

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
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In re:

Case No.: 17-23003-PGH
Chapter 11

FLORIDA COSMETOGYNECOLOGY, PLLC,

Debtor-in-Possession.

**DEBTOR'S MOTION FOR AUTHORITY TO USE CASH
COLLATERAL FROM FEBRUARY 9, 2018 TO JANUARY 30, 2019**

- Debtor is seeking authorization to use the cash collateral of Merchant Cash and Capital, LLC, d/b/a Bizfi Funding.
- There is no provision for adequate protection as the cash collateral is not depreciating in value through attachment to proceeds acquired after the commencement of the case pursuant to Section 552(b)(1) of the Bankruptcy Code.
- The cash collateral is 9% of Debtor's proceeds and is used to operate its business.
- Debtor is requesting to use all of the cash collateral.
- Debtor has attached a budget, pursuant to the Court's Guidelines for Motion Seeking Authority to Use Cash Collateral and Motion Seeking Approval of Postpetition Financing, as Exhibit "C".
- Debtor has attached a final order, pursuant to the Court's Guidelines for Motion Seeking Authority to Use Cash Collateral and Motion Seeking Approval of Postpetition Financing, as Exhibit "D".

Debtor, Florida Cosmetogynecology, PLLC (the "Debtor"), by and through undersigned

counsel, seeks an entry of an order authorizing the Debtor to use cash collateral¹ of the Debtor's prepetition lender, **Merchant Cash and Capital, LLC, d/b/a Bizfi Funding**, (the "Prepetition Lender"), and, in support thereof, Debtor states as follows:

Jurisdiction and Venue

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 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 basis for relief requested herein are sections 361 and 363 of the Bankruptcy Code, Rule 4001(b)(2) of the Federal Rules of Bankruptcy, Local Rule 4001-2 and 9013-1(F)-(G), and the Court's Guidelines for Motions Seeking Authority to Use Cash Collateral and Motions Seeking Approval of Postpetition Financing.

Factual Background

4. On October 27, 2017, Debtor filed for voluntary relief under Chapter 11 of the Bankruptcy Code (DE 1).
5. On July 26, 2016, Debtor entered into a Merchant Agreement (Revenue Program) (the "Agreement") (Exhibit "A") with Merchant Cash and Capital, LLC, d/b/a Bizfi Funding.
6. The Agreement provided that "Seller [Debtor] hereby authorizes Buyer [Prepetition Lender] and its agents to initiate electronic checks or Automated Clearinghouse (ACH) payments equal to the Purchased Percentage of all deposits made into the Bank Account until the Buyer has received an amount equal to the Purchased Amount."
7. The Purchased Percentage was 9%.
8. The Agreement is secured by UCC Number 201608350051 (the "UCC") (Exhibit "B").

¹ As defined in 11 U.S.C. § 363(a).

9. The UCC covers the following collateral: “the proceeds of each future sale by the Debtor(s) identified on this financing statement as seller(s), whether the proceeds are paid by cash, check, ACH, credit card, debit card, bank card, charge card and/or and other means (collectively the “future sale proceeds”) sold by seller, and purchased by Merchant Cash and Capital, LLC, as buyer, pursuant to that certain merchant agreement...” (the “Cash Collateral”).

10. Debtor’s total outstanding balance on the Agreement is \$23,281.60.

11. On December 22, 2017, the Court entered an *Interim Order Authorizing the Use of Cash Collateral Nunc Pro Tunc to October 27, 2017 and Setting Final Hearing Date for February 9, 2018 at 9:30 a.m.* (DE 37), which authorized the Debtor to use Cash Collateral to February 9, 2018.

12. Debtor now seeks to use Cash Collateral on terms proposed by Debtor, which include no provision for adequate protection payments as Prepetition Lender’s security interest is adequately protected by force of Section 552 of the Bankruptcy Code.

Legal Argument

13. Section 363 of the Bankruptcy Code provides for the use, sale or lease of property in bankruptcy.

14. Pursuant to section 363(c)(2)(B) of the Bankruptcy Code, the Court may authorize the use of cash collateral only if the use accords with other provisions of section 363. *See In re George Ruggiere Chrysler-Plymouth, Inc. v. Ruggiere (In re George Ruggiere Chrysler-Plymouth, Inc.)* 727 F. 2d 1017, 1019 (11th Cir. 1984).

15. The principal determination on authorizing the use of cash collateral is whether “adequate protection”, a term undefined by the Bankruptcy Code, is provided. *Id.*

16. Adequate protection payments are payments that are intended to protect against, and compensate for, a decrease in the value of a creditor's collateral. *See In re Sunacruz Casinos, LLC*, 298 B.R. 833 (Bankr. S.D. Fla. 2003).

Adequate protection is provided to safeguard the creditor against depreciation in the value of its collateral during the reorganization process. If the value of the collateral decreases, the creditor is entitled to cash payments so that the value of its interest in the collateral remains constant. Thus, the amount by which the collateral depreciates is the amount of adequate protection to which the secured creditor is entitled.

First Fed. Bank v. Weinstein (In re Weinstein), 227 B.R. 284, 296 (9th Cir. BAP 1998) (citations omitted).

17. **In the instant case, Prepetition Lender's collateral is not depreciating in value as Prepetition Lender has a security interest in Debtor's future sale proceeds.**

18. The security agreement between Debtor and Prepetition Lender is an agreement extends to property Debtor has and will acquire after the commencement of the case.

19. Pursuant to Section 552(b)(1) of the Bankruptcy Code:

[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 proceeds, products, offspring, or profits of such property, then such security interest extends to such proceeds, products, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

20. Prepetition Lender's security interest automatically attaches by force of Section 552(b)(1) of the Bankruptcy Code. *See In re Barkley 3A Investors, Ltd.*, 175 B.R. 755 (Bankr. D. Kan. 1994).

21. **Prepetition Lender's security interest, therefore, does not require adequate protection payments to protect against a decrease in the value of the collateral.**

22. **It is crucial that Debtor maintains access to the Cash Collateral to continue to operate its business in the chapter 11 case.**

23. Debtor requests access to all of the Cash Collateral to continue to operate.

WHEREFORE, Debtor Florida Cosmetogynecology, PLLC, requests this Court enter an order (a) authorizing the Debtor to use Cash Collateral from February 9, 2018 to January 30, 2019 and (b) for any further relief this Court deems appropriate.

Dated: February 2, 2018

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