

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
NORTHERN DIVISION**

In re CH KIM, LLC

Debtor.

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Case No. 16-81749-CRJ-11

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**MOTION (I) FOR RELIEF FROM THE AUTOMATIC STAY, OR IN THE  
ALTERNATIVE, FOR ADEQUATE PROTECTION; AND (II) TO PROHIBIT USE OF  
CASH COLLATERAL, OR IN THE ALTERNATIVE, FOR ADEQUATE PROTECTION**

ReadyCap Lending, LLC ("ReadyCap"), as a secured creditor and party-in-interest, moves this Court (I) pursuant to 11 U.S.C. § 362(d) for relief from the automatic stay such as terminating, annulling, modifying or otherwise conditioning the stay, so that ReadyCap may take any and all action necessary and appropriate to preserve, protect and foreclose its interest in and to certain personal property owned by the debtor in this case; and (II) to pursuant to 11 U.S.C. § 363(c)(2) to prohibit the Debtor from using ReadyCap's cash collateral absent adequate protection. This motion is supported by the moving papers, the Declaration of Laura Trani and the exhibits attached thereto (the "Trani Declaration"), attached hereto as **Exhibit 1**. In support of this Motion, ReadyCap states as follows:

**Procedural Posture and Jurisdiction**

1. On June 16, 2016 (the "Petition Date"), CH Kim, LLC (the "Debtor") filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code, § 101, *et seq.* (the "Bankruptcy Code").
2. The Debtor continues to operate its business as a Debtor-in-Possession

3. ReadyCap brings this motion (the "Motion") pursuant to Section 362(d) of the Bankruptcy Code, Rule 4001(a)(1) of the Federal Rules of Bankruptcy Procedure, and Rule 4001-1 of the Local Rules of the Bankruptcy Court for the Northern District of Alabama.

4. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This matter is a core proceeding under 28 U.S.C. § 157(b)(2).

5. Venue of this matter is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

### **Facts**

6. On December 28, 2007, Debtor executed and delivered to CIT Small Business Lending Corporation ("Original Lender") that certain Note in the original principal amount of \$875,000.00 (the "Note"). *See* Trani Declaration at ¶ 5. Pursuant to the terms of the Note, Debtor agreed to repay the principal amount of the Note in monthly installments of \$11,443.00, consisting of principal and interest calculated at a variable rate equal to the Prime Rate (defined therein) plus 2.5% (the "Loan"). *Id.* True and correct copies of the Note and Allonge attached thereto are attached to the Trani Declaration as Exhibit A.

7. As security for the Loan, Debtor executed that certain Security Agreement dated December 28, 2007 in favor of Original Lender (the "Security Agreement"), pursuant to which Debtor granted Original Lender a security interest in and lien on certain collateral more particularly described therein, including all of Debtor's equipment, fixtures, machinery, furniture, inventory, accounts, instruments, chattel paper, general intangibles, and documents (collectively, the "Collateral"). The Collateral includes certain of Debtor's cash (the "Cash") *See* Trani Declaration at ¶ 6. A true and correct copy of the Security Agreement is attached to the Trani Declaration as Exhibit B.

8. Pursuant to the Allonge attached to the Note, the Note and all rights thereunder were endorsed, transferred and assigned from Original Lender to ReadyCap. *See* Trani Declaration at ¶ 7.

9. ReadyCap is the owner and holder of the Loan Documents and it is entitled to enforce the same. *See* Trani Declaration at ¶ 8.

10. ReadyCap's interest in the Collateral is perfected through that certain UCC-1 Financing Statement filed with the Alabama Secretary of State on October 21, 2013, as filing number B 13-0476665 FS (as amended, continued and assigned from time to time, the "Financing Statement"). *See* Trani Declaration at ¶ 9. A true and correct copy of the Financing Statement is attached to the Trani Declaration as Exhibit C.

11. The Note and Allonge attached thereto, Security Agreement, Financing Statement, and all other documents executed in connection with the Loan are referred to herein, collectively, as the "Loan Documents."

12. The Debtor defaulted on its payment obligations under the Note, which resulted in ReadyCap commencing a lawsuit against the Debtor in the Circuit Court of Limestone County, Alabama, designated Case Number 2016-900086 (the "State Court Litigation").

13. ReadyCap filed a motion for summary judgment in the State Court Litigation, which precipitated Debtor's filing of this bankruptcy case.

14. As of the Petition Date, the outstanding indebtedness due under the Note was \$546,993.92, as set forth in ReadyCap's Proof of Claim filed in this case.

15. The value of the Collateral is substantially less than the amounts owed to ReadyCap under the Note. *See* Trani Declaration at ¶ 12.

16. Debtor has not made any payments to ReadyCap since the Petition Date. *See* Trani Declaration at ¶ 13.

### Law and Argument

#### **I. The Debtor Should Be Prohibited From Using ReadyCap's Cash or Compelled To Provide Adequate Protection to ReadyCap.**

Section 363(c)(2) of the Bankruptcy Code states that the Debtor may not use, sell or lease cash collateral unless:

- (A) each entity that has an interest in the cash collateral consents; or
- (B) the court, after notice and hearing, authorizes such use in accordance with the provisions [of Section 363 of the Bankruptcy Code].

11 U.S.C. § 363(c)(2). Cash collateral includes "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 property . . . ." 11 U.S.C. §363(a). Section 363 does not require that a creditor actually own the property for it to constitute cash collateral; "the section expressly defines cash collateral as property in which a creditor has an interest, including a valid security interest." *In re Foxcroft Square Co.*, 178 B.R. 659, 664 (E.D. Pa. 1995). A Debtor's use of cash collateral, "absent adequate protection, would clearly cause a decrease in the value of that creditor's property in which the debtor had an interest, and would constitute an improper taking of the secured creditor's collateral." *In re 680 Fifth Avenue Assocs.*, 154 B.R. 38, 43 (Bankr. S.D.N.Y. 1993); *see also In re Sunnymeade Shopping Ctr. Co.*, 178 B.R. 809, 814 (9th Cir. B.A.P. 1995) ("A court's authorization for use of cash collateral must adequately protect the creditor's interest in that collateral.").

Section 363 further states that the Court "*shall* prohibit or condition such use [of cash collateral] . . . as is necessary to provide adequate protection of such interest." 11 U.S.C. §

363(e) (emphasis added). Because cash collateral, once spent, is impossible to recover, the Bankruptcy Code strictly conditions a debtor's use of cash collateral upon the secured creditor receiving adequate protection of its interest in such collateral. The requirement of adequate protection under section 363(e) is mandatory, and if the adequate protection cannot be provided, then the debtor's use of the cash collateral cannot be allowed. *See e.g., Martin v. Commodity Credit Corp.*, 761 F.2d 472, 475 (8th Cir. 1985) (citing 11 U.S.C. § 363(e)).

ReadyCap is entitled to adequate protection of its interests in the Cash and Collateral pursuant to Sections 361 and 363 of the Bankruptcy Code. ReadyCap has fully perfected, first priority security interests in the Collateral, which includes personal property such as the Cash, accounts, inventory, equipment, and cash proceeds. By its very nature, this type of collateral diminishes in value as it ages and, especially, as the Debtor utilizes it in the operation of their business. Moreover, since ReadyCap already has fully perfected, first priority security interests in the Collateral, a replacement lien on ReadyCap's interest in the Collateral without any cash payments does not provide adequate protection of ReadyCap's interest. *See In re Buttermilk Town Center, LLC*, 442 B.R. 558 (6th Cir. B.A.P. 2010) (holding that replacement lien in collateral alone does not adequately protect creditor where creditor already has security interest in collateral); *cf. In re Waste Conversion Techs.*, 205 B.R. 1004 (D. Conn. 1997) (holding that unperfected lien on cash collateral did not provide adequate protection of creditor's interest). The Debtor bears the burden of establishing that ReadyCap's interests in the Cash Collateral will be adequately protected. *See* 11 U.S.C. § 363(p) (debtor has burden of proof on "issue of adequate protection"); *see also In re Philadelphia Consumer Discount Co.*, 37 B.R. 946, 949 (E.D. Pa. 1984) (debtor had the burden to show that its proposed use of collateral would adequately protect the creditor's interest in collateral).

Accordingly, absent a showing that the Debtor can provide ReadyCap with adequate protection, the Debtor should be prohibited from using ReadyCap's cash collateral without its consent.

## **II. ReadyCap Should Be Granted Relief From the Automatic Stay For Cause.**

The Court should grant ReadyCap relief from the automatic stay for cause due to the lack of adequate protection of ReadyCap's Collateral.

Cause exists to grant relief from the automatic stay when a creditor's interest in property is not adequately protected. 11 U.S.C. § 362(d)(1); *In re Continental Airlines, Inc.*, 154 B.R. 176, 180 (Bankr. E.D. Del. 1993). Section 361 of the Bankruptcy Code defines "adequate protection" in the context of a motion for relief from the automatic stay. 11 U.S.C. § 361. Section 361 states that adequate protection may be granted a creditor by three means: (1) by cash payment or periodic cash payment; (2) by additional or replacement lien; or (3) other arrangements which guarantee the creditor "the indubitable equivalent" of its interest in the collateral. *Id.*

ReadyCap's interest in its Collateral is not adequately protected, due in part to the default under the Note and Debtor's failure to make any payments to ReadyCap during this case. *See, e.g., In re Balco Equities, Ltd., Inc.*, 312 B.R. 734, (Bankr. S.D.N.Y. 2004) (citing *In re James River Assocs.*, 148 B.R. 790 (E.D.Va.1992)); *In re Winslow Center Associates*, 32 B.R. 685, 687 (Bankr. E.D. Pa. 1983). Accordingly, relief from the stay should be granted.

Alternatively, if this Court determines not to grant ReadyCap stay relief, ReadyCap moves the Court to require the Debtor to provide ReadyCap with adequate protection for its use of the Collateral. While "adequate protection" may be a flexible concept, this flexibility cannot operate to the detriment of the secured creditor. *See In re Martin*, 761 F.2d 472, 477 (8th Cir.

1985). Regardless of the form that adequate protection takes, a secured creditor is entitled to receive the "indubitable equivalent of such entity's interest in such property." 11 U.S.C. § 361(3); *see also In re Metromedia Fiber Network, Inc.*, 290 B.R. 487, 491 (Bankr. S.D.N.Y. 2003) (adequate protection is mandatory); *In re Leavell*, 56 B.R. 11, 13 (Bankr. S.D. Ill. 1985) (same).

WHEREFORE, PREMISES CONSIDERED, ReadyCap requests this Court to enter an order (I) lifting, terminating, annulling or modifying as requested herein the automatic stay imposed by Section 362(a) of the Bankruptcy Code, to permit ReadyCap to take any and all actions permitted under the Loan Documents and applicable non-bankruptcy law to take possession of, preserve, protect and foreclose its interests in the Collateral; and (II) to prohibit the Debtor from using ReadyCap's cash collateral. Alternatively, ReadyCap requests that the Court condition the further use of ReadyCap's Collateral and Cash on such terms and conditions as will provide adequate protection to ReadyCap. ReadyCap further requests such other, different or additional relief as to which it may be entitled.

Respectfully Submitted,

/s/ Matthew M. Cahill  
Matthew M. Cahill (CAH001)  
Attorneys for ReadyCap Lending, LLC

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 30, 2016, a copy of the above and foregoing paper has been served upon the following electronically through the court's CM/ECF system where indicated, or by placing a copy of same in the U.S. Mail, first-class postage prepaid and properly addressed to:

Service by U.S. Mail:

*Debtor*  
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