

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE:	)	CHAPTER 11
	)	
B.C. GRAND, LLC,	)	CASE NO. 17-50094-mgd
	)	
Debtor.	)	

**DEBTOR’S MOTION FOR AUTHORITY TO USE CASH  
COLLATERAL ON INTERIM AND CONTINUING BASIS  
AND TO DETERMINE AND GRANT ADEQUATE PROTECTION**

COMES NOW, B.C. Grand, LLC (“Debtor”) and files this Motion for Authority to Use Cash Collateral on an Interim and Continuing Basis and to Determine and to Grant Adequate Protection (the “Motion”) to those secured creditors with an interest in cash collateral. Debtor respectfully shows the Court:

**BACKGROUND FACTS**

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. §157(b). Venue is proper in this district pursuant to 28 U.S.C. §§1408 and 1409.
2. Debtor filed a voluntary Petition for relief under Chapter 11 of Title 11 of the United States Code on January 2, 2017.
3. Debtor is operating as a debtor in possession, with no trustee having been appointed to manage the Debtor’s assets. No creditor’s committee has been appointed in this case.

**DEBTOR’S PROPERTY**

4. The Debtor owns certain real property consisting of a ten (10) story office building in downtown Atlanta, Georgia, located at 44 Broad Street, NW, Atlanta, Georgia 30303, which is

commonly known as “The Grant Building” (also referred to herein as the “Property”).

5. The Grant Building is one of the oldest high-rise buildings in downtown Atlanta. Its architects were sent to study the styles of commercial architecture being constructed in Chicago in the late 1800s, and the building is modeled on those styles, with construction completed in the year 1898. The building has a historic façade and lobby, and has been utilized recently as a location for filming television shows.

6. The Property is leased to commercial tenants who generally make monthly rent payments to Debtor.

7. Debtor had an appraisal conducted on the Property with an effective date of October 17, 2016, which gave the Property a fair market value of Fifteen Million Four Hundred Thousand Dollars (\$15,400,000.00). A copy of the October 17, 2016 appraisal report is filed herewith as **Exhibit “A”**.

8. As shown in the immediately following section of this motion, the secured debts of lenders with an interest in cash collateral are less than the value of the Property.

#### **SECURED LENDERS**

9. First Citizens Bank & Trust Company (“First Position Lender”) claims a first position lien against the Property in its capacity as assignee of Capitol City Bank & Trust Company (“Capitol City”) by virtue of an assignment through the Federal Deposit Insurance Corporation. First Position Lender was reflected as a first position lienholder on Debtor’s Schedules.

10. First Position Lender may also claim an interest in the rents generated at the Property (the “Cash Collateral”) by virtue of the terms of that certain “Deed to Secure Debt” filed in Deed Book 50860, Page 149 (originally granting an interest to Capitol City), of the Real Property Records of

Fulton County, Georgia, which provides at pages 1-2, Paragraph “d”, for an interest in rents arising at the Property.

11. First Position Lender has asserted that it is entitled to a claim in the amount of \$2,358,877.31 as of January 24, 2017, inclusive of post-petition interest.

12. The United States Small Business Administration (the “SBA”) claims a second position lien against the Property as reflected in Debtor’s Schedules.

13. The SBA may also claim an interest in the rents generated at the Property (the “Cash Collateral”) by virtue of the terms of that certain “Assignment of Assignment of [sic] Leases and Rents” by which the SBA took an assignment of an Assignment of Leases and Rents from the Economic Development Corporation of Fulton County, with said Assignment of Assignment of Leases and Rents filed in Deed Book 50860, Pages 267, of the Real Property Records of Fulton County, Georgia, and further by virtue of the terms of that certain “Assignment of Deed to secure Debt and Security Agreement” (also from the Economic Development Corporation of Fulton County), with said Assignment filed in Deed Book 50860, Pages 229, of the Real Property Records of Fulton County, Georgia

14. The SBA has not filed a claim in the above-captioned case as of the filing of this Motion. Debtor’s Schedules reflect that the SBA has a loan balance of approximately \$1,400,000.

15. The Atlanta Development Authority, as agent for the City of Atlanta, Georgia, a municipal corporation (“Third Position Lender”) has claimed a third position lien against the Property. (The First Position Lender, SBA, and Third Position Lender may be collectively referenced herein as the “Secured Lenders”).

16. The Third Position Lender may also claim an interest in the Cash Collateral by virtue of

the terms of that certain “Third Priority Deed to Secure Debt, Security Agreement and Assignment of Leases, Rents and Profits” filed in Deed Book 51047, Page 628, of the Real Property Records of Fulton County, Georgia, which provides at page 3 for an interest in rents arising at the Property.

17. The Third Position Lender has not filed a claim in the above-captioned case as of the filing of this Motion. As reflected on the Third Position Lender’s security agreement, the original principal balance of its loan was \$100,000, and as reflected on Debtor’s Schedules the current loan balance is approximately \$86,000.

18. CapitalPlus Equity, LLC (“CapitalPlus”) may claim a lien against the Property by virtue of that certain “Deed to Secure Debt and Security Agreement” filed in Deed Book 54731, Page 396 of the Real Property Records of Fulton County, Georgia. Debtor understands, however, that the CapitalPlus security agreement does not provide for any interest in rents.

#### **DEBTOR’S NEED FOR CASH COLLATERAL**

19. Unless Debtor is authorized to use the Cash Collateral in the ordinary course of business Debtor will be unable to operate during the pendency of this case.

20. For instance, if the Debtor is unable to use Cash Collateral on an interim basis it will be unable to (a) pay for maintenance and repairs, (b) pay the 24-hour security and concierge personnel, who control access to the building for tenants and visitors, (c) pay future insurance premiums as they come due in order to protect the Property, protect secured creditors, and protect Debtor’s estate from potential losses, (d) pay utilities, and (e) pay other ordinary and necessary expenses associated with the building in order to generate revenues and maintain value.

#### **ARGUMENT AND CITATION OF AUTHORITIES**

21. **Use of Cash Collateral Is Necessary.** If unable to use cash collateral, Debtor would not

have funds for necessary operations, such as utilities, maintenance and repairs, and would be unable to protect the property fully, such as through paying security personnel and by keeping casualty and liability insurance in place as future premiums come due. Thus, use of cash collateral is necessary to protecting the property of the estate during this case.

**22. Debtor Seeks to Determine that an Equity Cushion Constitutes Adequate Protection.**

Debtor submits that those entities that have an interest in cash collateral are adequately protected on the basis that the Property is valued at substantially more than the amounts of debts of the entities with interests in cash collateral. The appraisal obtained by Debtor with an effective date of October 17 2016 indicates a fair market value of over Fifteen Million Dollars (\$15,000,000.00). That valuation exceeds the combined total of all of the debts claimed by entities with interests in cash collateral, which totals approximately \$3,844,877.31 as reflected on Debtor's Schedules and information received from Lender. When a secured lender has collateral worth more than its loan balance, the secured lender is generally considered adequately protected so that a debtor-in-possession will be permitted to utilize cash collateral that does not diminish the equity. *See, e.g. In re May*, 169 B.R. 462, 472 (Bankr. S.D. Ga. 1994) ("An equity cushion in property may provide a creditor with adequate protection of its interest."); *In re Las Torres Dev., L.L.C.*, 413 B.R. 687, 696–97 (Bankr. S.D. Tex. 2009)<sup>1</sup>; *In re Mickler*, 9 B.R. 121, 124 (Bankr. M.D. Fla. 1981) (J.

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1 In the *Las Torres Dev., LLC* decision, the Bankruptcy Court explained: "Although the Debtors have not provided the Lender with adequate protection under the three enumerated examples set forth in § 361, the Court concludes that the Lender is nevertheless adequately protected because § 361 is not limiting. The Fifth Circuit has aptly noted that the Code contains no specific, definitive definition of adequate protection. *In re First S. Sav. Ass'n*, 820 F.2d 700, 710 (5th Cir.1987). The Fifth Circuit has stated, however, that " 'in determining whether a secured creditor's interest is adequately protected, most courts engage in an analysis of the property's "equity cushion"—the value of the property after deducting the claim of the creditor seeking relief from the automatic stay and all senior claims.' " *Mendoza v. Temple–Inland Mortgage Corp. (Matter of Mendoza)*,

Paskay held that debtor may use cash collateral to pay ordinary and necessary expenses when lender is adequately protected by equity cushion and court imposed conditions including a 12 month time-frame in which debtor must sell real estate to pay secured debts); *In re Senior Care Properties, Inc.*, 137 B.R. 527 (Bankr. N.D. Fla. 1992); *In re Triplett*, 87 B.R. 25 (Bankr. W.D. Tex. 1988); *In re Pawtuxet Valley Prescription & Surgical Ctr., Inc.*, No. BK 07-11767, 2008 WL 1990887, at \*3 (Bankr. D.R.I. Mar. 10, 2008) (“when BankRI enjoyed a significant equity cushion and was adequately protected, the Debtor was allowed the use of cash collateral on an interim basis, with frequent reporting and regular examination of its operations. BankRI was owed approximately \$2.5 Million and the parties stipulated to the market value of the real estate at \$2.2 Million. The Bank also has a first lien on machinery and equipment which was valued at \$253,700 (at forced liquidation), and inventory and vehicles<sup>1</sup> at \$125,000 (again at liquidation). In October 2007, a major area of dispute was PVP's accounts receivable, with the Bank arguing that the receivables were worthless and that most were over 90 days old. PVP said the receivables were worth in excess of \$1,000,000. In the October 2007 interim order, giving no value to the receivables, and based on these values, the Bank was deemed to be adequately protected.”); *In re McCombs Properties VI, Ltd.*, 88 B.R. 261 (Bankr. C.D. Cal. 1988).<sup>2</sup> Debtor submits that the

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111 F.3d 1264, 1272 (5th Cir.1997) (quoting *In re Indian Palms Assoc., Ltd.*, 61 F.3d 197, 207 (3d Cir.1995)). Given the sufficient equity cushion in this case, the Court concludes it may authorize the Debtors to use the Lender's cash collateral to pay certain administrative expenses. The record here reflects that there is more than a 20% equity cushion in the Shopping Center; and case law is clear that an equity cushion of 20% or more constitutes adequate protection. *Mendoza*, 111 F.3d at 1272 (quoting *In re Kost*, 102 B.R. 829, 831 (D.Wyo.1989))<sup>9</sup>; *In re Knight Energy Corp.*, Nos. 09-32163, 09-32165, 2009 WL 1851739, at \*3 (Bankr.N.D. Tex. June 26, 2009) (applying the 20% equity cushion test to determine whether the secured lender was adequately protected).” *In re Las Torres Dev., L.L.C.*, 413 B.R. 687, 696-97 (Bankr. S.D. Tex. 2009).

2 In the similar context of a creditor's motion for relief from stay, bankruptcy courts have likewise concluded that an equity cushion may warrant denial of stay relief. As the Bankruptcy Court for

Property has a sufficient equity cushion to constitute adequate protection of the Secured Lenders based on the difference between Debtor's appraisal with an effective date of October 17, 2016, which values the Property at over Fifteen Million Dollars (\$15,000,000.00), and the amounts of the debts of the Secured Lenders with a combined total of approximately \$3,844,877.31.

**23. Debtor also Seeks to Grant Entities with Interests in Cash Collateral Adequate Protection Payments.** Although Debtor believes that an equity cushion exists which provides adequate protection for the use of cash collateral, Debtor is also willing and able to make monthly payments to lenders with interests in cash collateral. Debtor proposes to make the following payments:

- (a) First Citizens Bank & Trust Co.: \$14,906.24 per month (equal to the full pre-petition principal and interest payment);
- (b) U.S. Small Business Administration \$8,446.92 per month (equal to the full pre-petition principal and interest payment).

Bankruptcy courts have held that periodical payments, including payments in the amount of interest accrual, may constitute adequate protection. *See, e.g., In re Podzemny*, No. 09-14226-

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the Northern District of New Hampshire noted, "Debtors in real estate reorganization cases have many other things to do on 'Day One' after their bankruptcy court filing besides responding to detailed demands by mortgagees as to how they will use essentially all their cash flow and conduct their business during their reorganization effort. In my judgment, if the debtor makes a showing with regard to the usage of rents as cash collateral that the mortgagee involved has a clear equity cushion in the underlying real property, as these debtors have done, supporting a surface determination to that effect by the Court sufficient to get the case to the more structured and mandated 30 or 60 day hearings on relief from automatic stay, as indicated above, the reorganization Court may appropriately interpret the 'as is necessary' language in § 363(e) to deny requests by mortgagees for specific restrictions and conditions upon the use of rents for that relatively short interim period. This will effectuate the goal of the present Bankruptcy Code to foster negotiated, consensual reorganizations." *In re Rancourt*, 123 B.R. 143, 152-53 (Bankr. D.N.H. 1991)

J11, 2011 WL 576591, at \*8 (Bankr. D.N.M. Feb. 8, 2011) (“The adequate protection as set forth in prior cash collateral orders entered by this Court includes an acknowledgement of the amount of indebtedness owed to GPAC and of its lien position, replacement liens, periodic cash payments in the amount of interest accrual, price protection on the cattle and corn to limit market risks, operating within a budget to control expenses, reporting requirements and access for inspections to enable GPAC to monitor compliance, insurance, and various default provisions.”).<sup>3</sup> Here, Debtor proposes to continue payments to secured lenders of the full pre-petition loan payments.

24. **Debtor proposes to Provide Replacement Liens.** Additionally, Debtor seeks to provide a replacement lien to Secured Lenders to the same extent and with the same priority as its pre-petition lien. The rents are regenerating in nature – meaning, each month Debtor’s tenant pays rent to replace the rent that existed the month before, so the cash collateral is not used up in the manner that using inventory or raw materials might deplete a creditor’s collateral. Additionally, the rent will be used to protect Lender’s collateral through appropriate maintenance, repairs, security services, utility payments, and insurance premium payments.

25. **Debtor Proposes Limits on the Use of Cash Collateral.** Debtor hereby proposes that its use of Cash Collateral will be limited to those specific categories of expenses identified on its proposed Budget which accompanies this Motion, with an allowance of only 10% for normal variation in expenses on those line items above \$500 and a 20% variance on those line items of

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<sup>3</sup> Debtor’s willingness to agree to make such periodic cash payments to lenders should not be construed as an admission that such payments are mandated by law in all circumstances. To the contrary, the Eleventh Circuit Court of Appeals has held that an oversecured creditor’s interest in property which must be adequately protected encompasses the decline in the value of the collateral only, rather than perpetuating the ratio of the collateral to the debt as of the Petition date, and that an oversecured creditor is not entitled to periodic payments of accruing postpetition interest during the pendency of a bankruptcy case. *In re Delta Res., Inc.*, 54 F.3d 722 (11th Cir. 1995).



\$500 or less. Debtor further proposes that an interim Order authorizing the use of Cash Collateral be entered, and that the interim Order authorizing the use of Cash Collateral terminate upon the earliest of any of the following events occurring: (a) failure of Debtor to abide by the terms, covenants, and conditions of this Order or the budget filed herewith; (b) appointment of a Chapter 11 trustee; or (c) conversion of this case to Chapter 7; if any of the foregoing are not cured by Debtor within five (5) business days from the date of notice to Debtor from Lender, unless otherwise altered by consent of Lender in writing or by Order of the Court.

**26. Debtor Proposes that an Interim Order regarding Cash Collateral Not Permanently Bind Debtor or its Creditors.** Debtor proposes that the entry of an interim Order on this Motion be without prejudice to the rights of Debtor and/or creditors claiming Cash Collateral in all respects, including, but not limited to, rights (1) to assert a failure of adequate protection, (2) to contest the validity of pre-petition security interests and liens, (3) to move for relief from the automatic stay, (4) to seek extensions, modifications or alterations of the terms of this Order, (5) to propose and confirm a Plan of Reorganization inconsistent with the terms of this Order, and/or (6) to seek continued or additional use of Cash Collateral.

**27. The Court Is Authorized to Grant the Requested Relief.** The entry of an Order permitting use of cash collateral is authorized by Section 363 of the Bankruptcy Code and Bankruptcy Rule 4001,<sup>4</sup> as well as by the case law cited herein.

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<sup>4</sup> The Court is authorized to permit the use of cash collateral by 11 U.S.C. § 363(a), which states: “(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless--(A) each entity that has an interest in such cash collateral consents; or (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.”

This Motion is made in compliance with Federal Rule of Bankruptcy Procedure 4001, as the Motion (a) includes a proposed form of Order, (b) states the name of each entity with an interest

28. **Proposed Order submitted herewith.** A proposed Order Authorizing Interim Use of Cash Collateral, and scheduling a hearing to convert the interim Order to a continuing or permanent Order, is being submitted with this motion.

### CONCLUSION

The Debtor needs to use cash collateral to continue to operate its business and protect the collateral securing its obligations to creditors, including through ordinary maintenance, repairs, payment of utilities, payment of security personnel controlling access to the property, and payment of premiums for liability and casualty insurance. Lenders with an interest in cash collateral will receive a combination of replacement liens, periodic cash payments, protection from an equity cushion, and Debtor's adherence to reporting requirements and deadlines proposed herein. The use of cash collateral is essential to reorganization efforts, and to protecting the property of the estate, and the terms of the proposed Interim Order do not prejudice any party's rights.

WHEREFORE, Debtor requests that this Court:

- (i) schedule an preliminary hearing on this Motion on an expedited basis;
- (ii) authorize Debtor's use of cash collateral on an interim basis;
- (iii) set a final hearing concerning the use of cash collateral;
- (iv) authorize Debtor's continuing or permanent use of cash collateral after the final hearing;
- (v) determine and grant adequate protection to lenders with interests in cash collateral;

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in the cash collateral, (b) identifies the security agreement provisions concerning the collateral, (c) states the purposes for the use of the cash collateral by the Debtor, (d) states the duration of the use of the cash collateral, and (e) identifies the adequate protection for the secured lender(s).

and

(vi) grant such other and further relief as may be equitable, proper and just.

This 25th day of January, 2017.

Respectfully submitted,

**ROBL LAW GROUP LLC**

/s/ Michael Robl

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