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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

In Re:)
Nature's Choice Landscape Supply, Inc.,)
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Debtor(s))

BK No.: 17-07949

Chapter: 11

Honorable Donald R. Cassling

THIRD INTERIM AGREED ORDER (A) AUTHORIZING DEBTOR'S USE OF CASH COLLATERAL FOR A LIMITED PERIOD PURSUANT TO 11 U.S.C. §§ 361 AND 363 AND RULE 4001 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE, (B) AUTHORIZING ADEQUATE PROTECTION WITH RESPECT THERETO, AND (C) GRANTING OTHER RELIEF

THIS CAUSE coming on to be heard on the Motion of Swift Financial Corporation d/b/a Swift Capital ("Swift") for Entry of an Order (A) Prohibiting the Debtor's Use of Non-Estate Property and Cash Collateral, (B) Ordering the Segregation of Cash Collateral and an Accounting, and (C) Granting Other Relief (the "Motion"); notice having been duly given; counsel for Swift and the Debtor having informed the Court that the parties have reached an accord on the Debtor's use of cash collateral for a limited period upon the terms and conditions contained in this agreed Order; the Court being fully advised in the premises; and based upon the following stipulations among Swift and the Debtor:

1. On February 14, 2017 (the "Petition Date"), the Debtor filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101 et seq. (as amended, the "Bankruptcy Code"), thereby commencing this Bankruptcy Case.
2. This Court has jurisdiction over this Bankruptcy Case and the Motion pursuant to 28 U.S.C. §§ 157(b) and 1334. The Motion presents a core proceeding as defined in 28 U.S.C. §§ 157(b)(2).
3. The Debtor is in the business of snow removal and the installation of hard-paving surfaces for customers in the Chicagoland area (the "Business").
4. The Debtor continues to operate the Business post-petition as debtor-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108.
5. On December 11, 2015, the Debtor entered into a second Future Receivables Sales Agreement ("FRSA") with Swift by which, in consideration for the payment by Swift of \$100,000.00, the Debtor sold to Swift the Debtor's rights and interest in \$132,900.00 worth of its future receivables, representing a true sale of the Debtor's receivables.
6. Pursuant to the terms of the FRSA, the Debtor is required to pay to Swift through weekly remittance ten percent (10%) of the Debtor's future receivables by irrevocably authorizing Swift to debit, via ACH, said percentage from the Debtor's approved business checking account. This arrangement is to continue until such time as the outstanding and unpaid purchased dollar value of the future receivables sold by Debtor has been paid in full.
7. As part of the FRSA, and to secure the Debtor's obligations and performance thereunder, the Debtor granted Swift a security interest in all of the Debtor's personal property, tangible and intangible,

including but not limited to accounts, deposits, accounts receivables, general intangibles, inventory, and equipment (collectively, the "Swift Collateral"). Swift perfected its security interest in the Swift Collateral by filing a UCC Financing Statement with the Secretary of State of Illinois on March 26, 2015. Swift asserts in the Motion that it holds a valid and perfected first priority lien and security interest in all of the Swift Collateral and that Swift's lien is a perfected lien in "cash collateral" within the meaning of Bankruptcy Code § 363(a). Alternatively, Swift asserts that the Debtor no longer has any interest in the purchased future receivables and thus may not utilize the purchased future receivables or the cash proceeds thereof for the benefit of its estate.

8. Prior to the Petition Date, certain disputes arose among Swift and the Debtor, culminating in an arbitration award in favor of Swift and against the Debtor and its principal in the principal amount of \$133,988.00, the entire amount of which remained due and owing as of the Petition Date, plus any and all other fees and costs to which Swift is entitled pursuant to the FRSA.

9. The Debtor requested that Swift consent to the Debtor's use of Cash Collateral, and the Debtor has undertaken arm's-length negotiations with Swift, regarding its use of Cash Collateral. A first interim agreed cash collateral order was entered on May 22, 2017. A second interim agreed cash collateral order was entered on August 10, 2017. Swift consents to an extension of the second interim cash collateral order pursuant to the terms and conditions set forth in this Order.

10. The Debtor has determined in its business judgment that it is in its best interest to continue to perform post-petition under Swift's FRSA and to continue to make regular payments to Swift pursuant to the FRSA, as modified by this Order and limited to the term of this Order, as may be extended by further order or the consent of Swift.

11. The Debtor believes the terms and conditions of this Order are fair and reasonable and were negotiated by the parties in good faith at arm's-length.

WHEREFORE, based on the foregoing stipulations among the Debtor and Swift, the entire record before the Court, and good cause appearing;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

1. Authorized Use of Cash Collateral. The Debtor is authorized to use the Cash Collateral for a limited period to pay the ordinary and necessary operating expenses of the Debtor from the Petition Date until the earlier of (a) 5:00 p.m. on November 22, 2017, or (b) the date upon which a Termination Event (as defined below) occurs (the "Termination Date"); except that the Termination Date may be extended from time to time by a written agreement of Swift and the Debtor without the need for further order of this Court, subject only to written notice thereof to the Office of the United States Trustee.

2. Adequate Protection. As adequate protection to Swift, the Debtor shall remit to Swift the sum of \$5,000.00 per month commencing in October 2017. The Debtor and Swift are authorized and directed to perform, and shall continue to perform, all of their respective obligations under the FRSA post-petition unless and until the occurrence of a Termination Event (as defined below).

3. Additional Adequate Protection.

a. Replacement Liens. Notwithstanding anything in Bankruptcy Code §552 to the contrary, and in addition to its liens and security interests under the existing FRSA, as additional adequate protection, Swift shall have and is hereby granted (effective and continuing without the necessity of the

execution, filing and/or recordation of mortgages, deeds of trust, security agreements, control agreements, pledge agreements, financing statements or otherwise), a valid and perfected security interest and lien in the same priority as Swift had prior to the Petition Date (the "Replacement Lien"), to the extent of the Debtor's use of cash collateral and adequate protection set forth herein, in all of the Debtor's now owned or after acquired personal property of the types described in the FRSA, including without limitation the following types of property (whether owned or existing as of the Petition Date or thereafter acquired): profits and other revenues arising out of the operations of the Business; all cash; accounts; chattel paper; deposit accounts; documents; furniture; equipment; fixtures; general intangibles, including all trademarks, trade names, good will, and other intellectual property, goods, including accessions and goods with which such goods are commingled; instruments; inventory; investment property; letter-of-credit rights, payment intangibles, promissory notes; software; and all replacements, supporting obligations, offspring, products, and proceeds of the foregoing (collectively, the "Replacement Collateral"), but excluding all of the Debtor's rights, claims, and demands, if any, under Chapter 5 of the Bankruptcy Code. The Replacement Lien shall be to the same extent, validity and priority as the pre-petition lien of Swift and will be evidenced by the existing FRSA and this Order. The Replacement Lien will secure all obligations owing to Swift. In addition, Swift will retain, to the same extent, validity and priority, its existing lien and security interest in all of the Collateral, including, without limitation, the lien and security interest described above and any rights of setoff and/or recoupment.

b. Perfection of Replacement Lien. The Replacement Lien in the Replacement Collateral granted hereby shall be valid, perfected, enforceable and effective, to the same extent, validity and priority as its prepetition liens, against the Debtor and its successors and assigns, including any trustee or receiver in this or any superseding Chapter 7 case, without any further action by the Debtor or Swift and without the execution, delivery, filing or recordation of any control agreements, promissory notes, financing statements, mortgages, security agreements or other documents. The Debtor acknowledges that Swift may, but is not required to, file any financing statement to perfect the Replacement Lien granted by this Order.

4. Cash Collateral Account. All post-petition receivables collected by the Debtor after the Petition Date, shall be deposited, immediately and hereafter daily, as collected, into the Debtor-in-Possession ("DIP") account established by the Debtor. The Debtor shall execute a fully binding ACH Authorization Agreement authorizing Swift to debit the Debtor's deposit account such amounts necessary to satisfy the revised monthly percentage in accordance with Swift's FRSA and all adequate protection payments due hereunder, and shall further consent to the amendment of the automatic stay pursuant to § 363 of the Bankruptcy Code to permit the grant of replacement liens and the execution of such ACH Authorization Agreement.

5. Relief from the Automatic Stay. To the extent applicable, the automatic stay under Bankruptcy Code § 362(a), shall be lifted, terminated, and annulled to permit such debits or withdrawals authorized by this Order. The Debtor has agreed to consensually grant Swift relief from any and all applicable stays and injunctions, including but not limited to the automatic stay pursuant to § 362 of the Bankruptcy Code as part of this Order and Swift is hereby granted such relief for the limited purpose of carrying out the terms of this Order.

6. Termination Events: The Debtor's right to continue to use Cash Collateral shall be contingent upon the Debtor's compliance with each and every provision of this Order and Swift's FRSA, except as modified herein. Unless extended further with the written consent of Swift (confirmed by the execution of another cash collateral agreement and entry of a further order of the Court approving such further cash collateral agreement), the authorization granted to the Debtor to use Cash Collateral under this

- a. the date upon which the Debtor files a motion, stipulation, or proposes an order which provides for or consents to the conversion of the Debtor's Bankruptcy Case to Chapter 7;
- b. the date upon which the Debtor no longer is Debtor-In-Possession in the Bankruptcy Case or is otherwise limited or excluded from the management and operation of its business (through the appointment of a trustee or an examiner under the Bankruptcy Code, or through the appointment of some other type of fiduciary or custodian under federal or state law);
- c. the Debtor fails to make any payment when due under this Order;
- d. the granting of stay relief to any party that claims an interest in the Collateral or in the Replacement Collateral;
- e. the Debtor ceases to operate its business (without the prior written consent of Swift);
- f. an order is entered by the Court rejecting a non-residential real property lease of the Debtor relating to the Business (without the prior written consent of Swift);
- g. an order is entered by the Court or a stipulation is entered into by the Debtor providing for modification of the automatic stay for any party with an interest in the non-residential real property lease (including the lessor, the sub-lessor, or any fee ownership interest);
- h. the Debtor's actions or inactions materially affect the payments being made to or received by Swift, or
- i. the Debtor fails to comply with the provisions of this Order. (Any of the forgoing (a)-(i) shall be referred to as a "Termination Event").

Notwithstanding any such Termination Event, the rights, claims, security interest, lien and priority of Swift with respect to all transactions that occur prior to the occurrence of such termination, including, without limitation, all liens and priority claims provided for in this Order, will remain unimpaired and unaffected by any such termination, will survive any such termination, and will be binding upon any and all successors-in-interest to the Debtor, including any Chapter 11 or Chapter 7 trustee that may be appointed in the Bankruptcy Case.

7. Reporting Requirements. The Debtor will timely prepare and file, with a copy to Swift via counsel, each Monthly Operating Report as required by the Operating Guidelines and Reporting Requirements for Chapter 11 Cases issued by the Office of the United States Trustee as well as a weekly report on each Wednesday detailing the prior week's use of the Cash Collateral. The Debtor will respond promptly to any request for accountings or other financial information from Swift and shall permit inspection of its books and records, or the Business or other Collateral by Swift (or its representatives) upon five (5) business day's notice.

8. Insurance. The Debtor shall keep and maintain insurance coverage on all of Debtor's assets in an amount sufficient to fully protect Swift's interests in the Collateral naming Swift as loss-payee in order of lien priority. Said insurance coverage shall be acceptable to Swift in all respects, including, but not limited to, the terms, amount, deductibles, and other conditions. The Debtor shall provide evidence of insurance to Swift, and it shall be deemed an immediate event of default if the Debtor fails to keep

and maintain said insurance.

9. Survival. The Debtor's representations and warranties, acknowledgments and waivers set forth in this Stipulation shall survive the Termination Date. Furthermore, the adequate protection granted Swift herein, including Swift's Replacement Lien, shall survive the Termination Date and continue in full force and effect unless and until modified by Court order.

10. Rights Reserved. Nothing in this Order will be deemed or construed as an admission or waiver by Swift as to adequate protection, or any other issue in the case, and this Order will not constitute consent by Swift to the use of its Cash Collateral other than for the limited purpose expressly provided herein. To the extent that Swift's interest in the Collateral or Cash Collateral is not adequately protected by the terms of this Agreed Order, Swift shall be entitled to file a motion asserting it is entitled to an allowed superpriority administrative expense pursuant to Bankruptcy Code § 507(b), which shall only be ruled on after notice and a hearing. In addition, nothing contained in this Order will prejudice the rights of Swift to (i) seek further relief from the automatic stay of Section 362(a) of the Bankruptcy Code; (ii) oppose confirmation of any plan of reorganization filed by the Debtor or any other party in interest; (iii) oppose approval of any post-petition financing; (iv) seek a dismissal of the Debtor's Bankruptcy Case; (v) seek allowance of an administrative claim or additional adequate protection in connection with the use of Cash Collateral; or (vi) seek any other relief that Swift may deem necessary and appropriate under the circumstances. Nothing contained in this Order will be deemed to waive or diminish any rights of Swift under or pursuant to its FRSA.

11. Terms Binding. The provisions of this Order will be binding upon and inure to the benefit of Swift and the Debtor and their respective successors and assigns, including but not limited to any trustee in bankruptcy hereinafter appointed as a representative of the Debtor's estate.

12. Modifications. Any of the requirements of this Order may be waived or modified by Swift and the Debtor jointly in writing. Any motion or request by the Debtor or any other party to authorize the use of Cash Collateral, to modify the terms of this Order, or to obtain any other relief that would impair, adversely affect or alter the rights of Swift under this Order shall only be heard upon at least three (3) business days actual notice to Swift's counsel of record. No subsequent stay, modification, termination, failure to extend the term of or vacation of this Order shall affect, limit or modify the validity, enforceability or perfection of the Replacement Lien granted to Swift.

13. Further Hearing. A further hearing on the Debtor's use of cash collateral and the Motion shall be held on November 21, 2017 at 10:00 a.m., with notice thereof to be served by the Debtor on all parties in interest. The Debtor shall serve a copy of this Order on all required parties and those parties requesting notice pursuant to Bankruptcy Rule 2002, if any.

14. Effective Date. This Order shall be effective immediately notwithstanding the provisions of Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure.

15. Enforcement. The Court has and will retain jurisdiction to enforce this Order according to its terms.

Enter: 

Honorable Donald R. Cassling
United States Bankruptcy Judge

Dated: October 06, 2017

Prepared by:

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