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10 **UNITED STATES BANKRUPTCY COURT**
11 **DISTRICT OF NEVADA**

12 In re: CASE NO.: BK-N-17-51375-btb
13 Chapter 11

14 BTH QUITMAN HICKORY LLC,
15 Debtor.

**MOTION FOR ORDER: (1) AUTHORIZING
POST-PETITION FINANCING; AND
(2) GRANTING POST-PETITION LENDER
SENIOR LIEN PURSUANT TO 11 U.S.C.
§364(d)**

16 Hearing Date: tbd
17 Hearing Time: OST Requested

18 Debtor and Debtor in Possession, BTH QUITMAN HICKORY LLC (the "Debtor") by
19 and through counsel, KEVIN A. DARBY, ESQ. of Darby Law Practice, LTD., moves this court
20 for the entry of an order: (1) authorizing Debtor to obtain \$350,000 in post-petition financing (the
21 "DIP Bridge Loan") pursuant to 11 U.S.C. § 364 of the Bankruptcy Code by entering into that
22 certain Debtor-in-Possession Loan and Security Agreement (the "DIP Agreement") by and among
23 the Debtor and Heetway Inc. (the "Post-Petition Lender"), a copy of which is attached to the
24 contemporaneously filed Declaration of Neal Smaler as *Exhibit 1*; and (2) granting certain senior
25 liens to the Post-Petition Lender pursuant to 11 U.S.C. §364(d)(1). This Motion is supported by
26 the Declaration of Neal Smaler and based on the following points and authorities.

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POINTS AND AUTHORITIES

I. CONCISE STATEMENT OF REQUESTED RELIEF (Fed R. Bankr. P. 4001(c)(1)(B))

By this Motion, the Debtor requests entry of the an order: (a) authorizing the Debtor to obtain post-petition financing pursuant 364(d) of the Bankruptcy Code by entering into the DIP Agreement; and (b) granting a senior lien against Debtor’s real property to Post-Petition Lender to secure the DIP Bridge Loan obligations. The Debtor is in dire need of immediate funds to protect and preserve of valuable assets of this bankruptcy estate. The purpose of the DIP Bridge Loan is to provide the funds necessary to preserve and protect this bankruptcy estate until a larger term DIP loan is obtained by the Debtor.

The material provisions of the proposed DIP Bridge Loan are summarized as follows:

- a. **Debtor:** BTH Quitman Hickory LLC.
- b. **Lender:** Heetway Inc. (defined above as the Post-Petition Lender).
- c. **Commitment:** A non-amortizing multiple draw super-priority bridge loan facility in an aggregate principal amount not to exceed \$350,000, of which \$156,973 is in the form of new money funding and refinance and roll up of a protective pre-petition secured loan to the Debtor since August 1, 2017, of \$193,027 (the “Roll-over Loan Amount”), which funds were used to protect and preserve the assets of the Debtor, including the payment of casualty insurance, payroll, security guard service and utilities. This \$193,027 pre-petition loan is part of a \$276,917 loan secured by a first lien against certain personal property assets of the Debtor, which was perfected on December 6, 2017, in the State of Nevada.

d. **Loan Fees and Costs:** No upfront fees. A drawdown fee in the amount of 2.5% of each withdrawal of DIP Bridge Loan by the Debtor shall be paid to the DIP Lenders in cash ratably based on their respective principal amount of DIP Bridge Loans withdrawn and such fee shall be paid from the proceeds thereof.

e. **Repayment Terms & Due Date:** The DIP Bridge Loan shall mature on the earlier of : (i) funding of a term DIP Bridge Loan approved by an interim or final order of this court; (ii) June 1, 2018; (iii) the effective date of any chapter 11 plan for the reorganization of the Debtor; (iv) the consummation of any sale or other disposition of all or substantially all of the

1 assets of the Debtor pursuant to Bankruptcy Code section 363; and (v) the date of the acceleration
2 of the DIP Bridge Loan in accordance with the DIP Loan Agreement.

3 f. **Purpose:** The Debtor is in urgent need of funds to continue to protect and
4 preserve of the assets of the bankruptcy estate. The purpose of the DIP Bridge Loan is to provide
5 such funds while a term DIP loan approval is obtained by the Debtor. Upon entry of the interim
6 order and acceptance of the term sheet, the Postpetition Lender shall make available to the Debtor
7 the DIP Bridge Loan in an amount up to \$350,000. The proceeds will be used: (i) to provide
8 working capital for legal fees and administrative costs and for other costs to protect and preserve
9 the assets of the Debtor including, but not limited to casualty insurance, labor and security guard
10 service and utilities, and (ii) to refinance the existing bridge loan facility.

11 g. **Priority and Liens:** All obligations of the Debtor to the Lender including,
12 without limitation, all principal and accrued interest, costs, fees and expenses, shall be: (1)
13 secured, pursuant to Bankruptcy Code sections 361, 362, 364(c)(2), 364(c)(3) and 364(d), by a
14 valid, binding, continuing, enforceable, fully-perfected, non-avoidable, automatically and properly
15 perfected first priority senior priming lien on, and security interest in all present and after
16 acquired personal property of the Debtor, wherever located, including, without limitation,
17 including all accounts, inventory, equipment, capital stock in subsidiaries of the Debtors,
18 investment property, instruments, chattel paper, real estate, leasehold interests, contracts, patents,
19 copyrights, trademarks and other general intangibles, and all products and proceeds thereof, and
20 the proceeds of any causes of action under Bankruptcy Code sections 502(d), 544, 545, 547, 548,
21 549, 550 or 553 or any other avoidance actions under the Bankruptcy Code or applicable
22 non- bankruptcy law (all such property, the "Debtor Collateral"), which liens and security interests
23 shall be senior to any and all other liens and security interest, and the liens granted to any
24 prepetition secured parties; and (2) The DIP obligations shall also constitute claims entitled to
25 the benefits of Bankruptcy Code section 364(c)(1), having a super-priority over any and all
26 administrative expenses and claims, of any kind or nature whatsoever, including, without
27 limitation, the administrative expenses of the kinds specified in or ordered pursuant to Bankruptcy
28 Code sections 105, 326, 327, 328, 330, 331, 361, 362, 363, 364, 365, 503, 506, 507(a), 507(b), 546,

1 552, 726, 1113 and 1114, and any other provision of the Bankruptcy Code.

2 h. **Interest:** 12% per annum payable in cash on the DIP Termination Date.

3 i. **Waiver of Applicable Non-Bankruptcy Law Relating to Perfection:** This
4 Court's order granting this Motion shall be deemed to be sufficient and conclusive evidence of the
5 priority, perfection, and validity of the post-petition liens and security interests granted therein,
6 effective as of the petition date, without any further act and without regard to any other federal,
7 state, or local requirements or law requiring notice, filing, registration, recording, or possession of
8 the subject collateral, or other act to validate or perfect such security interest or lien.

9 **II. RELEVANT BACKGROUND**

10 1. Debtor owns a large scale torrefication plant located in Quitman, Mississippi (the
11 "Quitman Plant"). Torrefaction is the process of roasting wood or other biomass material at high
12 temperatures in an oxygen-deprived environment. This process removes and recycles low quality
13 energy from the material and changes its chemical composition. The torrefied wood is then
14 ground and processed through a pellet mill to create durable torrefied pellets. Torrefied wood
15 pellets are an immediate and practical replacement for coal. Torrefied pellets integrate easily into
16 existing coal power plants, enabling plants to generate clean energy without lengthy or expensive
17 conversions.

18 2. The Quitman Plant has produced, sold and shipped more torrefied wood pellets than
19 any other facility in the world.

20 3. The Debtor previously entered into agreements that in substance leased the Quitman
21 Plant to Solvay S.A., a Belgian chemical company. In September, 2016, the agreements with
22 Solvay were terminated and Solvay vacated the Quitman Plant.

23 4. In October, 2016, immediately after Solvay vacated the Quitman Plant, the Debtor
24 entered into a short term contract to provide a 4,000 ton burn sample of torrefied pellets through
25 the end of 2016 to Portland General Electric ("PGE"). In February 2017, PGE conducted a
26 significant test using the Debtor's torrefied pellets that received recognition by important large
27 power companies. Notably, the test results caught the attention of a Japanese power company,
28 which sent a delegation that visited the Quitman Plant two weeks ago together with a major

1 Japanese trading company. From there the delegation went to Oregon to meet with PGE who
2 confirmed the positive results from the utilization of the product from the Quitman Plant.

3 5. The Quitman Plant has not operated since producing the burn sample for PGE.
4 However, the Debtor has taken all steps necessary to protect and preserve the Quitman Plant,
5 including the payment of utilities, insurance and for security guard services.

6 6. Debtor is currently in discussions to supply torrefied pellets to multiple coal fired
7 power plants around the world, which would provide the Debtor a path to successfully reorganize.
8 For now, Debtor is in need of immediate funds to continue to pay the absolutely necessary expense
9 of preserving the assets of this bankruptcy estate.

10 7. The Debtor does not have sufficient funds to pay utilities, insurance premiums or for
11 continued security services at the Quitman Plant without the DIP Bridge Loan. Debtor needs those
12 funds immediately. Any delay in funding would immediately result in unpaid payroll for the
13 security services at the Quitman Plan and could result in the loss of utilities and insurance
14 coverage for the assets of this bankruptcy estate.

15 8. The Debtor cannot obtain unsecured financing, even if such financing is accorded
16 administrative expense priority. The only presently available loan to the Debtor is conditioned
17 upon a first priority security interest in the assets of the Debtor.

18 9. The Post-Petition Lender has a distant relationship to the Debtor, but does not likely
19 qualify as an *insider* of the Debtor under 11 U.S.C. §101(31). The DIP Lender may, however,
20 qualify as an *affiliate* of the Debtor under 11 U.S.C. §101(2). In this regard, attached to this
21 Declaration of Neal Smaler is a corporate structure of the Debtor and its relationship to the DIP
22 Bridge Lender.

23 **III. LEGAL AUTHORITY**

24 **A. Approval of DIP Under Section 364(d) of the Bankruptcy Code.**

25 11 U.S.C. §364(d)(1) permits the Debtor to incur debt secured by a senior lien if the
26 Debtor demonstrates that it "is unable to obtain such credit otherwise" and that "there is adequate
27 protection of the interest of the holder of the lien on the property of the estate on which such senior
28 or equal lien is proposed to be granted." 11 U.S.C. §364(d)(1); *See also*, In re Center Wholesale,

1 Inc., 759 F.2d 1440, 1450 (9th Cir. 1985). Adequate protection is defined in §361 to include
2 "providing ... an additional or replacement lien to the extent that such stay, use, sale, lease, or grant
3 results in a decrease in the value of such entity's interest in such property...." 11 U.S.C. §361(2).

4 If necessary, the evidence at the interim hearing will show that a \$350,000 debtor in
5 possession loan could not have been obtained on an unsecured basis. The potential sources of a
6 credit facility for the Debtor are very limited. In these circumstances, "[t]he statute imposes no
7 duty to seek credit from every possible lender before concluding that such credit is unavailable." In
8 re Snowshoe Co., 789 F.2d 1085, 1088 (4th Cir. 1986). A debtor need only demonstrate "by a
9 good faith effort that credit was not available without" the protections of Section 364(d). *See Id.*; In
10 re Plabell Rubber Prods., Inc., 137 B.R. 897, 900 (Bankr. N.D. Ohio 1992). Where there are few
11 lenders likely to be able and/or willing to extend the necessary credit to the debtor, "it would be
12 unrealistic and unnecessary to require [the debtor] to conduct an exhaustive search for financing."
13 In re Sky Valley, Inc., 100 B.R. 107, 113 (Banks. N.D. Ga. 1988)

14 In this case, Debtor is seeking an emergency secured bridge loan to be used to pay only
15 the absolutely necessary expenses of protecting and preserving this bankruptcy estate. Unsecured
16 credit is simply not available to the Debtor. The interests of junior creditors will be adequately
17 protected. The DIP Bridge Loan is being used in part to pay off (and replace) an existing secured
18 loan of \$193,027. The DIP Bridge Loan will only add \$156,973 a first priority lien. In addition,
19 Debtor owns assets worth at least \$3,650,562 and has prepetition secured debt of approximately
20 \$2,148,961, which includes the \$193,027 secured claim to be refinanced through the DIP Bridge
21 Loan. Therefore, even after the DIP Bridge Loan's priming lien, there will be an equity cushion of
22 approximately \$1,344,628 to protect all secured interests, including junior liens. Under these
23 circumstances, all junior lien holders are adequately protected.

24 **B. The Post-Petition Lender Has Acted In Good Faith.**

25 Section 364(e) of the Bankruptcy Code was designed to "encourage the extension of credit
26 to debtors" by allowing lenders to "rely on a bankruptcy court's authorization of the transaction."
27 In re EDC Holding Co., 676 F.2d 945, 947 (7th Cir. 1982) (the purpose of Section 364(e) is "to
28 overcome people's natural reluctance to deal with a bankrupt firm whether as purchaser or lender

1 by assuring them that so long as they are relying in good faith on a bankruptcy judge's approval of
2 the transaction they need not worry about their priority merely because some creditor is objecting
3 to the transaction and is trying to get the district court or the court of appeals to reverse the
4 bankruptcy judge"); see also In re North Atlantic Millwork Corp., 155 B.R. 271, 279 (Bankr. D.
5 Mass. 1993) ("The purpose of section 364(e) is to allow good faith lenders to rely upon conditions
6 at the time they extend credit and to encourage lenders to lend to bankrupt entities.").

7 The DIP Bridge Loan is the result of good faith and arm's-length negotiations. The Debtor
8 believes that the terms of the DIP Bridge Loan are fair and reasonable under the circumstances,
9 and that the Post-Petition Lender is entitled to the benefits of Section 364(e) of the Code.

10 **IV. CONCLUSION**

11 Based on the foregoing, Debtor requests an order: (a) authorizing the Debtor to obtain
12 post-petition financing pursuant 364(d) of the Bankruptcy Code on terms consistent with the DIP
13 Bridge Loan term sheet attached to the Declaration of Neal Smaler as Exhibit 2; (b) confirming
14 Pre-Petition Lender's existing pre-petition liens are valid, enforceable liens securing the allowed
15 secured pre-petition claims of the Pre-Petition Lender; and (c) granting a senior lien against
16 Debtor's personal property to the Post-Petition Lender to secure the DIP Bridge Loan obligations.

17 DATED this 11th day of December, 2017.

18 DARBY LAW PRACTICE, LTD.

19 By: /s/ Kevin A. Darby
20 KEVIN A. DARBY, ESQ.
21 Reorganization Counsel for Debtor
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