

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION - GRAND RAPIDS**

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*In re the Matter of:*

PAMELA F.R.O.G., LLC,

Debtor In Possession.

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Case No. 16-04965  
Chapter 11  
Hon. John T. Gregg  
Filed September 28, 2016

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**EMERGENCY MOTION TO USE CASH COLLATERAL AND  
EXPEDITED HEARING PURSUANT TO 11 U.S.C. § 363 AND TO SET HEARING**

**(Hearing Requested Before October 7, 2016)**

NOW COMES the Debtor by its attorney, Michael S. Mahoney, and requests this Court for an order to use the cash collateral from the payment of receipts/revenues to pay for labor, supplies, taxes, insurance, rent and other ordinary business expenses for the business owned by the Debtor under Chapter 11 of the Bankruptcy Code due to the following circumstances:

1. The Debtor filed for protection from Chapter 11 of the Bankruptcy Code on September 28, 2016.
2. The Debtor has current obligations for the payment of, *inter alia*, Consumers Energy, Board Water and Light, labor, employee wages, taxes, business supplies, insurance, and building maintenance that cannot be met without the use of cash collateral. An itemization is attached.
3. That in order to protect the property of the Debtor and the creditors of this case, it is imperative that the obligations stated above be paid as they become due.

### **JURISDICTION**

4. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

5. The statutory predicate for the relief requested in this Motion is 11 U.S.C. §§ 105 and 363 and Rule 4001(d)(1)(D) of the Federal Rules of Bankruptcy Procedure.

### **BACKGROUND**

6. On September 28, 2016, the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code (the "Petition Date"). Pursuant to Bankruptcy Code §§ 1107(a) and 1108, the Debtor is operating its business and managing its affairs as a debtor in possession. As of the date hereof, no trustee, examiner, or statutory committee has been appointed in this Chapter 11 case.

7. The Debtor is a Michigan Company that holds record title to 2 parcels of commercial real property (the "Property"). The Debtor's primary business involves the operation of a daycare center at the Property.

8. Prior to September 28, 2016, the Debtor has one secured lender with a lien on cash collateral. Specifically, Bayview Fund Acquisitions, IIIb, LLC ("Bayview"), held a first priority mortgage secured by the property and has a foreclosure judgment in the approximate amount of \$554,800.59 (the "Judgment").

9. The Debtor reserves the right to challenge the extent and priority of Bayview's lien on the Property and cash collateral.

10. The Debtor has filed this case to restructure its debt and pursue a traditional Chapter 11 reorganization plan by paying the liquidation value to its unsecured creditors and to service its debt to Bayview over time through a plan of reorganization.

11. The Debtor primarily generates income from daycare operations. At the time of filing, the Debtor had a total balance of approximately \$35,534.40 in its operating account (all collectively, the "Cash Collateral").

### **RELIEF REQUESTED**

12. By this Motion, the Debtor seeks the entry of an Order authorizing its use of cash collateral pursuant to 11 U.S.C. § 363, Federal Rules of Bankruptcy Procedure 4001(b)(2) and Local Rule 4001-3; setting the time for a final hearing and objection deadline for this Motion; and granting such other and further relief as is just and proper.

13. As set forth in the budget, incorporated herein and attached hereto as Exhibit "A", the Debtor requires the use of cash collateral to fund all necessary operating expenses of the Debtor's business.

14. The Debtor will suffer immediate and irreparable harm if it is not authorized to use cash collateral to fund the expenses set forth in the Budget. Absent such authorization, the Debtor will not be able to maintain and protect the Property.

15. The Debtor acknowledges that Bayview may have a lien on the cash collateral in accordance with 11 U.S.C §§ 361 and 363. In connection therewith, the Debtor seeks the use of Cash Collateral in the ordinary course of business.

**CASH COLLATERAL AND THE RELIEF SOUGHT BY THE DEBTOR**

16. The Debtor's use of property of the estate is governed by section 363 of the Bankruptcy Code, which provides that:

If the business of the debtor is authorized to be operated under section ... 1108 ... of this title and unless the court orders otherwise, the [debtor] may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, any may use property of the estate in the ordinary course of business without notice or a hearing. 11 U.S.C. § 363(c)(1).

17. A debtor in possession has all of the rights and powers of a trustee with respect to property of the estate, including the right to use property of the estate in compliance with Section 363 of the Bankruptcy Code. See 11 U.S.C. § 1107(a).

18. When a Chapter 11 debtor-in-possession is authorized to operate its business, it may use property of estate in ordinary course of business, but is prohibited from using cash collateral absent consent of the secured creditor or court authorization. *In re Kahn*, 86 B.R. 506 (Bankr. W.D. Mich. 1988); *In re Westport-Sandpiper Associates Ltd. P'Ship*, 116 B.R. 355 (Bankr. D. Conn. 1990)(debtor may not use cash collateral unless entity that has interest in it consents or debtor proves that interest of the entity is adequately protected).

19. "Cash collateral" is defined by the Bankruptcy Code as, "cash, negotiable instruments, documents of title securities, deposit accounts or other cash equivalents whenever acquired in the which the estate an entity other than the estate have an interest..." 11 U.S.C. § 363(a). Any cash collateral generate by the Debtor may constitute the cash collateral of the alleged secured creditors.

20. Further, the Debtor proposes to use the Cash Collateral in accordance with the terms of the Budget. The Debtor also requests that it be authorized: (i) to exceed any line item on the budget by an amount up 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 aggregate of the total budget.

**APPLICABLE AUTHORITY FOR RELIEF REQUESTED**

21. The Court should enter an order authorizing the continued use of cash collateral because the Debtor is providing the secured creditor with adequate protection.

22. The Bankruptcy Code does not 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.

23. Adequate protection is to be determined on a case-by-case factual analysis. See *Mbank Dallas, N.A. v. O’Connor (In re O’Connor)*, 808 F.2d 1393, 1396 (10th Cir. 1987); *In re Martin*, 761 F.2d 472 (8th Cir. 1985). For example, in *O’Connor*, the court held that “[i]n order to encourage the Debtors’ efforts in the formative period prior to the proposal of a reorganization, the court must be flexible in applying the adequate protection standard.” *O’Connor*, 808 F.2d at 1936 (citations omitted). See also *In re Quality Interiors, Inc.*, 127 B.R. 391 (Bankr. N.D. Ohio 1991) (holding that the granting or a replacement lien provided adequate protection).

24. Adequate protection is meant to ensure that the secured creditors receive the value for which it originally bargained pre-bankruptcy. *Swedeland Dev. Group., Inc.*, 16 F.3d 552, 564 (3rd Cir. 1994) (citing *In re O’Connor*, 808 F.2d 393, 1396-97 (10th Cir. 1987)). Courts have noted that the essence of adequate protection is the assurance of the maintenance and continued responsibility of the lien value during the interim between the filing and the confirmation. *In re Arrienes*, 25 B.R. 79, 81 (Bankr. D. Or. 1982). The purpose of adequate protection requirement is to protect secured creditors from diminution of 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).

25. In the instant case, adequate protection provided to Bayview includes a replacement lien on the Debtor’s receivables and the Debtor’s projected positive cash flow as well as up to \$2,000 in monthly cash payments.

26. Section 361(2) of the Bankruptcy Code expressly provides that the granting of a replacement lien constitutes a means of providing adequate protection. 11 U.S.C. § 361(2). In the instant case, granting Bayview a replacement lien on post-petition collateral to the extent its prepetition collateral is diminished by the Debtor’s use of cash collateral provides bayview with adequate protection. See e.g., *O’Connor*, 808 F.2d 1393; *In re Coody*, 59 B.R. 164, 167 (Bankr. M.D. Ga. 1986); *In re Dixie-Shamrock Oil & Gas, Inc.*, 39 B.R. 115, 118 (Bankr. M.D. Tenn. 1984).

27. The use of Cash Collateral will preserve the Debtor’s going concern value which will inure to the benefit of Bayview and other creditors.

28. The continued operation of the Debtor’s business will preserve its going concern value, enable the Debtor to capitalize on that value through a reorganization strategy, and ultimately facilitate the Debtor’s ability to confirm a Chapter 11 plan. If the Debtor is not

allowed to use cash collateral, it will be unable to operate and potentially cause harm to the property.

29. The Debtor will use the cash collateral during the interim cash collateral period to pay employee wages, utilities, and otherwise maintain and protect the real property.

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

31. A debtor, attempting to reorganize a business under Chapter 11, clearly has a compelling need to use cash collateral in its effort 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).

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 debtor's business. *Id.* at 460; *see also Federal Nat. Mort. v. Dacon Bolingbrook Assoc.*, 153 B.R. 204, 204 (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.*, 156 B.R. 600, 602 (Bankr. S.D. Fla. 1981) (marginally secured creditor adequately protected by lien on postpetition property acquired by debtor, debtors can use cash collateral in the normal operation of their business).

32. If the Debtor cannot use cash collateral, it will be forced to cease operations. By contrast, granting authority will allow the Debtor's to maintain operations and preserve the going concern value of its business which will inure to the benefit of any secured creditors and all other creditors.

33. The Debtor believes that use of Cash Collateral pursuant to the terms and conditions set forth above is fair and reasonable and adequately protects the secured creditor in this case. The combination of: (i) the Debtor's ability to preserve the going concern value of the business with the use of cash collateral; and (ii) providing the Secured Lender with the other protections set forth herein, adequately protects its alleged secured position under § 361(2) and (3). For all of the reasons stated above, this Court's approval of the Debtor's use of cash collateral is proper herein.

34. The Debtor believes that the approval of this Motion is in the best interest of the Debtor, its Creditors and its estate because it will enable the Debtor to (i) continue the orderly operation of its business and avoid an immediate total shutdown of operations; (ii) meet its obligations for necessary ordinary course expenditures, and other operating expenses; and (iii) make payments authorized under other orders entered by this Court, thereby avoiding immediate and irreparable harm to the Debtor's estate.

35. A proposed order granting the relief requested is attached hereto as Exhibit B.

WHEREFORE, the Debtor respectfully requests that this Court enter an order (a) authorizing the Debtor's use of cash collateral in accordance with the attached Budget and provide related adequate protection; (b) granting the replacement liens set forth above in connection with the use thereof; (c) granting such other and further relief that is just and proper.

Respectfully submitted:  
MICHAEL S. MAHONEY, P.C.

Attorney for Debtor in Possession

Dated: September 30, 2016

By: /s/ Michael S. Mahoney  
Michael S. Mahoney, Esq. (P71428)

# Debtor's Exhibit 'A'

# Ordinary Monthly Operating Budget Pamela F.R.O.G., LLC Debtor In Possession

Average monthly income	\$44,356
Chapter 11 Trustee fee	\$ 110
Accounting	\$ 300
Advertising	\$ 100
Meals	\$ 74
Banking fees	\$ 45
Dues	\$ 7.50
License fees	\$ 375
Professional/Attorney fees	\$ 300
Building repairs	\$ 873
Office supplies	\$ 800
Daycare supplies	\$ 2,500
Telephone	\$ 450
Utilities	\$ 2,150
Insurance	\$ 2,400
Maintenance	\$ 1,100
Owner draw	\$ 2,500
Property tax	\$ 2,916
IRS APP	\$ 350
Wages	\$22,490
Payroll taxes	\$ 1,700
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TOTAL	\$41,540



# Debtor's Exhibit 'B'

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION - GRAND RAPIDS**

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PAMELA F.R.O.G., LLC,

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Case No. 16-04965  
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Hon. John T. Gregg  
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**ORDER APPROVING INTERIM USE OF CASH COLLATERAL**

At a session of Bankruptcy Court held in and for the  
Western District of Michigan, on this the \_\_\_\_\_ day of October, 2016

**Present: HONORABLE JOHN T. GREGG, United States Bankruptcy Judge**

On September 28, 2016, Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code. On September 30, 2016, the Debtor filed an emergency motion for use of cash collateral.

THE COURT HEREBY FINDS AND CONCLUDES AS FOLLOWS:

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.
2. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).
3. Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409.
4. The Debtor has provided notice of the motion and the hearing by facsimile, electronic mail, overnight mail or first class mail to: (a) the Debtor's twenty (20) largest unsecured creditors; (b) each of the Debtor's prepetition secured creditors, including, without limitation, Bayview Funding Acquisitions. Under the circumstances, the foregoing notice: (i) was, in the Debtor's good faith belief, the best available under the circumstances, (ii) constitutes due and sufficient notice of the motion and the hearing, and (iii) complies with Bankruptcy Rules 4001(b) and 4001(c). No further or other notice of the relief sought in the motion or at the hearing is necessary or required.
5. The Debtor has an immediate and critical need to use cash collateral. The ability to access and use cash collateral is critical and vital to the Debtor's ability to fund its postpetition operating requirements in a manner that will permit the Debtor to manage its properties and assets while preserving and maintaining the value of its assets.

Consequently, without access to the continued use of cash collateral as provided in this cash collateral order, the Debtor and its estate would suffer immediate and irreparable harm.

Based on the foregoing and upon the record made before this Court, and good and sufficient cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

The Debtor's emergency motion is approved to the extent provided in this Order. This Order shall become effective immediately upon its entry.

A. The Debtor is hereby authorized to use the cash collateral to: (i) fund general, ordinary course corporate and working capital requirements of the Debtor, including wages, adequate protection payments to the cash collateral creditors to the extent provided herein, in each case, substantially in accordance with the Budget and this Order; and (ii) pay fees and expenses of professionals retained by the Debtor, substantially in accordance with the Budget and Order to the extent such professional fees and expenses are allowed by order of the Bankruptcy Court.

B. The final hearing is scheduled for \_\_\_\_\_ at \_\_\_\_\_ (Eastern) before this Court.

C. The Debtor shall promptly serve a notice of entry of this Order and the notice of the final hearing, together with a copy of this Order, by first class mail, postage prepaid, facsimile, electronic mail or overnight mail upon the parties having been given notice of the hearings, to any other party that has since filed a request for notices with this Court, and to counsel to the Creditors' Committee, if any. The notice shall state that any party in interest objecting to the relief sought at the final hearing shall file written objections with the United States Bankruptcy Court for the Western District of Michigan and shall serve such objections on counsel to the Debtor.

**END OF ORDER**