

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

IN RE:	§	
	§	
SPECTACULARX, INC.	§	BANKRUPTCY NO. 16-52383-CAG
	§	
DEBTOR	§	CHAPTER 11 CASE
	§	

DEBTOR’S MOTION FOR INTERIM AND FINAL ORDERS PURSUANT TO 11 U.S.C. §§ 105, 361, 363, AND 507 AND FEDERAL RULES OF BANKRUPTCY PROCEDURE 4001 AND 9014 (I) AUTHORIZING THE USE OF CASH COLLATERAL AND (II) GRANTING ADEQUATE PROTECTION, INCLUDING REPLACEMENT SECURITY INTERESTS AND SUPERPRIORITY CLAIMS

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE

SpectaculaRX, Inc., debtor and debtor-in-possession (“**Debtor**”), by and through its counsel Pulman, Cappuccio, Pullen, Benson & Jones, LLP, hereby files this *Debtor’s Motion for Interim and Final Orders pursuant to 11 U.S.C. §§ 105, 361, 363, and 507 and Federal Rules of Bankruptcy Procedure 4001 and 9014 (I) Authorizing the Use of Cash Collateral and (II) Granting Adequate Protection, including Replacement Security Interests and Superpriority Claims* (the “**Motion**”). In support of the Motion, Debtor respectfully represents as follows:

I. JURISDICTION, VENUE AND PROCEDURAL BACKGROUND

1. This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. On October 19, 2016 (the “**Petition Date**”), the Debtor filed a voluntary petition under Chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the

“Bankruptcy Code”).

3. Debtor continues to manage and operate its business as a debtor-in-possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code. No creditors’ committee has been appointed in this Case by the United States Trustee. Further, no trustee or examiner has been requested or appointed.

4. The statutory predicates for the relief requested herein are Sections 105, 361, 363, and 507 of the Bankruptcy Code, Rules 4001 and 9014 of the Federal Rules of Bankruptcy Procedure.

5. Attached hereto as Exhibit A is the proposed order on the Motion.

II. FACTUAL BACKGROUND

6. Debtor operates a Pearle Vision retail location at 8235 Agora Pkwy, Suite 123 in The Forum at Olympia Parkway shopping center (the **“Store”**). The Store provides eye care products including prescription glasses, contact lenses and sunglasses. The Store has an unaffiliated Optometrist on site that provides customers with eye exams. Debtor began operations at the Store on or about September 27, 2013.

7. The equity in Debtor is owned equally between Ms. Virge Santiago and Mr. Thomas Goldstein, O.D. Debtor operates the Store pursuant to a License Agreement (the **“SpectaculaRX License Agreement”**) with Luxottica Retail North America Inc. (**“Luxottica”**), which was executed by both Ms. Santiago and Mr. Goldstein. Ms. Santiago has undertaken all operations of the Store since its acquisition by Debtor. While Mr. Goldstein is an equity holder in Debtor, he does not receive a salary from Debtor, is not involved in any of the Store’s operations and does not provide any optometric services at the Store. Instead, Mr. Goldstein owns and operates a separate retail eyewear location at the Ingram Park Mall (the **“Ingram Park Store”**),

pursuant to a separate license agreement with Luxottica.

8. In 2014, a dispute arose between Mr. Goldstein and Luxottica regarding the operations of the Ingram Park Store. In September 2015, the entity operating the Ingram Park Store filed a voluntary petition under chapter 11 of the Bankruptcy Code initiating the case styled In re Thomas J. Goldstein, OD, PA, dba Pearle Vision #8636, Case No. 15-52167 pending before this Court (the “Goldstein Bankruptcy”). In connection with the Goldstein Bankruptcy, an adversary proceeding was initiated against Luxottica for, inter alia, breach of contract, which is still pending before this Court. Luxottica has filed a claim of \$803,030.00 in the Goldstein Bankruptcy.

9. On September 21, 2016, Debtor was sent a Notice of Default stating that the actions taken by Mr. Goldstein in connection with the Ingram Park Store constituted a cross-default of the SpectaculaRX License Agreement. The Notice of Default stated that Debtor could cure the cross-default by paying \$803,029.63 to Luxottica within thirty days of the Notice of Default, otherwise the SpectaculaRX License Agreement would be terminated. Debtor has annual cash profits of less than \$100,000.00, so it was financially unable to satisfy the cure amount. Therefore, in order to avoid termination of the SpectaculaRX License Agreement, Debtor filed this Case.

10. On or about September 30, 2013, Debtor, as Borrower, and Compass Bank (“**Secured Lender**”), as Lender, entered into that specific Loan Agreement, whereby Debtor borrowed funds in the principal amount of \$270,000.00 (the “**Loan**”).

11. As of the Petition Date, the Debtor was indebted to Secured Lender in the amount of at least \$177,101.21 (the “**Pre-Petition Claim**”). The Pre-Petition Claim constitutes a legal, valid and binding obligation of the Debtor that is enforceable in accordance with the terms of the Loan Documents and applicable law. No portion of the Pre-Petition Claim, or any pre-Petition

Date payments made to Secured Lender that were applied to the obligations owing under the Loan are subject to avoidance, subordination, recharacterization, recovery, offset, counterclaim, defense or any type of Claim (as defined in the Bankruptcy Code) pursuant to the Bankruptcy Code or applicable non-bankruptcy law. Additionally, interest, fees, costs, expenses and attorney's fees continue to accrue on the Debtor's indebtedness to Secured Lender (collectively with the Pre-Petition Claim, "**Secured Lender's Claim**").

12. Secured Lender's Claim is secured by, among other things, first priority, valid and perfected liens and security interests (collectively, "**Secured Lender's Liens**") in substantially all of the Debtor's assets, including, but not limited to, the inventory, accounts receivable and the Debtor's related personal property, including any proceeds generated therefrom (collectively, the "Pre-Petition Collateral").¹ Secured Lender's Claim, pursuant to Section 552(b) of the Bankruptcy Code, is also secured by security interests and liens in all post-petition revenues in any way related to the Pre-Petition Collateral, and all related proceeds and profits therefrom, which is Cash Collateral (as hereinafter defined), whether now in the Debtor's (or persons in privity with the Debtor) possession, custody, or control, or in which the Debtor will obtain an interest during the pendency of this Case, and all other Cash Collateral (as hereinafter defined) within the meaning of Section 363(a) of the Bankruptcy Code (collectively with the Pre-Petition Collateral and the Post-Petition Collateral (as hereinafter defined), the "**Collateral**").

13. Secured Lender's Cash Collateral is comprised of all cash and cash equivalents of the Debtor's bankruptcy estate (as defined in Sections 363(a) and/or 552 of the Bankruptcy Code), whether in the form of cash, negotiable instruments, documents of title, securities, deposit

¹ The description of the Pre-Petition Collateral set forth herein is not intended to be all inclusive, and is subject to the more complete description of the Pre-Petition Collateral set forth in the Loan Documents.

accounts, tariffs, governmental rentals, or in any other form, including, but not limited to, all revenues, other income, proceeds, rents or profits of the Collateral, wherever located, that is now in the possession, custody or control of the Debtor, or in which the Debtor will obtain an interest during the pendency of this Case (collectively, “**Cash Collateral**”).²

14. In connection with filing the Motion, Debtor has prepared a monthly budget demonstrating the use of Cash Collateral during that time period. Attached hereto as Exhibit B is a true and correct copy of the Proposed Budget.

III. RELIEF REQUESTED

15. By this Motion, Debtor requests entry of an interim and final order authorizing Debtor to use the Cash Collateral pursuant to the attached Proposed Budget. Additionally, Debtor requests that the Court establish that the adequate protection offered by Debtor to Secured Lender, as outlined in the Motion, is sufficient under 11 U.S.C. §§ 361 and 362(d).

IV. AUTHORITIES AND ARGUMENTS

A. The Court Should Authorize the Use of Cash Collateral

16. Debtor requires use of cash collateral to pay the expenses associated with the operation of the Store, as well as providing adequate protection payments to Secured Lender. If Debtor cannot use the cash collateral, the Debtor would be unable to maintain the Real Property during the course of the Bankruptcy Case, which would be detrimental to proposing a plan of reorganization in this Case. Additionally, Debtor would not be able to make adequate assurance payments to Secured Lender. As set forth on Exhibit B, the budget provided by Debtor encompasses routine maintenance and management of the Real Property. Debtor believes these

² For purposes of this Motion, “proceeds” of any of the Collateral shall mean “Proceeds,” as defined in the Uniform Commercial Code, of such Collateral.

expenses are reasonable and necessary to insure that the value of the Real Property will not deteriorate during the course of the Case.

17. Bankruptcy Code section 363(c)(2) provides that the Debtor may not use, sell, or lease cash collateral unless “(A) each entity that has an interest in such cash collateral consents; or (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.” Bankruptcy Code section 363(e) provides that upon request of an entity that has an interest in property to be used by a debtor, the Court shall prohibit or condition such use as necessary to provide adequate protection of such interest. Secured Lender has consented to the use of cash collateral as set forth in the Proposed Budget. Debtor, without the prior written approval of the Secured Lender, shall not incur expenses for any line item for an amount that exceeds the lesser of the amount for such line item in the Proposed Budget and the actual expenditure for such line item. Debtor shall be entitled to a 5% variance for the monthly budget, but no line-item variance shall exceed 10%.

B. Approval of Adequate Protection

18. Under Bankruptcy Code section 361, when adequate protection is required under Bankruptcy Code section 363 to protect against any diminution in value of an interest of an entity in property, a debtor may provide additional or replacement liens to the prepetition secured creditor. 11 U.S.C. §361(2). The determination of adequate protection is a fact-specific inquiry to be decided on a case-by-case basis. *See MBank Dallas, N.A. v. O’Connor (In re O’Connor)*, 808 F.2d 1393, 1396-97 (10th Cir. 1987). Adequate protection can be provided in a number of ways (*see, e.g.*, 11 U.S.C. §361), with the focus being to protect a secured creditor from diminution in the value of its interest in the collateral during the period of use. *See In re 495 Cent. Park Ave. Corp.*, 136 B.R. at 631 (purpose of adequate protection is “to safeguard the secured creditor from

diminution in the value of its interest” during the Chapter 11 reorganization).

19. In exchange for the Debtor’s use of the cash collateral, the Debtor would propose adequate protection payments to Secured Lender equal to the contractual interest at the non-default rate during the course of the Case.

20. Debtor will also agree that Secured Lender shall have valid first-priority replacement and additional liens and security interests, with priority over all other liens and security interests, save and except for the ad valorem tax liens of Bexar County, Texas, in and upon any and all assets of Debtor, including, but not limited to, the Real Property, the Collateral, Cash Collateral and all assets described as Collateral in the Loan Documents. Such replacement liens shall be automatically perfected without necessity to any further filing by Secured Lender.

21. As additional adequate protection, to the extent applicable, Secured Lender shall be granted an allowed super-priority administrative expense claim as set forth under § 364(c)(1) of the Bankruptcy Code, with priority in payment over any and all administrative expenses arising under Sections 507(b) and 503(b) of the Bankruptcy Code, to the extent of any diminution in the value of Secured Lender’s interest in the Collateral and Cash Collateral. Secured Lender shall also be granted all of the other benefits and protections allowable under Sections 503(b) and 507(b) of the Bankruptcy Code.

22. Debtor requests that the Court conduct an interim hearing to consider the relief requested in the Motion, as soon as possible, so that Debtor may maintain operations pending approval of a final order. Debtor expects that the final form of order will be substantially in the same form as Exhibit A attached hereto.

WHEREFORE, Debtor respectfully requests that the Court enter an Order authorizing Debtor to (a) use Cash Collateral as set forth in the Budget, (b) provide adequate protection to Secured Lender and (c) for such other and further relief to which Debtor may be justly entitled.

Respectfully submitted,

**PULMAN, CAPPUCCIO,
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By: /s/ Thomas Rice
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Thomas Rice
Texas State Bar No. 24025613
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**PROPOSED ATTORNEYS FOR
SPECTACULARX, INC.**

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of **November, 2016**, a true and correct copy of the foregoing document was filed with the Court and served electronically upon those parties registered to receive electronic notice via the Court's CM/ECF system. I further certify that it has been transmitted by first class mail to the parties on the attached service list.

Via CM/ECF: USTPRegion07.SN.ECF@usdoj.gov

Mr. John Kane
Kane Russell Coleman & Logan PC
3700 Thanksgiving Tower
1601 Elm Street
Dallas, TX 75201

Via CM/ECF: USTPRegion07.SN.ECF@usdoj.gov

United States Trustee - SA12
615 E. Houston Street, Suite 533
San Antonio, TX 78205

/s/ Thomas Rice

Thomas Rice

TOP TWENTY LARGEST UNSECURED CREDITORS

Pearle Vision
4000 Luxottica Place
Mason, OH 45040

BBVA Compass Bank
PO Box 797808
Dallas, TX 75379

TCF Equipment Finance
11100 Wayzata Blvd., Ste. 801
Minneapolis, MN 55480

Citibank Customer Service
P.O. Box 6500
Sioux Falls, SD 57117

Luxottica USA
12 Harbor Park Dr.
Port Washington, NY 11050

Marcolin
3140 Route 22 West
Somerville, NJ 08876

Ideal Optics
1290 Maplelawn Drive
Troy, MI 48084

RGV
519 Nolana Ave.
McAllen, TX 78504

ABB Optical
12301 NW 39th Street
Coral Springs, FL 33065

B&B Protector
PO Box 4665
Carol Stream, IL 60197-4665

Silhouette
260 Cannon Street
Green Island, NY 12183

Aspex
2755 SW 32nd Avenue
Pembroke, Park FL 33023

Darilek, Butler & Associates, PLLC
2702 N. Loop 1604 East, Ste. 202
San Antonio, TX 78232

Maverick Optical
1706 Brush Creek Dr.
San Antonio, TX 78248

AT&T
PO Box 5014
Carol Stream, IL 60197

Time Warner Cable
PO Box 60074
City of Industry, CA 91716

SOMO
12135 E. Slauson Ave.
Santa Fe Springs, CA 90670

Bushnell Holdings, Inc.
9200 Cody
Overland Park, KS 66214

Forum Lone Star
c/o AVR Realty Company
One Executive Blvd.
Yonkers, NY 10701

Attn: Compass Bank Department
Ascension Capital Group
Account: xxxxx7982
P.O. Box 165028
Irving, Texas 75016

EXHIBIT A

reached an agreement with Compass Bank (“Secured Lender”), seeks the use of the Secured Lender’s cash collateral (the “Cash Collateral”) during the pendency of this Bankruptcy Case. Having analyzed the agreement of the Debtor and Secured Lender, the Motion, the representations and acknowledgements of all pertinent parties, and the facts presented in this case,

THE COURT HEREBY FINDS:

A. On October 19, 2016 (the “Petition Date”), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor is now operating its business and managing its property as a debtor in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code. No official committee has yet been appointed.

B. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue of the Chapter 11 Case and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

C. An immediate and critical need exists for the Debtor to obtain funds in order to continue the operation of its business. Without such funds, the Debtor will not be able to pay its payroll and other direct operating expenses and obtain goods and services needed to carry on its business during this sensitive period in a manner that will avoid irreparable harm to the Debtor’s estate. At this time, the Debtor’s ability to use Cash Collateral is vital to the confidence of the Debtor’s vendors and suppliers of the goods and services, to the customers and to the preservation and maintenance of the going concern value of the Debtor’s estate.

D. As of the Petition Date, the Debtor was indebted to Secured Lender in the amount of at least \$177,101.21 (the “Pre-Petition Claim”). The Pre-Petition Claim constitutes a legal, valid and binding obligation of the Debtor that is enforceable in accordance with the terms of the Loan Documents¹ and applicable law. No portion of the Pre-Petition Claim, or any pre-Petition Date payments made to Secured Lender that were applied to the obligations owing under the Loan are subject to avoidance, subordination, recharacterization, recovery, offset, counterclaim, defense or any type of Claim (as defined in the Bankruptcy Code) pursuant to the Bankruptcy Code or applicable non-bankruptcy law. Additionally, interest, fees, costs, expenses and attorney’s fees continue to accrue on the Debtor’s indebtedness to Secured Lender (collectively with the Pre-Petition Claim, the “Secured Lender's Claim”).

E. Secured Lender’s Claim is secured by, among other things, first priority, valid and perfected liens and security interests in substantially all of the Debtor’s assets, including, but not limited to, the inventory, accounts receivable and the Debtor’s related personal property, including any proceeds generated therefrom (collectively, the “Collateral”).

F. The Debtor has requested immediate entry of this Order pursuant to Bankruptcy Rule 4001(b)(2) and (c)(2). The permission granted herein to allow the Debtor to obtain the use of Cash Collateral financing is necessary to avoid immediate and irreparable harm to the Debtor. This Court concludes that entry of this Order is in the Debtor’s best interest and its estate and creditors as its implementation will, among other things, allow for the continued operation and rehabilitation of the Debtor’s business.

THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED THAT

1. The Debtor is authorized to enter into all agreements pursuant to the terms of this Order necessary to allow the Debtor to use Cash Collateral subject to the protections and

¹ Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Motion.

consideration described in this Order in the amounts and for the expenses set forth on the monthly budget attached hereto.

2. The Debtor, without the prior written approval of the Secured Lender, shall not incur expenses for any line item for an amount that exceeds the lesser of the amount for such line item in the budget attached hereto as Exhibit A ("Budget") and the actual expenditure for such line item. The Debtor shall be entitled to a 5% variance for the monthly budget, but no line-item variance shall exceed 10%. The Debtor and the Secured Lender shall be permitted to modify the Budget upon written mutual consent without further order of the Court.

3. The Debtor is authorized to collect and receive all cash funds and credit card payments. The Debtor shall account each month to the Secured Lender for all funds received. For purposes of this Order, "Proceeds" of any of the Secured Lender's collateral shall mean Proceeds (as defined in the Uniform Commercial Code) of such collateral security for all Cash Collateral permitted to be used hereunder by the Debtor. Those Proceeds shall not, directly or indirectly, be used to pay expenses of the Debtor or otherwise disbursed except for those expenses and/or disbursements that are expressly permitted herein and as shown on the Debtor's Budget.

4. The Secured Lender is hereby granted valid, binding, enforceable, and perfected liens co-extensive with the Secured Lender's pre-petition liens in all currently owned or hereafter acquired property and assets of the Debtor, of any kind or nature, whether real or personal, tangible or intangible, wherever located, now owned or hereafter acquired or arising, and all proceeds and products thereof, including, without limitation, all accounts receivable, general intangibles, inventory, and deposit accounts.

5. As adequate protection for the interests of the Secured Lender, the Secured Lender is hereby granted first priority replacement liens and security interests, in accordance with Bankruptcy Code Sections 361, 363, 364(c)(2), 364(e), 501(b)(1) and 552, having priority over all other creditors, against the Debtor's accounts receivable originating post-petition and any and all cash or other proceeds from those receivables on a dollar-for-dollar basis for each dollar of pre-petition cash or accounts receivable used by Debtor hereunder, to secure all of the Secured Lender's allowed claims, including post-petition interest and attorneys' fees. The replacement liens granted to the Secured Lender in this Order are automatically perfected without the need for filing of a UCC-1 financing statement with the Secretary of State's Office or any other such act of perfection.

6. As further adequate protection to the Secured Lender, the Secured Lender is hereby granted an allowed super-priority administrative expense claim as set forth under § 364(c)(1) of the Bankruptcy Code, with priority in payment over any and all administrative expenses arising under Sections 507(b) and 503(b) of the Bankruptcy Code, to the extent of any diminution in the value of Secured Lender's interest in the Collateral and Cash Collateral. Secured Lender is further granted all of the other benefits and protections allowable under Sections 503(b) and 507(b) of the Bankruptcy Code.

7. As further adequate protection to the Secured Lender, the Debtor shall pay to Secured Lender each monthly installment due and owing to the Secured Lender in accordance with the Secured Lender's applicable loan documents. The adequate protection payments shall be applied by the Secured Lender in accordance with the terms of the Loan Agreement.

8. Nothing herein shall grant a lien on, interest in or claim on Chapter 5 causes of action.

9. All cash accounts of Debtor and all accounts receivable collections by Debtor post-petition shall be deposited in a separate cash collateral account, being Debtor's debtor-in-possession account.

10. During the pendency of this order, the Debtor will maintain insurance on the Secured Lender's collateral and pay taxes when due.

11. The Debtor shall execute and deliver to the Secured Lender all such agreements, financing statements, instruments and other documents as the Secured Lender may reasonably request to evidence, confirm, validate or perfect the liens granted pursuant hereto. The Debtor shall deliver a copy of its Monthly Operating Report and a copy of each DIP bank account statement to the Secured Lender's counsel by the 20th day of each month for the prior month.

12. If the Debtor defaults under the terms of this Order, the Secured Lender shall provide the Debtor with seven (7) days written notice of the default and opportunity to cure the default. If after the expiration of the 7-day notice period the Debtor has not cured its default, the automatic stay under Section 362 of the Bankruptcy Code shall be modified to allow the Secured Lender to enforce all of its rights, title, and interest in any pre or post-petition collateral securing its claim, in accordance with its loan documents, this Order, and applicable law, and including but not limited to repossession and foreclosure.

END OF ORDER

AGREED:

KANE RUSSELL COLEMAN & LOGAN PC

By: /s/ John J. Kane
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**PROPOSED ATTORNEYS FOR
SPECTACULARX, INC.**

EXHIBIT B

SPECTACULARX MONTHLY BUDGET

Description	Amount
Sales	\$61,000.00
Costs of Goods Sold	-\$20,000.00
Gross Profit	\$41,000.00
Operating Expenses	
Officer/Mgmt Payroll	\$6,800.00
Payroll-Other Employees	\$4,200.00
Payroll Taxes	\$2,180.00
Rental Real Property	\$9,461.00
Equipment Payment -TCF	\$1,000.00
Repairs and Maintenance	\$300.00
Insurance	\$229.00
Telephone and Utilities	\$1,200.00
Luxottica Royalty Payment (7% of Gross Sales)	\$4,270.00
Luxottica Advertising Fee (8% of Gross Sales)	\$4,880.00
Adequate Assurance to Compass Bank	\$3,817.00
Payroll Preparation	\$700.00
Credit Card Transaction Fees	\$965.00
Total Operating Expenses	\$40,002.00
Net Gain from Operations	\$998.00