



and proposed order which was signed on April 2, 2015, setting the hearing for 3:00 p.m. on April 2, 2015. Dckt. 10.

The Debtor-in-Possession is engaged in the business of providing nurses to various hospitals and health care providers for a limited term appointment. Debtor-in-Possession often provides travel and housing accommodations for the visiting nurses. Typically, Debtor-in-Possession receives payment from hospitals and health care providers after services are provided.

The Debtor-in-Possession states that there are two creditors holding secured claims: (1) Westamerica Bank and (2) Internal Revenue Service. Debtor-in-Possession states that these creditors' security interests may include accounts receivable, equipment, cash on hand, and general intangibles.

Debtor-in-Possession argues that it is vital and necessary for the continued operation of the business to use cash collateral to pay wages, provide travel and housing accommodations to visiting nurses, and basic overhead expenses incurred post-petition for the running of its business.

Debtor-in-Possession anticipates that by using the cash collateral it will generate post-petition accounts receivable and/or accumulated cash sufficient to provide adequate protection to the secured creditors.

The Debtor-in-Possession offers a portion of the accounts receivable, equipment, and accumulated cash it will generate post petition as replacement collateral to the secured creditors, to the extent that the secured creditors' collateral is diminished from the Debtor-in-Possession's use of cash collateral. The replacement liens on post-petition accounts receivable, equipment, and cash shall be of the same scope, in the same priority, and subject to the same infirmities and defenses as existed pre-petition.

Debtor-in-Possession request the court allow the use of cash collateral with the provision that it be required to maintain accounts receivable and cash as same existed on the petition date, within a 15% variance. Debtor-in-Possession proposes a \$5,000.00 payment to Westamerica Bank in the first month after filing. Debtor-in-Possession projects that the percentage of loan to collateral will be at 32% by September 2015.

#### **APPLICABLE LAW**

Pursuant to 11 U.S.C. § 1101, a Debtor-in-Possession serves as the trustee in the Chapter 11 case when so qualified under 11 U.S.C. § 322. As a Debtor-in-Possession, the Debtor-in-Possession can use, sell, or sell property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to

any person unless--

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease--

(I) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Fed. R. Bankr. P. 4001(b) provides the procedures in which a trustee or Debtor-in-Possession may move the court for authorization to use cash collateral. In relevant part, Fed. R. Bankr. P. 4001(b) states:

(b)(2) Hearing

The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

## **DISCUSSION**

In the instant case, the Debtor-in-Possession is seeking authorization of the court to use cash collateral on an interim basis, pending a final hearing, to pay necessary expenses to avoid immediate and irreparable harm to the state pending a final hearing.

While the Motion states that it is necessary and imperative for the court to authorize the interim use of cash collateral, the Debtor-in-Possession does not provide specific expenses that are "necessary to avoid immediate and irreparable harm to the estate." Instead, the Debtor-in-Possession provides the declaration of Tyler Covey, the Chief Financial Officer of the Debtor-in-Possession, which has attached a budget spreadsheet for January 2015 through September 2015. Dckt. 13.

The budget provides an extensive list of all income and expenses, including taxes, legal expenses, and miscellaneous expenses, but does not specify which of these expenses are necessary to be paid using cash collateral while awaiting the final hearing on the Motion.

## **Review of Schedules**

The Debtor in Possession lists personal property assets having a value

of \$97,190.00 on Schedule B (of which \$63,761.00 are stated to be accounts receivable). Dckt. 1 at 8-10. Internal Revenue Service and WestAmerica Bank are listed on Schedule D as the creditors having secured claims. *Id.* at 12-13.

The unsecured claims listed on Schedule F total \$694,759.20. *Id.* at 17-19. No real property is listed on Schedule A and no leases are listed on Schedule G. *Id.* at 7, 21.

**Declaration in Support of Motion**

Tyler Covey, the current Chief Financial Officer for the Debtor, (having joined the company in January 2015), provides his declaration in support of the Motion. Much of his declaration discusses the nature of the business and the two creditors asserting liens against the Estate assets. The business plan is to use cash collateral to generate new accounts receivable and to pay the Westamerica Bank claim from the accounts receivable that existed when the bankruptcy case was commenced. Mr. Tyler projects being able to pay Westamerica Bank an additional \$5,250.00 a month until that secured claim is paid. Mr. Tyler does not testify how the Internal Revenue Service secured claim will be addressed.

Mr. Tyler attaches to his declaration a projected income statement that shows anticipated income and expenses of the Debtor.

**Specific Uses Necessary to Avoid Irreparable Harm  
Pending Noticed Hearing**

At the hearing, the Debtor-in-Possession and counsel provided the following expenses that the Debtor-in-Possession alleges are necessary to avoid irreparable harm to the estate:

<u>EXPENSE</u>	<u>AMOUNT</u>
	\$1.00
	\$1.00
	\$1.00
	\$1.00
	\$1.00
	\$1.00
	\$1.00
	\$1.00
	\$1.00
	_____
Total Cash Collateral Authorized Pending Noticed Hearing	\$9.00

**NOTICE OF HEARING AND SERVICE OF MOTION TO USE CASH COLLATERAL**

A review of the Proof of Service shows that the Debtor-in-Possession served the following parties:

1. Office of the U.S. Trustee - electronic mail
2. Russell Rizzardi, Senior Vice President Credit Administration for Westamerica Bank - electronic mail
3. Rhonda Roberts, Internal Revenue Service Special Procedures Unit - facsimile

Notice of the hearing and service of the notice and motion for use of case collateral is governed by Federal Rule of Bankruptcy Procedure 4001(b)(1)(C):

The motion shall be served on: (1) any entity with an interest in the cash collateral; (2) any committee elected under § 705 or appointed under § 1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, the creditors included on the list filed under Rule 1007(d); and (3) any other entity that the court directs.

Here, the Debtor-in-Possession provided notice to and served not all of the parties required by Federal Rule of Bankruptcy Procedure P. 4001(b)(1)(C) for this emergency use of cash collateral. The Debtor-in-Possession did not serve the creditors included on the list filed under Fed. R. Bankr. P. 1007(d), which consists of the 20 largest creditors.

Furthermore, the Debtor-in-Possession did not serve the Internal Revenue Service. See Local Bankruptcy Rule 2002-1.

However, in light of the emergency basis of the Motion, the court deems the service sufficient for authorizing the emergency use of cash collateral pending the noticed hearing on the Motion which shall be conducted at -----  
- x.m. on April -----, 2015. The order authorizing the Debtor-in-Possession to use cash collateral shall direct the Debtor in Possession to serve the Notice of Hearing, Motion, Supporting Pleadings to all parties as required by Federal Rule of Bankruptcy Procedure 4001(b)(1)(C) on or before April xxxxx, 2015.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Authority to Use Cash Collateral filed by Debtor-in-Possession having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is **xxxx** and the cash collateral may be used to pay the following expenses, granting the Debtor-in-Possession a variance of ten percent in any individual line item expense as long as the total amount used does not exceed the total amount allowed:

<u>EXPENSE</u>	<u>AMOUNT</u>
	\$1.00
	\$1.00
	\$1.00
	\$1.00
	\$1.00
	\$1.00
	\$1.00
	\$1.00
	\$1.00
	_____
Total Cash Collateral Authorized Pending Noticed Hearing	\$9.00

**IT IS FURTHER ORDERED** that the creditors having an interest in the cash collateral are given replacement liens in the post-petition proceeds in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim.

**IT IS FURTHER ORDERED** that the final noticed hearing on the Motion shall be conducted at ----- **x.m. on April ----** ---, 2015. The Debtor in Possession shall serve the Notice of Hearing, Motion, Supporting Pleadings to all parties as required by Federal Rule of Bankruptcy Procedure 4001(b)(1)(C) on or before **April xxxxx, 2015**.