund I, LLC (“**Nations**”), do hereby enter into this Stipulation re Adequate Protection (this “**Stipulation**”), based upon the following recitals, each of which is an integral part hereof, and respectfully request that the Court enter its order approving this Stipulation.

RECITALS

A. On September 7, 2015 (the “**Petition Date**”), the Debtor and various affiliates filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code.

B. Scheduled for hearing before this Court on September 10, 2015, are various expedited and emergency motions and applications of the Debtor and its affiliates, including, the *Debtors’ Emergency Motion for the Entry of Interim and Final Orders Authorizing the Use of Cash Collateral and Granting Adequate Protection* (the “**Cash Collateral Motion**”) [Docket No. 10].

C. Prior to the Petition Date, on December 29, 2014, the Debtor and Nations entered into that certain *Master Lease Agreement*, as supplemented and modified from time to time (the “**Lease**”). Pursuant to the Lease the Debtor leases from Nations 25 pieces of equipment owned

by Nations (the "**Nations Equipment**"). The Nations Equipment is then rented to third party customers of the Debtor. Pursuant to the Lease, the Debtor is obligated to pay Nations \$49,230.52 (the "**Base Lease Payment**"), on the first day of each month, as and for a lease payment (plus various other fees, costs and expenses as may be permitted pursuant to the Lease).

D. Pursuant to the Lease the Debtor is required to maintain a lockbox account (the "**Lockbox Account**") established by and under the exclusive dominion and control of Nations, with respect to all payments due to the Debtor from the Debtor's customer, Devon Energy Production Company, L.P. ("**Devon**"). Nations asserts that it has a valid and perfected security interest in the entire funds in the Lockbox Account. In contrast, the Debtor asserts that Nations lien against the funds in the Lockbox Account is limited to funds generated from the Nations Equipment.

E. As of the Petition Date the Lockbox account had a zero balance. As of the Petition Date the Debtor owed Nations \$10,218.64 with respect to the September 1, 2015 Base Lease Payment, the balance thereof having been applied by Nations prior to the Petition Date.

F. The Debtor has advised Nations that on a monthly basis Devon pays the Debtor, *via* the Lockbox Account, \$83,766, solely on account of the Nations Equipment. Further, the Debtor expects deposits into the Lockbox Account, on a monthly basis, of approximately \$150,000, from Devon. Finally, the Debtor has advised that it expects approximately \$300,000 to be paid by Devon into the Lockbox Account during the month of September 2015 (consisting of Devon's August and September 2015 payments to the Debtor). Nations has not confirmed the figures in this Recital, and thus relies upon the Debtor's statements with respect thereto.

G. Nations asserts that the Lease is a *true lease* not subject to challenge as, *inter alia*, a disguised financing transaction. The Debtor takes no position, as this time, with respect to this issue.

H. Nations has advised the Debtor that it has various objections to the Cash Collateral Motion, which the Debtor disagrees with. Nations has further advised that part and parcel to the approval of this Stipulation, Nations' issues with respect to the Cash Collateral Motion will be resolved and thus Nations will not object thereto.

STIPULATION

Based upon the foregoing recitals, the Debtor and Nations agree and stipulate as follows:

1. Absent Court approval, on notice and an opportunity to be heard: (a) the Debtor will not seek to, nor instruct Devon to, modify the requirement that all payments due to the Debtor from Devon be made directly to the Lockbox Account; and (b) Devon is hereby authorized and directed to make all payments due to the Debtor into the Lockbox Account on a timely basis.

2. From the funds sent by Devon to the Lockbox Account in the month of September 2015, Nations shall distribute such funds in the following descending order, to the extent available:

a. First, to Nations, the sum of \$10,218.64, as and for the balance of the September 2015 Base Lease Payment, and Nations shall apply such payment to such balance;

b. Second, to Nations, the sum of \$60,000, which amount shall be held by Nations, as and for adequate protection for, *inter alia*, the Debtor's obligations under the Lease ("**Adequate Protection Funds**"), and such amount shall be applied by Nations as provided herein below;

c. Third, to the Debtor, the sum of no more than \$79,781.36;

d. Fourth, to Nations, the sum of \$15,000, as additional Adequate Protection Funds; and

e. Fifth, to the Debtor, all sums in excess of the amounts distributed pursuant to paragraphs 2.a. through 2.d. above.

3. From the funds sent by Devon to the Lockbox Account in each month, commencing in the month of October 2015, and each month thereafter, Nations shall distribute such funds in the following descending order:

a. First, to Nations, the sum of \$49,230.52, as and for the Base Lease Payment for said month and Nations shall apply such payment in such regard; provided however, that to the extent Nations has already made said month Base Lease Payment by the application of funds from the Adequate Protection Funds

Account (as defined below), pursuant to paragraph 5 hereof, then the distribution to Nations pursuant to this paragraph 3.a. shall be as a replenishment of the Adequate Protection Funds Account;

b. Second, to Nations, the sum of \$34,535.48, as additional Adequate Protection Funds, subject to the limitation provided in the last sentence of paragraph 4 hereof; and

c. Third, to the Debtor, all sums in excess of the amount distributed to Nations pursuant to paragraphs 3a. and 3b. hereof.

4. Nations shall maintain all Adequate Protection Funds, in a segregated account (the "**Adequate Protection Funds Account**"), and shall provide to the Debtor, on the 5th business day of each month, commencing October 7, 2015, an accounting for all amounts in the Adequate Protection Funds Account. Except as expressly authorized in this Stipulation, no use or other disposition of the Adequate Protection Funds shall be made except upon further Order of the Court. The Adequate Protection Funds Account shall, at no time, exceed \$75,000.

5. Pursuant to the Lease, Base Lease Payments are due on the first day of each month. Payments from Devon to the Lockbox Account do not generally arrive on the first day of each month. Thus, on and after October 1, 2015, in Nations sole and exclusive discretion, Nations may apply up to \$49,230.52 from the Adequate Protection Funds Account to the Base Lease Payment in any particular month, and, to the extent so applied, shall replenish the Adequate Protection Funds Account pursuant to paragraph 3.a. hereof.

6. In the event that the funds in the Lockbox Account are insufficient to make the payments required to Nations by paragraph 3.a. hereof, then Nations, without further Order of the Court, may apply the Adequate Protection Funds from the Adequate Protection Funds Account to the extent of the shortfall in the monthly obligations owed to Nations pursuant to paragraph 3.a. hereof. Further, in the event that Adequate Protection Funds are utilized by Nations as provided in this paragraph 6, Nations shall be entitled to replenish the Adequate Protection Funds and the Adequate Protection Funds Account, from the next funds in the Lockbox Account, after payment of the obligations to Nations pursuant to paragraphs 3.a. and 3.b. hereof.

7. In the event that the Lockbox Account and the Adequate Protection Funds are insufficient to make payment to Nations, in a particular month in accordance with paragraph 3.a. hereof, the Debtor shall be obligated, from other funds in its possession to cover any such shortfall, on or prior to the last business day of the month in question.

8. The Debtor, on its own behalf and on behalf of its Estate, agrees that absent the Debtor filing an adversary proceeding against Nations, on or before October 5, 2015, seeking to challenge the *true lease nature* of the Lease or any other action against Nations with respect to the Lease, that the Lease shall be deemed a *true lease* and not subject to challenge as a disguised financing transaction or otherwise challenged. Further, the Debtor asserts that a deadline of October 25, 2015, is fair and reasonable for all other interested parties to challenge the Lease in any respect, and thus requests that the Court set such deadline. Thus, upon entry of an Order approving this Stipulation, the Debtor proposes to provide notice to all interested parties of such deadline after which no interested party may challenge the Lease in any respect.

9. The Debtor shall comply with all duties and obligations required pursuant to the Lease.

10. The Debtor agrees, that no later than, the earlier of: (a) 20 days before the first set hearing on confirmation of a plan of reorganization or liquidation for the Debtor; and (b) January 8, 2016, the Debtor shall file a motion seeking to assume or reject the Lease. Absent such timely filed motion, the Lease shall be automatically deemed rejected, without further Order of the Court on the first calendar day after the earlier of (a) and (b) in the preceding sentence.

11. Nothing in this Stipulation prevents Nations from seeking an Order of the Court compelling the assumption or rejection of the Lease at any time. By entering into this Stipulation, Nations does not waive any of its rights and remedies under the Lease, any guaranty agreements, or under state or federal law, all of which are expressly preserved, except as modified by this Stipulation and only to the extent the Stipulation is fully complied with by the Debtor.

12. The Debtor shall not file a plan of reorganization or liquidation that shall modify the terms of this Stipulation, absent written consent of Nations.

13. This Stipulation shall be binding upon the Debtor, its successors, assigns, trustees appointed over its estate, or an examiner for the Debtor.

14. The Court shall retain exclusive jurisdiction to hear and determine all matters or disputes arising from or relating to the interpretation and/or enforcement of this Stipulation. This provision shall expressly survive conversion of the Debtor's chapter 11 case, appointment of a trustee/examiner in the Debtor's case, or dismissal of the Debtor's case. In the event of a dismissal or conversion, this Court will nonetheless retain jurisdiction and authority to enforce this Stipulation and the Debtor's compliance with all provisions, including the Debtors' obligations under the Stipulation.

15. The Debtor and Nations expressly agree and acknowledge that this Stipulation is subject to the Court's approval and absent the Court's entry of an Order approving this Stipulation, then this Stipulation shall have no force and effect and shall not otherwise bind or obligate the parties hereto.

DATED: September 9, 2015

By: /s/ Michael D. Warner

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Counsel to Nations Fund I, LLC

DATED: September 9, 2015

By: /s/ J. Robert Forshey

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Proposed Counsel to the Debtor

ORDER

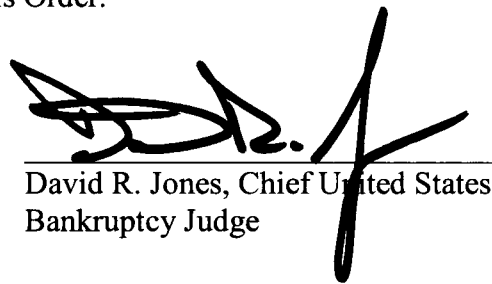
The forgoing Stipulation having been presented to the Court in connection with the Cash Collateral Motion, and the Court having accepted the presentations, arguments and proffers of the Debtor and Nations as to the terms of the Stipulation and the reasonableness thereof; and the Court having determined that proper and sufficient notice of the Stipulation has been provide and no further notice is necessary; and the Court having found that the Stipulation is in the best interest of the Debtor and its estate, and together with the findings that the Court made on the record at the hearing on the Cash Collateral Motion, it is therefore;

ORDERED that the foregoing Stipulation is hereby APPROVED.

ORDERED that the Debtor is authorized to execute any document necessary to carry out the terms and obligations pursuant to the Stipulation and take any action necessary to effectuate the same.

ORDERED that (a) October 5, 2015, with respect to the Debtor, and any affiliated Debtors, and (b) October 25, 2015, with respect to any other party in interest, including any representative of the Debtor's estate, including an Official Creditors Committee, a trustee or an examiner appointed for the Debtor's estate, with requisite standing (the "**Challenge Deadlines**"), are the last days to commence an adversary proceeding against Nations, to assert any claim, with respect to the validity, priority, status or amount of the obligations owed pursuant to the Lease, challenges to the Lease as a true lease or claims that the Lease is a disguised financing transaction (collectively, "**Challenges**"). Upon the expiration of the Challenge Deadlines, any Challenges, by any party in interest (including, the Debtor, any official creditors' committee, any trustee or examiner) not asserted in a timely filed adversary proceeding, will be deemed to be forever waived and barred, without further Order of the Court.

ORDERED that the Debtor shall provide notice of this Order and the Stipulation to all interested parties within 5 calendar days of the entry of this Order.



David R. Jones, Chief United States
Bankruptcy Judge