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UNITED STATES BANKRUPTCY COURT
DISTRICT OF UTAH

In re: Sunplay Pools and Spas Superstore, Inc., a Utah Corporation, Debtor.	Case No. 18-27417 Chapter 11 Hon. Joel T. Marker

DEBTOR, SUNPLAY POOLS AND SPAS SUPERSTORE'S MOTION FOR AUTHORITY TO USE CASH COLLATERAL ON AN INTERIM AND FINAL BASIS

The Debtor-in-Possession, Sunplay Pools and Spas Superstore, Inc., ("Sunplay" or the "Debtor") seeks authority to use cash collateral on an interim and final basis pursuant to 11 U.S.C. §363(c)(1).

In support of this Motion, the Debtor has simultaneously filed the Declaration of John Olson, the president of the Debtor, in Support of First Day Motions and Financing Motions (the "Omnibus Declaration"), incorporated herein by reference. In support of this Motion, the Debtor respectively represents as follows:

I.

Compliance with Bankruptcy Rule 4001 and Local Rule 4001-2

The following entities claim, or may claim, an interest in the Debtor's security interests in monies, receivables and/or inventory, located in Ogden, Utah (The "Collateral"), which is based on filed UCC Financing Statements: Wells Fargo Bank (bought from GE Commercial Distribution)[1]; American Express[2]; JP Morgan Chase[3]; JPMorgan Chase[4]; American Express[5]; American Express[6]; and PoolFX Supply (aka

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[1] GE Commercial Distribution, filed October 14, 2009. This creditor provides the flooring for the hot tubs that the Debtor stocks. The loan was bought by Wells Fargo Bank.

[2] American Express, filed July 14, 2014. The principal amount of the obligation is $0.00. The Debtor believes that the present amount owed to this term loan is $0.00.

[3] JPMorgan Chase, filed October 29, 2015. The principal amount of the obligation is $356,739.72. The Debtor believes that the present amount owed to this creditor is $356,739.72. This is an SBA guaranteed loan.

[4] JPMorgan Chase, filed December 10, 2015. The principal amount of the obligation is $50,739.72. The Debtor believes that the present amount owed to this creditor is $50,739.72. This is a line of credit.

Pool Corp)[7] (collectively, the "Secured Lenders").

The Debtor proposes to use its cash, including cash that may constitute cash collateral, to pay the Debtor's ordinary post-petition operating expenses and certain administrative expenses (the "**Approved Expenses**"), as more particularly set forth in the Budget.

The Debtor requests authority to use cash collateral on an interim basis pending a final hearing on this Motion.

The Debtor seeks entry of a final order authorizing use of cash collateral through the period ending January 2018.

Further, subject to the terms and conditions of future budgets to be submitted to and considered by the Court by amendments to the Motion (and/or by amendments to the Budget), the Debtor hereby moves the Court to approve and authorize the use of cash collateral for additional periods beyond January 2018.

The Motion anticipates, and the Debtor requests, that the Court schedule

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[5]American Express, filed July 12, 2016. The principal amount of the obligation is $0.00. The Debtor believes that the present amount owed to this term loan is $0.00.

[6]American Express, filed August 11, 2017. The principal amount of the obligation is $229,277.60. The Debtor believes that the present amount owed to this creditor is $229,277.60. This is a term loan.

[7]PoolFX Supply (aka Pool Corp) filed August 8, 2018. The Debtor believes that the present amount owed to this creditor is $679,000.00 [per the amount stated in the complaint against the Debtor filed by Pool Corp].

further hearings to consider and approve use of cash collateral for future periods, based upon budgets to be submitted in advance of such further hearings.

The Debtor does not request any "extraordinary relief" within the meaning of Local Rule 4001-2(a)(1).

The Debtor proposes that the order(s) approving this Motion on an interim and final basis provide the following "adequate protection" to Secured Lenders(collectively, the "**Adequate Protection Rights**"): the Secured Lenders will receive a replacement lien upon all pre-petition and post-petition assets of the Debtor (excepting, chapter 5 claims and the proceeds of new sales) to the extent the Debtor's use of cash collateral results in a diminution in the amount or value of the secured claim of such creditor.

A summary of the proposed use of cash collateral is as follows: (a) the Debtor proposes to use cash to pay the Approved Expenses, as more particularly detailed on the Budget; (b) the Debtor proposes to use cash collateral to pay expenses in the amounts specified in the Budget; and (c) the Debtor proposes to grant Secured Lenders the Adequate Protection Rights described above, including a replacement lien upon non-excluded post-petition assets of the Debtor.

Further, the Debtor is requesting interim relief to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

II.

Case Information and Jurisdiction

The Debtor, commenced this case under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§101, *et seq.* (the "Bankruptcy Code"), by filing a voluntary petition on October 4, 2018 (the "Petition Date"). No creditors' committee, trustee or examiner has been appointed in this case.

This Court has jurisdiction under 28 U.S.C. §§157 and 1334. Venue is proper in this Court pursuant to 28 U.S.C. §§1408 and 1409. This is a core proceeding under 28 U.S.C. §157(b)(2)(A), (D), and (O) and the Court has jurisdiction to enter a final order.

The Debtor continues to operate and manage its business as debtor-in-possession pursuant to sections §§1107(a) and 1108 of the Bankruptcy Code.

II.

Background

In the concurrently filed Omnibus Declaration, John Olson describes the financial and legal problems which led the Debtor to file its Chapter 11 petition, steps it has taken to solve these problems and the steps it will be taking to reorganize. The Debtor intends to file a plan of reorganization and does not intend to sell its business or its assets (except for inventory in the ordinary course).

The Debtor seeks authority to use cash collateral in the ordinary course of business. The Debtor seeks authority to use cash collateral on an interim and on a final basis under the budget. The budget is attached to the Omnibus Declaration as **Exhibit "A".**

The value of estate assets subject to these financing statements is such that perhaps the filed security interests may be under-secured or unsecured. The values of the estate's assets (as stated in Schedule B to the petition) are based on management's opinions and an appraiser may reach different conclusions of value.

The Debtor's financial position can be seen in the financial reports attached to the First Day Declaration. These reports include the following:

- Projection of gross revenues, COGS, expenses and cash flow (**Exhibit "A"**)
- Cash basis P&L Statement 2018 YTD (**Exhibit "B"**)
- Accrual basis P&L Statement 2018 YTD (**Exhibit "C")**
- Balance sheet as of August 31, 2018 (**Exhibit "D"**)
- Payables report (aged) as of August 31, 2018 **(Exhibit "E")**
- Receivables report (aged) as of August 31, 2018 **(Exhibit "F")**
- An Accrued based P&L statements for year 2017 (**Exhibit "G")**

The reports reflect a mixed situation - considerable orders but insufficient monies on hand.

However, with reduced expenses and other changes to the Debtor's business model, the Debtor projects that through the first eight weeks of the case, it will not lose money but instead will realize a modest net income while its receivables increase in amount.

In the proposed eight (8) week interim period, the Debtor should generate net cash flow of $44,887.00 on gross revenues of $2,980,000.00, costs of goods sold at $2,342,400.00 and net profit of $79,887.00. Cash flow will be positive during this interim period and the value of assets on hand will increase.

The projections also reflect an intention by the Debtor to not push monthly gross revenue figures as high as they have been in the past but to aim for a more modest annual gross revenue amount, likely under $10,000,000, to provide to the Debtor time to get its expenses under control, to implement other changes to its business model and to determine what annual gross revenue total permits the Debtor the highest possible net income figure.

The Debtor's assets include the following: (figures are approximate) (1) monies on hand $48,690.90 (as of October 1, 2018); and (2) vehicles, machinery and equipment $300,900.00. (Schedule "B").

II.

Request for Relief

The Debtor requests that the Court take the following actions: (1) enter an order authorizing the Debtor to use cash collateral on an interim basis per the budget with the requested variances, rollover provisions and application of excess revenues to costs of goods sold; (2) set a hearing on final use of cash collateral in the ordinary course of business; (3) grant to the entities asserting interests in the estate's monies replacement liens in collateral of the estate as discussed above; and (4) Such further relief as the Court deems appropriate and consistent with this Motion.

III.

Basis for Relief Requested

Section 363(c)(2)(B) of the Bankruptcy Code enables this Court to authorize the use of cash collateral. The Court is required, however, to "prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest." 11 U.S.C. § 363(e). Adequate protection is a concept "which is to be decided flexibly on the proverbial 'case-by case' basis." MBank Dallas, N.A. v. O'Connor (In re O'Connor), 808 F.2d 1393, 1396-97 (10th Cir. 1987). A creditor secured by cash collateral is only entitled to adequate protection to the extent of any post-petition diminution in the value of the collateral. See In re Club Assocs., 107 B.R. 385, 394 (Bankr. N.D. Ga. 1989) ("adequate protection payments are intended to replace the value of the collateral lost during the pendency of the case"); United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 372 (1988).

Adequate protection, if it is necessary, may take many available forms, including (1) cash payments, (2) additional or replacement liens, and (3) allowance of an administrative expense or other relief. See 11 U.S.C. § 361; Travelers Ins. Co. v. American AgCredit Corp. (In re Blehm Land & Cattle Co.), 859 F.2d 137, 139 (10th Cir. 1988) (explaining that the three methods of adequate protection delineated in § 361 are "nonexclusive").

The Debtor requires the use of cash collateral to operate its business, to pay employees, to pay rent and utilities and pay other expenses. Without the use of cash collateral, the Debtor cannot remain in business. If the Debtor cannot use cash collateral, its reputation in the industry will be harmed. Granting the relief requested above will benefit entities asserting security interests in monies and receivables. Operation of the business protects their security. If their security interests extend to the Debtor's monies, then the Debtor lacks unencumbered monies to pay ordinary course of business obligations.

Variance.

The Debtor has done its best to make accurate projections concerning income and expenses. However, budgeting is not an exact science, especially as the Debtor does not control when customers order products and in what dollar amount. The Debtor is attempting to influence its margins by increasing prices, and the Debtor expects an increase. The Debtor's projection is based on (1) historical experience, (2) the present circumstances and (3) management's opinion concerning future orders with the higher margins. Despite management's best estimations, there may be considerable variance week to week and month to month. Therefore, the Debtor requests that it be permitted to vary from the expenses projected in the projection by as much as 20% in any one category where the projected spending is under $1,000.00 and vary from the proposed budget by as much as 15% as to any other category. If the Debtor determines it needs to vary from any one budgeted item by more than the 15% or 20% variances, the Debtor proposes that it provide written notice by email or telecopier of the variance to the entities who have recording financing statements and asserting interests in the estate's monies. If they do not object to the variance within 48 business hours, then the variance will be deemed approved. In the event an entity objects, then SunPlay may seek to set a hearing to obtain approval of the variance.

Rolling Unspent Budgeted Monies Forward.

The budget is a weekly budget. It is likely the Debtor will underspend in certain categories in some weeks. The Debtor requests that the Court authorize the Debtor to carry over from previous weeks any unused monies to be used in the same categories in future weeks. The Debtor also requests that the monies carried forward not count toward the 20% variance. The rollover is important because the Debtor cannot control the timing or amounts of its customers' orders. If no roll over is permitted, then the Debtor may have insufficient monies in various categories to properly attend to rentals or to sales.

Applying Any Excess Revenues to Costs of Goods Sold.

It may be that in some periods the Debtor's actual gross revenues exceed the projected figures. If this happens, this means the Debtor has more orders than projected. Many expenses including costs of goods sole are directly tied to the amount of orders received. The Debtor requests that in the event that its gross revenues exceed the projected figures that it be permitted to apply up to 75% of such excess gross revenues to costs of goods sold. COGS includes these categories: Costs of products and shipping.

The Entities Interests Are Adequately Secured.

Entities claiming interests in cash collateral are afforded adequate protection of their claims in many ways.

a. The value of the assets discussed above.

b. Continuing to operate the business and maintaining and servicing the assets.

c. Operating the business creates additional revenues.

d. All assets are adequately insured.

e. Providing replacements lien to entities to the extent their prepetition liens attached to property of the Debtor prepetition and with the same validity, priority, and description of collateral. To be clear, if there is a defect in a security interest prepetition, that same defect would apply post-petition.

f. The Court may order the Debtor at the interim hearing or at the final hearing to make adequate protection payments. The Debtor does not propose to make adequate protection payments until some months into the case so that it can get its finances on firmer ground.

WHEREFORE, the Debtor requests that the Court take the following actions: (1) enter an order authorizing the Debtor to use cash collateral on an interim basis per the budget with the requested variances, rollover provisions and application of excess revenues to costs of goods sold; (2) set a hearing on final use of cash collateral in the ordinary course of business; (3) grant to the entities asserting interests in the estate's monies replacement liens in collateral of the estate as discussed above; and (4) Such further relief as the Court deems appropriate and consistent with this Motion.

Dated: October 4, 2018

Respectfully submitted,

FOX LAW CORPORATION

/s/ Steven R. Fox
Steven R. Fox, proposed counsel for Sunplay Pools and Spas Superstore, Inc. Debtor-in-Possession

COHNE KINGHORN, P.C.

/s/ Jeffrey Trousdale
Jeffrey Trousdale, proposed local counsel for Sunplay Pools and Spas Superstore, Inc. Debtor-in-Possession