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6
7 **IN THE UNITED STATES BANKRUPTCY COURT**
8 **FOR THE DISTRICT OF ARIZONA**

9 In re:

Chapter 11 Proceedings

10 LAZAR ENTERPRISES, INC, d.b.a.
11 ARIZONA STAGECOACH an Arizona
corporation

Case No. 4:17-bk-06877-BMW

12 Debtor.

**EMERGENCY MOTION FOR (1)
INTERIM ORDER AUTHORIZING
USE OF CASH COLLATERAL; (2)
ORDER SCHEDULING FINAL
HEARING ON USE OF CASH
COLLATERAL; AND, (3) FINAL
ORDER AUTHORIZING USE OF
CASH COLLATERAL**

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17 Debtor and debtor in possession LAZAR ENTERPRISES, INC, an Arizona
18 corporation, d.b.a. ARIZONA STAGECOACH (the “**Debtor**” or “**Arizona Stagecoach**”)
19 respectfully requests that the Court enter an order under 11 U.S.C. §§ 105, 361, 362 and
20 363 and Fed. R. Bankr. P. 4001: (1) authorizing use of cash collateral on an interim basis;
21 (2) scheduling a final hearing on use of cash collateral, and (3) ultimately enter a final or
22 authorizing use of cash collateral so that Arizona Stagecoach may continue to operate and
23 reorganize.

24 This Court has jurisdiction to hear and determine the core proceeding arising from
25 this Cash Collateral Motion under 28 U.S.C. §§ 1334, 157(a) and (b)(2)(A) and (M) and
26

1 *General Order 01-15* of the United States District Court for the District of Arizona. Since
2 Arizona Stagecoach filed its voluntary petition for relief under Chapter 11 on June 16, 2017
3 (“**Petition Date**”), venue is proper for this case under 28 U.S.C. §§ 1408 and 1409.

4 This Cash Collateral Motion is supported by the *Omnibus Declaration of Kirk*
5 *Markworth* filed contemporaneously herewith, and the attached Memorandum of Points and
6 Authorities and attached Exhibits (including proposed interim budget).

7 DATED: June 19, 2017

8 KASEY C. NYE, LAWYER, PLLC,

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10 By /s/Kasey C. Nye, #20610
11 Kasey C. Nye

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12 Proposed Attorneys for the Debtor

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1 **MEMORANDUM OF POINTS AND AUTHORITY**

2 **I. BACKGROUND**

3 **A. Arizona Stagecoach**

4 Arizona Stagecoach, based out of Tucson International Airport, has offered reliable
5 and affordable transportation service throughout Southern Arizona since 1978. In addition
6 to offering door-to-door to and from Tucson International Airport, Arizona Stagecoach
7 offers transportation services in a 100-mile radius of Tucson, Arizona including, but not
8 limited to Phoenix Sky Harbor, Davis-Monthan Air Force Base, Oro Valley, Saddlebrook,
9 Vail, Green Valley, Nogales, AZ, Fort Huachuca/Sierra Vista, Benson, Bisbee,
10 Tombstone, Douglas and places in between. Arizona Stagecoach also provides wedding,
11 and Event Transportation.

12 **B. Events Leading to Chapter 11**

13 The market for airport shuttle services has changed significantly since 2012. As a
14 preliminary matter, the number of enplanements and deplanements at Tucson International
15 Airport have dropped 13% from 3,649,783 to 3,228,389. More significant has been the
16 exponential growth of passengers using ride share apps such as UberX and Lyft which
17 have dramatically eroded the Debtor's market share in revenue. In 2014 the Debtor's
18 revenue was \$1.37 million, in 2015 it was \$1.24 million and in 2016 its revenue was just
19 \$1,027,000.

20 Over the last 36-months, the Debtor has attempted various measures to cut costs
21 and increase revenue including:

- 22 • Reducing staff;
- 23 • Eliminating the Counter inside Tucson International Airport, which required
24 24/7 staffing (even when there are no incoming or outgoing flights);
- 25 • Changing drivers from payroll employees to 1099 independent contractors;
- 26 and,

- 1 • Adding a daily shuttle service to and from Phoenix Sky Harbor.

2 While the Debtor was trying to stabilize its rapidly contracting business, the Debtor
3 borrowed money secured by merchant service receivables (credit card receivables).

4 **C. The Chapter 11 Case**

5 The Debtor filed this Chapter 11 Reorganization Case in order to implement
6 strategies to increase profitability while certain historic obligations (back rent, back fuel
7 debt, and merchant service loans) are stayed. Once its operational model is stabilized and
8 profitable the Debtor will propose a plan restructuring its secured and unsecured debt in
9 accordance with the Bankruptcy Code.

10 **D. Secured Creditors Alleging Interest in Cash Collateral**

11 The following creditors may assert an interest in cash collateral:

- 12 • **On Deck Capital, Inc.**, 12/2/2015 Original Principal Balance \$165,000.
13 Current Balance \$127,000;
- 14 • **IOU Financial** 5/21/2016 Original Principal Balance \$51,785 Current
15 Balance. \$34,000
- 16 • **Core Business Finance** 8/5/2016 Original Principal Balance \$64,800.
17 Current Balance \$50,000
- 18 • **Core Business Finance** 9/13/2016 Original Principal Balance \$14,000.
19 Current Balance \$33,000.

20 The only one of these creditors that require adequate protection is On Deck Capital,
21 Inc. IOU Financial failed to file a UCC-1 financing statement with the Arizona Secretary
22 of State, and therefore, whatever interests it may assert in the Debtor's cash collateral may
23 be avoided under 11 U.S.C. § 544 strong arm powers.

24 While Core Business Finance appears to have filed a UCC-1 with the Arizona
25 Secretary of State on August 9, 2016 SOS File Number 2016-222-8766-3, its claim suffers
26 from a more significant defect. Section 4.5 of its agreements provide that the loans are to

1 be governed and construed in accordance with the laws of the State of New York. The
2 interest rates under the loans is 59.62% and on the second loan is 82.63% per annum
3 respectively. Since the subject loans impose an annual interest rate well in excess of 25%,
4 they are criminally usurious on their face (see New York Penal Law § 190.40; *Venables v*
5 *Sagona*, 85 AD3d 904, 905 [2011]).

6 While a corporation or limited liability company, or an individual guarantor of such
7 an entity's debt, may not assert the defense of civil usury under New York Law
8 (see General Obligations Law § 5-521 [1]; Limited Liability Company Law § 1104
9 [a]; *Schneider v Phelps*, 41 NY2d 238, 242 [1977]; *Pepin v Jani*, 101 AD3d 694, 695
10 [2012]; *Arbuzova v Skalet*, 92 AD3d 816, 816 [2012]), a corporation or LLC, or a
11 guarantor of such an entity's debt, **may assert the defense of criminal usury** (see General
12 Obligations Law § 5-521 [3]; Limited Liability Company Law § 1104 [c]; Penal Law
13 § 190.40; *Blue Wolf Capital Fund II, L.P. v American Stevedoring, Inc.*, 105 AD3d
14 178 [2013]; *Nikezic v Balaz*, 184 AD2d 684, 685 [1992]).

15 In New York State, a usurious contract is **void** and relieves the Debtor of the
16 obligation to repay principal and interest thereon (see General Obligations Law § 5-
17 511; *Abir v Malky, Inc.* 59 AD3d 646 [2009], *Seidel v 18 E. 17th St. Owners*, 79 NY2d
18 735 [1992]; *Stanley Weisz, P.C. Retirement Plan v NCHD Assoc.*, 237 AD2d 276 [1997]).
19 Since the contracts are void under New York Law, the Debtor has no obligation to repay
20 Core Financial, much less an obligation to provide “adequate protection.”

21 **E. Proposed Adequate Protection**

22 On the petition date, the Debtor had the following cash collateral in its possession:
23 Merchant Service Receivables totaling \$1,926, other accounts receivable totaling
24
25
26

1 \$2,750.60, for a total cash collateral value of \$4,676.60.¹ In order to adequately protect

2 On Deck the Debtor will:

- 3 • Operate in accordance with the Attached Budget;
- 4 • Provide budget to actual accounting on a weekly basis;
- 5 • Granting OnDeck a replacement lien on Cash Collateral generated post-
6 petition to the same nature, extent \$4,676.60 and priority as the creditor
7 enjoyed in the Cash Collateral on the Petition Date.

8 **II. ARGUMENT**

9 **A. The Law**

10 The Bankruptcy Code authorizes a debtor in possession to utilize another entity's
11 cash collateral with authorization from the bankruptcy court, so long as the other entity's
12 interest in the cash collateral is adequately protected. In this regard, the Bankruptcy Code
13 provides at 11 U.S.C § 363 as follows:

14 (c)(2) The trustee may not use, sell, or lease cash collateral under paragraph
(1) of this subsection unless—

- 15 (A) each entity that has an interest in such cash collateral consents; or
- 16 (B) the court, after notice and a hearing, authorizes such use, sale, or
17 lease in accordance with the provisions of this section.

18 This Motion asks the Court to authorize use of cash collateral both on a preliminary
19 interim basis then permanent basis under 11 U.S.C. § 363(c)(3). Under this subsection the
20 debtor in possession must establish a likelihood of success at a final hearing under the
21 standard set for the in 11 U.S.C. § 363(e).

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24 ¹ While On Deck asserts an interest in the Debtor's bank accounts, that interest is not properly
25 perfected. Since A.R.S. §§ 47-9312, 47-9314 require the secured creditor to have control over
26 such accounts. On Deck has no control account agreement which would give it control over the
Debtor's pre-petition bank accounts. Since it is unperfected, and interest On Deck asserts in the
Debtor's bank accounts can be avoided under the debtor-in-possession's strong arm powers under
11 U.S.C. § 544.

1 Section 363(e) states that the Court “shall prohibit or condition such use, sale, or
2 lease [of cash collateral] *as is necessary to provide adequate protection of such interest.*”

3 Adequate protection is defined in 11 U.S.C. § 361 which provides:

4 When adequate protection is required under § 362, 363 or 364 of this title, of
5 an interest of an entity and property, such adequate protection may be
6 provided by -

7 (1) requiring the trustee to make a cash payment or periodic cash payments
8 to such entity, to the extent that the stay under section 362 of this title, use,
9 sale, or lease under section 363 of this title, or any grant of a lien under
10 section 364 of this title results in a decrease in the value of such entity’s
11 interest in such property;

12 (2) providing to such entity an additional or replacement lien to the extent
13 that such stay, use, sale, lease, or grant results in a decrease in the value of
14 such entity’s interest in such property; or

15 (3) granting such other relief, other than entitling such entity to
16 compensation allowable under section 503(b)(1) of this title as an
17 administrative expense, as will result in the realization by such entity of the
18 indubitable equivalent of such entity’s interest in such property.

19 The purpose of providing "adequate protection" is to ensure the creditor receives
20 the value for which the creditor bargained pre-bankruptcy. *In re O'Connor*, 808 F.2d 1393,
21 1396 (10th Cir. 1987). "Adequate protection" is a concept which is decided flexibly on a
22 case-by-case basis. *In re Martin*, 761 F.2d 472 (8th Cir., 1985); *In re Monroe Park*, 17
23 B.R. 934 (D.C. Delaware 1982). Since "value" is the lynchpin of adequate protection, and
24 since value is a function of many factual variables, it follows that adequate protection is a
25 question of fact. *In re Martin*, 761 F.2d at 472; *In re O'Connor*, 808 F.2d at 1397.

26 Thus, the protection afforded a creditor whose cash collateral is permitted by the
Bankruptcy Court to be used by a debtor in possession is whatever condition is deemed
necessary to provide adequate protection of the creditors' interest. *In re Quality Beverage
Co., Inc.*, 181 B.R. 887, 896 (Bankr. S.D. Tex, 1995); *In re J.K.J. Chevrolet, Inc.*, 190
B.R. 542, 545 (Bankr. E.D. Virginia 1995). Pursuant to 11 U.S.C. § 361, adequate
protection may be provided by a replacement lien. *In re Center Wholesale, Inc.*, 759 F.2d

1 1440, 1450 (9th Cir. 1985); *In re Swedeland Dev. Group, Inc.*, 16 F.3d 552, 564 (3d Cir.,
2 1994); *In re Beeker Industries Corp.*, 58 B.R. 725, Bankr. S.D.N.Y. 1986).

3 The Debtor proposes to provide adequate protection to the On Deck by granting a
4 replacement lien on Cash Collateral generated post-petition to the same nature, extent and
5 priority as the creditor enjoyed in the Cash Collateral on the Petition Date. This
6 replacement Lien in will give On Deck the indubitable equivalent to the interest in cash
7 collateral that it had on the Petition Date. On Deck will be further protected by the
8 operating budget and ongoing reporting.

9 III. CONCLUSION

10 Arizona Stagecoach respectfully requests that this Court set an emergency hearing
11 to:

- 12 1) Authorize the Debtor to use cash collateral on an interim basis in accordance
13 with the Budget;
- 14 2) Set a final hearing on the Debtor's use of cash collateral; and,
- 15 3) For such other relief as the Court deems just under the circumstances.

16 DATED: June 19, 2017

17 KASEY C. NYE, LAWYER, PLLC,

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19 By /s/Kasey C. Nye, #20610

20 Kasey C. Nye

21 Proposed Attorneys for the Debtor
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Exhibit A

WEEK ENDING	STAGECOACH						WEEKLY		BUDGET		13 WEEKS				
	6-23-17	6-30-17	7-7-17	7-14-17	7-21-17	7-28-17	8-4-17	8-11-17	8-18-17	8-25-17	9-8-17	9-15-17	9-22-17	9-29-17	
500 - Sales	12,000	14,000	12,000	14,000	12,000	14,000	12,000	14,000	12,000	14,000	12,000	14,000	12,000	14,000	
606 - Fuel	1,500	1,500	1,400	1,400	1,400	1,400	1,300	1,300	1,300	1,300	1,300	1,400	1,400	1,400	
607 - Permit Fees	0	3,250	0	0	0	0	0	0	0	0	0	0	0	0	
604 - Sub Contract Drivers	8,500	0	8,100	0	8,100	0	8,100	0	8,100	0	8,100	0	8,100	0	
608 - Van Insurance	2,210	2,210	2,210	2,210	2,210	2,210	2,210	2,210	2,210	2,210	2,210	2,210	2,210	2,210	
611 - Auto Expense & Repair	450	450	450	450	450	450	450	450	450	450	450	450	450	450	
618 - Credit Card Fees	0	0	1,800	0	0	0	1,800	0	0	0	1,800	0	0	0	
700 - Advertising & Promotion	0	0	1,600	0	0	0	1,600	0	0	0	1,600	0	0	0	
701 - Management Wages	3,200	0	3,200	0	3,200	0	3,200	0	3,200	0	3,200	0	3,200	0	
704 - Dispatch Wages	4,000	0	4,000	0	4,000	0	4,000	0	4,000	0	4,000	0	4,000	0	
710 - Rent & Storage	0	1,350	0	0	0	1,350	0	0	0	1,350	0	0	0	1,350	
711 - Payroll Taxes	648	0	648	0	648	0	648	0	648	0	648	0	648	0	
713 - Uniforms	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
714 - Postage & Freight	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
717 - Telephone/cable	0	1,300	0	1,300	0	0	0	1,300	0	0	0	1,300	0	0	
720 - Office Supplies	30	30	30	30	30	30	30	30	30	30	30	30	30	30	
722 - Dues & Membership	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
728 - Radio Expense	0	0	450	0	0	0	450	0	0	0	450	0	0	0	
736 - Business Insurance	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
737 - Printing	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
748 - Professional Fees	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
753 - Miscellaneous Expense	0	0	0	0	0	0	0	0	0	0	0	0	0	0	
754 - Database	0	0	1,100	0	0	0	1,100	0	0	0	1,100	0	0	0	
	20,538	10,090	24,988	5,390	20,038	5,440	24,888	5,290	19,938	5,340	24,888	5,390	20,038	5,440	