

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(Baltimore Division)**

In re:

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THE SAILING EMPORIUM, INC.,

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**Case No. 16-24498-TJC
(Chapter 11)**

Debtor.

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**EMERGENCY MOTION BY THE PEOPLES BANK TO PROHIBIT
THE DEBTOR’S UNAUTHORIZED USE OF CASH COLLATERAL**

The Peoples Lender (“Lender”), by and through its undersigned counsel, hereby files this emergency motion seeking an order prohibiting the unauthorized use of its Cash Collateral (as defined herein) by The Sailing Emporium, Inc. (the “Debtor”). In support of its Motion, the Lender states as follows:

JURISDICTION AND VENUE.

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1334(a) and 11 U.S.C. § 363.
2. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409(a).
3. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

BACKGROUND.

The Parties.

4. On November 1, 2016 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtor remains in possession of its property and the management of its business as a debtor in possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

5. The Debtor filed the Cash Collateral Motion, as defined herein, on November 11, 2016. The Cash Collateral Motion provides that the Debtor owns and operates a full service marina on eight acres of property on Rock Hall Harbor (the “Property”) in Rock Hall, Maryland.

6. Lender is a Maryland banking corporation organized under the laws of the State of Maryland and a secured creditor in the Debtor’s bankruptcy case by virtue of a properly perfected, first-priority security interest in the Property. Lender also holds a properly perfected, first priority security interest in all rents and income derived and/or generated from the Property (collectively, the “Cash Collateral”).

The Debtor’s Obligations to Lender.

7. Lender is a secured creditor of the Debtor pursuant to certain written agreements documents and instruments (collectively, the “Loan Documents”) executed in connection with the indebtedness owed to Lender as of the Petition Date. The Loan Documents include, but are not limited to, the following:

- a. A promissory note executed by the Debtor in favor of Lender in the original principal amount of \$1,187,000.00 dated December 19, 2013 (as amended, modified, restated and/or renewed, the “Sailing Emporium Note”).
- b. A promissory note executed by the William Arthur Willis and Mary Sue Willis (collectively, the “Co-Debtors”) in favor of Lender in the original principal amount of \$1,187,989.64 dated December 19, 2013 (as amended, modified, restated and/or renewed, the “Willis Note”).
- c. The Debtor guaranteed repayment of the Willis Note pursuant to that certain guaranty agreement from the Debtor dated December 19, 2013 (as amended, modified, restated and/or renewed, the “Guaranty”).
- d. The obligations arising under the Sailing Emporium Note, the Willis Note and the Guaranty (the “Obligations”) are secured by that certain Deed of Trust from the Debtor and the Co-Debtors dated November 9, 2012, and recorded in the Land Records of Kent County, Maryland at Liber 735, folio 257 (as amended, modified, restated and/or renewed, the “Deed of Trust”). The Deed of Trust secures a principal amount of \$2,374,989.64.

The Debtor's Use of Lender's Cash Collateral.

8. As set forth in the Debtor's Motion For An Order (I) Authorizing Use of Cash Collateral Through January 31, 2017 and (II) Granting Adequate Protection (the "Cash Collateral Motion") (Doc. No. 13), the Debtor owns and operates an income-producing, full service marina on Rock Hall Harbor, which derives income from boat sales, boat repair and restoration, electronics sales and service, sailboat charters, and winter boat storage. Through the Cash Collateral Motion, the Debtor sought authority to use the Lender's Cash Collateral to pay its ordinary and necessary monthly operating expenses.

9. The Debtor and Lender resolved their disputes relating to the Cash Collateral Motion, and this Court entered its Stipulation and Consent Order (I) Authorizing Use of Cash Collateral Through January 31, 2017 and (II) Granting Adequate Protection (the "First Cash Collateral Order") (Doc. No. 48) an Amended First Cash Collateral Order was entered on January 23, 2017 (Doc. No. 71).

10. Prior to the expiration of the First Cash Collateral Order, the Debtor and Lender agreed to extend the First Cash Collateral Order through April 30, 2017, and the Court entered a Stipulation and Consent Order (I) Authorizing Use of Cash Collateral Through April 30, 2017 and (II) Granting Adequate Protection (the "Second Cash Collateral Order") (Doc. No. 76).

11. Thereafter, on April 28, 2017, the Debtor filed a Request for Emergency Use of Cash Collateral (Doc. No. 109) and the Court held a hearing on the morning of May 3, 2017. On May 10, 2017, this Court entered its Consent Order Authorizing Continued Use of Cash Collateral for the Period May 1, 2017 through August 31, 2017 and Granting Adequate Protection (Doc. No. 116).

12. On May 26, 2017, the Lender filed a Notice of Events of Default Under the Second Cash Collateral Order (the “Notice of Default”) (Docket No. 124) due to the discovery that the Debtor violated the Second Cash Collateral Order by, among other things, paying the personal expenses of its principals, the Co-Debtors, and impermissibly paying a salary to Mr. Willis.

13. As set forth in the Notice of Default, by letter dated May 9, 2017, the Debtor was notified that unless either (a) the Lender receives a satisfactory explanation as to why the defaults identified are not, in fact, Events of Default under the Second Cash Collateral Order, or (b) the Debtor provides evidence that it was refunded for the unauthorized expenditures, within five business days of the May 9 Letter, that the Lender intended to file the Notice of Default with the Court.

14. By letter dated May 16, 2017, the Debtor responded that the issues raised in the default letter were discussed with the Lender’s counsel prior to the May 3, 2017 hearing on the Debtor’s request for extended use of cash collateral. The Lender vigorously disputes this, and submits that Mr. Willis’ payments to himself in violation of the Cash Collateral Order were not discovered until his Section 341 Meeting later the same day as the May 3, 2017 hearing, when the U.S. Trustee provided evidence of Mr. Willis’ undisclosed checking account.

15. As of the date of this Motion, the Debtor has not provided a sufficient explanation for the Events of Default nor has there been any offer to refund the payments Mr. Willis received in February and March 2017.

16. Additionally, Mrs. Willis’ monthly operating report for May, 2017 shows a transfer of \$1,000 from the Debtor’s account to Mrs. Willis’ bank account. This transfer also appears on the Debtor’s monthly operating report. At the continued section 341 meeting of

creditors of Mr. and Mrs. Willis held on June 26, 2017, Mr. Willis admitted that he authorized this transfer and that this transfer was not a transfer of Mrs. Willis' social security income.

17. At the continued 341 meeting of creditors, Mr. Willis also admitted that the Debtor is paying the Willis' individual household expenses.

18. Notwithstanding that the Debtor's authority to use Cash Collateral has terminated as set forth in the Notice of Default, the Debtor clearly continues to use the Lender's Cash Collateral and continues to use the Lender's Cash Collateral for unauthorized purposes and in violation of this Court's Orders.

BASIS FOR RELIEF REQUESTED.

19. All rents, profits and proceeds derived from the Debtor's operation of the Property are "cash collateral" under the Bankruptcy Code and remain subject to the Lender's perfected lien under the Loan Documents. *See* 11 U.S.C. §§ 363(a) & 552(b).

20. Furthermore, section 363(c)(2) of the Bankruptcy Code expressly prohibits the Debtor's use of the Cash Collateral unless the entity that has an interest in the Cash Collateral consents or this Court authorizes such use. *See* § 363(c)(2).

21. Moreover, section 363(c)(4) of the Bankruptcy Code further provides that the Debtor shall segregate and account for any cash collateral in the Debtor's possession, custody or control. *See* § 363(c)(4).

22. Here, it is beyond dispute that the rents and income derived from the Property are subject to the Lender's perfected security interest and constitute its Cash Collateral.

23. Moreover, the Debtor was notified pursuant to the Notice of Default that its authority under the Cash Collateral Orders had terminated due to its failure to cure or explain the Events of Default.

24. However, it is the Lender's understanding that the Debtor continues to collect and utilize the Cash Collateral notwithstanding that the Debtor's authority to use the Lender's Cash Collateral pursuant to this Court's Cash Collateral Orders has terminated.

25. The Lender does not consent to the Debtor's continued use of Lender's Cash Collateral.

{Signatures appear on following page}

WHEREFORE, The Peoples Bank respectfully requests that this Court enter an Order:

- (i) immediately prohibiting the Debtor's use of Cash Collateral,
- (ii) requiring the Debtor to immediately segregate and account for any Cash Collateral in the Debtor's possession, custody or control,
- (iii) requiring the Debtor to file within five (5) business days of entry of an Order granting the relief herein, an accounting detailing and specifying: (a) all Cash Collateral in the Debtor's possession, custody or control including, but not limited to, rents and revenues generated from the operating of the Property; and (b) all expenditures made with such rents and revenues, from February 1, 2017 through the date of any Order granting the relief requested herein; and
- (iv) (iv) granting such other and further relief as is just and proper in this case.

Dated June 30, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 2017, a copy of the foregoing ***EMERGENCY MOTION BY THE PEOPLES BANK TO PROHIBIT THE DEBTOR'S UNAUTHORIZED USE OF CASH COLLATERAL*** was served electronically on all parties registered to receive electronic notices in this case and/or by first-class, U.S. mail on the following:

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