

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

In re:

EXCEL STAFFING SERVICES, INC.¹

Debtor.

Case No.

16-35795-KLP

Chapter

11

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

The above-captioned debtor and debtor-in-possession (the "Debtor"), 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") in an amount not to exceed the total amount of the Debtor's accounts receivable from Stephen Brown, Edward Brown, Beverly Davis, Lydia Saboor, Eugene Thomas, and/or Bill Weber (collectively the "Lenders," and each individually a "Lender"). In support of this Motion, the Debtor represents the following facts to the Court:

¹ The Debtor's principal place of business is 200 East Cary Street, Richmond, VA 23219 and the Debtor's EIN is

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Background

1. On November 28, 2016 (the “Petition Date”), the Debtor filed for relief under Chapter 11 of the Bankruptcy Code.

2. The Debtor is continuing in possession of its respective properties and is operating and managing its business, as a 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 Business

4. Excel Staffing Services, Inc. is a privately owned small business that operates as a staffing intermediary between various employers and temporary workers from typically underserved neighborhoods in the City of Richmond. The Debtor had, for a number of years, worked primarily with the City of Richmond, but is now diversifying its portfolio of clients.

5. The Debtor’s prospects for a successful reorganization are good.

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. The Debtor conducted arms length negotiations with several prospective lenders regarding financing for the Debtor’s operations. No such prospective lenders were willing to provide unsecured or secured financing to the Debtor under terms that were feasible for the Debtor.

8. Post-petition, the Debtor has negotiated with Lenders 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.

9. The Debtor finances its business operations through contracts and the receivables generated therefrom. However, any such cash flow will not provide funds to the Debtor until such time as receivables have been received. The receipt may be after a required payroll. The Financing requested herein will assist cash flow for the gap period.

10. Lenders agreed to provide the Financing under the terms and conditions described herein (the "Post-Petition Financing Agreement"). In summary, one or more Lenders will provide cash to the Debtor when needed in an amount not greater than one or more identified receivables (collectively the "Identified Receivables," and each an "Identified Receivable") of the Debtor. Upon receipt of said Identified Receivable(s), the Debtor will immediately provide said funds over to the respective Lender. The terms of the Financing are as follows:

(a) Loan Amount: Principal amount not to exceed the requisite Identified Receivable;

(b) Interest Rate: Interest shall accrue on the outstanding principal balance at a rate equal to 0 % per annum;

(c) Payment Terms: All outstanding principal and interest shall be due and payable without notice, demand or setoff on the earlier of (a) the day after the date the accounts receivable are collected, (b) conversion of the Debtor's Chapter 11 case to Chapter 7 and/or (c) the sale of substantially all of the Debtor's assets;

(d) Security: The Lender shall have a perfected lien in the Identified Receivable.

11. The Financing is necessary for the Debtor to pay its employees their earned wages, salaries, commissions, reimbursable advances, and the related costs of and taxes related to its employment, to pay the costs of using and maintaining its property, to pay the costs of operating its business as a going concern, in the pursuit of a reorganization in accordance with Chapter 11 of the Bankruptcy Code. Without the relief requested, the Debtor may not be able to pay wages, salaries, taxes, and other ongoing operating expenses in the ordinary course of its operations. Interruption of the Debtor's business in this manner will significantly harm the Debtor's estate and fundamentally undermine its reorganization efforts.

12. The Lenders are relatives and/or family friends of the Debtor's President and sole shareholder. To the extent possible, the Financing has been negotiated in good faith and at arms length between the Debtor and Lenders.

Legal Authority

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

(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).

14. 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).

15. 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).

16. 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.*

17. The very circumstances of this case 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.

18. Pursuant to claim number 6, the Internal Revenue Service (the “IRS”) purports to have a blanket lien on all of the Debtor’s assets. However, the Debtor has filed its Objection to Claim 6 of the IRS, ECF No. 70, wherein the Debtor alleges that the claim has been satisfied in full. As such, the Financing in no way supersedes the purported lien of the IRS because the Debtor maintains that said lien has been satisfied, and the IRS does not possess a security interest in the Identified Receivables.

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.

Notice

21. No trustee, examiner, or creditors’ committee has been appointed in this chapter 11 case.

22. Notice of this Motion has been given to: (a) the Office of the United States Trustee; (b) the Debtor’s twenty largest unsecured creditors, as identified in its chapter 11 petition; (c) the Debtor’s known secured creditors; (d) the IRS and (e) 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 an order substantially in the form of Exhibit A 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,

EXCEL STAFFING SERVICES, INC.

Dated: July 26 , 2017
Richmond, Virginia

By: /s/ Paula S. Beran
Lynn L. Tavenner, Esquire (VSB No. 30083)
Paula S. Beran, Esquire (VSB No. 34679)
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Counsel for the Debtor

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of July, 2017, a true and correct copy of the Debtor's Motion For Entry Of An Order Authorizing Post-Petition Financing Pursuant To 11 U.S.C. § 364 And Memorandum In Support Thereof was served via first-class mail postage prepaid and/or electronic delivery to the Debtor's twenty largest unsecured creditors as identified in the chapter 11 petition, the Debtor's known secured creditors, any known legal counsel for the Debtor's secured creditors and the IRS.

/s/ Paula S. Beran
Counsel

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

In re:

EXCEL STAFFING SERVICES, INC.¹

Debtor.

Case No.

16-35795-KLP

Chapter

11

**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 Stephen Brown, Edward Brown, Beverly Davis, Lydia Saboor, Eugene Thomas, and/or Bill Weber (collectively the “Lenders,” and each individually a “Lender”) have reached an agreement pursuant to which Lenders 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 an identified receivable (the “Identified Receivable”), 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

¹ The Debtor’s principal place of business is 200 East Cary Street, Richmond, VA 23219 and the Debtor’s EIN is 31-1676369.

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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:

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 pay the costs of operating its business as a going concern or otherwise manage its assets in the pursuit of a reorganization in accordance with Chapter 11 of the Bankruptcy Code. Without the relief requested, the Debtor will not be able to pay wages, salaries, taxes and other ongoing operating expenses in the ordinary course of its operations. Interruption of the Debtor's business in this manner will significantly harm the Debtor's estate and fundamentally undermine its reorganization efforts.
6. A financing facility is not available to the Debtor except in accordance with § 364(c) and the terms of this Order.
7. The respective Lenders shall have a perfected security interest in the respective Identified Receivable.

8. The Post-Petition Financing has been negotiated in good faith and at arms' length between the Debtor and the Lenders. 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 Lenders 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 Lenders 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. Nothing herein is intended, however, to waive any rights of the Lenders to request any relief it may believe is appropriate, including to seek additional adequate protection of its interests in its collateral, relief from the automatic stay, conversion of the cases, to propose a plan of reorganization or liquidation, or any other relief or remedies that may be available to the Lenders under bankruptcy or non-bankruptcy law

11. The provisions of this Order shall be binding upon the Lenders 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 Lenders 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. 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, the Debtor's twenty largest unsecured creditors as identified in their chapter 11 petitions, the Debtor's known secured creditors, any known legal counsel for the secured creditors, and the IRS.

Entered:

UNITED STATES BANKRUPTCY JUDGE

I ask for this:

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Counsel to the Debtor

Seen and not objected to:

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Assistant United States Trustee