

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MICHIGAN (GRAND RAPIDS)

IN THE MATTER OF:

Bear Creek Partners II, LLC, *et al.*¹,

Debtors.

Bankruptcy Case No. 16-02553
Jointly Administered
Honorable John T. Gregg
Chapter 11

MOTION OF CHAPTER 11 TRUSTEE PURSUANT TO BANKRUPTCY CODE
SECTIONS 105, 361, 362, 363 AND 507 FOR ENTRY OF A STIPULATED AND
AMENDED FINAL ORDER (I) AUTHORIZING THE USE OF CASH
COLLATERAL AND (II) GRANTING ADEQUATE PROTECTION

Kelly M. Hagan, Chapter 11 Trustee (the “Trustee”) for the above-captioned debtors (collectively, the “*Debtors*”) file this motion (the “*Motion*”), pursuant to sections 105(a), 361, 362, 363 and 507 of title 11 of the United States Code (the “*Bankruptcy Code*”), Rules 2002, 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the “*Bankruptcy Rules*”) and Rule 4001-3 of the Local Bankruptcy Rules for the Western District of Michigan (the “*Local Rules*”), seeking entry of the Stipulated and Amended Final Order, substantially in the form attached here as Exhibit A (the “*Final Order*”), (a) authorizing the Trustee to use cash collateral (“*Cash Collateral*”) and (b) authorizing the Trustee to provide

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The Debtors in these jointly administered chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are (i) Bear Creek Partners II, LLC [9959] and (ii) Bear Creek Retail Partners II, LLC [8183]. The mailing address for the Debtors is 5000 Northwind Drive, Suite 120, East Lansing, MI 48823.

adequate protection for the use of Cash Collateral. In support of the Motion, the Trustee respectfully states as follows:

Jurisdiction

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding under 28 U.S.C. § 157(b)(2).
2. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The statutory bases for the relief sought herein are Bankruptcy Code sections 105, 361 and 363, Bankruptcy Rules 2002, 4001, and 9014 and Local Rule 4001-2.

Background

4. On May 6, 2016 (the "*Petition Date*"), each of the Debtors filed a petition with this Court under chapter 11 of the Bankruptcy Code. The factual background regarding the Debtors, including their business operations, their capital and debt structure, and the events leading to the filing of these chapter 11 cases, is set forth in detail in the First Day Declaration.
5. On October 18, 2016, this Court entered an Order Appointing a Chapter 11 Trustee in Debtors' Bankruptcy Cases (DN 287).
6. On October 19, 2016 Kelly M. Hagan was appointed the Chapter 11 Trustee in these proceedings which was accepted by Ms. Hagan on the same day.
7. Prior to the Trustee's appointment, the Debtors operated as Debtors' in Possession pursuant to 11 U.S.C. §1107 and §1108.

8. Since her appointment, the Trustee has been operating the businesses and managing their property pursuant to Bankruptcy Code section 1108. No statutory committees have been appointed or designated.

9. On October 3, 2016, this Court entered a Final Order (I) Authorizing the Use of Cash Collateral and (II) Granting Adequate Protection (DN 258) which expires by its terms on November 30, 2016.

10. It is necessary for the Trustee to continue the use of Cash Collateral beyond November 30, 2016 and up to a point in time when the Trustee consummates the sale of the Debtors' assets.

Concise Statement Pursuant to Bankruptcy Rule 4001(b) and Local Rule 4001-2

11. Pursuant to Bankruptcy Rule 4001(b) and Local Rule 4001-3, the following is a concise statement and summary of the proposed material terms of the Interim Order:

Parties with an interest in cash collateral

DOF IV REIT Holdings, LLC as "*Prepetition Lender*"

Use of Cash Collateral

Subject to the terms and conditions of the Interim Order, the Trustee is authorized to use Cash Collateral from December 1, 2016 through the Final Hearing ("Specified Period"). Except as otherwise expressly provided in the Interim Order, during the Specified Period, Cash Collateral may be in accordance with the Budget defined below for (i) ordinary course of business for working capital and general corporate purposes and (ii) for expenses incurred in the ordinary course of business, (iii) used for the payment of Professional Fees of the Trustee and other fees and expenses to the extent provided in the Budget. An 8 week budget for the Trustee is attached hereto as Exhibit B ("*Budget*") and will be supplemented prior to the requested Final Hearing. Following the date of entry of the Final Order, the Trustees' authority to use Cash Collateral shall be governed by the terms of the Final Order. Nothing in the Interim Order shall authorize the disposition of any assets of the Debtors or their estates outside the ordinary course of business, or any use of any Cash Collateral or other proceeds resulting therefrom, except as permitted in the Interim Order or another order of the Court.
Interim Order, ¶2.

Adequate Protection Liens And Payments As adequate protection against any diminution in value ("*Diminution in Value*") of its interests in the collateral securing the obligations under the prepetition Loan Agreement (the "*Prepetition Collateral*"), pursuant to Bankruptcy Code sections 361 and 363(e), the Prepetition Lender, shall be granted additional and replacement continuing and automatically perfected postpetition security interests in and liens (the "*Adequate Protection Liens*") on any and all presently owned and hereafter acquired personal property, real property and all other assets of the Debtors, together with any proceeds thereof (collectively, the "*Collateral*") in and to the same extent, validity and priority as they existed on the Petition Date, including any of the Trustee's claims or causes of action arising under Bankruptcy Code sections 502(d), 544, 545, 547, 548, 549, 550 and 553 and any other avoidance or similar action under the Bankruptcy Code after the payment of all allowed claims in full. The Adequate Protection Liens shall be junior to: (A) the Carve Out; and (B) the liens having priority over the Prepetition Lender's liens on the Prepetition Collateral. All liens remain subject to challenge by any party in interest, including the Debtors. Interim Order ¶12.

The Trustee shall make monthly adequate protection payments to Prepetition Lender in the per diem amount of \$3,746.03 multiplied by the number of days for such month ("*Adequate Protection Payments*"). ¶5

Grant of Priority or Liens on Property of the Estate Only the Adequate Protection Liens are being granted and no lien is being granted upon the Trustee's claims or causes of action arising under Bankruptcy Code sections 502(d), 544, 545, 547, 548, 549, 550 and 553 and any other avoidance or similar action under the Bankruptcy Code.

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The Order does not contain any provisions relating to the following:

- (a) Adequate Protection or Priority for a Claim that Arose Prepetition
- (b) Determination of the Validity, Enforceability, Priority, or Amount of a Claim that Arose Before the Commencement of the Case
- (c) Waiver or Modification of the Automatic Stay
- (d) Waiver or Modification of the Authority to File a Plan, Seek an Extension of Time in which the Debtors have the Exclusive Right to File a Plan, Request Use of Cash Collateral, or Request Authority to Obtain Credit
- (e) Establishment of Deadlines for Filing a Plan, for Approval of a Disclosure Statement, for a Hearing on a Confirmation Order, or for Entry of a Confirmation Order
- (f) Waiver or Modification of Applicability of Non-Bankruptcy Law Relating to the Perfection of a Lien on Property of the Estate, or on the Foreclosure or Other Enforcement of the Lien

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- (g) Release, Waiver, or Limitation on any Claim or Cause of Action Belonging to the Estate
- (h) Indemnification of Any Entity
- (i) Release, Waiver, or Limitation on Rights under 11 U.S.C. § 506(c) except that such relief must be obtained by order of this Court.
- (j) Cross-collateralization protection
- (k) Findings of Fact that bind the estate or other parties in interest
- (l) Provisions that prime any secured lien without the consent of that lienor

12. As set forth herein, Trustee proposes these provisions in good faith to allow her to use Cash Collateral to continue the business operations of the Debtors for the benefit of all parties in an orderly manner.

Pre-Petition Indebtedness

13. On May 17, 2012, the Debtors and Basis Real Estate Capital II, LLC, entered into a certain Loan Agreement, Promissory Note in the face principal amount of \$18,400,000.00, Mortgage and Assignment of Leases and Rents relating to real property located at 1520, 1525, 1540, 1545, 1565, 1585, 1625, 1645, 1660, 1665, 1680, 1685, 1600 Bear Creek Lane, Bear Creek, Michigan and 2160, 2170 and 2180 Anderson Road, Petoskey, Michigan, as more particularly identified in the Mortgage and Assignment of Leases and Rents. Pursuant to a variety of assignments, Prepetition Lender now reportedly is the lender and mortgagee.

14. Debtor Bear Creek Partners II, L.L.C. owns what is referred to as the Bear Creek Meadows Apartments, a 240-unit multi-family apartment property in Bear Creek Township, Emmet County, Michigan. First Day Declaration at ¶5.

15. Debtor Bear Creek Retail Partners II LLC owns what is referred to as the Bear Creek Crossings, a 45,857 square foot retail development in Bear Creek Township, Emmet County, Michigan. First Day Declaration at ¶6.

16. The Trustee is seeking and the Court has approved the sale of substantially all of the assets of the Debtors for the sum of \$28.5 million by order of this Court (DN 318).

17. As set forth in the Budget, the Debtors' receive rent and other charges in the aggregate amount of approximately \$295,453.00 per month.

18. As set forth in the Budget, to avoid immediate and irreparable harm, the Trustee expects to expend approximately \$537,811.00 in the first 8 weeks from December 1, 2016 which includes adequate protection payments to Pre-petition Lender.

19. Prepetition Lender has filed secured claim in the amount of \$25,687,034.45.

20. From the sale of the Debtors' assets, the Trustee anticipates that she will receive minimum net proceeds in the amount of \$27.8 million which the Trustee believes will be sufficient to pay all allowed claims in full or provide a substantial dividend.

The Proposed Use of Cash Collateral

21. The Trustee require the immediate postpetition use of Cash Collateral in order to continue to operate and maintain the properties in an orderly manner during the pendency of these chapter 11 cases. The Trustee's ability to use Cash Collateral will allow the Trustee to, among other things, maintain business relationships with vendors and suppliers, pay the fees of management for the maintenance of the property, pay the fees of leasing staff responsible for keeping the property fully leased, and satisfy other ordinary operational costs, including rent, taxes and insurance, pending a sale of the

Debtors' assets. If the Trustee is not authorized to immediately use Cash Collateral, the Trustee would be forced to cease maintaining and leasing the properties, thereby causing serious, irreparable harm to Prepetition Lender, Debtors and their estates. The use of Cash Collateral is critical to enabling the Trustee to preserve and maintain the value of their estates for the benefit of all parties in interest.

Proposed Adequate Protection

22. The Prepetition Lender asserts that because of accruing interest, costs and professional fees, its equity position is eroding and in fact, it claims they may become undersecured. In order to protect the Prepetition Lender from any diminution in value of the Cash Collateral, the Trustee has agreed to grant adequate protection in the form of replacement liens and adequate protection payments. Specifically, the Prepetition Lender, will be granted the Adequate Protection Liens and Adequate Protection Payments as set forth in the proposed order.

Relief Requested

23. By this Motion, Trustee seeks entry of the Stipulated and Amended Final Superseding Order (a) authorizing the Trustee to use Cash Collateral, and (b) authorizing the Trustee to provide adequate protection for the use of Cash Collateral.

Supporting Authority

I. The Use of Cash Collateral is Warranted and Should Be Approved

24. The Trustee satisfies the requirements for the use of Cash Collateral. Pursuant to Bankruptcy Code section 363(c)(2), a debtor may not use cash collateral unless "(A) each entity that has an interest in such 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.” 11 U.S.C. §363(c)(2). Pursuant to section 363(c)(2) of the Bankruptcy Code, the Court may authorize the Debtors to use cash collateral as long as the applicable secured creditors consent or are adequately protected. See, In re McCormick, 354 B.R. 246, 251 (Bankr. C.D. Ill. 2006) (to use the cash collateral of a secured creditor, the debtor must have the consent of the secured creditor or establish to the Court that the secured creditor’s interest in the cash collateral is adequately protected).

25. The Trustee does have the Prepetition Lender’s consent to use cash collateral beyond November 30, 2016 pursuant to the attached Stipulated and Amended Final Superseding Final Order , however, the Prepetition Lender is oversecured and the Trustee is granting adequate protection to protect against any unexpected diminution in value.

II. The Proposed Adequate Protection Should Be Approved

26. The adequate protection proposed by the Trustee is appropriate and should be approved. Bankruptcy Code section 363(e) requires that the debtor adequately protect the secured creditors’ interest in property to be used by a Trustee against any diminution in value of such interest resulting from Trustee’s use of the property during the chapter 11 cases. Bankruptcy Code section 361 contains a nonexhaustive list of acceptable forms of adequate protection, including a cash payment or periodic cash payments, additional liens, replacement liens, and the “indubitable equivalent of such entity’s interest in such property.” 11 U.S.C. § 361. Adequate protection is aptly described as “a balancing of the

debtor's and a creditor's respective harm." In re Carson, 34 B.R. 502, 505 (Bankr. D. Kan. 1983) (citation omitted). The legislative history of section 361 of the Bankruptcy Code reflects Congress' intent to give the Court flexibility to fashion adequate protection in light of the facts and equitable considerations in each case. E.g., In re O'Connor, 808 F.2d 1393, 1396-97 (10th Cir. 1987); In re 5-Leaf Clover Corp., 6 B.R. 463, 466 (Bankr. S.D. W. Va. 1980); see also In re Harrington & Richardson, Inc., 48 B.R. 431, 433 (Bankr. D. Mass. 1985) (noting that adequate protection is "a flexible concept which requires a Court to make decisions on a case-by-case basis."). For example, in determining what constitutes "adequate protection," courts must consider not only the interests of the secured creditor whose cash collateral is affected, but the interests of all other creditors in light of the debtor's efforts to enhance the prospects of reorganization. O'Connor, 808 F.2d at 1397-98. The Trustee's use of Cash Collateral pursuant to the terms and conditions set forth above and in the Interim Order is fair and reasonable, and will adequately protect the interests of the oversecured Prepetition Lender.

27. The Prepetition Lender will be granted the Adequate Protection Liens on Collateral in and to the same extent, validity and priority as existed as of the Petition Date to adequately protect against the diminution in value of the Prepetition Collateral. The Trustee believes that the foregoing form of adequate protection will sufficiently protect the interests of the Prepetition Lender in the Cash Collateral. Accordingly, the adequate protection proposed by the Trustee is fair and reasonable and sufficient to satisfy the requirements of Bankruptcy Code section 363(c).

28. The Prepetition Lender and the United States Trustee consents to the entry of the proposed order attached hereto as Exhibit A.

WHEREFORE, the Trustee respectfully request that the Court enter an order, substantially in the form attached hereto as Exhibit A, (a) authorizing the Trustee to use Cash Collateral and (b) authorizing the Trustee to provide adequate protection for the use of Cash Collateral, and (d) granting such other relief as is just and proper.

Respcctfully submitted,

/S/ Kevin M. Smith

By: Kevin M. Smith (P48976)

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Dated: November 18, 2016