

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION**

In re:

**CASE NO. 17-16095-BKC-RBR
Chapter 11**

BARMER ENTERPRISES, LLC,

Debtor.

SUNTRUST BANK'S MOTION TO PROHIBIT USE OF CASH COLLATERAL

SUNTRUST BANK ("SunTrust"), by and through its undersigned counsel, hereby and pursuant to 11 U.S.C. § 363(e) files this Motion to Prohibit Use of Cash Collateral of Debtor, Barmer Enterprises, LLC (the "Debtor"), and states as follows:

BACKGROUND

1. On May 15, 2017 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of title 11, United States Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code").

2. As set forth in the Court's May 26, 2017 *Order (I) Setting Final Evidentiary Hearing on Debtor's Motion for Authorization of Cash Collateral; (II) Approving the Interim Use of Cash Collateral; (III) Granting Adequate Protection and (IV) Fixing Time for Creditors to Object to Validity, Priority, Extent and Enforceability of Secured Claims* (Doc. Nos. 25 and 26), SunTrust holds a blank first priority lien and security interest in and to the Debtor's property, which includes, without limitation, the Debtor's cash collateral.

3. On August 31, 2017, SunTrust filed its proof of claim, which is Claim No. 9 in the claims register, attaching proof of its perfected security interest in all of the Debtor's property and assets.

4. The Debtor was authorized, on an interim basis, to use SunTrust's cash collateral pursuant to the Court's October 5, 2017 *Third Interim Order (I) Setting Final Hearing on Debtor's Motion for Authorization of Cash Collateral on October 25, 2017 at 1:30 PM; (II) Approving the Interim Use of Cash Collateral; (III) Granting Adequate Protection and (IV) Fixing Time for Creditors to Object to Validity, Priority, Extent and Enforceability of Secured Claims* (the "Interim Order").

5. Pursuant to the Interim Order, the Debtor's interim use of cash collateral is conditioned upon the Debtor's timely payment of weekly adequate protection payments to SunTrust.

6. According to the Interim Order, the Debtor is required to make weekly adequate protective payments to SunTrust in the amount of \$3,500.00 no later than Wednesday of each week, commencing on August 2, 2017. The Debtor has made a total of five adequate protection payments, but made each payment consistently late. The Debtor failed to make the payment due September 6, 2017, and has failed to make any subsequent payments due under the Interim Order.

7. SunTrust provided the Debtor with notice of its payment defaults, as required by the Interim Order, by transmitting to the Debtor's attorney an email dated September 18, 2017 notifying the Debtor of its payment defaults under the Interim Order and giving the Debtor two business days to cure the defaults.

8. The Debtor failed to cure the payment defaults, and pursuant to the Interim Order, the Debtor's ability to use cash collateral ceased after close of business on Wednesday, September 20, 2017.

9. Upon information and belief, the Debtor continues to use SunTrust's cash collateral, in violation of the Court's Interim Order and 11 U.S.C. §§ 363(c)(2), and (e), and the Debtor is also not current on its post-petition rent obligations.

10. SunTrust is not adequately protected, absent timely adequate protection payments from the Debtors. As evident from the Debtor's continuing payment defaults and inability or refusal to cure, the Debtor's use of cash collateral must be prohibited to prevent further deterioration in the value of SunTrust's security interest.

11. Accordingly, SunTrust requests the Court to enter an order prohibiting the Debtor's use of cash collateral.

12. Furthermore, any use by the Debtor of cash collateral after close of business on September 20, 2017 is not authorized, pursuant to the Interim Order. To the extent that the Debtor transferred property of the estate that was not authorized under the Interim Order, SunTrust reserves the right to seek appointment of a trustee to recover any unauthorized post-petition transfers under 11 U.S.C. § 549, or to seek conversion or dismissal of the Debtor's case under 11 U.S.C. § 1112.

MEMORANDUM OF LAW

13. Section 363(a) defines cash collateral as "cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever

acquired . . . and includes the proceeds, products, offspring, rents, or profits of property . . . whether existing before or after the commencement of a case under this title.”

14. Section 363(c)(2) provides that a 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.”

15. 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, sale, or lease as is necessary to provide adequate protection of such interest.”

16. Section 363(p)(1) provides that the Debtor has the burden of proof on the issue of adequate protection.

17. A debtor attempting to reorganize a business under Chapter 11 has a need to use “cash collateral” in its effort to rebuild. However, “[o]pposed to the debtor's need for use of cash collateral is the valid concern that free use of secured 'property' may result in the dissipation of the estate.” *In re George Ruggiere Chrysler-Plymouth, Inc.*, 727 F.2d 1017, 1019 (11th Cir. 1984).

18. “Thus, when a creditor opposes a proposed use of cash collateral, the guiding inquiry is whether its security interests are ‘adequately protected’ absent the additional protection that the cash collateral would provide.” *Id.*

19. “Adequate protection is designed to assure that a secured creditor does not suffer a decline in the value of its interest in the estate's property while the automatic stay remains in effect.” *In re Wrecclesham Grange, Inc.*, 221 B.R. 978, 981 (Bankr. M.D.

Fla. 1997). “The rationale is that the protected cash proceeds are being used to generate new collateral which will be of at least equivalent value of those replaced.” *Id.*

WHEREFORE, SunTrust respectfully requests that this Court enter an order barring and prohibiting the Debtor from any use, sale, or lease of its cash collateral without the written authorization of SunTrust, together with any further relief this Court deems just and proper.

Dated this 9th day of October, 2017.

Respectfully submitted,

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ATTORNEYS FOR SUNTRUST BANK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of October, 2017, I caused the foregoing to be served on all parties receiving notification using the Court’s CM/ECF system.

/s/ Denise D. Dell-Powell _____