

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re: : Chapter 11
: Case No. 12-12465-MJK
:
DEMCO, INC., :
:
Debtor. :
:
:

**FINAL ORDER PURSUANT TO §§ 105(a), 362, 363, 364(c) AND (d) OF THE
BANKRUPTCY CODE AUTHORIZING DEBTOR TO OBTAIN POST-PETITION
FINANCING FROM ALBA INVESTMENTS, LLC**

DEMCO, Inc., debtor and debtor in possession (the “Debtor”), having moved the Court (the “Motion”) for entry of this final order (the “Final Order”), pursuant to §§105(a), 362, 363, 364(c) and (d) of Title 11 of the United States Code (the “Bankruptcy Code”) and Rules 2002 and 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), authorizing the Debtor to (a) obtain secured postpetition financing on a superpriority basis (the “DIP Facility”) pursuant to the terms and conditions of that certain Senior Secured Super-Priority Debtor-in-Possession Credit and Security Agreement (the “Agreement”) and Secured Credit Line Note (the “Note”) between the Debtor and Alba Investments, LLC (“DIP Lender”), (b) authorizing the Debtor to execute the Agreement and Note and any other documents, agreements and instruments delivered pursuant thereto or executed or filed in connection therewith (as amended from time to time, collectively, the “DIP Loan Documents”) and to perform such other acts as may be necessary or desirable in connection with the DIP Loan Documents, (c) subject to the Carve Out (as defined herein), granting the DIP Lender first priority security interests in and liens on all of the DIP Collateral (defined herein) on account of the DIP Facility and all obligations owing thereunder and under the DIP Loan Documents (collectively, and including all “Obligations” as described in the DIP Loan Documents, the “DIP Obligations”), and (d) subject

to the Carve Out, granting allowed superpriority expense claims to the DIP Lender; and the Court having held hearings on the Motion on April 28, 2017 and May 10, 2017 (the “Hearings”); and due notice of the Hearings having been given; and based upon all of the pleadings filed with the Court, the evidence presented at the Hearings and the entire record herein; and all opposition having been resolved; and it appearing that the relief requested in the Motion and granted on the terms and conditions set forth in this Final Order is in the best interests of the Debtor, its estate; and after due deliberation and consideration, and sufficient cause appearing therefor:

IT IS HEREBY FOUND:¹

A. Good Cause Shown. Good cause has been shown for entry of this Final Order. The ability of the Debtor to obtain sufficient liquidity under the DIP Loan Documents is vital to the Debtor’s estate and creditors. The liquidity to be provided under the DIP Loan Documents will enable the Debtor to continue to operate its business in the ordinary course and preserve the value of the Debtor’s business.

B. Good Faith. Based upon the record before the Court at the Hearings, the DIP Loan Documents have been negotiated in good faith and at arm’s-length among the Debtor and the DIP Lender. Any DIP Loans and other financial accommodations made to the Debtor by the DIP Lender pursuant to this Final Order and the other DIP Loan Documents shall be deemed to have been extended by the DIP Lender in good faith, as that term is used in § 364(e) of the Bankruptcy Code, and the DIP Lender shall be entitled to all protections afforded thereby.

Based upon the foregoing findings, acknowledgements, and conclusions, and upon the record made before this Court at the Hearings, and good and sufficient cause appearing therefor,

¹ Findings of fact shall be construed as conclusions of law, and conclusions of law shall be construed as findings of fact, pursuant to Bankruptcy Rule 7052.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Disposition. The Debtor's request for relief as set forth in the Motion is granted. This Final Order shall be valid, binding on all parties-in-interest, and fully effective immediately upon entry, notwithstanding the possible application of Bankruptcy Rules 6004(h), 7062, and 9014.

2. Authorization to Obtain Financing. The Debtor is hereby authorized to obtain postpetition financing (the "DIP Loans") immediately pursuant to the terms of this Final Order and subject to the terms of the Budget (in the form attached hereto as Exhibit A, the "Budget") and the DIP Loan Documents² in the aggregate principal amount of up to \$1,000,000.00.

3. DIP Lender's Lien Priority.

(a) To secure the DIP Obligations, the DIP Lender is hereby granted valid, enforceable and fully perfected, first priority priming liens on and senior security interests (collectively, the "Postpetition Liens") in the Collateral,³ subject only to (i) the Carve-Out and (ii) any accounts receivable expressly listed on Schedule 3.05 to the Agreement (with the Lender's Lien with respect thereto being second in priority to the lien of KeyBank N.A. as successor by merger to First Niagara Bank N.A. under the First Niagara Stipulation).

(b) The Postpetition Liens are effective immediately upon the entry of this Final Order, and shall not at any time be made subject or subordinated to, or made *pari passu* with, any other lien, security interest or claim existing as of the Petition Date, or created under §§ 363 or 364(d) of the Bankruptcy Code or otherwise.

² To the extent the DIP Loan Documents are inconsistent with the terms of this Final Order, this Final Order shall control.

³ Capitalized terms used but not defined herein have the meanings ascribed to them in the Agreement.

(c) The Postpetition Liens shall be deemed fully perfected liens and security interests hereunder, effective and perfected upon the date of this Final Order (and shall remain fully perfected from and after the date of this Final Order) without the necessity of execution or filing by the Debtor of security agreements, pledge agreements, financing agreements, financing statements and other agreements or instruments, such that no additional steps need be taken by the DIP Lender to perfect such interests.

4. DIP Lender's Superpriority Claim. The DIP Lender is granted an allowed superpriority administrative expense claim (the "Superpriority Claim") pursuant to § 364(c)(1) of the Bankruptcy Code in the Chapter 11 Case and in any successor case under the Bankruptcy Code (including a case under chapter 7 of the Bankruptcy Code, a "Successor Case") for all DIP Obligations, having priority over any and all other claims against the Debtor, now existing or hereafter arising, of any kind whatsoever, including, without limitation, all administrative expenses of the kinds specified in or arising or ordered under §§ 105(a), 326, 328, 330, 331, 503(a), 503(b), 507(a), 507(b), 546(c), 546(d), 726, 1113, and 1114 and any other provision of the Bankruptcy Code or otherwise, whether or not such expenses or claims may become secured by a judgment lien or other non-consensual lien, levy or attachment, which allowed claims shall be payable from and have recourse to all prepetition and postpetition property of the Debtor and all proceeds thereof; provided, however, that the Lender waives recoveries on the Superpriority Claim with respect to proceeds of any and all Avoidance Actions. The Superpriority Claim granted in this section shall be subject and subordinate in priority of payment only to payment of the Carve-Out, including with respect to the fees and expenses of counsel in pursuing any and all Avoidance Actions (for the avoidance of doubt, Carve-Out funds may include the fees and expenses of counsel in pursuing any and all Avoidance Actions). The Superpriority Claim in

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favor of the Lender shall be senior to all claims granted under the NESCO DIP Order, including any superpriority claims granted thereunder.

5. Circumstances of Waiver of 506(c) Surcharge. No party shall assert a claim under 506(c) of the Bankruptcy Code, including any subsequently appointed Chapter 11 or 7 Trustee; provided, that in the case of a subsequently appointed trustee, if the circumstances regarding preservation of the Collateral were the result of exigent circumstances and the trustee could not have reasonably first consulted with the Lender, then the trustee's right to assert a claim under 506(c) is preserved. For the avoidance of doubt, it is expressly understood that the Lender does not consent to the administration of its collateral.

6. Survival of Postpetition Liens and Superpriority Claim. The Postpetition Liens, Superpriority Claim, and other rights and remedies granted under this Final Order to the DIP Lender shall continue in this and any Successor Case and shall be valid and enforceable against any trustee appointed in the Chapter 11 Case and/or upon the dismissal of the Chapter 11 Case or any Successor Case and such liens and security interests shall maintain their first priority until all the DIP Obligations have been indefeasibly paid in full in cash and the DIP Lender's commitments have been terminated in accordance with the DIP Loan Documents.

7. Carve-Out. Payment of any amounts on account of the DIP Loans, the Postpetition Liens and the Superpriority Claim shall be subject and subordinate only to the payment of the following (collectively, the "Carve-Out"):

- a. the statutory fees payable to the United States Trustee pursuant to 28 U.S.C. § 1930(a)(6) and 31 U.S.C. § 3717;
- b. fees payable to the Clerk of this Court;
- c. subject to the terms and conditions of this Final Order and the Budget, the unpaid and outstanding reasonable fees and expenses actually incurred on or after the Petition Date and prior to the occurrence of an Event of Default under the DIP Loan Documents

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or other termination or Maturity Date under this Final Order or the DIP Loan Documents, to the extent allowed and payable under §§ 326, 328, 330 and 331 of the Bankruptcy Code (but excluding success, completion or other transaction fees) by attorneys, accountants and other professionals retained by the Debtor and the Committee, in an aggregate amount not to exceed \$140,000.00 (the “Professionals”). The \$140,000.00 Carve-Out shall be allocated \$100,000.00 to fees and disbursements of Debtor’s counsel, Andreozzi Bluestein LLP; \$25,000.00 to fees and disbursements of Committee Counsel Baumeister Denz LLP; and \$15,000.00 to fees and disbursements of Debtor’s accountants, Katz & Fierro, LLP CPAs. To the extent that any United States Trustee’s fees or Court Clerk’s fees are outstanding at the time of any liquidation or conversion of this Case or any post-confirmation sale of the Debtor or its assets, any such fees shall be payable from that portion of the Carve-Out allocated to Debtor’s counsel.

8. Automatic Stay Modified. The automatic stay provisions of § 362 of the Bankruptcy Code are, to the extent applicable, vacated and modified without further application or motion to, or order from the Court, to the extent necessary so as to permit the following and neither § 105 of the Bankruptcy Code nor any other provision of the Bankruptcy Code or applicable law shall be utilized to prohibit the exercise, enjoyment and enforcement of any of such rights, benefits, privileges and remedies regardless of any change in circumstances (whether or not foreseeable):

(a) In the event of a default or upon the occurrence of an Event of Default under the DIP Loan Documents or a default by the Debtor of any of its obligations under this Final Order, and without application and motion to, or order from the Court or any other court and without any interference from the Debtor or any other party in interest but subject to three (3) business days prior written notice (which may be delivered by electronic mail) (the “Remedies Notice Period”) to the Debtor, its counsel, counsel to any Committee and the United States Trustee, to exercise all rights and remedies provided for in the DIP Loan Documents, this Final Order or under other applicable bankruptcy and nonbankruptcy law to the extent permitted

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under the DIP Loan Documents and this Final Order including, without limitation, (i) terminate the commitments under the DIP Loan Documents, (ii) cease making DIP Loans and/or suspend or terminate the commitments under the DIP Loan Documents, (iii) declare all DIP Obligations immediately due and payable, (iv) exercise the Lender Election and/or (v) take any actions reasonably calculated to preserve or safeguard the DIP Collateral or to prepare the DIP Collateral for sale; provided, however, that immediately upon the occurrence of an Event of Default under the DIP Loan Documents or a default by the Debtor of any of its obligations under this Final Order or the DIP Loan Documents, the DIP Lender, may cease making DIP Loans and charge interest at the default rate set forth in the DIP Loan Documents without being subject to the Remedies Notice Period.

(b) During the Remedies Notice Period, the Debtor, the Committee and the Office of the United States Trustee shall have the right to make a motion to the Court and to seek a hearing solely for the purpose of seeking a determination of whether an Event of Default has occurred. The automatic stay of § 362(a) of the Bankruptcy Code, to the extent applicable, shall be deemed terminated without the necessity of any further action by the Court in the event that the Debtor, the Committee and/or the United States Trustee have not obtained an order from this Court to the contrary prior to the expiration of the Remedies Notice Period. The Debtor, the Committee and/or the United States Trustee shall have the burden of proof at any hearing on any request by them to re-impose or continue the automatic stay of § 362(a) of the Bankruptcy Code or to obtain any other injunctive relief.

(c) This Court shall retain exclusive jurisdiction to hear and resolve any disputes and enter any orders required by the provisions of this Final Order and relating to the application, re-imposition or continuance of the automatic stay of § 362(a) of the Bankruptcy Code or other injunctive relief requested.

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9. The Debtor shall provide counsel to the Committee with: (a) contemporaneous copies of each Notice and Cash Report referred to in Section 2.01 of the Agreement; (b) confirmation of a Loan disbursement; and (c) contemporaneous copies of the financing reporting, updated Budget on a weekly basis and rolling four (4) week cash forecast referred to in Section 5.15 of the Agreement. The Debtor and the Lender shall contemporaneously copy counsel to the Committee on any Notices issued pursuant to Section 11.02 of the Agreement.

ADDITIONAL PROVISIONS COMMON TO DIP FINANCING

10. DIP Lender's Right to Exercise the Lender Election. Effective immediately upon entry of this Final Order, the Debtor grants to Lender to, at Lender's sole discretion, the ability to accept 51% of the equity interests in the post-confirmation Debtor (which percentage may be subject to a future earn-back agreement reducing Lender's equity to as low as 33^{1/3} % on satisfaction of terms to be agreed upon) in satisfaction of the Obligations due by the Debtor to the Lender under the Agreement, and which Obligations shall be fully and finally satisfied should Lender make such election. To any extent that such approval is required by law, the Lender Election is expressly approved in accordance with the terms of the Agreement.

11. DIP Lender's Right to Credit Bid. The DIP Lender shall have the right to bid for the assets of the Debtor in any proposed sale and shall have the right, pursuant to § 363(k) of the Bankruptcy Code, to credit bid the outstanding and unpaid amount of the DIP Loans.

12. Successors and Assigns. The DIP Loan Documents and the provisions of this Final Order shall be binding upon and inure to the benefit of the Debtor, the DIP Lender, and each of their respective successors and assigns including, without limitation, any trustee, responsible officer, estate administrator or representative, or similar person appointed in a case

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for the Debtor under any chapter of the Bankruptcy Code. The provisions of this Final Order shall also be binding upon all of the Debtor's creditors, equity holders, and all other parties in interest.

13. Subsequent Reversal or Modification. This Final Order is entered pursuant to § 364 of the Bankruptcy Code and Bankruptcy Rules 4001(b) and (c), granting the DIP Lender all protections afforded by § 364(e) of the Bankruptcy Code. If any or all of the provisions of this Final Order are hereafter reversed, modified, vacated or stayed, that action will not affect (i) the validity of any obligation, indebtedness or liability incurred hereunder by the Debtor to the DIP Lender prior to the date of receipt by the DIP Lender of written notice of the effective date of such action or (ii) the validity and enforceability of any lien or priority authorized, created or re-affirmed under this Final Order or pursuant to the DIP Loan Documents prior to the date of receipt by the DIP Lender of written notice of the effective date of such action.

14. Conversion/Dismissal.

(a) If an order dismissing or converting this Chapter 11 Case under §§ 305 or 1112 of the Bankruptcy Code or otherwise is at any time entered, such order shall provide that (i) the Postpetition Liens and the Superpriority Claim granted hereunder and in the DIP Loan Documents shall continue in full force and effect, remain binding on all parties-in-interest, and maintain their priorities as provided in this Final Order and the DIP Loan Documents until all DIP Obligations are completely satisfied and the commitments under the DIP Loan Documents are terminated in accordance with the DIP Loan Documents and (ii) this Court shall retain jurisdiction, notwithstanding such dismissal, for purposes of enforcing the Postpetition Liens and the Superpriority Claim.

15. Retention of Jurisdiction. This Court shall retain jurisdiction over all

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matters pertaining to the implementation, interpretation and enforcement of this Final Order.

Dated: Buffalo, New York
May 10, 2017



HON. MICHAEL J. KAPLAN
UNITED STATES BANKRUPTCY JUDGE

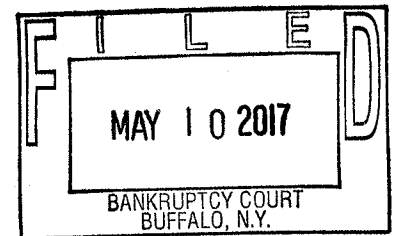


EXHIBIT A

BUDGET

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DEMCO - Cash Flow Summary

	Apr-17	May-17	Jun-17	Jul-17	Aug-17
Collection of Receivables					
Santee Cooper Moncks Corner	\$ 730,114.00	\$ 750,000.00	\$ 800,000.00	\$ 1,000,000.00	\$ 1,000,000.00
Florida Power & Light (Cedar Bay)	\$ 325,000.00	\$ 450,000.00	\$ 450,000.00	\$ 450,000.00	\$ 425,000.00
Oak Ridge National Laboratory - Building 7001	\$ 150,000.00	\$ 300,000.00	\$ 200,000.00	\$ 200,000.00	\$ 150,000.00
Exelon - Panhandle	\$ -	\$ -	\$ 100,000.00	\$ 300,000.00	\$ 400,000.00
MISC. Projects to be secured	\$ -	\$ -	\$ -	\$ -	\$ 500,000.00
Retention Release - AFP 59					
Retention (10%)	\$ (75,000.00)	\$ (75,000.00)	\$ (120,000.00)	\$ (120,000.00)	\$ (100,000.00)
Actual Cash Collected	\$ 1,130,114.00	\$ 1,425,000.00	\$ 1,730,000.00	\$ 1,730,000.00	\$ 2,375,000.00
Job Costs					
Santee Cooper Moncks Corner	\$ 500,000.00	\$ 500,000.00	\$ 700,000.00	\$ 800,000.00	\$ 800,000.00
Florida Power & Light (Cedar Bay)	\$ 150,000.00	\$ 300,000.00	\$ 300,000.00	\$ 300,000.00	\$ 300,000.00
Oak Ridge National Laboratory - Building 7001	\$ 250,000.00	\$ 150,000.00	\$ 120,000.00	\$ 120,000.00	\$ 96,480.00
Exelon - Panhandle	\$ -	\$ 100,000.00	\$ 200,000.00	\$ 200,000.00	\$ 400,000.00
MISC. Projects to be secured	\$ -	\$ 50,000.00	\$ 200,000.00	\$ 200,000.00	\$ 400,000.00
Total Monthly Job Costs	\$ 900,000.00	\$ 1,100,000.00	\$ 1,520,000.00	\$ 1,520,000.00	\$ 1,996,480.00
Administrative Monthly Expenses					
	\$ 110,000.00	\$ 110,000.00	\$ 110,000.00	\$ 110,000.00	\$ 110,000.00
Monthly Cash Cash Flow Before Payable Payoff					
	\$ 120,114.00	\$ 215,000.00	\$ 100,000.00	\$ 100,000.00	\$ 268,520.00
Total Pay Off of Payables					
	\$ 1,078,684.42	\$ 392,977.84	\$ 45,792.64	\$ 45,792.64	\$ 45,792.64
Cash Balance After Payable Payoff	\$ 190,721.00	\$ (767,849.42)	\$ (945,827.26)	\$ (891,619.90)	\$ (668,892.53)