

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

In re:

Case No: 11-32532-LMI

MAYSVILLE, INC.,

Chapter 11

Debtor.

**DEBTOR IN POSSESSION'S MOTION FOR AUTHORITY TO USE CASH
COLLATERAL PURSUANT TO 11 U.S.C. § 363 AND TO SET HEARING**

(Hearing Requested Before September 1, 2011)

Debtor-in-Possession, Maysville, Inc. (the "Debtor"), by and through its undersigned proposed counsel, hereby files its Motion for Authority to Use Cash Collateral Pursuant to 11 U.S.C. § 363, and in support thereof, respectfully states as follows:

JURISDICTION

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicate for the relief requested in this Motion is 11 U.S.C. §§ 105 and 363 and Rule 4001(d)(1)(D) of the Federal Rules of Bankruptcy Procedure.

BACKGROUND

3. On August 11, 2011, the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code (the "Petition Date"). Pursuant to Bankruptcy Code §§ 1107(a) and 1108, the Debtor is operating its business and managing its affairs as a debtor in possession. As of the date hereof, not trustee, examiner, or statutory committee has been appointed in this Chapter 11 case.

4. The Debtor is a Florida Corporation that holds record title to 21 condominium units (the “Condominium Units”) and 133 rental apartment units (the “Apartment Units”) in Miami-Dade, Florida (the “Property”). The Debtor’s primary business involves renting the Condominium Units and the Apartment Units.

5. Prior to August 10, 2011, the Debtor has one secured lender with a lien on cash collateral. Specifically, MUNB Loan Holdings, LLC (“Mellon”), held a first priority mortgage secured by the property and has a foreclosure judgment in the approximate amount of \$23 million (the “Judgment”). The Debtor reserves the right to challenge the extent and priority of Mellon’s lien on the Property and cash collateral.

6. The Debtor has filed this case to restructure its debt and pursue a traditional chapter 11 reorganization plan by paying the liquidation value to its unsecured creditors and to service its debts to Mellon over time through a plan of reorganization.

7. The Debtor primarily generates income from renting the Condominium and Apartment Units. At the time of filing, the Debtor had a total balance of approximately \$14,653.62 in its operating account, \$533,129.14 in a rents escrow account and the Property generates the approximate sum of \$98,000 per month (all collectively, the “Cash Collateral”).

8. On August 10, 2011, Mellon assigned its Judgment to Fifteen Encore Platinum Properties, LLC (the “Fifteen Group”), but it appears that Mellon has retained certain rights to pursue unsecured deficiency claims against the Debtor.¹

RELIEF REQUESTED

9. By this Motion, the Debtor seeks the entry of an Order authorizing its use of cash collateral pursuant to 11 U.S.C. § 363, Federal Rules of Bankruptcy Procedure 4001(b)(2) and

¹ The Debtor believes that Mellon and/or Fifteen Group will assert an interest in the Debtors cash collateral. The Assignment document and certain filings by Mellon in its foreclosure action are unclear as to the rights retained by Mellon. The Debtor is requesting from Mellon and Fifteen Group the supporting documents for clarification. If appropriate, the Debtor will seek clarification from the Court.

Local Rule 4001-3; setting the time for a final hearing and objection deadline for this Motion; and granting such other and further relief as is just and proper.

10. As set forth in the budget, incorporated herein and attached hereto as Exhibit “A”, the Debtor requires the use of cash collateral to fund all necessary operating expenses of the Debtor’s business.

11. The Debtor will suffer immediate and irreparable harm if it is not authorized to use cash collateral to fund the expenses set forth in the Budget. Absent such authorization, the Debtor will not be able to maintain and protect the Property.

12. The Debtor acknowledges that Mellon or the Fifteen Group may have a lien on the cash collateral in accordance with 11 U.S.C §§ 361 and 363. In connection therewith, the Debtor seeks the use of Cash Collateral in the ordinary course of business.

CASH COLLATERAL AND THE RELIEF SOUGHT BY THE DEBTOR

13. The Debtor’s use of property of the estate is governed by section 363 of the Bankruptcy Code, which provides that:

If the business of the debtor is authorized to be operated under section ... 1108 ... of this title and unless the court orders otherwise, the [debtor] may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, any may use property of the estate in the ordinary course of business without notice or a hearing.

11 U.S.C. § 363(c)(1). A debtor in possession has all of the rights and powers of a trustee with respect to property of the estate, including the right to use property of the estate in compliance with Section 363 of the Bankruptcy Code. See 11 U.S.C. § 1107(a).

14. When a Chapter 11 debtor-in-possession is authorized to operate its business, it may use property of estate in ordinary course of business, but is prohibited from using cash collateral absent consent of the secured creditor or court authorization. *In re Kahn*, 86 B.R. 506

(Bankr. W.D. Mich. 1988); *In re Westport-Sandpiper Associates Ltd. P'Ship*, 116 B.R. 355 (Bankr. D. Conn. 1990)(debtor may not use cash collateral unless entity that has interest in it consents or debtor proves that interest of the entity is adequately protected).

15. “Cash collateral” is defined by the Bankruptcy Code as, “cash, negotiable instruments, documents of title securities, deposit accounts or other cash equivalents whenever acquired in the which the estate an entity other than the estate have an interest...” 11 U.S.C. § 363(a). Any cash collateral generate by the Debtor may constitute the cash collateral of the alleged secured creditors.

16. Further, the Debtor proposes to use the Cash Collateral in accordance with the terms of the Budget. The Debtor also requests that it be authorized: (i) to exceed any line item on the budget by an amount up to ten (10) percent of each such line item; or (ii) to exceed any line item by more than ten (10) percent so long as the total of all amounts in excess of all line items for the Budget do not exceed ten (10) percent in the aggregate of the aggregate of the total budget.

APPLICABLE AUTHORITY FOR RELIEF REQUESTED

A. The Court Should Enter an Order Authorizing the Continued Use of Cash Collateral Because the Debtor is Providing the Secured Creditor with Adequate Protection.

17. The Bankruptcy Code does not define “adequate protection” but does provide a non-exclusive list of the means by which a debtor may provide adequate protection, including “other relief” resulting in the “indubitable equivalent” of the secured creditors’ interest in such property. See 11 U.S.C. § 361.

18. Adequate protection is to be determined on a case-by-case factual analysis. *See Mbank Dallas, N.A. v. O'Connor (In re O'Connor)*, 808 F.2d 1393, 1396 (10th Cir. 1987); *In re Martin*, 761 F.2d 472 (8th Cir. 1985). For example, in *O'Connor*, the court held that “[i]n order

to encourage the Debtors' efforts in the formative period prior to the proposal of a reorganization, the court must be flexible in applying the adequate protection standard." *O'Connor*, 808 F.2d at 1936 (citations omitted). *See also In re Quality Interiors, Inc.*, 127 B.R. 391 (Bankr. N.D. Ohio 1991) (holding that the granting of a replacement lien provided adequate protection).

19. Adequate protection is meant to ensure that the secured creditors receive the value for which it originally bargained pre-bankruptcy. *Swedeland Dev. Group, Inc.*, 16 F.3d 552, 564 (3rd Cir. 1994) (citing *In re O'Connor*, 808 F.2d 393, 1396-97 (10th Cir. 1987)). Courts have noted that the essence of adequate protection is the assurance of the maintenance and continued responsibility of the lien value during the interim between the filing and the confirmation. *In re Arrienes*, 25 B.R. 79, 81 (Bankr. D. Or. 1982). The purpose of adequate protection requirement is to protect secured creditors from diminution of value during the use period. *See In re Kain*, 86 B.R.506, 513 (Bankr. W.D. Mich. 1988); *In re Becker Indus. Corp.*, 58 B.R. 725, 736 (Bankr. S.D.N.Y. 1986); *In re Ledgmere Land Corp.*, 116 B.R. 338, 343 (Bankr. D. Mass. 1990).

20. In the instant case, adequate protection provided to Mellon includes a replacement lien on the Debtor's receivables and the Debtor's projected positive cash flow.

21. Section 361(2) of the Bankruptcy Code expressly provides that the granting of a replacement lien constitutes a means of providing adequate protection. 11 U.S.C. § 361(2). In the instant case, granting Mellon a replacement lien on post-petition collateral to the extent its prepetition collateral is diminished by the Debtor's use of cash collateral provides Mellon with adequate protection. *See e.g., O'Connor*, 808 F.2d 1393; *In re Coody*, 59 B.R. 164, 167 (Bankr. M.D. Ga. 1986); *In re Dixie-Shamrock Oil & Gas, Inc.*, 39 B.R. 115, 118 (Bankr. M.D. Tenn. 1984).

B. The Use of Cash Collateral will Preserve the Debtor's Going Concern Value Which will Inure to the Benefit of Mellon and other Creditors.

22. The continued operation of the Debtor's business will preserve its going concern value, enable the Debtor to capitalize on that value through a reorganization strategy, and ultimately facilitate the Debtor's ability to confirm a Chapter 11 plan. If the Debtor is not allowed to use cash collateral, it will be unable to operate and potentially cause harm to the property.

23. The Debtor will use the cash collateral during the interim cash collateral period to pay association dues, utilities and otherwise maintain and protect the real property.

24. It is well established that a bankruptcy court, where possible, should resolve issues in favor of preserving the business of the debtor has a going concern.

A debtor, attempting to reorganize a business under Chapter 11, clearly has a compelling need to use cash collateral in its effort to rebuild. Without the availability of cash to meet daily operating expenses such as rent, payroll, utilities etc., the congressional policy favoring rehabilitation over economic failure would be frustrated.

In re George Ruggiere Chrysler-Plymouth, Inc., 727 F.2d 1017, 1019 (11th Cir. 1984).

25. Accordingly, courts authorize the use of cash collateral to enhance or preserve the debtor's going concern value. For example, in *In re Stein*, 19 B.R. 458 (Bankr. E.D. Pa. 1982), the Court allowed a debtor to use cash collateral where the secured party was undersecured, finding that the use of cash collateral was necessary to the debtors' continued operations and the creditor's secured position can only be enhanced by the continued operation of the debtor's business. *Id.* at 460; *see also Federal Nat. Mort. v. Dacon Bolingbrook Assoc.*, 153 B.R. 204, 204 (N.D. Ill. 1993) (security interest protected to extent debtor reinvested rents n operation and maintenance of the property); *In re Constable Plaza Assoc.*, 125 B.R. 98, 105 (Bankr. S.D.N.Y. 1991) (debtor's reinvestment of rents to maintain and operate office building will serve to

preserve or enhance the value of the building which, in turn, will protect the collateral covered by [the] mortgage); *In re Dynaco Corp.*, 162 B.R. 389, 395-96 (Bankr. D. N.H. 1983)(finding that the alternative to the debtor's use of cash collateral, termination of its business, would doom reorganization and any chance to maximize value for all creditors); *In re Karl A. Neise, Inc.*, 156 B.R. 600, 602 (Bankr. S.D. Fla. 1981) (marginally secured creditor adequately protected by lien on postpetition property acquired by debtor, debtors can use cash collateral in the normal operation of their business).

26. If the Debtor cannot use cash collateral, it will be forced to cease operations. By contrast, granting authority will allow the Debtor's to maintain operations and preserve the going concern value of its business which will inure to the benefit of any secured creditors and all other creditors.

27. The Debtor believes that use of Cash Collateral pursuant to the terms and conditions set forth above is fair and reasonable and adequately protects the secured creditor in this case. The combination of: (i) the Debtor's ability to preserve the going concern value of the business with the use of cash collateral; and (ii) providing the Secured Lender with the other protections set forth herein, adequately protects its alleged secured position under § 361(2) and (3). For all of the reasons stated above, this Court's approval of the Debtor's use of cash collateral is proper herein.

28. The Debtor believes that the approval of this Motion is in the best interest of the Debtor, its creditors and its estate because it will enable the Debtor to (i) continue the orderly operation of its business and avoid an immediate total shutdown of operations; (ii) meet its obligations for necessary ordinary course expenditures, and other operating expenses; and (iii) make payments authorized under other orders entered by this Court, thereby avoiding immediate and irreparable harm to the Debtor's estate.

29. A proposed order granting the relief requested is attached hereto as Exhibit B.

WHEREFORE, the Debtor respectfully requests that this Court enter an order (a) authorizing the Debtor's use of cash collateral in accordance with the attached Budget and provide related adequate protection; (b) granting the replacement liens set forth above in connection with the use thereof; (c) granting such other and further relief that is just and proper.

Dated: August 15, 2011.

Respectfully submitted,

BAST AMRON LLP

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By: /s/ Jeffrey P. Bast

Jeffrey P. Bast (FBN 996343)

Brett M. Amron (FBN 148342)

Morgan B. Edelboim (FBN 040955)

CERTIFICATE OF ADMISSION AND SERVICE

I HEREBY CERTIFY that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in the Court set forth in Local Rule 2090-1(A).

I FURTHER CERTIFY that a true and correct copy of the foregoing was served via ECF Electronic Mail and/or U.S. Mail this 15th day of August, 2011, upon the parties on the service list attached hereto.

By: /s/ Jeffrey P. Bast
Jeffrey P. Bast

SERVICE LIST

- Office of the US Trustee USTPRegion21.MM.ECF@usdoj.gov
- James D Gassenheimer jgassenheimer@bergersingerman.com,
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- Miami-Dade County Tax Collector md tcbkc@miamidade.gov
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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

In re:

Case No: 11-32532-LMI

MAYSVILLE, INC.,

Chapter 11

Debtor.

_____ /

**ORDER GRANTING DEBTOR IN POSSESSION'S MOTION FOR AUTHORITY TO
USE CASH COLLATERAL PURSUANT TO 11 U.S.C. § 363 AND SETTING HEARING**

THIS MATTER came before the Court for hearing on August ____, 2011 upon the *Expedited Motion for Authority to use Cash Collateral Pursuant to 11 U.S.C. § 363* (the "Motion") (ECF No.) filed by Maysville, Inc. (the "Debtor"). The Court, having considered the Motion, and the record in this case,

ORDERS AND ADJUDGES as follows:

1. The Motion is GRANTED on an interim basis subject to a final hearing.

2. Use of Cash Collateral. The Debtor shall be entitled to use Cash Collateral (as defined in the Motion) to pay all ordinary and necessary expenses in the ordinary course of its business for the purposes contained in the budget (the "Budget") attached as Exhibit "A" through and including October ____, 2011. The Debtor is also authorized: (i) to exceed any line item on the Budget by an amount equal to ten percent (10%) of each such line item; or (ii) to exceed any line item by more than ten percent (10%) so long as the total of all amounts in excess of all line items for the Budget do not exceed ten percent (10%) in the aggregate of the total Budget.

3. Adequate Protection. Notwithstanding the provisions of Section 552(a) of the Bankruptcy Code, and in addition to security interests preserved by Section 552(b) of the Bankruptcy Code, the Debtor grants in favor of any creditor holding an interest in Cash Collateral, as security for all indebtedness that is owed by the Debtor to it, under the secured documentation, but only to the extent that the Cash Collateral is used by the Debtor, a post-petition security interest and lien in, to and against all of the Debtor's assets, to the same extent and priority that the creditor held a properly perfected security interest in such assets pre-petition. Under no circumstances shall the creditor have a lien on any causes of action arising under 11 U.S.C. 542 et seq., 547, 548, 549, 550, 551 or any of the Debtor's assets on which it did not have a lien or security interest prepetition.

4. Duration. The use of cash collateral provisions in this Order shall remain in effect until ____, 2011, or until otherwise ordered by the Court.

5. Further Interim Hearing. This Court shall hold a further interim hearing on cash collateral on ____, 2011 at _____.m. at the United States Bankruptcy Court

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Submitted by:

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[Attorney Edelboim shall serve a conformed copy of this Order to all interested parties and file a Certificate of Service.]

MAYSVILLE, INC.
Proposed Monthly Cash Flow Budget
486,555,575,700,711,2955 NE MIAMI
& PLATINUM 21 CONDO UNITS
Year 2011

EXHIBIT "A"

INCOME	Biscayne Shores		Platinum	Total Net Income	
Rental Income (486,555,575,700,711,2955)	\$	73,000.00	\$	-	\$ 73,000.00
Rental Income (Platinum 21 Condo Units)	\$	-	\$	29,000.00	\$ 29,000.00
Laundry Income	\$	685.00	\$	-	\$ 685.00
Total Income:	\$	73,685.00	\$	29,000.00	\$ 102,685.00
EXPENSES					
Administration:					
Alarm Monitoring Fees	\$	41.00	\$	-	\$ 41.00
Insurance-Flood	\$	1,466.67	\$	-	\$ 1,466.67
Insurance-Liab,Wind,Prop.	\$	6,390.00	\$	-	\$ 6,390.00
Accounting Fees	\$	200.00	\$	100.00	\$ 300.00
License/Inspection Fees	\$	500.00	\$	100.00	\$ 600.00
Legal Fees	\$	12,000.00	\$	3,000.00	\$ 15,000.00
Office Supplies/Software	\$	150.00	\$	50.00	\$ 200.00
Bank Charges	\$	50.00	\$	-	\$ 50.00
Subtotal Administration Expense:	\$	20,797.67	\$	3,250.00	\$ 24,047.67
Management Fees					
Management Fees	\$	9,000.00	\$	3,000.00	\$ 12,000.00
Subtotal Mgmt. Fees:	\$	9,000.00	\$	3,000.00	\$ 12,000.00
Maintenance:					
HOA Fees-Platinum Condo Units	\$	-	\$	16,943.59	\$ 16,943.59
Advertising/Marketing Fees	\$	150.00	\$	100.00	\$ 250.00
Appliance Repair/Replacement Fees	\$	800.00	\$	200.00	\$ 1,000.00
Carpet Cleaning/Replacement Fees	\$	500.00	\$	350.00	\$ 850.00
Contractors Repair Fees	\$	1,000.00	\$	500.00	\$ 1,500.00
Cleaning Fees/Supplies	\$	1,200.00	\$	200.00	\$ 1,400.00
Elevator Service	\$	300.00	\$	-	\$ 300.00
Hardware Supplies	\$	900.00	\$	100.00	\$ 1,000.00
Landscaping Fees	\$	500.00	\$	-	\$ 500.00
Pest Control	\$	75.00	\$	30.00	\$ 105.00
Pool Service	\$	600.00	\$	-	\$ 600.00
Subtotal Maintenance Expense:	\$	6,025.00	\$	18,423.59	\$ 24,448.59
Utilities:					
Electric Service	\$	900.00	\$	-	\$ 900.00
Gas Service	\$	900.00	\$	-	\$ 900.00
Telephone/Internet/Cell Service	\$	500.00	\$	120.00	\$ 620.00
Water/Sewer Service	\$	4,600.00	\$	-	\$ 4,600.00
Trash Removal Fees	\$	900.00	\$	-	\$ 900.00
Subtotal Utilities Expense:	\$	7,800.00	\$	120.00	\$ 7,920.00
Total Operating Expenses:	\$	43,622.67	\$	24,793.59	\$ 68,416.26
CASH FLOW:	\$	30,062.33	\$	4,206.41	\$ 34,268.74
NET CASH FLOW:					\$ 34,268.74