

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re:) Chapter 11
)
TWG CAPITAL, INC.,) Case No. 12-11019-BHL-11
)
Debtor.)

FIRST DAY MOTION FOR INTERIM ORDER (i) AUTHORIZING DEBTOR TO OBTAIN POSTPETITION FINANCING PURSUANT TO 11 USC §§ 364(c) AND 364(d); (ii) GRANTING LIENS AND SUPERPRIORITY CLAIMS; (iii) AUTHORIZING THE USE OF CASH COLLATERAL; AND (iv) SCHEDULING A FINAL HEARING

TWG Capital Inc. (“Debtor”), the debtor and debtor-in-possession in the above-captioned Chapter 11 case (the “Chapter 11 Case”), files its motion (the “Motion”) (a) seeking this Court’s authorization (i) pursuant to Sections 364(c) and 364(d) of Title 11, United States Code, 11 U.S.C. §§ 101 et seq. (as amended, the “Bankruptcy Code”), to obtain up to \$340,000 (plus the fees and expenses incurred by the Lender that constitute DIP Obligations¹) of postpetition financing (the “DIP Financing”) on the terms and conditions set forth in the Debtor in Possession Loan Agreement (the “DIP Agreement”) dated as of September 14, 2012, between Debtor, on the one hand, and Carmel Funding LLC (“Lender”), on the other hand; (ii) pursuant to Bankruptcy Code Section 364(c), to grant an automatic, valid, perfected, DIP Lien in the Primary Collateral (as hereinafter defined), subject and subordinate only to the Carveout and Permitted Liens, and a superpriority administrative claim, subject only to the Carveout, as collateral security for Debtor’s obligations to Lender in respect of the DIP Financing; and (iii) authorizing Debtor to use Cash Collateral pursuant to Sections 361 and 363(a); and (b) requesting a final hearing under Rule 4001 of the Federal Rule of Bankruptcy Procedure (the “Bankruptcy Rules”)

¹ Capitalized terms not otherwise defined herein shall have the meaning ascribed to such term in the DIP Agreement.

for the entry of a final order approving the DIP Financing. The proposed form of the interim order (the “Interim Order”) is attached hereto as Exhibit A.

In support of the DIP Financing Motion, Debtor relies on the Declaration of Mark P. Nondorf in Support of First Day Applications and Motions (the “Nondorf Declaration”), and may present additional evidence at the hearing on the Motion.

JURISDICTION

1. On September 14, 2012 (the “Petition Date”), the Debtor filed with the United States Bankruptcy Court for the Southern District of Indiana, Indianapolis Division (the “Bankruptcy Court”), its voluntary petition for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. as amended (the “Bankruptcy Code”) commencing the Debtor’s Chapter 11 Case.

2. Debtor continues to operate its business and manage its property as a debtor in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

3. No trustee or examiner has been appointed in the Chapter 11 Case.

4. This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court under 28 U.S.C. §§ 1408 and 1409.

5. The statutory bases for the relief sought herein are Sections 105, 361, 362, 363, 364(c)(1), 364(c)(2), 364(c)(3) and 507 of the Bankruptcy Code and Bankruptcy Rules 4001(c), (d), and 6004(a)(2).

6. The Motion is a “First Day Motion” as defined and allowed under Rule B-9013-3 of the Local Rules of the United States Bankruptcy Court for the Southern District of Indiana (the “Local Bankruptcy Rules”).

7. Pursuant to Local Bankruptcy Rule B-9013-3, the Court shall schedule and conduct a hearing on a First Day Motion within two business days (if possible) of the filing of a First Day Motion.

BACKGROUND AND EVENTS LEADING TO FILING

8. As more fully set forth in the Nondorf Declaration, the Debtor is a specialty finance company that services the insurance industry. Insurance agents and agencies own predictable renewal commission rights on certain types of insurance policies ("Insurance Commission Receivables," commonly referred to in the industry as "ICRs") that generate significant cash flows over extended periods of time. The Debtor provides a range of products and services based on the value of the ICRs.

9. The Debtor's business consists of three primary segments. The Debtor's most significant line of business is providing liquidity to insurance agents and agencies by serving as an originator to special purpose vehicles ("SPVs") for the purchase of ICRs at a rate less than the expected value of their future cash flows. The Debtor earns origination fees for this service. Second, the Debtor services on behalf of SPVs and other parties ICR asset portfolios, using proprietary technology. The Debtor earns a servicing fee for this service. Finally, the Debtor's wholly owned subsidiary, IR Finance 1, LLC ("IR Finance") makes loans to insurance agencies and collateralizes the loans with future insurance commissions. The Debtor services the loan assets and insurance commission collateral on behalf of IR Finance.

10. On or around July 12, 2007, the Debtor entered into an origination and servicing contract with its wholly owned subsidiary, Insurance Receivables 7, LLC ("IR7"), whereby the Debtor would receive (i) an origination fee for purchases placed in IR7's debt facility and (ii) a servicing fee for monitoring and processing commission payments that were

received under the purchases (the "IR7 Servicing Agreement"). On or around May 13, 2008, the Debtor, Inservico, Inc. ("Inservico") and other parties, including lenders to IR7 (the "IR7 Lenders") entered into that certain Back-Up Servicing Agreement (the "Back-Up Servicing Agreement"). On August 13, 2010, the Debtor was terminated as the IR7 servicer and pursuant to the Back-Up Servicing Agreement, the IR7 Lenders purportedly appointed Inservico as successor to the Debtor as the servicer with respect to the IR7 Servicing Agreement. Inservico disputes any allegation that it has any obligations under the Back-Up Servicing Agreement or the IR7 Servicing Agreement. With reservation of Inservico's position, by that certain Subservicing Agreement between Inservico and the Debtor dated effective as of September 13, 2012, Inservico has subcontracted the servicing of IR7 to the Debtor. The origination and servicing fees from IR7 are currently the Debtor's primary source of revenue. Inservico is a 62.47% owner of the Debtor.

11. The prolonged impact of the financial crisis that hit in 2008 has impaired the performance of the Debtor's purchased asset portfolio, and the Debtor has sustained significant losses as a result. The financial crisis has also impacted the insurance industry as a whole, which caused the Debtor to experience lower than projected cash flows. The Debtor has also been required to sustain unexpected costs of litigation, including arbitration resulting from the Debtor's discovery of misrepresentations by the seller in the purchase of Medicare Supplemental policies (the "AIMC Arbitration"). During the AIMC Arbitration, the senior lenders on the IR7 debt facility declared an event of default that resulted in the immediate termination of new originations within the IR7 debt facility, thereby further impairing the Debtor's cash flow.

12. The Debtor has taken many measures to prevent the filing of the Chapter 11 Case. The Debtor has worked with investment bankers for over three years to develop and execute recapitalization strategies. However, traditional financing sources have been constrained, and the Debtor has been unable to raise sufficient capital to implement its business plan.

13. A more in depth discussion of the Debtor's business and the circumstances precipitating the filing of the Chapter 11 Case is set forth in the Nondorf Declaration, which is incorporated by reference herein.

BACKGROUND AND DESCRIPTION OF LENDER

14. The Lender is a wholly owned subsidiary of 221 Partners Fund, L.P. (“221 Partners”). 221 Partners owns 57.72% of Inservico. Inservico owns 62.47% of the Debtor.

RELIEF REQUESTED

A. Summary of Relief

15. By the Motion, the Debtor seeks, among other things, this Court’s authorization under Sections 105, 361, 362, 363, 364(c)(1), 364(c)(2), 364(c)(3) and 507 of the Bankruptcy Code:

(a) to enter into the DIP Financing with Lender and execute the DIP Agreement, authorizing Debtor to borrow up to \$340,000 from Lender. The DIP Financing is more fully described in the DIP Agreement, which is attached to the Interim Order as Exhibit A;

(b) to grant Lender, pursuant to Sections 364(c)(2) and (c)(3) of the Bankruptcy Code, (A) a valid, enforceable, senior, non -avoidable, perfected lien on all of the property of Debtor’s estate under section 541 of the Bankruptcy Code (the “Primary Collateral”), except for (i) claims and causes of action arising under chapter 5 of the Bankruptcy Code and (ii) those assets of the Debtor as of the Petition Date (the “Secondary Collateral”) that secure prepetition obligations of Debtor as to which a valid, enforceable, perfected, and unavoidable Permitted Liens (as that term is defined in the DIP Agreement) existed as of the Petition Date in favor of a creditor other than Lender (collectively, the “Preexisting Liens”); and (B) a valid, enforceable, non-avoidable, perfected second priority lien on the

Secondary Collateral, subordinate only to any Preexisting Liens (collectively, the “DIP Liens”). Subject to the Carveout (defined below) and the replacement lien to be provided to the Receiver (as described below) and except as expressly provided otherwise above, the DIP Liens shall be prior and senior to all liens and encumbrances of all other secured creditors and judgment creditors in and to the Primary Collateral granted or arising after the Petition Date;

(c) as adequate protection to the U.S. Small Business Administration, as Receiver for Cardinal Growth, L.P. (“Receiver”) for the use of its Cash Collateral, to the extent that the Receiver has a first, valid and perfected security interest in all of the assets of the Debtor (the “Receiver’s Lien”) (the validity of which the Debtor disputes) to secure an obligation of approximately \$52,475.84 (the “Receiver’s Claim”) (the amount and validity of which the Debtor disputes): (A) to grant a replacement lien in and to the Debtor’s cash and cash equivalents (the “Cash Collateral”), which lien shall have the same validity and priority as the Receiver’s Lien; and (B) to segregate and hold in escrow the proceeds from the Proposed Transaction (as defined below) in the amount of \$52,475.84, pending a determination as to the validity and priority of the Receiver’s Lien and the allowed amount of the Receiver’s Claim;

(d) to grant Lender, pursuant to Section 364(c)(1) of the Bankruptcy Code, an allowed administrative expense claim having priority over any and all administrative expenses of the kind specified or ordered pursuant to any provision of the Bankruptcy Code (the “DIP Superpriority Claim”), including, but not limited to, Sections 326, 328, 330, 331, 503(b), 507(a), 507(b) and 726 of the Bankruptcy Code, subject only to the Carveout, as to which the DIP Superpriority Claim shall be subordinate; and

(e) to borrow up to \$50,000 under the DIP Financing on an interim basis under the Interim Order pending the Final Hearing; and

(f) to schedule the Final Hearing pursuant to Bankruptcy Rule 4001, and establish notice procedures with respect of the Final Hearing.

B. Basis for Relief

16. The Debtor has determined that the DIP Financing is necessary for the Debtor to operate its business and for the Debtor's successful reorganization. Because the Debtor’s existing cash on hand will not be sufficient to fund its Chapter 11 Case, the Debtor has concluded that the DIP Financing is necessary and in the best interests of the Debtor, its estate, and its creditors.

17. Prior to the Petition Date, Debtor, in consultation with its financial and legal advisors, determined to pursue the sale of substantially all of Debtor's assets (the "Proposed Transaction"). In order to permit the maintenance and proper preservation of Debtor's assets, and to satisfy other working capital and operations, financial and general corporate needs, and facilitate the Proposed Transaction, Debtor requires the DIP Financing. Lender is advancing the DIP Financing to provide Debtor the means to pay administrative expense claims incurred in the ordinary course of Debtor's businesses in accordance with the Budget, which is attached to the Interim Order as Exhibit B.

18. The DIP Financing and the DIP Agreement to be executed in connection therewith, are the result of arm's length negotiations between the Debtor and Lender. The DIP Financing's principal provisions are:

(A) Closing Date: The closing of the DIP Financing will occur upon Court approval.

(B) Purpose: The DIP Financing will be used to the extent required to pay those expenses enumerated in the Budget, subject as set forth in the DIP Agreement to a permitted variance of up to ten percent (10%) with respect to any one line item of the Budget, provided that the overall disbursements for any four (4) week period do not exceed one hundred and ten percent (110%) of the budgeted expenses of Debtor for any four (4) week period (or shorter period since the Petition Date), and the statutory fees and expenses, including professional fees and expenses, associated with the Debtor's Chapter 11 Case (the "Permitted Variance").

(C) Termination Date: Upon the later of: (i) one (1) business day after written notice is delivered to Debtor, counsel for the United States Trustee, and counsel for the official committee of unsecured creditors, if any, of the occurrence and continuance of any of the Events of Default (as defined below) ("Notice of Default"); or (iii) the expiration of any applicable cure period following such Notice of Default.

(D) Interest Rate: Daily rate equivalent of seven hundred (700) basis points in excess of LIBOR.

(E) Carve-Out: The Carveout includes:

ii. the unpaid fees of the clerk of the Bankruptcy Court or District Court, as applicable, and of the Office of the United States Trustee pursuant to 28 U.S.C. §§ 1930(a) and (b) and 31 U.S.C. § 3717;

iii. the aggregate accrued and unpaid fees and expenses, including any holdback amounts, allowed and payable under sections 330 and 331 of the Bankruptcy Code to professional persons retained by Debtor pursuant to Court order (the “Professional Fees and Expenses”) incurred prior to a Termination Date, and in amounts not to exceed that which are set forth in the Budget, subject to the Permitted Variance;

iv. up to \$15,000 of allowed and unpaid Professional Fees and Expenses incurred by Debtor after a Termination Date, but only to the extent that any then remaining retainer held by such professional person and any unencumbered funds of the estate are insufficient to pay such allowed Professional Fees and Expenses;

v. the costs and administrative expenses not to exceed \$10,000 in the aggregate that are permitted to be incurred by any chapter 7 trustee pursuant to an order of this Court following any conversion of the Chapter 11 Case pursuant to Section 1112 of the Bankruptcy Code ; and

vi. the Carveout shall be senior in priority to the DIP Liens.

(F) Events of Default: The following shall constitute a Default under the DIP Agreement:

i. The Debtor shall fail to pay any principal or interest of the DIP Loan or any other DIP Obligation (including any fees or reimbursable amounts) when any such amount becomes due in accordance with the terms hereof, which failure continues for a period of five (5) Business Days after notice thereof from Lender;

ii. The Debtor, shall default in the observance or performance of any covenant, agreement, obligation or restriction set forth in the Asset Purchase Agreement, the DIP Agreement or any other DIP Loan Document, and, to the extent such default is curable, such Default shall continue unremedied for a period of ten (10) Business Days after notice thereof from Lender;

iii. The Bankruptcy Court shall enter an order with respect to the Debtor dismissing the Chapter 11 Case or converting it to a case under chapter 7 of the Bankruptcy Code, or, without the prior written consent of Lender (i) appointing a trustee in its Chapter 11 Case or (ii) appointing a responsible officer or an examiner with enlarged powers relating to the operation of the Debtor’s business (beyond those set forth in Section 1106(a)(3) or (4)) under Bankruptcy Code Section 1106(b);

iv. A Chapter 11 plan of reorganization with respect to the Debtor is filed, and such plan does not provide for the indefeasible payment in full in cash of the DIP Obligations on or prior to the earlier of the Maturity Date and the termination of the DIP Loan Commitment or such other treatment to which Lender may agree in writing;

v. Debtor shall fail to comply with the terms of the Interim DIP Order or the Final DIP Order, if any;

vi. Debtor's use of any cash collateral or advances under the DIP Loan for any purpose other than those set forth in the Budget or as otherwise approved by the Bankruptcy Court;

vii. The Bankruptcy Court grants any superpriority administrative expense claim or Lien, or enters any order granting relief from the automatic stay (if not in favor of Lender) on any assets of the Debtor which have an aggregate value in excess of \$25,000.00, except with the express written consent of Lender; or

viii. Except as provided in the Budget, payment of any pre-petition claims without Lender's prior consent.

19. Other terms and conditions are set forth in the DIP Agreement. The Debtor will attempt to provide copies of any other documents related to the DIP Financing, if any, to all other parties entitled to service of the Motion in advance of the interim hearing requested herein.

BASIS FOR RELIEF

20. If a debtor is unable to obtain unsecured credit allowable as an administrative expense under Section 503(b)(1) of the Bankruptcy Code, then the Court, after notice and hearing, may authorize the debtor to obtain credit or incur debt:

- (a) with priority over any or all administrative expenses of the kind specified in Sections 503(b) or 507(b) of the Bankruptcy Code; or
- (b) secured by a lien on property of the estate that is not otherwise subject to a lien; or
- (c) secured by a junior lien on property of the estate that is subject to a lien.

11 U.S.C. § 364(c).

21. In addition, this Court may authorize the Debtor to enter into the DIP Financing pursuant to Section 105(a) of the Bankruptcy Code. Section 105(a) of the Bankruptcy Code grants broad authority to a court to enforce the provisions of the Bankruptcy Code under equitable common law doctrines. This section provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

C. The DIP Financing Should Be Approved

22. The Debtor has been unable to procure the required funds in the form of unsecured credit or unsecured debt with an administrative priority because of the risk factors and amount of funds required by the Debtor to operate in the ordinary course of its business and complete the Proposed Transaction. Accordingly, the circumstances of the Chapter 11 Case require the Debtor to obtain financing under Section 364(c) of the Bankruptcy Code.

23. Having determined that financing is available only under Section 364(c) of the Bankruptcy Code, the Debtor negotiated the DIP Financing at arm's length and pursuant to its business judgment. Provided that this judgment does not run afoul of the provisions of and policies underlying the Bankruptcy Code, courts routinely grant a debtor considerable deference in acting in accordance with its business judgment. See, e.g., In re YL West 87th Holdings I LLC, 423 B.R. 421, 441 (Bankr. S.D.N.Y. 2010) (“Courts have generally deferred to a debtor's business judgment in granting Section 364 financing.”) (citations omitted); In re Snowshoe Co., 789 F.2d 1085, 1088 (4th Cir. 1986) (approving debtor-in-possession financing necessary to sustain seasonal business); In re Ames Dep't Stores, 115 B.R. 34, 40 (Bankr.

S.D.N.Y. 1990) (“[C]ases consistently reflect that the 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 parties in interest.”).

24. The DIP Financing is for the benefit of the Debtor’s estate and creditors. Such financing is critical to the preservation and enhancement of the Debtor’s going concern value and completion of the Proposed Transaction. With the credit provided by the DIP Financing, the Debtor will be able to pay its employees and maintain adequate cash balances customary and necessary for a company of this size in this industry to operate its business in order to preserve the ongoing value of its business for the benefit of all parties in interest, and to complete the Proposed Transaction and proceed to confirmation.

25. The terms and conditions of the proposed DIP Financing are fair and reasonable and were negotiated by the parties in good faith and at arm’s length. Accordingly, the Lender should be accorded the benefits of Section 364(e) of the Bankruptcy Code in respect of the DIP Financing.

D. Use of Cash Collateral and Adequate Protection

26. Pursuant to Sections 363(c)(2)(A) and 363(c)(2)(B) of the Bankruptcy Code, a debtor in possession may use cash collateral if: (a) each entity that has an interest in such cash collateral consents; or (b) the Court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section. The Receiver asserts that the Receiver’s Lien is a first, valid and perfected security interest in all assets of the Debtor to secure the Receiver’s Claim. The Debtor disputes the validity of the Receiver’s Lien and the Receiver’s Claim. Debtor has no other secured obligations, and the only liens on its assets, other than the disputed

Receiver's Lien, are liens permitted under the DIP Agreement. The value of the Debtor's assets substantially exceeds the amount of the disputed Receiver's Claim.

27. In order to provide adequate protection to the Receiver, and only to the extent that the Receiver's Lien is a first, valid and perfected security interest in all of the assets of the Debtor, the Debtor agrees to and the DIP Order shall: (a) grant the Receiver a replacement lien in and to the Cash Collateral, which lien shall have the same validity and priority as the Receiver's Lien; and (b) segregate and hold in escrow the proceeds from the Sale Transaction in the amount of \$52,475.84, pending a determination as to the validity of the Receiver's Lien and the allowed amount of the Receiver's Claim.

28. To the extent that the Receiver's Lien is a first, valid and perfected security interest in all assets of the Debtor, the Receiver is the only entity that would have an interest in the Cash Collateral. The Receiver has reviewed the DIP order and consents to the Debtor's use of cash collateral in accordance with the terms and conditions of the DIP Order. Consequently, approval of the Debtor's use of the Cash Collateral is warranted.

E. Interim Approval of the DIP Financing Should be Granted

29. Bankruptcy Rule 4001(c) provides that a final hearing on a motion to obtain credit pursuant to Section 364 may not be commenced earlier than fifteen (15) days after the service of such motion. Upon request, however, the Court is empowered to conduct a preliminary expedited hearing (an "Interim Hearing") on the Motion and authorize the obtaining of credit to the extent necessary to avoid immediate and irreparable harm to the Debtor's estate.

30. The Debtor requests that the Court conduct an Interim Hearing on the Motion and authorize the Debtor, from and after the entry of the Interim Order until the Final Hearing, to borrow under the Loan Agreement in an amount up to \$50,000. This will enable the Debtor to

access cash, maintain ongoing operations, and avoid immediate and irreparable harm and prejudice to its estate and all parties in interest, pending the Final Hearing.

NOTICE

31. The Debtor respectfully requests that it be authorized to serve a copy of the signed Interim Order, which fixes the time and date for filing objections, if any, by first class mail upon: (i) the office of the United States Trustee for the Southern District of Indiana; (ii) the Receiver and any other party asserting a security interest or lien of record against Debtor's real and personal property; and (iii) the Debtor's twenty (20) largest general unsecured creditors (collectively, the "Initial Notice Parties"). The Debtor requests that the Court consider such notice of the Final Hearing to be sufficient notice under Bankruptcy Rules 4001(c) and (d).

NO PRIOR REQUEST

32. No previous request for the relief requested herein has been made to the Court in the Chapter 11 Case.

WHEREFORE, the Debtor respectfully requests that the Court enter an order (i) granting the relief requested herein and (ii) granting such other relief as is just and proper.

Respectfully submitted,

FAEGRE BAKER DANIELS LLP

By: /s/ Jay Jaffe

Jay Jaffe (#5037-98)
Wendy W. Ponader (#14633-49)
600 E. 96th Street, Suite 600
Indianapolis, IN 46240
Telephone: (317) 569-9600
Facsimile: (317) 569-4800
jay.jaffe@FaegreBD.com
wendy.ponader@FaegreBD.com

Proposed Counsel for the Debtor and Debtor in Possession

Kayla D. Britton (#29177-06)
300 N. Meridian Street, Suite 2700
Indianapolis, IN 46204
Telephone: (317) 237-0300
Facsimile: (317) 237-1000
kayla.britton@FaegreBD.com