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A LIMITED LIABILITY LAW PARTNERSHIP

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Debtor-in-Possession,
ROLLOFFS HAWAII, LLC

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

In re

ROLLOFFS HAWAII, LLC,

Debtor and
Debtor-in-Possession.

Case No. _____
(Chapter 11)

Hearing:

Date:

Time:

Judge: Honorable Robert J. Faris

**DEBTOR'S MOTION FOR ORDER AUTHORIZING THE
INTERIM USE OF CASH COLLATERAL PURSUANT TO
11 U.S.C. § 363(c)(2) AND RULE 4001(b), F.R.Bk.P.;
EXHIBITS A and B**

Rolloffs Hawaii, LLC, the Debtor and Debtor-in-Possession, hereby
moves this Court for the entry of an order authorizing the Debtor to use cash
collateral pursuant to 11 U.S.C. § 363(c)(2) and Rule 4001(b), F.R.Bk.P.

The Debtor seeks to use the cash collateral of its one (1) secured creditor American Savings Bank (“ASB”). See Exhibit A, Title Guaranty Escrow of Hawaii, Inc. Lien Report and Financing Statement Report dated November 15, 2016.

The total scheduled amount due to ASB, as of the Petition Date is in the principal amount of approximately \$6.5 Million secured by the collateral described in the Financing Statement.

The Debtor seeks authority to use the Secured Creditor’s Cash Collateral to pay operating expenses for the period for not less than 15 days until the court schedules a final hearing pursuant to Rule 4001(b)(2), F.R.Bk.P., as provided for by the Debtor's Chapter 11 budget 30-60-90 budget. See Exhibit B.


The Debtor proposes to provide adequate protection for the use of Cash Collateral by providing a replacement lien having the same validity, priority and extent as the respective Secured Creditor existing security interests in their pre-petition collateral, and subject to the same rights and challenges by or on behalf of the Debtor. For ASB, the Debtor will provide adequate protection payments in an amount equal to the monthly interest on the ASB secured debt.

Nothing in this Motion shall be deemed a request for authority to assume, and nothing in this Motion shall be deemed an authorization to assume

any executory contracts or unexpired lease under Section 365 of the Bankruptcy Code, 11 U.S.C. § 365.

This Motion is brought pursuant to 11 U.S.C. § 363 and Rules 4001(d) and 9014 of the Federal Rules of Bankruptcy Procedure, and is based upon the attached Memorandum in Support, the exhibits attached hereto, and by the record in this case, and by such other evidence and argument as counsel may present before or at the hearing on the Motion and the files and pleadings in this case.

DATED: Honolulu, Hawaii, December 9, 2016.



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**MEMORANDUM IN SUPPORT OF MOTION;
EXHIBITS A and B**

Rolloffs Hawaii, LLC, the Debtor and Debtor-in-Possession, submits
this Memorandum in Support of its Motion for Order Authorizing the Interim Use of
Cash Collateral Pursuant to 11 U.S.C. § 363(c)(2) and Rule 4001(b), F.R.Bk.P., the
Debtor, respectfully represents as follows:

I. BACKGROUND

The Debtor filed for relief under Chapter 11 of the Bankruptcy Code on December 9, 2016.

At the time of the filing, the Debtor owns and operates a refuse collection and trash disposal business in the State of Hawaii.

II. SECURED CREDITOR

As of the Petition Date, the Debtor had one (1) consensual secured creditor American Savings Bank (“ASB”), whose collateral might include cash collateral, as that term is defined in the Bankruptcy Code. See Exhibit A, Lien Report and Financing Statement Report dated November 15, 2016.

III. USE OF CASH COLLATERAL

Attached hereto is the Proposed Interim Order (i) Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. §§ 363(c)(2), (ii) Granting Adequate Protection Pursuant to 11 U.S.C. §§ 363 and 364, (iii) Scheduling of Final Hearing, and (iv) Granting Related Relief. See Exhibit B.

The Debtor requests authority to use the Cash Collateral on the same terms and conditions as provided for in the Proposed Interim Order (i) Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. §§ 363(c)(2), (ii) Granting Adequate Protection Pursuant to 11 U.S.C. §§ 363 and 364, (iii) Scheduling of Final Hearing,

and (iv) Granting Related Relief, including a replacement lien in favor of Secured Creditor for the use post-petition secured creditor's pre-petition collateral, to pay the reasonable and ordinary expenses of operating the Debtor's business, including, without limitation, employees and benefit expenses, federal and state taxes, supplies and equipment, advertising, utility services, insurance, vendor and supplier services, and other expenditures as are necessary for operating his businesses and preserving their going concern value, including the "lease rents" to the Lessor of the Debtor's property, including professional fees and costs as approved by the Court, after notice and hearing.

The Debtor also requests authority to use the Cash Collateral to pay the reasonable and ordinary expenses to administer this estate in bankruptcy, including, without limitation, quarterly fees payable to the United States Trustee, and payment of the fees and reimbursement of costs to the Debtor's professionals including, without limitation, their attorneys, accountants, and the fees and reimbursement of costs to the professionals retained with the Court's approval by any statutory committees appointed in the Chapter 11 case, in amounts approved and authorized to be paid by the Court.

The Debtor believes the Secured Creditor is adequately protected because the use of Cash Collateral enables the Debtor to operate its business, will replace the cash component of Cash Collateral, and the Debtor is willing to provide

ASB with a full and complete replacement liens in the post-petition cash received by the Debtor in its post-petition operations.¹

Without prejudice to the Debtor's and other parties' positions regarding the validity, perfection, priority, and/or extent of any of the Secured Creditor's claims or security interests in the Cash Collateral, and to provide adequate protection for such security interests (if and to the extent such security interests are valid and perfected), the Debtor intends to grant Secured Creditor replacement liens (the "Replacement Liens"), in the Debtor's post-petition cash with the same priority and extent as Secured Creditor's existing pre-petition security interests in the Pre-Petition.

The Replacement Liens will have the same validity and priority and to the same extent and as Secured Creditor's prepetition security interest, and would be subject to the same rights and challenges by or on behalf of the Debtor. The amount secured by the Replacement Liens shall be equal to any actual net diminution of Secured Creditor's pre-petition Cash Collateral due to the Debtor's use thereof.

The Replacement Liens shall be valid, perfected and enforceable against the Replacement Collateral as of the Petition Date, without further filing or

¹ In In re Muller, 172 B.R. 473, 476 (Bankr.D. Mass. 1994), the court noted that while the debtor uses up the pre-petition collateral, the value of the lien remains the same, as long as the value of the stream of income, is not declining. There is no indication that there won't be sufficient post-petition revenues to replace the pre-petition cash collateral used post-petition.

recording of any document or instrument or the taking of any further action, and shall not be subject to dispute, avoidance or subordination as to the Adequate Protection Claim.

The Replacement Liens shall be subject and subordinate in priority to any liens, security interests and other encumbrances, existing as of the Petition Date, or which attach to the Replacement Collateral after the Petition Date, that are valid, perfected, enforceable and unavoidable, that are otherwise senior to the pre-petition liens in favor of Secured Creditor.

For the ASB, by Stipulation, the Debtor will pay adequate protection payments in an amount equal to the monthly interest only payments on the ASB secured debt.

IV. THE COURT SHOULD AUTHORIZE THE DEBTOR'S USE OF CASH COLLATERAL BECAUSE THE SECURED CREDITOR IS ADEQUATELY PROTECTED AND WILL CONTINUE TO BE ADEQUATELY PROTECTED

A debtor's use of estate property is governed by Bankruptcy Code Section 363.

A debtor-in-possession may continue to operate its business unless the court orders otherwise, under 11 U.S.C. §§1107 and 1108, and so long as the debtor continues to operate in its ordinary course of business, under Section 363(c)(1) of the Bankruptcy Code, without notice or a hearing the debtor may enter

into transactions and use property of the estate, provided said property does not constitute cash collateral.

“Cash collateral” is defined in Bankruptcy Code Section 363(a) as meaning “cash, 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, 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.”

Bankruptcy Code Section 363(c)(2) permits a debtor to use cash collateral if either of two alternate circumstances exist:

- (1) each entity that has an interest in such collateral consents; or
- (2) the court, after notice and a hearing, authorizes such use in accordance with the provisions of this section.

11 U.S.C. § 363(c)(2). Therefore, the Court may authorize use of a creditor's cash collateral in the absence of creditor consent.

Authority to use Cash Collateral is consistent with the very purposes for which Chapter 11 exists:

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.

Chrysler Credit Corp. v. Ruggiere (In re George Ruggiere Chrysler-Plymouth, Inc., 727 F.2d 1017, 1019(11th Cir. 1984).

Courts will allow the use of cash collateral when the use tends to enhance or preserve the debtor's reorganization value. See, e.g. Stein v. United States Farmers Home Administration (In re Stein), 19 B.R. 458, 460 (Bankr. Pa. 1982) (debtor was granted authority to use cash collateral where the secured party was undersecured because the use of cash collateral was necessary to the debtor's continued operations and the creditor's "secured position can only be enhanced by the continued operation of the [debtor's business]"); In re Dvnaco Corp., 162 B.R. 389, 396 (Bankr. D.N.H. 1993) (finding that the alternative to the debtor's use of cash collateral - termination of the debtor's business - would doom the reorganization and any chance to maximize value for all of the creditors).²

² The Dynaco court in discussing adequate protection of "soft" collateral or cash collateral, ,

The crucial inquiry in the § 363 context, and the purpose for which the valuation and adequate protection determinations are being made, is whether the debtors' ongoing operation with the fact keep the level of soft collateral essentially the same during the period prior to plan confirmation, or denial of confirmation, or whether some additional cash infusion of "new money" should be required to assure the secured creditor that the level of soft collateral will be maintained in the ongoing business operation. In the present case, I believe the debtors have made the requisite

Pursuant to Section 363(e), “on request of an entity that has an interest in property used, sold or leased, or proposed to be used, sold, or leased, by the trustee, 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) (emphasis added). Thus, the Court may authorize the Debtors to use the Secured Creditor’s cash collateral if their interest in such collateral is adequately protected.

Bankruptcy Code Section 361 addresses the issue of adequate protection, and although adequate protection is not defined therein, several nonexclusive methods of adequate protection are enumerated:

When adequate protection is required under sections 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by-

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent

showing in that regard and there is no need or justification for the requiring at this time any additional cash infusions to provide adequate protection.

Judge Peter Yacos, further noted as to the crucial role of cash collateral,

Cash collateral usage in the early stages of a Chapter 11 reorganization proceeding is simply unique in that if the debtor were to be required to provide dollar-for-dollar new money replacement to cover a temporary decline in the cash collateral level few debtors coming into the bankruptcy court for reorganization would be able to comply.

that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

11U.S.C. §361.

It is only when the value of a secured creditor's interest in collateral is likely to decline post-petition that added protection is needed:

The analysis of the Supreme Court in Timbers is instructive here. The phrase “interest in property” in § 363(e) means the value of the collateral. That is the interest that I am required to protect. If that value is likely to diminish during the time of the use, adequate protection must be provided by the Debtor.

In re McCombs Properties VI Ltd., 88 B.R. 261, 266 (Bankr.C.D.Cal. 1988). Accord, In re Delta Resources, Inc., 54 F3d 722, 730 (11th Cir.1995); In re Westchase I L.P., 126 B.R. 692, 694-95 (W.D.N.C. 1991). See In re Weinstein, 227 B.R. 284 (9th Cir.B.A.P.1998) (adequate protection other than replacement lien only required for deterioration or decline in value of the collateral).

A secured creditor is deemed to be adequately protected when the post-petition revenues are used to preserve and protect the secured creditor collateral. In In re 5028 Wisconsin and Associates Ltd., 167 B.R. 699, 706 (Bankr. D.D.C. 1994), the court wrote:

By the same token, however, the debtor would be entitled to use the cash collateral upon providing the mortgagee adequate protection. Usually, adequate protection can be accorded the mortgagee by devoting the rents to necessary costs of operating and preserving the building so as to continue generating rents. See In re Sunset Centres Ltd Partnership, Misc. Action No. 93-26 (D.D.C.1993) (Penn, C.J.); In re Ledgemere Land Corp., 116 B.R. 338, 343 (Bankr.D.Mass.1990); In re Willowood East Apts. of Indianapolis II, Ltd., 114 B.R. 138, 142-43 (Bankr.S.D.Ohio 1990). The debtor's use may alternatively be authorized under 11 U.S.C. § 552(b) by limiting the mortgagee's security interest based on the equities of the case to rents net of operating and maintenance expenses. Sunset Centres; In re Cardinal Indus., Inc., 118 B.R. 971, 981 (Bankr. S.D.Ohio 1990); Willowood East Apts., 114 B.R. at 143-44.

The courts in In re Willowood East Apts. of Indianapolis II, Ltd., 144 B.R. 138, 143-44 (Bankr.S.D.Ohio 1999) wrote as to the steps and services taken post-petition to adequately protect a secured creditor with the post-petition cash collateral:

1. All payroll and normal and reasonable employee expenses, including post-petition payroll taxes for employees located at the Property;

2. Utilities, equipment leases, insurance and similar expenses necessary to operate the Property;

3. Reasonable fees under management I and marketing agreements;

4. Ordinary and necessary repairs and maintenance to permit the continued use j and operation of the Property, but not, without consent of Lincoln, any expenditure generally considered to be a capital improvement;

5. Ordinary advertising or marketing, expenses;

6. Taxes and governmental charges accruing after the filing of the Petition herein attributable to the Property;

7. Reasonable bookkeeping and accounting fees to the entity chosen by the Debtor to perform these services for the Property; and

8. Other charges incurred after the filing of the Petition which are necessary to conduct the Debtor's normal business operations.

Adequate protection is aimed not at protecting precise collateral, but protecting the value of a secured creditor's interest in collateral. In re Williams, 7 B.R. 234, 237 (Bankr. M.D.Ga. 1980) (Though a creditor may not be able to retain his lien upon the specific collateral held at the time of filing, the purpose of section 361 is to insure that the secured creditor receives the value for which he bargained).

The Debtor believes that a full and complete replacement lien is adequate to protect the Secured Creditor's security interest and the use of the ASB's cash collateral, post-petition, provides a complete replacement for any use of any pre-petition cash collateral, and no other adequate protection is needed.

V. THE SECURED CREDITOR IS ADEQUATELY PROTECTED BY THE GOING CONCERN VALUE OF THE DEBTOR'S BUSINESS AND THE REPLACEMENT LIENS

Courts should take a pragmatic approach when assessing whether a secure creditor is adequately protected, and that may require consideration of whatever factors are relevant to a particular debtor. See, e.g., In re Rogers, 239 B.R. 883, 887 (Bankr. E.D.Tex. 1999):

The determination of whether a creditors interest is adequately protected is not an exact science nor does it involve a precise arithmetic computation. Rather, it is pragmatic and synthetic, requiring a court to balance all relevant factors in a particular case, including the value of the collateral; whether the collateral is likely to depreciate over time, the debtor's prospects for a successful reorganization and the debtors performance under the plan. In re Olick, 221 B.R. 146, 161 (Bankr.E.D.Pa.1998). Other considerations may include the balancing of hardships between the parties and whether the creditor's property interest is being unduly jeopardized.

The Bankruptcy Code expressly provides that the granting of additional liens constitutes a means of providing adequate protection. 11 U.S.C. § 361(2) ("adequate protection may be provided by ... an additional or replacement

lien to the extent that such... use ... results in a decrease in the value of such entity's interest in such property.”).

Courts have recognized that the granting of replacement liens, coupled with the continued operations of the debtor, provides adequate protection of a creditor's interest in cash collateral used by the debtor. See, e.g., Mbank Dallas v. O'Connor (In re O'Connor), 808 F.2d 1393, 1396-96 (10th Cir. 1987) (debtor authorized to use cash collateral to drill gas wells where creditors offered replacement liens of equal or greater value on well proceeds and other regular income).

The Secured Creditors will be granted replacement liens on the post-petition revenues of the Debtor and proceeds generated with alleged Cash Collateral with a value equal to the amount of the Cash Collateral expended by the Debtor. The Debtor proposes to give a Replacement Lien and 11 U.S.C. § 507(b) priority.

Accordingly, where a Debtor's use of cash collateral protects the secured creditors from such loss, the secured creditors are adequately protected without any other form of adequate protection, other than a full and complete replacement lien. In this case, the Debtor is giving ASB a replacement lien in the post-petition revenues. See, e.g., Orix Credit Alliance, Inc. v. Delta Resources, Inc. (In re Delta Resources, Inc.), 54 F.3d 722, 730 (11th Cir. 1995); In re Westchase I

Associates, L.P., 126 B.R. 692, 694 (Bankr. W.D.N.C. 1991) (“Thus, if the value of the property itself is not declining, as is the case here, the creditor would not be entitled to protection of the accruing interest value of the claim.”).

In August, 2012, the Ninth Circuit Bankruptcy Appellate Panel decided In re Premier Golf Properties, LP., 477 B.R. 767 (9th Cir. BAP 2012), the BAP held that post-petition revenues generated by the debtor’s post-petition business, and a § 552(b) pre-petition security interest does not apply to the debtor’s post-petition revenues.

In this case, while ASB has pre-petition security interest in the Debtor’s inventory, which may be sold post-petition, the pre-petition security interest does not apply to services provided post-petition are not covered by § 552(b). See In re Skagit Pacific Corp., 316 B.R. 330 (9th Cir. B.A.P. 2004); In re Zeeway Corp., 71 B.R. 210 (9th Cir. B.A.P. 1987).

The Debtor does not know how Premier Golf Properties will affect the post-petition use of cash collateral by the post-petition debtor-in-possession, but this court can, at a final hearing on cash collateral, determine whether ASB have a post-petition security interest in any of the Debtor-in-Possession’s post-petition revenues, notwithstanding § 552(b).

Regardless of how this court rules on the issue of the need for more than replacement liens for ASB, that does not resolve the issue of the Debtor's requirements to pay ASB adequate protection.

In the Ninth Circuit, the courts follow In re Weinstein, 227 B.R. 284 (9th Cir. BAP 1997), following United Savings Assn. of Texas v. Timbers of Inwood Forest Assoc. Ltd., 484 U.S. 365 (1988), the Weinstein court wrote as to the need to pay a secured creditor adequate protection:

Adequate protection is provided to safeguard the creditor against depreciation in the value of its collateral during the reorganization process. See Paccomm Leasing Corp. v. Deico Elecs., Inc. (In re Deico Elecs., Inc.), 139 B.R. 945, 947 (9th Or. BAP 1992). If the value of the collateral decreases, the creditor is entitled to cash payments so &at the value of its interest in the collateral remains constant 11 U.S.C. §§ 362(d)(1) and 361(1); see also In re Addison Properties Ltd. Partnership, 185 B.R. 766, 769 (Rankr. N.D. Ill. 1995). Thus, the amount by which the collateral depreciates is the amount of adequate protection to which the secured creditor is entitled, Deico Elecs., 139 B.R. at 947. As the Supreme Court explained in Timbers, adequate protection payments cannot be used to compensate the creditor for lost interest or to provide lost opportunity costs. 484 U.S. 365, 108 S. Ct. 626, 98 L. Ed 2d 740.

In QMECT Inc. v. Burlingame Capital Partners L.P., 373 B.R. 682 (N.D.Cal. 2007) the district court wrote:

Adequate protection is made available to protect creditors from the diminution of collateral during the pendency of the bankruptcy petition; not to compensate

creditors for delay in being able to foreclose on collateral. See In re Timbers of Imwood Forest Assocs., Ltd., 484 U.S. 365, 377, 108 S. Ct. 626, 98 L. Ed 2d 740 (1988). The principle that adequate protection under 11 U.S.C. 363 is intended to compensate lenders for diminution of their collateral was reaffirmed by a Bankruptcy Appellate Panel of the Ninth Circuit In re Weinstem, 227 B.R. 284, 296 (9th Cir., 1998). Bankruptcy courts have held that lenders are not entitled to foreclose on replacement liens absent proof that collateral has diminished in value as a result of the automatic stay or the collateral's use during the pendency of a bankruptcy petition. In re Sun Valley Ranches, Inc., 38 B.J.L. 595, 598 (Br. Id. 1984) (Young, J.). Accordingly, the purpose of adequate protection is to protect lenders from diminution in the value of their collateral, so the bankruptcy court did not err in requiring secured lenders from proving that their collateral had diminished in value.

In the recent In re Big 3D, Inc., 438 B.R. 214 (9th Cir. BAP 2010), the BAP wrote, following In re Deico, 139 B.R. 945 (9th Cir. BAP 1992),

We disagree with PCLC's interpretation of the Bankruptcy Code, and its reading of the holding in Deico. Instead, in our view, as the Deico decision states, “the amount of adequate protection to which an undersecured creditor is entitled is equal to the amount of depreciation its collateral suffers after it would have exercised its state court remedies. . . .” Deico, 139 B.R. at 947. Indeed, Deico left no ambiguity on this point, because later in the opinion the Panel concluded that “[a]dequate protection payments compensate undersecured creditors for the delay bankruptcy imposes upon the exercise of their state law remedies.” *Id.* (emphasis added).

ASB has the burden of showing that it is entitled to adequate protection monetary payments in addition to a replacement lien on the post-petition revenues for the use of pre-petition cash collateral, by showing a deterioration in the value. See accounting concept of “depreciation” is not “deterioration” in value.

In re Elmira Litho, Inc., 174 B.R. 892, 905 (Bankr. S.D.N.Y. 1994)

the court distinguish depreciation from deterioration value as follows:

Further, depreciation expenses taken for tax or other purposes do not constitute evidence that the collateral is declining in value. Conversely, fully depreciated assets may continue to decline in value. Depreciation is an accounting concept that does not necessarily correspond to the actual diminution in value: “[A]s a matter of accounting theory, depreciation is simply an accounting devise intended to allocate the cost of using an asset to the periods in which that use contributes to revenue by approximating the gradual diminution in value of the asset over time due to age, wear and tear, and obsolescence.” *Hawkins v. C.I.R.*, 713 FJld 347, 351 (8th Cir.1983). “[Depreciation is a process of estimated allocation which does not take account of fluctuation in valuation through market appreciation.” *Fribovrg Navigation Co. v. C.I.R.*, 383 U.S. 272, 86 S.Ct. 862, 15 L.Ed.2d 751 (1966).

Williams v. L & S Industries, Inc. (In re L & S Industries, Inc.), 60 B.R. 937, 942 (Bankr.N.D.111.1986).

An entity can select among several depreciation methods, and its choice frequently depends upon tax considerations rather than the effect of time on market value. The most common method, straight-line depreciation, is uniform over time. J. Alix, et al., *Financial Handbook for Bankruptcy Professionals* § 9.25

at 377 (1991). Alternatively, the entity can select an accelerated depreciation method that permits greater depreciation deductions in earlier years. Id. Or the entity can select one method for financial reporting and the other for tax accounting. Id. at 377-78.

In order to justify the award of monetary adequate protection, in addition to the debtor's post-petition use of pre-petition cash collateral, ASB must show actual deterioration in the value of its collateral, not just depreciation on accounting concept, which is not directly related to the deterioration in the value of the collateral.

Like a secured creditor who has a security interests in rents, the cases hold that the secured creditor is adequately protected in a retail context, like the Debtor's, where post-petition revenues are equal to the pre-petition sales revenues and proceeds.

VI. IMMEDIATE RELIEF IS APPROPRIATE IN THIS CASE BECAUSE THE CONTINUATION OF THE DEBTOR'S BUSINESS DEPENDS UPON AUTHORIZATION TO USE CASH COLLATERAL

In enacting section 363 of the Bankruptcy Code, Congress specifically recognized that it might be necessary to schedule expedited hearings on requests for authorization to use cash collateral because of the business exigencies of individual cases. Section 363(c)(2)(B) authorizes the use, sale, or lease of cash collateral "after notice and a hearing." Section 363(c)(3) provides, in pertinent part:

Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with the hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor . . . The court shall act promptly on any request for authorization under Paragraph (2)(B) of this subsection,

11 U.S.C. § 363(c)(3).

Similarly, the Ninth Circuit Court of Appeals has recognized that ex parte interim relief may be crucial to the success of a reorganization:

We realize that “in certain circumstances the entire reorganization effort may be thwarted if emergency relief is withheld” and that reorganization under the Bankruptcy Code “is a perilous process, seldom more so than at the outset of the proceedings when the debtor is often without sufficient cash flow to fund essential business operations.” [citation omitted] ... It is for this very reason that Congress specified that hearings concerning the use of cash collateral “shall be scheduled in accordance with the needs of the debtor.”

Owens-Corning Fiberglass Corp. v. Center Wholesale, Inc. (In re Center Wholesale, Inc., 759 F.2d 1440, 1449 n. 21 (9th Cir. 1985).

Rule 4001(b)(2) of the Federal Rules of Bankruptcy Procedure provides that, at a preliminary hearing, the “court may authorize the use of only the amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.” Rule 4001(b)(2), F.R.Bk.P.

The Debtor requests, to avoid immediate and irreparable harm to the estate, the Court, schedule a preliminary Hearing for _____ and

authorize the Debtor to use the ASB's Cash Collateral through the date of the final hearing.

The Debtor must have the immediate use of the alleged Cash Collateral to meet payroll, and reasonable expenses, to meet the daily costs and expenses of operating, to promptly pay its vendors to keep the Debtor operating. Any delay in the Debtor's ability to meet any of these needs could deprive the Debtor of its business and the ability to successfully reorganize its financial affairs, to the prejudice of all creditors and parties in interest.

In this case, the entry of an order authorizing the use of ASB's cash collateral is particularly relevant because, the Debtor's operations while not subject to deterioration or decline in value, the Debtor is willing to give a full and complete Replacement Liens and pay an adequate protection for the use of ASB's cash collateral for the next 30 days.

VII. THE COURT SHOULD SCHEDULE A FINAL HEARING ON THE MOTION AS SOON AS PRACTICABLE

Rule 4001 (b) of the Federal Rules of Bankruptcy Procedure provides that "the court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. " Fed. R. Bank. Proc. Rule 4001(b)(1).

The Debtor requests the Court set a final hearing on the Motion for Order Authorizing the Use of Cash Collateral, on or about _____.

The Debtor further requests that at the _____ hearing on the Motion, the Court authorize the Debtors to continue to use revenues from the Cash Collateral for the Debtor's projected expenses, in accordance with the proposed Chapter 11 Plan budget, attached hereto as Exhibit B, to provide an analysis of the budget upon confirmation of the Plan.

VIII. RESERVATION

At this time, the Debtor has not completed an analysis of the perfection or priority of the Secured Creditor's interests, or whether any of the claims or security interests of the Secured Creditors are subject to avoidance or subordination. Nothing in this Motion is intended or should be construed as an admission by the Debtor as to the nature, extent, or priority of the claims or secured interests, if any, claimed by the Secured Creditor. Rather, to the extent the Secured Creditor has an interest in the Debtor's Cash Collateral, the Debtor proposes to provide the Secured Creditors with the adequate protection proposed herein.

IX. CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court:

(1) enter an order authorizing the Debtor's immediate use of the cash collateral use of cash collateral for the period from December 9, 2016 to _____, in accordance with this motion, upon the Debtor, providing ASB with full and complete replacement liens for all post-petition revenues. Order expires on _____ and the Debtor needs emergency and immediate relief.

(2) schedule a _____ hearing on this Motion and a final hearing on the Motion for Order Authorizing the Use of Cash Collateral, no earlier than _____;

(3) The first adequate protection payment to ASB in an amount equal to the monthly interest payment on the unpaid secured debt will be due and payable before January 3, 2017.

(4) for such other and further relief as the Court may deem just and proper.

DATED: Honolulu, Hawaii, December 9, 2016.



JERROLD K. GUBEN
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