

UNITED STATES BANKRUPTCY COURT  
Eastern District of California

Honorable Ronald H. Sargis  
Chief Bankruptcy Judge

**SPECIALLY SET FOR HEARING IN  
COURTROOM 34, SACRAMENTO DIVISION COURTHOUSE, 6<sup>th</sup> FLOOR**

**April 9, 2019 at 10:00 a.m.**

- 
1. [19-90122](#)-E-11      MIKE TAMANA FREIGHT      CONTINUED MOTION FOR  
[MF-3](#)                      LINES, LLC                      AUTHORITY TO OBTAIN FINANCING  
                                    Reno F.R. Fernandez III                      2-12-19 [[15](#)]

**TO BE HEARD IN COURTROOM  
#34, 6TH FLOOR, SACRAMENTO**

**No Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).**  
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Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors holding the twenty largest unsecured claims, creditors, and Office of the United States Trustee on February 12, 2019. By the court's calculation, 2 days' notice was provided. The court set the hearing for February 14, 2019. Dckt. 28.

The Motion For Authority To Obtain Financing was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

**The Motion For Authority To Obtain Financing is XXXXXXXX**

Debtor in Possession Mike Tamana Freight Lines, LLC filed this First Day Motion to Obtain Debtor in Possession Financing from Transportation Alliance Bank, Inc. which is styled as a Accounts Receivable Purchase and Sale Agreement so that the Debtor in Possession can continue to operate the estate's business. The terms of the financing are stated in the document titled "Debtor in Possession Accounts Receivable Purchase and Security Agreement." Exhibit C, Dckt. 17.

## **FEBRUARY 14, 2019 HEARING**

At the February 14, 2019 hearing the court granted the Motion and authorized the requested financing on an interim basis through April 5, 2019 (making no determination if there is a sale of accounts receivable or secured financing). Civil Minutes, Dckt. 44.

The court further held Amajot Tamana, identified as the President and Manager of Mike Tamana Freight Lines, LLC, is the Responsible Representative to act for the Debtor in Possession and the person authorized to execute all documents for this authorized financing.

The court issued an Order providing the foregoing, continuing the hearing to March 28, 2019, and also requiring any opposition to the Motion be filed and served on or before March 14, 2019, and replies, if any, filed and served on or before March 21, 2019. Order, Dckt. 46.

## **CREDITOR'S OPPOSITION**

Creditor Wells Fargo Equipment Finance, Inc. holding a secured claim ("WFEF") filed a Limited Opposition on March 13, 2019. Dckt. 93.

WFEF asserts it has a secured interest in equipment of the Debtor, including trucks and trailers, and their proceeds. WFEF opposes the Security Agreement to the extent it seeks to grant a security interest in already encumbered assets of the Debtor in Possession.

## **DEBTOR IN POSSESSION'S REPLY**

Debtor in Possession filed an Omnibus Reply on March 21, 2019. Dckt. 108. Debtor in Possession states it does not oppose limiting the lien granted under the order approving agreement with TAB to the unencumbered assets of the estate, consistent with the request made in the Motion.

## **FINANCING TERMS**

As WFEF comments, the financing to be provided seeks to encumber all of the personal property assets of the bankruptcy estate. The terms of the financing (see discussion below about the selling/financing issue) include:

- A. The contract is between Transportation
  1. Alliance Bank, Inc., dba TAB

and

2. Debtor Mike Tamana Freight Lines, LLC

The contract is clear that it is between the Debtor LLC and TAB, not the fiduciary Debtor in Possession and TAB. The signature block at the end of the agreement is equally clear that it is being signed by the Debtor individually and not in its fiduciary capacity as the Debtor in Possession.

Presumably a sophisticated lender has intentionally drafted this agreement to do business with the LLC shell entity and not the fiduciary Debtor in Possession.

- B. The Debtor LLC is “required” to submit all of the Debtor, LLC’s “Accounts” to TAB. Agreement ¶ 2; Exhibit C, Dckt. 17.
1. “Accounts” is a defined term to as defined in the Uniform Commercial Code (the agreement does not specify whether it is the Commercial Code as enacted by the State of California or the academic Uniform Commercial as developed by the National Conference of Commissioners on Uniform State Laws and the American Law Institute). Agreement *Id.* ¶ 1. Paragraph 19 of the agreement states that the agreement and transaction are to be governed by “internal laws of the State of Utah,” so it is possible that the reference could be to that State’s Commercial Code, or the specific reference is intended to be the academic Uniform Commercial Code.
- a. This section goes further to state: “any and all amounts owing to Seller under any rental agreement or lease, payments on construction contracts, promissory notes or on any other indebtedness, any rights to payment customarily or for accounting purposes classified as accounts receivable, and all rights to payment, proceeds or distributions under any contract of Seller, presently existing or hereafter created, and all proceeds thereof.”
- C. TAB will consider (indicating no obligation to perform on TAB’s part) purchasing only “Accounts” that meet a set of terms stated in a long paragraph that is 48 lines long and contains three periods and four hundred and fifty-six (456) words (excluding the two periods and two words used in the title). One sentence consists of fourteen (14 words) and a second sentence consists of thirty-five (35) words. That leave the third sentence of this one paragraph consisting of four hundred and seven (407) words. The paragraph is one large block, with no organization of subparagraphs, listed items, or other devices to make such a long string of words more easily readable. *Id.* ¶ 3.
- D. The Debtor LLC will offer to sell “Accounts” to TAB, with TAB as the absolute

owner. *Id.* ¶ 4. TAB's purchase of any "Accounts" is in its sole discretion. *Id.* TAB has no obligation to purchase any "Accounts."

- E. During the term of this agreement in which TAB has no obligation to purchase any accounts, the Debtor LLC "shall not sell, factor or otherwise finance its accounts receivable except with Purchaser." *Id.*

Thus, it appears that TAB has drafted this agreement and the Debtor LLC seeks to enter into an agreement by which TAB controls the finances of the Debtor LLC, freezing the use of its "Accounts" (which is very broadly defined).

- F. The purchase price is denied to be "the Face Amount of the Purchased Account." *Id.* ¶ 1. The term "Face Amount" is defined to be "the total amount due specified on an Account's invoice, at the time of Purchase, less any finance charges included therein." *Id.*
- G. The Debtor LLC is obligated to pay various fees and expenses as stated in Paragraph 7 of the agreement. These are stated (in one long run on paragraph) to be

(I) discount fees, at the Discount Fee Rate, on the Balance Subject to Discount Fee, from the date upon which an Account is purchased hereunder, with said discount fee being due and payable monthly on the last Business Day of the calendar month in which it accrues;

(ii) the Administration Fee on each Purchased Account at the time each said Purchased Account is Closed;

(iii) any Misdirected Payment Fee immediately upon its accrual;

(iv) any Missing Notation Fee on any Invoice that is sent by Seller to an Account Debtor that does not contain the notice as required by Section 12 hereof;

(v) any amount by which the sum of the fees and charges earned in any month (prorated for partial months) is less than the Minimum Monthly Fee, to be paid on the last Business Day of the calendar month in which it accrues;

(vi) the Early Termination Fee if Seller terminates this Agreement or prepays the Obligations (whether by acceleration or otherwise) prior to the termination date set forth herein, computed from the date of termination to the date on which termination is requested by Seller pursuant to Section 18 hereof;

(vii) the Late Charge on all past due amounts due from Seller to Purchaser hereunder, and on the amount of any Reserve Shortfall;

(viii) any and all other fees and charges referred to herein, at the earlier of the time required by the terms hereof or when billed by Purchaser; and

(ix) any expenses directly incurred by Purchaser in the administration of this Agreement such as wire transfer fees, postage, extra-ordinary collection costs, periodic UCC or tax lien searches, and audit fees, calculated at Purchaser's standard fee schedule, a copy of which will be provided to Seller upon request;

(x) in the event any applicable law, statute, rule or regulation shall subject Purchaser or any of its affiliates to any tax levy (other than taxes imposed on or measured by the overall net income of Purchaser), duty, impost, duty, charge, fee, deduction or withholding, or increase the cost to Purchaser of purchasing Accounts due to the application or use of the LIBOR Rate, then upon written demand therefor, Seller shall reimburse Purchaser for all such costs and expenses. Any amounts owed by Seller to Purchaser shall be paid by Seller, at Purchaser's option, by:

(a) charging said amounts to the Reserve Account;

(b) deducting said amounts from the Purchase Price otherwise directed by Seller to be deposited into Seller's Account;

(c) debiting said amounts from Seller's Account; or

(d) Seller's paying said amounts, in cash or other good funds acceptable to Purchaser, immediately upon demand made by Purchaser.

H. While structured as a "purchase" of accounts, TAB has the power to "require," on TAB's Demand, Debtor LLC to "repurchase" the purportedly "sold" "Accounts." *Id.* ¶ 8.

I. Debtor LLC grants a security interest in "Collateral" described as:

"Collateral" – any collateral now or hereafter described in any financing statement, continuation statement, financing change statement, or any other UCC-1 filing, or any other amendment, or similar security filing or registration statement filed against or executed by Seller naming Purchaser as the secured party, and all of Seller's right, title and interest

in, to and under the following property, now owned or hereafter acquired:

(I) All Accounts (including any Exclusions and any Accounts purchased by Purchaser hereunder and repurchased by Seller), chattel paper, general intangibles, including, but not limited to, tax refunds, registered and unregistered patents, trademarks, service marks, copyrights, trade names, trade secrets, customer lists, licenses, documents, instruments, deposit accounts, certificates of deposit, and all rights of Seller as a seller of goods, including rights of reclamation, replevin and stoppage in transit;

(ii) All Inventory as defined in the Uniform Commercial Code, wherever located, all goods, merchandise or other personal property held for sale or lease, names or marks affixed thereto for purposes of selling or identifying the same or the seller or manufacturer thereof and all related rights, title and interest, all raw materials, work or goods in process or materials or supplies of every nature used, consumed or to be used in Seller's business, all packaging and shipping materials, and all other goods customarily or for accounting purposes classified as inventory of Seller, now owned or hereafter acquired or created, all proceeds and products of the foregoing and all additions and accessions to, replacements of, insurance or condemnation proceeds of, and documents covering any of the foregoing, all property received wholly or partially in trade or exchange for any of the foregoing, all leases of any of the foregoing, and all rents, revenues, issues, profits and proceeds arising from the sale, lease, license, encumbrance, collection, or any other temporary or permanent disposition of any of the foregoing or any interest therein;

(iii) All Equipment and fixtures and goods, wherever located, and all additions, substitutions, replacements (including spare parts), and accessions thereof and thereto;

(iv) All books and records relating to all of the foregoing property and interests in property, including, without limitation, all computer programs, printed output and computer readable data in the possession or control of the Seller, any computer service bureau or other third party;

(v) All investment property; and

(vi) All proceeds of the foregoing, including but not limited to, all insurance proceeds, all claims against third parties for loss or destruction of or damage to any of the foregoing, and all income from the lease or rental of any of the foregoing. *Id.* ¶ 1.

J. The Exhibit A to the agreement contains the interest rate and other fee and expense terms, *Id.*, Dckt. 17 at 42, which include:

1. A “Discount Fee Rate” calculated at the LIBOR Rate plus 8.37%. Based on the current stated LIBOR Rate, the agreement identifies the interest rate to start at 11.46% on all “Obligations” of Debtor LLC under the agreement. However, the Agreement also provides that notwithstanding the stated “Discount Fee Rate” calculation, at no time shall the LIBOR Rate used in the calculation be less than 8.73%.

This appears to be a drafting error. Likely the Agreement sought to make the minimum Discount Fee Rate 8.73% (the amount of the “plus” interest above the LIBOR Rate). Instead, the language seems to fix the LIBOR Rate at a minimum of 8.73%, which would make the minimum Discount Fee Rate 17.46%.

2. Origination Fee of \$15,000.

3. Attorney Documentation Fee (for agreement between TAB and the Debtor LLC) of \$7,500.

4. Administration fee of 0.10% per diem (.10% per day x 365 days = 36.5% per annum). This 36.5% fee is computed on:

a. “the cumulative uncollected balance of the Purchase Price of all outstanding Purchased Accounts (which are not Closed) minus the balance in the Reserve Account” *Id.* ¶ 1.

5. Minimum Monthly Fee 0.40% (0.40% per month x 12 months = 4.8% per annum). This is a fee computed on the “Maximum Amount,” \$3,000,000, without regard to the account’s purchased, which equals \$144,000 a year to be paid for TAB having the discretion to “purchase” accounts.

## **MARCH 28, 2019 HEARING**

At the March 28, 2019 hearing on the Motion, the court noted (as discussed above) a number of issues that have arisen in connection with the financing, the parties involved, and the terms. Civil Minutes, Dckt. 143. Counsel for the Debtor in Possession reported that alternative financing sources are being considered. Counsel for the lender confirmed with the court that she would address with her client the issues discussed; including the actual terms (including whether the lender would be recovering interest, whether designated interest, maintenance fees, or minimum monthly fee -in addition to origination and drafting fees); and whether the annual interest and maintenance fees are in excess of 40% of the outstanding accounts "purchased" on which interest and fees must be paid.

The court issued an Order on April 1, 2019, extending its Interim Order (Order, Dckt. 46) through and including April 19, 2019, and continuing the hearing on the Motion to April 4, 2019. Order, Dckt. 148.

**RULING**

At the prior hearing, Counsel for the TAB indicated she would address with her client the terms of the financing agreement.

At the hearing, counsel for the Debtor in Possession and Counsel for TAB advised the court  
XXXXXXXXXXXXXXXXXXXX

Counsel for Debtor in Possession reported at the prior hearing that alternative financing sources were being considered.

At the hearing, XXXXXXXXXXXXXXXXXXXXXXX

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 Obtain Post-Petition Financing filed by Mike Tamana Freight Lines, LLC (“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 Motion to Obtain Post-Petition Financing is  
XXXXXXX.



2. [19-90122-E-11](#)      **MIKE TAMANA FREIGHT**      **CONTINUED MOTION TO USE CASH**  
[MF-4](#)                      **LINES, LLC**                      **COLLATERAL**  
                                    **Reno F.R. Fernandez III**                      **2-12-19 [21]**

**TO BE HEARD IN COURTROOM**  
**#34, 6TH FLOOR, SACRAMENTO**

**No Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

**Below is the court’s tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).**

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Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on creditors holding the twenty largest unsecured claims, creditors, and Office of the United States Trustee on February 12, 2019. By the court’s calculation, 2 days’ notice was provided. The court set the hearing for February 14, 2019. Dckt. 29.

The Motion for Authority to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

**The Motion for Authority to Use Cash Collateral is XXXXXXXXXX.**

Debtor in Possession Mike Tamana Freight Lines, LLC filed this First Day Motion to use cash collateral to pay necessary expenses for the estate to continue to operate the transportation business that is included in the estate. The Debtor in Possession is continuing to operate on interim post-petition financing terms.

The Expenses to be paid with cash collateral are set forth in Exhibit C (Dckt. 23) filed in support of this Motion.

## **FEBRUARY 14, 2019 HEARING**

At the February 14, 2019 hearing creditor Transportation Alliance Bank, Inc., holding the senior lien on the collateral, which was represented to be over encumbered, represented non-opposition to the Motion to Use Cash Collateral. Dckt. 43.

To provide for any diminution in the value of the collateral to junior lien holders by the use of cash collateral (11U.S.C. § 506(a) secured claim), the court granted replacement liens to the creditors having liens on the cash collateral being used by the Debtor in Possession.

The court issued an Order providing the foregoing, continuing the hearing to March 28, 2019, and also requiring any opposition to the Motion be filed and served on or before March 14, 2019, and replies, if any, filed and served on or before March 21, 2019. Order, Dckt. 47.

## **WELL'S FARGO'S OPPOSITION**

Creditor Wells Fargo Equipment Finance, Inc. holding a secured claim ("Wells Fargo") filed a Limited Opposition on March 13, 2019. Dckt. 95. Wells Fargo asserts an interest certain equipment of the Debtor, including trucks and trailers, and their proceeds.

While Wells Fargo does not oppose the proposed \$100,000.00 weekly adequate protection payment, Wells Fargo argues the Motion is silent as to which creditors are to be paid, the amount of payment, and when payment will be provided.

Wells Fargo asserts that as of the filing of its Limited Opposition no payment had been received.

## **TCF'S OPPOSITION**

Creditor TCF Equipment Finance, a division of TCF National Bank or its assigns, holding a secured claim ("TCF") filed a Limited Opposition on March 14, 2019. Dckt. 98. TCF asserts it has an interest in multiple trucks and trailers used by Debtor in the operation of its business.

While not opposing the use of its cash collateral, TCF asserts Debtor's Motion and budget fail to identify which secured creditors will be paid or the amounts of such payments. TCF argues Debtor in Possession should be required, as a form of adequate protection, to specify to whom payments will be made, the amount of the payments, and the dates that the payments will be made.

TCF asserts it has received one adequate protection payment totaling \$12,789.89.

**DEBTOR IN POSSESSION’S REPLY**

Debtor in Possession filed an Omnibus Reply on March 21, 2019. Dckt. 110. Debtor in Possession states Wells Fargo and TCF oppose the motion to the extent that the underlying agreement purports to prime their liens on certain equipment assets of the Debtor in Possession. Debtor in Possession states further it does not oppose limiting any replacement lien granted under the order approving the use of cash collateral.

**MARCH 28, 2019 HEARING**

At the March 28, 2019 hearing, counsel for the Debtor in Possession reported that cash collateral stipulations are being executed.

The court issued an Order on April 1, 2019, extending its Interim Order (Order, Dckt. 47) through and including April 19, 2019, and continuing the hearing on the Motion to April 4, 2019. Order, Dckt. 149.

**DISCUSSION**

On April 4, 2019, the Declaration of Amanjot Tamana, the Responsible Representative of the Debtor in Possession (Dckt. 155), was filed. Filed with the Declaration is Exhibit “D,” which is identified to be the amended post-petition operating budget for the estate during the 13-week period starting on February 10, 2019. That budget provides:

| <i>Week Starting On:</i> | <b>Feb 10<br/>2019</b> | <b>Feb 17<br/>2019</b> | <b>Feb 24<br/>2019</b> | <b>Mar 3<br/>2019</b> | <b>Mar 10<br/>2019</b> | <b>Mar 17<br/>2019</b> | <b>May 24<br/>2019</b> | <b>Mar 31<br/>2019</b> | <b>Apr 7<br/>2019</b> | <b>Apr 14<br/>2019</b> | <b>Apr 21<br/>2019</b> | <b>Apr 28<br/>2019</b> | <b>May 5<br/>2019</b> | <b>Total</b>       |
|--------------------------|------------------------|------------------------|------------------------|-----------------------|------------------------|------------------------|------------------------|------------------------|-----------------------|------------------------|------------------------|------------------------|-----------------------|--------------------|
| <b>Income</b>            |                        |                        |                        |                       |                        |                        |                        |                        |                       |                        |                        |                        |                       |                    |
| Revenue                  | \$390,000              | \$410,000              | \$400,000              | \$390,000             | \$400,000              | \$425,000              | \$450,000              | \$400,000              | \$425,000             | \$450,000              | \$400,000              | \$450,000              | \$450,000             | \$5,440,000        |
| Brokerage Revenue        | \$105,000              | \$105,000              | \$105,000              | \$105,000             | \$105,000              | \$105,000              | \$105,000              | \$105,000              | \$105,000             | \$105,000              | \$105,000              | \$105,000              | \$105,000             | \$1,365,000        |
| <i>Total Income</i>      | <i>\$495,000</i>       | <i>\$515,000</i>       | <i>\$505,000</i>       | <i>\$495,000</i>      | <i>\$505,000</i>       | <i>\$530,000</i>       | <i>\$555,000</i>       | <i>\$505,000</i>       | <i>\$530,000</i>      | <i>\$555,000</i>       | <i>\$505,000</i>       | <i>\$555,000</i>       | <i>\$555,000</i>      | <i>\$6,805,000</i> |
| <b>Expenses</b>          |                        |                        |                        |                       |                        |                        |                        |                        |                       |                        |                        |                        |                       |                    |
| Driver Payroll           | \$94,000               | \$99,000               | \$96,000               | \$94,000              | \$96,000               | \$102,000              | \$108,000              | \$96,000               | \$102,000             | \$108,000              | \$96,000               | \$108,000              | \$108,000             | \$1,307,000        |
| Payroll Taxes            | \$12,000               | \$12,000               | \$12,000               | \$12,000              | \$12,000               | \$12,000               | \$13,000               | \$12,000               | \$12,000              | \$13,000               | \$12,000               | \$13,000               | \$13,000              | \$160,000          |
| Benefits                 | \$6,000                | \$6,000                | \$6,000                | \$6,000               | \$6,000                | \$6,000                | \$6,000                | \$6,000                | \$6,000               | \$6,000                | \$6,000                | \$6,000                | \$6,000               | \$78,000           |
| Workers Comp             | \$9,200                | \$9,200                | \$9,200                | \$9,200               | \$9,200                | \$9,200                | \$9,200                | \$9,200                | \$9,200               | \$9,200                | \$9,200                | \$9,200                | \$9,200               | \$119,600          |
| Diesel/DEF/Reefer        | \$82,000               | \$86,000               | \$84,000               | \$82,000              | \$84,000               | \$90,000               | \$94,000               | \$84,000               | \$90,000              | \$94,000               | \$84,000               | \$94,000               | \$94,000              | \$1,142,000        |
| Carrier Pay              | \$90,000               | \$90,000               | \$90,000               | \$90,000              | \$90,000               | \$90,000               | \$90,000               | \$90,000               | \$90,000              | \$90,000               | \$90,000               | \$90,000               | \$90,000              | \$1,170,000        |
| Office Payroll           | \$19,500               | \$19,500               | \$19,500               | \$18,000              | \$18,000               | \$17,400               | \$17,400               | \$16,000               | \$16,000              | \$16,000               | \$16,000               | \$16,000               | \$16,000              | \$225,300          |
| Office Payroll Taxes     | \$2,300                | \$2,300                | \$2,300                | \$2,050               | \$2,050                | \$1,950                | \$1,950                | \$1,800                | \$1,800               | \$1,800                | \$1,800                | \$1,800                | \$1,800               | \$25,700           |
| Officer Salary           | \$4,000                | \$4,000                | \$4,000                | \$4,000               | \$4,000                | \$4,000                | \$4,000                | \$4,000                | \$4,000               | \$4,000                | \$4,000                | \$4,000                | \$4,000               | \$52,000           |
| Insurance                | \$19,200               | \$19,200               | \$19,200               | \$19,200              | \$19,200               | \$19,200               | \$19,200               | \$19,200               | \$19,200              | \$19,200               | \$19,200               | \$19,200               | \$19,200              | \$249,600          |
| Car                      | \$400                  | \$400                  | \$400                  | \$400                 | \$400                  | \$400                  | \$400                  | \$400                  | \$400                 | \$400                  | \$400                  | \$400                  | \$400                 | \$5,200            |
| Ceres Yard               | \$1,800                | \$1,800                | \$1,800                | \$1,800               | \$1,800                | \$1,800                | \$1,800                | \$1,800                | \$1,800               | \$1,800                | \$1,800                | \$1,800                | \$1,800               | \$23,400           |
| Houston Yard             | \$900                  | \$900                  | \$900                  | \$900                 | \$900                  | \$900                  | \$900                  | \$900                  | \$900                 | \$900                  | \$900                  | \$900                  | \$900                 | \$11,700           |

|                             |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                    |
|-----------------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|------------------|--------------------|
| Unloading/ Lumpers          | \$7,500          | \$7,500          | \$7,500          | \$7,500          | \$7,500          | \$7,500          | \$7,500          | \$7,500          | \$7,500          | \$7,500          | \$7,500          | \$7,500          | \$7,500          | \$97,500           |
| Scales                      | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$13,000           |
| Truck and Trailer Washing   | \$1,200          | \$1,200          | \$1,200          | \$1,200          | \$1,200          | \$1,200          | \$1,200          | \$1,200          | \$1,200          | \$1,200          | \$1,200          | \$1,200          | \$1,200          | \$15,600           |
| Tolls                       | \$500            | \$500            | \$500            | \$500            | \$500            | \$500            | \$500            | \$500            | \$500            | \$500            | \$500            | \$500            | \$500            | \$6,500            |
| Gps/Elogs/Trailer Temp      | \$1,200          | \$1,200          | \$1,200          | \$1,200          | \$1,200          | \$1,200          | \$1,200          | \$1,200          | \$1,200          | \$1,200          | \$1,200          | \$1,200          | \$1,200          | \$15,600           |
| Transflo                    | \$400            | \$400            | \$400            | \$400            | \$400            | \$400            | \$400            | \$400            | \$400            | \$400            | \$400            | \$400            | \$400            | \$5,200            |
| Recruiting                  | \$1,250          | \$1,250          | \$1,250          | \$1,250          | \$1,250          | \$1,250          | \$1,250          | \$1,250          | \$1,250          | \$1,250          | \$1,250          | \$1,250          | \$1,250          | \$16,250           |
| Maintenance                 | \$10,000         | \$10,000         | \$10,000         | \$10,000         | \$10,000         | \$10,000         | \$10,000         | \$10,000         | \$10,000         | \$10,000         | \$10,000         | \$10,000         | \$10,000         | \$130,000          |
| Safety                      | \$1,500          | \$1,500          | \$1,500          | \$1,500          | \$1,500          | \$1,500          | \$1,500          | \$1,500          | \$1,500          | \$1,500          | \$1,500          | \$1,500          | \$1,500          | \$19,500           |
| Oregon Tax/NM Tax           | \$4,000          | \$4,000          | \$4,000          | \$4,000          | \$4,000          | \$4,000          | \$4,000          | \$4,000          | \$4,000          | \$4,000          | \$4,000          | \$4,000          | \$4,000          | \$52,000           |
| IT Expense/Software         | \$3,000          | \$3,000          | \$3,000          | \$3,000          | \$3,000          | \$3,000          | \$3,000          | \$3,000          | \$3,000          | \$3,000          | \$3,000          | \$3,000          | \$3,000          | \$39,000           |
| Miscellaneous               | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$13,000           |
| Modular Office              | \$500            | \$500            | \$500            | \$500            | \$500            | \$500            | \$500            | \$500            | \$500            | \$500            | \$500            | \$500            | \$500            | \$6,500            |
| Utilities                   | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$1,000          | \$13,000           |
| Property Taxes (Real Prop.) | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$6,493          | \$0              | \$0              | \$0              | \$0              | \$0              | \$6,493            |
| Other Expenses              | \$2,500          | \$2,500          | \$2,500          | \$2,500          | \$2,500          | \$2,500          | \$2,500          | \$2,500          | \$2,500          | \$2,500          | \$2,500          | \$2,500          | \$2,500          | \$32,500           |
| Equip. Adq. Protection Pmts |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                    |
| Allegiance Fin. Group       | \$0              | \$0              | \$0              | \$0              | \$7,585          | \$24,092         | \$0              | \$0              | \$0              | \$31,677         | \$0              | \$0              | \$0              | \$63,355           |
| Banc of America             | \$0              | \$0              | \$0              | \$17,061         | \$0              | \$0              | \$0              | \$0              | \$17,061         | \$0              | \$0              | \$0              | \$17,061         | \$51,182           |
| BB&T Commercial Equip.      | \$0              | \$26,048         | \$3,431          | \$0              | \$0              | \$26,048         | \$3,431          | \$0              | \$0              | \$26,048         | \$0              | \$3,431          | \$0              | \$88,437           |
| First Midwest               | \$0              |                  | \$6,128          | \$0              | \$0              | \$0              | \$0              | \$0              | \$6,128          | \$0              | \$0              | \$6,128          | \$0              | \$18,385           |
| Hitachi                     | \$0              | \$3,818          | \$0              | \$0              | \$0              | \$3,818          | \$0              | \$0              | \$0              | \$3,818          | \$0              | \$0              | \$0              | \$11,453           |
| Lee Financial               | \$0              | \$0              | \$0              | \$0              | \$62,977         | \$0              | \$31,641         | \$0              | \$62,977         | \$0              | \$31,641         | \$0              | \$62,977         | \$252,214          |
| People's Capital            | \$12,121         | \$0              | \$28,663         | \$0              | \$12,121         | \$0              | \$28,663         | \$0              | \$0              | \$12,121         | \$0              | \$28,663         | \$0              | \$122,351          |
| Signature Financial         |                  | \$0              | \$0              | \$14,219         | \$0              | \$0              | \$0              | \$14,219         | \$0              | \$0              | \$0              | \$0              | \$14,219         | \$42,656           |
| TCF Equipment Fin.          | \$0              | \$0              | \$3,831          | \$12,790         | \$0              | \$0              | \$3,831          | \$12,790         | \$0              | \$0              | \$0              | \$16,621         | \$0              | \$49,863           |
| Volvo                       | \$0              | \$2,457          | \$12,964         | \$34,134         | \$0              | \$2,457          | \$12,964         | \$34,134         | \$0              | \$0              | \$2,457          | \$44,326         | \$2,751          | \$148,643          |
| Wells Fargo Equip. Fin.     | \$59,058         | \$0              | \$0              | \$0              | \$59,058         | \$0              | \$0              | \$0              | \$0              | \$59,058         | \$0              | \$0              | \$0              | \$177,175          |
| Executory K Assumption      |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                    |
| Love's                      | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$13,462         | \$13,462           |
| Carriers                    | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$65,859         | \$65,859         | \$0              | \$75,000         | \$0              | \$0              | \$206,717          |
| Debtor's Professionals*     | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$100,000        | \$100,000          |
| TAB DIP Fees                | \$0              | \$19,000         | \$0              | \$0              | \$0              | \$19,000         | \$0              | \$0              | \$0              | \$19,000         | \$0              | \$0              | \$0              | \$57,000           |
| US Trustee Fees             | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$0              | \$40,000         | \$0              | \$40,000           |
| <b>Total Expenses</b>       | <b>\$449,030</b> | <b>\$438,173</b> | <b>\$436,867</b> | <b>\$454,303</b> | <b>\$521,842</b> | <b>\$466,815</b> | <b>\$482,930</b> | <b>\$511,344</b> | <b>\$541,875</b> | <b>\$552,573</b> | <b>\$486,948</b> | <b>\$540,019</b> | <b>\$611,319</b> | <b>\$6,494,037</b> |
|                             |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                  |                    |
| <b>Net Income/(Loss)</b>    | <b>\$45,970</b>  | <b>\$76,827</b>  | <b>\$68,133</b>  | <b>\$40,697</b>  | <b>\$16,842</b>  | <b>\$63,185</b>  | <b>\$72,070</b>  | <b>\$6,344</b>   | <b>\$11,875</b>  | <b>\$2,427</b>   | <b>\$18,052</b>  | <b>\$14,981</b>  | <b>\$56,319</b>  | <b>\$310,963</b>   |

|  |          |           |           |           |           |           |           |           |           |           |           |           |           |
|--|----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| Contribution to TAB Reserve                      | \$45,970 | \$76,827  | \$68,133  | \$23,855  | \$0       | \$35,214  | \$0       | \$0       | \$0       | \$0       | \$0       | \$0       | \$0       |
| TAB Reserve Account Balance                      | \$45,970 | \$122,798 | \$190,931 | \$214,786 | \$214,786 | \$250,000 | \$250,000 | \$250,000 | \$250,000 | \$250,000 | \$250,000 | \$250,000 | \$250,000 |
| Cumulative Free Cash                             | \$0      | \$0       | \$0       | \$16,842  | \$0       | \$27,971  | \$100,041 | \$93,697  | \$81,822  | \$84,249  | \$102,301 | \$117,282 | \$60,963  |
| *Subject to court approval after fee application |          |           |           |           |           |           |           |           |           |           |           |           |           |

To summarize the above, the Debtor in Possession projects the following financial consequences of operating under the cash collateral budget:

Total Revenue.....\$6,805,000  
Total Expenses.....(\$6,494,037)

Net Operating Income For the 13 Week Period.....\$310,963

The (\$6,494,037) includes (\$40,000) in U.S. Trustee fees and (\$57,000) in “TAB DIP Fees.” It is not clear if this is the interest payable on the financing provided by TAB, the 0.1% per day Administrative Fee, or the estimated 11.46% interest on the TAB financing.

In addition to the operating expenses, (\$250,000) for the period is held in the TAB financial reserve account. This leaves \$60,963 of apparently unspent, unencumbered monies (before paying any state or federal taxes) left from the operation generating \$6,805,000 in revenues after 13 weeks.

The above expenses do include an allocation of (\$100,000) for professional fees and (\$1,025,750) in adequate protection payments for creditor’s with secured claims.

At the hearing, XXXXXXXXXXXXXXXXXX.

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 Mike Tamana Freight Lines, LLC (“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 Motion to Use Cash Collateral is XXXXXXXXXX.

3. [19-90122-E-11](#)      **MIKE TAMANA FREIGHT**      **CONTINUED MOTION TO ASSUME**  
[MF-9](#)                      **LINES, LLC**                      **LEASE OR EXECUTORY CONTRACT**  
                                    **Reno F.R. Fernandez III**                      **3-25-19 [116]**

**TO BE HEARD IN COURTROOM  
#34, 6TH FLOOR, SACRAMENTO**

**No Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

**Below is the court’s tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).**

-----  
Local Rule 9014-1(f)(3) Motion—Hearing Required.

The court set the hearing for March 28, 2019. Order, Dckt. 126. The Order required service by overnight delivery. *Id.*

The Omnibus Motion To Assume Executory Contracts was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing -----

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**The interim Omnibus Motion To Assume Executory Contracts is ~~XXXXXXXXXX~~.**

Mike Tamana Freight Lines, LLC, as the Debtor in Possession, filed this emergency Motion seeking approval for the cure of arrearage and assumption of executory contracts pursuant to 11 U.S.C. §§ 105 and 365, and Federal Rule of Bankruptcy Procedure 6006.

Debtor in Possession has numerous executory contracts for freight delivery services both directly and through third party carriers. Brokering third party delivery contracts generates approximately \$100,000.00 weekly in gross revenue. Declaration ¶ 5, Dckt. 118.

Debtor in Possession states payment since filing on executory contracts has been withheld, and argues the is problematic because:

1. The unpaid carriers are ceasing to do business with the Debtor in Possession despite assurances of prompt payment for future shipments.
2. The carriers are proceeding to collect unpaid amounts directly from the Debtor in Possession’s customers, causing those customers to cease to do business with the Debtor in Possession either through carriers or directly.
3. Debtor in Possession’s broker's license depends upon a bond being maintained with the Department of Transportation. The carriers have filed, severally, 18 claims against the Debtor in Possession’s bond, which could therefore be cancelled as early as March 23, 2019.

Debtor in Possession provides the following list of executory contracts, and respective agreement execution dates and arrearages owing:

| <u>Counterparty</u>      | <u>Contract Identifier</u>  | <u>Arrears</u> |
|--------------------------|---|----------------|
| A&A EXPRESS              | Transportation Brokerage Agreement dated January 8, 2019  | \$4,100.00     |
| ALL AMERICAN FREIGHT     | Transportation Brokerage Agreement*****   | \$1,350.00     |
| AMD EXPRESS LLC          | Transportation Brokerage Agreement dated November 11, 2016  | \$1,200.00     |
| BLUE HORSE TRUCKING INC  | Transportation Brokerage Agreement dated July 26, 2017 (note contract purports to be dated in 2011, which is an error)    | \$1,700.00     |
| BULLET EXPRESS LINE INC. | Transportation Brokerage Agreement dated December 12, 2017  | \$1,000.00     |
| CAMPOS TRUCKING LLC      | Transportation Brokerage Agreement dated October 19, 2017 (note contract purports to be dated in 2011, which is an error) | \$1,164.00     |

|                           |  |            |
|---------------------------|--|------------|
| CAPITAL CITY CARGO        | Transportation Brokerage Agreement dated January 22, 2019 (note contract purports to be dated in 2011, which is an error)  | \$1,000.00 |
| CAPITOL FREIGHTLINES INC. | Transportation Brokerage Agreement dated May 16, 2018 (note contract purports to be dated in 2011, which is an error)      | \$1,100.00 |
| C GOMEZ TRUCKING INC      | Transportation Brokerage Agreement *****   | \$2,100.00 |
| CIMA TRANSPORTATION       | Transportation Brokerage Agreement dated February 27, 2019 (note contract purports to be dated in 2011, which is an error) | \$2,404.00 |
| D&D EXPRESS LLC           | Transportation Brokerage Agreement dated January 22, 2019  | \$3,500.00 |
| DH CARRIERS INC           | Transportation Brokerage Agreement dated October 30, 2019  | \$1,700.00 |
| DUBLIN LOGISTICS          | Transportation Brokerage Agreement dated January 17, 2019 (note contract purports to be dated in 2011, which is an error)  | \$5,000.00 |
| DUQUE BROTHERS INC        | Transportation Brokerage Agreement dated September 11, 2017  | \$1,100.00 |
| GLOBAL CARRIER INC.       | Transportation Brokerage Agreement dated March 27, 2015  | \$1,100.00 |



|                           |   |             |
|---------------------------|---|-------------|
| GLOBAL TRANS SOLUTION INC | Transportation Brokerage Agreement dated May 30, 2017 (note contract purports to be dated in 2011, which is an error)     | \$950.00    |
| GS TRANSPORT              | Transportation Brokerage Agreement dated November 5, 2018   | \$1,900.00  |
| HARMAN TRUCKING INC       | Transportation Brokerage Agreement dated October 3, 2018  | \$1,050.00  |
| H&H TRANSPORTATION INC    | Transportation Brokerage Agreement dated August 22, 2018 (note contract purports to be dated in 2011, which is an error)  | \$900.00    |
| HP TRANS INC              | Transportation Brokerage Agreement dated January 16, 2018   | \$1,693.00  |
| HS CARRIER LLC            | Transportation Brokerage Agreement dated May 29, 2017   | \$31,600.00 |
| HS TRUCKLINES INC         | Transportation Brokerage Agreement dated January 19, 2019 (note contract purports to be dated in 2011, which is an error) | \$850.00    |
| JB CARRIER INC            | Transportation Brokerage Agreement dated April 24, 2017   | \$4,916.00  |
| JFS EXPRESS INC           | Transportation Brokerage Agreement dated December 3, 2018   | \$5,000.00  |
| KANG EXPRESS LLC          | Transportation Brokerage Agreement dated January 28, 2019   | \$900.00    |

|                               |  |             |
|-------------------------------|--|-------------|
| LYONS TRANS INC               | Transportation Brokerage Agreement dated August 23, 2018 (note contract purports to be dated in 2011, which is an error)   | \$2,500.00  |
| MOYA SERVICES INC             | Transportation Brokerage Agreement dated December 18, 2017   | \$28,490.00 |
| NEW SOURCE TRANSPORTATION INC | Transportation Brokerage Agreement dated September 26, 2017  | \$1,500.00  |
| NST LLC                       | Transportation Brokerage Agreement dated July 20, 2017 (note contract purports to be dated in 2011, which is an error)     | \$1,000.00  |
| OSCAR PEREZ TRUCKING          | Transportation Brokerage Agreement dated September 16, 2017  | \$1,500.00  |
| PIB, INC.                     | Transportation Brokerage Agreement dated February 5, 2019  | \$1,700.00  |
| PLATINUM EXPRESS INC          | Transportation Brokerage Agreement dated December 14, 2017 (note contract purports to be dated in 2011, which is an error) | \$1,600.00  |
| S & J TRUCKING                | Transportation Brokerage Agreement dated March 3, 2017   | \$850.00    |
| S & M TRANSPORT               | Transportation Brokerage Agreement dated December 27, 2017 (note contract purports to be dated in 2011, which is an error) | \$1,600.00  |
| SOUTH GREAT TRUCKLINE INC     | Transportation Brokerage Agreement dated January 7, 2019   | \$2,100.00  |

|                        |  |                     |
|------------------------|--|---------------------|
| SPRINT CARRIERS INC    | Transportation Brokerage Agreement *****                 | \$1,800.00          |
| SPS TRANSPORTATION INC | Transportation Brokerage Agreement dated January 7, 2019 | \$4,400.00          |
| USA EXPRESS INC        | Transportation Brokerage Agreement dated June 26, 2018   | \$3,400.00          |
| <b>TOTAL</b>           |  | <b>\$131,717.00</b> |

### Review of Agreements

Debtor in Possession states the numerous carrier executory contracts (“Agreements”) are identical. Debtor in Possession summarizes the essential terms as follows:

- a. The carrier agrees to timely ship goods as may be required by the Debtor (Agreement, § 3(a)); and
- b. The Debtor agrees to pay the carrier within thirty (30) days of receipt of the carrier's invoice (Agreement, § 2(d)).

The complete terms of the agreements are provided in full in the respective agreements, filed as Exhibits 1-35, Dckts. 120-124.

### Cure of Arrearages

The Motion proposes to pay \$97,967.00 to cure arrearages pursuant to 11 U.S.C. § 365(b). Debtor in Possession states that creditor Transportation Alliance Bank has consented to the use of \$200,000.00 in proceeds of pre-petition receivables that are its cash collateral in support of this Motion.

Debtor in Possession states further there additional executory contracts which will be brought in subsequent motion.

### MARCH 28, 2019 HEARING

At the March 28, 2019 hearing the court granted the Motion on an interim basis. Civil Minutes, Dckt. 145.

The court issued an Order authorizing the Debtor in Possession to conditionally assume and make interim cure payments, in the Debtor in Possession’s discretion for such dip discretion, with such conditional assumption and interim cure payment subject to rejection and immediate repayment and disgorgement of the interim cure payments if the assumption of such contract is not authorized by a final order of this court. Order, Dckt. 150.

The court further ordered that Debtor in Possession shall provide notice of the Order to each person whose contract is being assumed, and continued the hearing on the Motion to April 9, 2019.

## APPLICABLE LAW

A debtor in possession, subject to the court's approval, may assume or reject any executory contract or unexpired lease. 11 U.S.C. §§ 365, 1107.

In the Ninth Circuit, courts apply the business judgment rule when reviewing a decision to reject an executory contract or lease. *See Agarwal v. Pomona Valley Med. Group, Inc. (In re Pomona Valley Med. Group, Inc.)*, 476 F.3d 665 (9th Cir. 2007). In reviewing a rejection motion, the bankruptcy court should presume that the trustee "acted prudently, on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the bankruptcy estate" and should approve rejection unless the "conclusion that rejection would be 'advantageous is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice.'" *Id.* at 670 (quoting *Lubrizol Enter. v. Richmond Metal Finishers*, 756 F.2d 1043, 1047 (4th Cir. 1985)). Adverse effects upon the other contract party are not relevant, unless the effect is so disproportionate to the estate's prospective advantage that it shows rejection could not be a sound exercise of business judgment. *See id.* at 671; *In re Old Carco LLC*, 406 B.R. 180, 192 (Bankr. S.D.N.Y. 2009).

Additionally, where the executory contracts are in default, the debtor in possession must (1) cure or provide adequate assurance of prompt cure for the default(s), (2) compensate or provide adequate assurance of prompt compensation for pecuniary loss resulting from default, and (3) provide adequate assurance of future performance under such contract or lease. 11 U.S.C. § 365(b).

## DISCUSSION

At the hearing, **XXXXXXXXXXXXXXXXXX**.

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 Omnibus Motion To Assume Executory Contracts filed by Mike Tamana Freight Lines, LLC ("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 Omnibus Motion To Assume Executory Contracts is **XXXXXXXXXX**.

4. [19-90122-E-11](#) MIKE TAMANA FREIGHT  
[MF-13](#) LINES, LLC  
Matthew Olson

SECOND OMNIBUS MOTION TO  
ASSUME LEASE OR  
EXECUTORY CONTRACT O.S.T.  
4-4-19 [163]

**TO BE HEARD IN COURTROOM  
#34, 6TH FLOOR, SACRAMENTO**

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

**Below is the court’s tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).**

-----  
Local Rule 9014-1(f)(3) Motion—Hearing Required.

The court set the hearing for April 9, 2019 at 10:00 a.m.. Order, Dckt. 168. The Order required service by overnight delivery. *Id.* The Proof of Service indicates service was made on the 20 largest unsecured creditors, parties requesting special notice, parties in interest, and Office of the U.S. Trustee on April 4, 2019 by Federal Express delivery and email. Dckt. 173.

The Second Omnibus Motion To Assume Executory Contracts was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing -----

**The interim Second Omnibus Motion To Assume Executory Contracts is granted.**

Mike Tamana Freight Lines, LLC, as the Debtor in Possession, filed this emergency Motion seeking retroactive approval for the cure of arrearage and assumption of executory contracts pursuant to 11 U.S.C. §§ 105 and 365, and Federal Rule of Bankruptcy Procedure 6006.

Debtor in Possession has numerous executory contracts for freight delivery services both directly and through third party carriers. Brokering third party delivery contracts generates approximately

\$100,000.00 weekly in gross revenue. Declaration ¶ 5, Dckt. 165.

Debtor in Possession states payment since filing on executory contracts has been withheld, and argues the is problematic because:

1. The unpaid carriers are ceasing to do business with the Debtor in Possession despite assurances of prompt payment for future shipments.
2. The carriers are proceeding to collect unpaid amounts directly from the Debtor in Possession's customers, causing those customers to cease to do business with the Debtor in Possession either through carriers or directly.
3. Debtor in Possession's broker's license depends upon a bond being maintained with the Department of Transportation. The carriers have filed, severally, 18 claims against the Debtor in Possession's bond, which could therefore be cancelled as early as March 23, 2019.

Motion ¶¶ 9-11, Dckt. 163.

Debtor in Possession provides the following list of executory contracts, and respective agreement execution dates and arrearages owing:

| <u>Counterparty</u>            | <u>Contract Identifier</u>   | <u>Arrears</u> |
|--------------------------------|--|----------------|
| 24/7 Transport & Storage, Inc. | Transportation Brokerage Agreement dated April 4, 2018   | \$1,700.00     |
| Bluestar Trucking LLC          | Transportation Brokerage Agreement dated November 10, 2016 (note contract purports to be dated in 2011, which is an error) | \$3,750.00     |
| M and V Trucking               | Transportation Brokerage Agreement dated September 21, 2017  | \$8,509.00     |
| PA Logistics Inc.              | (execution date unknown)   | \$1,700.00     |
| Reliance Intermodal Inc.       | (execution date unknown)   | \$850.00       |

|                    |   |                    |
|--------------------|---|--------------------|
| Speed Haulier Inc. | (execution date unknown)  | \$1,350.00         |
| Stream Logistics   | Transportation Brokerage Agreement dated October 15, 2018 (note contract purports to be dated in 2011, which is an error) | \$3,250.00         |
| <b>TOTAL</b>       |   | <b>\$21,109.00</b> |

### **Retroactive Approval**

On March 25, 2019 Debtor in Possession filed the First Omnibus Motion To Assume Executory Contracts (Dckt. 116) which was granted on an interim basis and set for further hearing. Order, Dckt. 150. The Interim Order authorized the Debtor in Possession to conditionally assume and in its discretion make interim cure payments. Order, Dckt. 150.

Debtor in Possession states that the executory contracts subject of this Motion were, due to error, omitted from the First Omnibus Motion. However, believing they had been included, Debtor in Possession already paid the cure amounts for the aforementioned executory contracts.

Debtor in Possession argues that the court has the power to grant retroactive approval, that Debtor in Possession has substantially complied with 11 U.S.C. § 365 and is acting in good faith, and that the circumstances here support retroactive approval where funds used were for an appropriate purpose. Motion ¶ 21, Dckt. 163.

The Declaration of Amanjot Singh Tamana was filed in support of the Motion. Declaration, Dckt. 165. Tamana testifies he is the “responsible individual” for Debtor in Possession, that he believed the executory contracts subject to this Motion were already approved in the Interim Order granting the First Omnibus Motion, and that stopping payments already made would cause great inconvenience and expense to the Estate. *Id.*, ¶¶ 1, 15.

### **Cure of Arrearages**

The Motion seeks retroactive authorization to pay \$21,109.00 to cure arrearages pursuant to 11 U.S.C. § 365(b). Debtor in Possession states the cure amount has been included in the revised cash collateral budget.

### **Review of Agreements**

Debtor in Possession states the numerous carrier executory contracts (“Agreements”) are identical. Debtor in Possession summarizes the essential terms as follows:

a. The carrier agrees to timely ship goods as may be required by the Debtor (Agreement, § 3(a)); and

b. The Debtor agrees to pay the carrier within thirty (30) days of receipt of the carrier's invoice (Agreement, § 2(d)).

The complete terms of the agreements are provided in full in the respective agreements, filed as Exhibits 1-5, Dckt. 166.

## **APPLICABLE LAW**

A debtor in possession, subject to the court's approval, may assume or reject any executory contract or unexpired lease. 11 U.S.C. §§ 365, 1107.

In the Ninth Circuit, courts apply the business judgment rule when reviewing a decision to reject an executory contract or lease. *See Agarwal v. Pomona Valley Med. Group, Inc. (In re Pomona Valley Med. Group, Inc.)*, 476 F.3d 665 (9th Cir. 2007). In reviewing a rejection motion, the bankruptcy court should presume that the trustee "acted prudently, on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the bankruptcy estate" and should approve rejection unless the "conclusion that rejection would be 'advantageous is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice.'" *Id.* at 670 (quoting *Lubrizol Enter. v. Richmond Metal Finishers*, 756 F.2d 1043, 1047 (4th Cir. 1985)). Adverse effects upon the other contract party are not relevant, unless the effect is so disproportionate to the estate's prospective advantage that it shows rejection could not be a sound exercise of business judgment. *See id.* at 671; *In re Old Carco LLC*, 406 B.R. 180, 192 (Bankr. S.D.N.Y. 2009).

Additionally, where the executory contracts are in default, the debtor in possession must (1) cure or provide adequate assurance of prompt cure for the default(s), (2) compensate or provide adequate assurance of prompt compensation for pecuniary loss resulting from default, and (3) provide adequate assurance of future performance under such contract or lease. 11 U.S.C. § 365(b).

## **DISCUSSION**

Here, as with the First Omnibus Motion, Debtor in Possession has demonstrated several sound business judgment reasons for assuming the executory contracts, including the continuation and preservation of Debtor in Possession's business which is at the heart of this reorganization.

Additionally, Debtor in Possession has provided testimony that the cash collateral funds have already (due to mistake) been applied to cure the arrearages on the Agreements, and that a revised cash collateral budget accounts for these expenditures. This evidence is sufficient on this interim Motion.

Upon review of Debtor in Possession's request and cause shown, the court finds that it is in the best interest of Debtor, creditors, and the Estate to authorize Debtor in Possession to assume the carrier executory contracts. Therefore, the Motion is granted, and Debtor in Possession is authorized to assume the executory leases, pursuant to 11 U.S.C. § 365(a).



At the hearing, XXXXXXXXXXXXXXXXXX.

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 Second Omnibus Motion To Assume Executory Contracts filed by Mike Tamana Freight Lines, LLC (“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 interim Second Omnibus Motion To Assume Executory Contracts is granted on an interim basis, and the cure payments in the amount of \$21,109.00 made by the Debtor in Possession to assume executory contracts, filed as Exhibits 1-5 (Dckt. 166), are conditionally retroactively authorized, conditioned with such conditional assumption and interim cure payment subject to rejection and immediate repayment and disgorgement of the interim cure payments if the assumption of such contract is not authorized by a final order of this court.

**IT IS FURTHER ORDERED** that the Debtor in Possession shall provide a copy of this Order to each person whose contract is to be conditionally assumed and for which interim cure payments will have to be repaid if final approval of such assumption is not obtained.

**IT IS FURTHER ORDERED** that the final hearing on the Second Omnibus Motion To Assume Executory Contracts shall be conducted at 10:30 a.m. on April 18, 2019.