



CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed December 14, 2017

United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

In re:	§	
	§	
DIVERSIFIED POWER SYSTEMS,	§	Case No. 17-44538-rfn11
INC.,	§	
XX-XXX4830	§	
900 N. Walnut Creek, Ste. 100	§	
PMB 414	§	
Mansfield, Texas 76063	§	
	§	
Debtor,	§	Chapter 11
	§	

**AGREED SECOND INTERIM ORDER AUTHORIZING USE OF CASH
COLLATERAL AND PROVIDING ADEQUATE PROTECTION**

This Court, having heard and considered the Expedited Motion for Interim and Final Order Authorizing Use of Cash Collateral (“Motion”), on or about November 17, 2017, and having further considered the agreement to the terms of this Agreed Second Interim Order Authorizing Use of Cash Collateral and Providing Adequate Protection (“Order”) by the Debtor and Frost Bank, formerly The Frost National Bank (“Frost Bank”), finds as follows:

A. On November 6, 2017 (the “Petition Date”), the Debtor filed a voluntary petition for relief pursuant to chapter 11 of title 11 of the United States Bankruptcy Code (“Bankruptcy

Code”). Pursuant to sections 1107 and 1108 of the Bankruptcy Code, the Debtor remains in possession of its assets and is authorized as debtor-in-possession to continue the operation and management of its business. The Motion was filed shortly after the commencement of this case and requested that it be scheduled as an expedited matter.

B. This Court has jurisdiction over the subject matter of the Motion pursuant to 28 U.S.C. § 1334(b). This is a core proceeding within the meaning of 28 U.S.C. § 157(b).

C. An immediate need exists for the Debtor to use the Frost Cash Collateral (defined below) in order to preserve and protect its assets and bankruptcy estate.

D. The Debtor has submitted a new interim operating budget for the period of December 15, 2017 and through and including January 22, 2018 (the “Initial Budget”). The Initial Budget is for thirty (30) days and is attached as Exhibit “1” to this Order.

E. An emergency situation exists for the Debtor. Good cause has been shown for the entry of this Order. The entry of this Order will minimize disruption of the operations of the Debtor, allow it to continue operating as a going concern, and preserve and protect its assets and the bankruptcy estate and is in the best interests of the Debtor, its creditors, and other parties in interest.

F. The Debtor has provided written notice of this hearing, and copies of the Motion and this proposed order to counsel for Frost Bank, the parties that Debtor believes to be the respective twenty largest unsecured creditors, and the United States Trustee as evidenced by the matrix filed with the Court. Such notice is appropriate and adequate under the circumstances and in accordance with the provisions of sections 105, 361, 362, and 363 of the Code, and Fed. R. Bankr. P. 4001.

G. Frost Bank alleges that the following loan documents exist between Frost Bank,

the Debtor and related parties:

- (1) Promissory Note dated January 29, 2014 in the original principal amount of \$149,836.25, executed by the Debtor and payable to Frost Bank;
- (2) Commercial Security Agreement dated January 29, 2014, executed by the Debtor granting Frost Bank a security interest in all of Debtor's inventory, accounts and equipment and other collateral as described therein; and
- (3) Commercial Guaranty agreement dated November 7, 2011, executed by William R. Bertrand.

All of the loan documents, agreements and instruments that have been defined and/or referred to herein together with all other documents, agreements and instruments evidencing, securing, governing, guaranteeing, pertaining to and/or executed in connection with the loan described above and all modifications, amendments, renewals and extensions thereof are collectively referred to herein as the "Frost Loan Documents." Frost Bank alleges that it has a perfected security interest in the collateral described in the Frost Loan Documents (hereinafter, the "Frost Pre-Petition Collateral"), some of which constitutes cash collateral within the meaning of section 363 of the Bankruptcy Code (hereinafter, the "Frost Cash Collateral").

H. Any findings of fact contained herein that are conclusions of law shall be deemed conclusions of law and vice versa.

IT IS THEREFORE ORDERED AND DECREED AS FOLLOWS:

1. The Motion was filed and the hearing requested pursuant to Fed. R. Bankr. P. 4001 in order to prevent immediate and irreparable harm to the estate, and notice of the Motion in light of the facts and circumstances is sufficient and adequate for purposes of Fed. R. Bankr. P. 4001. No further notice of the Motion or the entry of this Order is necessary, except that this

Order will be served in accordance with paragraph 18 of this Order.

2. The use of the Frost Cash Collateral to the extent set forth in the Initial Budget for the interim period on the terms set forth herein, will provide Frost Bank with “adequate protection” for the use of the Frost Cash Collateral as that term is defined in section 363(e) of the Bankruptcy Code. The Frost Cash Collateral is hereinafter referred to as the “Cash Collateral”.

3. Good cause has been shown for the entry of this Order. The entry of this Order is in the best interests of the Debtor, its creditors and its bankruptcy estate. The terms and conditions for the use of Cash Collateral and the security interests, liens, rights and priorities granted to Frost Bank hereunder as adequate protection for use of its Cash Collateral on an interim basis are fair and appropriate under the circumstances.

4. Consideration of the Motion constitutes a core proceeding as defined in 28 U.S.C. § 157(b)(2).

5. All proceeds of the Cash Collateral shall be considered Cash Collateral of Frost Bank, to the extent necessary to protect against the diminution in the value of that Cash Collateral.

6. Pending a final hearing, the Debtor shall be authorized to use the Cash Collateral only in strict accordance with the terms set forth herein and solely in the amounts and solely for the items in the manner set forth in and pursuant to the Initial Budget. The use of the Cash Collateral by the Debtor shall be limited to the normal, actual, necessary, and proper post-petition expenditures required to pay the items identified in the Initial Budget during the particular time set forth herein; *provided, however*, that expenditure on particular items may vary so long as the total variance from budget is not greater than five percent (5%) on a cumulative

basis for total cash disbursements.

7. As adequate protection for and to the extent of any diminution of value of Frost's Pre-Petition Collateral resulting from post-petition use of Frost's Cash Collateral by the Debtor from and after the Petition Date as set forth herein, Frost Bank hereby is granted, without any further action:

- (a) Valid and automatically perfected, continuing, additional, and replacement liens on and security interests in the same property as existed pre-petition, any and all assets and property of the Debtor, including, without limitation, both real property and personal property, wherever located, in which the Debtor now has or may hereafter acquire any right, title or interest, including, but not limited to, all real property, any funds on deposit for the benefit of Debtor, wherever located; documents of title evidencing or issued with respect thereto; accounts; deposits; chattel paper; contracts; documents; records; equipment; fixtures; general intangibles; instruments; inventory; letter of credit rights; supporting obligations, along with all proceeds and products of the foregoing; all as may be generated or acquired by the Debtor from and after the Petition Date; *provided, however*, that Frost Bank's liens granted herein shall not extend or attach to the estate interests of the Debtor in any causes of action under chapter 5 of the Bankruptcy Code or any proceeds thereof; and
- (b) Valid and automatically perfected continuing, additional and replacement liens and security interests in, to and against any and all rents, issues, profits or proceeds of any and all of the foregoing. The collateral described in this paragraph 7 is hereinafter referred to as the "Frost Post-Petition Collateral." The

Frost Post-Petition Collateral, the Frost Pre-Petition Collateral and the Cash Collateral are collectively referred to hereinafter as the “Frost Collateral.” The Frost Post-Petition Collateral shall secure repayment of all indebtedness and obligations owing to Frost Bank under this Order.

8. Nothing contained herein shall constitute an admission or determination of the validity or priority of any lien asserted by Frost Bank in the Frost Loan Documents, and the liens granted in the preceding section shall be subject to this provision.

9. Nothing in this Order shall constitute a limitation on the ability of the Debtor to request additional authority to use cash or of Frost Bank’s right to object to such request.

10. The rights, claims, security interests, liens and priorities of Frost Bank arising under this Order are in addition to, and not in lieu or substitution of, the rights, obligations, claims security interests, liens and priorities under the Frost Loan Documents. The liens described above are granted pursuant to sections 361, 362, and 363 of the Bankruptcy Code Bankruptcy Code.

11. All of Frost Bank’s post-petition liens and security interests granted pursuant to this Order shall be effective, valid and perfected as of the date of the entry of this Order without the necessity of the filing or lodging by or with any entity of any documents or instruments otherwise required to be filed or lodged under applicable non bankruptcy law. This Order shall be deemed to be a security agreement for purposes of creation, attachment and perfection of Frost Bank’s liens on and security interests in, to and against collateral. Said liens and security interests shall be valid and perfected as against, and binding upon the Debtor and any subsequently appointed trustee, whether appointed under Chapter 11 or Chapter 7 of the Bankruptcy Code. To the extent that any applicable non-bankruptcy law otherwise would

restrict the granting, scope, enforceability, attachment, or perfection of the liens and security interests authorized or created herein, such law is preempted to the maximum extent permitted by the Bankruptcy Code, other applicable federal law, and the judicial power of the United States Bankruptcy Court. This Order and the Frost Loan Documents shall be sufficient and conclusive evidence of the priority, perfection, attachment, and validity of all of the replacement liens and security interests of Frost Bank in and on the Frost Pre-Petition Collateral and the Frost Post-Petition Collateral granted herein, and the liens and security interests granted, created and ratified herein shall, by virtue of the filing of a certified copy of this Order in any filing or recording office in any county or state, constitute valid and automatically perfected liens and security interest without the necessity of creating, filing, recording or serving any financing statements or other documents that might otherwise be required under federal or state law in any jurisdiction or the taking of any other action to validate or perfect the adequate protection replacement liens and security interests granted herein to Frost Bank in this Order and, in such event, the subject filing or recording officer is authorized to file or record a certified copy of this Order.

12. Unless otherwise authorized by this Court, the Debtor shall not use any of the Cash Collateral for payment of any pre-petition debts or obligations of the Debtor or claims against the Debtor.

13. Debtor shall deliver to Frost Bank copies of its monthly operating reports required by the United States Trustee at the same time that such reports are filed with the Court. Commencing on November 20, 2017, and continuing every seventh (7th) day thereafter until the final hearing on cash collateral, the Debtor shall deliver to Frost Bank for the period that includes the immediately preceding seven (7) days a complete and accurate list of each and all checks

written or other forms of payment made by Debtor identifying each payee, the amount of payment, and the date of payment. The first report provided under this paragraph will go back to and include all payments made from November 6, 2017.

14. The Debtor shall permit representatives, agents, and/or employees of Frost Bank to have reasonable access to business premises and the books and records of the Debtor for review appraisal, and inspection of the collateral of Frost Bank, and shall cooperate with respect to such reviews, appraisals, and inspections.

15. The following shall constitute an event of default (“Event of Default”) under this Order (or any Final Order):

- (a) *Improper Use of Cash Collateral.* The Debtor shall fail to use the Cash Collateral in accordance with the Initial Budget or this Order.
- (b) *Reporting.* The Debtor shall have failed to deliver to Frost Bank any material reports required to be provided pursuant to this Order;
- (c) *Conversion.* The entry of an order by the Court converting this Case to a case under chapter 7 of the Bankruptcy Code;
- (d) *Dismissal.* The entry of an order by the Court dismissing this Case pursuant to sections 1112(b) or 305 of the Bankruptcy Code or otherwise;
- (e) *Appointment of Trustee or Examiner.* The entry of an order by the Court authorizing the election or appointment of a trustee pursuant to section 1104 of the Bankruptcy Code or otherwise, or an examiner or other responsible person with expanded powers, in this case;
- (f) *Failure to Maintain Insurance.* The Debtor shall have failed to maintain insurance on any property that constitutes the Frost Bank Pre-Petition

Collateral.

16. Upon the occurrence of any Event of Default, Frost Bank may terminate the use of Cash Collateral by providing written notice to the Debtor of an Event of Default and Frost Bank's intent to terminate (a "Termination Notice"). The Termination Notice shall set forth the Event of Default with particularity. If the Event of Default has not been cured within three (3) business days after the receipt by the Debtor of the Termination Notice, the authority of the Debtor to use Cash Collateral under this Order shall immediately be terminated unless otherwise ordered by the Court.

17. The Automatic Stay is hereby modified to the extent necessary to permit all acts, actions, and transfers contemplated herein.

18. A hearing shall be scheduled for the 22nd day of January 2018, at 9:30 a.m. CST before The Honorable Russell F. Nelms, 501 West Tenth Street, Fort Worth, Texas 76102 to consider final an additional interim order or final order. At that hearing, if no objections are filed, or if this Court considers any objections and overrules those objections, this Order shall become a final order. A copy of this Order and Notice of the Hearing shall be served by the Debtor on Frost Bank and its counsel and any committee appointed by the United States Trustee, the twenty largest unsecured creditors, the United States Trustee, and the Official Service List.

19. Ad valorem taxing authorities also have liens against the real and personal property owned by the Debtors. Nothing in this order is intended to affect the validity or priority of the liens alleged to protect those creditors, except that this order does provide those creditors shall retain all liens and be entitled to a replacement lien of the same statutory priority.

20. This Order shall be effective *nunc pro tunc* to the Petition Date.

END OF ORDER

AGREED AS TO FORM AND ENTRY REQUESTED:

/s/ Craig Davis
RONALD W. ROBERTS
State Bar No. 17018600
CRAIG D. DAVIS
State Bar No. 00793588
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ATTORNEYS FOR DEBTOR

/s/ Chad Berry
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ATTORNEYS FOR FROST BANK

Projected Cash Flow*

*Amended 12-12-17 to remove Tahoe payment

	Nov-17	Dec-17	Jan-18
Income			
Fire Marshall Income			
Generator Sales			
Services			
Zless Credit or Discount			
4050 - Service Call Sales	\$ 36,618	\$ 74,529	\$ 62,801
4070 - Previous Maint Contract Sales	\$ 44,261	\$ 24,595	\$ 20,724
Total Income	<u>\$ 80,879</u>	<u>\$ 99,124</u>	<u>\$ 83,525</u>
COGS			
Generator/Equipment (fuel)	\$ 9,938	\$ 12,180	\$ 10,263
Labor (service calls)	\$ 9,356	\$ 11,466	\$ 9,662
Shop Supplies	\$ 250	\$ 306	\$ 258
Vehicles (gas)	\$ 4,547	\$ 5,573	\$ 4,696
Total COGS	<u>\$ 24,090</u>	<u>\$ 29,524</u>	<u>\$ 24,878</u>
Gross Profit	\$ 56,789	\$ 69,600	\$ 58,647
Expenses			
Advertising - print	\$ -	\$ -	\$ -
Ally - Secured Vehicle Notes	\$ 4,714	\$ 4,714	\$ 4,714
Bad Debt - Write Off	\$ -	\$ -	\$ -
Bank Service Fees	\$ 35	\$ 35	\$ 35
Employee Benefits:			
Blue Cross Blue Shield - Health	\$ 6,000	\$ 6,000	\$ 6,000
Aflac	\$ 518	\$ 518	\$ 518
Principal - Disab/Vision/Dental/TermLife	\$ 832	\$ 832	\$ 832
Computer - software/anti virus	\$ -	\$ -	\$ -
Disputed CC Charges	\$ -	\$ -	\$ -
Credit Card Finance Charges	\$ 530	\$ 650	\$ 547
Dues & Subscriptions	\$ -	\$ -	\$ -
Frost Bank - Secured Loan	\$ 2,421	\$ 2,421	\$ 2,421
Health & Safety - Supplies	\$ -	\$ -	\$ -
Insurance -Auto/Umbrella/Liability & Worker's Comp.	\$ 5,838	\$ 5,838	\$ 5,838
Interest Expense			
Late fees			
Lease Payment			
Office Supplies	\$ 100	\$ 100	\$ 100
Travel & Phone Reimbursements	\$ 1,180	\$ 1,180	\$ 1,180
Payroll - includes 941 taxes	\$ 22,880	\$ 22,880	\$ 22,880
Rent	\$ 2,456	\$ 2,456	\$ 2,456
Repairs & Maintenance	\$ 1,000	\$ 1,000	\$ 1,000
Taxes - Sales Tax * Post Petition	\$ 2,100	\$ 2,100	\$ 2,100
Telephone	\$ 1,800	\$ 1,800	\$ 1,800
Trustee Fees	\$ 1,200	\$ 1,200	\$ 1,200
Utilities - Electric/Water/Trash	\$ 380	\$ 380	\$ 380
Total Expenses	<u>\$ 53,983</u>	<u>\$ 54,103</u>	<u>\$ 54,001</u>
Net Income	\$ 2,806	\$ 15,497	\$ 4,646