

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

ZIP'S WISEGUYS INC.,

Debtor.¹

Chapter 11

BK No. 1-16-12294-CLB

Hon. Carl L. Bucki

MOTION PURSUANT TO 11 U.S.C. §§ 105, 361, AND 363 FOR AUTHORITY
TO USE CASH COLLATERAL ON *EX PARTE* EMERGENCY BASIS AND PROVIDE
ADEQUATE PROTECTION AND TO SCHEDULE INTERIM AND FINAL HEARINGS
TO USE CASH COLLATERAL

Zip's Wiseguys Inc. ("Zip's" or, the "Debtor"), the Debtor in the above-captioned proceedings voluntarily commenced under Chapter 11 of title 11 of the United States Code (the "Code"), by and through its proposed counsel, Amigone, Sanchez & Mattrey, LLP, as and for its motion (the "Motion"), pending an interim and final hearing for interim and final orders, for an emergency *ex parte* order (the "Ex Parte Order"), pursuant to Code sections 105, 361, and 363, and rule 4001 of the Federal Rules of Bankruptcy Procedure (the "Rules"), (a) granting authority to use cash collateral on an emergency basis, and (b) scheduling interim and final hearings on further use of cash collateral, respectfully represents as follows:

PRELIMINARY STATEMENT

1. Zip's is a New York corporation formed on or about October 28, 2014, which has operated since that time, and continues to operate, as a pizzeria and fast food restaurant,

¹ The last four digits of the Debtor's federal tax identification number is 2087. See 11 U.S.C. §342(c).

providing dine-in, takeout, and delivery food service. Zip's has three locations: (a) 1341 Hertel Avenue, Buffalo, New York 14216; (b) 1161 Sheridan Drive, Tonawanda, New York 14150; and (c) 1127 Tonawanda Street, Buffalo, New York, 14207.

2. Paula Turton holds a one hundred (100%) percent shareholder interest in Zip's and is its sole director. Daniel DiRosa is the Vice President of Zip's, and is the individual authorized and directed to be the signatory on behalf of the Debtor and has been designated as the responsible person in the above-captioned proceeding.

3. As of the Petition Date (defined below), Zip's was indebted to the following creditors holding secured claims:

- a. Department of the Treasury, Internal Revenue Service (the "IRS"), in the aggregate amount of approximately \$32,000 (the "IRS Prepetition Indebtedness");
- b. New York State Department of Taxation and Finance (the "NYS Tax Dep't"), in the aggregate amount of approximately \$23,000 (the "NYS Tax Dep't Prepetition Indebtedness"); and
- c. New York State Department of Labor, Unemployment Insurance Division (the "NYS DOL"), in the aggregate amount of approximately \$3,500 (the "NYS DOL Prepetition Indebtedness" and together with the IRS Prepetition Indebtedness and the NYS Tax Dep't Prepetition Indebtedness, the "Prepetition Indebtedness").

The exact amount of the Prepetition Indebtedness is subject to review by the Debtor, the United States Trustee, or any other party in interest, and is the reason the IRS Prepetition

Indebtedness, the NYS Tax Dep't Prepetition Indebtedness, and the NYS DOL Prepetition Indebtedness will be listed as "disputed" on the Debtor's Schedule D Creditors Who Have Claims Secured by Property.

4. The IRS currently holds a lien against Zip's cash collateral, as evidenced by three (3) Notices of Federal Tax Lien, in the aggregate amount of \$30,775.71, filed with the Office of the Erie County Clerk as follows: (a) on or about March 14, 2016, in the amount of \$12,987.65; (b) on or about January 19, 2016, in the amount of \$11,958.06; and (c) on or about November 5, 2015, in the amount of \$5,830.00 (collectively, the "Prepetition IRS Tax Liens"), which evidence a lien against Zip's cash collateral (the "IRS Tax Lien Notices").

5. The NYS Tax Dep't also currently holds a lien against Zip's cash collateral, as evidenced by three (3) Warrants, in the aggregate amount of \$15,787.10, filed with the Office of the Erie County Clerk as follows: (a) on or about October 24, 2016, in the amount of \$244.15; (b) on or about September 26, 2016, in the amount of \$9,544.87; and (c) on or about June 27, 2016, in the amount of \$5,998.08 (collectively, the "Prepetition NYS Tax Dep't Liens"), which evidence a lien against Zip's cash collateral (the "NYS Tax Dep't Warrants").

6. The NYS DOL also currently holds a lien against Zip's cash collateral, as evidenced by four (4) Warrants, in the aggregate amount of \$12,134.61, filed with the Office of the Erie County Clerk as follows: (a) on or about September 30, 2016, in the amount of \$1,993.86; (b) on or about July 5, 2016, in the amount of \$2,043.44; (c) on or about March 30, 2016, in the amount of \$7,349.39, which is further subject to that certain Satisfaction of Judgment received by the Debtor and dated as of October 4, 2016; and (d) on or about September 3, 2015, in the amount of \$747.92 (collectively, the "Prepetition NYS DOL Liens"),

which evidence a lien against Zip's cash collateral (the "NYS DOL Warrants" and together with the IRS Tax Lien Notices and the NYS Tax Dep't Warrants, the "Lien Documents"). Copies of the Lien Documents are attached as Exhibit A.

7. Zip's further submits that its cash collateral is not subject to any other claims or liens, including those by any trust fund beneficiaries, as such term is defined by the Perishable Agricultural Commodities Act, or any such other similar state or federal law.

8. To maintain the liquidity necessary to administer this Chapter 11 case and continue its operations in the ordinary course of business, the Debtor respectfully requests authority: (i) to continue using cash collateral in the ordinary course of business subject to the Prepetition IRS Tax Liens, the Prepetition NYS Tax Dep't Liens, and the Prepetition NYS DOL Liens, and during the pendency of this Chapter 11 case (the "Cash Collateral"), in accordance with (a) the emergency budget covering the period through November 21, 2016 (the "Emergency Budget" and attached to the *Ex Parte* Order as Exhibit 1), (b) the interim budget covering the period from November 22, 2016, through December 5, 2016 (the "Interim Budget"), and (c) the thirteen (13) week budget covering the period from December 6, 2016 through March 7, 2017 (the "Final Budget" and collectively with the Emergency Budget and the Interim Budget, the "Budgets"), all of which are collectively attached as Exhibit B); (ii) to grant adequate protection to the IRS, the NYS Tax Dep't, and the NYS DOL, with respect to any potential diminution in value to the extent the Cash Collateral is actually used during the pendency of this Chapter 11 case, pursuant to the Budgets, and as set forth more fully below (collectively, the "Adequate Protection"); and (iii) to schedule interim and final hearings on the relief sought by this Motion.

9. A copy of the *Ex Parte* Order is attached as Exhibit C.

BACKGROUND

10. On November 14, 2016, the Debtor voluntarily filed its petition and commenced the above-captioned Chapter 11 proceeding (the "Petition Date").

11. The Debtor is authorized to continue to operate its business and manage its property as a debtor in possession pursuant to Code sections 1107(a) and 1108.

12. No trustee, examiner, or statutory committee of creditors has been appointed in this Chapter 11 case.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a), and the Standing Order of Reference so ordered by Hon. William M. Skretny, Chief Judge, United States District Court for the Western District of New York, on February 29, 2012. This is a "core proceeding" pursuant to 28 U.S.C. § 157(b)(2)(A) and (b)(2)(M). Venue of this proceeding is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

THE EMERGENCY AND INTERIM RELIEF REQUESTED SHOULD BE GRANTED BY THE COURT

14. By this Motion, the Debtor requests entry of an *Ex Parte* Order, pending interim and final hearings, (i) granting authority to use the Cash Collateral on an emergency basis; and (ii) scheduling an interim and final hearing on the relief sought in this Motion. Specifically, the Debtor seeks the following:

- a. authority to use the Cash Collateral subject to the Prepetition IRS Lien, the Prepetition NYS Tax Dep't Lien, and the NYS DOL Lien, on an emergency

basis pursuant to the Emergency Budget, so as to meet basic operating costs and payroll obligations of the Debtor during this Chapter 11 case, in exchange for granting Adequate Protection to the IRS, the NYS Tax Dep't, and the NYS DOL in the form of roll-over or replacement liens granting security to the same extent, to the same relative priority, and with respect to the same assets as served as collateral for the Prepetition IRS Indebtedness, the Prepetition NYS Tax Dep't Indebtedness, and the Prepetition NYS DOL Indebtedness, respectively, to the extent the Cash Collateral is actually used, without the need of any further recordation to perfect such liens or security interests (the "Adequate Protection Liens"); and

- b. scheduling interim and final hearings on this Motion.

15. Upon interim and final hearings on the relief sought by this Motion, the Debtor further seeks authority to (i) continue using the Cash Collateral in accordance with the Budgets, with the Adequate Protection Liens continuing as the Cash Collateral is actually used during this Chapter 11 case; and (ii) provide adequate protection in the form of monthly cash payments as they would be due and owing prepetition in the ordinary course of business, but in any event to commence no later than December 15, 2016, as follows:

- a. \$625.00 per month to the IRS;
- b. \$625.00 per month to the NYS Tax Dep't; and
- c. \$70.00 per month to the NYS DOL (collectively, the "Adequate Protection Cash Payments").

A. The Debtor should be authorized to use the Cash Collateral and to Provide the Adequate Protection.

16. Code section 363(c) provides that a debtor may use cash collateral in the ordinary course of business, after a preliminary hearing scheduled in accordance with the

needs of the debtor. *See* 11 U.S.C. § 363(c) (2016). Parties with an interest in cash collateral are entitled to adequate protection. *See* 11 U.S.C. § 363(e) (2016). Adequate protection may be provided in various forms, including granting roll-over or replacement liens and providing cash payments. *See generally* 11 U.S.C. § 361 (2016); *see also* 495 *Cent. Park*, 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992); *In re Beker Indus. Corp.*, 58 B.R. 725, 736 (Bankr. S.D.N.Y. 1986); *In re Hubbard Power & Light*, 202 B.R. 680, 685 (Bankr. E.D.N.Y. 1996). An *ex parte* order authorizing the use of cash collateral may be appropriate so as to maintain the status quo of the debtor's operations. *See generally*, *Armstrong v. Norwest Bank, Minneapolis, N.A.*, 964 F.2d 797, 801 (8th Cir. 1992).

17. The Debtor does not dispute that there is the Prepetition IRS Indebtedness in the approximate amount of \$32,000 subject to review by the Debtor, the United States Trustee, and any other party in interest. However, the Debtor reserves its rights to challenge the validity, extent, and priority of the Prepetition IRS Liens held by the IRS in the Debtor's cash proceeds.

18. The Debtor does not dispute that there is the Prepetition NYS Tax Dep't Indebtedness in the approximate amount of \$23,000 subject to review by the Debtor, the United States Trustee, and any other party in interest. However, the Debtor reserves its rights to challenge the validity, extent, and priority of the Prepetition NYS Tax Dep't Liens held by the NYS Dep't of Tax in the Debtor's cash proceeds.

19. The Debtor does not dispute that there is the Prepetition NYS DOL Indebtedness in the approximate amount of \$3,500 subject to review by the Debtor, the United States Trustee, and any other party in interest. However, the Debtor reserves its

rights to challenge the validity, extent, and priority of the Prepetition NYS DOL Liens held by the NYS DOL in the Debtor's cash proceeds.

20. Prior to the Petition Date, the Debtor used cash collateral in the ordinary course of business to pay its ongoing operating costs and payroll obligations, the latter of which are due each Saturday.

21. In the event the Debtor is not authorized to use the Cash Collateral on an emergency basis, the Debtor will be unable to meet its various obligations as they become due, including its weekly payroll due November 19, 2016.

22. The Debtor believes and submits that the Adequate Protection Liens and proposed Adequate Protection Cash Payments are sufficient to protect the IRS, the NYS Tax Dep't, and the NYS DOL, from any potential diminution in value of their collateral with respect to any prepetition indebtedness and their respective prepetition liens, including the relative priority of any such liens, to the extent the Cash Collateral is actually used during this Chapter 11 case.

23. Accordingly, for the reasons set forth above, entry of an *Ex Parte* Order granting the above relief on an emergency basis, pending interim and final hearings on the additional relief sought herein, is necessary to preserve the status quo of the Debtor's operations and to avert immediate and irreparable harm to the Debtor's estate.

B. Request for an Interim and Final Hearing

24. Pursuant to Rule 4001(b)(2), the Debtor requests (a) the Court set a date within seven (7) days after entry of the *Ex Parte* Order as a hearing for consideration of entry of an interim order on the relief sought by this Motion; and (b) the Court set a date more than

fourteen (14) days after entry of the *Ex Parte* Order as a hearing for consideration of entry of a final order on the relief sought by this Motion.

25. The Debtor requests that it be authorized to serve a copy of the signed *Ex Parte* Order, which fixes the time and date for the interim and final hearings, by first class mail upon the notice parties listed below. The Debtor further requests that the Court consider such notice of the Interim Hearing to be sufficient notice under Rule 4001(c)(2).

THE DEBTOR SATISFIES BANKRUPTCY RULE 6003

26. Rule 6003 provides that, “[e]xcept to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within twenty-one (21) days after the filing of the petition, issue an order granting the following: . . . a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate” FED. R. BANKR. P. 6003(b) (2016). The Debtor submits that, because the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtor for the reasons set forth herein, Rule 6003 has been satisfied. The Debtor only seeks authorization to pay amounts due and owing in the first twenty-one (21) days after the filing of the petition and do not seek to accelerate any payments.

WAIVER OF RULE 6004(a) AND 6004(h)

27. To implement the foregoing successfully, the Debtor respectfully requests a waiver of the notice requirements under Rule 6004(a) and the fourteen (14)-day stay of an order authorizing the use, sale, or lease of property under Rule 6004(h). Pursuant to Rule 6004(h), “[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of fourteen (14) days after entry of the order, unless the court

orders otherwise.” As set forth above, the payments proposed herein are essential to prevent potentially irreparable damage to the Debtor’s operations, value, and ability to reorganize. Accordingly, the Debtor submits that ample cause exists to justify a waiver of the fourteen (14)-day stay imposed by Rule 6004(h), to the extent it applies.

RESERVATION OF RIGHTS

28. Nothing contained herein is intended to be or shall be construed as (i) an admission as to the validity of any claim against the Debtor, except as expressly set forth herein, (ii) a waiver of the Debtor’s or any appropriate party in interest’s rights to dispute any claim, or (iii) an approval or assumption of any agreement, contract, program, policy, or lease under Code section 365. Likewise, if the Court grants the relief sought herein, any payment made pursuant to the Court’s order is not intended to be and should not be construed as an admission to the validity of any claim or a waiver of the Debtor’s rights to dispute such claim, except as expressly set forth herein.

NOTICE

29. The Debtor proposes that Notice of this Motion and the Motion for interim and final hearings be provided to (i) the Office of the U.S. Trustee for Region 2: Western District of New York (Buffalo Division) (Attn.: Mr. Joseph W. Allen, II, Esq.); (ii) the Department of the Treasury, Internal Revenue Service, secured creditor of the Debtor; (iii) the New York State Department of Taxation and Finance, secured creditor of the Debtor; (iv) Mr. Christopher Moen, Esq., counsel to New York State Department of Taxation and Finance; and (v) the New York State Department of Labor, Unemployment Insurance Division; and that Notice of this Motion for interim and final hearings be provided to the

holders of the twenty (20) largest unsecured claims against the Debtor. The Debtor submits that, in view of the facts and circumstances, such notice is sufficient and no other or further notice need be provided.

WHEREFORE the Debtor respectfully requests entry of the *Ex Parte* Order, as well as interim and final orders, granting the relief requested herein and such other and further relief as the Court may deem just and proper.

DATED: Buffalo, New York
November 14, 2016

AMIGONE, SANCHEZ & MATTREY, LLP

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