

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
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In re: Chapter 11
FLORIDA EAR & SINUS CENTER, P.A., Case No. 8:17-bk-1120-KRM
Debtor. *Emergency Hearing Requested*

**DEBTOR'S EMERGENCY MOTION FOR
AUTHORITY TO USE CASH COLLATERAL**

STATEMENT OF RELIEF REQUESTED

The Debtor seeks authority to use cash collateral to fund its operating expenses and the costs of administering this Chapter 11 case in accordance with a proposed budget to be furnished in advance of the hearing and to provide replacement liens as described below as adequate protection for the interests in the cash collateral. The Debtor believes that the secured creditor listed herein may assert valid and perfected security interests in the cash collateral. As adequate protection, the Debtor proposes to grant to the secured creditor replacement liens to the same extent, validity, and priority as the security interests held by the secured creditor as of the Petition Date.

FLORIDA EAR & SINUS CENTER, P.A. (the “Debtor”) respectfully requests the entry of an order authorizing the use of cash collateral and, in support thereof, the Debtor respectfully represents as follows:

Jurisdiction

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. The subject matter of this Motion is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper in this district pursuant to 28 U.S.C. § 1408. The statutory predicates for the relief sought herein are §§ 105(a), 361, 363, and 541, 552 of the Bankruptcy Code and Rule 4001 of the Federal Rules of Bankruptcy Procedure.

Background

2. On February 13, 2017 (the “**Petition Date**”), the Debtor filed its Voluntary Petition for Relief under Chapter 11 of Title 11 of the United States Code (the “**Bankruptcy Code**”).

3. The Debtor is a Florida professional services corporation that owns and operates a medical practice which specializes in the treatment of diseases and surgery of the ears, nose and throat.

Summary of Prepetition Secured Indebtedness

4. On or about June 11, 2014, JPMorgan Chase Bank, N.A. (“**Chase Bank**”) made a loan to the Debtor in the principal amount of \$250,000.00, evidenced by a line of credit note (the “**Chase Bank Loan**”) given by Debtor in favor of Chase Bank. The indebtedness under the Chase Bank Loan is secured by that certain Continuing Security Agreement dated June 11, 2014, Credit Agreement dated June 11, 2014, and a UCC-1 Financing Statement filed on June 19, 2014 (collectively, the “**Chase Bank Loan Documents**”), which among other things appears to have granted a lien to Chase Bank on the Debtor’s inventory, accounts, equipment, general intangibles, and fixtures. As of the Petition Date, the total balance under the Chase Bank Loan is approximately \$250,000.00.

5. In addition to the Chase Bank Loan, the Debtor may be indebted to Chase Bank (a) in the approximate amount of \$4,900,000.00 for contingent guaranty liabilities associated with financing on the property on which the Debtor operates, and (b) in connection with two equipment loans in the aggregate amount of approximately \$92,000.00.

6. Lastly, on or about January 31, 2017, Dr. Herbert Silverstein (“**Dr. Silverstein**”) made a loan to the Debtor in the principal amount of \$150,000.00, evidenced by a promissory

note (the “**Silverstein Loan**”) given by the Debtor in favor of Dr. Silverstein. The indebtedness under the Silverstein loan is secured by that certain Security Agreement dated January 31, 2017, and a UCC-1 Financing Statement filed on February 8, 2017 (collectively, the “**Silverstein Loan Documents**”), which granted a junior lien to Dr. Silverstein on the Debtor’s inventory, accounts, equipment, general intangibles, and fixtures. As of the Petition Date, the total principal balance under the Silverstein Loan is \$150,000.00.

7. Chase Bank and Dr. Silverstein (collectively, the “**Lenders**”) may assert they have a lien on the Debtor’s accounts receivable and, in the case of Chase Bank, upon the bank account maintained at Chase Bank, and that they therefore have an interest in the Debtor’s cash collateral within the meaning of 11 U.S.C. § 363(a) (the “**Cash Collateral**”).

8. The Debtor intends to use the Cash Collateral in the continued operation of its business and in accordance with the budget (the “**Budget**”) attached hereto as **Exhibit A**.

Relief Requested and Grounds for Relief

9. By this Motion, the Debtor respectfully requests the entry of an interim order, the proposed form of which is attached hereto as **Exhibit B** and incorporated herein by reference, authorizing the use of Cash Collateral, in accordance with a budget to be furnished in advance of the interim hearing, to fund its operating expenses and the costs of administering this Chapter 11 case so as to avoid immediate and irreparable harm to the estate pending a final hearing and the entry of a final order. Specifically, the Debtor intends to use Cash Collateral for the:

- a. care, maintenance, and preservation of the Debtor’s assets;
- b. payment of necessary suppliers, utilities, and other business expenses;
- c. other payments necessary to sustain continued business operations;
and

d. costs of administration in this Chapter 11 case.

Except as specifically authorized by law or court order, the Debtor will not use Cash Collateral to pay pre-petition obligations.

10. The Debtor requests authorization to use Cash Collateral immediately to fund operating expenses necessary to continue the operation of its business, to maintain the estate, to maximize the return on its assets, and to otherwise avoid irreparable harm and injury to its business and the estate.

11. There is insufficient time for a full hearing pursuant to Rule 4001(b)(2) of the Federal Rules of Bankruptcy Procedure to be held before the Debtor must use Cash Collateral. If this motion is not considered on an expedited basis and if the Debtor is denied the ability to immediately use Cash Collateral, there will be a direct and immediate material and adverse impact on the continuing operations of the Debtor's business and on the value of its assets. In order to continue its business activities in an effort to achieve a successful reorganization, the Debtor must use Cash Collateral in the ordinary course of business. The inability of the Debtor to meet its ordinary business expenses will require the Debtor to discontinue normal operations, which will result in irreparable injury to the Debtor and its chances for reorganization. Any such discontinuation would also materially and adversely impact the value of the Collateral. Indeed, it is in the best interest of the Lender that the Debtor use Cash Collateral, if such usage will preserve the value of the Collateral.

12. "Cash Collateral" is defined as "cash, negotiable instruments, documents of title, securities, deposit accounts or other cash equivalents in which the estate and an entity other than the estate have an interest." 11 U.S.C. § 363(a). Pursuant to section 363(c)(2) of the Bankruptcy Code, the Court may authorize the Debtor to use Cash Collateral as long as the applicable

secured creditors consent or are adequately protected. *See, e.g., In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984); *see also In re McCormick*, 354 B.R. 246, 251 (Bankr. C.D. Ill. 2006) (to use the cash collateral of a secured creditor, the debtor must have the consent of the secured creditor or must establish to the court that the secured creditor's interest in the cash collateral is adequately protected).

13. In exchange for the Debtor's ability to use Cash Collateral in the operation of its business, the Debtor proposes to grant to the Lenders as adequate protection replacement liens on assets acquired after the Petition Date to the same extent, validity, and priority as existed on the Petition Date and to continue to make regular payments to Chase Bank on its loans in the approximate amount of \$7,400.00. In other words, the Debtor proposes that the Lenders' "floating" liens on such assets continue to "float" to the same extent, validity, and priority as existed on the Petition Date, notwithstanding Section 552 of the Bankruptcy Code. The Debtor asserts that the interests of the Lenders will be adequately protected by the replacement liens.

14. If allowed to use Cash Collateral, the Debtor believes that it can stabilize its business operations and maintain going concern value. Otherwise, the Debtor's business operations will cease and its assets will have only liquidation value.

15. The motion is without prejudice to the rights of the Debtor or any other party to contest the extent, validity and/or priority of the Lenders' asserted liens.

Notice

16. No appearance has yet been entered by counsel for Chase Bank. The Debtor provided telephonic notice of the filing of the Chapter 11 Petition to the Chase Bank account officer on February 13, 2017 and will provide telephonic notice of any hearing to such officer.

WHEREFORE, the Debtor respectfully requests that this Court: (1) enter the Interim Order granting the instant Motion and authorizing the interim use of Cash Collateral, the proposed form of which is attached as **Exhibit B**, (2) schedule a preliminary hearing on the Motion at the earliest possible time, (3) schedule a final cash collateral hearing in accordance with Bankruptcy Rule 4001(b)(2), (4) authorize the Debtor to use the Cash Collateral in the operation of its business, and (5) providing for such other and further relief as may be just and proper.

Dated: February 15, 2017

/s/ Harley E. Riedel

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Attorneys for Debtor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Debtor's Emergency Motion for Authority to Use Cash Collateral* has been furnished on this 15th day of February, 2017, by either the Court's CM/ECF system, email, fax, or U.S. Mail to:

Office of the U.S. Trustee
Camille Iurillo, Esquire
LBR 1007-2 Parties in Interest matrix

Dr. Herbert Silverstein
hsilverste@aol.com

JPMorgan Chase Bank, N.A.
Attn: Mark W. Irby, Vice President
4820 S. Florida Ave., Floor 1
Lakeland, FL 33813
(877) 760-1120 (Fax)

/s/ Harley E. Riedel

Harley E. Riedel

EXHIBIT A

**FL. EAR AND SINUS CENTER, P.A
INTERIM CASH COLLATERAL BUDGET**

**Expense Budget
4 Week Period**

EXPENSES

NON-PHYSICIAN STAFF EXPENSES	170,000.00
SUPPLIES EXPENSE	20,000.00
OCCUPANCY COSTS	70,000.00
EQUIPMENT EXPENSE	6,500.00
OTHER OPERATING EXPENSES	81,000.00
PHYSICIAN COMPENSATION	77,000.00
ADEQUATE PROTECTION PAYMENTS	7,400.00
TOTAL EXPENSES	431,900.00

EXHIBIT B

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FLORIDA EAR & SINUS CENTER, P.A., Case No. 8:17-bk-1120-KRM
Debtor.
_____ /

**INTERIM ORDER GRANTING DEBTOR'S EMERGENCY
MOTION FOR AUTHORITY TO USE CASH COLLATERAL**

THIS CASE came on for hearing on February ____, 2017 at _____.m. upon the motion by Florida Ear & Sinus Center, P.A. (the “**Debtor**”) to use cash collateral (Doc. No. _____) (the “**Motion**”). For the reasons stated orally and recorded in open Court, which shall constitute the decision of the Court, it is

ORDERED:

1. The Motion is granted on an interim basis until the continued hearing on the Motion on _____.
2. The Debtor is authorized to use Cash Collateral (as that term is defined in Section 363(a) of the Bankruptcy Code) including, without limitation, cash, deposit accounts, and accounts receivable, to pay ordinary and necessary expenses substantially in accordance with the

budget (the “**Budget**”), a copy of which is attached hereto as **Exhibit A**. Unless the Lenders consent in writing, the Debtor’s total monthly expenditures of cash collateral shall not exceed the total budgeted expenses by more than the Permitted Variance. As used herein, “Permitted Variance” shall mean 10% of the budgeted expenditures.

3. The Lenders are granted as adequate protection post-petition replacement liens against the same property of the Debtor in which they held pre-petition liens, to the same extent, validity, and priority as existed as of the Petition Date, which replacement liens shall be duly perfected without the need to file or execute any document as may otherwise be required under applicable nonbankruptcy law. In addition, the Debtor shall continue to make regular payments to Chase Bank on its loans in the approximate amount of \$7,400.00.

4. To the extent the adequate protection provided for hereby proves insufficient to protect the Lenders’ interest in and to the Cash Collateral under Section 507(b), the Lenders shall have a superpriority administrative expense claim, pursuant to Section 507(b) of the Bankruptcy Code, senior to any and all claims against the Debtor under Section 507(a)(2) of the Bankruptcy Code, whether in this proceeding or in any superseding proceeding.

5. Upon reasonable notice by the Lenders, Lenders shall have the right to inspect its collateral and the Debtor’s books and records during normal business hours to verify the existence, condition, and location of collateral in which said creditor holds a security interest and to audit Debtor’s cash receipts and disbursements, provided such inspection does not unreasonably interfere with Debtor’s business operations.

6. The Debtor shall maintain insurance coverage for the Collateral in accordance with the obligations under the loan and security documents.

7. This Order is not and shall not be construed as determinative as to whether or not any creditor has a valid lien on any property of the Debtor or its estate. This Order is not and shall not be construed as determinative as to the extent or amount of any secured claim associated with any such lien.

8. This Order is without prejudice to the Debtor's right to challenge the extent, validity, or priority of any lien or claim of any creditor, and is likewise without prejudice to the right of any creditor to seek modified adequate protection or restrictions on use of cash collateral or any other remedy available to Lenders under applicable law, and nothing contained in this Order shall be deemed to constitute a waiver of any party's rights or any other right or remedy available to the Debtor or the Lenders.

9. The provisions of this Order shall remain in full force and effect unless modified or vacated by subsequent order of this Court.

Attorney Harley E. Riedel is directed to serve a copy of this order on interested parties who are non-CM/ECF users and to file a proof of service within 3 days of entry of the order.