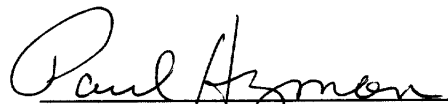




ORDERED in the Southern District of Florida on December 23, 2016.


Paul G. Hyman, Jr., Judge
United States Bankruptcy Court

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

In re:

PODIUM PERFORMANCE, LLC,

Case No. 16-21400-PGH

Chapter 11

Debtor.

**AGREED ORDER GRANTING DEBTOR'S SECOND
EMERGENCY MOTION TO USE CASH COLLATERAL**

This case came on for an emergency hearing before this Court on December 23, 2016, upon the Emergency Motion of Podium Performance, LLC, as debtor and debtor-in-possession in the above-captioned case (the "Debtor"), requesting entry of an Order (A) authorizing the Debtor to continue to use cash collateral subject to the lien of SunTrust Bank ("SunTrust") on an interim basis pursuant to 11 U.S.C. § 363, and (B) to continue to provide adequate protection in connection therewith pursuant to 11 U.S.C. § 361 (Doc. No. 41) (the "Motion"). At the hearing, counsel for the Debtor and counsel for SunTrust indicated that they had reached an agreement, pursuant to 11 U.S.C. § 363 and Fed. R. Bankr. P. 4001(b), with respect to the Debtor's continued use of cash collateral subject to a perfected first priority security interest held by SunTrust, on substantially

the same terms previously agreed upon and included in the Court's Agreed Order Granting Debtor's Motion to Use Cash Collateral (Doc. No. 31) (the "First Order"). The Court, finding that it has jurisdiction over the matters raised in the Motion pursuant to 28 U.S.C. §§ 157 and 1334; that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); that the relief requested in the Motion is in the best of interests of the Debtor, its estate, creditors and parties-in-interest; that proper and adequate notice of the Motion and the hearing thereon has been given and that no other or further notice is necessary; and upon the agreement of Debtor and SunTrust as set forth herein and announced in open court, and for the reasons stated on the record, the Court finds good and sufficient cause exists for the granting of the relief as set forth herein, and makes the following findings of fact and conclusions of law:

- A. On or around August 14, 2015, SunTrust made a U.S. Small Business Administration ("SBA") loan to the Debtor in the original principal amount of \$472,400.00 (the "Loan"). The Loan is evidenced by that certain SBA Note dated August 14, 2015, in the original principal amount of \$472,400.00, made by the Debtor in favor of SunTrust (the "Note").
- B. As security for the Note, the Debtor executed that certain Security Agreement (Commercial) dated August 14, 2015, pursuant to which the Debtor granted SunTrust a security interest in all assets owned by the Debtor, including but not limited to, all accounts, inventory, furniture, fixtures, and equipment (the "Security Agreement").
- C. On August 17, 2015, SunTrust perfected its security interest in the Debtor's personal property, including its accounts, by filing two UCC-1 Financing Statements with the Florida Secured Transaction Registry (together, the "Financing Statements"; and the Note, Security Agreement, Financing Statements, and all other documents entered into in connection with the Loan, the "Loan Documents"). One Financing Statement

perfected SunTrust's purchase money security interest in all equipment purchased by the Debtor with the Loan funds (the "Specific Equipment Collateral"). The other Financing Statement perfected SunTrust's security interest in "all tangible and intangible property and assets, including, but not limited to, all equipment, fixtures, inventory, accounts, instruments, chattel paper and general intangibles..." (the "Collateral").

- D. On or around May 14, 2016, SunTrust and the Debtor entered into that certain Amendment to the Note, pursuant to which SunTrust agreed to allow the Debtor to make interest only payments for a period of six (6) months.
- E. SunTrust and the Debtor further agree, without prejudice to the rights of creditors and other parties in interest to contest such, as provided in Section 14 herein, that (i) the pre-petition liens arising from or under the Loan Documents (any and all such liens, collectively, the "Prepetition Liens") are legal, valid, enforceable, non-avoidable, and duly perfected security interests in and liens on the Specific Equipment Collateral and the Collateral to the extent of the value of the Specific Equipment Collateral and the Collateral, pursuant to the terms of the Loan Documents, and, as of the Petition Date (defined below), and without giving effect to this Order, the Debtor is unaware of any liens or security interests having priority over the Specific Equipment Collateral and the Collateral, (ii) the prepetition debt under the Loan Documents (the "Prepetition Debt") constitutes an allowed secured claim under section 506 of the Bankruptcy Code, (iii) the Prepetition Debt is not subject to offset, defenses, or counterclaims of any kind, and (iv) neither the Prepetition Debt nor the Prepetition Liens are subject to**

recharacterization or subordination under the Bankruptcy Code or applicable non-bankruptcy law.

- F. The Debtor filed its Chapter 11 Petition on August 18, 2016 (the “Petition Date”).
- G. As of the Petition Date, the following amounts were due and owing to SunTrust on account of the Prepetition Debt: (i) the principal sum of \$466,613.93; (ii) accrued and unpaid interest at the non-default Note rate in the amount of \$311.07, (iii) plus attorneys’ fees and costs, plus additional amounts due and owing pursuant to the Loan Documents, all of which continue to accrue.
- H. On October 20, 2016, the Court entered its Agreed Order Granting Debtor’s Motion to Use Cash Collateral (Doc. No. 31), which set forth the terms and conditions pursuant to which SunTrust consented to the Debtor’s limited use of Cash Collateral (as defined therein) through December 31, 2016.
- I. SunTrust has agreed to further authorize the Debtor’s use of Cash Collateral (as defined herein) for an additional interim period through and including February 28, 2017.
- J. As a result of the Debtor’s authorization to use Cash Collateral, SunTrust is entitled to adequate protection pursuant to sections 361, 362 and 363 of the Bankruptcy Code.

ORDERED:

- 1. The Emergency Motion is GRANTED IN PART, as set forth herein.
- 2. **Recitals. The representations and recitals set forth in the preceding paragraphs of this Order shall be deemed to be a part of this Order and are hereby deemed the Court’s findings of fact, subject to the rights of parties in interest (other than the Debtor) and any creditors’ committee appointed in this Chapter 11 case to challenge such findings of fact, as further described in Paragraph 14 of this Order.**

3. Cash Collateral Defined. The term “Cash Collateral” as that term is used in this Order shall include the definition of that term as defined in 11 U.S.C. § 363(a), including all accounts and accounts receivable.

4. Payment of Operating Expenses and Loan Payment.

(a) Subject to the occurrence of an uncured Event of Cash Collateral Order Default (defined below), the Debtor is authorized to use Cash Collateral through February 28, 2017, or until further hearing on the Motion (but not thereafter), without further order of the Court or written permission of SunTrust, to pay the reasonable, ordinary, and necessary expenses of operating its business and maintaining the Specific Equipment Collateral and the Collateral as they become due solely for the items and in the amounts set forth in the Budget attached hereto as Appendix A. No reallocation of Budget line items or expenditures in excess of Budget line items shall be permitted except as provided in the following Paragraph 4(b). During the pendency of this bankruptcy and until further Order of this Court, all pre- petition and post-petition income shall be turned over and paid to the Debtor for deposit into the Debtor in Possession bank accounts. The use of the Cash Collateral is necessary for an effective reorganization and to avoid harm to the Debtor’s bankruptcy estate. The Debtor needs to be able to pay its regular business operating expenses and administrative expenses and other ordinary expenses as they become due.

(b) The Debtor shall be authorized: (i) to exceed any line item on the Budget by an amount equal to ten percent (10%) of each such line item; or (ii) to exceed any line item by more than ten percent (10%) so long as the total of all amounts in excess of all line items for the Budget do not exceed five percent (5%) in the aggregate of the total Budget in any calendar month.

(c) The Debtor is authorized to pay and shall pay SunTrust the sum of \$2,783.77 due January 1, 2017, and the sum of \$2,783.77 due February 1, 2017, as adequate protection payments to be applied to the outstanding balance due under the Note (such payments,

the “Adequate Protection Payments”); *provided*, that the Debtor shall be allowed a ten (10) day grace period after payment due date within which to make such Adequate Protection Payments. The deadlines for the Adequate Protection Payments set forth in this Paragraph 4(c) may not be extended without the written consent of SunTrust or an Order of this Court. Nothing contained in this Order shall prejudice or limit in any way SunTrust’s rights to recover interest at the default rate, late charges, or any other amounts due under the Loan Documents. The failure of the Debtor to timely make the payments set forth in this Paragraph 4(c) shall be deemed an Event of Cash Collateral Order Default, subject to the Debtor’s right to cure such payment default as set forth herein.

(d) The Debtor’s authorization to use Cash Collateral shall automatically terminate upon the earlier of a Cash Collateral Order Default, upon confirmation of a plan of reorganization, or on February 28, 2017.

(e) The Debtor shall pay quarterly payments due and owing to the United States Trustee established under 28 U.S.C. § 1930(a)(6), and SunTrust expressly consents to the use of Cash Collateral for this purpose.

5. Replacement Liens.

(a) Without limitation on the effect of the Loan Documents, and as further adequate protection for the extent of the Debtor’s use of Cash Collateral in addition to the monthly payments and restrictions on the Debtor’s use of Cash Collateral provided herein, SunTrust shall have, *nunc pro tunc* as of the commencement of the Chapter 11 case, a replacement lien pursuant to 11 U.S.C. § 361(2) (the “Replacement Lien”) on all property acquired or generated post-petition by the Debtor to the same extent and priority and of the same kind and nature as SunTrust’s pre-petition liens and security interests in the Cash Collateral. However, SunTrust’s liens shall not attach to any 11 U.S.C. Chapter 5 causes of action or the proceeds thereof. No lien or security

interest in any property of the Debtor granted or arising on or after the Petition Date shall be created or permitted to be *pari passu* with, or senior to, the liens and security interest of SunTrust in its pre-petition collateral or the Replacement Liens, nor shall the Replacement Liens be altered by any Plan. The grant of Replacement Liens hereunder shall be supplemental to the security interest and liens which SunTrust possesses pursuant to the Loan Documents.

(b) The security interests and liens granted herein in connection with the use of Cash Collateral shall be valid and perfected without the need for the execution or filing of any further documents or instruments or other compliance with non-bankruptcy law. The Debtor shall, however, at SunTrust's request, execute and deliver any and all documents permitting such security interest to be filed or recorded with any appropriate agency or official. Such filing or recording shall be deemed to have been filed or recorded on the date of the entry of this Order.

(c) The Replacement Liens granted to SunTrust may be subject and junior to the fees of the Office of the United States Trustee pursuant to 28 U.S.C. § 1930.

6. Waiver of 11 U.S.C. § 506(c). In order to provide further adequate protection to SunTrust with respect to Debtor's use of Cash Collateral, at no time during the time that the Debtor is authorized to use Cash Collateral pursuant to the terms of this Order, any subsequent Order, or the agreement of SunTrust and Debtor, shall the surcharge provisions of 11 U.S.C. § 506(c) be imposed on or against SunTrust, the Cash Collateral, the Specific Equipment Collateral, or the Collateral.

7. Deadlines. In order to provide further adequate protection to SunTrust, the Debtor agrees to use best efforts to meet the following deadlines: (i) obtain approval of any Disclosure Statement filed by the Debtor on or before January 31, 2017; (ii) obtain an order approving Debtor's Plan on or before March 15, 2017; and (iii) for the Effective Date of any Plan filed by

the Debtor to take place on or before April 1, 2017. The failure of the Debtor to meet any of the deadlines of this Section 7(a) shall not constitute an Event of Cash Collateral Order Default.

8. No Granting of Senior Liens. Except as otherwise agreed to by SunTrust in writing in its sole discretion, the Debtor shall be enjoined and prohibited from granting any mortgage, security interest or liens and encumbrances including liens created under 11 U.S.C. § 364(d) that are senior to, or on a parity with, SunTrust's Prepetition Liens and security interest or the Replacement Liens.

9. Prohibited Payments. Notwithstanding the items in the Budget, absent written consent of SunTrust or an order of the Court (obtained following notice and a hearing), the Debtor shall not use Cash Collateral: (a) to make any prepayments with respect to services which were not yet rendered, goods that have not been received, or any other item for which payment is not currently due; (b) to pay any increases in salaries or compensation for employees, other than increases in the normal course of business; (c) to pay any part or portion of pre-petition claims; (d) to object, contest or raise any defense to the validity, perfection, priority, extent or enforceability of (i) any amount due under the Loan Documents, (ii) the Prepetition Liens or (iii) the Replacement Liens; (e) to assert any claims and defenses of causes of action against SunTrust or its respective agents, affiliates, representatives, attorneys or advisors, (f) prevent, hinder, or otherwise delay SunTrust's assertion, enforcement or realization on the Cash Collateral, the Specific Equipment Collateral, the Collateral, the Replacement Liens or any other right granted to SunTrust pursuant to this Order; (g) to seek to modify any of the rights granted to SunTrust under this Order or pursuant to the Loan Documents without SunTrust's prior written consent; or (h) to pay the fees of any constituent groups (such prohibited uses as are set forth in this Paragraph 9, collectively, the "Prohibited Uses").

10. Access to Property. The Debtor shall permit any authorized representative of SunTrust, from time-to-time, upon 48 hours' notice to the Debtor, and during normal business hours, to examine and copy all the records and books of, and inspect the business premises of, the Debtor and/or to appraise SunTrust's collateral at SunTrust's initial cost and expense, but which cost and expense SunTrust reserves the right to seek to add to the balance of the debt owed to SunTrust by Debtor. Upon five (5) business days' written notice to the Debtor, SunTrust shall be entitled to have its appraiser or any third party inspector visit the Debtor's operations to appraise and inspect the Specific Equipment Collateral and Collateral, and the Debtor shall reasonably cooperate in providing said appraiser or other inspector full access to the Specific Equipment Collateral and Collateral, along with any other financial information SunTrust may reasonably request, with any such inspections to occur in the company of the Debtor (or its designated agent).

11. Events of Cash Collateral Order Default by Debtor. The occurrence of any one or more of the following events shall constitute an "Event of Cash Collateral Order Default" under this Order: (i) the Debtor fails to timely and punctually perform any of its obligations in strict accordance with the terms of this Order or otherwise defaults or breaches any provision hereof, including (A) the use of Cash Collateral except as expressly permitted in this Order; and (B) the failure to provide any report, document, or information to SunTrust as required under this Order; (ii) any representation or warranty made by the Debtor in any certificate, report, expense statement, other financial statement, or other document delivered to SunTrust after the Petition Date proves to have been false or misleading in any material respect as of the time when made or given; (iii) any person or entity obtains an order permitting the use of Cash Collateral without SunTrust's written consent in its sole discretion; (iv) the Replacement Liens granted to SunTrust pursuant to Paragraph 5 above cease to be valid and perfected first priority liens on the Property and Personal

Property; (v) the automatic stay in this Chapter 11 case is modified so as to enable a party to proceed against the Specific Equipment Collateral or any part of the Collateral.

12. Termination of Use of Cash Collateral Upon Occurrence of Event of Cash Collateral Order Default and a Termination Event.

(a) If an Event of Cash Collateral Order Default occurs as defined herein, SunTrust shall give written notice of any such default to the Debtor and Debtor's counsel (the "Default Notice"), provided that in no event shall the provisions of this Paragraph 12(a) apply to a Payment Default as defined below. The Debtor shall have three (3) days from the date of said Default Notice to cure, or to object in writing sent to counsel for SunTrust, any Event of Cash Collateral Order Default alleged therein (the "Cure Period"). If the Debtor objects to or disputes the alleged Event of Cash Collateral Order Default, the Debtor shall state the grounds for such objection in writing delivered to counsel for SunTrust before the expiration of the Cure Period. Upon expiration of the Cure Period, and if the Event of Cash Collateral Order Default remains uncured or the Debtor fails to timely object in writing, SunTrust is authorized to file an affidavit of Event of Cash Collateral Order Default averring to the occurrence of an Event of Cash Collateral Default (a "Default Affidavit"). The automatic stay pursuant to section 362 of the Bankruptcy Code shall be deemed lifted immediately upon filing of the Default Affidavit so as to allow (but not require) SunTrust to take any action or exercise any right or remedy that it possesses under the Loan Documents, this Order, or under applicable law, all of which rights are expressly preserved and retained, as are any rights, remedies, and defenses of the Debtor. Concurrent with the submission of the Default Affidavit, SunTrust shall submit a proposed order lifting the automatic stay under § 362.

If the Debtor timely objects in writing before the expiration of the Cure Period, SunTrust may file on an emergency basis a motion to terminate the Debtor's use of cash collateral

and a motion to terminate the automatic stay under § 362 of the Bankruptcy Code, stating within such motion(s) the basis for the alleged Event of Cash Collateral Order Default and the basis for the Debtor's objection thereto, along with a Default Affidavit in support thereof. The Court may, in its discretion, set such emergency motion(s) for hearing or enter an order granting such relief as it deems appropriate under the circumstances.

(b) Notwithstanding any other provision of this Order, Debtor's authorization to use Cash Collateral pursuant to this Order shall terminate immediately and automatically, without any obligation of SunTrust to provide notice to the Debtor, upon the occurrence of any of the following: (i) the Debtor fails to cause SunTrust to receive an Adequate Protection Payment on or before the expiration of the 10-day grace period for any such payment due as provided in Paragraph 4(c) of this Order (a "Payment Default"); (ii) entry of an order converting or dismissing this case; (iii) entry of an order appointing a Chapter 11 Trustee or Chapter 7 Trustee in this case; (iv) the reversal, stay, amendment, supplementation, or modification of this Order without SunTrust's written consent; or (v) entry of an order granting SunTrust relief from the automatic stay in this case (which relief may be sought by SunTrust on emergency or expedited notice and hearing) (any of the foregoing, a "Termination Event"). Upon the occurrence of a Termination Event, SunTrust shall have the right to take any action or exercise any right or remedy that SunTrust possesses under the Loan Documents, this Order, or applicable law, all which rights are expressly preserved and retained, as are any rights, remedies and defenses of the Debtor; *provided*, that upon the occurrence of a Payment Default, SunTrust shall file a Default Affidavit pursuant to the provisions of Paragraph 12(a), and provided further that the automatic stay pursuant to § 362 of the Bankruptcy Code shall be deemed lifted immediately upon filing of the Default Affidavit so as to allow (but not require) SunTrust to take any action or exercise any right or remedy that it possesses under the Loan Documents, this Order, or under applicable law, all of which rights are

expressly preserved and retained, as are any rights, remedies, and defenses of the Debtor. Concurrent with the submission of a Default Affidavit, SunTrust shall submit a proposed order lifting the automatic stay under § 362.

13. No Impairment. Nothing in this Order or in any other document or instrument contemplated to be delivered in connection herewith shall in any way be deemed or construed in any manner to effect, impair or diminish any rights SunTrust may have against any property which is not property of this bankruptcy estate or against any person or entity that is not a debtor.

14. Limitations on the Right to Challenge Liens. **As provided in this Court's Guidelines for Motions Seeking Authority to Use Cash Collateral and Motions Seeking Approval of Post-Petition Financing, any challenge or objection to the validity, perfection and amount of the Prepetition Liens or SunTrust's claims under the Loan Documents, as set forth herein, shall be filed as a contested matter or adversary proceeding and properly served (a) by any party in interest (other than the Debtor or any creditors' committee appointed in this Chapter 11 case), on or before the date that is seventy-five (75) days after the date of entry of this order, and (b) by any creditors' committee appointed in this Chapter 11 case, within sixty (60) days of its formation (the termination deadlines described in (a) and (b), as applicable, the "Challenge Termination Date"). If no challenges or objections to the validity, perfection, and amount of the Prepetition Liens or SunTrust's claims under the Loan Documents as set forth herein are brought by the Challenge Termination Date, SunTrust shall be deemed to hold allowed secured claims as set forth herein. If a challenge or objection is timely filed by a party-in-interest (other than the Debtor) or the creditors' committee appointed in this Chapter 11 case, SunTrust shall hold secured claims as provided in any further Order entered upon such challenge or objection. Nothing herein shall preclude the**

ability of SunTrust or the Debtor to challenge or object to the standing of the creditors' committee or any party in interest to bring an action pursuant to this paragraph.

15. Section 552(b) of the Bankruptcy Code. For the avoidance of doubt, SunTrust shall be entitled to all the rights and benefits of § 552(b) of the Bankruptcy Code, and the “equities of the case” exception shall not apply to SunTrust.

16. Credit Bid. In the event the any part of the Specific Equipment Collateral or the Collateral is sold pursuant to § 363 of the Bankruptcy Code or under a plan, SunTrust shall have the right (but not the obligation) to credit bid in such sale, up to the full amount of the amounts due to SunTrust under the Loan Documents (less any previously successful credit bids of SunTrust).

17. No Third Party Rights. Except as expressly provided herein, this Order does not create any right for the benefit of any third party, creditor, equity holder or any director or indirect beneficiary thereof.

18. Retention of Jurisdiction. This Court retains jurisdiction to enforce this Order according to its terms.

19. Continued Hearing. The Debtor shall file a separate Motion for Continued use of Cash Collateral (“Continued Motion”) at such time as to provide adequate notice to all interested parties prior to a hearing on such Continued Motion. The Debtor’s failure to timely file the Continued Motion shall not alter or extend the Debtor’s authorization to use Cash Collateral as set forth in this Order.

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Order submitted by:
Nadine White-Boyd
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And

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Attorneys for SunTrust Bank

Nadine White-Boyd is directed to immediately serve a conformed copy of this Order on the parties listed below, and file with the court a certificate of service conforming with Local Rule 2002-1(F).

Copies provided to:

Nadine White-Boyd, Esq. (Counsel for Debtor)

Christopher R. Thompson, Esq. (Counsel for SunTrust)

All creditors and parties in interest