

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF LOUISIANA

In re:	*	CASE NO. 15-10553
	*	
THINKSTREAM INCORPORATED	*	CHAPTER 11
OF DELAWARE	*	
	*	
Debtor	*	

CHAPTER 11 TRUSTEE’S MOTION FOR ORDER (A) GRANTING AUTHORITY TO OBTAIN POST-PETITION SECURED FINANCING AND (B) GRANTING PRIORITY CLAIM TO POST-PETITION LENDER

David S. Rubin (“Trustee”), the Chapter 11 Trustee for Thinkstream Incorporated of Delaware (“Thinkstream” or the “Debtor”) in this Chapter 11 Case files this Motion for Order (A) Granting Authority to Obtain Post-Petition Secured Financing and (B) Granting a Priority Claim to Post-Petition Lender (the “Motion”), and in support thereof, states as follows:

JURISDICTION

1.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

CORE PROCEEDING

2.

This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), (B), (D), (K), (M), and (O).

INTRODUCTION

3.

On May 11, 2015, an Involuntary Petition was filed against Thinkstream by several petitioning creditors. On July 9, 2015, this Court entered an Order for Relief (P-105) under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §104, *et seq.* (the “Bankruptcy Code”). On July 9, 2015, the Trustee was appointed pursuant to section 1104 of the Bankruptcy Code. (P-106) and the Court approved the appointment (P-108). A committee of unsecured creditors has not been appointed.

JURISDICTION AND VENUE

4.

This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue of this proceeding is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory basis for the relief requested herein are sections 105, 361, and 364(c) of the Bankruptcy Code. This Motion is also governed by Bankruptcy Rule 4001(b).

THE DEBTOR’S BUSINESS

5.

The Debtor operates a technology business with its principal office in Baton Rouge and a branch office in Tigard, Oregon. The vast majority of the Debtor’s customers are states, governmental agencies, and state cities, towns, sheriffs, and police departments. The Debtor has over 200 clients and customers. The Debtor offers a suite of software technology including tools which allow different law enforcement databases and “911” communications systems to query one another as well as thousands of other data sources, as a result expediting and containing law

enforcement and public safety. The Debtor's platform was engineered to tie together data and users across organizational boundaries, and resolves the technical difficulties that are associated with routing communications; searching, updating, and synchronizing multiple systems; mapping and translating data from disparate sources; security; and user management. The systems provided by the Debtor are mission-critical to its customers and clients.

6.

The Debtor has approximately 12 employees. Most of the Debtor's employees are directly involved in supporting the Debtor's platform. These employees are essential to the maintenance of the Debtor's operations and customer relationships.

7.

From the date of his appointment, the Trustee has operated and managed the Debtor's business with the assistance of the Debtor's employees. The Trustee has, among other efforts, filed the required Schedules of Assets and Liabilities, Statement of Financial Affairs, and all monthly operating reports due to the United States Trustee; attended the 341(a) meeting of creditors; maintained all necessary insurance; paid all previously unpaid employee wages and benefits; arranged the continuation of service from utility providers, has brought all past due rent current on the Debtor's two offices; spoken with numerous shareholders of the Debtor; reviewed certain of the Debtor's contracts in order to ascertain whether the Debtor is owed funds thereunder; spoken to numerous contract parties to attempt to assure them that Thinkstream will continue its current operations, and, in his capacity as attorney for the Trustee, filed necessary pleadings.

PRE-PETITION INDEBTEDNESS

8.

The Debtor is party to one or more loan and security agreements entered into in 2012 and thereafter (collectively the "Prepetition Loan Agreement") with First NBC Bank ("FNBC"), pursuant to which FNBC made loans to the Debtor (collectively the "FNBC Loan"). The FNBC Loan is evidenced by promissory notes. FNBC alleges the Debtor owes it approximately \$6,740,000.¹

9.

In connection with the FNBC Loan, the Debtor granted to FNBC a continuing security interest in and lien (the "FNBC Lien") on, among other assets, all or substantially all of the Debtor's assets, including the following: All Accounts, Chattel Paper, Contracts and General Intangibles; whether any of the foregoing is owned now or acquired later; all accessions, additions, replacements, and substitutions relating to any of the foregoing; all records of any kind relating to any of the foregoing; all proceeds relating to any of the foregoing (including insurance, chattel paper and other accounts proceeds) and all related general intangibles (collectively, the "FNBC Thinkstream Collateral"), all as more fully described as the FNBC financing statements. FNBC filed financing statements with respect to its loans in Delaware on February 25, 2013 and in Louisiana on June 29, 2011, February 17, 2012, August 7, 2012, and May 7, 2014.

¹ The Trustee has recently learned that the actual indebtedness of the Debtor to FNBC may be approximately \$4.1 million, and that the balance of the amount owed to FNBC is represented by a personal obligation of Mr. Barry Bellue, Sr. The Trustee is reviewing documents at this time and will file amended schedules at a later date if required.

10.

FNBC has other collateral securing its debts, including, upon information and belief, certificates of deposit owned by third parties, one or more guaranties of third parties (including the principal of the Debtor), real estate owned by Mr. Bellue, the principal of the Debtor, and other collateral (the "FNBC Additional Collateral").

11.

The Debtor is also indebted to TSB Ventures, L.L.C. ("TSB") under a Consent Judgment entered by the Nineteenth Judicial District Court for the Parish of East Baton Rouge, Louisiana on November 18, 2014. A copy of the Judgment is attached to TSB's Motion for Partial Summary Judgment (P-40, Exhibit 13). TSB asserted in its involuntary petition that the amount owed to it under the Consent Judgment is approximately \$9,089,000 (P-1).

12.

TSB alleges that the Judgment it obtained arises out of a series of loan transactions (debentures and notes) with the Debtor (the "TSB Loans"). In connection with the TSB Loans, the Debtor granted to TSB a continuing security interest (the "TSB Lien") in and upon, among other assets, any and all contracts, leases, licenses, purchase orders, sales order or other binding agreements or commitments of the Debtor related to the sale, maintenance and service of software and other services and produces sold or licensed by the Debtor and now existing as of or entered into, acquired or arising after the date thereof; any and all equipment, furniture, and fixtures; and, together with all property added to or substituted for the any of the foregoing, and all accounts and other rights to payment arising therefrom, and all interest, dividends, income, returns, accessions, profits, and proceeds of or arising out of any of the foregoing (the "TSB

Collateral”). TSB filed financing statements in Colorado and Delaware. TSB’s security interest was recognized in its judgment.

13.

The Trustee has conducted a lien search in Delaware and Louisiana to determine whether there are any entities other than FNBC or TSB which assert liens against the FNBC Collateral, the FNBC Additional Collateral, or the TSB Collateral. No other claimants to any of that collateral have been revealed by that search as of this date nor has the Debtor, FNBC, or TSB advised the Trustee that any other claimants to the collateral exist. As shown by the FNBC and TSB financing statements, there is an overlap in that some of the FNBC Thinkstream Collateral is also TSB Collateral.

14.

It is not possible at this stage of the case to ascertain the value of the Debtor’s assets and thus not possible to determine the extent of the allowed amounts of FNBC’s and TSB’s allegedly secured claims.

15.

The Debtor collects accounts receivable and uses those funds to meet necessary operating expenses. To the extent that FNBC’s and TSB’s liens and claims are valid, the cash in the estate may constitute “cash collateral” as such term is defined in Section 363(A) of the Bankruptcy Code (the “Cash Collateral”). On August 17, 2015, this Court entered its Final Order authorizing the Trustee to use cash collateral (the “Final CCO,” P-227).

16.

Notwithstanding the relief requested in this Motion, the Trustee has not concluded that either FNBC or TSB have duly perfected, non-avoidable liens against any of their respective collateral, and the Trustee reserves all rights with respect thereto.

DEBTOR'S FINANCIAL CONDITION

17.

Although the Trustee has not yet determined the best course for resolving this case, it is apparent that the most likely scenario involves either a sale of all or substantially all of the Debtor's assets or a recapitalization with new investors or joint venture participants in a manner that will allow Thinkstream's current customers and clients assurance that Thinkstream products and maintenance will continue on an uninterrupted basis and that Thinkstream will continue to perform its contractual obligations with its customers and clients. The Trustee is currently reviewing various alternatives which would allow him to establish a process by which Thinkstream's assets can be marketed and the above goal can best be achieved.

18.

The Trustee has concluded that the estate requires a loan at this time to allow the Debtor to continue its operations, service its customers and clients as required under outstanding contracts and maintenance agreements, and for the Trustee to implement such process.

19.

The Trustee, FNBC, and TSB are cognizant of the difficulties in obtaining post-petition financing for Thinkstream given that all or substantially all of the Debtor's assets are encumbered, and the Trustee has spoken to representatives of both FNBC and TSB regarding the

necessity for a loan. Further, the Trustee has remained in frequent contact with counsel for both FNBC and TSB regarding Thinkstream's financial condition

20.

The Trustee carefully reviewed and considered the options available and determined that a loan from one of the Debtor's existing creditors would be the least expensive and most expeditious avenue for loan.

21.

Further, the Trustee is aware that TSB may allege that its collateral position ranks ahead of FNBC's. The Trustee has not determined if TSB's allegations are correct, but believes that a priming dispute at this time would be wasteful and inefficient until and unless a process results in viable offers for the Debtor's assets and a plan of reorganization is proposed.

22.

The Trustee had a conversation with one bank about the possibility of a post-petition loan to the Debtor, and that bank responded that it would not make a loan to the Debtor under the circumstances of this case and considering the Debtor's current financial condition. Further, the Trustee's accountant is also of the view that post-petition financing from lenders experienced in distressed lending/DIP financings is virtually impossible under the circumstances of this case and the Debtor's financial condition, and, even if found, would be extraordinarily expensive and time-consuming to structure, and could involve disputes with FNBC and TSB with respect to ranking and asset valuation.

23.

The Trustee contacted both FNBC and TSB with a request for post-petition financing. TSB never presented a proposal for financing. FNBC and the Trustee have engaged in

substantial discussions and negotiations that have resulted in a loan proposal from FNBC that is acceptable to the Trustee.

RELIEF REQUESTED

24.

The Trustee requests that he be authorized to obtain a revolving loan facility on behalf of the Debtor and the estate from FNBC for up to \$750,000.00 (the “Post-Petition Loan,”) such loan to be secured by (a) a priority claim of the kind provided by section 364 (c)(1), subject to certain carve outs, and (b) the FNBC Thinkstream Collateral, in such rank and order as may be finally determined by this Court.

SUMMARY OF TERMS OF THE POST-PETITION LOAN

25.

In accordance with Bankruptcy Rules 4001 (b) and (d), the chart below summarizes the signification terms of the proposed Post-Petition Loan.²

Material Terms of the Post-Petition Loan	
Borrower	The Debtor, acting through the Trustee.
Lender	First NBC Bank
Borrowing Limit	\$750,000.00 (revolving)
Interest rate	2% over First NBC Bank Prime Rate
Maturity Date	The earlier of: (i) One year after the Closing Date (ii) A sale of all or substantially all of the Debtor’s assets; (iii) the effective date of a chapter 11 plan; and (iv) the conversion of the case to Chapter 7 or the dismissal of the case.
Loan fee	None

² This chart is qualified in its entirety by reference to the applicable provisions of the Post-Petition Loan Agreement or any subsequent order of this Court. To the extent there exists any inconsistency between this chart and the provisions of the Post-Petition Loan Agreement, the provisions of the Post-Petition Loan Agreement shall control. Any terms used but not defined in the chart shall have the meanings ascribed to such terms in the Post-Petition Loan Agreement.

Lender fees	Lender shall be entitled to add to the loan principal the amount of any expenses it incurs in connection with the loan
Collateral and Priority	The loan shall be secured by a lien on the FNBC Thinkstream Collateral in the same rank and order as the FNBC Lien ranked on the Petition Date as may be determined by any final order of the Court; and shall additionally be accorded the priority provided by section 364(c)(1), subject to Carve Out
Carve Out	The priority accorded the Post-Petition Loan shall be subject to a Carve Out for: <ul style="list-style-type: none"> (i) The statutory fees of the U.S. trustee; (ii) The fees and costs of the chapter 11 Trustee and the fees and expenses incurred by the chapter 11 Trustee and any professionals retained by the Trustee, in an aggregate amount not to exceed \$350,000.00.
Events of Default	<ul style="list-style-type: none"> (i) Conversion of case to chapter 7; (ii) Reversion to Debtor in Possession; (iii) Entry of an order confirming a plan of reorganization that does not require indefeasible repayment in full in cash of the Post-Petition Loan on the effective date of the plan
No priming lien	The Order granting the Post-Petition Loan shall not provide that the loan primes that of TSB, but rather that the loan will be accorded the same rank as the FNBC Lien ranked on the Petition Date as may be determined by any final order of the Court
Cash Collateral	To the extent that such order is required, the Court shall order that the Trustee is entitled to use Cash Collateral resulting from the Post-Petition Loan or from collateral securing the Post-Petition Loan. Adequate protection shall be provided in the same manner as in the Final Cash Collateral Order.

26.

Attached to this Motion are the following, and the Trustee requests the Court approval of each:

Exhibit 1 - Term Sheet signed by the Trustee with FNBC

Exhibit 2 - proposed Post-Petition Loan Agreement with FNBC

Exhibit 3 – proposed Commercial Security Agreement with FNBC

27.

A budget reflecting the anticipated use of the proceeds of the Post-Petition Loan will be provided to the Court prior to the hearing in this matter (the “Budget”).

BASIS FOR THE REQUESTED RELIEF

28.

Pursuant to section 364 of the Bankruptcy Code, a Trustee is authorized to obtain secured or superpriority financing under certain circumstances. The Trustee has concluded that a post loan is required in order move towards a process to provide a resolution of this case. Although Thinkstream has accounts receivable, the amount and timing of the payments of those receivables is very difficult to determine which makes cash flow planning very difficult.

29.

Given Thinkstream’s financial condition and the existing secured debt owed to FNBC and TSB, the Trustee has determined that he cannot obtain unsecured credit or other financial accommodations allowable solely as an administrative expense under section 503(b)(1) of the Bankruptcy Code.

30.

The Trustee determined in the exercise of his business judgment that the best financing arrangement that can be arranged is as presented in this Motion.

FNBC is Entitled to the Good Faith Protection of Section 364(3)

31.

The terms and conditions of the proposed loan are fair and reasonable. Such terms and conditions were negotiated in good faith and at arm's length at all times between the Trustee and FNBC. In light of the foregoing, FNBC should be afforded the benefits and protections of section 364(e) of the Bankruptcy Code with respect to the loan.

32.

Pursuant to Section 363(e) of the Bankruptcy Code, a court may condition a debtor's use of cash collateral as necessary to provide adequate protection of a party's interest in the cash collateral. 11 U.S.C. § 363(e). As noted above, this Court has already entered its Final CCO which allows the Trustee to use cash collateral and protects the status quo for both FNBC and TSB.

33.

The Trustee submits that the relief sought in this Motion does not adversely affect the rights granted and reserved to TSB in the Final CCO, and that TSB remains adequately protected.

34.

Attached as Exhibit 4 is a proposed order to be entered after a hearing on this Motion.

NOTICE

35.

A copy of this Motion has been served on all parties shown on the Master Mailing Matrix filed with the certificate of service for this Motion. The Trustee submits that no other or further notice need be provided in accordance with this Court's Order establishing noticing procedures (P-151).

PRAYER

Accordingly, the Trustee requests that the Court enter an order (i) granting the relief requested in this Motion and (ii) awarding the Trustee such further relief the Court deems appropriate.

Dated: August 26, 2015

Respectfully submitted,

By Attorneys:
KANTROW, SPAHT, WEAVER & BLITZER
(A PROFESSIONAL LAW CORPORATION)
P. O. Box 2997
Baton Rouge, Louisiana 70821-2997
Telephone: 225-383-4703/Facsimile: 225-343-0630

By: /s/David S. Rubin
David S. Rubin (La. 11525)
Julie M. McCall (La. 29992)
**Attorneys for David S. Rubin, Chapter 11
Trustee**

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