

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

)	
In re:)	Chapter 11
)	
TRIAD GUARANTY INC., ¹)	Case No. 13-11452 (MFW)
)	
Debtor.)	Obj. Deadline: March 29, 2017 at 4:00 p.m. (ET)
)	Hearing Date: April 4, 2017 at 2:00 p.m. (ET)
)	
)	

**DEBTOR’S SECOND MOTION FOR A FINAL ORDER AUTHORIZING
DEBTOR TO INCUR ADDITIONAL POSTPETITION DEBT**

Triad Guaranty Inc., the debtor and debtor-in-possession (the “Debtor”) in the above-captioned chapter 11 case (the “Case”), hereby presents this motion (the “Motion”) for an entry of a Final Order Authorizing Debtor’s Second Motion to Incur Additional Postpetition Debt. In support of the Motion, the Debtor respectfully represents as follows:

INTRODUCTION

1. By this Motion, the Debtor seeks entry a final order authorizing the Debtor to obtain further post-petition financing from its Chairman and CEO, Mr. William T. Ratliff, III, sufficient to extend the Debtor’s D&O insurance policy, which expires on March 11, 2017, for a second time, to pay certain fees required to be paid to the Office of the United States Trustee under section 1930 of title 28 of the United States Code, and to pay certain other monthly expenses in the ordinary course of business.² Mr.

¹ The last four digits of the Debtor’s federal taxpayer identification number are 8519. The location of the Debtor’s headquarters and the Debtor’s service address is 1900 Crestwood Blvd., Birmingham, AL 35210.

² The Debtor is currently indebted to Mr. Ratliff in the amount of \$45,000.00 in prior debtor-in-possession loans.

Ratliff has agreed to extend this loan, on the same terms and conditions as those approved in the prior order, to the Debtor on an unsecured basis, without interest, but with superpriority administrative expense treatment for this additional indebtedness, as described in this Motion.

2. It is critical that the Debtor pay its statutory fees to the United States Trustee and maintain D&O coverage, without which any director or officer of the Debtor reasonably can be expected to continue to serve the company. The financing that the Debtor proposes in this Motion will enable the Debtor to meet these financial commitments while continuing to work towards what it hopes will be a successful emergence from this case.

3. To continue operating in the ordinary course while formulating and seeking approval of a plan of reorganization that would permit the Debtor to emerge from bankruptcy with the support of its major stakeholders, the Debtor needs access to additional funds. The Debtor will obtain such additional liquidity from Postpetition Debt. Thus, to ensure that the Debtor's access to sufficient funding that will provide the foundation for maximizing value for all stakeholders, the Postpetition Debt should be approved.

JURISDICTION, VENUE AND AUTHORITY

4. This Court has jurisdiction over the case and this Motion pursuant to sections 157 and 1334 of title 28 of the United States Code. This matter is a core proceeding within the meaning of sections 157(b)(2)(A) and (D) of title 28 of the United States Code.

5. Venue is proper in this District pursuant to sections 1408 and 1409 of title 28 of the United States Code.

6. The statutory predicates for the relief requested herein are sections 361, 362, 363, and 364 of title 11 of the United States Code. (as amended and applicable hereto, the “Bankruptcy Code”), Rules 2002, 4001(c), and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Rule 4001-2 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”).

BACKGROUND

A. The Bankruptcy Case

7. On June 3, 2013 (the “Petition Date”), the Debtor filed a petition with this Court under chapter 11 of the Bankruptcy Code. The Debtor is operating its business as debtor in possession pursuant to Bankruptcy Code sections 1107(a) and 1108. No request for the appointment of a trustee or examiner has been made in this chapter 11 case, and no committees have been appointed or designated.

8. A description of the Debtor’s business, the reasons for commencing this chapter 11 case and the relief sought from this Court to allow for a smooth transition into chapter 11 are set forth in the Declaration of William T. Ratliff, III in Support of Debtor’s Chapter 11 Petition and First Day Motions (the “First Day Declaration”) [Docket No. 3].

9. The Debtor is current in its monthly reporting obligations, but needs to remain current in payment of fees required under section 1930 of title 28 of the United States Code. In addition, the Debtor has maintained director and officer insurance coverage, but its policy, as extended, will expire on March 11, 2017.

10. The Debtor intends to use the proceeds of the funding proposed in this Motion to pay the premium for a six month extension of its D&O policy and to pay fees to the United States Trustee.

B. Prior Financing Motion

11. On March 9, 2016, the Debtor filed a Motion for Interim and Final Order Authorizing Debtor to Incur Postpetition Debt (the “Initial Financing Motion”)[Docket No. 383]. In addition, the Debtor filed a Motion to Shorten Notice of Interim Hearing on Motion for Interim and Final Order Authorizing Debtor to Incur Postpetition Debt (the “Motion to Shorten”)[Docket No. 384]. On that same day, this Court entered an Order granting the Motion to Shorten [Docket No. 385].

12. On March 10, 2016, the Court entered its Order Authorizing Debtors to: (a) Incur Postpetition Debt on an emergency basis pending a Final Hearing; and (b) Grant Adequate Protection and Provide Other Relief [Docket No. 389] (the “Initial Interim Order”) authorizing the Debtor to borrow \$20,000 to pay certain fees required to be paid to the Office of the United States Trustee and to extend the Debtor’s D&O insurance policy.

13. After the Final Hearing in connection with the Initial Financing Motion, the Court entered its Final Order Authorizing Debtors to: (a) Incur Postpetition Debt; and (b) Grant Adequate Protection and Provide Other Relief [Docket No. 396] (the “Initial Final Order”).

RELIEF REQUESTED

14. By this Motion, pursuant to Bankruptcy Code sections 361, 363, and 364 and Bankruptcy Rules 4001(c), the Debtor requests that this Court enter a final order authorizing the Debtor to incur further postpetition debt.

BANKRUPTCY RULE 4001 CONCISE STATEMENT

15. Under the disclosure requirements of Bankruptcy Rule 4001(c) and Local Rule 4001-2(a) (ii), the following summarizes the significant terms of the Second DIP Financing and Final Order.³ The substantive provisions of the loan are unchanged from those approved in the Prior Final Order. Furthermore, the terms of the proposed financing are identical to those previously approved by this Court. There are no provisions required to be highlighted pursuant to Local Rule 4001-2(a)(i)(A)-(H).

(a) **Borrower:** Triad Guaranty Inc.

(b) **Lender:** William T. Ratliff, III

(c) **Maximum Aggregate Debt Available.** \$20,000 for the Final Period (the "Postpetition Debt").

(d) **Interest Rate.** None.

(e) **Maturity Date.** The earliest of: (a) the date on which the United States Bankruptcy Court for the District of Delaware approves a debtor-in-possession lending transaction with any other lender, (b) the effective date of any plan of reorganization of Borrower, (c) the date of the conversion of the Borrower's bankruptcy

³ This summary, including the use of defined terms herein (whether or not defined in the summary), is qualified in its entirety by the provisions of the note by and between Triad Guaranty Inc. and William T. Ratliff, III, attached hereto as Exhibit A (the "Note") and the Final Order, as applicable. To the extent there are any conflicts between this summary, on the one hand, and the Note or Final Order, as applicable, on the other hand, the terms of the Note or the Final Order, as applicable, shall govern.

case to a case under chapter 7 of title 11 of the United States Code, or the dismissal of this bankruptcy case, and (d) the date on which all amounts under the Note shall become due and payable under section 3 of the Note.

(f) **Events of Default.** Any one or more of the following:

- (A) Failure to Pay. The Debtor fails to pay any principal amount of the Loan when due and such failure continues for 30 days after written notice to the Borrower.
- (B) Breach of Representations and Warranties. Any representation or warranty made or deemed made by the Debtor to the Noteholder herein is incorrect in any material respect on the date as of which such representation or warranty was made or deemed made.
- (C) Breach of Covenants. The Borrower fails to observe or perform (a) any covenant, condition or agreement contained in **Section 6.3** or (b) any other material covenant, obligation, condition or agreement contained in this Note other than those specified in clause (a) and **Section 7.1** and such failure continues for 30 days after written notice to the Borrower.

16. In addition, the provisions described in Bankruptcy Rule 4001(c)(1)(B)(i)-(xi) are:

(i) **Grant of Priority or a Lien on Property of the Estate under § 364(c) or (d).** Pursuant to the Final DIP Order, the Lender is to be granted a superpriority administrative expense claim for the amount loaned under the Note.

(ii) **Providing of Adequate Protection or Priority for a Claim that Arose Before the Commencement of the Case, including the Granting of a Lien on Property of the Estate to Secure the Claim, or the Use of Property of the Estate or Credit Obtained Under § 364 to Make Cash Payments on Account of the Claim.** Not applicable.

(iii) Determination of the Validity, Enforceability, Priority, or Amount of a Claim that Arose Before the Commencement of the Case, or of any Lien Securing the Claim. Not applicable.

(iv) Waiver or Modification of Code Provisions or Applicable Rules Relating to the Automatic Stay. Not applicable.

(v) Waiver or Modification of any Entity's Authority or Right to file a Plan, Seek an Extension of Time in Which the Debtor has the Exclusive Right to File a Plan, Request the Use of Cash Collateral Under § 363(c), or Request Authority to Obtain Credit Under § 364. Not applicable.

(vi) Establishment of Deadlines for Petition a Plan of Reorganization, for Approval of a Disclosure Statement, for a Hearing on Confirmation, or for Entry of a Confirmation Order. Not applicable.

(vii) Waiver or Modification of the Applicability of Nonbankruptcy Law Relating to the Perfection of a Lien on Property of the Estate, or on the Foreclosure or Other Enforcement of the Lien. Not applicable.

(viii) Release, Waiver, or Limitation on any Claim or Other Cause of Action Belonging to the Estate or the Debtor, including any Modification of the Statute of Limitations or Other Deadline to Commence an Action. Not applicable.

(ix) Indemnification of any entity. Not applicable.

(x) Release, Waiver, or Limitation of any Right Under § 506(c). Not applicable.

(xi) Grant of a Lien on any Claim or Cause of Action Arising under §§ 544, 545, 547, 548, 549, 553(b), 723(a), or 724(a). Not Applicable.

BASIS FOR RELIEF REQUESTED

17. As a debtor-in-possession, the Debtor is authorized to operate its business under Bankruptcy Code section 1108. As part of that operation, the Debtor may incur unsecured debt in the ordinary course of business. See 11 U.S.C. § 364(a).

18. Section 364 of the Bankruptcy Code governs a debtor's ability to incur debt or obtain credit postpetition. More specifically, Bankruptcy Code section 364(c)(1)-(3) addresses the incurrence of postpetition credit on a non-priming basis, providing as follows:

(c) If the [debtor in possession] 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(c).

19. Other than the requirement of “notice and a hearing,” the only statutory prerequisite for obtaining secured credit on a “superpriority” basis under Bankruptcy Code section 364(c)(1) is that “the [debtor in possession] is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense.” 11 U.S.C. § 364(c). The Debtor has satisfied this threshold test.

20. Despite the Debtor's efforts, the Debtor, as of the Petition Date, has been unable to obtain credit other than by granting superpriority administrative

expense status to such obligations. However, significantly, the debt to be incurred will be unsecured and will not bear interest. Mr. Ratliff is willing to provide this additional funding to the Debtor on these favorable terms. Neither the Debtor nor Mr. Ratliff seeks to modify the terms of the loan previously approved by this Court.

21. Consequently, the Debtor should be permitted to borrow from Mr. Ratliff on a “superpriority” basis under Bankruptcy Code section 364(c)(1).

22. Generally, courts give broad deference to business decisions of a debtor-in-possession. See, e.g., Richmond Leasing v. Capital Bank, N.A., 762 F.2d 1303, 1311 (5th Cir. 1985). Moreover, a Bankruptcy Court will respect a debtor-in-possession’s business judgment regarding the need for and the proposed use of funds:

A court’s discretion under section 364 is to be utilized on grounds that permit reasonable business judgment to be exercised so long as the financing agreement does not contain terms that leverage the bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to benefit a party in interest.

In re Ames Dep’t Stores, Inc., 115 B.R. 34, 40 (Bankr. S.D.N.Y 1990). The power of the debtor-in-possession to incur secured debt follows necessarily from the general power of the debtor-in-possession to operate its business in the exercise of its business judgment. See 11 U.S.C. § 1108.

23. In the present case, the Debtor’s decision to obtain the additional \$20,000 in postpetition financing represents an exercise of sound business judgment. Without the financing, the Debtor would fall into arrears in its obligation to pay fees to the United States Trustee required under section 1930 of title 28 of the United States Code. In addition, the financing will be used to pay for an extension of the Debtor’s D&O coverage through September 11, 2017.

24. Without such coverage, Mr. Ratliff cannot reasonably be expected to continue to serve as the Debtor's sole remaining director and officer, and likely will resign.

25. Like most business decisions, the Debtor's decision to obtain the postpetition financing will both confer a number of benefits on the Debtor and impose several obligations. The postpetition financing should provide the Debtor with sufficient capital to meet these certain critical and time sensitive needs as it attempts a restructuring. In exchange for the foregoing, the Debtor has agreed, among other things, that the postpetition indebtedness shall be entitled to superpriority administrative expense treatment.

26. In sum, the substantial benefits that the Debtor will derive from the proposed financing support the Debtor's business judgment to enter into the postpetition financing arrangement with Mr. Ratliff.

NOTICE

27. Notice of this Motion has been given to (a) the Office of the United States Trustee for the District of Delaware; (b) all parties requesting notice under Bankruptcy Rule 2002; (c) the Debtor's twenty (20) largest unsecured creditors; and (d) Mr. Ratliff. The Debtor submits that under the circumstances, no other or further notice need be given.

NO PRIOR REQUEST

28. No previous motion for the relief sought herein has been made to this or any other court.

CONCLUSION

WHEREFORE, the Debtor respectfully requests that this Court enter the Final DIP Order substantially in the form annexed hereto: (a) authorizing the Debtor to obtain the additional \$20,000 in postpetition financing from the Lender; (b) approving the postpetition financing on a final basis; (c) authorizing the Debtor to execute any and all documents and take such other actions as necessary to effectuate the transactions contemplated by the postpetition financing; and (d) granting such other and further relief as this Court deems just and proper under the circumstances.

Dated: March 15, 2017

**WOMBLE CARLYLE SANDRIDGE
& RICE, LLP**

/s/ Mark L. Desgrosseilliers

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