

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:

Adoption of Guidelines for Financing Motions

Administrative Order No. 558

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UPON the resolution of the Board of Judges for the United States Bankruptcy Court for the Eastern District of New York, it is hereby

ORDERED, that the annexed Guidelines for Financing Motions are adopted.

Dated: Brooklyn, NY
April 15, 2010

/s/Carla E. Craig
CARLA E. CRAIG
Chief United States Bankruptcy Judge

GUIDELINES FOR FINANCING MOTIONS

The United States Bankruptcy Court for the Eastern District of New York (the "Court") has adopted the following guidelines (the "**Financing Guidelines**") for use in chapter 11 cases where a Debtor¹ seeks authority to use cash collateral pursuant to section 363(c) of 11 U.S.C. §§ 101 *et seq.* (the "**Bankruptcy Code**") or to obtain credit pursuant to section 364 of the Bankruptcy Code (a "**Financing Motion**"). The Financing Guidelines are designed to: (a) provide a framework for Debtors to clearly and uniformly describe proposed postpetition financing transactions to allow the Court and parties to understand such transactions and (b) identify certain provisions that should be specifically identified and explained whenever included in Financing Motions or the relevant financing agreements.

The Financing Guidelines do not: (a) address the circumstances under which a financing motion will be approved, (b) address other substantive legal issues or (c) constitute rules of the Court.

The Financing Guidelines supplement, but do not replace, sections 363 and 364 of the Bankruptcy Code and Rules 4001(b), (c) and (d) of the Federal Rules of Bankruptcy Procedure.

1. Contents of Financing Motion

The following provisions, to the extent applicable, are in addition to the material provisions set forth in Bankruptcy Rules 4001(b)(1)(B), (c)(1)(B) and (d)(1)(B). The requirements of Bankruptcy Rules 4001(b)(1)(B), (c)(1)(B) and (d)(1)(B) may be fulfilled through citation reference to the provisions of a filed copy of the relevant agreement:

- (a) the amount of cash collateral the party seeks permission to use or the amount of credit the party seeks to obtain, including any committed amount or borrowing base formula and the estimated availability under the formula;
- (b) material conditions to closing and borrowing, including budget provisions;
- (c) pricing and economic terms and the treatment of costs and expenses of the lender(s), any agent for the lender(s) and their respective professionals;
- (d) any effect on existing liens of the granting of collateral or adequate protection provided to the lender(s) and any priority or superpriority provisions;
- (e) any carve-outs from liens or superpriorities;
- (f) any provision that elevates prepetition debt to administrative expense status or that secures prepetition debt with liens on postpetition assets;
- (g) any provision that applies the proceeds of postpetition financing to pay, in whole or in part, prepetition debt or which otherwise has the effect of converting prepetition debt to postpetition debt ("**rollup**");

¹ The term "Debtor" includes "debtor in possession" and "trustee," as appropriate under the particular circumstances.

(h) any limitation on the lender's obligation to fund certain activities of the Debtor or committee appointed under sections 1102 or 1114 of the Bankruptcy Code;

(i) any terms that provide that the use of cash collateral or the availability of credit will cease on (i) the filing of a challenge to the lender's prepetition lien or the lender's prepetition claim based on the lender's prepetition conduct; (ii) entry of an order granting relief from the automatic stay; (iii) the grant of a change of venue with respect to the case or any adversary proceeding; (iv) management changes or the departure, from the Debtor, of any identified employees; (v) the expiration of a specified time for filing a plan; or (vi) the making of a Financing Motion by a party in interest seeking any relief (as distinct from an order granting such relief);

(j) any change-of-control provisions;

(k) any provision establishing a deadline for, or otherwise expressly requiring, the sale of property of the estate;

(l) any prepayment penalty or other provision affecting the Debtor's right or ability to repay the financing in full during the course of the chapter 11 case;

(m) in jointly administered cases, terms that govern the joint liability of the Debtors, including any provisions that would govern the nature and/or priority, if any, of any interdebtor claims that would result if a Debtor were to repay debt incurred by or for the benefit of another Debtor;

(n) any provision for the funding of non-debtor affiliates with the cash collateral or proceeds of the loan, as applicable, and the approximate amount of such funding; and

(o) any termination or default provisions, cross-default provisions or provisions providing for events of default or having the effect of termination or default on the automatic stay or the lender's ability to enforce remedies.

(p) any provision which purports to preclude the Court from entering an order authorizing financing which primes liens held by the lender, or any provision which purports to preclude the Court from confirming a plan of reorganization which impairs the lender without the lender's consent.

2. Disclosure of Efforts to Obtain Financing and Good Faith

A Financing Motion seeking authority to obtain credit should describe the efforts of the Debtor to obtain financing, the basis on which the Debtor determined that the proposed financing is on the best terms available and material facts bearing on the issue of whether the extension of credit is being extended in good faith.

3. Notice After Event of Default

If a proposed order contains a provision that modifies or terminates the automatic stay or permits the lender to enforce remedies against the collateral upon the occurrence of a default, the proposed order should require at least seven days' notice to the Debtor, the United States Trustee and the committee appointed under section 1102 of the Bankruptcy Code (or the 20 largest unsecured creditors of the Debtor as listed on the Debtor's schedules if no committee is appointed under section 1102 of the Bankruptcy Code), before the modification or termination of the automatic stay or the enforcement of the lender's remedies. If less notice is provided, the Financing Motion should explain why.

If a proposed order contains a provision terminating the use of cash collateral, the proposed order should require at least three days' notice before the use of cash collateral ceases (provided that the use of cash collateral conforms to any budget in effect). If less notice is provided, the Financing Motion should explain why.

4. Carve-Outs

Any provision in a Financing Motion or proposed order relating to a carve-out from liens or superpriority claims should disclose when the carve-out takes effect, whether it remains unaltered after payment of interim fees made before an event of default, and any effect of the carve-out on any borrowing base or borrowing availability under the postpetition loan. If a provision relating to a carve-out provides disparate treatment for the professionals retained by a committee appointed under sections 1102 or 1114 of the Bankruptcy Code, when compared with the treatment for professionals retained by the Debtor, or if the carve-out does not include reasonable expenses of committee members (excluding fees and expenses of professionals employed by such members individually) and/or reasonable post-conversion commissions, fees and expenses of a chapter 7 trustee, or fees payable to the Bankruptcy Court and the United States Trustee (together with any accrued interest) are not provided for in a separate carve-out, there should be disclosure thereof under subdivision (a) of these Financing Guidelines and the Financing Motion should contain an explanation of the reasons therefor.

Reasonable allocations in a carve-out provision may be proposed for, *inter alia*, (i) expenses of professionals retained by committees appointed in the case, (ii) expenses of professionals retained by the Debtor, (iii) fees payable to the Bankruptcy Court and to the United States Trustee, (iv) reasonable expenses of committee members and (v) reasonable post-conversion commissions, fees and expenses of a chapter 7 trustee.

5. Investigation Periods Relating to Waivers and Concessions as to Prepetition Debt

If a Financing Motion seeks entry of an order in which the Debtor has stipulated, acknowledged or otherwise admitted the validity, enforceability, priority, or amount of a claim that arose before the commencement of the case, or of any lien securing the claim, either the proposed order should include a provision to permit the investigation and proceedings relating to such

determination by parties other than the Debtor as follows, or the Financing Motion should explain why the proposed order does not contain such a provision:

(a) the committee of unsecured creditors appointed under section 1102 of the Bankruptcy Code shall have at least 60 days (or a longer period as the Court orders for cause shown before the expiration of such period) from the date of the selection of its counsel for the committee to investigate the facts and file a complaint or a motion seeking authority to commence litigation as a representative of the estate;

(b) if no such committee has been appointed, any party in interest (other than the Debtor) shall have at least 75 days (or a longer period as the Court orders for cause shown before the expiration of such period) from the entry of the final financing order to investigate the facts and file a complaint or a motion seeking authority to commence litigation as a representative of the estate; or

(c) upon conversion of a chapter 11 case to chapter 7, to the extent that any period to investigate the facts and file a complaint or a motion seeking authority to commence litigation as a representative of the estate has not expired, such period shall automatically be extended for 75 days from the date a chapter 7 trustee is appointed.

6. Content of Interim Orders

A single motion may be filed seeking entry of an interim order and a final order, which orders would be normally entered at the conclusion of the preliminary hearing and the final hearing, respectively, as those terms are used in Bankruptcy Rules 4001(b)(2) and (c)(2). In addition, where circumstances warrant, the Debtor may seek emergency relief for financing limited to the amount necessary to avoid immediate and irreparable harm to the estate pending the preliminary hearing.

A Financing Motion that seeks entry of an emergency or interim order before a final hearing under Bankruptcy Rule 4001(b)(2) or (c)(2) should describe the amount and purpose of funds sought to be used or borrowed on an emergency or interim basis and should set forth facts to support a finding that immediate or irreparable harm will be caused to the estate if immediate relief is not granted before the final hearing.

An interim order will not ordinarily bind the Court with respect to the provisions of the final order provided that (i) the lender will be afforded all the benefits and protections of the interim order, including a lender's protections under sections 364(e) and 363(m) of the Bankruptcy Code with respect to funds advanced during the interim period and (ii) the interim order will not bind the lender to advance funds pursuant to a final order that contains provisions contrary to or inconsistent with the interim order.

7. Adequacy of Budget

If the Debtor will be subject to a budget under a proposed cash collateral or financing order, the Financing Motion should include a statement by the Debtor stating whether there is reason to

believe that the budget will be adequate (inclusive of professional fees and disbursements), considering all available assets, to pay all administrative expenses due or accruing during the period covered by the financing or the budget.

8. Notice

Notice of a preliminary or final hearing should be given to the United States Trustee, the debtor's twenty largest unsecured creditors or the creditors' committee if one has been appointed, the persons required by Bankruptcy Rules 4001(b)(3) and 4001(c)(3), as the case may be, the, and any other persons whose property or collateral would be directly affected by the outcome of a Financing Motion or any provision of a proposed order.

Emergency and interim relief may be sought after the best notice available under the circumstances; however, emergency and interim relief will ordinarily not be considered unless the United States Trustee and the Court have had a reasonable opportunity to review the motion, the financing agreement, and the proposed interim order, and the Court normally will not approve provisions that directly affect the interests of parties without notice to them, which may be given by overnight package express, facsimile or electronic mail.

The hearing on a final order for the use of cash collateral under section 363(c) of the Bankruptcy Code or for authority to obtain credit under section 364 of the Bankruptcy Code will ordinarily not commence until there has been a reasonable opportunity for the formation of a creditors' committee under section 1102 of the Bankruptcy Code and for the creditors' committee to obtain counsel.

9. Early Notice to the Office of the United States Trustee

Prospective Debtors may provide substantially complete drafts of the Financing Motion, interim order and related financing documents to the Office of the United States Trustee in advance of a filing, on a confidential basis. Debtors are encouraged to provide drafts of financing requests, including proposed orders, to the Office of the United States Trustee as early as possible in advance of filing to provide that office with the opportunity to comment.

10. Presence at Hearing

Unless the court directs otherwise,

(a) counsel for each proposed lender, or for an agent representing such lender, should be present at all preliminary and final hearings on the authority to obtain credit from such lender, and counsel for each entity, or for an agent of such entity, with an interest in cash collateral to be used with the entity's consent should be present at all preliminary and final hearings on the authority to use such cash collateral; and

(b) a business representative of the Debtor, the proposed lender or an agent representing such lender, and any party objecting to the Financing Motion for authority to

obtain credit, each with appropriate authority, should be present at, or available by telephone for, all preliminary and final hearings.

11. Contents of Proposed Order

(a) Findings of Fact

(i) A proposed order approving the use of cash collateral under section 363(c) of the Bankruptcy Code, or granting authority to obtain credit under section 364 of the Bankruptcy Code, should limit the recitation of findings to facts essential to entry of the order. Non-essential facts regarding prepetition dealings and agreements may be included in an order approving the use of cash collateral or granting authority to obtain credit under a heading with a title such as “Stipulations Between the Debtor and the Lender” or “Background.”

(ii) A proposed emergency or interim order should include a finding that immediate and irreparable loss or damage will be caused to the estate if immediate financing is not obtained and should state with respect to notice only that the hearing was held pursuant to Bankruptcy Rule 4001(b)(2) or (c)(2), the parties to which notice was given, the manner of notice and that the notice was the best available under the circumstances.

(iii) A proposed final order may include factual findings as to notice and the adequacy thereof.

(iv) To the extent that a proposed order refers to a specific section of a prepetition or postpetition loan agreement or other document, the proposed order should also include a summary of the material provisions of that section.

(b) Optional Provisions

A proposed order may include any appropriate material provisions of the financing agreement.

(c) Cross-Collateralization and Rollups

A proposed order approving cross-collateralization or a rollup should ordinarily include language that reserves the right of the Court, after notice and hearing, to unwind or partially unwind the postpetition protection provided to the prepetition lender or the paydown of the prepetition debt, whichever is applicable, in the event that there is a successful challenge to the validity, enforceability, extent, perfection or priority of the prepetition lender’s claims or liens, or a determination that the prepetition debt was undersecured as of the petition date, and the cross-collateralization or rollup improperly advantaged the lender.

(d) Waivers, Consents or Amendments with Respect to the Loan Agreement

A proposed order may permit the parties to enter into agreements providing waivers or consents to amendments of the loan agreement without the need for further court approval or notice, provided that (i) the agreement as so modified does not shorten the maturity, alter the claim priority or collateralization or increase the commitments, the rate of interest or the fees payable by the estate and (ii) notice of all amendments (other than those that are ministerial or technical and do not adversely affect the estate) is provided in advance to counsel for any committee appointed under section 1102 of the Bankruptcy Code and the United States Trustee.

(e) Conclusions of Law

A proposed interim order may provide that the Debtor is authorized to enter into the loan or other agreement, but it should not state that the Court has examined and approved the loan or other agreement.

(f) Order to Control

A proposed order should state that to the extent that a loan or other agreement differs from the order, the order shall control.

(g) Statutory Provisions Affected

A proposed order should specify those provisions of the Bankruptcy Code, Bankruptcy Rules and/or Local Rules relied upon as authority for granting relief.

(h) Conclusions of Law Regarding Notice

A proposed final order may contain conclusions of law with respect to the adequacy of notice under section 364 of the Bankruptcy Code and Bankruptcy Rule 4001.