

8 Pages

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13 UNITED STATES BANKRUPTCY COURT
 14 EASTERN DISTRICT OF CALIFORNIA
 15 SACRAMENTO DIVISION

16 In re:
 17 ECS REFINING, INC.,
 18 Debtor.

19 CASE NO.: 18-22453-D-11
 20 Chapter 11
 21 DCN: FWP-11

22 Date: June 29, 2018 [Per OST]
 23 Time: 10:30 a.m.
 24 Courtroom: 34
 25 501 I Street, 6th Floor
 26 Sacramento, CA

27 **INTERIM ORDER ON FIFTH EMERGENCY MOTION FOR AN INTERIM**
 28 **ORDER (1) AUTHORIZING THE USE OF CASH COLLATERAL**
PURSUANT TO 11 U.S.C. § 363; (2) SCHEDULING A FINAL
HEARING; AND (3) GRANTING RELATED RELIEF

29 This matter came before the Court on June 29, 2018 upon the Fifth Emergency Motion for
 30 an Interim Order (1) Authorizing Use of Cash Collateral Pursuant to 11 USC § 363; (2)
 31 Scheduling a Final Hearing; and (3) Granting Related Relief (“Motion”) filed by W. Donald
 32 Gieseke, the duly appointed Chapter 11 Trustee (the “Trustee”) for ECS Refining, Inc.
 33 (“Debtor”).

34 NOW, THEREFORE, based upon the Motion, offers of proof, and the pleadings and other
 35 submissions in this case and, after due deliberation and sufficient cause appearing therefor, the
 36 parties represent to the Court as follows:

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RECEIVED
 June 29, 2018
 CLERK, U. S. BANKRUPTCY COURT
 EASTERN DISTRICT OF CALIFORNIA
 0006311091

BACKGROUND

1
2 A. The Debtor filed a voluntary petition for relief under chapter 11 of the United
3 States Bankruptcy Code (“Bankruptcy Code”) with this Court April 24, 2018 (the “Petition
4 Date”).

5 B. On May 2, 2018, the Court entered its Order Granting Emergency Ex Parte Motion
6 on Stipulation for Immediate Appointment of Chapter 11 Trustee (Docket No. 91). On May 8,
7 2018, the Court entered an order appointing the Trustee (Docket No. 99). A creditors’ committee
8 has not been appointed.

9 C. SummitBridge National Investments V LLC (“Secured Lender” or
10 “SummitBridge”) asserts that as of the Petition Date, the Debtor was indebted to Secured Lender
11 in the approximate amount in excess of \$25,000,000 and additional fees and expenses owed
12 pursuant to applicable loan documents (hereafter such indebtedness and all accrued but unpaid
13 interest, fees and costs and all other obligations, contingent liabilities, and swap liabilities
14 incurred or existing as of the Petition Date shall be referred to collectively as the “Pre-Petition
15 Secured Debt”).

16 D. Secured Lender claims that the Pre-Petition Secured Debt is secured by a valid and
17 perfected first priority lien and security interest in substantially all of the Debtor’s property and
18 all proceeds (including insurance) thereof, including but not limited to all of Debtor’s accounts,
19 equipment, inventory, goods, work in process, general intangibles, fixtures, trademarks, patents,
20 other personal property assets and all proceeds thereof (the “Pre-Petition Collateral”).

21 E. Trustee on behalf of the Debtor is in critical need of the release of funds during the
22 pendency of its chapter 11 case on an emergency basis. In order to avoid immediate and
23 irreparable harm Trustee has requested that Secured Lender consent to the limited use of Secured
24 Lender’s cash collateral, as defined in Section 363(a) of the Bankruptcy Code (the “Cash
25 Collateral”) for the expenses and payments, and in the order and priority, set forth on Exhibit 2
26 hereto, all of which the Trustee believes are necessary to avoid immediate and irreparable harm
27 (collectively the “Approved Expenses”).

28 F. Trustee has an immediate need to use Cash Collateral in order to permit, among

1 other things, the orderly continuation of the operation of the Debtor's business, to maintain
2 business relationships with vendors, suppliers and customers, to make payroll and to satisfy other
3 working capital needs.

4 G. The proposed use of Cash Collateral is necessary and appropriate for the continued
5 operation of the Debtor's business and management and preservation of its assets.

6 H. Secured Lender is willing to consent to the use of Cash Collateral subject to the
7 terms and conditions set forth herein.

8 I. Trustee has requested entry of this Order pursuant to Bankruptcy Rules 4001(b)
9 and 4001(d). Absent entry of this Order, the Debtor's estate will suffer immediate and irreparable
10 harm. Trustee believes that the use of Cash Collateral in accordance with this Order is in the best
11 interests of the Debtor's estate.

12 J. Trustee believes that sufficient and adequate notice of the Motion and the hearing
13 with respect thereto appears to have been given pursuant to Bankruptcy Rules 2002, 4001(b) and
14 (d) and 9014, and no timely objections were filed.

15 ORDER

16 Based upon the foregoing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED,
17 effective as of the date set forth below that:

18 1. Denial. The Trustee's request to approve the two week budget to continue
19 operations on the terms set forth in Exhibit 1 to the Exhibits to the Motion, Docket No. 235
20 ("Exhibit 1 to the Motion") was denied at the hearing.

21 2. Approval. The Motion is granted as set forth herein and approved with respect to
22 the expenditures detailed in Exhibit 2 to the Motion, a copy of which is attached hereto as Exhibit
23 2.

24 3. Authorization to Use Cash Collateral. Trustee, on behalf of the Debtor, is hereby
25 authorized to use Cash Collateral for the purpose of preserving and maximizing value of the
26 estate for the Approved Expenses. Unless the Secured Lender consents in writing, Trustee shall
27 not pay any items that are not Approved Expenses or amounts exceeding the Approved Expenses.
28

1 4. Additional Adequate Protection. As used herein the term “Cash Collateral Use
2 Amount” includes all cash collateral used by the Trustee hereunder. To provide Secured Lender
3 with the adequate protection required by Sections 361(1), (2) and 363(e) of the Bankruptcy Code:

4 (a) Replacement Lien: To the extent of the Cash Collateral Use Amount the
5 Secured Lender is hereby granted and provided with a security interest in and first priority lien
6 and security interest upon all post-petition inventory, chattel paper, accounts and general
7 intangibles and all proceeds thereof and all proceeds of the Pre-Petition Collateral (the “Adequate
8 Protection Collateral”).

9 (b) Further Adequate Protection: To the extent that there is a diminution in
10 value in Secured Lender’s Pre-Petition Collateral after the Petition Date that is not offset by the
11 value of the replacement lien in Adequate Protection Collateral, Secured Lender is hereby granted
12 an allowed super-priority administrative claim pursuant to Section 507(b) of the Bankruptcy Code
13 which shall have priority over any and all other indebtedness, liabilities and obligations of the
14 Debtor, now in existence or hereafter incurred by the Debtor.

15 (c) Section 552: The Secured Lender’s liens upon and security interests in the
16 Pre-Petition Collateral continue in the proceeds and profits of the Pre-Petition Collateral, as
17 provided in section 552(b) of the Bankruptcy Code without exception, including without
18 limitation all post-petition inventory and accounts receivable.

19 5. Nothing herein shall prevent Secured Lender from seeking additional adequate
20 protection or other relief, nor shall anything hereunder preclude Trustee from opposing any
21 additional adequate protection or other relief sought by the Secured Lender.

22 6. Nothing in this Order shall preclude or have any *res judicata* or collateral
23 estoppel effect on either the Trustee or SummitBridge (the “Parties”) except to the limited amount
24 required respecting the specific authorization to use cash collateral and the granting of the
25 requested replacement liens, and the Parties preserve any and all other rights and claims, and any
26 defenses thereto, including but not limited to the rights of: (a) the Trustee to dispute the validity
27 of SummitBridge’s lien and claim; (b) the Trustee to file any type of affirmative recovery action
28 or claim against SummitBridge, and/or any related party (including a marshaling claim); (c) the

1 Trustee's right to seek to surcharge SummitBridge's liens, and/or (d) SummitBridge to assert
2 claims or defenses of any kind in the Bankruptcy Case and/or against third parties who may also
3 be liable for its asserted claims.

4 7. Automatic Perfection. This Order shall be sufficient and conclusive evidence of
5 the validity, perfection, and priority of the replacement liens granted to Secured Lender in the
6 Adequate Protection Collateral. Secured Lender, in its discretion, shall be entitled to file a
7 certified copy of this Order in any filing or recording office in any jurisdiction in which Debtor
8 conducts its businesses or possesses any personal property and, in such event, the filing or
9 recording officer is authorized and directed to file or record such certified copy of this Order.

10 8. Carve Out. Provided that the Trustee does not seek Court approval of post-
11 petition financing on terms without the consent of SummitBridge (a "Non-Consensual
12 Financing"), then SummitBridge agrees to an additional carve out of \$100,000 from
13 SummitBridge's collateral comprised of post-petition accounts receivable bringing the total carve
14 out to \$425,000 to be available (the "Carve Out") for the payment of approved fees and costs of
15 the Trustee and his professionals incurred in the chapter 11 case which shall be binding in any
16 chapter 7 case; provided, however, the Carve Out shall not be available in the event of a Non-
17 Consensual Financing and further provided that the Carve Out shall not apply to any fees and
18 costs incurred to investigate, research, challenge or otherwise avoid the obligation or lien of
19 SummitBridge, including but not limited to any attempts to prime SummitBridge's lien.

20 9. Accounting by Trustee. Within ten (10) calendar days after the entry of this
21 Order, Trustee shall account to Secured Lender for all cash, checks, notes, drafts, instruments,
22 acceptances or other property representing cash or other proceeds of Pre-Petition Collateral in
23 Trustee's possession or control (collectively, "Cash Proceeds"). All Cash Proceeds in the
24 possession of Trustee or in any accounts of Debtor in financial or other institutions, including any
25 lock box, brokerage or escrow, pledge or depository accounts, as of the Petition Date, shall be
26 deemed proceeds of the Pre-Petition Collateral.

27 10. Insurance. Trustee shall maintain insurance coverage on the Pre-Petition
28 Collateral and the Adequate Protection Collateral for the full replacement value therefor and to

1 cause Secured Lender to be named as a loss payee for the insurance policies. In addition, Trustee
2 shall maintain adequate casualty and general liability insurance and shall name Secured Lender as
3 an additional insured on all insurance policies.

4 11. Financial Reporting. Trustee shall provide Secured Lender with reasonable
5 access to Debtor's books and records and shall provide a summary of all Approved Expenses paid
6 by the Trustee hereunder. Trustee shall reasonably provide Secured Lender with periodic updated
7 accounts receivable aging and summary of all inventory.

8 12. Reliance Upon Order. Secured Lender is consenting to Trustee's use of Cash
9 Collateral in reliance on this Order. The liens and security interests granted to Secured Lender
10 hereunder and the rights of Secured Lender pursuant to this Order with respect to the Adequate
11 Protection Collateral shall not in any way be altered, impaired, modified, or otherwise adversely
12 affected.

13 13. Survivability. The provisions of this Order shall inure to the benefit of Trustee,
14 Debtor and Secured Lender and shall be binding upon Trustee, Debtor and its estate. The
15 provisions of this Order and any actions taken pursuant hereto shall survive entry of any order
16 which may be entered converting this case to a chapter 7 case or any order which may be entered
17 confirming or consummating any plan of reorganization of Debtor.

18 14. Final Hearing. A final hearing on the Motion shall be held before this Court on
19 July 17, 2018 at 10:30 a.m. in Courtroom 34, United States Bankruptcy Court, Eastern District of
20 California. The Trustee's authorization as set forth herein to use the Secured Lender's Cash
21 Collateral in accordance with the Approved Expenses, shall continue only through the date set
22 forth above for the further hearing on the Motion.

23 15. The Trustee is authorized to take reasonable and necessary steps in his business
24 judgement in the exercise of his role as the liquidating fiduciary for the bankruptcy estate to halt
25 or reduce operations..

26 16. Trustee shall promptly mail copies of this Order and notice of the final hearing to
27 Secured Lender, its counsel, the U.S. Trustee, the Debtor and its counsel, any other secured
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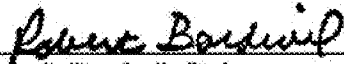
1 creditor herein, any creditor requesting special notice, and the 20 Largest Unsecured Creditors
2 herein, which mailing must be accomplished no later than July 6, 2018.

3 APPROVED AS TO FORM

4 MARKUS WILLIAMS YOUNG &
5 ZIMMERMANN LLC

6 By: /s/ James T. Markus
7 JAMES T. MARKUS
8 Attorneys for SummitBridge National
Investments V LLC

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12 **Dated:** July 02, 2018

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15 Robert S. Bardwil, Judge
16 United States Bankruptcy Court

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**ECS Refining, Inc.
June 29,2018 Shut Down Cash Distributions**

6/15/2018 Cash in Bank	1,584,760	
		Includes checks outstanding and checks being cut that were approved in the last cash colateral order.
Outstanding Checks	526,320	
Net Book Cash	1,058,440	

Increases in Cash	
none known	-
Total Projected Cash	1,058,440

Net Priority Payments	
Regular Payroll (w/ 401(k) & FSA)	420,000
Payroll Taxes	120,000
Rush Payroll Processing	10,000
FedEx for Payroll	6,000
Secure Media	15,000
Forensic Back-Ups	25,000
Increased Guard Service	20,000
Outside Storage	500
Electricians and Plumbers	10,000
Temporary Help to Move	5,000
Temporary Offices	5,000
Overtime / Incentives to Move	20,000
Sub-total	<u>656,500</u>
Net Available	<u><u>401,940</u></u>

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