

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 17-10703-BKC-LMI
Chapter 11 Proceeding

IN RE:

MIAMI NEUROLOGICAL
INSTITUTE, LLC

Debtor.

**DEBTOR'S EMERGENCY MOTION FOR ORDER (A)
AUTHORIZING THE DEBTOR (1) TO USE CASH COLLATERAL
ON AN INTERIM BASIS PURSUANT TO 11 U.S.C. §363, AND (2) TO
PROVIDE ADEQUATE PROTECTION IN CONNECTION
THEREWITH PURSUANT TO 11 U.S.C. §361, AND (B) SETTING A
FINAL HEARING PURSUANT TO BANKRUPTCY RULE 4001**

The Debtor seeks to continue to operate its business, to preserve the value of its estate, and to facilitate a successful reorganization. Without the immediate authorization to use cash collateral, the Debtor will not be able to meet payroll obligations or to acquire materials and services for its day-to-day operations. City National Bank of Florida has filed an Emergency Motion to Prohibit the Use of Case Collateral, which is scheduled to be heard on January 31, 2017, at 2 pm. The Debtor seeks to have this motion heard at that time.

MIAMI NEUROLOGICAL INSTITUTE, LLC, as debtor and debtor-in-possession ("MNI" or "Debtor"), respectfully requests, pursuant to sections 361, 362, and 363 of the Bankruptcy Code, 11 U.S.C. §§101 *et. seq.* (the "Bankruptcy Code"), and Federal Rules of Bankruptcy Procedure 4001(b) and 9014 (the "Bankruptcy Rules"), and Local Rules 9013-1(G) and 9075-1, entry of an order of the Court authorizing the use of cash, including cash collateral in which City National Bank of Florida ("Lender") has an interest and the granting of adequate protection, and respectfully represents the following:

Jurisdiction

1. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Venue is proper in this District pursuant to 28 U.S.C. § 108.

Background

2. On January 23, 2017, the Debtor filed its voluntary petition for relief under Chapter 11, Title II, United States Code (the “Petition Date”).

3. The Debtor is operating its business and managing its affairs as debtor and debtor-in-possession. 11 U.S.C. §§ 1107(a) and 1108.

4. The Debtor is engaged in the ownership and operation of neurological and spine surgery centers located in Miami-Dade County, Florida.

5. By this Motion the Debtor seeks the entry of an interim Order (the “Interim Order”) authorizing, on an emergency and limited basis, use of “Cash Collateral” (as that term is defined in section 363(a) of the Bankruptcy Code).

6. Prior to the instant filing, the Debtor began a relationship with Lender, where Lender provided loans to the Debtor. During the course of this relationship, the Debtor executed certain promissory notes in favor of Lender, as well as executed a security agreement securing said promissory notes. Specifically, the Debtor executed the following promissory notes in favor of Lender:

- a. Note #80000009780 Balance \$325,392.34 Term Loan September 8, 2014
- b. Note #80000009785 Balance \$575,000.00 Line of Credit September 8, 2014
- c. Note #80000009790 Balance \$407,492.71 Term Loan September 8, 2014
- d. Note #800000017480 Balance \$318,493.86 Term Loan July 6, 2014.

7. In total, the Debtor executed promissory notes in favor of Lender totaling \$1,900,000.00. Finally, the Debtor executed a Security Agreement which provided Lender a lien on all of the Debtor's assets as collateral for the indebtedness. On September 15, 2014, Lender perfected its security interest in the Debtor's assets by recording a UCC-1 with the Florida Secretary of State.

8. Any cash or cash equivalents, funds or proceeds (the "Cash Collateral") of or from all accounts receivable (collectively, the "Collateral") generated by the Debtor may constitute the cash collateral of the Lender within the meaning of Section 363 of the Bankruptcy Code.

9. The Lender has asserted an interest in Cash Collateral pursuant to the Lender's potential secured claims arising for the prior Chapter 11 bankruptcy filing for the Debtor. The Debtor does not dispute the amount of the indebtedness or validity of the liens held by Lender.

10. An immediate and critical need exists for the Debtor to be permitted access to Cash Collateral to continue its operation.

11. By this Motion the Debtor further seeks a final hearing on this Motion to be held no less than fifteen (15) days from service of a notice of hearing on such final hearing, in accordance with Bankruptcy Rules 4001(b)(2) and (3).

12. The Debtor acknowledges the Lender, is entitled to adequate protection of its security interest in and lien on the Cash Collateral generated from the use and/or sale of the Collateral after the Petition Date in accordance with 11 U.S.C. §§ 361 and 363.

13. In connection therewith and in an abundance of caution, the Debtor seeks the use of Cash Collateral in its operations and it will provide adequate protection to the Lender pursuant to the terms hereof.

14. The Debtor attaches its proposed budget, which includes a balance sheet as well, **as Exhibit “1”**, as well as its projected monthly expenditures, **attached as Exhibit “2”**.

15. The Debtor also requests that it be authorized: (i) to exceed any line item on the Budget by an amount equal to ten (10%) percent of each such line item; or (ii) to exceed any line item by more than ten (10%) percent so long as the total of all amounts in excess of all line items for the Budget do not exceed ten (10%) percent in the aggregate of the total Budget.

APPLICABLE AUTHORITY FOR RELIEF REQUESTED

17. Pursuant to the terms hereof, the Debtor shall provide and will provide adequate protection to the Lender as contemplated and required by sections 361, 363(c)(2)(B) and 363(e), respectively, and hereby seeks the Court’s approval thereof. The Bankruptcy Code does not explicitly define “adequate protection” but does provide a non-exclusive list of the means by which a debtor may provide adequate protection, including “other relief” resulting in the “indubitable equivalent” of the secured creditors’ interest in such property. *See* 11 U.S.C. § 361. What constitutes adequate protection must be evaluated on a case-by-case basis. *See In re Swedeland Dev. Group Inc.*, 16 F.3d 552, 564 (3d Cir. 1994) (*citing In re O’Connor*, 808 F.2d 393, 1396-97 (10th Cir. 1987)); *In re Martin*, 761 F.2d 472, 476 (8th Cir. 1985).

18. Adequate protection is meant to ensure that the secured lender receives the value for which it originally bargained. *Swedeland*, 16 F.3d at 564 (citing *O'Connor*, 808 F.2d at 1396) (“the whole purpose of adequate protection for a creditor is to ensure that the creditor receives the value for which he bargained pre bankruptcy”). Courts have noted that the essence of adequate protection is the assurance of the maintenance and continued recoverability of the lien value during the interim between the filing . . . and the confirmation. *In re Arriens*, 25 B.R. 79, 81 (Bankr. D.Or. 1982). The focus of the requirement is to protect a secured creditor from diminution in value during the use period. *See In re Kain*, 86 B.R. 506, 513 (Bankr. W.D. Mich.1988); *In re Becker Indus. Corp.*, 58 B.R. 725, 736 (Bankr. S.D.N.Y. 1986); *In re Ledgmere Land Corp.*, 116 B.R. 338, 343 (Bankr. D. Mass. 1990).

19. The Debtor’s requested use of Cash Collateral and the protections afforded to the Lender herein, including but not limited to the Debtor's payment of the ongoing contractual amounts to Lender, the potential granting of an administrative claim, replacement lien, and reporting, in light of the circumstances, are reasonable, appropriate, and sufficient to satisfy the legal standard of “adequate protection” and will serve to maintain the value of the Lender’s collateral.

20. As stated above, the Debtor proposes that the Lender will be adequately protected by the ongoing contractual payments and the granting of a replacement lien in the assets generated by the use of its cash collateral.

21. However, the Debtor proposes to pay the Lender the ongoing contractual payments pursuant to the executed promissory notes through the conclusion of this case. This would also result in the Lender not only being provide with a replacement lien on all assets as stated above, but the Lender receiving all of the post-petition contractual payments due from Debtor.

22. The Debtor asserts that the replacement lien on these assets, as well as providing the cash above, is sufficient to provide the Lender with adequate protection on its collateral. During this period, the Debtor asserts that it will be able to begin the process of properly liquidate portions of its inventory, while maximizing the value of the business as a going concern.

23. Further, the continued operation of the Debtor's business will preserve its going-concern value, enable the Debtor to capitalize on that value through a liquidation strategy, and ultimately facilitate the Debtor's ability to confirm a Chapter 11 plan. However, as discussed above, if the Debtor is not allowed to use Cash Collateral, it will be unable to operate and will likely shutdown, and the Debtor will lose its clients and deteriorate in value.

24. It is well established that a bankruptcy court, where possible, should resolve issues in favor of preserving the business of the debtor as a going concern.

25. A debtor, attempting to reorganize a business under Chapter 11, clearly has a compelling need to use "cash collateral" in its efforts to rebuild. Without the availability of cash to meet daily operating expenses such as rent, payroll, utilities, etc., the congressional policy favoring rehabilitation over economic failure would be frustrated. *In re George Ruggiere Chrysler-Plymouth, Inc.*, 727 F.2d 1017, 1019 (11th Cir. 1984).

26. Accordingly, courts authorize the use of cash collateral to enhance or preserve the Debtor's going-concern value. For example, in *In re Stein*, 19 B.R. 458 (Bankr. E.D. Pa 1982), the court allowed a debtor to use cash collateral where the secured party was undersecured, finding that the use of cash collateral was necessary to the debtors' continued operations and the creditor's secured position can only be enhanced by the continued operation of the debtors' business. *Id.* at 460; *see also Fed. Nat. Mortgage Ass'n. v. Dacon Bolingbrook Assocs. Ltd. P'ship*, 153 B.R. 204, 214 (N.D. Ill. 1993) (security interest protected to extent debtor reinvested rents in operation and maintenance of the property); *In re Constable Plaza Assoc.*, 125 B.R. 98, 105 (Bankr. S.D.N.Y. 1991) (debtor's reinvestment of rents to maintain and operate office building will serve to preserve or enhance the value of the building which, in turn, will protect the collateral covered by [the] mortgage); *In re Dynaco Corp.*, 162 B.R. 389, 395-96 (Bankr. D.N.H. 1983) (finding that the alternative to the debtor's use of cash collateral, termination of its business, would doom reorganization and any chance to maximize value for all creditors); *In re Karl A. Neise, Inc.*, 16 B.R. 600, 602 (Bankr. S.D. Fla. 1981) (marginally secured creditor adequately protected by lien on postpetition property acquired by debtor, debtor can use cash collateral in the normal operation of their business).

27. As discussed above, the Debtor will use Cash Collateral in the ordinary course of operating its business to, among other things, pay employees, and operating expenses. If the Debtor cannot continue to use Cash Collateral, it will be forced to cease operations, which will severely disrupt the Debtor's entire operations.

28. This cessation would irreparably damage the Debtor's business by causing, among other things, employee attrition, lost revenues, and loss of business reputation. By contrast, granting authority will allow the Debtor to maintain operations and preserve the going concern value of its business which will inure to the benefit of the Lender and all other creditors.

29. If the adequate protection described herein proves inadequate, as determined by the Court after notice and hearing, then to that extent, the Lender will be granted an allowed administrative expense claim having the priority specified in Section 507(b) of the Bankruptcy Code.

30. The Debtor believes that use of Cash Collateral pursuant to the terms and conditions set forth above is fair and reasonable and adequately protects Lender. The combination of: (i) the Debtor's ability to preserve the going concern value of the business with the use of Cash Collateral; (ii) providing the Lender with the other protections set forth herein, including the availability of financial reporting and the payment of the ongoing contractual liabilities due post-petition to Lender; and (iii) granting administrative priority under Section 507(b) of the Bankruptcy Code, adequately protects the Lender's secured positions under § 361(2) and (3). For all of the reasons stated above, this Court's approval of the Debtor's use of Lender's Cash Collateral is proper herein.

31. No trustee or examiner has been appointed in these cases and no official committees have yet been appointed pursuant to Section 1102 of the Bankruptcy Code.

32. Notice of this Motion has been provided to all parties that have filed a Notice of Appearance by CM/ECF, and by U.S. first-class mail to the Debtor's primary secured creditors and 20 largest unsecured creditors.

WHEREFORE, the Debtor respectfully requests that this Court enter an order, in substantially the form attached: (A) authorizing the Debtor (i) to use the Cash Collateral of the Lender pursuant to the terms set forth above and in accordance with the Budget; and, (ii) setting a final hearing hereon fifteen (15) days after the entry of an interim order on this Motion, and for such other and further relief as the Court deems just and proper.

I HEREBY CERTIFY that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this Court set forth in Local Rule 2090-1(A).

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by CM/ECF on the 30th day of January 2017 to:

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By: /s/ Brett A. Elam .
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