

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF:)
)
D & L ENERGY, INC., *et al.*)
)
Debtors and Debtors-in-Possession)
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)
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DEBTOR)

CASE NO. 13-40813
CHAPTER 11
JUDGE KAY WOODS

**DEBTORS’ MOTION FOR AN ORDER (I) AUTHORIZING POST-PETITION
SECURED FINANCING PURSUANT TO BANKRUPTCY CODE SECTIONS 105,
361, 362, AND 364 (II) MODIFYING THE AUTOMATIC STAY AND (III)
SCHEDULING A HEARING PURSUANT TO BANKRUPTCY RULE 4001**

D & L Energy, Inc., (“D&L”) & Petroflow, Inc., (“Petroflow”) (collectively, “Debtors”), debtors and debtors-in-possession in the above-captioned Chapter 11 cases (the Cases”), by and through counsel, hereby move this Court (the “Motion”) for the entry of an order: (i) authorizing Debtors to obtain post-petition secured financing pursuant to sections 105, 361, 362, and 364 of the Bankruptcy Code, (ii) modifying the automatic stay, and (iii) scheduling a hearing. In support of the Motion, the Debtors respectfully state as follows:

Bankruptcy Rule 4001 Concise Statement¹

1. By this Motion, Debtors request entry of the proposed order substantially in the form attached hereto as Exhibit A (the “DIP Order”) (A) granting (i) authorization to obtain postpetition financing pursuant to sections 105(a), 361, 362, and 364(c), of Title 11

¹ Unless otherwise defined herein, capitalized terms used in this motion shall have the meanings ascribed in the Commitment Letter (as defined herein).

of the United States Code (the "Bankruptcy Code") in accordance with the terms of that certain Commitment Letter (the "Commitment Letter"), in the form attached hereto as Exhibit B, by and between Debtors and with ITG Taxable Fund LLLP (hereinafter "DIP Lender"), and any related documents required to be delivered by or in connection with the DIP Loan (any such related documents and all other "Loan Documents" as defined by the Commitment Letter, together with the Commitment Letter hereinafter collectively being called the "DIP Loan Documents"), and (ii) a security interest and priority lien to the DIP Lender pursuant to section 364(c) of the Bankruptcy Code, and (B) scheduling a hearing pursuant to Rule 4001 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").²

2. Upon entry of the DIP Order, the Debtors will obtain, debtor-in-possession priority financing under the DIP Loan Documents (all such financing, loans, extensions of credit and other indebtedness, including interest and fees in connection therewith, shall hereinafter be referred to as the "Post-Petition Advances"). Pursuant to Bankruptcy Rule 4001, the chart below evidences the material provisions of the DIP Order.³

<u>Borrowers</u> <i>Bankruptcy Rule 4001(c)(1)(B)</i>	D&L Energy, Inc. and Petroflow, Inc.
<u>DIP Lender</u> <i>Bankruptcy Rule 4001(c)(1)(B)</i>	ITG Taxable Fund LLLP

² The Commitment letter provides, among other things, that DIP Lender shall be granted a priming mortgage and security interest in Collateral senior to all other interests pursuant to 11 USC §364(d). As a condition precedent to DIP Lender's obligation to make the DIP Loan, Debtors must satisfy their prepetition liability to Huntington National Bank upon funding of the loan. Therefore, Debtors are not seeking relief in the Motion pursuant to 11 USC §364(d).

³ The summaries and descriptions of the terms and conditions of the DIP Order set forth in this Motion are intended solely for informational purposes to provide the Court and parties in interest with an overview of the significant terms thereof and should only be relied upon as such. The summaries and descriptions are qualified in their entirety by the Commitment Letter and the DIP Order. In the event there is a conflict between this Motion and the Commitment Letter and the DIP Order, the Commitment Letter and the DIP Order, as applicable, shall control in all respects.

<p><u>Term</u> <i>Bankruptcy Rule</i> 4001(c)(1)(B)</p>	<p>The maturity date shall be (12) months after the date of the initial funding (the “Maturity Date”). (Commitment Letter at p. 3)</p>
<p><u>Loan Commitment</u> <i>Bankruptcy Rule</i> 4001(c)(1)(B)</p>	<p>Upon entry of the DIP Order - the maximum aggregate principal amount of the loan shall be \$2,000,000.00, which includes fees and costs advanced in connection with the DIP Loan Documents. (Commitment Letter at p. 2)</p>
<p><u>Interest Rates</u> <i>Bankruptcy Rule</i> 4001(c)(1)(B)</p>	<p>Interest Rate: 10% per annum. (Commitment Letter at p. 4)</p> <p>Default Interest Rate shall be 14% above the otherwise applicable rate. (Commitment Letter at p. 4)</p>
<p><u>Fees</u> <i>Bankruptcy Rule</i> 4001(c)(1)(B)</p>	<p>Loan Application Fee - \$15,000.00. (Commitment Letter at p. 12)</p> <p>Legal Fee Deposit - \$5,000.00. (Commitment Letter at p. 13)</p> <p>Commitment Fee – 2% of the Maximum Loan Amount - \$40,000.00. (Commitment Letter at p. 11)</p> <p>Exit Fee – 5% of the Maximum Loan Amount - \$100,000.00. (Commitment Letter at p. 11)</p>
<p><u>Use of Proceeds</u> <i>Bankruptcy Rule</i> 4001(c)(1)(B)</p>	<p>Proceeds shall be used in accordance with the Budget attached to the Commitment Letter, which may be modified or supplemented with prior consent of the DIP Lender in its sole discretion. (Commitment Letter at p. 4)</p>
<p><u>Borrowing Conditions</u> <i>Bankruptcy Rule</i> 4001(c)(1)(B)</p>	<p>Customary borrowing conditions, including, among other things: (i) entry of the attached DIP Order, (ii) completion and receipt by the Lender of all documentation in form and substance satisfactory to the Lender in its discretion. (Commitment Letter at p. 9-10)</p> <p>As a condition precedent to Lender’s obligation to make the DIP Loan and as a material inducement to the Lender, Borrowers shall satisfy their liability to Huntington National Bank under the February 2008 Continuing Commercial Guaranty from the upon funding of the DIP Loan. (Commitment Letter, p. 5)</p>

<p><u>Liens and Priorities</u> <i>Bankruptcy Rule</i> 4001(c)(1)(B)(i)</p>	<p>The DIP Loan shall be secured by a first priority lien on all of Borrowers' assets pursuant to 11 U.S.C. §364(c)(2). (Commitment Letter, p. 5)</p> <p>DIP Lender shall also receive a super-priority administrative expense in the Bankruptcy Case pursuant to 11 U.S.C. §§364(c)(1), 503(b) and 507(b), with priority over all other administrative expense claims in the Bankruptcy Case except fees payable to the Office of the United States Trustee, and the Lender shall not be required, without its consent, to accept property other than cash in satisfaction of (a) its liens and security interests which encumber the Collateral as security for payment of the Loan and (b) the super-priority administrative expense claim, notwithstanding 11 U.S.C. §1129 (a)(7) or (b)(2)(A). (Commitment Letter, p. 5-6)</p>
<p><u>Events of Default</u> <i>Bankruptcy Rule</i> 4001(c)(1)(B)</p>	<p>Events of default that are usual and customary for DIP financings, including, among other things, (i) failure to make principal or interest payments when due, (ii) non-monetary covenant defaults, (iii) entry of an order dismissing or converting its Chapter 11 Case or appointing a Chapter 11 Trustee or (iv) entry of any order which authorizes under any section of the Bankruptcy Code the granting of any lien or security interest in any Collateral in favor of any party other than DIP Lender or the obtaining of any credit or the incurring of any indebtedness that is entitled to super-priority administrative status equal to or superior to that granted to DIP Lender. (Commitment Letter, p. 7)</p>
<p><u>Waiver or Modification of the Automatic Stay</u> <i>Bankruptcy Rule</i> 4001(c)(1)(B)(iv)</p>	<p>Subject to the time limitations set forth in the DIP Order, the automatic stay is modified to the extent necessary to permit all acts, actions and transfers, relating to perfection of interests contemplated therein. (DIP Order at ¶ 19)</p>
<p><u>Waiver of Modification of Applicability of Non-Bankruptcy Law Relating to the Perfection or Enforcement of a Lien</u> <i>Bankruptcy Rule</i> 4001(c)(1)(B)(vii)</p>	<p>All DIP Liens granted for the benefit of the DIP Lender shall be valid, enforceable and deemed perfected, effective upon entry of the DIP Order, and no further action shall be required to effect such perfection. (DIP Order at ¶ 8)</p>

JURISDICTION AND VENUE

3. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Consideration of the Motion is a core proceeding pursuant to 28 U.S.C. §157(b)(2). Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND FACTS

4. On April 16, 2013 (the “Petition Date”), the Debtors commenced their Cases pursuant to Chapter 11 of the Bankruptcy Code. The Cases are being jointly administered pursuant to an order of this Court.

5. The Debtors are continuing in possession of their property and are operating and managing their business, as debtors-in-possession, pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

6. On April 25, 2013, The United States Trustee appointed an official committee of unsecured creditors (the “Committee”).

Summary Of Capital Structure And Current Business Operations

7. D&L is a “C” corporation formed under the laws of the State of Ohio, with its primary business operations being located at 2761 Salt Springs Road, Youngstown, Ohio 44509. D&L was formed by David DeChristofaro, Ben Lupo, and James Beshara in 1986 to be a conventional oil and gas well operator and producer, primarily targeting oil and gas reserves in the Clinton Sandstone formation throughout Northeast Ohio and Northwest Pennsylvania. D&L Energy currently has three (3) shareholders, Ben Lupo (“Lupo”) (80.76% shareholder), Susan Faith (“Faith”) (15%

shareholder), and Holly Serensky Lupo (“Serensky Lupo”) (4.24% shareholder). Nicholas C. Paparodis (“Paparodis”) is the acting CEO and President of D&L. Kathy Kaniclides (“Kaniclides”) is the acting Secretary and Treasurer of D&L. Currently, Serensky Lupo is the sole director of D&L.

8. Petroflow is an Ohio corporation which is a wholly owned subsidiary of D&L. Originally intended to operate as the “drilling arm” of D&L, Petroflow ceased all operations prior to the filing of these bankruptcy matters. Petroflow has no current income, no bank accounts, and no employees. Paparodis is the president, CEO and sole director of Petroflow.

9. Debtors employ approximately 18 employees.

Events Leading To The Filing Of These Chapter 11 Proceedings and the Sale of Assets

10. Prior to 2013, Lupo was an officer and director of D&L and had an active role in D&L’s business dealings. Toward the beginning of 2013, Lupo was accused of violating the U.S. Clean Water Act. Amid these allegations, Lupo resigned from D&L in his capacity as an officer and as a director and executed a one year irrevocable voting rights/proxy in favor of Serensky Lupo.

11. Debtors have incurred substantial liabilities with respect to clean up efforts which include, but are not necessarily limited to, clean-up costs and penalties/fines imposed by both the state and federal governments and independent contractors. D&L’s general business reputation has suffered greatly from these incidents and has resulted in decreased business operations/revenues.

12. Since the commencement of the Cases, Debtors have explored multiple

options with respect to liquidating sufficient assets to maximize the proceeds from any sale which would allow Debtors to satisfy creditors' claims in full.

13. On September 18, 2013, Debtors filed motions with the Court seeking approval to sell substantially all of their assets at auction on November 13, 2013. On October 22, 2013, the Court entered the Sales Procedure Order establishing the procedures with respect to the sale of Debtors' assets.

14. Debtors' present cash needs are a result of a decrease in operational revenues since February 2013, and their need to satisfy their current and ongoing operating expenses, pay administrative costs, and pay necessary costs incurred with respect to the sales and closing process.

Prepetition & Current Debt Structure

15. The February 2008 Continuing Commercial Guaranty - On or around, February 21, 2008, Lupo acting in his role as President of D&L, executed a continuing commercial guaranty with Huntington National Bank ("HNB") in which he obligated D&L on all of the then-existing or future debt incurred by Lupo or Serenksy Lupo individually (the "Guaranty"). According to the terms of the Guaranty, D&L would continue to be bound by the Guaranty for all of the indebtedness incurred by Lupo and/or Serenksy Lupo prior to HNB's receipt of D&L's written notice of revocation of guaranty. Said revocation was given to HNB in April 2013. The Guaranty was commercial and cognovit in nature, but it did explicitly exclude any IRAs, Keogh accounts or trust accounts for which setoff would be otherwise prohibited. In order to further secure this continuing guaranty, HNB filed certain financing statements which covered substantially all of Debtors' assets (the "Prepetition Collateral"). It is this continuing guaranty and the

security instruments associated therewith which Debtors believe give rise to the liabilities Debtors may currently owe to HNB.

16. As of October 25, 2013, Debtors liability to HNB under the Guaranty is believed to be approximately \$73,000.00.

Post-petition Indebtedness

17. On April 26, 2013, this Court entered an Interim Order authorizing the interim use of HNB's cash collateral for a period of (90) days, through July 16, 2013. On July 10, 2013, this Court entered a Second Interim Order authorizing the interim use of HNB's cash collateral for a period of (60) days, through September 18, 2013. Debtors are currently utilizing HNB's cash collateral on an interim basis through November 20, 2013, pursuant to the Third Interim Order entered by this Court on September 17, 2013.

RELIEF REQUESTED

18. Debtors request that the Court enter an Order: (i) authorizing Debtors to obtain postpetition financing up to an aggregate principal amount of \$2,000,000.00 from the DIP Lender, and (ii) granting a security interest and lien to the DIP Lender on all of Debtors' assets, pursuant to 11 U.S.C. §364(c)(2). Debtors further request that this Court schedule a hearing pursuant to Bankruptcy Rule 4001 to consider the relief requested herein.

Debtors' Proposed DIP Credit Facility

19. Debtors, through their investment banker SS&G Parkland, have sought postpetition financing from numerous lending services, including both conventional and asset based lenders, among others.

20. Debtors and DIP Lender engaged in arms' length negotiations with respect to the terms and conditions set forth in the Commitment Letter, the material provisions of which are summarized in the chart appearing in paragraph 2 above. Significantly, the Commitment Letter provides that the DIP Lender will make available a maximum amount of \$2,000,000.00 to be used in accordance with the Budget (defined below) upon entry of the DIP Order.

21. Assuming that the figures appearing in the Budget do not change substantially, the DIP Loan should allow Debtors to meet all of their financial obligations through the closing of the sale of substantially all of their assets.

22. Debtors and the DIP Lender have agreed upon an initial cash flow estimate and other financial projections (the "Budget," a copy of which is attached hereto as Exhibit C), which will be updated by the Debtors pursuant to amendments approved by the DIP Lender, in its sole discretion, during the pendency of these Cases. The Debtors shall use the proceeds of the Post-Petition Advances solely in accordance with the Budget for payment of, among other things: (i) postpetition operating expenses and other working capital and financing requirements of the Borrowers, (ii) fees, costs and expenses associated with the DIP Loan, (iii) other costs and expenses of administration of the Chapter 11 Cases, including professional fees, and (iv) fees, costs, and expenses associated with the closing and transfer of assets to any successful bidder(s).

23. As security for the full and timely payment of the Post-Petition Obligations and the timely performance of each of the other obligations owing by Debtors pursuant to the DIP Loan Documents, the Debtors request that the DIP Lender be granted, pursuant to section 364(c)(2) of the Bankruptcy Code, a first priority security interest in and lien upon all prepetition and postpetition assets of the Debtors except for those vehicles with purchase money security interest attached thereto (collectively, the “Collateral”), and as further described in the DIP Loan Documents, (collectively, the “DIP Lien”).⁴

24. Pursuant to section 364(c)(1) of the Bankruptcy Code, Debtors also request that the DIP Lender be granted an allowed superpriority administrative expense claim against Debtors with priority over all other administrative expenses and claims, except United States Trustee fees, against Debtors (the “Superpriority Claim”).

25. As a condition precedent to DIP Lender’s obligation to make the DIP Loan and as a material inducement to the DIP Lender, Debtors must satisfy their liability to HNB under the February 2008 Continuing Commercial Guaranty upon funding of the DIP Loan.

26. The Debtors submit that HNB’s interest in the Collateral will be satisfied upon funding of the DIP Loan and that no adequate protection is necessary.

The DIP Facility Should Be Authorized

27. Debtors do not have sufficient funds to continue to: pay all necessary expenses incurred in the operation of their business, pay administration costs incurred in prosecuting the Cases, ready their assets for sale, and close on the sale of substantially all

⁴ To the extent Debtors’ vehicles are encumbered by purchase money security liens, DIP Lender’s lien will be junior to any such liens.

of their assets. Approval of the Post-Petition Advances will provide Debtors with immediate access to financing necessary to satisfy their current and ongoing operating expenses, pay administrative costs, and pay necessary costs incurred with respect to the sales and closing process. Unless these expenses are paid, Debtors will not have sufficient funds to maintain operations and could be forced to delay the closing on assets which may result in a substantial deterioration of the overall value of the estate assets.

28. Debtors propose to obtain financing as set forth in the Commitment Letter by providing, among other things, superpriority claims, security interests, and liens pursuant to section 364(c) of the Bankruptcy Code. Section 364(c) of the Bankruptcy Code provides, among other things, that, if a debtor is unable to obtain unsecured credit allowable as an administrative expense under section 503(b)(1) of the Bankruptcy Code, the court may authorize the debtor to obtain credit or incur debt (a) with priority over any and all administrative expenses as specified in section 503(b) or 507(b) of the Bankruptcy Code, (b) secured by a lien on property of the estate that is not otherwise subject to a lien, or (c) secured by a junior lien on property of the estate that is subject to a lien. 11 U.S.C. § 364(c).

29. As discussed above, despite their efforts, Debtors have been unable to (a) procure sufficient financing (i) in the form of unsecured credit allowable under section 503(b)(1), (ii) as an administrative expense under section 364(a) or (b), (iii) in exchange for the grant of a superpriority administrative expense claim pursuant to section 364(c)(1), (iv) without granting security interest and lien pursuant to section 364(c)(2); or (b) obtain postpetition financing or other financial accommodations from any alternative prospective

lender or group of lenders on more favorable terms and conditions than those for which approval is sought herein.

30. Having determined that financing is available only under sections 364(c) and/or (d) of the Bankruptcy Code, Debtors negotiated the Commitment Letter with the DIP Lender at arms' length. Provided that a debtor's business judgment does not run afoul of the provisions of, and policies underlying, the Bankruptcy Code, courts grant a debtor considerable deference in acting in accordance therewith. *See, e.g., Bray v. Shenandoah Fed. Sav. & Loan Ass'n (In re Snowshoe Co.)*, 789 F.2d 1085, 1088 (4th Cir. 1986); *In re Ames Dep't Stores, Inc.*, 115 B.R. 34, 40 (Bankr. S.D.N.Y. 1990) ("Cases consistently reflect that the court's discretion under section 364 is to be utilized on grounds that permit reasonable business judgment to be exercised so long as the financing agreement does not contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit parties in interest."); *see also In re Funding Sys. Asset Mgmt. Corp.*, 72 B.R. 87, 88 (Bankr. W.D. Pa. 1987); *In re Curlew Valley Assocs.*, 14 B.R. 506, 513-14 (Bankr. D. Utah 1981); *In re Simasko Prod. Co.*, 47 B.R. 444, 449 (D. Colo. 1985).

31. Section 364 does not require that a debtor seek alternative financing from every possible lender; rather, the debtor simply must demonstrate sufficient efforts to obtain financing without the need to grant a senior lien. *In re Snowshoe Co.*, 789 F.2d 1085, 1088 (demonstrating that credit was unavailable absent the senior lien by establishment of unsuccessful contact with other financial institutions in the geographic area); *In re 495 Central Park Ave. Corp.*, 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992) (debtor testified to numerous failed attempts to procure financing from various sources,

explaining that “most lend money only in return for a senior secured position”); *In re Aqua Assocs.*, 123 B.R. 192, 196 (Bankr. E.D. Pa. 1991) (debtor adequately established that some degree of priming loan was necessary if debtor were to obtain funding).

32. Substantially all of Debtors’ assets are encumbered and, despite the diligent efforts of Debtors, through their investment banker, Debtors have been unable to procure the necessary funding absent the proposed superpriority claims and granting of a security interest. Furthermore, Debtors have negotiated the best terms available to obtain the funding they need to maintain sufficient liquidity to preserve their assets over the course of their chapter 11 cases. Debtors submit that the circumstances of these cases require Debtors to obtain financing under sections 364(c)(2) of the Bankruptcy Code, and accordingly, the Commitment Letter reflects the exercise of their sound business judgment.

33. The terms and conditions of the Commitment Letter are fair and reasonable, and were negotiated by well-represented, independent parties in good faith and at arms-length.

34. As discussed above, the ability of Debtors to continue to operate their businesses and conduct a marketing and sale process under chapter 11 of the Bankruptcy Code depends upon their ability to obtain the financing memorialized in the Commitment Letter. Without the proposed financing, Debtors will not have the funds necessary to pay postpetition operating expenses as well as other expenses required to be paid by Debtors to maintain their businesses as a going concern, if applicable, and ready their assets for the sale and closing process.

35. The credit provided under the DIP Loan enables the Debtors to continue to

operate their businesses in the ordinary course and in an orderly and reasonable manner to preserve and enhance the value of their estates for the benefit of all parties in interest. The availability of credit under the DIP Loan will provide confidence to Debtors' creditors that will enable and encourage them to continue their relationships with Debtors through the sale process. Accordingly, the timely approval of the relief requested herein is imperative.

The Automatic Stay Should Be Modified on a Limited Basis

36. The relief requested herein contemplates a modification of the automatic stay (to the extent applicable) to permit Debtors to: (i) grant the security interests, liens, and superpriority claims described above and to perform such acts as may be requested to assure the perfection and priority of such security interests and liens; (ii) permit the DIP Lender to exercise, upon the occurrence and during the continuance of an event of default and after five (5) business days' notice thereof, all rights and remedies under the Commitment Letter; and (iii) implement the terms of the proposed DIP Order.

37. Stay modifications of this kind are ordinary and standard features of postpetition debtor financing facilities and, in the Debtors' business judgment, are reasonable and fair under the present circumstances.

Waiver of Bankruptcy Rules 6004(a) and (h)

38. To implement the foregoing, Debtors seek a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the fourteen-day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h).

NOTICE

39. Notice of this Motion has been provided to (i) the Office of the United States Trustee for the Northern District of Ohio (the “U.S. Trustee”); (ii) counsel for Huntington National Bank; (iii) counsel for the DIP Lender; (iv) counsel for the Unsecured Creditors Committee; (v) the Internal Revenue Service and the Ohio Department of Taxation; (vi) all equity security holders of the Debtors, (vii) and all other parties in interest in each of the Debtors’ individual cases. In light of the nature of the relief requested, Debtors submit that no other or further notice is necessary.

CONCLUSION

WHEREFORE, Debtors respectfully request entry of an order, substantially in the form attached hereto as Exhibit A granting the relief requested herein and granting such other and further relief as the Court deems just and proper.

Dated: November 1, 2013.

Respectfully submitted,

Roderick Linton Belfance LLP

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