

IN THE UNITED STATES BANKRUPTCY COURT  
 FOR THE NORTHERN DISTRICT OF GEORGIA  
 ATLANTA DIVISION

IN RE:	:	
	:	CASE NO. 17-71400-BEM
FIVE A TRADING, INC.	:	
	:	CHAPTER 11
DEBTOR.	:	
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FIVE A TRADING, INC.,	:	
	:	
Movant,	:	
v.	:	
	:	
CIVIS BANK f/k/a Citizens Bank of	:	
Tennessee & IMPERIAL TRADING	:	
COMPANY, LLC,	:	
	:	
Respondents.	:	
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**MOTION SEEKING EMERGENCY RELIEF FOR ENTRY OF ORDERS  
 AUTHORIZING INTERIM AND FINAL ORDERS FOR USE OF CASH  
 COLLATERAL**

The Debtor in the above-styled chapter 11 case, **Five A Trading, Inc.**, (“**Debtor**”), by and through its undersigned counsel, hereby files its motion pursuant to Sections 361 and 363 of the Bankruptcy Code and Rule 4001 of the Federal Rules of Bankruptcy Procedure for an order: (1) Authorizing the Debtor’s use of cash collateral; (2) granting adequate protection payments as necessary to protect creditors with a security interest in Debtor’s cash and cash collateral; (3) scheduling and approving the form and method of notice of the final hearing on this motion; and (4) for other further relief as this honorable Court deems just and proper (hereinafter, “**The Motion**”). In support of its Motion, Debtor shows as follows:

**JURISDICTION**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

2. The statutory grounds for the relief requested herein are Sections 361 and 363 of the Bankruptcy Code and Rule 4001 of the Bankruptcy Rules.

### **FACTS**

3. Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code on December 11, 2017 and remains a debtor in possession, pursuant to 11 U.S.C. §§ 1107 and 1108.

4. Counsel for the Office of the United States Trustee has entered an appearance this the case. However, neither a receiver nor an examiner has been appointed. No official committee of creditors or equity security holders has been established.

5. Five A Trading, Inc. is a small business debtor pursuant to 11 U.S.C. §101(51D).

6. Debtor is a wholesaler of groceries, tobacco, and other products primarily sold to gas stations and convenience stores.

### **CREDITORS WITH A SECURITY INTEREST IN CASH COLLATERAL**

7. Civis Bank (“Civis”), formerly known as The Citizens Bank of Tennessee<sup>1</sup>, is a first in priority, secured creditor of Debtor. Civis Bank’s security interest was perfected by the filing of a UCC1 on January 1, 2013. Civis’s UCC1 indicates that Civis has a security interest in all of debtor’s goods, equipment, inventory, accounts, accounts receivable, chattel paper, proceeds, products and after acquired property.

8. Debtor’s Schedule D indicates that Civis’ secured claim is in the amount of \$1,148,500.00. The debt arises from a pre-petition guarantee Debtor executed for an affiliate, Five A DeKalb Investment, LLC, who is listed as a co-debtor on Schedule H.

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<sup>1</sup> In 2013, The Citizens Bank of Tennessee changed its name to Civis Bank pursuant to the records of the FDIC:  
<https://research.fdic.gov/bankfind/detail.html?bank=9499&name=Civis+Bank&tabId=3&searchName=Civis+Bank>

(Doc. 1, p. 24). Pre-petition, co-debtor Five A DeKalb Investment, LLC was making all monthly principal and interest payments owed to Civis Bank and the loan was current and not in monetary or a nonmonetary default.

9. Imperial Trading Co., LLC (hereinafter, “Imperial Trading”) is a second in priority, secured creditor of Debtor. Imperial Trading’s security interest was perfected by the filing of a UCC1 on April 24, 2014. Imperial Trading’s UCC1 indicates that Imperial Trading has a security interest in all of debtor’s equipment, inventory furnished by Imperial, proceeds, accounts and all proceeds. Debtor’s Schedule D indicates that Imperial Trading’ secured claim is in the amount of \$6,601.00<sup>2</sup>. However, the controller for Imperial Trading has indicated that Debtor’s account balance as December 13, 2017 was zero.

10. Copies of the UCC1s held by Civis Bank and Imperial Trading are attached to this Motion as **Exhibit “A”**.

11. Debtor’s Schedule B indicates that Debtors’ assets have a current fair market or liquidation value of \$1,005,350.92.

12. No other creditors have a security interest in, or lien against, Debtor’s cash or cash collateral.

### **RELIEF REQUESTED**

13. By this Motion, Debtor respectfully requests:

(a) Interim and Final orders from the Court, pursuant to section 363 of the Bankruptcy Code and Bankruptcy Rule 4001(c)(2), authorizing the Debtor’s use of cash collateral and approving adequate protection liens and payments as more specifically set forth below:

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<sup>2</sup> Debtor believed it had tendered a pre-petition payment to Imperial Trading for the full balance listed on Schedule D, however the check had not cleared and Debtor was not certain if payment had in fact been received.

(i) Debtor requests authorization to use cash, which may constitute cash collateral (hereinafter **“Cash Collateral”**)<sup>3</sup>, on both an interim and final basis in accordance with the proposed interim order attached hereto as **Exhibit “C”** (the **“Proposed Interim Order”**) and in accordance with the budget attached hereto as **Exhibit “B”** (hereinafter, the **“Budget”**), and as either may be amended, supplemented, modified, or extended from time to time by a subsequent Court order or the consent of the Debtor, Civis Bank, and Imperial Trading. And,

(ii) However, with respect to the Budget, on a weekly, monthly, and six-month basis, Debtor seeks authority to exceed each line item in the Budget by up to twenty percent (25%), so long as the aggregate amount of the Budget on a monthly and six-month basis is not exceeded by more than twenty percent (25%). Debtor projects its cost of goods sold at approximately 89%. As a wholesaler, Debtor’s ability to reorganize and increase sales will require that Debtor increase its gross sales, which will in turn increase Debtor’s costs. And,

(iii) Debtor requests approval of adequate protection payments or liens as may be necessary to protect Civis Bank and Imperial Trading. And,

(iv) Pending a final hearing on this Motion (the “Final Hearing”), Debtor requests authority to use cash, which may constitute Cash Collateral (as defined below), on a limited and interim basis to and including the date on which the Final Order is entered. And,

(b) in accordance with Bankruptcy Rule 4001(b)(2), that this Court hold an emergency hearing and schedule the Final Hearing and approve notice of the interim and final hearings as more particularly set forth in the Proposed Interim Order attached as Exhibit “C” or in any notice of hearing filed and served by debtor, with (or after) this Motion.

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<sup>3</sup> Debtor reserves the right to seek a determination as to whether its post-petition revenues constitute cash collateral under 11 U.S.C. § 363(a).

14. Pursuant to Section 363(c)(2) of the Bankruptcy Code, a debtor in possession may use cash collateral with: (a) the consent of each entity that has an interest in cash collateral; or (b) with court approval and after notice and a hearing. Debtor seeks authority to use cash collateral in which Civis Bank or Imperial Trading asserts a security interest. Pursuant to Section 363(e) of the Bankruptcy Code, the Court may condition the use of such cash collateral “as is necessary to provide adequate protection of” the interests of creditors with a security interest in the Cash Collateral. Pursuant to Section 361 of the Bankruptcy Code, when a secured party’s interest in cash collateral is entitled to adequate protection, such adequate protection may be provided by, among other things, an additional or replacement lien on assets generated post-petition “to the extent that such ... use ... results in a decrease in value of such entity's interest in the cash collateral.”

15. Given that (a) Civis Bank and Imperial Trading may possess liens encumbering all, or substantially all, of Debtor’s assets; and, (b) the pre-petition secured claims of these two creditors potentially exceed the value of the pre-petition estate, Debtor proposes to grant Civis Bank and Imperial Trading replacement liens on post-petition assets, having the same respective priority as their pre-petition liens to secure any post-petition diminution in value of cash which may constitute Cash Collateral thereof to the extent such interests are entitled to adequate protection against such diminution under the Bankruptcy Code.

16. IMMEDIATE NEED FOR AUTHORIZATION TO USE CASH COLLATERAL: Debtor has an immediate need to use Cash Collateral for the purpose of meeting necessary expenses incurred in the ordinary course of its business, including: covering any post-petition payroll and payroll taxes of its management and employees, payment of excise taxes or other taxes incurred in the ordinary course of Debtor’s business, ordering inventory to be sold to Debtors’ customers, payment of utilities and other normal operating expenses, payment of quarterly fees owed to the Office of the United States Trustee during this case, funding Debtor’s reorganization in this Chapter 11 case, and paying any and all other expenses set forth in the budget attached as **Exhibit “B”**. Withstanding any line items in the proposed budget, Debtor shall not use cash collateral to pay for attorneys’ fees, post-petition professional fees, or pre-petition debts

without a subsequent Court order authorizing the payment of these professional fees or expenses. Debtor estimates at this time that Debtor's cash on hand, funds generated from Debtor's post-petition operations, and the Cash Collateral as defined herein, will be sufficient to fund Debtor's continued operations and reorganization during the period set forth in the Budget. Debtor has filed this case to restructure and reorganize its debts and business in a manner that maximizes Debtor's value and that is fair and equitable to all parties in interest and pursuant to the order of priorities set forth in the Bankruptcy Code.

17. The Budget attached hereto as Exhibit "B" provides for the payment of essential ordinary course operating expenses during the Budget period. Ceasing operations is not in the best interests of any party to this chapter 11 case, including Debtor's secured and unsecured creditors, as Debtor's failure to operate will immediately and irreparably impair (a) Debtor's extrinsic value and (b) Debtor's ability to use Cash Collateral to generate cash proceeds in excess of the amount of the Cash Collateral. Furthermore, it appears that in the event of any liquidation of Debtor's assets, the only creditor that will receive a dividend is Civis Bank. It is in the best interest of all creditors, including Civis Bank, Imperial Trading, and all unsecured creditors for Debtor to be authorized to use cash collateral and pursue a reorganization in this Chapter 11 case.

18. Additionally, the Budget provides for payment of restructuring costs, including periodic payments to professionals engaged in this chapter 11 case (after an application and order approving the payment of professional fees has been entered by this Court as required by the Bankruptcy Code). As long as Civis Bank and Imperial Trading are adequately protected, Debtor's use of the Cash Collateral to pay its professionals is allowed. See In re: Proalert, LLC, 314 B.R. 436 (9th Cir. B.A.P. 2004) ("plain language of §363 allows a debtor to use cash collateral [to pay its professionals if the secured party's] interest is adequately protected"); In re: Coventry Commons Assoc., 149 B.R. 109 (Bankr. E.D. Mich. 1992) (a debtor may use cash collateral to pay professional fees if the secured creditor is adequately protected, without regard to requirements of section 506 of the Bankruptcy Code); In re Tri-County Water Ass'n., Inc., 91 B.R. 547, 550 (Bankr. D.S.D. 1988) (generally, only unencumbered assets may be used to pay administrative claimants, but such claims may be paid from collateral if they resulted in a

direct benefit to the secured creditor, if the secured creditor consents or if the secured creditor is adequately protected). Based on the proposed adequate protection payments and relief proposed in this Motion to Civis Bank and Imperial Trading, Debtor's use of cash collateral to pay normal operating expenses of this case, as set forth in the budget and including professional fees, filing fees, and quarterly fees owed to the Office of the United States Trustee, is proper.

### **PROPOSED ADEQUATE PROTECTION**

19. Whether or not a creditor is adequately protected is determined on a case-by-case basis. See In re O'Connor, 808 F.2d 1393, 1396 (10th Cir. 1987) (stating that the concept of adequate protection is a flexible one and that courts should determine whether it exists on a case-by-case basis); In re Self, 239 B.R. 877, 881 (Bankr. N.D. Tex. 1999) (determination of adequate protection is not an "exact science"; rather, it requires a court to balance all relevant factors); In re JKJ Chevrolet, Inc., 190 B.R. 542, 545 (Bankr. E.D. Va. 1995) (stating that adequate protection is determined on a case-by-case basis).

20. Adequate protection exists by virtue of augmentation (or preservation) of the value of a secured creditor's collateral. See In re Ralar Distribs., Inc., 166 B.R. 3, 6 (Bankr. D. Mass. 1994) ("[a]ctivities of a debtor can enhance collateral value and thereby provide adequate protection"); In re T.H.B. Corp., 85 B.R. 192, 195 (Bankr. D. Mass. 1988) ("[T]he stream of cash collateral will likely remain at an approximate even level over a sustained period, with new proceeds replacing old. The constant nature of this stream gives the [secured lender] protection for its cash collateral."); In re Pursuit Athletic Footwear, Inc., 193 B.R. 713, 716-717 (Bankr. D. Del. 1996) (court found secured creditor was adequately protected given lack of evidence that collateral was diminishing, debtor had operated profitably and was projected to continue operating profitably); In re Pine Lake Villa. Apartment Co., 19 B.R. 819 (Bankr. S.D.N.Y. 1982) (where property which secured mortgagee's claim was experiencing no depreciation and was arguably being enhanced in value and where the value of the property securing the claim was increasing to the extent of unspent rental income being accumulated in segregated cash collateral accounts, mortgagee had adequate protection).

## I. ADEQUATE PROTECTION FOR CIVIS BANK

21. This Motion seeks the entry of an order allowing Debtor to use cash collateral and adequately protecting the pre-petition, first in priority, secured interest (if any) of Civis Bank against any diminution of Civis Bank's valid and enforceable lien, if any, on Cash Collateral (collectively hereinafter, the "**Civis Bank Post Petition Obligations**") by:

(a) Granting Civis Bank replacement security interests and liens ("**the Civis Adequate Protection Liens**") on all post-petition assets of Debtor and the estate on which Civis Bank held (as valid and perfected liens) pre-petition, including all proceeds and products of all of the foregoing and all distributions thereon (collectively, the "**Civis Post-Petition Collateral**"), in the same respective priority Civis Bank held pre-petition, and subject only to valid, perfected, enforceable and non-avoidable liens and security interests granted by law or by Debtor to any person or entity that were superior in priority to the pre-petition security interests and liens held by Civis Bank, and only to the extent such pre-petition senior liens are not otherwise subject to avoidance, bifurcation, or subordination, which said Civis Adequate Protection Liens are granted to secure the amount of any post-petition diminution in value of the Debtor's interests in the Cash Collateral to the extent such interests are entitled to adequate protection against such diminution under the Bankruptcy Code. Notwithstanding the foregoing or anything herein to the contrary, the Post-Petition Collateral shall not include any claims, causes of action and proceeds thereof arising under Sections 510, 544, 545, 546, 547, 548, 549, 550 and 551 of the Bankruptcy Code (collectively, "**Avoidance Actions**") or limit Debtor's ability to bifurcate any secured claim pursuant to 506 or other provisions in the Bankruptcy Code.

(b) The Civis Adequate Protection Liens shall be granted immediately and without the necessity of execution by the Debtor of financing statements, security agreements, or other documents in accordance with Section 361(2) of the Bankruptcy Code.



(c) CIVIS BANK ADEQUATE PROTECTION PAYMENTS: Allowing the Debtor or its Co-Debtor, Five A DeKalb Investment, LLC, to continue to make monthly principal and interest payments to Civis Bank in the amount of \$8,694.28 per month (“**The Civis Adequate Protection Payment**”). When Debtor’s Chapter 11 case was filed, Civis Bank had received all pre-petition installment payments owed by Debtor and the Co-Debtor and neither debtor had defaulted on the terms of the original note and security agreement held by Civis Bank. The proposed Civis Adequate Protection Payment is the same amount of the required pre-petition payments and will adequately protect Civis Bank during the pendency of this Chapter 11 Case. Debtor contemplates that all Civis Adequate Protection Payments shall continue to be made by Five A DeKalb Investment, LLC pursuant to the pre-petition practice.

(d) In addition to the Civis’ Adequate Protection Liens and the Civis Adequate Protection Payments, Civis Bank also has a security deed against real property exclusively owned by Five A DeKalb Investment, LLC. The foregoing adequate protection payments and liens will provide sufficient and reasonable security to Civis Bank during this Chapter 11 reorganization.

## **II. ADEQUATE PROTECTION FOR IMPERIAL TRADING**

22. This Motion also seeks entry of an order allowing Debtor to use cash collateral and adequately protecting the pre-petition, second in priority, secured interest (if any) of Imperial Trading, LLC by:

(a) Granting Imperial Trading replacement security interests and liens (“**the Imperial Trading Adequate Protection Liens**”) on all post-petition assets of Debtor and the estate on which Imperial Trading held (as valid and perfected liens) pre-petition and all proceeds and products of all of the foregoing and all distributions thereon (collectively, the “**Imperial Post-Petition Collateral**”), in the same respective priority Imperial Trading held pre-petition, and subject only to valid, perfected, enforceable and non-avoidable liens and security interests granted by law or by Debtor to any person or entity that were superior in priority to the pre-petition security interests and liens held by Imperial Trading, and only to the extent such pre-petition senior liens are not otherwise

subject to avoidance, bifurcation or subordination, which Adequate Protection Liens are granted to secure the amount of any post-petition diminution in value of the Debtor's interests in the Cash Collateral to the extent such interests are entitled to adequate protection against such diminution under the Bankruptcy Code. Notwithstanding the foregoing or anything herein to the contrary, the Post-Petition Collateral shall not include any claims, causes of action and proceeds thereof arising under Sections 510, 544, 545, 546, 547, 548, 549, 550 and 551 of the Bankruptcy Code (collectively, "**Avoidance Actions**") or limit Debtor's ability to bifurcate any secured claim pursuant to 506 or other provisions in the Bankruptcy Code.

(b) The Imperial Adequate Protection Liens shall be granted immediately and without the necessity of execution by the Debtor of financing statements, security agreements, or other documents in accordance with Section 361(2) of the Bankruptcy Code.

(c) IMPERIAL TRADING ADEQUATE PROTECTION PAYMENT: The entry of an order authorizing Debtor to retire the pre-petition balance owed to Imperial Trading, during the six-month period immediately after the Petition Date, by tendering payment to Imperial Trading for its pre-petition claim in the amount of \$6,601.00 in a single lump sum. Debtor believed it had tendered pre-petition payment to Imperial Trading, but was not certain that this payment had cleared Debtor's account prior to the filing of the petition. Imperial's Trading's controller reported that Debtor's account balance was zero as of December 13, 2017.

(d) Post-Petition, pursuant to the Imperial Trading Adequate Protection Liens and/or 11 U.S.C. § 364(a), Imperial Trading shall be authorized to advance goods, products, and inventory to Debtor, post-petition, without any further court order, in the ordinary course of Debtor's business and pursuant to the ordinary business practices of wholesalers and suppliers such as Debtor and Imperial Trading in this Chapter 11 case.

### III. ADDITIONAL PROTECTION – CIVIS BANK & IMPERIAL TRADING

23. In addition to the foregoing liens, adequate protection payments, and relief requested for Civis Bank and Imperial Trading as previously set forth in the Motion, Debtor also shows that Cash Collateral now existing and hereinafter acquired shall be protected by Debtor's use of post-petition debtor-in-possession bank accounts (the "DIP Accounts"), pending disbursement in the ordinary course of business of the Debtor and consistent with the provisions of the Motion and the Proposed Interim Order and the Budget. Debtor shall promptly and within a reasonable time open DIP Accounts, have all credit card payments be deposited in the DIP Accounts, transfer all funds from any prepetition accounts to the DIP Accounts, and close the pre-petition accounts.

24. The Budget includes (a) Debtor's projected uses of cash over the Budget period and (b) the positive result of Debtor operating its business during the Budget period. The Budget attached to the Motion demonstrates that the value of Debtor's Cash Collateral will increase over the term of the Budget. This increase provides adequate protection to the interests of Civis Bank and Imperial Trading during Debtor's reorganization efforts.

### IV. INTERIM USE OF CASH COLLATERAL SHOULD BE GRANTED

25. Bankruptcy Rule 4001(b) provides that a final hearing on a motion to use cash collateral pursuant to Section 363 may not be commenced earlier than fourteen (14) days after the service of such motion. Upon request, however, the Court is empowered to conduct a preliminary expedited hearing on the motion and authorize use of cash collateral to the extent necessary to avoid immediate and irreparable harm to a debtor's estate.

26. Pursuant to Bankruptcy Rule 4001(b), Debtor requests that the Court conduct a preliminary expedited hearing as soon as practicable (the "**Preliminary Hearing**") to enter the **Proposed Interim Order** authorizing Debtor to use Cash Collateral in an aggregate amount not to exceed the amounts set forth in the Budget attached to the Proposed Interim Order pending the Final Hearing.

27. The ability of Debtor to finance, through the use of Cash Collateral, its ongoing operations as it restructures its indebtedness and business for the benefit of all creditor constituencies is in the best interests of Debtor, all of its creditors and its estate. The relief requested herein is necessary in order to avoid immediate and irreparable harm and prejudice to Debtor's estate and to all parties in interest in Debtor's chapter 11 case. Debtor has an immediate need to use Cash Collateral to continue its business operations while it pursues the confirmation of a plan of reorganization or an alternate resolution to this chapter 11 case. Debtor's only hope of providing a dividend to unsecured creditors is by operating and reorganizing. Debtor's business will be immediately and irreparably harmed without authorization from the Court to use Cash Collateral, as requested, on an interim basis pending the Final Hearing.

28. The Cash Collateral may also be used for the following additional purposes (the "Carve-Out"):

(a) the payment of allowed professional fees and disbursements incurred by the professionals retained by Debtor, pursuant to Sections 327 or 1103(a) of the Bankruptcy Code for the Interim Period after application by professionals, a hearing, and approval by the Court,

(b) the payment of statutory fees required to be paid pursuant to 28 U.S.C. § 1930(a)(6), and

(c) the payment of any fees payable to the Clerk of the Bankruptcy Court or the Office of the United States Trustee.

29. The interests of Civis Bank and Imperial Trading in the Cash Collateral will be adequately protected pursuant to the Proposed Interim Order. As indicated by the Budget, Debtor projects its operations will be cash flow positive during the period covered therein after payment of essential expenses and expenses related to the administration of this chapter 11 case.

30. The terms of the Proposed Interim Order are incorporated herein and made a part hereof by this reference. Pending the Final Hearing, this Motion should be granted

on an interim basis, on the terms set forth in the Proposed Interim Order, in order to maximize the value of the estates and to prevent irreparable harm to Debtor prior to the Final Hearing.

**V. REQUEST FOR INTERIM & FINAL HEARINGS**

31. Finally, pursuant to Bankruptcy Rule 4001(b)(2), Debtor respectfully requests that this Court set a date for the Final Hearing that is no less than fourteen (14) days from the Petition Date and approve the provisions for notice of such Final Hearing that are set forth in the Proposed Interim Order.

32. Debtor requests that it be authorized to serve a copy of the signed Interim Order, which fixes the time and date for filing objections, if any, by first-class United States Mail upon all secured creditors of record, the Office of the United States Trustee, Debtor' twenty (20) largest creditors and any party having filed a request to receive service in Debtor's chapter 11 case. Debtor requests that the Court consider such notice of the Final Hearing to be sufficient notice under Rule 4001 of the Bankruptcy Rules.

33. WHEREFORE, Debtor respectfully requests that this Court (a) conduct an emergency hearing on this Motion; (b) enter the Proposed Interim Order substantially in the form submitted herewith; (c) schedule a Final Hearing on the relief requested herein; and (d) grant such further relief as may be equitable and just.

Respectfully submitted on December 14, 2017.

/s/ Justin Oliverio  
Justin Oliverio  
Georgia Bar No. 368598  
Attorney for Debtor

Attorney Justin Oliverio, LLC  
150 E. Ponce de Leon Ave.,  
Suite 200  
Decatur, GA 30030  
Tel: 678-856-6780  
Justin@AJOLLC.com