

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK**

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In re

Tonawanda Auto Sales & Service, Inc.,  
  
Debtor.

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Proceedings Under Chapter 11

Tax I.D. No. 45-1759317

Case No.: 17-10860-MJK

Assigned Judge: Michael J. Kaplan

**STIPULATION AND ORDER AUTHORIZING DEBTOR'S  
CONTINUED USE OF CASH COLLATERAL**

This stipulation ("Stipulated Conditional Order"), entered into by Tonawanda Auto Sales & Service, Inc. ("Debtor") and New York State Dept. of Taxation and Finance ("NYSDTF"), a secured creditor herein, shall constitute the consent of the NYSDTF for the Debtor's continued use of cash collateral and other assets securing the claims of NYSDTF herein.

1. On April 27, 2017 this case was commenced by the filing of a voluntary petition for relief under Chapter 11 of the Bankruptcy Code ("Filing Date").
2. On or about July 17, 2017, the Debtor and the NYSDTF entered into a Stipulation and Order Authorizing Debtor's Interim Use of Cash Collateral and Authorizing Adequate Protection of the Interests of the State of New York (the "Cash Collateral Stipulation"). The Cash Collateral Stipulation attached hereto as Exhibit "A."
3. On or about January 10, 2018, the NYSDTF filed an Administrative Proof of Claim in the amount of \$35,602.47 representing post-petition sales tax liabilities (the "Administrative Claim").
4. On or about January 22, 2018 the NYSDTF served debtor with a notice of default Notice of Default, pursuant to paragraphs 13 and 14 of the Cash Collateral Stipulation
5. In consideration of the following, the Debtors and the NYSDTF hereby consent to the following Stipulated Conditional Order:
  - a. All terms and conditions set forth in the Cash Collateral Stipulation shall remain in full force and the Debtor shall remain current on all adequate protection payments set forth therein; and
  - b. The Debtor acknowledges and agrees that the amounts due as stated in the Administrative Claim are accurate and currently outstanding; and
  - c. The Debtor shall pay \$20,000 toward the January 10, 2018

Administrative Proof of Claim on or before January 31, 2018; and,

- d. The Debtor shall cure the remainder of the tax set forth in the January 10, 2018 Administrative Proof of Claim, on or before February 28, 2018; and,
- e. Payments contemplated above shall be made by check, payable to the “State of New York” which shall be sent to:

Office of the New York State Attorney General  
Civil Recoveries Bureau  
Bankruptcy Litigation Unit  
Attn: Louis J. Testa, Esq.  
The Capitol  
Albany, NY 12224-0341

- f. The Debtor shall file all post-petition tax returns on the due date of the return with the appropriate NYS office; and
- g. The Debtor shall pay all ongoing post-petition tax obligations including, but not limited to, sales and withholding taxes in timely fashion until further order of the Court.

6. The Debtor’s authority to use Cash Collateral pursuant to this Stipulation shall immediately terminate without further order, notice, hearing, or application to the Court except for notice to the Office of the United States Trustee, upon the occurrence of any of the following events:

- a. The conversion of this Chapter 11 Case to one under Chapter 7 of the Code; and
- b. The appointment of any Chapter 11 Trustee; and
- c. The dismissal of the Debtor’s Bankruptcy Case; and
- d. The cessation of Debtor’s normal business operations or the sale of substantially all of the Debtor’s assets; and
- e. The default and failure to cure any default under the Stipulation or other administrative order of the court effecting this Stipulation.

7. Notwithstanding any provision in this Stipulation to the contrary, in the event the Debtor defaults in making any payment when due under the terms of this Stipulation, and such default continues or five (5) days after receipt of written notice to the Debtor’s counsel and to the United States Trustee, in addition to any and all other available rights and remedies, the NYSDTF shall have the right, without further notice or application to the Court, to seek collection of all or any part of the amounts outstanding under this Stipulation from any party or parties who may be liable therefor.

8. Nothing herein shall be construed to limit the NYSDTF’s rights to seek the collection of taxes, including interest and penalties, that become due subsequent to the execution of this stipulation from any party or parties who may be liable therefor.

9. Each party hereto assumes the risk of any misinterpretation or mistake, and if any party hereto should subsequently discover that any fact relied upon in entering this Stipulation was untrue, or that its understanding of the facts and law was incorrect, it shall not be entitled to set aside this Stipulation or any Court order approving it be reason thereof.

10. The Debtor further acknowledges and agrees that the execution of this Stipulation is upon the informed consent, advice and representation of counsel and that nothing contained herein is intended to constitute a waiver, relinquishment or modification of any rights that the Debtor or NYSDTF under Title 11 U.S.C., or any other applicable state or federal law or regulation, other than the extent specifically modified herein.

Gleichenhaus, Marchese & Weishaar, PC

NYS Dept. of Taxation and Finance

/s/ Michael A. Weishaar 01/26/18

Michael A. Weishaar, Esq.  
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/s/ Louis J. Testa 1/31/18

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Civil Recoveries Bureau  
The Capitol  
Albany, New York 12224-0341  
Phone: (518) 776-2607

/s/ Eiad M. Musleh 01/29/18

Eiad M. Musleh  
Tonawanda Auto Sales & Service, Inc.

**SO ORDERED:**

DATED

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**U.S. BANKRUPTCY JUDGE, WDNY**

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**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK**

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<p>In re</p> <p style="text-align:center">Tonawanda Auto Sales &amp; Service, Inc.,</p> <p style="text-align:center">Debtor.</p>	<p>Proceedings Under Chapter 11</p> <p>Tax I.D. No. 45-1759317</p> <p>Case No.: 17-10860-MJK</p> <p>Assigned Judge: Michael J. Kaplan</p>
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**STIPULATION AND ORDER AUTHORIZING DEBTOR'S  
INTERIM USE OF CASH COLLATERAL AND  
AUTHORIZING ADEQUATE PROTECTION OF THE  
INTERESTS OF THE STATE OF NEW YORK**

This stipulation ("Stipulation" or "Agreement"), entered into by Tonawanda Auto Sales & Service, Inc. ("Debtor") and New York State Dept. of Taxation and Finance ("NYSDTF"), a secured creditor herein, shall constitute the consent of the NYSDTF for the Debtor's interim use of cash collateral and other assets securing the claims of NYSDTF herein.

1. On April 27, 2017 this case was commenced by the filing of a voluntary petition for relief under Chapter 11 of the Bankruptcy Code ("Filing Date").
2. Circa 2016, the NYSDTF found that the sole shareholder and president, Eiad M. Musleh (the "Principal") was a responsible party and, on October 26, 2016, the Principal filed for Chapter 13 relief (*In re Eiad M. Musleh*; Bk No.: 16-12189-MJK).
3. Prior to the Petition Date NYSDTF filed a notice or notices of tax warrant(s) for certain outstanding tax liabilities of the Debtor ("Warrants") to the NYSDTF. The liens created by the Warrants encumber certain property belonging to the Debtor and secure unpaid taxes, penalties and interest owed by the Debtor to NYSDTF.
4. Among the property securing the claims of the NYSDTF are, without limitation, cash or cash equivalents and proceeds of the Debtor's accounts receivable or inventory ("Cash Collateral") which, by stipulation, the parties hereby agree constitute "cash collateral" within the meaning of 11 U.S.C. §363(a).<sup>1</sup>
5. The Debtor requires the use of the Cash Collateral to pay current operating expenses including payroll.
6. On May 18, 2017, the Debtor filed an Interim Motion of the Debtor for Interim and Final Authority to Use Cash Collateral and Seeking Entry of an Order Establishing Dates for Hearings Thereon and Prescribing Appropriate Notice Thereof

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<sup>1</sup> Unless otherwise stated all references to "§" or "§§" shall mean the designated provisions of Title 11, U.S.C.

[D.E. 16] and New York State authorized interim use of cash collateral through June 14, 2017.

7. Subject to the terms of this Agreement, NYSDTF is willing to consent to the interim use of the Cash Collateral and other personal property in which it may hold a secured interest. This Stipulation will enable the Debtor to continue business operations during the period of this Agreement, and is necessary to provide the NYSDTF with adequate protection as defined in § 361.

8. In consideration for the consent of NYSDTF for the Debtor's interim use of cash collateral, and to provide adequate protection for such use to NYSDTF, the Debtor hereby stipulates and agrees to the following:

- a. The NYSDTF shall be granted a "rollover" replacement lien, effective as of the Petition Date, on all post-petition property of the Debtor, including proceeds and products thereof to the same extent and priority as existed as of the Petition Date; and
- b. The Debtor represents that all funds received since the Petition Date and which will be received during the pendency of this case will be deposited in the Debtor's bank account ("DIP Account") and that all expenses of the Debtor during the pendency of this case including adequate protection to NYSDTF will be paid from the DIP Account; and
- c. All post petitions tax deposits and the adequate protection payments contemplated herein shall be segregated and set aside by the Debtor in a separate bank account ("Tax/CC Account") to be established by the Debtor pursuant to §363(c)(4). All funds deposited in the TAX/CC Account shall be (i) held in trust for the sole benefit of the NYSDTF, and (ii) used strictly for the purposes contained herein or per any other order of the Court; and
- d. The Debtor shall not use Cash Collateral during the pendency of this Agreement for any purpose which is not authorized by the Bankruptcy Code or by an order of the Court. The parties to this Stipulation agree that the Bankruptcy Code permits the Debtor to pay normal post-petition expenses incurred in the ordinary course of business. The Debtor may use Cash Collateral only for the purposes and in the amounts allocated to line items budgeted by the Debtor for operating expenses during the Stipulation Period (defined below), plus a cumulative variance of five percent; and
- e. There shall not be any surcharge to the Cash Collateral or the Tax/CC Account pursuant to section 506(c) of the Bankruptcy Code in this Chapter 11 case, but the foregoing shall not bind any Chapter 7 trustee, and all rights of NYSDTF are reserved in that regard; and

- f. The terms of this Stipulation, including, without limitation, all agreements, representations, warranties, acknowledgments, admissions and releases by the Debtor, shall be binding upon the successors, representatives and assigns of the Debtor and its estate including, without limitation, any Chapter 11 or Chapter 7 trustee appointed herein and any creditors' or other constituents' committee; and
- g. The Debtor acknowledges and agrees that the total outstanding liability to the NYSDTF as of the Petition Date is \$ 127,428.53, comprised of a Secured Claim in the amount of \$115,534.36, an (11 U.S.C. 507) Unsecured Priority Claim of \$10,700.25 and a General Unsecured Claim in the amount of \$1,193.92 ("NYSDTF Claim"); and
- h. The Debtor further acknowledges and agrees that the NYSDTF claim is not subject to any credits, set offs, recoupment or other offset as of the date of the approval of this Stipulation;
- i. As adequate protection for the use of the Cash Collateral, the Debtor shall pay the NYSDTF the amount of \$2,052.23 per month during the Cash Collateral Period defined below. Payments will be made on the 15th day of each month with the first payment due and payable on July 15, 2017 and shall continue each consecutive month thereafter until confirmation of a plan of reorganization or one hundred eighty(180) days from entry of an order approving this Stipulation ("Cash Collateral Period"). Adequate protection payments shall be made by check from the Tax/CC account, payable to the "State of New York" which shall be sent to:

Office of the New York State Attorney General  
Civil Recoveries Bureau  
Bankruptcy Litigation Unit  
Attn: Louis J. Testa, Esq.  
The Capitol  
Albany, NY 12224-0341

9. At any time after approval of this Stipulation by the Court, should the NYSDTF deem that the adequate protection contemplated herein is inadequate to fully and properly protect the creditor's interests and at any time the NYSDTF may apply to the court for any additional adequate protection.

10. The Debtor shall file all post-petition tax returns on the due date of the return with the appropriate NYS office.

11. The Debtor shall pay all ongoing post-petition tax obligations including, but not limited to, sales and withholding taxes in timely fashion until further order of the Court.

12. The Debtor's authority to use Cash Collateral pursuant to this Stipulation shall immediately terminate without further order, notice, hearing, or application to the Court except for

notice to the Office of the United States Trustee, upon the occurrence of any of the following events:

- a. The conversion of this Chapter 11 Case to one under Chapter 7 of the Code; and
- b. The appointment of any Chapter 11 Trustee; and
- c. The dismissal of the Debtor's Bankruptcy Case; and
- d. The cessation of Debtor's normal business operations or the sale of substantially all of the Debtor's assets; and
- e. The default and failure to cure any default under the Stipulation or other administrative order of the court effecting this Stipulation.

13. The occurrence of any of the following shall constitute an event of default by the ("Event of Default"): Debtor's failure to keep, observe, or perform any of its agreements or undertakings under this stipulation, including, but not limited to, the timely payment of the adequate protection payments (without having checks returned for insufficient funds) and the timely and accurate payment of all ongoing tax obligations to the State of New York and Internal Revenue Service.

14. Upon occurrence of any Event of Default, the NYSDTF shall give written notice of such an Event of Default to the Debtor, to the Debtor's counsel and to the United States Trustee and the Debtor shall have five (5) days, from receipt of said written notice, to cure said default or, if such default is disputed, to commence a proceeding before the Bankruptcy Court disputing the claimed default.

15. In consideration of the adequate protection contemplated herein the NYSDTF agrees to entry of an Order in the case of *In re Eiad M. Musleh*; Bk No.: 16-12189-MJK which shall, in brief:

- a. direct the Chapter 13 Trustee to suspend remittance on the NYSDTF's first amended Proof of Claim, dated January 4, 2017, in the amount of \$106,537.39 (the "NYS POC");
- b. in the event of default of Adequate Protection payments contemplated herein, authorize the NYSDTF to file a second amended Proof of Claim in the Principal's individual bankruptcy in an amount equivalent to the balance due upon default; and
- c. providing a decretal paragraph excepting the NYS POC from discharge pursuant to §523(a)(8).

16. In consideration of the forbearance by the NYSDTF of collection and, in consideration of the payments to the NYSDTF by the Debtor and completion of those payments, and in consideration of the desire of all parties to avoid litigation, the RP(s) stipulate and agree to execute all documents required by the NYSDTF extend any and all statute of limitations and other time limits applicable to any responsible party assessment arising in favor of the NYSDTF against the principal Eiad M. Musleh.

17. Notwithstanding any provision in this Stipulation to the contrary, in the event

the Debtor defaults in making any payment when due under the terms of this Stipulation, and such default continues or five (5) days after receipt of written notice to the Debtor's counsel and to the United States Trustee, in addition to any and all other available rights and remedies, the NYSDTF shall have the right, without further notice or application to the Court, to seek collection of all or any part of the amounts outstanding under this Stipulation from any party or parties who may be liable therefor including, without limitation any RP(s).

18. Nothing herein shall be construed to limit the NYSDTF's rights to seek the collection of taxes, including interest and penalties, that become due subsequent to the execution of this stipulation from any party or parties who may be liable therefor.

19. In the absence of any Default (as set forth above) under this Stipulation and subject to its terms, the NYSDTF hereby consents to the Debtor's interim use of the Collateral, which authority to use Cash Collateral shall terminate: (i.) ninety 90 days after entry of an Order authorizing use of Cash Collateral, unless otherwise extended with NYSDTF written consent, (ii) the date of the confirmation of any Chapter 11 plan in this Case within such 90 day period, or (iii) upon the occurrence of an Event Default which is not cured as provided in paragraph "12" hereof, whichever occurs first ("Termination"), unless extended in writing by the NYSDTF, which extension may be effected without further order of the Court, or unless the NYSDTF shall be paid irrevocably and in full. Upon Termination, the rights granted to the Debtor to use Cash Collateral shall cease; provided, however, that the security interests, pledges, liens and other rights and protections granted to the NYSDTF hereunder shall remain in effect until the Indebtedness due the NYSDTF is paid irrevocably and in full.

20. The Debtor, in partial consideration for the use of Cash Collateral also, agrees to provide NYSDTF an accounting for any and all transactions and expenditures of funds used from the Tax/CC Account upon within three (3) days of request.

21. The Debtor shall file all regular monthly operating reports with the Court in timely fashion. All other accountings or reports required by this Stipulation shall not be deemed to be in lieu of the filing of monthly operating reports with the Court.

22. The failure of the Debtor to provide NYSDTF with any accounting as required hereunder shall be considered, after notice to the Debtor and five (5) days opportunity to cure, an Event of Default under the terms and provisions of this Stipulation.

23. This Stipulation and any Order approving same will bind and inure to the benefit of each of the undersigned party's respective predecessors, successors, trustees, receivers, directors, officers, employees, shareholders, agents, beneficiaries and assignees whether so expressed or not.

24. The Stipulation may be executed in one or more separate counterparts, each of which, when so executed, shall be deemed to be an original. Such counterparts shall together constitute and be one and the same instrument. Facsimile signatures shall be deemed to have the full force and effect of ink signatures.

25. This Stipulation constitutes the entire understanding and agreement of the parties with respect to the subject matter of this Stipulation, and any and all prior agreements



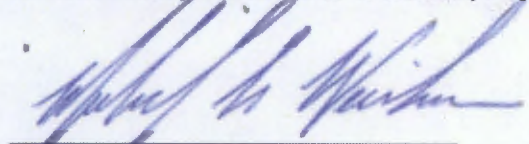
or understandings are hereby terminated and canceled in their entirety and are of no further force or effect.

26. Each party hereto assumes the risk of any misinterpretation or mistake, and if any party hereto should subsequently discover that any fact relied upon in entering this Stipulation was untrue, or that its understanding of the facts and law was incorrect, it shall not be entitled to set aside this Stipulation or any Court order approving it be reason thereof.

27. The Debtor further acknowledges and agrees that the execution of this Stipulation is upon the informed consent, advice and representation of counsel and that nothing contained herein is intended to constitute a waiver, relinquishment or modification of any rights that the Debtor or NYSDTF under Title 11 U.S.C., or any other applicable state or federal law or regulation, other than the extent specifically modified herein.

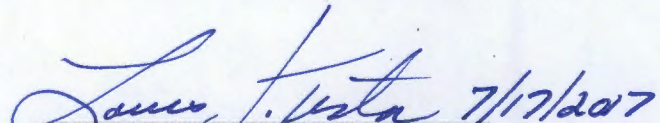
28. This Stipulation is subject to the entry of an order in the Bankruptcy Case ordering and approving the terms of the Settlement. If the Bankruptcy Court does not approve this Settlement, the terms and provisions of this Stipulation shall be null, void and of no effect whatsoever.

Gleichenhaus, Marchese & Weishaar, PC



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Eiad M. Musleh  
Tonawanda Auto Sales & Service, Inc.

**SO ORDERED:**

**DATED**

**U.S. BANKRUPTCY JUDGE, WDNY**