IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND DIVISION

In Re:	**§**	**Chapter 11**
	§	
Saul Rodriguez Welding &Trucking, LLC	**§**	**Case No. 17-70115-tmd**
	§	
	§	
Debtor.	**§**	

EMERGENCY MOTION FOR INTERIM AND FINAL ORDERS (A) AUTHORIZINGPOST-PETITION ACCOUNTS RECEIVABLE FINANCING; AND (B) USE OF CASH COLLATERAL NUNC PRO TUNC TO THE PETITION DATE

Saul Rodriguez Welding & Trucking, LLC, debtor and debtor in possession in the above-captioned chapter 11 case (the "Debtor"), by and through its proposed counsel, hereby files this *Emergency Motion for Interim and Final Orders Authorizing (A) Post-Petition Accounts Receivable Financing and (B) Use of Cash Collateral Nunc Pro Tunc to the Petition Date* (the "Motion"). In support of this Motion, the Debtor respectfully represents the following:

I.
JURISDICTION AND VENUE

1. This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334. This Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (D). Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409. The predicates for the relief requested herein are 11 U.S.C. §§ 105, 363, and 364, which may be implemented under Rules 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

II.
RELIEF REQUESTED

2. The Debtor requires accounts receivable financing to maintain its operations. Without accounts receivable financing, the Debtor will not have sufficient working capital to

maintain its operations. Due to the nature of the Debtor's business and the Debtor's relationships with its customers, accounts receivable financing is necessary to maintain positive cash flow.

III.
BACKGROUND

3. On June 28, 2017 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code").

4. The Debtor continues to operate its business and manage its assets as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in this chapter 11 case pursuant to section 1104 of the Bankruptcy Code.

5. Prior to the Debtor's formation, its sole member, Saul C. Rodriguez ("Mr. Rodriguez"), executed a factoring agreement to receive advances secured by that certain *Factoring, Security and Service Agreement* (the "Factoring Agreement") entered into between Mr. Rodriguez and TCI Business Capital, Inc. ("TCI").

6. The Factoring Agreement provides that all invoices generated by Mr. Rodriguez will be sent to TCI and funds would be advanced subject to fees, charges security reserves or chargebacks.

7. The Debtor was formed on December 13, 2013 as a welding and trucking company located in Fort Stockton, Texas.

8. The Debtor provides welding and trucking services to oil and gas companies in the Midland/Odessa, Texas metropolitan area.

9. The Debtor and TCI executed that certain *Factoring, Security and Service Agreement Amendment* (the "Factoring Agreement Amendment" collectively with the Factoring Agreement, the "Agreement") dated April 7, 2014.

10. The Debtor's invoices have been provided to TCI since its formation.

11. TCI manages a cash reserve and a security reserve. The cash reserve funds are released to the Debtor after TCI has received payment and deducted its fees from the proceeds of the Debtor's invoices, accounts receivable and other general intangibles. As of the Petition Date, there is approximately $101,053.14 held in the cash reserve account at TCI.

12. The security reserve is an account where 20% of the Debtor's cash proceeds are held to secure payment of outstanding invoices, accounts receivable and other general intangibles until TCI receives more than the 20% threshold. Once the 20% threshold is met, the funds are sent to the cash reserve and the Debtor is entitled to have the funds released.

13. The Debtor sells to its customers on net 30 day terms, but customers in the industry regularly pay their invoices in 45 to 90 days. Thus, factoring allows the Debtor to access up to 80% of the face value of its accounts receivable in 24 to 72 hours and the balance upon payment of the invoice from the customer.

14. In March of 2017, the Internal Revenue Service (the "Service") assessed the Debtor approximately $100,000.00 for nonpayment of its 941 taxes.

15. On June 26, 2017, the Service assessed the debtor an additional $85,152.05 for unpaid 941 taxes.

16. The Service contacted TCI and advised that the Service had a claim to approximately $100,000.00 in the cash reserve for the nonpayment of the Debtor's 941 taxes.

17. In June of 2017, the Debtor requested that TCI release the $101,053.14 in the cash reserve, yet TCI refused citing the Service's notification.

18. TCI has now agreed to release the $101.053.14 in the cash reserve account upon interim approval of the Debtor's use of cash collateral.

19. Diversified Lenders, Inc. ("DLI") has proposed that certain *Factoring and Security Agreement* (the "DIP Agreement") on essentially the same terms as the prepetition Agreement between the Debtor and TCI. A true and correct copy of the DIP Agreement is attached hereto as **Exhibit "A"**.

20. Pursuant to the DIP Agreement, DLI has agreed to provide accounts receivable financing up to $1,000,000.00 whereby DLI will advance 85% of the gross amount of all invoices purchased from the Debtor.

21. When the Debtor's customers tender payment, DLI advances the remaining 15% to the Debtor, less its factoring fees, which range from 1.75% of the invoice amount for the initial 30 days and 1.75% each 30 days thereafter.

22. In addition to the foregoing fees, DLI will charge the Debtor the Wall Street Journal prime rate on the outstanding Net Funds Employed (NFE) that have not been paid.

23. DLI will charge a $500.00 due diligence fee.

24. The DIP Agreement shall remain fully enforceable between the Debtor and DLI until confirmation of any plan of reorganization, conversion or dismissal, whichever occurs first.

25. To continue its operations and maintain its cash flow, the Debtor requires accounts receivable financing.

26. Without this accounts receivable financing, the Debtor will be unable to secure sufficient working capital to reorganize its affairs. Thus, obtaining post-petition financing is necessary in order to avoid immediate and irreparable harm to the Debtor and its estate.

27. The Debtor believes that the DIP Agreement is on the best terms available under the circumstances, and was negotiated at arms' length and in good faith. Further, as set forth above, the Debtor was unable to obtain debtor-in-possession financing on better terms than that provided under the DIP Agreement. Last, the Debtor believes, after diligent consideration of all known circumstances, in its reasonable business judgment.

IV.
BASIS FOR RELIEF REQUESTED

28. Section 364 of the Bankruptcy Code states that a debtor-in-possession may obtain financing either in the ordinary course of business or outside the ordinary course of business. *See* 11 U.S.C. § 364. First, Section 364(a) of the Bankruptcy Code allows the debtor to obtain unsecured credit and to incur unsecured debt in the ordinary course of business. 11 U.S.C.§ 364(a). Second, after notice and a hearing, the Court may authorize a debtor to obtain financing outside the ordinary course of business. 11 U.S.C. § 364(b).

29. Section 364 is structured with an escalating series of inducements that a debtor may offer to attract post-petition financing outside of the ordinary course of business. *In re Photo Promotion Assoc. Inc.*, 87 B.R. 835, 839 (Bankr. S.D.N.Y. 1988), aff'd, 881 F.2d 6 (2d Cir. 1989). Specifically, when a debtor cannot obtain ordinary course unsecured post-petition financing, more specialized forms of credit may be obtained under the conditions set forth in Section 364 of the Bankruptcy Code. *See In re T.M. Sweeney & Sons LTL Servs., Inc.*, 131 B.R. 984, 989 (Bankr. N.D. Ill. 1991). Initially, Section 364(b) states that the post-petition financing may be allowable as an administrative expense under Section 503(b)(1). 11 U.S.C. § 364(b). If lenders are unwilling

to extend credit to a debtor on a general administrative expense priority basis, then, upon notice and a hearing, further inducements can be offered, including (i) superpriority administrative expense status for the post-petition credit, (ii) liens on any unencumbered property of the estate, and liens junior to existing liens on property of the estate. 11 U.S.C. §§ 364(c)(1), (c)(2) and 364(c)(3).

30. For the reasons set forth herein, the Debtor submits the standards of Sections 364(c) are satisfied.

31. After appropriate investigation and analysis, the Debtor's management has concluded that the DIP Agreement provides the best alternative available. Bankruptcy courts routinely defer to a debtor's business judgment on most business decisions, including the decision to borrow money. *See In re Simasko Prods. Co.*, 47 B.R. 444, 449 (Bankr. D. Colo. 1985) ("Business judgments should be left to the board room and not this Court."); *In re Lifeguard Indus., Inc.*, 37 B.R. 3, 17 (Bankr. S.D. Ohio 1983) (same). "More exacting scrutiny would slow the administration of the debtor's estate and increase its costs, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially." *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985).

32. In general, a bankruptcy court should defer to a debtor-in-possession's business judgment regarding the need for and the proposed use of funds, unless such decision is arbitrary and capricious. *In re Curlew Valley Assocs.*, 14 B.R. 506, 511-14 (Bankr. D. Utah 1981). Courts generally will not second guess a debtor-in-possession's business decisions when those decisions involve "a business judgment made in good faith, upon a reasonable basis, and within the scope of his authority under the Code." *Id.* at 513-14.

33. The Debtor exercised its sound business judgment in determining the proposed DIP Agreement is appropriate and necessary, and has satisfied the legal prerequisites to borrowing under the DIP Agreement. The DIP Agreement is in the best interests of the Debtor's estate and, accordingly, the Debtor should be granted authority to enter into the DIP Agreement and borrow funds from DLI pursuant to Sections 364(c) of the Bankruptcy Code, and take all other actions contemplated by the DIP Agreement and as requested herein.

A. The DIP Agreement Terms are Fair, Reasonable, and Appropriate

34. The proposed terms of the DIP Agreement are fair, reasonable, and adequate. The purpose of the DIP Agreement is to enable the Debtor to meet obligations of the Debtor, including ongoing operational and administrative expenses while it attempts to reorganize by proposing a confirmable plan.

35. The terms and conditions of the DIP Agreement are fair and reasonable, and was negotiated by at arms'-length and in good faith, pursuant to Section 364(e) of the Bankruptcy Code. The ability of the Debtor to continue to operate its businesses under Chapter 11 depends upon its ability to obtain the financing memorialized in the DIP Agreement to ensure that the Debtor has funds to meet the obligations approved by this Court, and so that it has sufficient liquidity to reorganize. More specifically, the credit provided under the DIP Agreement will enable the Debtor to continue to, among other things, satisfy its business needs, pay its employees, and operate its business in the ordinary course of business and in an order and reasonable manner to preserve and enhance the value of the Debtor's estate for the benefit of all parties in interest.

36. Finally, the proposed DIP Agreement is subject to a carve out for all professional fees and expenses authorized by the Court. *In In re Ames Dep't Stores*, 115 B.R. 34 (Bankr.

S.D.N.Y. 1990), the court found that such "carve-outs" are not only reasonable, but are necessary to ensure that the debtor's estate will be assured of the assistance of counsel. *Id.* at 40.

37. Similarly, the various fees and charges required by DLI under the DIP Agreement are reasonable and appropriate under the circumstances. The combination of key terms of the DIP Agreement, including interest rate, fees, availability, financial covenants and other terms and conditions are competitive in the marketplace for short-term debtor in possession financing of this type for companies in similar situations.

B. Immediate Relief Is Necessary and Appropriate

38. Fed. R. Bankr. P. 4001(c)(2) provides that a final hearing on a motion to obtain credit pursuant to Section 364 of the Bankruptcy Code may not be commenced earlier than fourteen (14) days after the service of such motion. Upon request, however, the Court is empowered to conduct a hearing before such fourteen (14) day period and authorize the obtaining of credit to the extent necessary to avoid immediate and irreparable harm to a debtor's estate pending a final hearing. *See* Fed. R. Bankr. P. 4001(c)(2).

39. Pursuant to Fed. R. Bankr. P. 4001(c)(2), the Debtor request that the Court conduct an interim hearing on the Motion and authorize the Debtor to obtain post-petition financing from DLI on an interim basis pending a final hearing. As demonstrated above, the Debtor has an emergent need to obtain funds to operate its business. Absent interim relief, the Debtor and its estate will suffer immediate and irreparable harm in that the Debtor will not have access to any funds to operate its business. Accordingly, it is appropriate for the Court to approve the Motion on an interim basis.

40. During the interim period and before a final hearing pursuant to Fed. R. Bankr. P.

4001(c)(2) (the "Final Hearing"), the post-petition financing arrangement will be governed by the terms of the DIP Agreement. The Debtor is proposing that it be permitted to borrow up to 85% of the gross value of the invoices sold to DLI per month under the DIP Agreement pending the Final Hearing.

41. Accordingly, it is appropriate for the Court to hear the Motion on an expedited basis.

V.
TCI'S CASH COLLATERAL

42. The Debtor proposes to use the DIP Lender's cash collateral to pay ordinary and necessary business expenses. Absent use of the DIP Lender's cash collateral, the Debtor's operations would cease, causing the Debtor's estate to suffer immediate and irreparable harm.

43. A Chapter 11 debtor-in-possession has the statutory right to use cash collateral to operate its business. The standards governing a debtor's use of cash collateral are set forth in Section 363(c)(2) of the Bankruptcy Code, which provides:

> The trustee [or debtor-in-possession] may not use, sell, or lease cash collateral under paragraph 1 of this subsection, unless –
>
> (A) each entity that has an interest in such cash collateral consents; or
>
> (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

11 U.S.C. § 363(c)(2) (2017).

44. The "provisions of this section" referenced in Section 363(c)(2) include Section 363(e), which provides:

> Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property

> used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale or lease as is necessary to provide adequate protection of such interest.

11 U.S.C. § 363(e) (2017).

45. Here, TCI consents to the use of cash collateral in accordance with the DIP Agreement. TCI will also release the $101,053.14 held in the cash account upon entry of the interim approval of the DIP Agreement. Because Section 363(c)(2)(a) of the Bankruptcy Code is satisfied, the Debtor respectfully submits that cause exists to authorize its use of TCI's cash collateral upon interim approval of the DIP Agreement. TCI's interests are adequately protected through: (a) a replacement lien on the Debtor's post-petition assets, and/or (b) an administrative expense claim to the extent the Debtor's use of cash collateral results in a diminution of the TCI's collateral, rendering them under secured.

46. Pursuant to Fed. R. Bankr. P. 4001(b)(2), the Debtor requests that the Court conduct an expedited preliminary hearing on the Motion and authorize the Debtor to use TCI's cash collateral on an interim basis and release the $101,053.14 held in the cash account pending final approval of the DIP Agreement. Absent interim relief, the Debtor and its estate will suffer immediate and irreparable harm.

VI. NOTICE

47. Notice of this Motion has been provided to: (a) the Office of the United States Trustee for the Western District of Texas; (b) counsel to TCI; (c) counsel to DLI; (d) the Debtor's secured creditors; (e) the twenty (20) largest unsecured creditors of the Debtor (which includes the Internal Revenue Service and the U.S. Department of Labor); (f) In light of the nature of the relief requested herein, the Debtor submits that no other or further notice is necessary.

VII. CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court enter the Order granting the Motion and such other relief as the Court deems just and appropriate under the circumstances.

Dated: July 14, 2017

Respectfully submitted,

/s/ M. Jermaine Watson

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 14, 2017, a true and correct copy of the foregoing document was served electronically via the Court's PACER system; by U.S. First Class Mail postage prepaid, or email, on the parties listed on the attached Service List.

/s/ M. Jermaine Watson
M. Jermaine Watson