

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF PUERTO RICO**

IN RE:

E. MENDOZA & CO., INC.

Debtor

CASE NO.: 16-06661 (ESL)

CHAPTER 11

**MOTION TO PROHIBIT THE USE OF CASH COLLATERAL**

TO THE HONORABLE COURT:

COMES NOW secured creditor Condado 2, LLC (hereinafter "Condado 2"), through its undersigned counsel, and respectfully states and prays as follows:

Introduction

On August 22, 2016, the Debtor filed a voluntary petition for relief under 11 U.S.C. Chapter 11 (the "Bankruptcy Petition"). See, Docket No. 1. Condado 2 is a secured creditor in this case, having a mortgage over the properties described below located in Puerto Rico. These properties generate rent proceeds, which are also pledged in favor of Condado 2 and constitute cash collateral under Section 363 of the Bankruptcy Code. The Debtor has not sought the authorization of the Court to use Condado 2's cash collateral nor has it proffered any adequate protection whatsoever. Condado 2 has not consented to such use. Hence, Condado 2 moves the Court to prohibit the use of its cash collateral.

Factual and Procedural Background

On September 15, 2008, prior to the filing of the instant Bankruptcy Petition, Firstbank Puerto Rico ("Firstbank") extended to Eduardo Mendoza Vidal and his wife, Marta Fernández Torres, certain credit facilities in the principal amount of \$3,110,000.00 (the "Term Loan Agreement"), whereby the following real estate properties, described in the Spanish language were mortgaged:

- A. RUSTICA: Radicada en el Barrio Caimital Alto del término municipal de Aguadilla, Puerto Rico, con una cabida superficial de 1,417.20 metros cuadrados. En lindes por el NORTE, con carretera estatal #2; por el SUR,

con Gerardo Rodríguez; por el ESTE, con Gilberto Grajales y por el OESTE, con Tomas Arce.

Lot no. 6,173 registered at page 189 of volume 133 of Aguadilla, Property Registry of Aguadilla. ("*Property A*").

- B. RUSTICA: Parcela de terreno ubicado en el barrio Minillas de Bayamón, Puerto Rico, con una cabida superficial de 1.2314 cuerdas. En lindes por el NORTE, y en el ESTE, con la finca de donde se segrega, propiedad de la compañía de Fomento Industrial, a ser vendida al Municipio de Bayamón; por el SUR, con calle número 5 de la comunidad de la Administración de Programas Sociales del Estado Libre Asociado de Puerto Rico, y por el ESTE, con la carretera Estatal número 174. (No expresa colindancia Oeste). ("*Property B*").

Lot no. 41,587 (segregated from lot 11,944) registered at page 62 of volume 926 of Bayamón Sur, Property Registry of Bayamón, Section II.

- C. URBANA: Solar radicado en la Urbanización Royal Palm Extensión número 2, situado en el barrio Minillas de Bayamón, con el número 44 de la manzana 1F, área del solar 336.13 metros cuadrados. En lindes por el NORTE, con el solar número 11, distancia de trece metros y cincuenta centímetros; por el SUR, con la calle Principal de Lomas Verdes, distancia de trece metros y cincuenta centímetros; por el ESTE, con el solar número 43, distancia de veinticuatro metros y ochenta y un centímetros; y por el OESTE, con el solar número 45, distancia de veinticuatro metros y noventa y nueve centímetros. ("*Property C*").

Lot no. 22,122 (segregated from lot 8,670) registered at page 171 of volume 486 of Bayamón Sur, Property Registry of Bayamón, Section I.

- D. URBANA: Solar marcado con el número 20 del bloque A del plano de inscripción de la Urbanización Reparto Villa Blanca, radicado en el Barrio Bairoa del término municipal de Caguas, Puerto Rico, con un área superficial de 424.92 metros cuadrados. En lindes por el NORTE, en una distancia de 28.765 metros, con el solar número 15 del bloque A del mencionado plano; por el SUR, en una distancia de 28.45 metros, con el solar número 17 del bloque A; por el ESTE, en una distancia de 15.00 metros, con el solar número 38 del bloque A; y por el OESTE, en una distancia de 15.00 metros, con la calle Marginal de la Urbanización Reparto Villa Blanca. Enclava una casa. ("*Property D*").

Lot no. 8,649 (segregated from lot 8,638) registered at page 206 of volume 313 of Caguas, Property Registry of Caguas, Section I.

- E. URBANA: Solar radicado en el número 6 del bloque A del plano de inscripción de la Urbanización Jardines Fagot, radicado en el barrio Machuelo Debajo de Ponce, Puerto Rico, con un área superficial de trescientos setenta metros cuadrados, en colindancias por el NORESTE, con el solar número siete del bloque A, por donde mide veinticinco metros; por el SUROESTE, con el solar número cinco del bloque A por donde mide

veinticinco metros; por el NOROESTE, con la calle número uno, por donde mide catorce metros ochocientos milímetros; y por el SUROESTE, con el solar número treinta y cinco del bloque A, por donde mide catorce metros ochocientos milímetros.

Lot no. 24,495 (segregated from lot 23,460) registered at page 72 of volume 905 of Ponce, Property Registry of Ponce, Section I. ("*Property E*").

Copies of the most recent title studies for the *Properties* were attached to Proof of Claim No. 12 and Proof of Claim No. 13-2 for *Property A* (Claims Register No. 12, part 9, p. 12 and Claims Register No. 13-2, part 10, p. 12); *Property B* (Claims Register No. 12, part 9, pp. 1-3 and Claims Register No. 13-2, part 10, pp. 1-3); *Property C* (Claims Register No. 12, part 9, pp.6-7 and Claims Register No. 13-2, part 10, pp.6-7); *Property D* (Claims Register No. 12, part 9, pp. 8-11 and Claims Register No. 13-2, part 10, pp. 8-11); and *Property E* (Claims Register No. 12, part 9, pp. 4-5 and Claims Register No. 13-2, part 10, pp. 4-5).

*Property A* was mortgaged through *Mortgage Deed No. 93* executed by and between E. Mendoza & Co., Inc., represented by Eduardo Mendoza Vidal, and Banco Popular de Puerto Rico ("BPPR") on August 9, 2006, before Notary Public Feliberto Ramírez Toro (Proof of Claim No. 12, part 3, pp. 1-13, the "*Mortgage Deed No. 93*") and secures a mortgage note in the amount of \$455,000.00 (Proof of Claim No. 12, part 5, pp. 9-10, the "*Mortgage Note A*"), currently endorsed in favor of Condado 2, which was authenticated through affidavit no. 13,276 on that same date before the aforementioned Notary. *Mortgage Deed 93* currently constitutes a first rank mortgage over *Property A* and is registered at page 189 of volume 133, Property Registry of Aguadilla.

*Property B* was mortgaged through *Mortgage Deed No. 60* executed by Eduardo Mendoza Vidal and his wife, Marta Fernández Torres on September 15, 2008, before Notary Public Herman Cestero Rodríguez (Proof of Claim No. 12, part 3, pp. 14-42, the "*Mortgage Deed No. 60*") and secures a mortgage note in the amount of \$2,250,000.00 (Proof of Claim No. 12, part 5, pp. 7-8, the "*Mortgage Note B*"), currently endorsed in favor of Condado 2, which was authenticated through affidavit no. 12,167 on that same date before the aforementioned Notary.

*Mortgage Deed 60* currently constitutes a first rank mortgage over *Property B* and is registered at page 62 of volume 926, Property Registry of Bayamón, Section II.

*Property C* was mortgaged through *Mortgage Deed No. 61* executed by Eduardo Mendoza Vidal and Marta Fernández Torres on September 15, 2008, before Notary Public Herman Cestero Rodríguez (Proof of Claim No. 12, part 3, pp. 43-70, the "*Mortgage Deed No. 61*") and secures a mortgage note in the amount of \$280,000.00 (Proof of Claim No. 12, part 5, pp. 3-4, the "*Mortgage Note C*"), currently endorsed in favor of Condado 2, which was authenticated through affidavit no. 12,168 on that same date before the aforementioned Notary. *Mortgage Deed 61* currently constitutes a first rank mortgage over *Property C* and is registered at page 171 of volume 486, Property Registry of Bayamón, Section I.

*Property D* was mortgaged through *Mortgage Deed No. 149* executed by and between E. Mendoza & Co., Inc, represented by Eduardo Mendoza Vidal, and BPPR on November 7, 2001, before Notary Public Feliberto Ramírez Toro (Proof of Claim No. 12, part 4, pp. 1-14, the "*Mortgage Deed No. 149*") and secures a mortgage note in the amount of \$200,000.00 (Proof of Claim No. 12, part 5, pp. 13-14, the "*Mortgage Note D*"), currently endorsed in favor of Condado 2, which was authenticated through affidavit no. 8,165 on same date before the aforementioned Notary. *Mortgage Deed 149* currently constitutes a voluntary mortgage over *Property D* and is registered at page 206 of volume 313, Property Registry of Caguas, Section I. Further, *Property D* was mortgaged through *Mortgage Deed No. 62* executed by E. Mendoza & Co., Inc., represented by Eduardo Mendoza Vidal on September 15, 2008, before Notary Public Herman Cestero Rodríguez (Proof of Claim No. 12, part 4, pp. 15-42, the "*Mortgage Deed No. 62*") and secures a mortgage note in the amount of \$120,000.00 (Proof of Claim No. 12, part 5, pp. 11-12, the "*Mortgage Note D1*"), currently endorsed in favor of Condado 2, which was authenticated through affidavit no. 12,169 on that same date before the aforementioned Notary. *Mortgage Deed 62* currently constitutes a first rank mortgage over *Property D* and is registered at page 206 of volume 313, Property Registry of Caguas, Section I.

*Property E* was mortgaged through *Mortgage Deed No. 63* executed by Eduardo Mendoza Vidal and his wife, Marta Fernández Torres on November 7, 2001, before Notary Public Feliberto Ramírez Toro (Proof of Claim No. 12, part 4, pp. 43-70, the "*Mortgage Deed No. 63*") and secures a mortgage note in the amount of \$390,000.00 (Proof of Claim No. 12, part 4, pp. 5-6, the "*Mortgage Note E*"), currently endorsed in favor of Condado 2, which was authenticated through affidavit no. 12,170 on same date before the aforementioned Notary. *Mortgage Deed 63* currently constitutes a first rank mortgage over *Property E* and is registered at page 72 of volume 905, Property Registry of Ponce.

On September 15, 2008, Eduardo Mendoza Corporation, represented by Eduardo Mendoza Vidal, and Firstbank executed a Guaranty Agreement authenticated through affidavit no. 12,159 before Notary Public Herman Cestero Rodríguez (Proof of Claim No. 12, part 7, pp. 1-2). On that same date, E.M. T-Shirts Distributors, Inc., represented by Eduardo Mendoza Vidal, and Firstbank executed a Guaranty Agreement authenticated through affidavit no. 12,160 before Notary Public Herman Cestero Rodríguez (Proof of Claim No. 12, part 7, pp. 3-4).

On May 14, 2010, Firstbank extended to E. Mendoza & Co., Inc. a certain commercial loan ("*Contrato de Préstamo*") in the principal amount of \$800,000.00, whereby *Property A, B, C, D* and *E*, described above in the Spanish language were mortgaged. Eduardo Mendoza Vidal and his wife, Marta Fernández Torres appeared in such agreement as guarantors and Eduardo Mendoza Corporation and E.M. T-Shirt Distributors, Inc. as solidary corporate guarantors (Proof of Claim No. 13-2, part 6, pp. 1-33).

On even date, the following documents were executed: (a) *Pledge Agreement* ("*Contrato de Prenda*") between Eduardo Mendoza Vidal and his wife, Marta Fernández Torres, as solidary guarantors of E. Mendoza & Co., Inc., and Firstbank, whereby the solidary guarantors agreed to constitute a lien over the following collateral: (i) *Mortgage Note B* constituted through *Mortgage Deed No. 60*; (ii) *Mortgage Note C* constituted by *Mortgage Deed No. 61*, and (iii) *Mortgage Note E* constituted by *Mortgage Deed No. 63*, authenticated through affidavit no. 5,768 before Notary

Public Antonio A. Hernández Almodóvar (Proof of Claim No. 13-2, part 9, pp. 1-5); (b) *Pledge Agreement* (“Contrato de Prenda”) between E. Mendoza & Co., Inc., represented by Eduardo Mendoza Vidal and Firstbank, whereby E. Mendoza & Co., Inc., agreed to constitute a lien over the following collateral: *Mortgage Note A* constituted through *Mortgage Deed No. 93*; (ii) *Mortgage Note D* constituted by *Mortgage Deed No. 149*, and (iii) *Mortgage Note D1* constituted by *Mortgage Deed No. 62*, authenticated through affidavit no. 5,767 before Notary Public Antonio A. Hernández (Proof of Claim No. 13-2, part 9, pp. 6-9) (c) Transfer Assignment (“Contrato de Cesión”), where Eduardo Mendoza Vidal and his wife, Marta Fernández Torres transferred to Firstbank a Certificate of Deposit number 3180001040 in the amount of \$400,000.00 with 1.75% interests per annum, which expired on April 28, 2011, guaranteeing the payment of any future debt of Eduardo Mendoza Vidal and/or E. Mendoza & Co., Inc., authenticated through affidavit no. 5,769 before Notary Public Antonio A. Hernández Almodóvar (Proof of Claim No. 13-2, part 9, p. 10); (d) Guaranty (“Garantía”) subscribed by Eduardo Mendoza Corporation, authenticated through affidavit no. 5,775 before Notary Public Antonio A. Hernández Almodóvar (Proof of Claim No. 13-2, part 7, pp. 1-3); (d) Guaranty (“Garantía”) subscribed by Eduardo Mendoza Vidal and his wife, Marta Fernández Torres, authenticated through affidavit no. 5,773 before Notary Public Antonio A. Hernández Almodóvar (Proof of Claim No. 13-2, part 7, pp. 4-6); (e) Guaranty (“Garantía”) subscribed by E.M. T-Shirts Distributors, Inc., authenticated through affidavit no. 5,774 before Notary Public Antonio A. Hernández Almodóvar (Proof of Claim No. 13-2, part 7, pp. 7-9); (f) UCC no. 2010003545 filed with the State Department of the Commonwealth of Puerto Rico, subscribed by Eduardo Mendoza Vidal and his wife, Marta Fernández Torres and Firstbank, authenticated through affidavit no. 5,771 before Notary Public Antonio A. Hernández Almodóvar (Proof of Claim No. 13-2, part 8, pp. 1-2); and (g) UCC no. 2010003692 filed with the State Department of the Commonwealth of Puerto Rico, subscribed by Eduardo Mendoza Vidal and his wife, Marta Fernández Torres and Firstbank, authenticated through affidavit no. 5,772 before Notary Public Antonio A. Hernández Almodóvar (Proof of Claim No. 13-2, part 8, pp. 3-4).

The *Properties* generate rental proceeds and/or cash collateral. The rental proceeds of the *Properties*, among other collateral, were assigned through *Mortgage Deed No. 92* (Proof of Claim No. 12, part 3, pp. 9-10 and Proof of Claim No. 13-2, part 3, pp. 9-10); *Mortgage Deed No. 60* (Proof of Claim No. 12, part 3, pp. 15-16 and Proof of Claim No. 13-2, part 3, pp. 15-16); *Mortgage Deed No. 61* (Proof of Claim No. 12, part 3, pp. 44-45 and Proof of Claim No. 13-2, part 3, pp. 44-45); *Mortgage Deed No. 149* (Proof of Claim No. 12, part 4, pp. 9-10 and Proof of Claim No. 13-2, part 4, pp. 9-10); *Mortgage Deed No. 62* (Proof of Claim No. 12, part 4, pp. 15-16 and Proof of Claim No. 13-2, part 4, pp. 15-16); and *Mortgage Deed No. 63* (Proof of Claim No. 12, part 3, pp. 44-45 and Proof of Claim No. 13-2, part 3, pp. 44-45) As of today, Condado 2 has not consented to the Debtor's use of its cash collateral for any purpose whatsoever.

#### Applicable Law and Discussion

##### (A) *Rent Proceeds as Cash Collateral*

When the Debtor filed for bankruptcy, the rent proceeds from the bankruptcy estate's interest in the *Properties* became cash collateral under Section 363(a) of the Bankruptcy Code. "Cash collateral" is defined as follows:

[C]ash, 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 and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging 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.

11 U.S.C. § 363(a).

The aforementioned collateral documents constitute perfected security liens over the Debtor's interest in the rent proceeds generated from the *Properties*. See *In re National Promoters & Servs.*, 499 B.R. 199, 208 (Bankr. D.P.R. 2013) ("Under Section 363(a), rents that are subject to a pre-petition lien are treated as the secured creditor's cash collateral.")

Section 363(c) of the Bankruptcy Code prohibits the Debtor to “use, sell, or lease cash collateral” in the ordinary course of business, unless: (a) the secured creditor consents; or (b) the court authorizes it after notice and a hearing. See 11 U.S.C. § 363(c)(2). In the instant case, because Condado 2 has not consented for the Debtor to use the cash collateral, the court must authorize such use within the confines of the Bankruptcy Code. See 11 U.S.C. § 363(c)(2)(B).

*(B) Adequate Protection*

Section 363(b) of the Bankruptcy Code allows a debtor to use cash collateral other than in the ordinary course of business, subject to objection by the secured creditor under Section 363(e). Section 363(e) provides that when a creditor objects to a debtor’s use of its cash collateral, the bankruptcy court “shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.” 11 U.S.C. § 363(e).

The right to adequate protection arises from the Fifth Amendment’s property interest protections. See In re Panther Mt. Land Dev., LLC, 438 B.R. 169, 189 (Bankr. E.D. Ark. 2010), aff’d 2011 Bankr. LEXIS 1274 (B.A.P. 8<sup>th</sup> Cir. 2011), citing In re Carson, 34 B.R. 502, 505 (D. Kan. 1983); In re Johnson, 90 B.R. 973, 979 (Bankr. D. Minn. 1988). “The purpose of adequate protection is to guard the secured creditor’s interest from a decline in the value of the collateralized property.” In re Panther Mt. Land Dev., LLC, 438 B.R. at 189, citing 11 U.S.C. § 361; In re Anthem, 267 B.R. 867, 871 (Bankr. D. Colo. 2001); U.S. Sav. Ass’n v. Timbers, 484 U.S. 365, 370 (1988).

In exchange for providing protective assurances against a decline in property value, the debtor is allowed to retain the protections provided by the Bankruptcy Code. See U.S. Sav. Ass’n v. Timbers, 484 U.S. at 378. “It is well settled that the debtor bears the burden to demonstrate that a creditor is adequately protected.” In re National Promoters & Servs., 499 B.R. at 208, quoting In re South Side House LLC, 474 B.R. 391, 408 (Bankr. E.D.N.Y. 2012).



“Adequate protection” is “a term of art in bankruptcy practice, defined in 11 U.S.C. § 361 and applied in §§ 362(d) and 363(e); in short, it is a payment, replacement lien, or other relief sufficient to protect the creditor against diminution in the value of his collateral during the bankruptcy.” Bank of N.Y. Trust Co. NA v. Pac. Lumber Co. (In re Scopac), 624 F.3d 274, 278, fn. 1 (5<sup>th</sup> Cir. 2010). Under Sections 362, 363 and 364 of the Bankruptcy Code, a secured lender is entitled to be “adequately protected” from any erosion in the value of its collateral. See United Sav. Ass’n of Texas v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 370 (1988) (“It is common ground that ... a secured creditor’s interest is not adequately protected if the security is depreciating during the Chapter 11 reorganization.”) Also see In re Martin, 761 F.2d 472, 474-77 (8<sup>th</sup> Cir. 1985) (quoting S. Rep. No. 989, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 53) (adequate protection should “as nearly as possible” provide secured lender with bargained-for rights); Resolution Trust Corp. v. Swedeland Dev. Group (In re Swedeland Dev. Group), 16 F.3d 552, 564 (3<sup>rd</sup> Cir. 1994) (same).

“Although ‘adequate protection’ is not defined in the Bankruptcy Code, the provisions in 11 U.S.C. § 361 constitute an illustrative, non-exclusive list of the remedies that may be fashioned by the court to secure the ‘indubitable equivalent’ of the entity’s interest in such property.” In re National Promoters & Servs., 2013 Bankr. LEXIS 4267 at \*5, 2013 WL 5567262 (Bankr. D.P.R. 2013). For instance, adequate protection may be provided by cash payments or additional or replacement liens “to the extent” debtor’s use of the property “results in a decrease of value of such entity’s interest in such property”. 11 U.S.C. § 361(1).

A secured creditor “is entitled to adequate protection of two distinct interests: its mortgage on the property and its right to collect the rents flowing from the property or, at the very least, its security interest in such rents.” In re National Promoters & Servs., 499 B.R. at 208, citing Financial Center Assoc. v. TNE Funding Corp., 140 B.R. 829, 834 (Bankr. E.D.N.Y. 1992). When considering adequate protection for the use of rents, courts have recognized that Section 552(b) of the Bankruptcy Code creates a security interest in post-

petition rental income that is separate and distinct from the creditor's security interest in the property securing the mortgage. See In re National Promoters & Servs., 499 B.R. at 208, citing In re Gramercy Twins Assocs., 187 B.R. 112, 121 (Bankr. S.D.N.Y. 1995).

Section 552(b)(2) of the Bankruptcy Code provides that if a creditor, such as Condado 2, obtained a security interest prior to bankruptcy in rents paid to the Debtor, that security interest extends to post-petition rents to the extent provided in the security agreement.

Condado 2 holds a first priority pre-petition security interest in the cash collateral through duly registered *Mortgage Deed* and the notarized *Assignment Agreement*. Therefore, the post-petition effect of such security interest is governed by Section 552(b)(2) of the Bankruptcy Code, which states in pertinent part:

Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, and notwithstanding section 546(b) of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to amounts paid as rents of such property or the fees, charges, accounts, or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties, then such security interest extends to such rents and such fees, charges, accounts, or other payments acquired by the estate after the commencement of the case to the extent provided in such security agreement, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

11 U.S.C. § 552(b)(2).

Section 552(b)(2) was added to the Bankruptcy Code in 1994 to dispel confusion as to how a security interest in or assignment of revenues, rents, and similar income streams needed to be perfected to protect the rights of the lender or assignee post-bankruptcy. It creates an exception to the general rule, stated in Section 552(a), that property acquired by a debtor after the commencement of the bankruptcy case is not subject to a prepetition security agreement. Pursuant to Section 552(b)(2), a creditor's security interest in rents paid to the debtor survives the debtor's bankruptcy filing and persists, to the full extent provided in the security agreement, as the bankruptcy moves forward.

Some courts have applied a “lien replacement” approach, which assumes that a security interest in rents should not be treated as an independent security interest for purposes of adequate-protection analysis. See e.g. In re Mullen, 172 B.R. 473 (Bankr. D. Mass. 1994). Under the “lien replacement” approach, the secured creditor is treated as having a lien on each month’s rent that is replaced by another lien on the following month’s rent. Thus, even if the debtor is permitted to use the rental-income stream for purposes other than maintaining the value of the real property, under the lien-replacement theory, the secured creditor remains adequately protected by virtue of the ever-renewing lien on future rents. The lien-replacement theory, however, has been harshly criticized in recent years as being inconsistent with the requirements of Section 552(b). See Putnal v. Suntrust Bank (In re Putnal), 489 B.R. 285, 290 (M.D. Ga. 2013) (“the replacement lien theory has by now been generally discredited”). “Most courts recognize that a prepetition security interest in rents is a special kind of collateral that, pursuant to 11 U.S.C. § 552(b), continues in full force and effect after the petition is filed.” Id. As such, the replacement lien theory’s protection has been described as “illusory”. See In re Smithville Crossing, LLC, 2011 Bankr. LEXIS 4605 at \*31, 2011 WL 5909527 at \*10 (Bankr. E.D.N.C. 2011) (“Virtually every case addressing this issue has held that the proffer of a replacement lien on post-petition rents is illusory by virtue of § 552(b) of the Bankruptcy Code”). In other words, a replacement lien simply provides no protection for the very real interest the creditor has in accruing rents. “It is clear from these cases that giving a replacement lien on post-petition rents is not adequate protection or the indubitable equivalent of the post-petition rents.” Id. In re Putnal, *supra*, is a recent case of what appears to be a growing majority of courts holding that a secured creditor’s interest in post-petition rents is entitled to separate and independent adequate protection, even if the creditor’s interest in the rent-producing real property itself is adequately protected.

In In re Builders Group & Dev. Corp., 502 B.R. 95, 122 (Bankr. D.P.R. 2013), the Bankruptcy Court held “the fact that rental income is utilized to pay the operating expenses

of the shopping center by itself does not provide the adequate protection required under 11 U.S.C. § 363 for the security interest regarding the assignment of rents.” Also see In re River Oaks Ltd. Partnership, 166 B.R. 94, 99 (E.D. Mich. 1994) (“The Court does not believe the mere fact that the rental income is used to pay the necessary expenses of operating and maintaining the property or that the property is adequately maintained and not depreciating, in and of itself, provides the adequate protection required under § 363 for the security interest covered by the assignment of rents”). Similarly, in In re Manuel Mediavilla, Inc., Case No. 13-02800 (MCF), Docket No. 155, the Bankruptcy Court denied the debtors’ proffer for adequate protection “disagree[ing] with the debtors’ legal analysis that each month, as the tenants pay their rents, the creditor is obtaining a replacement lien” and that “the constant stream of rental income and the payments of real estate taxes, insurance, and other operating expenses are sufficient for adequate protection”. The Mediavilla court also weighed that the “debtors ha[d] not justified how all their personal expenses benefit the value of the collateral and the estate, especially certain living expenses (e.g., housekeeping for \$500 a month), which are unreasonable” (Case No. 13-02800 Docket No. 155).

In the instant case, the Debtor has not even alleged nor met its burden to “demonstrate that [Condado 2] is adequately protected”. In re National Promoters & Servs., 499 B.R. at 208, quoting In re South Side House LLC, 474 B.R. at 408.

#### Conclusion

The Debtor has not requested authorization to use Condado 2’s cash collateral and Condado 2 has not consented to such use. Hence, the Debtor has not alleged nor met its burden to demonstrate that Condado 2 is adequately protected.

#### Prayer for Relief

WHEREFORE, Condado 2 respectfully prays the Court to: (a) enter an order prohibiting the use of cash collateral; and (b) grant any other remedy that is fair and equitable.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, on this 31<sup>st</sup> day of October, 2016.

Objection Language - PR LBR 9013-1(c)(1)

Within fourteen (14) days after service as evidenced by the certification, and an additional three (3) days pursuant to Fed. R. Bank. P. 9006(f) if you were served by mail, any party against whom this paper has been served, or any other party to the action who objects to the relief sought herein, shall serve and file an objection or other appropriate response to this paper with the clerk's office of the United States Bankruptcy Court for the District of Puerto Rico. If no objection or other response is filed within the time allowed herein, the paper will be deemed unopposed and may be granted unless: (i) the requested relief is forbidden by law; (ii) the requested relief is against public policy; or (iii) in the opinion of the court, the interest of justice requires otherwise.

Certificate of Service

We hereby certify on this same date, we electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participants in this case.

**Ferraiuoli** LLC

Attorneys for Condado 2  
PO Box 195168  
San Juan, PR 00919-5168  
Tel.: (787) 766-7000  
Fax: (787) 766-7001

/s/ Sonia E. Colón

Sonia E. Colón  
USDC-PR No. 213809  
[scolon@ferraiuoli.com](mailto:scolon@ferraiuoli.com)

/s/ Gustavo A. Chico-Barris

Gustavo A. Chico-Barris  
USDC-PR No. 224205  
[gchico@ferraiuoli.com](mailto:gchico@ferraiuoli.com)

/s/ Camille N. Somoza

Camille N. Somoza  
USDC-PR No. 302908  
[csomoza@ferraiuoli.com](mailto:csomoza@ferraiuoli.com)