

UNITED STATES BANKRUPTCY COURT
DISTRICT OF IDAHO

IN RE:)	
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WESTERN AUTO SALES, LLC,)	Case No. 16-01375-JDP
)	
Debtor.)	Chapter 11
)	
_____)	

**INTERIM ORDER AUTHORIZING DEBTOR’S USE OF CASH COLLATERAL
PURSUANT TO 11 U.S.C. § 363**

THIS CAUSE was scheduled for hearing before the Court upon the Second Amended Motion for Use of Cash Collateral (Docket Entry No. 16, the “Motion”) filed by Western Auto Sales, LLC (the “Debtor”) on October 28, 2016 pursuant to 11 U.S.C. § 363. The Court conducted a preliminary hearing on the Motion on November 1, 2016, at which counsel for Debtor, counsel for Automotive Finance Corporation (“AFC”), and counsel for NextGear Capital, Inc. (“NextGear,” and collectively with AFC, the “Secured Creditors”), and counsel for the United States Trustee were present.

The Secured Creditors each filed an objection to the Motion objecting to the Debtor’s use of cash collateral in which they have an interest without adequate protection as provided by 11 U.S.C. § 363(e).

At the hearing on the Motion, the Court was advised that the Debtor, AFC, and NextGear have agreed to the Debtor’s use of cash collateral in which the Secured Creditors have an interest on an interim basis, and it appears to the Court that the terms and conditions of that agreement are reasonable and appropriate, are in the best interests of the Debtor, its estate, and its creditors,

and the Court finds it appropriate to authorize the Debtor's use of cash collateral as set forth herein on an interim basis and until such time as the Court conducts a final hearing on the Motion. The Court therefore makes the following findings of fact and conclusions of law. To the extent any finding of fact shall be determined to be a conclusion of law, it shall be so deemed, and vice versa.

Findings of Fact

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(M).

2. The Debtor filed its voluntary Chapter 11 petition on October 25, 2016 (the "Petition Date").

3. On or about October 7, 2013, the Debtor executed a Demand Promissory Note and Loan and Security Agreement in favor of NextGear in the initial principal sum of \$150,000.00 (the "NextGear Note"), together with interest payable and other charges all as stated in the Note. The Note was, by its terms, an amendment and restatement of all prior notes between Debtor and NextGear. Pursuant to the Note, Debtor granted NextGear a security interest in all of its assets and properties wherever located, including, without limitation, all equipment of any kind or nature; all vehicles, vehicle parts and inventory then owned or thereafter acquired; purchase money inventory, the purchase of which was financed or floorplanned by NextGear for Debtor, of whatever kind or nature, and all returns, repossessions, exchanges, substitutions, attachments, additions, accessions, accessories, replacements, and proceeds thereof; all accounts receivable, chattel paper, and general intangibles then owned or thereafter acquired by Debtor, together with the proceeds thereof; and all of Debtor's documents, books and records relating to

the foregoing. On or about August 10, 2014, Debtor and NextGear entered into an Amendment to Demand Promissory Note and Loan and Security Agreement pursuant to which NextGear increased Debtor's credit line to \$350,000.00. On or about June 5, 2015, Debtor and NextGear entered into a second Amendment to Demand Promissory Note and Loan and Security Agreement pursuant to which NextGear increased Debtor's credit line to \$500,000.00. On or about May 31, 2016, Debtor and NextGear entered into a third Amendment to Demand Promissory Note and Loan and Security Agreement pursuant to which NextGear increased Debtor's credit line to \$625,000.00. The amount due and owing from the Debtor to NextGear under the NextGear Note, as of the Petition Date, is \$535,593.88.

4. The Debtor acknowledges that prior to the Petition Date, NextGear financed the purchase of certain vehicles by the Debtor under the NextGear Note in which the Debtor remains in possession and in which NextGear has a first priority, properly perfected security interest (the "NextGear Secured Vehicles"). The amount due and owing from the Debtor to NextGear on the NextGear Secured Vehicles, as of the Petition Date, is \$494,746.02, which includes a collateral audit fee of \$165.00.

5. The Debtor acknowledges that prior to the Petition Date, it sold or otherwise disposed of certain vehicles purchased by the Debtor and financed by NextGear under the NextGear Note and did not pay NextGear the proceeds derived from the sale or disposition of those vehicles (the "NextGear Sold Out of Trust Vehicles"). The amount due and owing from the Debtor to NextGear on the NextGear Sold Out of Trust Vehicles, as of the Petition Date, is \$40,847.86.

6. NextGear asserts a first priority security interest in substantially all assets and proceeds of the Debtor, and asserts a first priority security interest in the NextGear Secured Vehicles and the proceeds of the NextGear Sold Out of Trust Vehicles, by virtue of the security interests granted by the Debtor to NextGear under the NextGear Note and NextGear's initial UCC filing made with the Idaho Secretary of State on February 26, 2008.

7. On or about November 13, 2012, the Debtor executed a Demand Promissory Note and Security Agreement (as amended from time to time, the "AFC Note"), pursuant to which the Debtor promised to pay AFC \$200,000.00, or such greater or lesser principal amount as may be advanced by AFC pursuant thereto, together with interest. Under the terms of the AFC Note and to secure the Debtor's present and future obligations to AFC under that note and any other instrument, guaranty, or other document, the Debtor granted AFC a security interest in substantially all of its assets, including inventory, then owned or thereafter acquired. Under the terms of the AFC Note and to secure the Debtor's present and future obligations to AFC under that note and any other instrument, guaranty, or other document, the Debtor also granted AFC a purchase money security interest in all vehicles, parts, and equipment financed by AFC thereunder. The amount due and owing from the Debtor to AFC under the AFC Note is \$257,949.44.

8. The Debtor acknowledges that prior to the Petition Date, AFC financed the purchase of certain vehicles by the Debtor under the AFC Note in which the Debtor remains in possession and in which AFC has a first priority, properly perfected security interest (the "AFC Secured Vehicles"). The amount due and owing from the Debtor to AFC on the AFC Secured

Vehicles is \$179,502.74.

9. The Debtor acknowledges that prior to the Petition Date, it sold or otherwise disposed of certain vehicles purchased by the Debtor and financed by AFC under the AFC Note and did not pay AFC the proceeds derived from the sale or disposition of those vehicles (the “AFC Sold Out of Trust Vehicles”). The amount due and owing from the Debtor to AFC on the AFC Sold Out of Trust Vehicles is \$78,446.70.

10. AFC asserts a second priority security interest in substantially all assets and proceeds of the Debtor, and asserts a first priority security interest in the AFC Secured Vehicles and the proceeds of the AFC Sold Out of Trust Vehicles, by virtue of the security interests granted by the Debtor to AFC under the AFC Note and AFC’s initial UCC filing made with the Idaho Secretary of State on November 14, 2012.

11. Westlake Flooring Company, LLC (“Westlake”) may assert an interest in certain cash collateral of the Debtor based on its prepetition loan agreement with the Debtor and its initial UCC filing with the Idaho Secretary of State on June 20, 2016. Westlake was provided notice of the Motion and the Debtor’s intent to use cash collateral in which Westlake may assert an interest. Westlake did not file an objection to the Motion or the relief requested therein, and did not appear at the preliminary hearing on the Motion to assert its interest in cash collateral.

12. For the purposes of this Order, the Debtor acknowledges and does not dispute the validity, priority, or enforceability of the liens asserted by the Secured Creditors or the amounts due to the Secured Creditors under their promissory notes and agreements; provided, however, that neither the Debtor nor any other party in interest shall be precluded from reviewing and

challenging the validity, priority, or enforceability of the security interests and liens held or asserted by any creditor of the Debtor or the amounts due and owing from the Debtor to such creditor.

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The Debtor's only significant source of income is through continued business operations consisting primarily of the sale of the Debtor's motor vehicle inventory and the collection of the accounts generated by those sales. In order to continue existing operations, the Debtor requires the use of cash collateral in which the Secured Creditors have an interest, and the Secured Creditors have agreed to such use on the terms set forth herein.

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Vehicle titles and cash proceeds generated from the Debtor's operations, inventory, and accounts receivable may constitute cash collateral of the Secured Creditors within the meaning of 11 U.S.C. § 363 and are property of the Debtor's estate pursuant to 11 U.S.C. § 541.

15. The terms and conditions of this Order provide adequate protection of the interests of the Secured Creditors for the Debtor's interim use of the cash collateral.

16. The requirements of the Bankruptcy Rules and the Bankruptcy Code, including without limitation Rule 4001(d) of the Federal Rules of Bankruptcy Procedure, have been satisfied for the Debtor's use of cash collateral and for the grant of adequate protection to the Secured Creditors upon the terms set forth in this Order.

Conclusions of Law

WHEREFORE, based upon the foregoing Findings of Fact, it is ORDERED that:

A. The Motion is GRANTED on an interim basis as provided for herein;

B. A final hearing on the Motion shall be held on **November 30, 2016, at 9:00 a.m.** Mountain time in the United States Bankruptcy Court, 550 W. Fort Street, Boise, Idaho.

C. During the interim period of cash use and until such time as the Court conducts a final hearing on the Motion, Debtor shall be authorized to use cash collateral for its post-petition, necessary and reasonable operating expenses, as detailed in the budget attached hereto as **Exhibit A**. Additionally, Debtor is authorized to pay Ms. Warner for her vehicle sold on consignment and to pay off the three liens that encumber the three vehicles accepted as trade-ins. Debtor shall be required to receive written authorization from each of the Secured Creditors for expenditures in excess of the budgeted amounts, except that the Debtor is authorized to exceed an individual line item by a maximum of 10% without prior approval.

D. As adequate protection under 11 U.S.C. § 363(e) of the Bankruptcy Code, the Debtor shall tender to Westlake by November 30, 2016, the sum of \$1,071.00.

E. The Debtor shall open and maintain a separate Debtor-in-possession bank account for each of the Secured Creditors and Westlake (the "Adequate Protection Accounts") into which the Debtor shall deposit only proceeds derived from the sale or disposition of vehicles financed by AFC, NextGear, or Westlake, as the case may be. By 5 p.m. Mountain time each Friday, the Debtor shall provide the Secured Creditors and their counsel with a report of the balance in the Adequate Protection Accounts, including a record of all deposits and withdrawals made since the time of the last report. Debtor may use funds in the Adequate Protection Accounts only in accordance with the terms of this Order and the budget attached hereto.

F. Each of the reports referenced in this Order shall be emailed to AFC at jeremy.dunn@autofinance.com and AFC's counsel at akight@taftlaw.com, and to NextGear

at amanda.stafford@nextgearcapital.com and NextGear's counsel at jkurtz@hawleytroxell.com.

G. The Debtor shall at all times keep each Secured Creditor's collateral insured under the same terms and conditions as set forth in the respective Secured Creditor's Note. Each Secured Creditor may inspect its collateral and all documents related thereto and the Debtor's premises during regular business hours without notice to the Debtor or its counsel. The Debtor shall maintain all documents related to each Secured Creditor's collateral, including all sale documents, at its principal place of business.

H. The Debtor shall remain current in the payment of all post-petition tax liabilities, including but not limited to accruing ad valorem property taxes, sales and use taxes, payroll taxes, and income taxes.

I. During the period of interim cash use, the Debtor may sell the NextGear Secured Vehicles, the AFC Secured Vehicles, and vehicles subject to Westlake's security interest, in the ordinary course of business. As adequate protection for the Debtor's use of cash collateral in which the Secured Creditors have an interest, the Debtor shall provide the Secured Creditors with adequate protection under 11 U.S.C. § 363(e) as follows:

i. The Debtor may sell any Secured Vehicle for an amount sufficient to pay the respective Secured Creditor the full amount owing on that vehicle as of the date of sale as indicated in the records of the Secured Creditor (the "Payoff Amount"). Absent written permission from the Secured Creditor, the Debtor may not sell a Secured Vehicle for less than the Payoff Amount, and the Debtor may not dispose of any Secured Vehicle through trade.

ii. Upon receipt of proceeds from the sale of any Secured Vehicle, the Debtor shall deposit all proceeds from the sale of each Secured Vehicle into the respective Secured Creditor's Adequate Protection Account;

iii. Until such time as the Debtor becomes current on its financial obligations to each Secured Creditor under their respective Note, within twenty-four (24) hours of

the receipt of the proceeds from the sale of any Secured Vehicle, the Debtor shall remit to the respective Secured Creditor (i) the Payoff Amount, and (ii) fifty percent (50%) of any amount over and above the Payoff Amount. The portion over and above the Payoff Amount that is paid to each Secured Creditor shall be applied to the debt owing from the Debtor to the Secured Creditor on that creditor's Sold Out of Trust Vehicles; the Debtor shall be entitled to use the remaining fifty percent (50%) of the amount over and above the Payoff Amount for ordinary operating expenses in accordance with the terms of this Order and pursuant to the budget attached hereto;

iv. When the Debtor becomes current on its financial obligations to each Secured Creditor under their respective Note, within twenty-four (24) hours of the receipt of the proceeds from the sale of any Secured Vehicle, the Debtor shall remit to the respective Secured Creditor the Payoff Amount. The Debtor shall be entitled to use all proceeds over and above the Payoff Amount for ordinary operating expenses in accordance with the terms of this Order and pursuant to the budget attached hereto;

v. Upon the sale of a Secured Vehicle, the Debtor shall provide written documentation to the respective Secured Creditor that, in the creditor's discretion, verifies the final sale of such vehicle, and within two (2) business days of such verification the Secured Creditor shall provide the Debtor with the title to the vehicle. The Secured Creditors shall retain all vehicle titles until such time as the Debtor pays for Secured Vehicles in accordance with the terms of this Order;

vi. Upon the receipt of documentation to the Secured Creditor that, in the creditor's discretion verifies the sale of a Sold Out of Trust Vehicle, and within two (2) business days of such verification, the Secured Creditor shall provide the Debtor with the title to the Sold Out of Trust Vehicle. As to NextGear, documentation sufficient to verify the sale of a Sold Out of Trust Vehicle, includes, without limitation, an affidavit from the consumer and a copy of the Bill of Sale;

vii. To the extent of the Cash Collateral used by the Debtor, each of the Secured Creditors is granted a replacement lien in all property and assets of any kind and nature in which Debtor has an interest, whether real or personal, tangible or intangible, wherever located, now-owned or hereafter-acquired or arising and all proceeds, products, rents and profits thereof, including, without limitation, all cash, accounts, chattel paper, deposit accounts, documents, equipment, general intangibles, instruments, investment property, letters of credit rights, vehicles, goods, accounts receivable, inventory, cash-in-advance deposits, real estate, machinery, intellectual property (including trademarks and trade names), licenses, causes of action, rights to payment, including tax refund claims, insurance proceeds and tort claims, and the proceeds, products, rents and profits of all of the foregoing with the same priority, validity and extent as the Secured Creditor's pre-petition liens; provided, however, that such liens shall not attach to any claims or causes of action arising under 11 U.S.C. §§ 544, 545, 547, 548 or 550;

viii. Other than for routine maintenance and test-drives during normal business hours, the Debtor shall not allow any Secured Vehicle to leave the Debtor's business premises until receipt of title from the respective Secured Creditor. Under no circumstances shall a Secured Vehicle be utilized as a "Demo" vehicle; and

ix. By 5 p.m. Mountain time each Friday during the period of interim cash use, the Debtor shall provide each Secured Creditor and their counsel with (a) a written report regarding each Secured Vehicle sold or otherwise disposed of in the previous week, including (i) the date of such sale, (ii) an identification of such vehicle, and (iii) the sale price of such vehicle, and (b) a written report regarding each Secured Vehicle still owned by the Debtor and the location and any change in condition of such vehicle.

A. With respect to the balances due and owing from the Debtor to the Secured Creditors on the Sold Out of Trust Vehicles, the Debtor agrees that (i) within two (2) business days of the date of the entry of this Order, it shall pay to the Secured Creditors all proceeds in the Debtor's possession that are attributable to the sale or disposition of each Secured Creditor's Sold Out of Trust Vehicles and in accordance with the budget attached hereto, and (ii) the remaining balances of each of the Secured Creditors' Sold Out of Trust Vehicles will be satisfied in full by November 29, 2016.

B. During the period of interim cash use, all interest, fees, and other charges provided for under the AFC Note and the NextGear Note shall accrue in accordance with the terms thereof and shall be allowed as provided under 11 U.S.C. § 506, provided however that the Secured Creditors agree to waive curtailment fees provided for under the Notes during the period of interim cash use.

C. All payments made to the Secured Creditors during the period of interim cash use may be applied to the Debtor's obligations by each Secured Creditor in its discretion.

D. In the event the Debtor fails to perform all obligations or make all payments to

the Secured Creditors in accordance with the AFC Note or the NextGear Note or the terms of this Order and fails to cure such failure within two (2) business days after receipt by Debtor's counsel of written notice of such failure, the Debtor's right to use cash collateral shall terminate without further order of the Court and a Secured Creditor may, without further notice or a hearing, request the Court to terminate the automatic stay of 11 U.S.C. § 362 as to its secured vehicles and other collateral and be entitled to exercise all rights under its respective Note and applicable law with respect to its secured vehicles and other collateral.

E. In the event any creditor receives relief under 11 U.S.C. § 362 with respect to collateral in which the Secured Creditors assert an interest, the Debtor's right to use cash collateral shall terminate without further order of the Court and a Secured Creditor may, without further notice or a hearing, request the Court to terminate the automatic stay of 11 U.S.C. § 362 as to its secured vehicles and other collateral and be entitled to exercise all rights under its respective Note and applicable law with respect to its secured vehicles and other collateral.

F. The Debtor expressly reserves its right to seek additional use of cash collateral beyond the stated term of this Order. Any party may seek further consideration of the relief granted in this Order or other cash collateral issues by filing a request with the Court. Nothing in this Order shall waive any rights of the Secured Creditors unless expressly provided for herein.

G. This Order shall remain in full force and effect until the earlier of the (i) entry of an Order by the Court modifying the terms of this Order; (ii) entry of an Order by the Court terminating this Order for cause, including but not limited to breach of its terms and conditions;

or (iii) entry of a subsequent interim or final Order approving use of cash collateral.

H. The Debtor shall serve notice of this Order on all parties entitled to receive the same pursuant to Bankruptcy Rules 1007 and 4001.

//end of text//

Dated: November 7, 2016



Honorable Jim D. Pappas
United States Bankruptcy Judge

Submitted by Jeffrey P. Kaufman, for Debtor

Approved as to form and content

/s/ Randal J. French (e-mail approval)

Randal J. French
Attorney for Automotive Finance Corporation

/s/ John Kurtz (e-mail approval)

John Kurtz
Attorney for NextGear Capital, Inc.

/s/ Mary Kimmel

Mary Kimmel
Attorney for United States Trustee