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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

ASANDA INC.

Chapter 11
Case No. 17-10054 (jlg)

Debtor.

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**DEBTOR’S MOTION, ON SHORTENED NOTICE, FOR AN
ORDER (I) AUTHORIZING THE DEBTOR’S USE OF CASH
COLLATERAL PURSUANT TO 11 U.S.C. §363(c)(2) AND
BANKRUPTCY RULE 4001 ON AN INTERIM BASIS, AND
PROVIDING ADEQUATE PROTECTION THEREFOR
PURSUANT TO 11 U.S.C. §§361 AND 362 AND
(IV) SCHEDULING A FINAL HEARING**

Asanda Inc., the above captioned debtor and debtor-in-possession (the "Debtor"), by its proposed attorneys, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, files this motion (the "Motion") for entry of an Order Scheduling a Preliminary Hearing on the Debtor’s Motion Requesting the Use of Cash Collateral, (II) Authorizing Debtor’s Use of Cash Collateral Pursuant to 11 U.S.C. §363 and Providing Adequate Protection Therefor Pursuant to 11 U.S.C. §§361 and 362 and (III) Scheduling a Final Hearing, respectfully state and represent as follows:

Jurisdiction

1. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of this proceeding and

this Motion is proper in this District pursuant to 28 U.S.C. §§1408 and 1409.

2. The statutory bases for the relief requested herein are §§ 105(a), 361, 362 and 363 of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the “Bankruptcy Code”), and Rule 4001 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

BACKGROUND

3. On January 11, 2017, (the “Filing Date”), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor has continued in possession of its property and the management of its business affairs as debtors-in-possession pursuant to §§1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner or statutory committee has been appointed.

4. The Debtor, together with its affiliate and co-debtor Asanda Park Avenue, Inc., own and operate two (2) fully service luxury salon and spas in New York city, one on Park Avenue (and 56th Street) and one in Soho.

5. The reason for the Debtor’s chapter 11 filing is cash flow issues stemming from protracted litigation in **both** landlord tenant court and Supreme Court with its landlord at the Debtor’s 56th Street Premises.

6. Although it is the Debtor’s affiliate who is a party to those lawsuits, given that the entities operate on a consolidated basis, the excessive legal fees together with the significant decrease in revenues (brought on by the landlord’s actions at the affiliate location) have resulted in cash flow shortages all around.

7. These cash flow shortages have been further aggravated by a series of loans which the Debtor took from two lenders specifically who have very significant daily and weekly repayment

obligations which leave the Debtor with little to no cash to operate.

8. Most recently, the Debtor's outstanding tax liabilities have become of paramount concern given the Internal Revenue Service's recent filing of a tax lien against the assets of the Debtor and threats to begin aggressive enforcement thereof which would certainly cripple if not shut down the Debtor's operations.

9. The Debtor intends to utilize the bankruptcy process in order to resolve its disputes with the 56th Street landlord in the most efficient and economic manner and forum possible. Meanwhile, the protections of the Bankruptcy Court will give the Debtor the protections and breathing room it needs to stabilize its operations, work on increasing its revenues and its operating cash while hopefully restructuring its secured debt and taking advantage of the Bankruptcy Codes time frame during which tax debt can be repaid.

10. The Debtor believes that with the help of counsel, that it will be able to restructure its affairs and propose a plan of reorganization that it is in the best interests of its creditors and affords them the greatest recovery possible.

PRE-PETITION SECURED DEBT

11. The Debtor has two (2) creditors that assert a "blanket lien" on the Debtor's assets: On Deck Capital, Inc. ("On Deck") and American Express Bank FSB ("Am Ex") (On Deck and Am Ex are collectively referred to as the ("Secured Creditors").

12. On or about March 31, 2015, the Debtor entered into a Business Loan and Security Agreement (the "On Deck Agreement") with On Deck in the original principal amount of \$250,000 at the rate of twenty (20%) percent interest. The On Deck Agreement provided that the loan must be repaid in fifty-two (52) weeks at the *weekly* rate of \$5,769.23 which is automatically electronically deducted from the Debtor's bank account. A copy of the On Deck

Agreement is annexed hereto as **Exhibit “A”**.

13. On or about March 31, 2015, On Deck filed a UCC-1 financing statement which states that it holds a lien “in and to all of [Debtor’s] present and future accounts, chattel paper, deposit accounts, personal property, assets and fixtures, general intangibles, instruments, equipment, inventory wherever located, and proceeds now or hereafter owned or acquired by [the Debtor].” A copy of the UCC-1 financing statement filed by On Deck is annexed hereto as **Exhibit “B”**.

14. As of the Filing Date, the Debtor believes that On Deck owed approximately \$80,000.

15. On or about May 13, 2016, the Debtor entered into a Business Loan and Security Agreement (“Am Ex Agreement”) with Am Ex in the original principal amount of \$250,000 at a rate of eight (8%) percent interest. The Am Ex Agreement provided that the loan would be repaid with *daily* rate of \$1,080. A copy of the Am Ex Agreement is annexed hereto as **Exhibit “C”**.

16. On or about October 30, 2015, Am Ex filed a UCC-1 financing statement which states that it holds a lien in “[a]ll assets of the Debtor, whether now owned or hereafter acquired or arising.” A copy of the UCC-1 financing statement filed by Am Ex is annexed hereto as **Exhibit “D”**.

17. As of the Filing Date, the Debtor believes that AmEx owed approximately \$80,000.

Relief Requested

18. The Debtor submits this Motion pursuant to Bankruptcy Code §363(c)(2)(B) and

361 and 362 and Bankruptcy Rule 4001(b) with respect to the Debtor's request for authority to use property which may constitute cash collateral ("Collateral") in which the Secured Creditors are likely to assert a security interest, substantially in accordance with the terms and conditions set forth in the proposed Interim Order (the "Order") annexed hereto as **Exhibit "E"**. The Debtor believes that the Secured Creditors are the only parties that may assert a perfected security interest in the Debtor's property which may constitute Collateral.

19. The proposed Order grants the Debtor the authority to use the Collateral pursuant to Bankruptcy Code §§363 (c)(1) and (2) and Bankruptcy Rule 4001(c) to the extent necessary to continue the operation of its business and to preserve the value of its estate during the course of the Chapter 11 case.

20. Section 363(a) of the Bankruptcy Code states as follows:

"In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of properties subject to a security interest as provided in Section 552(b) of this title, whether existing before or after the commencement of a case under this title."

21. Section 363(c)(1) of the Bankruptcy Code provides as follows:

"(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1304, 1203, or 1204 of this title and unless the court orders otherwise, the trustee 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, and may use property of the estate in the ordinary course of business without notice or a hearing".

22. Section 363(d) of the Bankruptcy Code provides as follows:

"(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(e), or 362(f) of this title".

23. Accordingly, pursuant to § 363(c)(2) of the Bankruptcy Code, the consent of the Secured Creditors or authority from this Court is required to use Collateral in which they may have a perfected security interest.

Adequate Protection

24. The purpose of adequate protection is to ensure that the secured creditor receives the value for which it bargained pre-bankruptcy. In re Swedeland Development Group, Inc., 16 F.3d 552 (3rd Cir. 1994); In re Dunes Casino Hotel, 69 B.R. 784, 793 (Bankr. D.N.J. 1986), citing In re Coors of the Cumberland, 19 B.R. 313 (Bankr. M.D. Tenn. 1982). See also, In re 495 Central Park Ave. Corp., 136 B.R. 626 (Bankr. S.D.N.Y. 1992). Adequate protection is designed to safeguard the secured creditor from diminution in the value of its interest during the Chapter 11 reorganization. In re Nice, 355 B.R. 554, 563 (Bankr. N.D. Va. 2006) (“adequate protection is solely a function of preserving the value of the creditor’s secured claim as of the petition date due to a debtor’s continued use of the collateral”).

25. Because the term “adequate protection” is not defined in the Bankruptcy Code, the precise contours of the concept are necessarily determined on a case-by-case basis. MBank Dallas, N.A. v. O’Connor (In re O’Connor), 808 F.2d 1393 (10th Cir. 1987). In re Snowshoe Co., 789 F.2d 1085, 1088 (4th Cir. 1086); In re Mosello, 195 B.R. 277, 289 (Bankr. S.D.N.Y. 1996); In re Beker Industries Corp., 58 B.R. 725 (Bankr. S.D.N.Y. 1986); see also In re JKJ Chevrolet, Inc. 190 B.R. 542, 545 (Bankr. E.D.Va. 1995) (adequate protection is a flexible concept that is determined by considering the facts of each case).

26. The Order provides that, as adequate protection for the Debtor’s use of the Secured Creditors’ Collateral, in consideration for the use of the cash Collateral and for the

purpose of adequately protecting them from Collateral Diminution¹, the Debtor shall grant the Secured Creditors replacement liens in all of the Debtor's pre-petition and post-petition assets and proceeds, including the cash Collateral and the proceeds of the foregoing, to the extent that they had valid security interests in said pre-petition assets on the Filing Date and in the continuing order of priority that existed as of the Filing Date (the "Replacement Liens").

27. The Replacement Liens shall be subject and subordinate only to: (a) United States Trustee fees payable under 28 U.S.C. Section 1930 and 31 U.S.C Section 3717; (b) professional fees of duly retained professionals in this Chapter 11 case as may be awarded pursuant to Sections 330 or 331 of the Code or pursuant to any monthly fee order entered in the Debtor's Chapter 11 case; (c) the fees and expenses of a hypothetical Chapter 7 trustee to the extent of \$10,000; and (d) the recovery of funds or proceeds from the successful prosecution of avoidance actions pursuant to sections 502(d), 544, 545, 547, 548, 549, 550 or 553 ("Avoidance Actions") of the Bankruptcy Code (collectively, the "Carve-Outs").

28. The Debtor submits that, in order to preserve the Debtor's estate and ensure the viability of the Debtor during the Chapter 11 case, Secured Creditors should be granted Replacement Liens with the same nature, extent and validity of their pre-petition liens, subject to investigation by any creditors or committee appointed in the Debtor's Chapter 11 case.

29. In addition to the liens and security interests proposed to be granted pursuant hereto, the Debtor shall continue making the monthly debt service payments in the amount of interest only at the respective contract rates provided for in the underlying agreements and in accordance with the terms set forth therein.

30. The Debtor submits that, in order to preserve the Debtor's estate and ensure the

¹ For purposes of this Order, "Collateral Diminution" shall mean any diminution in value of the Secured Creditor's interest in Debtor's property as of the Filing Date by reason of Debtor's use of Cash Collateral in accordance with this Order.

viability of the Debtor during the Chapter 11 case, it is critical that the Court approve the proposed adequate protection payments to the Secured Creditors and the grant to it of Replacement Liens with the same nature, extent and validity of the Secured Creditors' pre-petition liens, subject to investigation by any creditors or committee appointed in the Debtor's Chapter 11 case.

The Budget

31. The Debtor proposes to use Collateral only for ordinary and necessary operating expenses substantially in accordance with the operating budget annexed hereto as **Exhibit "F"** (the "**Budget**"). The Debtor believes that the Budget includes all reasonable, necessary and foreseeable expenses to be incurred in the ordinary course of operating the Debtor's business for the period set forth in the Budget. The Debtor believes that the use of Collateral in accordance with the Budget will provide the Debtor with adequate liquidity to pay administrative expenses as they become due and payable during the period covered by the Budget.

CONSIDERATION OF THIS MOTION ON SHORTENED NOTICE AND SCHEDULING A FINAL HEARING

32. The immediate and continued use of cash collateral is essential to the operation of the Debtor's business, and will not only preserve the estate but will help to maximize its value for the benefit of its creditors.

33. Federal Rule of Bankruptcy Procedure ("**Rule(s)**") 4001(b) requires that a motion to approve the use of cash collateral on a final basis be heard on no less than fourteen (14) days' notice.

34. However, the Rule 4001(b) further provides that if the motion so requests, the court may conduct a preliminary hearing before such fourteen (14) day period expires, but the

court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

35. As set forth herein and in the Declaration of Gene Frisco pursuant to Local Bankruptcy Rule 1007 and 9077-1, consideration of this motion on shortened notice is reasonable, proper and in the best interests of its creditors.

36. Finally, pursuant to Bankruptcy Rule 4001(d), the Debtor requests that the Court set a date at the Interim Hearing for a final hearing, but in no event later than thirty (30) days after the Filing Date, and fix the time and date prior to the final hearing for parties to file objections to this motion.

Notice

37. This Motion is being served on notice to all of the Debtor's secured creditors and all other parties asserting secured claims against the Debtor, as well as the United States Trustee and all other parties entitled to notice pursuant to Bankruptcy Rule 4001(d), including but not limited to the Debtor's twenty (20) largest unsecured creditors.

WHEREFORE, the Debtor respectfully requests entry of the Order, together with such other and further relief as is just and proper under the circumstances.

Dated: White Plains, New York
January 11, 2017

Respectfully submitted,

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