

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION  
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In re: Case No. 17-20528-LMI

SALAD & CO. INC., Chapter 11

Debtor. \_\_\_\_\_/

**SECURED LENDER'S EXPEDITED MOTION FOR ENTRY OF AN ORDER  
PROHIBITING DEBTOR'S USE OF CASH COLLATERAL**

*(Expedited Hearing Requested on or Before October 3, 2017)*

**Basis for Expedited Relief**

The Debtor has been operating under the protection of the Bankruptcy Code since August 20, 2017 and, upon information and belief, is attempting to intercept rents constituting cash collateral payable for the benefit of the Secured Lender without the consent of the Secured Lender and without authority from this Court in violation of 11 U.S.C. § 363(c). Due to the emergency nature of the relief requested in this Motion and the Debtor's inability to provide adequate protection of the Secured Lender's interest in the Property and the Cash Collateral, the Secured Lender is not able to obtain the Debtor's consent to the relief. In the event that the parties reach an agreement prior to any hearing on this Motion, an agreed order will be uploaded.

Armando Gutierrez, Jr. and Victor Bao (together, the "Secured Lender"), by and through undersigned counsel and pursuant to Sections 361, 363(c), and 363(e) of title 11 of the United States Code (the "Bankruptcy Code"), Rules 4001 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rules 4001-2, and 9013-1 of the local bankruptcy rules (the "Local Rules"), moves for entry of an order prohibiting the use of Secured Lender's cash collateral by Salad & Co. Inc. (the "Debtor"). In support of this Motion, Secured Lender states as follows:

**EHRENSTEIN CHARBONNEAU CALDERIN**

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## **JURISDICTION AND VENUE**

1. This Court has jurisdiction over this case under 28 U.S.C. §§ 157 and 1334. This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(M). Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

## **BACKGROUND**

### **A. The Debtor's Indebtedness to Secured Lender and Prepetition Foreclosure**

2. On January 29, 2007, the Debtor executed a promissory note in the principal amount of \$475,000.00 in favor of the Secured Lender (the "Promissory Note"). In order to secure the Debtor's obligations under the Promissory Note, the Debtor also executed a Purchase Money First Mortgage in favor of the Secured Lender (the "Mortgage"),<sup>1</sup> which, among other things, (a) grants to Secured Lender a first-priority lien on the real property located at 1245 S.W. 22nd Street, Miami, Florida 33145 (the "Property") and all rents, profits, proceeds, and revenues derived from the Property, (b) assigns to Secured Lender all rents and profits arising from any and all present and future leases or subleases of any part of the Property (the "Cash Collateral"), and (c) requires the Debtor to insure the Property.

3. Despite specific provisions in the Mortgage prohibiting the Debtor from leasing any portion of the Property without the Secured Lender's prior written consent (Mortgage § 16), in April 2015, the Debtor entered into a lease agreement (the "Lease") with The Cake Lounge (the "Tenant") with respect to the Property without the Secured Lender's consent. Under the terms of the Lease, the Tenant paid rent directly to the Debtor on the 15th day of each month. As of the Petition Date (defined below), rent was \$3,245.00 plus sales tax per month.

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<sup>1</sup> Victor Bao holds a 39.2% interest in the Promissory Note and Mortgage, and Armando Gutierrez, Jr. holds the remaining 60.8% interest in the Promissory Note and Mortgage.

4. Since approximately March 2016, the Debtor has failed to make any payment to the Secured Lender under the Note and Mortgage. Accordingly, on August 12, 2016, the Secured Lender commenced a foreclosure action in the Circuit Court of the 11th Judicial Circuit of Florida in and for Miami-Dade County (the “State Court”), Case No. 2016-20952 CA 01.

5. On January 27, 2017, the State Court entered an *Agreed Order on Plaintiff’s Motion for Assignment of Rents* (the “Order on Assignment of Rents”), which directs the Debtor to pay all rents received from the Property to the Miami Dade County Clerk of Court and disburse 39.20% of the funds, which pertain to Victor Bao’s portion of the Mortgage interest, and to hold the balance of 60.80% in escrow.

6. In accordance with the terms of the Mortgage and the Order on Assignment of Rents, the Tenant paid rent to the Secured Lender or for the Secured Lender’s benefit from February 2017 through June 2017.

7. On July 5, 2017, the State Court entered an Unopposed Final Judgment of Foreclosure in favor of the Secured Lender and against the Debtor in the aggregate amount of \$903,732.68 plus additional interest at the prevailing legal rate of 4.75% per year and ordered the Property to be sold at public auction on August 4, 2017.<sup>2</sup> The foreclosure sale was subsequently postponed to August 21, 2017.

#### **B. The Bankruptcy Case**

8. On August 20, 2017 (the “Petition Date”), days before the foreclosure sale was scheduled to take place, the Debtor filed a Voluntary Petition for relief under chapter 11 of the Bankruptcy Code solely to stop the foreclosure sale.

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<sup>2</sup> A copy of the Order on Assignment of Rents and the Unopposed Final Judgment of Foreclosure are attached as Exhibits A and B, respectively, to the *Secured Lender’s Expedited Motion to Dismiss Case* filed contemporaneously herewith.

9. Upon information and belief, after the filing of this chapter 11 case, the Debtor has sought payment of rent directly from the Tenant in direct contravention of the Mortgage and the Order on Assignment of Rents and without the consent of the Secured Lender to the use of cash collateral.

10. In addition, the Debtor has failed to insure the Property, thereby severely prejudicing the Secured Lender and placing the Property and the Secured Lender at great risk of loss.

**RELIEF REQUESTED AND BASIS THEREFOR**

11. Upon information and belief, the Debtor has been using Secured Lender's Cash Collateral since the Petition Date without the Secured Lender's Consent and without authorization from this Court in violation of Section 363(c)(2) of the Bankruptcy Code. The Bankruptcy Code defines "cash collateral" as "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 . . . ." *See* 11 U.S.C. § 363(a). Section 363(c)(2) provides that a debtor in possession may not use such 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 [section 363].

11 U.S.C. § 363(c)(2). Thus, without either express consent from the Secured Lender or an order of this Court authorizing its use—neither of which the Debtor has obtained or even requested—the Debtor is *prohibited* from using the Secured Lender's Cash Collateral since the first day of this case now over six weeks ago. *See, e.g., In re Delta Resources, Inc.*, 54 F.3d 722 (11th Cir. 1995); *In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984); *In re McCormick*, 354 B.R. 246, 251

(Bankr. C.D. Ill. 2006) (providing that use of cash collateral of a secured creditor requires the debtor to have the consent of the secured creditor, or the debtor must establish that the secured creditor's interest in the cash collateral is adequately protected.); *In re Senior Care Properties, Inc.*, 137 B.R. 527 (Bankr. N.D. Fla. 1992); *In re Lane*, 108 B.R. 6 (Bankr. D. Mass. 1989).

12. Notwithstanding the express and unambiguous provisions prohibiting the Debtors' use of cash collateral, upon information and belief the Debtor has continued to attempt to collect rents derived from the Property. The Debtor's attempts to collect rent directly contravenes the State Court's Order on Assignment of Rents as well as the Bankruptcy Code provisions requiring the Debtor to either obtain the Secured Lender's consent (which it has not done) or to obtain relief from the Bankruptcy Court (which it has not done). Accordingly, the Debtor's use of the Cash Collateral after the Petition Date is not and has not been authorized or consented to, and the Debtor should be prohibited from continuing to collect rent from the Property or otherwise use Cash Collateral unless and until it obtains authority from this Court or the consent of the Secured Lender.

13. Finally, the Debtor cannot demonstrate that the Secured Lender's interest in the Property or the Cash Collateral is adequately protected. Indeed, the Debtor has not insured the Property, as required by the Mortgage, and even by the Debtor's own valuations, the Property is woefully undersecured. The Debtor has no employees and no operations. The only other scheduled claims, other than the claim of the Secured Lender, are purported claims of insiders and a \$5,500.00 claim of the Internal Revenue Service. This case is a two-party dispute and it is evident that the Debtor filed the petition in bad faith solely to stop the foreclosure sale and with no intent—or ability—to reorganize. Accordingly, the Secured Lender is filing a motion contemporaneously herewith seeking dismissal of this case.

**WHEREFORE** the Secured Lender respectfully requests that the Court enter an order (a) prohibiting the Debtor's use of Cash Collateral and (b) providing any additional relief that this Court deems just and proper.

*I HEREBY CERTIFY that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am qualified to practice in this Court as set forth in Local Rule 2090-1(A).*

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By: /s/ Matthew A. Petrie  
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**CERTIFICATE OF SERVICE**

I CERTIFY that a true and correct copy of the foregoing was served by transmission of Notices of Electronic Filing generated by CM/ECF to those parties registered to receive electronic notices of filing in this case on September 27, 2017.

*I HEREBY CERTIFY that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am qualified to practice in this Court as set forth in Local Rule 2090-1(A).*

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