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**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re

**HAWAII MOTORSPORTS,
LLC,**

Debtors.

Case No. **1:20-bk-10006-BPH**

**INTERIM ORDER APPROVING MOTIONS TO OBTAIN CREDIT AND
ADEQUATE PROTECTION**

At Butte in said District this 18th day of February, 2020.

In this Chapter 11¹ case, the Debtor, Hawaii Motorsports, LLC, filed on February 11, 2020, six motions for interim orders on (i) Motion to Obtain Credit from Usher Enterprises, Inc., (ECF No. 15) (“Usher Motion”); (ii) Motion to Obtain Credit from Cebull and Usher (ECF No. 16) (“Cebull & Usher Motion”); (iii) Motion to Obtain Credit from Wells Fargo Commercial Distribution Finance, LLC (ECF Nos. 20) (“First Wells Fargo Motion”); (iv) Motion to Obtain Credit from Wells Fargo Commercial Distribution Finance, LLC (ECF No. 21) (“Second Wells Fargo Motion”) (collectively, the First and Second Wells Fargo Motions are referred to the “Well’s Motions”)²; (v) Automotive Finance Corporation (ECF No. 22) (“AFC Motion”); and, (vi) Mahindra Finance USA, LLC (ECF No. 23) (“Mahindra Motion”).

¹ Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all “Rule” references are to the Federal Rules of Bankruptcy Procedure, and all “Civil Rule” references are to the Federal Rules of Civil Procedure.

² The First and Second Well’s Motions are indistinguishable. The Second Motion appears to be duplicative of the First and includes the same financing agreement and UCC filing statement as exhibits.

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The Debtor also filed a Motion for Interim Hearing on Motions to Obtain Credit (ECF No. 24) and a Motion to Waive Notice (ECF No. 25) (collectively, ECF Nos. 24 and 25 are referred to as the “Hearing Motions”). The Hearing Motions were granted and an Interim hearing was held on February 14, 2020. Appearances were noted on the record. Exhibits 1, 2, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14 and G and H were admitted. Debtor’s manager, Barry Usher testified. A conditional objection was filed by Cycle City LTD, and it explained:

Cycle City LTD does not object to the effect of the Motions as they relate to motor vehicles because its security interest specifically excepts motor vehicles. Cycle City LTD does not object to the Motions to the extent that their effect does not clearly impair the secured lien interest of Cycle City LTD. Cycle City LTD files this conditional objection in order for it to have time to analyze the effect of the Motions upon its collateral and security interest, in addition to the other agreements in effect between the DIP and Cycle City LTD prior to the filing of the bankruptcy, and to preserve its right to object to the relief requested in the Motions at the final hearing on such Motions by the Court.

ECF No. 29.

Hawaii State Federal Credit Union (“Hawaii”) also objected, alleging and arguing:

the priority date for Hawaii FCU’s perfected security interest is the date of filing, or March 15, 2017. This interest has priority over the subsequent interests of Wells Fargo Commercial Distribution Finance, LLC, which was filed on March 16, 2017; AFC, which Debtor represents was filed on August 17, 2018; and Mahindra Finance USA, LLC, which was filed on July 5, 2019 unless an exception applies.

ECF No. 30. Hawaii further argued:

Since Hawaii FCU maintains a first-position priority lien in all or part of Debtor’s inventory, it is entitled to adequate protection of its interest in Debtor’s inventory as that inventory collateral is sold. If Debtor is allowed to replace inventory and subsequently obtain credit secured by a first-position lien on new inventory granted to Wells Fargo, AFC, or Mahindra, this sale will result in a decrease of Hawaii FCU’s collateral position. Therefore, Hawaii FCU is entitled to adequate protection under 11 U.S.C. § 361 of its interest in the inventory collateral to the extent it holds a first-position lien on such collateral.

Id. Hawaii concluded its objection:

To keep Debtor operating and without waiving any of its rights other than those expressly disclosed herein, Hawaii FCU consents to an interim Order granting Debtor’s motions

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and allowing Wells Fargo, AFC, and Mahindra to continue their financing agreements on an interim basis and pending a final hearing on the matter, so long as any new loan advances by the flooring lenders are secured solely by inventory purchased with the funds advanced.

Id.

This Court may authorize the obtaining of credit to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing. Rule 4001(c)(2).

Generally, each of the motions reflects an effort to maintain certain key credit arrangements post-petition that were in place pre-petition. The credit sought under the Motions relates to: (i) inventory financing; and, (ii) automotive, parts, clothing and merchandise inventory critical to the Debtor's continued operation, and a feasible chapter 11 plan. The post-petition continuation of these arrangements is in the best interests of the Debtor's bankruptcy estate during the interim period pending a final hearing.

A. Usher and Cebull & Usher Motions for unsecured credit on a superpriority Basis.

1. Usher Motion

The Usher Motion seeks authority for Debtor to continue to use post-petition a Capital One credit card issued in the name of Usher Enterprises Inc., to purchase product, clothing and accessories for retail sale pursuant to § 364(c). Usher testified that the existing balance on the credit card was \$2,751.36, and approximately, \$2,248.64 was available to use on a revolving basis. In exchange for the continued use of the credit card, Usher Enterprises Inc., requires that the post-petition debt attributable to the use of the Capital One credit card be afforded superpriority status.

2. Cebull & Usher Motion

The Cebull & Usher Motion seeks authority for Debtor to continue to access post-petition Cebull & Usher's revolving line of credit at First Interstate Bank. Ordinarily the line has

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a \$250,000 limit. However, as of the petition date, only \$60,000 in available credit existed. Similar to the Capital One credit card, this line of credit, although in the name of third-parties' Cebull and Usher, has historically been utilized by Debtor in its day-to-day operations. In exchange for the continued use of Cebull & Usher's line of credit, Cebull and Usher require that the post-petition debt attributable to use of the line be afforded super-priority status pursuant to § 364(c)(1), subject to a carve-out for the allowed professional fees in this case and costs of administration should this case be converted to chapter 7. Access to this revolving line of credit under the terms proposed in the Credit Loan Agreement, ECF No. 19-1, Ex. A, is necessary for managing Debtor's day-to-day liquidity. Usher testified that access to this liquidity is important for day-to-day operations.

If a debtor-in-possession is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title. § 364(c)(1). Usher testified that despite attempts to do so, the Debtor has been unable to obtain unsecured credit, even if the post-petition debt was treated as an administrative expense. Absent continuing access to the Capital One credit card, and more importantly the line of credit, Debtor may suffer immediate harm that may render its reorganization effort futile. Pending a final hearing, the Usher, and Cebull and Usher Motions are approved on an interim basis.

B. The Flooring Lines, Credit on a Secured Basis

1. Wells Fargo's Motions

Debtor and Wells Fargo Commercial Distribution Finance, LLC, ("Wells") entered an Inventory Financing Agreement March 1, 2017, and filed a UCC Financing Statement with the

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Montana Secretary of State on March 16, 2017. The Inventory Financing Agreement provided for an extension of credit to Debtor for the acquisition of inventory from Wells Fargo approved vendors. In exchange for the credit, Debtor granted Wells Fargo a security interest in the inventory acquired with the Wells Fargo credit. In addition, Debtor granted Wells Fargo a security interest in its other personal property. Use of the Inventory Financing Agreement during the pendency of this case is important to Debtor's ongoing operations because without it, Debtor cannot acquire inventory. The First and Second Motion seek to maintain post-petition, precisely the same credits terms that existed pre-petition for the acquisition of inventory, including granting a security interest to Wells in all new inventory acquired with the Wells post-petition financing.

2. AFC Motion

Debtor signed a promissory note and Security Agreement with Automotive Finance Corporation ("AFC") July 11, 2019, and filed a UCC Financing Statement with the Montana Secretary of State on August 17, 2018. The promissory note and security agreement provided for an extension of credit to Debtor for the purchase of rental automobile inventory from AFC. In exchange for the credit, Debtor granted AFC a security interest in the rental inventory acquired with the AFC credit. Use of the credit available under the Promissory Note during the pendency of this case is important to Debtor's ongoing operations because without it, Debtor cannot acquire rental inventory. The AFC Motion requests use of the AFC credit post-petition for the acquisition of rental inventory, including granting a security interest to AFC in all new rental inventory acquired with the AFC post-petition financing.

At the hearing, Debtor and AFC advised that AFC did not object to the AFC Motion provided any interim Order included the following:

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- a. The Debtor may continue to use and sell any vehicle purchased by the Debtor and financed by AFC (each a “Secured Vehicle”) in accordance with the terms of the prepetition loan documents between the Debtor and AFC (collectively and as amended from time to time, the “Note”).
- b. In the case of a non-sale use (i.e., rental, lease, or other similar use) of a Secured Vehicle, the Debtor may use proceeds derived from that use in the ordinary course of its business so long as the Debtor timely performs its obligations under the Note with respect to that Secured Vehicle, including but not limited to making periodic payments to AFC at the times and in the amounts required under the Note.
- c. The Debtor may sell a Secured Vehicle for an amount sufficient to pay AFC the full amount owing on that vehicle as of the date of sale as indicated in the records of AFC (the “Payoff Amount”). Absent written permission from AFC, the Debtor may not sell a Secured Vehicle for less than the Payoff Amount, and the Debtor may not dispose of any Secured Vehicle through trade.
- d. Upon the sale of a Secured Vehicle, all proceeds from the sale of such vehicle shall be deposited into a separate deposit account (the “AFC Escrow Account”) to be established and maintained at a financial institution on the list of authorized depositories approved by the United States Trustee.
- e. Within twenty-four (24) hours of the receipt of the proceeds from the sale of any Secured Vehicle, the Debtor shall remit to AFC the Payoff Amount. The Debtor shall be entitled to use all proceeds over and above the Payoff Amount in the ordinary course of its business.
- f. Upon the sale of a Secured Vehicle, the Debtor shall provide written documentation to AFC that, in AFC’s discretion, verifies the final sale of such vehicle, and within three (3) business days of such verification AFC shall provide the Debtor with the title to the vehicle. AFC shall otherwise retain all vehicle titles.
- g. Other than in accordance with the terms of the Note or for routine maintenance, the Debtor shall not allow any Secured Vehicle to leave its premises until receipt of title from AFC.
- h. AFC shall have the right to inspect the Debtor’s premises during regular business hours.
- i. If the Debtor fails to perform all obligations in accordance with the terms of the Note or any Interim Order, and in the event the Debtor does not cure such failure within three (3) business days after AFC provides Debtor’s counsel with notice of such failure, then upon filing with the Court by AFC of a notice of default the Debtor’s right to use AFC’s cash collateral and use and sell the Secured Vehicles shall terminate pending either the consent of AFC or further order of the Court.

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3. Mahindra Motion

Debtor entered a Retail Finance Agreement and Inventory Security Agreement with Mahindra Finance USA, LLC (“Mahindra”) dated July 11, 2019. Mahindra filed UCC Financing Statements with the Montana Secretary of State on July 5 and 26, 2019. The Retail Finance Agreement provided for an extension of credit to Debtor for the purchase of utility vehicle inventory from Mahindra. Usher testified that this credit is used to acquire, “Willy’s Jeeps,” or “Roxors.” In exchange for the credit, Debtor granted Mahindra a security interest in the utility vehicle inventory acquired with the Mahindra credit. Use of the credit available under the Retail Finance Agreement during the pendency of this case is important to Debtor’s ongoing operations because without it, Debtor cannot acquire the utility vehicle inventory, “Roxors.” The Motion requests use of the Mahindra credit post-petition for the acquisition of utility vehicle inventory, including granting a security interest to Mahindra in all new utility vehicle inventory acquired with the Mahindra post-petition financing. Neither Wells, AFC, nor Mahindra are willing to provide unsecured credit for Debtor’s acquisition of inventory.

Absent interim approval of the credit requested in the various motions, Debtor’s reorganization effort would fail before it even begins. Debtor would lack access to lines of credit that it uses in its day to day operations to acquire inventory and more importantly, that provide liquidity. Operations would be complicated if not stymied without access to the \$60,000 line of credit. Similarly, Debtor’s business of buying inventory for rental or sales purposes would be significantly inhibited if it were unable to acquire new inventory with new post-petition financing, as existing inventory is sold. Such an outcome would portend a liquidation, and essentially stall any nascent reorganization effort. This would hamper Debtor’s efforts and cause it immediate and irreparable harm.

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If a debtor-in-possession is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a lien on property of the estate that is not otherwise subject to a lien. § 364(c)(2). Each of the flooring lines provided by Wells, AFC, and Mahindra correspond to the acquisition of specific inventory that Debtor sells and uses in its business of selling and renting vehicles and motorcycles.

Section 1108 allows the Debtor to operate in the ordinary course of business, which includes the authority to make post-petition transfers of property if doing so is in the ordinary course of business. *Aalfs v. Wirum (In re Straightline Investors)*, 525 F.3d 870, 879 (9th Cir. 2008). Section 363(c) authorizes the sale of assets, which includes the motor vehicle inventory, in the ordinary course of business. *Pinnacle Rest. at Big Sky, LLC v. CH SP Acquisitions, LLC (In re Spanish Peaks Holdings II, LLC)*, 862 F.3d 1148, 1153 (9th Cir. 2017). Absent the availability of the flooring lines post-petition, Debtor would be unable to operate its business in the ordinary course. The Wells, AFC and Mahindra Motions to obtain credit are approved on an interim basis pending the final hearing.

Section 361 requires the provision of adequate protection of the interest of an entity in property of the estate which can be provided by, among other things, a cash payment to the extent a sale of property results in a decrease” in the value of such entity’s interest in the property sold. The payment of cash upon the sale of any part of such inventory is appropriate as adequate protection. *In re American Mariner Industries*, 734 F.2d 426, 431 (9th Cir. 1984). The adequate protection provisions of the Wells, AFC and Mahindra Motions are approved on an interim basis pending the final hearing.

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IT IS ORDERED that the Debtor's Motions for an Interim Order permitting the Debtor to obtain credit and pay adequate protection with respect to Usher Enterprises, Cebull and Usher, Wells Fargo Commercial Distribution Financing, LLC, Automotive Financing Corporation (subject to the terms described above), and Mahindra Finance, USA, LLC, are GRANTED, as follows:

1. The credit obtained shall not exceed any available limits that existed under the pre-petition agreements with respect to Wells Fargo Commercial Distribution Financing, LLC, Automotive Finance Corporation, and Mahindra Finance USA, LLC (the "Flooring Lenders"); the Flooring Lenders shall be granted a lien on any vehicle financed pursuant to this Order; the security granted shall be deemed perfected upon the issuance of an interim order, even if a final order denies the relief sought.

2. The credit obtained from Usher Enterprises Inc. shall not exceed, at any single point in time, on a revolving basis, the sum of \$2,248.64. Any unpaid amount shall be accorded administrative priority status.

3. The credit obtained from Brian Cebull and Barry Usher shall not exceed, at any single point in time, the sum of \$60,000. No interest shall be charged on the credit. The unpaid amount shall be accorded administrative priority status, subject to a carveout for the allowed professional fees in this case and costs of administration should this case be converted to chapter 7.

4. The administrative priority status granted by this order shall be preserved, to the extent the loan proceeds are advanced to the Debtor prior to a final hearing notwithstanding a final order.

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IT IS FURTHER ORDERED:

1. That a final hearing on Debtor's Motions to Obtain Credit filed at ECF Nos 15, 16, 20-21, 22, and 23 shall be held **Tuesday, March 3, 2020, at 09:00 a.m.**, or as soon thereafter as the parties can be heard, in the ELLA KNOWLES COURTROOM, 4TH FLOOR ROOM 4805, JAMES F. BATTIN UNITED STATES COURTHOUSE, 2601 2ND AVENUE NORTH, BILLINGS, MONTANA; and,
2. No later than February 26, 2020, Debtor's counsel shall convene and facilitate a teleconference with creditors' counsel for Cycle City Ltd., Hawaii, Wells, AFC, and Mahindra and share Debtor's analysis of lien priority, including any available records of Debtor, or Secretary of State reports that support its analysis.³ Attention should be given to the issues raised in the objections of Cycle City Ltd., and Hawaii, and the parties should be prepared to outline at the beginning of the March 3, 2020 hearing their relative positions regarding lien priority in this case. If any disagreement exists regarding lien priority amongst Cycle City Ltd., Hawaii, Wells, AFC, or Mahindra, the Court will inquire whether there exists an anticipated course of action to resolve those issues.⁴

BY THE COURT:



Hon. Benjamin P. Hursh
United States Bankruptcy Court
District of Montana

³ At the hearing Debtor introduced Exhibits 11, 12, and 13, which appear to communicate to Hawaii that Wells and AFC were or intended to extend credit to Debtor for the acquisition on inventory and would assert a purchase money security interest in Debtor's inventory.