

UNITED STATES BANKRUPTCY COURT
DISTRICT OF COLORADO

In re:

CREEKSIDE CANCER CARE, LLC,
EIN: 27-0468155,

Debtor.

Case No. 16-21943-MER

Chapter 11

MOTION OF DEBTOR FOR ENTRY OF FINAL ORDER
AUTHORIZING USE OF CASH COLLATERAL

Creekside Cancer Care, LLC (the “**Debtor**”), the debtor and debtor in possession in the above-captioned case, hereby files this motion (the “**Motion**”) for the entry of an order pursuant to section 363 of title 11 of the United States Code (the “**Bankruptcy Code**”), Rule 4001 of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), and Rules 4001-3 and 9013-1 of the Local Bankruptcy Rules, authorizing the Debtor’s use of cash collateral on a final basis and providing adequate protection to properly perfected secured creditors. In support of this Motion, the Debtor relies upon and incorporates by reference the *Declaration of Matthew O’Rourke in Support of Motion Seeking Expedited Entry of Orders* (the “**O’Rourke Declaration**”), filed on December 16, 2016 (Docket No. 28). In further support of this Motion, the Debtor respectfully states as follows:

SUMMARY OF RELIEF REQUESTED

1. The Debtor respectfully requests that the Court enter a final order (the “**Final Order**”),¹ substantially in the form attached hereto, (i) authorizing the Debtor to use cash collateral in accordance with the Budget attached as **Exhibit A** to the proposed Final Order; (ii) granting replacement liens to the Debtor’s secured creditors in accordance with their relative priorities; (iii) authorizing the Debtor to make adequate protection payments to secured lender

¹ Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the proposed Final Order.

MidFirst Bank (“**MidFirst**”); and (iv) granting related relief, all as described in more detail below.

2. Pursuant to Bankruptcy Rule 4001(b) and Local Rule 4001-3(2), the Debtor provides the following summary of the relief requested herein:

Items Required by Bankruptcy Rule 4001(b)(1)(B)	
The name of each entity with an interest in the cash collateral.	<p>The following entities have security interests in the cash collateral (each as defined below): MidFirst; CLS; NorthEast Bank; LiftForward.</p> <p>The following entities may also assert an interest in the cash collateral (each as defined below): AccuRay and Byline.</p>
The purposes for the use of the cash collateral.	To fund the Debtor’s ordinary course operations, including rent, payroll, and utilities, in accordance with the Budget.
The material terms, including duration, of the use of cash collateral.	The Debtor proposes to use the cash collateral in accordance with the Budget attached hereto. Unless terminated earlier in accordance with Paragraph 29 of the proposed Final Order, the Debtor’s use of Cash Collateral will terminate on June 30, 2017.
Any liens, cash payments, or other adequate protection that will be provided to each entity with an interest in the cash collateral.	<p>The Debtor proposes to grant replacement liens to each entity with an interest in the cash collateral pursuant to Bankruptcy Code section 361(2). <i>See</i> Final Order ¶ 21. The replacement liens will attach to the Debtor’s postpetition accounts and income in accordance with the secured creditors’ relative prepetition priorities. All rights of the Debtor and the secured creditors are reserved with respect to relative priority.</p> <p>As adequate protection and in consideration of MidFirst’s agreement to</p>

	charge postpetition interest at the non-default rate, the Debtor proposes to make adequate protection payments to MidFirst in form of: (1) postpetition interest payments, <i>see</i> Final Order ¶ 20, and (2) payment of MidFirst’s reasonable attorneys’ fees and costs, subject to the limitations set forth in Paragraph 17 of the Final Order.
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Items Required by Local Rule 4001-3	
Whether the proposed form of order contains any provision of the type indicated in the appendix at L.B.R. 4001-3(a)App.	Yes, see below.
Use of funds limitations.	Cash collateral shall be used in accordance with the Budget, subject to a 10% aggregate monthly variance (except for payment of professionals’ fees). Cash collateral shall not be used to sue MidFirst or contest its debt or liens. <i>See</i> Final Order ¶ 41.
Protections afforded under 11 U.S.C. §§ 363 and 364.	Replacement liens and adequate protection payments, as described above.

Items Required by L.B.R. 4001-3(a)App.	
Cross-collateralization clauses.	None.
Provisions or findings of fact that bind the estate or all parties in interest with respect to the validity, perfection or amount of the secured party’s lien or debt.	The Final Order contains provisions that bind the estate as to the validity, amount, and perfection of MidFirst’s secured claims. <i>See</i> Final Order ¶¶ 6-10. The justification for these provisions is that the Debtor is unaware of any basis to contest the validity, amount, or perfection of the MidFirst claims and such admissions were an essential part of the bargain negotiated between the Debtor and MidFirst.
Provisions or findings of fact that bind the	None. The Final Order contains no

<p>estate or all parties in interest with respect to the relative priorities of the secured party's lien and liens held by parties who are not party to the stipulation.</p>	<p>findings or admissions as to the relative priorities of secured lenders except for an admission that MidFirst holds a first priority deed of trust on the Debtor's real property located at 120 Old Laramie Trail, Lafayette, CO.</p>
<p>Waivers of 11 U.S.C. § 506(c).</p>	<p>Except as to professionals' fees, regarding which the Debtor's and MidFirst's rights are reserved, MidFirst's collateral shall not be subject to surcharge under section 506(c). <i>See</i> Final Order ¶ 43. The section 506(c) waiver is justified in this case because the Debtor and MidFirst have negotiated a detailed Budget governing the Debtor's use of cash collateral. MidFirst requested the inclusion of the section 506(c) waiver as consideration for its agreement to consent to the Debtor's use of cash collateral consistent with the Budget.</p>
<p>Provisions that operate, as a practical matter, to divest the debtor-in-possession of any discretion in the formulation of a plan, administration of the estate or limit access to the court to seek any relief under other applicable provisions of law.</p>	<p>The Final Order provides that the Debtor shall not use MidFirst's cash collateral or proceeds thereof to bring claims against MidFirst or challenge its secured claims. <i>See</i> Final Order ¶ 41. In addition, the filing of an adversary proceeding against MidFirst is grounds for termination of the Debtor's ability to use cash collateral. <i>See</i> Final Order ¶ 29. These provisions are justified because they were provided in consideration of MidFirst's agreement to consent to the Budget and to charge postpetition interest at the non-default rate. Moreover, the Debtor does not believe there is any basis for claims against MidFirst or challenges to its debt.</p>
<p>Releases of liability for the creditor's alleged prepetition torts or breaches of contract.</p>	<p>The Debtor is not aware of any claims against MidFirst, and to the extent that any claims may exist, waives all claims or causes of action against MidFirst, its officers, directors, employees, attorneys, advisors and representatives relating to or arising in connection with the MidFirst Loan Documents, the MidFirst</p>

	Obligations, or any security therefore, including but not limited to any defenses or challenges of Debtor to the validity, extent, perfection, or enforceability of any liens, security interests, claims, or causes of action of MidFirst. <i>See</i> Final Order ¶ 9. This provision is justified because it was provided in consideration of MidFirst's agreement to consent to the Budget and to charge postpetition interest at the non-default rate. Moreover, the Debtor does not believe there is any basis for claims against MidFirst or challenges to its debt.
Waivers of avoidance actions arising under the Bankruptcy Code.	The waiver of claims against MidFirst set forth in Paragraph 9 of the Final Order encompasses avoidance claims against MidFirst. This provision is justified because it was provided in consideration of MidFirst's agreement to consent to the Budget and to charge postpetition interest at the non-default rate. Moreover, the Debtor does not believe there is any basis for claims against MidFirst or challenges to its debt.
Automatic relief from the automatic stay upon default, conversion to chapter 7, or appointment of a trustee.	None.
Waivers of the procedural requirements for foreclosure mandated under applicable non-bankruptcy law.	None.

JURISDICTION AND VENUE

3. The Court has jurisdiction over the Debtor, its estate, and this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory bases for the relief requested herein are section 363 of the Bankruptcy Code and Bankruptcy Rule 4001.

BACKGROUND

A. General Background.

4. On December 9, 2016 (the "**Petition Date**"), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code.

5. The Debtor is operating its business as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request has been made for the appointment of a trustee or examiner, and no official committee has yet been established in this case.

6. The Debtor is engaged in business as a cancer care and treatment center. The Debtor provides a range of non-invasive radiation therapy treatment options to its patients. The Debtor is based in Lafayette, CO.

7. Additional factual background regarding the Debtor is set forth in the O'Rourke Declaration.

B. Creditors With a Claimed Interest in Cash Collateral.

8. The cash collateral is derived primarily from collection of the Debtor's accounts receivable. As of the date hereof, the Debtor's accounts receivable total approximately \$700,000.

9. As set forth in the O'Rourke Declaration, several secured creditors claim an interest in the Debtor's cash collateral by virtue of their security agreements and UCC filings.

10. MidFirst Bank ("**MidFirst**") is a secured creditor with two secured claims against the Debtor. MidFirst holds a claim in the principal amount of \$2,407,472.37, secured by substantially all assets of the Debtor pursuant to a Business Loan Agreement dated as of March 8, 2013 (as amended) by and between the Debtor and Steele Street Bank & Trust (as predecessor-in-interest to MidFirst) and perfected with a UCC Financing Statement filed on March 14, 2013. This loan was issued pursuant to the U.S. Small Business Administration's

CDC/504 loan program. MidFirst also holds a claim in the principal amount of \$212,786.80, secured by, *inter alia*, the Debtor's accounts and proceeds thereof pursuant to a Business Loan Agreement dated as of April 17, 2013 (as amended) by and between the Debtor and Steele Street Bank & Trust (as predecessor-in-interest to MidFirst) and perfected with a UCC Financing Statement filed on April 18, 2013.

11. Colorado Lending Source, Ltd. ("CLS"), is a secured creditor with a secured claim in the approximate amount of \$1,588,592. The claim of CLS is secured by substantially all assets of the Debtor pursuant to that certain Security Agreement dated as of November 5, 2013 and perfected with a UCC Financing Statement filed on November 5, 2013. This loan is also part of the SBA's CDC/504 loan program.

12. LiftForward, Inc. is a secured creditor with a secured claim in the approximate amount of \$63,166.12. LiftForward's claim is secured by substantially all assets of the Debtor pursuant to that certain LiftForward Credit Agreement dated as of September 21, 2015 and perfected with a UCC Financing Statement filed on September 29, 2015.

13. Northeast Bank is a secured creditor with a secured claim in the approximate amount of \$1,750,000. Northeast Bank's claim is secured by substantially all assets of the Debtor pursuant to that certain Security Agreement—Commercial dated as of October 13, 2015 and perfected with a UCC Financing Statement filed on October 14, 2015.

14. In addition to the foregoing secured creditors, the following entities may claim a security interest in the Debtor's cash collateral:

- a) TomoTherapy Incorporated, a wholly owned subsidiary of Accuray Incorporated ("Accuray") pursuant to that certain Accuray TomoHD System Shared Ownership Agreement dated as of September 30, 2011 by and between the Debtor and Accuray. On January 11, 2012, Accuray filed a UCC Financing Statement covering certain equipment and "proceeds generated by [the Debtor] therefrom."

- b) Byline Financial Group, as successor-in-interest to Baytree National Bank & Trust Company (“**Baytree**”) pursuant to that certain Lease Agreement dated as of June 6, 2013 by and between the Debtor and Baytree. Byline is owed approximately \$31,284 under the capital lease. On June 17, 2013, Baytree filed a UCC Financing Statement covering substantially all assets of the Debtor.

C. Use of Cash Collateral

15. The Debtor’s revenues are derived from the provision of cancer and tumor treatment services. Revenues are received from customers directly and from insurers. All customer and insurer revenue is generally cash collateral. The Debtor is replacing its accounts and cash in the ordinary course of operations on a daily basis.

16. In order to maintain ongoing operations, the Debtor needs to pay for operating expenses such as employee wages, utilities, insurance, rent, equipment maintenance, and other expense items accompanying the budget attached to the proposed Final Order as **Exhibit A** (the “**Budget**”). If the Debtor is not permitted to use cash collateral, the Debtor will not be able to pay its ordinary course expenses and its operations will cease.

D. Prior Cash Collateral Motion and Orders

17. On December 16, 2016, the Debtor filed its *Expedited Motion of Debtor for Authority to Use Cash Collateral* (Docket No. 26) (the “**Initial Motion**”). On December 23, 2016 and January 13, 2017, the Court entered interim orders authorizing the Debtor to use cash collateral (Docket Nos. 44 & 80). On February 10, 2017, the Court held a further hearing on the Initial Motion. At the hearing, the Debtor stated that it had reached agreement with MidFirst on a form of proposed Final Order. The Court entered an additional interim order (Docket No. 105) and requested that the Debtor send the proposed Final Order out on notice to creditors. *See* Minute Order (Docket No. 104). This Motion follows.

RELIEF REQUESTED AND BASIS FOR RELIEF

18. The Debtor plans to continue operation of its business throughout this chapter 11 case and propose a plan of reorganization that provides for the continuation of the Debtor's business. It is only through a plan and the continued operation of the business that unsecured creditors will receive a substantial recovery on account of their claims.

19. In order to pay necessary operating expenses, the Debtor must use cash collateral in which one or more creditors may have an interest. Without the use of cash collateral, the Debtor will have insufficient funding for business operations. The Debtor does not have material unencumbered cash. Therefore, the Debtor's use of cash collateral during the interim period is necessary to avoid immediate and irreparable harm to the estate. Without the use of cash collateral, the Debtor will not be able to pay employees, rent, utilities, and other costs associated with treatment services provided.

20. The Debtor will be replacing its accounts, cash, and cash equivalents in the course of its daily operations and therefore the collateral base will remain stable and is expected to improve over time. The Debtor's cash position is expected to be positive after meeting expenses during the term of this chapter 11 case.

21. In order to provide adequate protection for the Debtor's use of cash collateral to secured creditors, the Debtor has proposed adequate protection for secured creditors in the order of their relative priorities as set forth below. The proposed Final Order provides, among other things, the following treatment on account of cash collateral:

- a) The Debtor will provide secured creditors with a postpetition lien on all postpetition accounts and income derived from the operation of the business and assets, to the extent that the use of the cash results in a decrease in the value of the secured creditors' interest in the collateral pursuant to 11 U.S.C. § 361(2), *see* Final Order ¶ 21;

- b) The Debtor will only use cash collateral in accordance with the Budget attached to the Final Order as **Exhibit A** subject to an aggregate monthly deviation not to exceed 10% without the prior agreement of MidFirst or an order of the Court, *see id.* ¶ 17;
- c) The Debtor will keep all collateral fully insured, *see id.* ¶ 22; and
- d) The Debtor will provide adequate protection to MidFirst in the form of (i) postpetition Interest Payments, *see id.* ¶ 20, and payment of reasonable attorneys' fees and costs, subject to the limitations set forth in Paragraph 17 of the Final Order.

22. Should the Debtor default in the provision of adequate protection, the Debtor's approved use of cash collateral will cease and the secured creditors will have the opportunity to obtain further relief from this Court.

23. The Debtor's request to use cash collateral is made with a complete reservation of rights of secured creditors to their various lien positions in and to the Debtor's assets.

24. Approval of the Debtor's use of cash collateral in accordance with this Motion is in the best interest of the Debtor, its creditors, and the estate, as it will allow the Debtor to maintain its ongoing business operations, allow the Debtor to generate revenue, and provide the Debtor with an opportunity to propose a meaningful chapter 11 plan.

NOTICE AND HEARING

25. Notice of this Motion will be provided in compliance with applicable Bankruptcy Rules and Local Rules, as set forth in the Certificate of Service attached hereto and the Notice filed concurrently herewith.

26. If necessary, the hearing on this Motion will be held on March 3, 2017, at 9:30 a.m. *See* Minute Order (Docket No. 104).

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WHEREFORE, the Debtor respectfully requests this Court enter a Final Order, substantially in the form attached hereto, authorizing the Debtor to use cash collateral and granting such other and further relief as is just and proper.

Dated February 10, 2017.

Respectfully submitted,

BROWNSTEIN HYATT FARBER SCHRECK, LLP

s/Samuel M. Kidder

Michael J. Pankow, #21212
Samuel M. Kidder, #49125
410 17th Street, Suite 2200
Denver, Colorado 80202
Telephone: (303) 223-1100
Facsimile: (303) 223-1111
mpankow@bhfs.com
skidder@bhfs.com

Attorneys for Debtor

Label Matrix for local noticing
1082-1
Case 16-21943-MER
District of Colorado
Denver
Fri Feb 10 11:35:16 MST 2017

AG Adjustments, Ltd (assignee of Google)
Attn: Paula Tillem or Sean Morris
740 Walt Whitman Rd
Melville, NY 11747-2212

AXA Life Insurance
P.O. Box 1047
Charlotte, NC 28201-1047

Steven E. Abelman
410 Seventeenth St
22nd floor
Denver, CO 80202-4437

Accuray
1310 Chesapeake Terrace
Sunnyvale, CA 94089-1100

Airgas
PO Box 1152
Tulsa, OK 74101-1152

Airgas USA, LLC
110 West 7th St Suite 1400
Tulsa, OK 74119-1077

Anatome
Attn: Jeff Kuligowski
7505 Fannin St., Suite 442
Houston, TX 77054-1945

Anderson & Whitney
5801 West 11th Street, Suite 300
Greeley, CO 80634-4813

Andrew Fitts
PO Box 13527
Seattle WA 98198-1008

Anthem Blue Cross Blue Shield
PO Box 51011
Los Angeles, CA 90051-5311

Anthony Cody
120 Old Laramie Trl E
Lafayette, CO 80026-7012

Apple Financial Services
P.O. Box 3072
Cedar Rapids, IA 52406-3072

Ascentium Capital
PO Box 301593
Dallas, TX 75303-1593

BS Holdings, LLC
120 Old Laramie Trail E
Lafayette, CO 80026-7012

Bayer Healthcare
PO Box 360172
Pittsburgh, PA 15251-6172

Baytree / Byline Leasing
721 N. McKinley Rd #200
Lake Forest, IL 60045-1849

Mark F. Bell
360 S. Garfield St.
Ste. 600
Denver, CO 80209-3136

Block Imaging
1845 Cedar Street
Holt, MI 48842-1757

Bonnie Sorden
408 Elk Trail
Lafayette, CO 80026-9085

Brian Thorndyke
120 Old Laramie Trl E
Lafayette, CO 80026-7012

Brittany Barnes
9100 Vance St.
Westminster, CO 80021-7021

Byline Financial Group
721 N. McKinley Rd.
Lake Forest, IL 60045-1849

Chad S. Caby
1200 17th St.
Suite 3000
Denver, CO 80202-5855

Centennial Radiation Oncology, P.C.
120 Old Laramie Trail E
Lafayette, CO 80026-7013

Century Link
PO Box 52187
Phoenix, AZ 85072-2187

Century Link
PO Box 91155
Seattle, WA 98111-9255

Charles Kelley Simpson, Dr.
7730 Park Ridge Circle
Fort Collins, CO 80528-8908

Chris Noonan
120 Old Laramie Trl E
Lafayette, CO 80026-7012

City of Lafayette
1290 South Public Rd
Lafayette, CO 80026-2706

Coal Creek Investment Leasing Co
140 Old Laramie Trl E
Lafayette, CO 80026-7016

Coal Creek Investment Leasing Company, LLC
120 Old Laramie Trail E
Lafayette, CO 80026-7012

Cogent / ACEI
PO Box 791087
Baltimore, MD 21279-1087

Colorado Department Of Revenue
1375 Sherman St.
Room 504
Attention Bankruptcy Unit
Denver CO 80261-3000

Colorado Lending Source
518 17th St, 18th Floor
Denver, CO 80202-4117

Colorado Lending Source, Ltd.
1441 18th Street
Suite 100
Denver, CO 80202-5932

Aaron J. Conrardy
1660 Lincoln St.
Ste. 2200
Denver, CO 80264-2202

Cottonwood Office Partners, LLC
16427 N Scottsdale Rd., Ste 410
Scottsdale, AZ 85254-7102

Creekside Cancer Care, LLC
120 Old Laramie Trail E
Lafayette, CO 80026-7012

Dave Hahn
399 Becham Drive
San Jose, CA 95123-5605

Michael J. Davis
6795 E. Tennessee Ave.
Ste. 330
Denver, CO 80224-1691

Deborah Thompson
1819 Enfield St.
Ft. Collins, CO 80526-5549

Bradford E. Dempsey
3200 Wells Fargo Center
1700 Lincoln St.
Denver, CO 80203-4500

Direct Capital
155 Commerce Way
Portsmouth, NH 03801-3243

Donald E. Benjamin Living Trust
PO Box 544
Tesuque, NM 87574-0544

Dryland Stucco Inc
PO Box 270626
Fort Collins, CO 80527-0626

Drylands Stucco
PO Box 270626
Fort Collins, CO 80527-0626

El Milagro
8711 E . Pinnacle Rd., #141
Scottsdale, AZ 85255

Eldorado Water
PO Box 172526
Denver, CO 80217-2526

Everbank Commercial Finance
10 Waterview Blvd
Parsippany, NJ 07054-7607

Everbank Commercial Finance, Inc.
PO Box 911608
Denver, CO 80291-1608

Everbank Leasing
PO Box 911608
Denver, CO 80291-1608

FCF
PO Box 1358
Grand Junction, CO 81502-1358

Farber Medical Solutions
951 Old Clinton Rd #20
Westbrook, CT 06498-1786

Fire Alarm Services
4800 W 60th Ave
Arvada, CO 80003-6915

First Bank
10403 West Colfax Ave
Denver, CO 80215-3811

Google Adwords / AG Adjustments Ltd.
740 Walt Whitman Rd
Melville NY 11747-2212

Guardian
PO Box 824404
Philadelphia, PA 19182-4404

Hamilton Linen
P.O. Box 843348
Kansas City, MO 64184-3348

Hogan Lovells US LLP
Attn: Mark Heimlich
1601 Wewatta St., Suite 900
Denver, CO 80202-6314

IRS
PO Box 7346
Philadelphia PA 19101-7346

Key Business Strategies, Inc.
986 Berganot Trail
Castle Pines, CO 80108-3627

Samuel M. Kidder
410 17th St., Ste. 2200
Denver, CO 80202-4432

LEAF
P.O. Box 742647
Cincinnati, OH 45274-2647

LEAF Capital Funding, LLC
2005 Market St 14th Floor
ATTN: Legal Dept
Philadelphia, PA 19103-7009

LEAF Capital Funding, LLC
PO Box 742647
Cincinnati, OH 45274-2647

David B. Law
1900 W. Littleton Blvd.
Littleton, CO 80120-2023

Lift Forward
261 Madison Avenue
New York, NY 10016-2303

LiftForward, Inc
c/o Jeffrey Rogers
180 Maiden Lane, 10 Floor
New York, NY 10038-5178

Linde (MRI Helium)
PO Box 100691
Pasadena, CA 91189-0003

MacPractice
233 N 8th, Ste 300
Lincoln, NE 68508-1490

Matthew O'Rourke
120 Old Laramie Trl E
Lafayette, CO 80026-7012

McKesson Medical Surgical
PO Box 660266
Dallas, TX 75266-0266

McKesson Specialty
PO Box 841838
Dallas, TX 75284-1838

MedPro Medical Waste
PO Box 5683
Chicago, IL 60680-5683

Mercedes Gamez
11405 East 111th Ave.
Henderson, CO 80640-7706

MidFirst Bank
555 17th St., Ste 150
Denver, CO 80202-3913

Mile High Outdoor / Greenberg & Sada, P.C.
770 W. Hampden Ave #227
Englewood, CO 80110-2152

Morning Star Elevator
16165 Cliffrock Court
Colorado Springs, CO 80921-3728

Alan K. Motes
Byron G. Rogers Federal Building
1961 Stout St.
Ste. 12-200
Denver, CO 80294-6004

Northeast Bank
200 Berkeley Street
P.O. Box 171679
Boston, MA 02117-3523

Brandan Oliver
3200 Wells Fargo Center, 1700 Lincoln St
Denver, CO 80203

Michael J. Pankow
410 17th St.
22nd Fl.
Denver, CO 80202-4437

Paul L. Vosburgh Revocable Trust
PO Box 36060
Albuquerque, NM 87176-6060

Philadelphia Indemnity Insurance
P.O. Box 2057
Kalispell, MT 59903-2057

Philips Medical Capital
P.O. Box 92449
Cleveland, OH 44193-0003

Pinnacle
P.O. Box 561434
Denver, CO 80256-0001

Qwest Corp. dba
CenturyLink Communications LLC
1801 California St., Rm 900
Denver, CO 80202-2609

Royal Bank America Leasing, LP
550 Township Line Rd., Ste. 425
Blue Bell, PA 19422-2734

Royal Bank Leasing
550 Township Line Rd, Ste 425
Blue Bell, PA 19422-2734

Securities and Exchange Commission
Central Regional Office
1961 Stout St.
Ste. 1700
Denver CO 80294-1700

Securities and Exchange Commission
Midwest Regional Office
175 W. Jackson Blvd.
Ste. 900
Chicago IL 60604-2815

Securities and Exchange Commission
Central Regional Office
1801 California St.
Ste. 1500
Denver CO 80202-2656

Sherman & Howard, L.L.C.
Attn: Alan Roets
633 Seventeenth Street, Suite 3000
Denver, CO 80202-3622

Siemens Medical Solutions USA, Inc.
Attn: JoAnn McDonough
40 Liberty Boulevard
Mail Code 40-2W
Malvern, PA 19355-1418

(p)SPRINT NEXTEL CORRESPONDENCE
ATTN BANKRUPTCY DEPT
PO BOX 7949
OVERLAND PARK KS 66207-0949

Summit Funding Group, Inc.
Lease Administration Center
Dept. 3500
4680 Parkway Drive, Suite 300
Mason, OH 45040-7979

Summit Lease Administration
Lease Administration Center Dept. 3500
4680 Parkway Dr., Suite 300
Mason, OH 45040-7979

Susquehanna Commercial Finance, Inc.
2 Country View Road, Suite 300
Malvern, PA 19355-1420

TomoTherapy, Inc.
Attn: Stan Gee
1310 Chesapeake Terrace
Sunnyvale, CA 94089-1100

Travelers
PO Box 660317 443 Crown Pt Cir, Ste A
Grass Valley, CA 95945-9557

Trethan-Goswick, L.L.C.
Attn: Troy Gillenwater
PO Box 2335
Carefree, AZ 85377-2335

U.S. Small Business Administration
Disaster Assistance
Processing and Disbursement Center
14925 Kingsport Road
Fort Worth, TX 76155-2243

U.S. Small Business Administration
Jonathan Braun, Attorney
721 19th Street
Suite 426
Denver, CO 80202-2517

US Trustee
Byron G. Rogers Federal Building
1961 Stout St.
Ste. 12-200
Denver, CO 80294-6004

United States Small Business Administration
409 3rd St. SW
Washington, DC 20416-0005

United States Small Business Administration
Colorado District Office
721 19th St., Suite 426
Denver, CO 80202-2517

David Wadsworth
1660 Lincoln St.
Ste. 2200
Denver, CO 80264-2202

Wells Fargo
SBA 504 Program
9062 Old Annapolis Road
Columbia, MD 21045-2479

Western Equipment Finance
503 HWY 2 W
Devils Lake, ND 58301-2938

Western Equipment Finance
PO Box 640
Devils Lake, ND 58301-0640

Xcel Energy
PO Box 9477
Minneapolis, MN 55484-9477

The preferred mailing address (p) above has been substituted for the following entity/entities as so specified by said entity/entities in a Notice of Address filed pursuant to 11 U.S.C. 342(f) and Fed.R.Bank.P. 2002 (g)(4).

Sprint
PO Box 4181
Carol Stream, IL 60197

The following recipients may be/have been bypassed for notice due to an undeliverable (u) or duplicate (d) address.

(u) Anderson & Whitney, P.C.

(u)Accuray Inc.

(u)FirstBank

(u)LiftForward, Inc.

(u)MidFirst Bank

(u)Northeast Bank

End of Label Matrix	
Mailable recipients	111
Bypassed recipients	6
Total	117