

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

In re:

EMPRESAS PLAYA JOYUDA, INC.,

Debtor(s).

Case No. 15-09594 (EAG)

Chapter 11

**MOTION FOR ENTRY OF ORDER PROHIBITING THE USE OF TRIANGLE'S CASH
COLLATERAL AND FOR ADEQUATE PROTECTION**

COMES NOW secured creditor Triangle REO 2, Corp. ("Triangle"), through its undersigned legal counsel, and respectfully submits this *Motion for Entry of Order Prohibiting the Use of Triangle's Cash Collateral and for Adequate Protection* (the "Motion").

PROCEDURAL HISTORY

1. The debtor, Empresas Playa Joyuda, Inc. (the "Debtor") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code (the "Code") on December 1, 2015 (the "Petition Date"). See, Docket No. 1. The Debtor operates a resort by the name of Hotel Perichi's located in Cabo Rojo, Puerto Rico.

2. Prior to the Petition Date, the Debtor entered into several loans with Banco Popular de Puerto Rico (today, Triangle REO 2) (the "Loans"). See Proof of Claim 4-1.

3. The Loans are evidenced by judgments and certain loan documents executed pre-petition (collectively, the "Loan Documents"). See Proof of Claim 4-1, and attached Exhibits 1 & 2.

4. The Loans are secured by, among other things, certain real properties both located in Miradero Ward in the Municipality of Cabo Rojo (Property 7,158 and 7,159) (the "Real Estate Collateral"). See Proof of Claim 4-1 and attached Exhibits 1 & 2.

5. The Debtor generates rents by renting hotel rooms within the Real Estate Collateral.

6. As part of the Loan Documents and Collateral for the Loans, the Debtor granted to Triangle a lien over, among others, all of its pre and post-petition rents and revenue generated by the Real Estate Collateral (the “Cash Collateral”). See, **Exhibit III** of Proof of Claim 4-1 at pages 15 & 27; see also **Exhibit IV** of Proof of Claim 4-1 at 2-3, 14, and 28; see also Exhibit 1 at 7; see also Exhibit 2 at 9-10.

7. As of the Petition Date, Triangle is the holder of a valid, perfected, secured claim in the amount of \$2,448,105.33, which claim is afforded *prima facie* validity pursuant to Fed. R. Bankr. P. 3001(f). See, Proof of Claim No. 4-1.

8. While Triangle has engaged in good faith efforts with the Debtor to attempt to reach an agreement pursuant to which Triangle may provide its consent for the use of its Cash Collateral and pave the way towards the potential confirmation of a consensual plan, to this date, and notwithstanding Triangle’s best efforts, the parties have not been able to reach an agreement.

9. As of this date, the Debtor has not requested an order authorizing the use of any Cash Collateral. Moreover, the Debtor has not requested or obtained Triangle’s consent to use any of the Cash Collateral.

10. Notwithstanding the clear provisions of section 363 of the Code, as shown by the Monthly Operating Reports filed in this case (the “MORs”) (Dockets No. 37, 38, 48, 49, 52, and 53), it appears that the Debtor has used, without any authorization, Triangle’s Cash Collateral since the Petition Date.

11. Accordingly, Triangle is forced to file this Motion.

RELIEF REQUESTED AND BASIS THEREIN

12. For the reasons stated below, Triangle requests that the Court prohibit any and all use of the Cash Collateral, and direct the Debtor to deliver the Cash Collateral to Triangle.

A) Extent and Validity of Cash Collateral

13. The Cash Collateral constitutes “cash collateral” as defined in 11 U.S.C. § 363(a) of the Bankruptcy Code, which defines “cash collateral” as:

[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).

14. As noted above, Triangle has a first priority security interest in the Cash Collateral. The post-petition effect of Triangle’s security interest is governed by Section 552(b) of the Bankruptcy Code, which states:

(1) Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 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 **proceeds, products, offspring or profits of such property, then such security interest extends to such proceeds, products, offspring, or profits** by the estate after the commencement of the case to the extent provided in such security agreement and by applicable non-bankruptcy law, 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)(1) (Emphasis supplied).

15. Notwithstanding this, and given that Triangle's security interest over the Cash Collateral rents stems from a pre-petition mortgage deed over the Real Estate Collateral, which document specifically provides that the mortgage extends to the rents and proceeds of the Real Estate Collateral secured by such deed (See, Exhibit III of Proof of Claim 4-1 at pages 15 & 27; see also, Exhibit IV of Proof of Claim 4-1 at 2-3, 14, and 28; see also Exhibit 1 at 7; see also Exhibit 2 at 9-10), Triangle's lien also extends to the post-petition rent generated by such property pursuant to section 552(b)(2) of the Bankruptcy Code, which states, at its pertinent parts, that:

...[I]f 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 USCS § 552(b)(2) (Emphasis supplied). See also, In re Manuel Mediavilla, Inc., 505 B.R. 94, 110 (Bankr. D.P.R. 2013), In re National Promoters & Services, 499 B.R. 192, 207-08 (Bankr.D.P.R.2013) and In re Builders Grp. & Dev. Corp., 502 B.R. 95, 122 (Bankr. D.P.R. 2013).

16. The Real Estate Collateral is currently generating rental revenue of, at least, \$36,010.97 (December, 2015), \$25,412.00 (January, 2016), \$37,360.00 (February, 2016), \$43,219.00 (March, 2016), \$37,756.00 (April, 2016), \$37,734.00 (May 2016) a month, which revenue is Cash Collateral securing the Debtor's obligation with Triangle. See, Dockets No. 37, 38, 48, 49, 52, and 53.

17. Based on the foregoing, the post-petition rents for the use or occupancy of the rooms generated by the Real Estate Collateral constitute part of Triangle's Cash Collateral in accordance with section 552(b)(2) of the Bankruptcy Code, in light of the fact that the mortgage described above was voluntarily created between the parties pre-petition, the mortgage was effectively perfected and registered pre-petition, as well as the fact that said security interests extends to the Real Estate Collateral's post-petition rents for the use or occupancy of the rooms generated by the operations of the resort located at the Real Estate Collateral. Mediavilla, Builders and National Promoters, *supra*.

18. Triangle also has a valid and perfected security interest over such pre-petition Cash Collateral pursuant to Puerto Rico law, which expressly provides for the creation of a security interest in rents and cash collateral generated by real estate through the mortgage deed securing such real estate. See, Id.; Article 162 of the Puerto Rico Mortgage Law (Laws of P.R. Ann., Tit. 30 § 2558).

19. Accordingly, Triangle possesses a valid lien over all of the Cash Collateral for which Debtor has not obtained prior Court approval for its use, has not obtained Triangle's consent for its continued use, nor has provided adequate protection to Triangle pursuant to sections 361 and 363 of the Bankruptcy Code. 11 U.S.C. §§ 361 and 363.

B) The Court Should Prohibit the Use of Any Cash Collateral

20. Generally, a debtor in possession, after notice and a hearing, may use, sell, or lease property of the estate. 11 U.S.C. § 363(b). However, pursuant to section 363 of the Bankruptcy Code, a debtor-in-possession may not use, sell, or lease cash collateral unless each entity that has an interest in such cash collateral consents, or the court, after notice and

a hearing, authorizes such use, sale, or lease in accordance with the provisions of that section. 11 U.S.C. § 363(c)(2).

21. Triangle has not consented and does not consent to the Debtor's use of its Cash Collateral. Notwithstanding this, the Debtor has proceeded to use such Cash Collateral without seeking prior authorization from this Court. See, Dockets No. 37, 38, 48, 49, 52, and 53. This improper conduct alone is basis for denying any request for use of Cash Collateral that Debtor may file. See e.g., In re Williams, 61 B.R. 567, 575 (Bankr. N.D. Tex. 1986).

22. The Debtor should not be rewarded for violating the law. Marathon Petroleum Co., LLC v. Cohen (In re Delco Oil, Inc.), 599 F.3d 1255, 1257 (11th Cir. 2010) (holding unauthorized use of cash collateral violates section 363(c)(2) of the Bankruptcy Code and constitutes an avoidable transfer under section 549 of the Bankruptcy Code). Specifically,

The Bankruptcy Code could not be more explicit as to the duty imposed upon a debtor-in-possession to account for a creditor's cash collateral. A debtor-in-possession is absolutely prohibited from using cash collateral unless it obtains the consent of the affected secured creditor or an authorization from the bankruptcy court. In the absence of such consent or authorization, a debtor-in-possession is under an absolute obligation to segregate and to account for all such cash collateral. These principles are not subject to dispute.

In re Four Seasons, 263 B.R. 764, 768-769 (Bankr. E.D. Tex. 2001). (citations omitted).

23. Indeed, sanctions may be imposed against those responsible for the unapproved use of cash collateral. Several courts have endorsed this interpretation. See Midwest Properties No. Two v. Big Hill Inv. Co., 93 B.R. 357, 362 (N.D. Tex. 1988); In re AG Service Centers, L.C., 239 B.R. 545, 552 (Bankr. W.D. Mo. 1999). In re Mr. Gatti's, Inc., 164 B.R. 929, 942 (Bankr. W.D. Tex. 1994); In re Placid Oil Co., 80 B.R. 824, 831 (Bankr. N.D. Tex. 1987); In re Etch-Art, Inc., 48 B.R. 143, 146 (Bankr. D.R.I. 1985); Kelvin v. Avon Printing Co. Inc., 72 F. 3d 129 (6th Cir. 1995), available at 1995 WL 734481.

24. Triangle therefore requests that the Debtor be ordered to immediately cease any and all use of the Cash Collateral, and to turn over all future Cash Collateral to Triangle.

C) Lack of Adequate Protection to Warrant the Use of Triangle's Cash Collateral:

25. A party with an interest in cash collateral is entitled to adequate protection of that interest pursuant to sections 361 and 363(e) of the Bankruptcy Code. Section 363(e) states that "the court, with or without a hearing, 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).

26. Pursuant to section 363(e) of the Code, any authorized use of the Cash Collateral must be conditioned upon the Debtor's provision to Triangle of adequate protection for its interest in the Cash Collateral.

27. The Debtor has failed to provide Triangle with adequate protection. Thus, Triangle is justifiably concerned that, unless explicitly and clearly prohibited by the Court, the Debtor will continue to use its Cash Collateral.

28. Under these set of factors, the Court should not allow the use of Triangle's Cash Collateral, and accordingly requests adequate protection as required by 11 U.S.C. § 361 by:

- (a) Directing the Debtor to deliver to Triangle the Cash Collateral that is in the possession, custody or control of the Debtor (or any of the Debtor's insiders as such term is defined in 11 U.S.C. § 101), whether now existing or hereafter created, within the later of: (i) five days; or (ii) five days after receipt;
- (b) Directing the Debtor to account for all Cash Collateral received by or for the benefit of the Debtor since the Petition Date, without prejudice to Debtor's compliance with other reporting obligations under the Bankruptcy Code and Rules; and
- (c) Directing the Debtor to provide Triangle full access to the Debtor's books and records, including all electronic records on any on any computers used by or for Debtor, to make electronic copies,

photocopies or abstracts of the Debtor's business records relating to the Cash Collateral.

CONCLUSION

The Debtor has no right to use the Cash Collateral, and all such Cash Collateral should be forthwith turned over to Triangle. As previously stated, the Cash Collateral is property in which Triangle has a security interest and Debtor cannot provide sufficient adequate protection to Triangle for the use of said Cash Collateral. The circumstances described above further underscore Triangle's need for an immediate order prohibiting Debtor's use of any Cash Collateral until it obtains Triangle's consent.

WHEREFORE, Triangle requests that the Court prohibit any use of the Cash Collateral and, in addition to such prohibition, that the Court grant Triangle adequate protection as required by 11 U.S.C. § 361 by:

- a. granting a first priority replacement lien on all of the Debtor's post-petition assets;
- b. requiring an accounting of all Cash Collateral received by or for the benefit of the Debtor since the Petition Date;
- c. directing the Debtor to provide Triangle full access to the books and records of the Debtor, including all electronic records on any computers used by or for the benefit of the Debtor, to make electronic copies, photocopies or abstracts of the business records of the Debtor;
- d. requiring that any of Triangle's Cash Collateral or property that is in the possession, custody, or control of the Debtor or any of the insiders of the Debtor (as such term is defined in 11 U.S.C. § 101) be turned over to Triangle, whether now existing or hereafter created, within the later of: (i) five days from date hereof; or (ii) five days after receipt;
- e. imposing a constructive trust on any Cash Collateral, or proceeds from Triangle's Collateral, if any, that has been diverted to any person or bank account as a result of any diversion of the Debtor's accumulated rents;
- f. prohibiting the Debtor from using any of Triangle's Cash Collateral unless otherwise ordered by this Court;

- g. granting such other relief that this Court finds necessary and just; and
- h. providing that nothing herein shall prejudice the opportunity for, and nothing shall obligate any party to make, further stipulations concerning any matter (including but not limited to future use of Cash Collateral).

WE HEREBY CERTIFY that 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, including, but not limited to the Debtor's counsel and the U.S. Trustee. Copy of this motion will be sent by regular mail upon all parties listed in the Mailing Matrix of the instant bankruptcy proceeding.

NOTICE OF TIME TO RESPOND

If within fourteen (14) days after service as evidenced by this certification, and in addition three (3) days if you were served by mail pursuant to F.R.B.P. 9006(f), any party against whom this paper has been served, or any other party to the action who objects to the relief sought herein, must serve and file an objection or the appropriate response to this paper with the Clerk's office of the U.S. Bankruptcy Court for the District of Puerto Rico. If no objection or other response is filed within the time allowed herein, the Motion 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, (III) in the opinion of the Court the interests of justice requires otherwise.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico this 23rd day of November, 2016.

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