

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

In re:

OYSTER COMPANY OF VIRGINIA, LLC¹

Debtor

Case No.

16-34750-KLP

Chapter

11

**DEBTOR'S MOTION FOR ENTRY OF AN
ORDER AUTHORIZING POST-PETITION
FINANCING PURSUANT TO 11 U.S.C. § 364(c) ON AN
INTERIM AND FINAL BASIS AND MEMORANDUM IN SUPPORT THEREOF**

The above-captioned debtor and debtor-in-possession (the “Debtor” and/or “OCVA”), by counsel, hereby moves the Court for the entry of an order authorizing it, pursuant to § 364(c) of the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.* (the “Bankruptcy Code”), and Rule 4001 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), to obtain post-petition financing (the “Financing” and/or the “Post-Petition Financing”) in an amount of one hundred fifty thousand dollars from OCVA Holdings, LLC (the “Lender”). In support of this Motion, the Debtor represents the following facts to the Court:

¹ The debtor’s principal place of business is 838 Long Point Lane, Topping, VA 23169-2121 and the last four digits of the debtor’s EIN number are 7942.

Lynn Lewis Tavenner, Esquire (Va. Bar No. 30083)
Paula S. Beran, Esquire (Va. Bar No. 34679)
David N. Tabakin, Esquire (Va. Bar No. 82709)
Tavenner & Beran, PLC
20 North Eighth Street, Second Floor
Richmond, Virginia 23219
Telephone: (804) 783-8300
Telecopy: (804) 783-0178

Counsel for the Debtor

Background

1. On September 27, 2016, Jeffrey D. & Eleanor V. Orndorff, Chandler S. Wiegand, Half Shell Partners, LLC, and William E. and Patricia Loughridge by certifying under penalty of perjury that each held claims against the Debtor, instituted an involuntary bankruptcy petition in this Court against the Debtor under Chapter 7 of Bankruptcy Code. Thereafter, on October 20, 2016, the Debtor filed the Response, Consent to Entry of Order for Relief and Motion to Convert Case to Chapter 11 Pursuant to 11 U.S.C. § 706. Subsequently, the Bankruptcy Court entered an Order for Relief on November 4, 2016, and thereafter an Order Converting Case from Chapter 7 to Chapter 11.

2. The Debtor is continuing in possession of its property and is operating and managing its business, as Debtor-in-Possession, pursuant to §§ 1107 and 1108 of the Bankruptcy Code.

3. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

The Debtor's Businesses

4. The Oyster Company of Virginia is a unique company whose mission includes promoting the sustainable return of the native 'Virginia Oyster' ("Crassostrea virginica") as the basis for the health of the Chesapeake Bay and its ecosystem by accelerating programs and projects with proven results and enlisting our Virginia Watermen as an important part of the solution. OCVA has developed specific programs and projects using modeled and measured science from scientists and other individuals from highly regarded institutions as the basis for

creating value added solutions for restoring the Chesapeake Bay's oyster population while balancing the commodities (fisheries) with restoration (habitat).

5. The Debtor's prospect for a successful reorganization are good. In fact, in connection with successfully reorganizing, on July 6, 2017, the Debtor filed the Debtor's Plan of Reorganization, ECF No. 129, and the Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code, ECF No. 130.

Relief Requested

6. The Debtor respectfully requests entry of an order authorizing it, pursuant to § 364(c) of the Bankruptcy Code, to obtain the Financing as provided herein.

7. As this Court is aware, on November 1, 2017, the Debtor filed its Motion to (I) Approve Compromise with Half Shell Partners, LLC and William and Patricia Loughridge and (II) Shorten Notice and Memorandum in Support Thereof (the "Settlement"). ECF No. 152. An order was entered on December 6, 2017, approving the settlement (the "Settlement Order").

8. As part of the Settlement:

On or before December 31, 2017, OCVA shall pay and/ provide payment of \$150,000.00 to the Loughridges (the "Initial Payment"). At the time of the Initial Payment, the Deed of Trust and/or any and all other security interests or encumbrances shall be released immediately (if the Debtor so elects, this would be through simultaneous transactions).

Settlement at 3. The same is also a provision of the Settlement Order.

9. The Debtor contacted various sources about a loan to make the Initial Payment. No such prospective lenders were willing to provide unsecured or secured financing to the Debtor under terms that were more favorable than the terms provided herein.

10. Accordingly, the Debtor has negotiated with the Lender, who is a related entity to the Debtor,² for certain debtor-in-possession financing, and the parties have agreed to the terms thereof, which the Debtor believes are normal and customary (if not more favorable to the Debtor than current market terms) for financing of this nature.

11. The Debtor is seeking the Financing to fund the Initial Payment.

12. The Lender agreed to provide the Financing under the terms and conditions described herein (the “Post-Petition Financing Agreement”). In summary, the Lender will provide up to one hundred fifty thousand dollars (the “Principal Balance”) to the Debtor in exchange for a first position lien OCVA Docks located at 146 Forrest Drive, Poquoson, Virginia 23662 (the “OCVA Docks”). The terms of the Financing are as follows:

(a) Loan Amount: Principal amount not to exceed \$150,000.00;

(b) Interest Rate: Interest shall not accrue on the outstanding principal balance;

(c) Payment Terms: All outstanding principal shall be due and payable without notice, demand, or setoff on the earlier of (a) six months from the date of the Order approving the Financing, (b) conversion of the Debtors’ Chapter 11 case to Chapter 7 and/or (c) confirmation of the Debtor’s Chapter 11 plan;

(d) Security: The Lender shall have a perfected first-priority lien in the OCVA Docks.

13. The Financing is necessary for the Debtor to complete certain terms of the Settlement.

Legal Authority

14. Section 364 of the Bankruptcy Code provides in pertinent part as follows:

² W. Tolar Nolley is a member of both entities.

(a) . . . unless the Court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense.

(b) The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense.

(c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the Court, after notice and a hearing may authorize the obtaining of credit or the incurring of debt –

(1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;

(2) secured by a lien on property of the estate that is not otherwise subject to a lien; or

(3) secured by a junior lien on property of the estate that is subject to a lien.

11 U.S.C. § 364(a) through (c)(3).

15. Section 364 is structured with “an escalating series of inducements which a debtor may use to attract credit in the post-petition period.” *Mulligan v. Sobiech*, 131 B.R. 917, 921 (S.D.N.Y. 1991). In deciding whether to approve such a transaction, a bankruptcy court acts in its “informed discretion.” *In re Ames Dep’t Stores, Inc.*, 115 B.R. 34, 37 (S.D.N.Y. 1990); *see also Suntrust Bank v. Den-Mark Constr., Inc.*, 406 B.R. 683, 691 (E.D.N.C. 2009) (citations omitted).

16. The Bankruptcy Code requires notice and hearing but not the consent of creditors as a prerequisite to judicial approval of a financing agreement because that would undermine the authority of the bankruptcy court. *In re Adams Apple*, 829 F.2d 1484, 1491 (9th Cir. 1987).

17. Before a court should authorize a credit facility under § 364(c) of the Bankruptcy Code, a debtor must demonstrate that it cannot obtain necessary credit without resorting to § 364(c). *In re Sobiech*, 131 B.R. at 921; *see Suntrust Bank* 406 B.R. at 691. It is disputed how actively a debtor must look for financing before a court may authorize financing under § 364. However, § 364 does not require that the debtor seek credit from every possible source. *Bray v. Shenandoah Fed. Sav. And Loan Assoc. (In re Snowshoe Co.)*, 789 F.2d 1085, 1088 (4th Cir. 1986). Instead, a debtor must demonstrate a “good faith effort” that the financing is not available without the lien. *Id.*

18. The very circumstances of this situation require the Debtor to obtain its financing under § 364(c). The Debtor has been unable to locate any unsecured and/or secured financing. The terms of the Financing are more favorable to the Debtor than the market terms of similar loans. Accordingly, this Court should authorize the Debtor to obtain the Financing pursuant to the terms of the Post-Petition Financing Agreement.

19. Pursuant to § 552 of the Bankruptcy Code, “property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.”

20. The Debtor believes that the terms and conditions of the Financing are fair and reasonable. The terms of the Financing are not only beneficial to the Debtor’s estate, but also, the obtaining and implementation of the Financing is critical to the Debtor’s ultimate reorganization.

21. Bankruptcy Rule 4001(c)(2) governs the procedures for obtaining authorization to obtain postpetition financing and provides, in relevant part:

The court may commence a final hearing on a motion for authority to obtain credit no earlier than 14 days after service of the motion. If the motion so

requests, the court may conduct a hearing before such 14 day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

Fed. R. Bankr. P. 4001(c)(2). In this instance, the Settlement requires a payment on or before December 31, 2017. If this payment is not made the Debtor will be in violation of an order of this Court and as a result immediate and irreparable harm could result if Mr. Loughridge desired. There is no impact to the Debtor's estate of the requested Post-Petition Financing. It is merely replacing one secured creditor with another secured creditor, both with secured claims in the amount of \$150,000.00. Based on the same, the Debtor requests that the Court approve the Post-Petition Financing on an interim basis as allowed under Rule 4001(c)(2).

Notice

22. Notice of this Motion has been given to: (a) the Office of the United States Trustee; (b) the Official Committee of Unsecured Creditors; (c) the Debtor's known secured creditors; (d) any known legal counsel for the Debtor's secured creditors. In light of the nature of the relief requested herein, the Debtor submits that no other or further notice is required.

WHEREFORE, the Debtor respectfully requests that the Court enter orders substantially in the form of Exhibits A and B attached hereto: (i) approving the Financing; (ii) authorizing the Debtor to execute any and all necessary Financing documents; and (iii) granting such other and further relief as the Court may deem proper.

Respectfully submitted,

OYSTER COMPANY OF VIRGINIA, LLC,

Dated: December 18, 2017
Richmond, Virginia

By: /s/ Paula S. Beran
Lynn L. Tavenner, Esquire (VSB No. 30083)
Paula S. Beran, Esquire (VSB No. 34679)
David N. Tabakin, Esquire (VSB No. 82709)
Tavenner & Beran, PLC
20 North 8th Street
Richmond, Virginia 23219
Telephone: (804) 783-8300
Telecopier: (804) 783-0178

Counsel for the Debtor

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of December, 2017, a true and correct copy of the foregoing Motion was served via electronic delivery and/or first-class mail, postage prepaid, to the Office of the United States Trustee, the members of the Official Committee of Unsecured Creditors and any known counsel thereto, the Debtor's known secured creditors, any known legal counsel for the Debtor's secured creditors, and all parties requesting service of pleadings in this case.

/s/ Paula S. Beran
Counsel

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

In re:

OYSTER COMPANY OF VIRGINIA, LLC¹

Debtor

Case No.

16-34750-KLP

Chapter

11

**INTERIM ORDER AUTHORIZING POST-PETITION
FINANCING PURSUANT TO 11 U.S.C. § 364(c)**

This matter came before the Court upon the motion of the above-captioned debtor and debtor-in-possession (the “Debtor”) for Entry of an Order Authorizing Post-Petition Financing Pursuant to 11 U.S.C. § 364(c) (the “Motion”). It appearing to the Court that the Debtor and OCVA Holdings, LLC (the “Lender”) have reached an agreement pursuant to which Lender will provide certain post-petition financing (the “Post-Petition Financing”) to the Debtor to be secured by a first-priority, senior security interest in and lien upon the OCVA Docks located at 146 Forrest Drive, Poquoson, Virginia 23662 (the “OCVA Docks”), and the proceeds thereof pursuant to § 364(c) of the Bankruptcy Code, and having reviewed the Motion and having heard the statements of counsel in support of the relief requested in the Motion at a hearing before the Court (the “Hearing”); and the Court being fully advised in the premises and having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for

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Counsel for the Debtor

the relief granted herein; and that the Debtor's access to such Financing on an interim basis is necessary to avoid immediate and irreparable harm to the Debtor pending the Final Hearing; it is hereby

FOUND, DETERMINED, ORDERED, AND ADJUDGED, that:

1. The Motion is GRANTED.
2. Capitalized terms not otherwise defined herein shall have the meanings given to them in the Motion.
3. The Debtor is authorized to enter into the Post-Petition Financing in accordance with the terms provided in the Motion.
4. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2) and (c) notice of this Motion and the Hearing was sufficient under the circumstances.
5. The Post-Petition Financing is necessary to allow the Debtor to make the Initial Payment as defined in the Motion.
6. The Debtor's access to such Financing on an interim basis is necessary to avoid immediate and irreparable harm to the Debtor pending the Final Hearing. A financing facility is not available to the Debtor except in accordance with § 364(c) and the terms of this Order.
7. The Lender shall have a perfected first-priority security interest in the OCVA Docks.
8. The Post-Petition Financing has been negotiated in good faith and at arms' length between the Debtor and the Lender. The terms of the Post-Petition Financing are fair and reasonable under the circumstances, reflect the Debtor's exercise of sound business judgment,

and are supported by reasonably equivalent value and fair consideration. Thus, any loans made to the Debtor by the Lender shall be deemed to have been extended in good faith, as that term is used in Bankruptcy Code § 364(e), and shall be entitled to the protections of § 364(e) in the event of the modification or reversal on appeal of the authorization granted by this Order to enter into the Post-Petition Financing.

9. This Order shall constitute valid, binding obligations of the Debtor enforceable against the Debtor in accordance with their terms.

10. The Debtor is authorized and directed to do and perform all acts, to make, execute, and deliver all instruments and documents, and to pay fees, which may be required or necessary. However, the provisions of this Order shall be self-executing. Neither the Lender nor the Debtor shall be required to take any action or obtain any additional Orders to enjoy the benefits and/or protections of this Order.

11. In the event this Court modifies any of the provisions of this Interim Order, such modifications shall not affect the rights and priorities of Lender pursuant to this Interim Order, and this Interim Order shall remain in full force and effect except as specifically amended or modified at such Final Hearing. The provisions of this Order shall be binding upon the Lender and the Debtor and their respective successors and assigns (including any Trustee hereinafter appointed for the estate of the Debtor) and inure to the benefit of the Lender and the Debtor and their respective successors and assigns.

12. The notice given by the Debtor of the Motion constitutes due and sufficient notice in accordance with the Bankruptcy Rules and the Local Rules of this Court.

13. The Final Hearing to consider entry of the Final Order and final approval of the Financing is scheduled for January 16, 2018 at 10:00 a.m. at the United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division. Any party in interest objecting to the entry of the proposed Final Order shall file written objections with the Clerk of the Court no later than January 9, 2018 which objections shall be served so that the same are received on or before such date by counsel for the Debtor, Tavenner & Beran, PLC, 20 North Eight Street, Second Floor, Richmond, Virginia 23219, Attn: Lynn Lewis Tavenner, Esq.. If no objections to the relief sought in the Final Hearing are filed and served in accordance with this Interim Order, the Court may decide not to hold a Final Hearing, and a separate Final Order may be presented by the Debtor and entered by this Court. On or before December __, 2017, the Debtor shall serve, by United States mail, first-class postage prepaid, copies of this Interim Order on: (a) the parties having been given notice of the Interim Hearing; (b) counsel for any Committee, and (c) any party which has filed prior to such date a request for notices with this Court.

14. Upon entry the Clerk shall serve (by first class mail, postage prepaid or overnight delivery) copies of this Order on: the Office of the United States Trustee, the Debtor's counsel, and counsel for the Official Committee of Unsecured Creditors.

Entered:

UNITED STATES BANKRUPTCY JUDGE

I ask for this:

Lynn L. Tavenner, Esquire (Va. Bar No. 30083)
Paula S. Beran, Esquire (Va. Bar No. 34679)
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Counsel to the Debtor

CERTIFICATION OF ENDORSEMENT UNDER LOCAL RULE 9022-1(C)

Pursuant to Local Bankruptcy Rule 9022-1(C), I hereby certify that the foregoing proposed order was served upon all necessary parties.

/s/ _____
Counsel

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

In re:	Case No.
OYSTER COMPANY OF VIRGINIA, LLC ¹	16-34750-KLP
Debtor	Chapter
	11

**FINAL ORDER AUTHORIZING POST-PETITION
FINANCING PURSUANT TO 11 U.S.C. § 364(c)**

This matter came before the Court upon the motion of the above-captioned debtor and debtor-in-possession (the “Debtor”) for Entry of an Order Authorizing Post-Petition Financing Pursuant to 11 U.S.C. § 364(c) (the “Motion”). It appearing to the Court that the Debtor and OCVA Holdings, LLC (the “Lender”) have reached an agreement pursuant to which Lender will provide certain post-petition financing (the “Post-Petition Financing”) to the Debtor to be secured by a first-priority, senior security interest in and lien upon the OCVA Docks located at 146 Forrest Drive, Poquoson, Virginia 23662 (the “OCVA Docks”), and the proceeds thereof pursuant to § 364(c) of the Bankruptcy Code, and having reviewed the Motion and having heard the statements of counsel in support of the relief requested in the Motion at a hearing before the Court (the “Hearing”); and the Court being fully advised in the premises and having determined

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Counsel for the Debtor

that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; it is hereby

FOUND, DETERMINED, ORDERED, AND ADJUDGED, that:

15. The Motion is GRANTED.

16. Capitalized terms not otherwise defined herein shall have the meanings given to them in the Motion.

17. The Debtor is authorized to enter into the Post-Petition Financing in accordance with the terms provided in the Motion.

18. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2) and (c) notice of this Motion and the Hearing was sufficient under the circumstances.

19. The Post-Petition Financing is necessary to allow the Debtor to make the Initial Payment as defined in the Motion.

20. A financing facility is not available to the Debtor except in accordance with § 364(c) and the terms of this Order.

21. The Lender shall have a perfected first-priority security interest in the OCVA Docks.

22. The Post-Petition Financing has been negotiated in good faith and at arms' length between the Debtor and the Lender. The terms of the Post-Petition Financing are fair and reasonable under the circumstances, reflect the Debtor's exercise of sound business judgment, and are supported by reasonably equivalent value and fair consideration. Thus, any loans made to the Debtor by the Lender shall be deemed to have been extended in good faith, as that term is

used in Bankruptcy Code § 364(e), and shall be entitled to the protections of § 364(e) in the event of the modification or reversal on appeal of the authorization granted by this Order to enter into the Post-Petition Financing.

23. This Order shall constitute valid, binding obligations of the Debtor enforceable against the Debtor in accordance with their terms.

24. The Debtor is authorized and directed to do and perform all acts, to make, execute, and deliver all instruments and documents, and to pay fees, which may be required or necessary. However, the provisions of this Order shall be self-executing. Neither the Lender nor the Debtor shall be required to take any action or obtain any additional Orders to enjoy the benefits and/or protections of this Order.

25. The provisions of this Order shall be binding upon the Lender and the Debtor and their respective successors and assigns (including any Trustee hereinafter appointed for the estate of the Debtor) and inure to the benefit of the Lender and the Debtor and their respective successors and assigns.

26. The notice given by the Debtor of the Motion constitutes due and sufficient notice in accordance with the Bankruptcy Rules and the Local Rules of this Court.

27. Upon entry the Clerk shall serve (by first class mail, postage prepaid or overnight delivery) copies of this Order on: the Office of the United States Trustee, the Debtor's counsel, counsel for the Official Committee of Unsecured Creditors, the Debtor's known secured creditors, any known legal counsel for the secured creditors.

Entered:

UNITED STATES BANKRUPTCY JUDGE

I ask for this:

Lynn L. Tavenner, Esquire (Va. Bar No. 30083)
Paula S. Beran, Esquire (Va. Bar No. 34679)
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Counsel to the Debtor

CERTIFICATION OF ENDORSEMENT UNDER LOCAL RULE 9022-1(C)

Pursuant to Local Bankruptcy Rule 9022-1(C), I hereby certify that the foregoing proposed order was served upon all necessary parties.

/s/ _____
Counsel