

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA**

IN THE MATTER OF	)	Case No. BK 18-41602-TLS
	)	
1 <sup>ST</sup> HOSPITALITY, LLC	)	Chapter 11
	)	
Debtor.	)	

**DEBTOR'S EMERGENCY MOTION PURSUANT TO 11 U.S.C. §§ 105,  
361, 362, 363 AND 552 AND RULE 4001(b) AND (d) OF THE FEDERAL  
RULES OF BANKRUPTCY PROCEDURE FOR (A) ENTRY OF  
AN INTERIM ORDER (I) AUTHORIZING THE USE  
OF CASH COLLATERAL, (II) GRANTING ADEQUATE PROTECTION  
TO THE ACCESS, AND (III) GRANTING RELATED  
RELIEF, AND (B) SCHEDULING A FINAL HEARING**

COMES NOW 1<sup>st</sup> Hospitality, LLC debtor and debtor-in-possession in the above captioned Chapter 11 bankruptcy case ("Debtor"), and herewith files this emergency motion (the "Motion") pursuant to 11 U.S.C. §§105, 361, 362, 363 and 552 and Fed. R. Bank. P., for (A) entry of an order (i) authorizing the Debtor's use of cash that may comprise cash collateral ("Cash Collateral"), (ii) providing adequate protection to the interests of the Unity Bank (as defined below), and (iii) granting related relief and (B) scheduling a final hearing. In support of the Motion, Debtor states and alleges as follows:

**PRELIMINARY STATEMENT**

1. On September 30, 2018 (the "Petition Date") Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in this Court.
2. Debtor remains in possession of its assets and continues to operate as debtor-in-possession in accordance with 11 U.S.C. §§ 1107 and 1108.
3. An Official Committee of Unsecured Creditors has not yet been appointed in this case.

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4. This is a core proceeding pursuant to 28 U.S.C. §157(2)(A).
5. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1334.
6. Venue is proper in this Court pursuant to 28 U.S.C. §1408.
7. Debtor seeks the interim use of Cash Collateral during the period (the "Interim Period") from the Petition Date (as hereinafter defined) through the entry of an order granting the use of Cash Collateral on a final basis (the "Final Order"), unless sooner terminated under the terms of the Interim Order, solely in accordance with the Budget (as defined below) and on the terms set forth in the Interim Order.
8. The availability to Debtor of sufficient liquidity and other financial accommodations are vital to its ability to preserve the value of Debtor's assets. Debtor requires use of cash, including any cash that the Unity Bank may assert is part of its Cash Collateral, to preserve and maintain its assets and property. Absent the ability to use its cash, including Cash Collateral, to preserve and maintain such assets and to facilitate the sale thereof, the value of Debtor's assets, including the Pre-Petition Collateral (as hereinafter defined), will decrease significantly. Authorization to use cash, including any Cash Collateral, is thus (a) critical to Debtor's ability to preserve the value of its assets pending a sale under Section 363 of the Bankruptcy Code, (b) in the best interests of Debtor and its estate, and (c) necessary to avoid immediate and irreparable harm to Debtor, its creditors, and its assets.

#### **DEBTOR'S BACKGROUND**

9. Debtor acquired a hotel in September of 2006. Debtor is owned 60% by Anupam Dave and 40% by his spouse Solal Dave. The hotel was built in 1995 and is located at 117 Cody Avenue, Alliance, NE 69301 (the "Property"). The Property includes 59 guest rooms

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encompassing approximately 30,450 square feet. The Debtor believes that the value of the Real Property is approximately, \$1,625,128.00.

**RULE 4001 OF THE RULES OF BANKRUPTCY PROCEDURE**

**I. THE NAMES OF THE ENTITIES ASSERTING INTERESTS IN DEBTOR'S CASH COLLATERAL**

10. As of the Petition Date, and for purposes of this Motion only, all or substantially all of Debtor's assets are, subject to 11 U.S.C. §§ 506, 552, are or may be subject to the liens and security interests of Unity Bank ("Access").

11. Access may assert a claim against Debtor's "cash collateral" as such term is defined in Section 363(a) of the Bankruptcy Code.

**II. THE PURPOSE FOR THE USE OF THE CASH COLLATERAL**

12. Debtor's Cash Collateral will be used to maintain and preserve the value of Debtor's assets, including the Property.

13. Debtor will continue to provide, monthly reports of Cash Collateral usage which are filed with the CM/ECF system and served on Unity, as well as on other creditors who have signed up for notification via that system.

**III. CASH COLLATERAL TO BE USED**

14. A detailed projection of the Cash Collateral to be used during between October 1, 2018 through January 1, 2018 (the "Period") is attached hereto as Exhibit "A" (the "Budget").

**IV. ADEQUATE PROTECTION PROPOSAL**

15. For purposes of this Motion only, Unity is an over-secured creditor and thus has the luxury of an equity cushion in Debtor's assets. Based on assessed values for personal property and existing cash, Access may have an equity cushion of approximately \$500,000.00+.

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16. For purposes of this Motion only, and notwithstanding §552, Unity's liens and security interests in the Property, to the extent valid and enforceable prior to the Petition Date, shall continue to attach to Debtor's post-petition assets of the same kind, including without limitation, whether now owned or hereafter acquired, inventory, equipment, general intangibles, accounts, chattel papers, contract rights and other right to payment, including all substitutions and replacements of the foregoing and the proceeds thereof.

17. For purposes of this Motion only, the Loan Documents will remain in full force and effect to the extent the same were enforceable and effective before the Petition Date.

18. As a result, Unity's interests in the Cash Collateral to be used per the Budget assets are adequately protected.

**Pre-Petition Credit Agreements**

19. Prior to the Petition Date, Debtor and the Unity entered into: (a) that certain 2006 Promissory Note in the principal amount of \$1,488,000.00; (b) that certain Loan Agreement dated September 27, 2006 (collectively, together with all promissory notes, related security and other ancillary documents, instruments, and agreements, the "Pre-Petition Credit Agreements"). Upon information and belief, the current balance under the Loan Agreement is approximately \$1,118,000.00.

20. All of the Pre-Petition Obligations may be secured by first priority liens on and security interests in (collectively, the "Pre-Petition Liens") substantially all of Debtor's assets including, but not limited to, equipment, machinery, supplies, inventory, accounts receivable and other personal property, agreements, contracts, interests under policies of insurance, securities, indebtedness, information, records, judgments, monies, investments, intellectual property,

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general intangibles, and products and proceeds of the foregoing (collectively, the "Pre-Petition Collateral").

### **RELIEF REQUESTED**

21. Debtor seeks entry of a stipulated interim order (a) authorizing the use of Cash Collateral, (b) providing adequate protection of the interests of the Access, and (c) granting related relief. Debtor further requests that the Court schedule a final hearing in respect of same. Specifically, Debtor requests authorization to use the Cash Collateral on an interim basis in accordance with the Interim Order, which is attached hereto pursuant to Bankruptcy Rule 4001(d).

22. Debtor will immediately give all parties in interest as required by Bankruptcy Rules 4001 and 9014 notice of this Motion and of the expedited objection deadline as this Court may establish. Debtor also requests that this Court set a hearing date to consider the use of Cash Collateral on a final basis.

23. Pursuant to the Interim Order, Debtor may use its cash, including any Cash Collateral, during the Interim Period solely for the purposes defined in the Budget (subject to permitted variances set forth more fully in the Interim Order). The Budget provides for payment of post-petition expenses including costs and expenses necessary to preserve, maintain and protect the Pre-Petition Collateral pursuant to Section 363 of the Bankruptcy Code, other overhead and expenses in respect of the Debtor's continued conduct of business and professional fees and expenses and other expenses related to the administration of the Case.

### **BASIS FOR RELIEF**

24. Section 363(c)(2) of the Bankruptcy Code sets forth the requirements for a debtor's proposed use of cash collateral, and provides, in pertinent part that:

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[t]he trustee [or debtor in possession] 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.

11 U.S.C. § 363(c)(2).<sup>1</sup> Section 105(a) of the Bankruptcy Code also provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).

25. However, in considering whether to authorize the use of Cash Collateral, a court must find that the interests of the holder of the secured claim are adequately protected if they do not consent to such use. See 11 U.S.C. § 363(e). The principal purpose of adequate protection is to safeguard the interests of the secured creditor in the collateral against diminution in the value of that interest post-petition. See *In re 495 Cent. Park Ave. Corp.*, 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992) (stating that the goal of adequate protection is to safeguard the secured creditor from diminution in value of its interest during Chapter 11).

26. There is a great deal of flexibility in terms of what may constitute adequate protection. *MBank Dallas, N.A. v. O'Connor (In re O'Connor)*, 808 F.2d 1393, 1396-97 (10th Cir. 1987). Ultimately, adequate protection is determined on a case-by-case basis in light of the particular facts and circumstances presented. *Id.*

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<sup>1</sup> Section 363(a) of the Bankruptcy Code defines "cash collateral" as:

[C]ash, 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 and includes the proceeds, products, offspring, rents, or profits of property . . . subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title[.]

11 U.S.C. § 363(a).

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27. A list of commonly influential factors in deciding what constitutes adequate protection "is easily derived from prior court decisions on this topic. Of these factors, the most prevalent include the sufficiency of the equity cushion, periodic payments, additional liens, or a good prospect of a successful reorganization. By far the most determinative of these factors, however, is the existence of an equity cushion." *In re Panther Mountain Land Dev., LLC*, 438 B.R. 169, 190 (Bankr. E.D. Ark. 2010) *emphasis added*. See also *In re Belton Inns, Inc.*, 71 B.R. 811, 816 (Bankr. S.D. Iowa 1987) (The classic protection for a secured debt is the existence of an 'equity cushion').

28. Debtor's value is derived from continued operations. If Debtor were shutter its operations due to an inability to access cash reserves, the negative effects on Debtor and its creditors would be immediate. The proposed cash expenditures, as outlined in the Budget, are necessary to preserve and maintain the value of the Pre-Petition Collateral and the interests therein of the Unity and, subject to the ultimate proceeds realized, the estates. If Debtor is precluded from making expenditures necessary to maintain its assets and business, Debtor's value will be diminished, if not destroyed. Such preservation of value provides adequate protection to Unity.

#### **THE NEED FOR IMMEDIATE RELIEF PENDING A FINAL HEARING**

29. Pursuant to Bankruptcy Rule 4001(b), a final hearing on a motion to use cash collateral may not be commenced earlier than 15 days after service of such motion. The Court, however, is authorized to conduct an expedited hearing prior to the expiration of such 15-day period and to authorize the use of cash collateral to the extent necessary to avoid immediate and irreparable harm to a debtor's estate. Pursuant to Bankruptcy Rule 4001(b), Debtor requests that the Court (a) authorize the Debtor, pursuant to the terms of the Interim Order, to use Cash

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Collateral in accordance with the Budget and (b) schedule a hearing to consider approval of the Debtor's use of Cash Collateral on a final basis. If Debtor is unable to obtain the immediate use of Cash Collateral, it will be required to completely shut down its business, resulting in immediate and irreparable harm to the value of its assets.

### **NOTICE**

30. Notice of this Motion has been provided to the U.S. Trustee, Unity, and all parties listed on the consolidated creditor matrix. Debtor submits that no other or further notice need be provided.

### **CONCLUSION**

WHEREFORE, Debtor respectfully requests the Court (A) enter the Interim Order granting the relief requested herein, including (i) authorizing the Debtor's use of cash, including Cash Collateral, pursuant to the terms of the Interim Order (including the Budget), (ii) granting adequate protection, and (iii) granting related relief; (B) scheduling a final hearing; and (C) granting to Debtor such other and further relief as the Court deems just and proper.

Respectfully submitted this 3<sup>rd</sup> day of October, 2018.

**1<sup>ST</sup> HOSPITALITY, LLC, Debtor**

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