

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN RE:	)	Chapter 11
	)	
NEW ENERGY CORP.,	)	Case No. 12-33866-hcd
	)	
Debtor.	)	
_____	)	

**ORDER GRANTING DEBTOR’S THIRD  
MOTION FOR AUTHORITY TO USE CASH COLLATERAL**

This cause comes before the Court on the Debtor’s Third Motion For Authority To Use Cash Collateral (the “Third Cash Use Motion”)<sup>1</sup> filed by New Energy Corp., as debtor and debtor-in-possession (the “Debtor”). No objections to the Third Cash Use Motion were filed and the DOE (defined herein), the Debtor’s senior secured creditor, consented to the proposed relief. The Court, having considered the Third Cash Use Motion and being duly advised of the premises makes the following findings of fact and conclusions of law:

1. On November 9, 2012 (the “Petition Date”), the Debtor commenced this case by filing a voluntary petition for relief under Chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). The Debtor is continuing to operate its business as a debtor-in-possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code.

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(b) and 1334. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409. This proceeding presents a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (M). The Court’s jurisdictional

<sup>1</sup> Capitalized terms not otherwise defined herein shall have the meanings given to them in the Third Cash Use Motion.

limits and ability to enter final judgments under *Stern v. Marshall*, 131 S.Ct. 2594, 180 L.Ed.2d 475 (U.S. 2011) are not implicated.

3. On November 27, 2012, the Trustee appointed the Committee as an official committee to represent the interests of unsecured creditors of the Debtor pursuant to § 1102 of the Bankruptcy Code. The Trustee filed formal notice with the Court reflecting such appointment on that same date.

4. On the Petition Date, the Debtor filed the First Cash Use Motion. On December 18, 2012, the Court entered the Final First Cash Use Order, granting the First Cash Use Motion and authorizing the Debtor to use Cash Collateral through February 3, 2013. On February 7, 2013, the Court entered the Second Cash Use Order, granting the Second Cash Use Motion and authorizing the Debtor to use Cash Collateral through March 3, 2013.

5. Notice of the Third Cash Use Motion has been given in accordance with Federal Rule of Bankruptcy Procedure 4001(b).

6. The Debtor operates an ethanol refining plant in South Bend, Indiana. It had approximately 33 employees as of the Petition Date.

7. The Debtor became indebted to the United States Department of Energy (“DOE”) upon the Debtor’s acquisition of its business from an entity that had defaulted on a loan guaranteed by DOE under the Alcohol Fuels Program. The Debtor’s indebtedness to DOE is established in a Second Amended and Restated Loan Restructuring Agreement, dated December 18, 1997, and other loan documents referenced therein, as well as the following documents:

- i. Promissory note of New Energy Corp., payable to DOE, dated as of June 30, 2011, in the principal amount of Six Million Five Hundred Eighty-two Thousand Three Hundred Four and 19/100 Dollars (\$6,582,304.19); and

- ii. Promissory Note of New Energy Corp., payable to DOE, dated as of July 1, 2011, in the principal amount of Twenty-Four Million Five Hundred Ninety-Nine Thousand Two Hundred Seventy-Four and 55/100 Dollars (\$24,599,274.55); and
- iii. Modification and Forbearance Agreement, dated as of June 5, 2009, and effective as of January 1, 2009, as amended by the First Amendment to Modification and Forbearance Agreement, dated as of July 1, 2011 and effective as of January 1, 2011, as further modified by the First Extension Agreement, dated as of January 24, 2012 and effective as of January 17, 2012, as further modified by the Forbearance Agreement, dated as of April 17, 2012, and effective as of April 2, 2012, as amended by the First Amendment to the April 18, 2012 Forbearance Agreement, dated and effective as of April 24, 2012, as amended by the Second Amended and Restated 2012 Second Forbearance Agreement (collectively, the Forbearance Agreements”).

As of the Petition Date the Debtor's total obligations to DOE totaled approximately \$33,349,500.00.

8. The Debtor is in default of its obligations to DOE under the Loan Documents. As set forth more fully in the Forbearance Agreements, in exchange for certain periods of forbearance by DOE, the Debtor agreed to release the United States from any and all claims, among other things, that relate to, arise out of or otherwise arise in connection with the transactions contemplated in the Loan Documents and dealings between the Debtor and the United States relating thereto, and the Debtor ratifies same. In addition, the Debtor has released the Cash Collateral Creditors (defined below) from any claims or actions pursuant to the avoidance provisions of Bankruptcy Code §§ 544, 547 548, 549 and 550 and surcharge rights under Bankruptcy Code § 506(c), except with respect to the Debtor Professional Carve-Out and the Committee Professional Carve-Out.

9. The Debtor is also indebted to LF Financial, LLC (“LF Financial”) pursuant to certain various credit facilities in the approximate aggregate amount of \$7,097,000.00 as of the Petition Date.

10. The Debtor's indebtedness to DOE and LF Financial (the "Cash Collateral Creditors") is secured by valid, enforceable, properly perfected and non-avoidable liens and security interests in all of the property owned by Debtor, including among other things, cash, cash equivalents and accounts receivable. DOE has first priority liens up to \$2.6 million in collateral and the remainder of the DOE's liens are equal in priority with those of LF Financial. The foregoing admissions of the Debtor shall not apply to the Committee and are subject to the Committee's investigation and challenge rights set forth in the Final First Cash Use Order.

11. All of the Debtor's cash and cash equivalents (cash and accounts receivable) as of the Petition Date and all proceeds thereof securing the Debtor's obligations to the Cash Collateral Creditors constitute "cash collateral" as that term is defined in § 363(a) of the Bankruptcy Code (the "Cash Collateral"). The Debtor knows of no party other than the Cash Collateral Creditors who may claim an interest in the Cash Collateral.

12. The Debtor cannot maintain the value of its assets and pursue confirmation of a plan of liquidation to be filed jointly by the Debtor and the Committee without paying for necessary services and satisfying its other obligations incurred in the ordinary course of business.

13. The Debtor lacks sufficient unencumbered Cash Collateral with which to pay its expenses in this Chapter 11 case.

14. The Debtor must have authority to use Cash Collateral in order to protect its assets long enough to allow it to achieve a successful assets sale and confirmation of a plan of liquidation to be filed jointly by the Debtor and the Committee.

15. The Debtor lacks an alternative borrowing source from which it could secure sufficient funding to pay its expenses without the use of Cash Collateral.

16. The Debtor has developed a budget for ordinary and necessary business and administrative expenses for the period March 4, 2013 through April 28, 2013 (the "Third Budget"). A true and correct copy of the Third Budget is attached hereto as **Exhibit A**.

17. The Debtor's use of Cash Collateral to the extent and on the terms and conditions set forth herein is in the best interests of the Debtor, its estate, and its creditors in that it allows the Debtor to pay its expenses and avoid serious irreparable harm to the estate and the Debtor's creditors.

18. The Third Cash Use Motion complies with Federal Rule of Bankruptcy Procedure 4001. Based upon the foregoing findings and conclusions and the representations of counsel made at the hearing hereon, and good and sufficient cause appearing therefor, it is therefore **CONSIDERED AND ORDERED** as follows:

A. The foregoing findings and conclusions are hereby incorporated into the decretal provisions of this Order as if set forth in full herein.

B. The Third Cash Use Motion is hereby granted.

C. The Debtor may use Cash Collateral only according to the terms set forth in this Order.

D. The Cash Collateral Creditors shall be entitled to the following Adequate Protection during time period set forth in the Third Budget as adequate protection for the Debtor's use of Cash Collateral:

- i. The Debtor shall expend its Cash Collateral only for the items, and in the amounts, set forth in the Budget, plus a variance versus the Budget of up to 10% overall and for each line item; provided that medical claims shall be paid in the amounts for which the Debtor is obligated as determined by the third party administrator and, where appropriate, by the stop loss insurer;
- ii. The Debtor shall provide to the Cash Collateral Creditors replacement liens on all property of the Debtor of the same type, description and

priority as the Cash Collateral Creditors' pre-petition collateral to the extent that there is any diminution in value of such property resulting from the Debtor's post-petition use of such property;

- iii. The post-petition security granted to the Cash Collateral Creditors shall have priority over all other claims (including but not limited to claims pursuant to Bankruptcy Code §§ 503(b), 507(a), 507(b) and 726(b)) other than United States Trustee fees, to the extent of any diminution in value of their collateral;
- iv. The Debtor shall maintain insurance on all collateral of the Cash Collateral Creditors;
- v. The Debtor shall maintain and care for the Debtor's property post-petition in a manner consistent with the Debtor's maintenance and care for such property pre-petition;
- vi. The Debtor shall provide the Cash Collateral Creditors with monthly operating reports upon filing with the Court and the United States Trustee;
- vii. The Debtor shall provide the Cash Collateral Creditors with weekly budget-to-actual variance reports, to be provided by Wednesday of the subsequent week. Variance reports shall contain, among other things, reporting of the Debtor's professional fees as separate line items.
- viii. The Debtor shall permit the Cash Collateral Creditors, or their representatives, to have access to any of the Debtor's premises, on reasonable prior notice, to inspect the Debtor's books and records and the Cash Collateral Creditors' collateral;
- ix. The Debtor shall meet the deadlines of a sale of substantially all of the assets of the estate as set forth in the Final First Cash Use Order and the Order Granting Motion to Establish Bidding Procedures for the Sale of Substantially All The Assets of New Energy Corp. and Establishing Auction and Hearing Dates (Doc. No. 116) entered on December 19, 2012, except as extended or otherwise modified with the consent of the Cash Collateral Creditors; and
- x. The Debtor shall maintain all bank accounts with Lake City Bank.

E. The occurrence of any event listed in this paragraph shall be a default. If the Debtor fails to cure such default or file a motion contesting that a default has occurred within five business days of written notice of the default from the Cash Collateral Creditors, the

automatic stay of 11 U.S.C. § 362 shall immediately be lifted with respect to the Cash Collateral Creditors without the need to obtain further order of this Court. Events of default include:

- i. The Debtor's failure to provide any of the listed forms of adequate protection set forth in paragraph D above;
- ii. Appointment of a trustee; and
- iii. Conversion of the Debtor's bankruptcy case to a Chapter 7 case.

F. The Cash Collateral Creditors may withdraw their consent to the Debtor's use of Cash Collateral for some or all of expenditures set forth in the Third Budget after the closing of the sale of the Debtor's assets, in which case the Debtor shall not be authorized to use Cash Collateral for such expenditures absent further order of the Court.

G. Nothing in this Order shall bar or inhibit the Cash Collateral Creditors from seeking additional adequate protection, lifting of the automatic stay, conversion of the case to a Chapter 7 case, appointment of the trustee or any other form of relief, or from consenting to the Debtor's use of Cash Collateral amounts in excess of those set forth in the Budget.

H. The terms of the Investigation Period set forth in the Final First Cash Use Order are incorporated herein except that the expiration of the Investigation Period shall be changed to through and including February 15, 2013.

I. Notice of the entry of this Order shall be given by the Debtor to the parties upon whom service is required by Federal Rules of Bankruptcy Procedure 2002 and 4001.

J. Absent further order of this Court, or withdrawal of the Cash Collateral Creditors' consent under paragraph F above, the Debtor's authority to use Cash Collateral shall expire on April 28, 2013.

SO ORDERED this 27 day of February, 2013.

A handwritten signature in black ink, appearing to read "H. C. Dees, Jr.", written in a cursive style.

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The Honorable Harry C. Dees, Jr., Judge  
United States Bankruptcy Court



**New Energy Corp.**  
**Wkly Cash Flows - Forecast**  
 Prepared as of 2/20/2013

Wk Ending	Extended Forecast							
	3/10/13	3/17/13	3/24/13	3/31/13	4/7/13	4/14/13	4/21/13	4/28/13
<b>Cash - Beginning (Cash Recon. below)</b>	\$ 330,823	\$ 249,003	\$ 132,263	\$ 254,694	\$ 187,454	\$ 316,334	\$ 305,094	\$ 366,374
<i>Transfer From Sweep Account</i>	200,000	-	200,000	-	200,000	-	100,000	-
<b>Cash Receipts</b>								
Asset Recoveries/Other	30,000	-	-	-	-	-	-	-
Subtotal - Cash Receipts	30,000	-	-	-	-	-	-	-
<b>Operating Disbursements</b>								
Utility Costs (1)	70,880	2,500	880	25,000	880	-	880	-
Maintenance Exp./Operating Costs	14,500	14,500	14,500	14,500	2,500	2,500	2,500	2,500
Wages & Payroll Taxes	20,440	3,740	37,740	3,740	62,740	3,740	19,940	43,840
Employee Related	2,000	2,000	2,000	2,000	1,000	1,000	1,000	1,000
Medical Claims	2,000	2,000	2,000	20,000	2,000	2,000	2,000	2,000
Insurance - Prop/Genl,WC	-	90,000	18,449	-	-	-	-	-
Subtotal - Operating Disb.	109,820	114,740	75,569	65,240	69,120	9,240	26,320	49,340
<b>Operating Cash Flow</b>	<b>(79,820)</b>	<b>(114,740)</b>	<b>(75,569)</b>	<b>(65,240)</b>	<b>(69,120)</b>	<b>(9,240)</b>	<b>(26,320)</b>	<b>(49,340)</b>
<b>Bankruptcy/Restructuring Fees</b>								
Financial Advisory - Debtor	50,000	-	-	-	-	-	-	-
Legal - Debtor	100,000	-	-	-	-	-	-	-
Creditor Committee - Professional	50,000	-	-	-	-	-	-	-
Chapter 11 Trustee	-	-	-	-	-	-	10,400	4,875
Other Costs	2,000	2,000	2,000	2,000	2,000	2,000	2,000	2,000
Subtotal - Bankruptcy/Restructuring	202,000	2,000	2,000	2,000	2,000	2,000	12,400	6,875
Subtotal - Total Cash Disb.	311,820	116,740	77,569	67,240	71,120	11,240	38,720	56,215
<b>Net Cash Flow (2)</b>	<b>(281,820)</b>	<b>(116,740)</b>	<b>(77,569)</b>	<b>(67,240)</b>	<b>(71,120)</b>	<b>(11,240)</b>	<b>(38,720)</b>	<b>(56,215)</b>
<b>Cash - Ending Balance</b>	<b>\$ 249,003</b>	<b>\$ 132,263</b>	<b>\$ 254,694</b>	<b>\$ 187,454</b>	<b>\$ 316,334</b>	<b>\$ 305,094</b>	<b>\$ 366,374</b>	<b>\$ 310,159</b>
<b>Cash Reconciliation</b>								
Operating Acct (New) Beg. Balance	\$ 330,823	\$ 249,003	\$ 132,263	\$ 254,694	\$ 187,454	\$ 316,334	\$ 305,094	\$ 366,374
Net Cash Flow	(281,820)	(116,740)	(77,569)	(67,240)	(71,120)	(11,240)	(38,720)	(56,215)
Transfer From Sweep Account	200,000	-	200,000	-	200,000	-	100,000	-
Operating Acct (New) Ending Balance	249,003	132,263	254,694	187,454	316,334	305,094	366,374	310,159
Sweep Acct (Old/Frozen) Beg. Balance	1,539,804	1,339,804	1,339,804	1,139,804	1,139,804	939,804	939,804	839,804
Transfer to Operating Account	(200,000)	-	(200,000)	-	(200,000)	-	(100,000)	-
Sweep Acct (Old/Frozen) Ending Balance	1,339,804	1,339,804	1,139,804	1,139,804	939,804	939,804	839,804	839,804
<b>Total Cash Ending Balance</b>	<b>\$ 1,588,807</b>	<b>\$ 1,472,067</b>	<b>\$ 1,394,498</b>	<b>\$ 1,327,258</b>	<b>\$ 1,256,138</b>	<b>\$ 1,244,898</b>	<b>\$ 1,206,178</b>	<b>\$ 1,149,963</b>

(1) Assumes a close of 3/28 with utilities paid out of deposits or escrow funds.

(2) Revised forecast does not include property taxes and potential closing costs.

EXHIBIT A