

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

In Re:	*	Chapter 11
	*	Case No. 16-10602-BAH
Hanish, LLC	*	
	*	Hearing Date: September 27, 2017
	*	Hearing Time: 1:30 p.m.
	*	
Debtor(s)	*	<u>Objection Deadline: September 20, 2017</u>

MOTION PURSUANT TO 11 U.S.C. §§ 105, 363(a) and 552(b), FEDERAL BANKRUPTCY RULE 4001(b) AND LOCAL BANKRUPTCY RULE 1-4001 FOR AN ORDER AUTHORIZING THE USE OF CASH COLLATERAL AND PROVIDING REPLACEMENT LIENS AND OTHER ADEQUATE PROTECTION FOR THE SIXTH INTERIM PERIOD

Hanish, LLC (“Debtor”), pursuant to 11 U.S.C. §§ 105, 363(a) and 552(b), Federal Bankruptcy Rule 4001(b) and Local Bankruptcy Rule 1-4001, moves for an order authorizing the use of cash collateral, providing replacement liens and other adequate protection for the Sixth Interim Period, October 1, 2017 through December 31, 2017 (the “Sixth Interim Period”):

BRIEF STATEMENT

1. The Debtor seeks an order allowing it to use cash collateral, mostly in the form of hotel room rentals for the Sixth Interim Period. The business, a hotel, would be forced to shut down and evict customers if the business was not permitted use of cash during the Sixth Interim Period. The business would also be subject to significant franchise penalties if operations terminate.

BACKGROUND

2. Debtor owns and operates a 59 unit “Fairfield Inn and Suites by Marriott” hotel, at 8 Bell Avenue, Hooksett, New Hampshire. (the “Hotel”). The Hotel is operating at this time. A franchise agreement with Marriott is in effect at this time. Phoenix NPL, LLC (“Phoenix NPL”),

a Delaware limited liability company, purchased the loans underlying the Hotel and the Debtor evidenced by, among other things, a Construction Loan Agreement dated October 5, 2007 (the “Construction Loan Agreement”), a Promissory Note in the original principal amount of \$5,900,000 also dated October 5, 2007 (the “2007 Note”) and a Promissory Note dated March 6, 2009 in the original principal amount of \$450,000 (the “2009 Note” and collectively with the 2007 Note the “Loans”) from the Federal Deposit Insurance Corporation (the “FDIC”), as Receiver for The National Republic Bank of Chicago, the original lender of Hanish, on or about February 20, 2015. Thereafter Phoenix NPL assigned the Loans to Phoenix REO, LLC (“Phoenix REO” or “Phoenix”) on or about September 2, 2015.

3. Pre-petition Phoenix moved for a receiver to take over the Hotel in the Merrimack (State of New Hampshire) Superior Court. That request was denied. In the order denying the request the Court expressed concern that if a receiver was appointed the franchise with Marriott could be lost. (See State Court Order, Exhibit A, page 3 to the Emergency Cash Collateral Motion at Doc. No. 22-1). The Court also noted the Hotel was managed properly stating “This is not the case where the defendant’s financial distress stems from mismanagement of the Hotel.” The Hotel has won many awards from Trip Advisor, Booking.com, and Marriot (Marriott 2012 Silver Award and 2014 Gold Award). Nayan Patel and his son Jiten Patel, the operators of the Debtor, have decades of experience running these types of hotels.

4. Phoenix scheduled a foreclosure of the Hotel pre-petition. To stop the foreclosure Debtor filed Chapter 11 on April 26, 2016 (the “Petition Date”). Since the Petition Date Debtor has operated the Hotel and complied with all previous cash collateral orders. There is no committee in this case.

5. Nayan Patel is also a guarantor of the Loans, has been sued by Phoenix in Massachusetts. Phoenix has obtained attachments and has restrained the transfer of substantial assets of the guarantor.

6. During this bankruptcy, Debtor was required under its franchise agreement with Marriott to improve the Hotel by refurbishing the Hotel, called a “property improvement plan” or “PIP.” The PIP was on extension on the Petition Date and became seriously overdue during the case. As a result, Debtor moved to amend the Third Interim Cash Collateral Order for permission to commence the PIP by purchasing materials prior to the conclusion of the Third Cash Collateral Period. The Court approved the motion by Order dated February 17, 2017 [Doc. No. 218]. The Order authorized the Debtor to purchase materials in an amount up to \$235,663.06. The Debtor has purchased the materials for \$210,199.39. Debtor originally estimated the PIP would cost \$670,000.00. Its actual cost is approximately \$443,000.00. Debtor has the cash on hand to pay for the PIP. The PIP is progressing, and a major portion of the installation occurred during the Fifth Interim Period (the third quarter 2017.)

7. Mr. Patel and the Debtor need the bankruptcy process to attempt to restructure/refinance the Hotel debt, preserve the franchise and benefit all parties, including Phoenix.

JURISDICTION

8. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §1334(b). This matter is a core proceeding under 28 U.S.C. §157(b). The Debtor consents to the entry of a final order.

LIENS

9. The only lien that Debtor is aware of on the Hotel is the lien of Phoenix, which is a blanket lien on real estate and personal property in the amount of approximately \$6.7 million.

The Hotel is secured by a Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing in favor of Phoenix's predecessor bank, which loans were assigned to Phoenix.

PREVIOUS APPROVAL OF THE USE OF CASH COLLATERAL

10. The Court approved the use of cash collateral on an Emergency basis [Doc. No. 44]. The Court also approved the use of cash collateral for the First Interim Period, from May 24, 2016 to August 31, 2016 [Doc. No. 45], the Second Interim Period, from September 1, 2016 to December 31, 2016 [Doc. No. 62], the Third Interim Period, from January 1, 2017 to March 31, 2017 [Doc. No. 82], the Fourth Interim Period from April 1, 2017 to June 30, 2017 [Doc. No. 242] and the Fifth Interim Period from July 1, 2017 to September 30, 2017 [Doc. No. 277]. The use of cash has been consensual in the case (except for the recent purchase of the PIP materials). Phoenix has agreed to the use of cash pursuant to an agreed upon Court Order [Doc. No. 69] which has been slightly modified in the Fifth Interim Period [Doc. No. 277]. The Debtor has complied with all previous cash collateral Orders and met its budgets submitted therewith. The Debtor has certain bills from Marriott for legal fees which were budgeted for in the Fifth Interim Period in the amount of \$34,000.00, which were due under the Franchise Agreement. These have been paid outside the case.

USE OF CASH COLLATERAL

11. Section 363(a) of the Bankruptcy Code provides that post-petition rents and hotel-occupancy fees described in section §552(b) constitute "cash collateral". As a result, pursuant to §363(c)(2), a debtor may use such monies only with the consent of the secured creditor or with Court authorization. Section 363(e) conditions use upon court approval "as necessary to provide adequate protection of such interest." The Debtor proposes to use cash collateral for the direct benefit of preserving the Hotel, the case, and the franchise during the Sixth Interim Period. There

is also a small amount of inventory and other cash receipts which constitute “cash collateral” that Debtor intends to use as part of its Budget (defined below). The monthly room rentals are projected to remain stable during the Sixth Interim Period, and with reserved cash there is enough cash to pay all bills of the Debtor contained in the Budget (defined below). Debtor uses a management company called JHM, LLC (“JHM”). JHM is a related entity, owned by Nayan Patel, and run by Jiten Patel. Debtor pays JHM directly for certain expenses, including employees, and then is allocated their cost. This is fairly typical in the hotel industry.

12. If Debtor is not permitted use of cash, Debtor would have to shut down. This will not only destroy Debtor’s value, displace hotel guests, and terminate employees, but will trigger significant payments due to Marriott which the Debtor will not have the funds to pay, and likely lead to termination of the Marriott franchise. The Debtor proposes to use cash in the Sixth Interim Period under the terms of the attached Order.

THE BUDGET
PROPOSED USAGE OF CASH COLLATERAL AND ADEQUATE PROTECTION
DURING THE SIXTH INTERIM PERIOD

13. Section 363(a) of the Bankruptcy Code provides that post-petition rents and hotel-occupancy fees described in section §552(b) constitute “cash collateral”. As a result, pursuant to §363(c)(2), a debtor may use such monies only with the consent of the secured creditor or with Court authorization and subject to the equities of the case. Section 363(e) conditions use upon court approval “as necessary to provide adequate protection of such interest.” Section 361 contains a non-exhaustive list of methods to provide for the adequate protection of collateral.

14. Debtor has attached a budget as Exhibit A, one which provides for the use of cash collateral during the Sixth Interim Period for operations (the “Budget”). Routine operating

expenses are stable. Phoenix is adequately protected and there is no evidence the Hotel is declining in value; in fact, the Hotel is increasing in value.

15. Debtor provides multiple types of adequate protection to Phoenix. Debtor provides a replacement lien on all assets consistent with its pre-petition lien. Phoenix shall have to take no action to perfect the lien. Phoenix will continue to be secured and perfected in the rents pursuant to §552(b) and will be granted a replacement lien in the Hotel rents and other assets of the Debtor consistent with its pre-petition lien. The rents are being used for expenses reasonably necessary to preserve the Hotel which is consistent with §552(b) and §363's requirement of adequate protection.

16. Further, Debtor will continue to pay Lender \$30,000.00 per month in adequate protection payments, to be applied as provided in the attached order.

17. In addition, Lender has the secured guaranty of Nayan Patel on the 2007 Note as additional adequate protection, which additional security is worth approximately \$2,000,000.00. Nayan Patel is also a solvent guarantor with \$30,000,000.00 dollars of net worth. Nayan Patel provides a third level of adequate protection. See In re Roach, 540 B.R. 146, 151-52 (Bankr. W.D.Pa. 2007) (valuable assets previously pledged by non-debtors could constitute adequate protection); In re Diaconx, 69 B.R. 333, 338-39 (Bankr. E.D. Pa. 1987) (legislative history expressly refers to guaranties as a basis for providing adequate protection, even unsecured guaranties); In re KRC, 226 B.R. 112, 115 (Bankr. id. 1998) (real estate securing guaranty to debtor's lender relevant in determining adequate protection). Nayan Patel does dispute liability on the guaranty and has counter-claimed against the Lender in the state court action between them. The State Court has entered a judgment against Patel.

18. Most importantly, with regard to the PIP and real estate taxes, there is no diminution in value of Phoenix's collateral. Both expenditures directly benefit Phoenix in that they preserve and improve the value of the Hotel and preserve the Marriott franchise. See In re Mocco, 176 B.R. 335, 348 (Bankr. D. N.J.) (1995) (creditor provided with indubitable equivalent of its claim where expenditures for sewer connections increased value of property).

19. Debtor had approximately \$150,000.00 of cash on hand on the Petition Date. Phoenix has been paid more than \$330,000.00 in adequate protection payments on its claim since the Petition Date, covering more than Phoenix's pre-petition cash collateral position. Approving this Motion and the Budget is in the best interests of all involved. A dark hotel is in no one's interest. Plus, there is no evidence of any diminution in value of Phoenix's collateral from the expenditures contained in the Budget.

20. The Debtor is actively seeking a buyer for the Hotel and has entered into negotiations with an interested party.

NOTICE

21. Notice has been provided to the US Trustee and Phoenix's counsel, Riemer and Braunstein by e mail and first class mail and to the 20 largest creditors by first class mail. Service has also been made on the Town of Hooksett. Phoenix has not consented to this motion.

22. U.S. Trustee fees, which are not contained in the Budget, shall also be paid when due in addition to the Budget.

WHEREFORE, Hanish, LLC respectfully requests this Court:

- A. Grant this Motion for the Sixth Interim Period; and
- B. Grant Adequate Protection to Phoenix REO, LLC
- C. Grant such other and further relief as this Court deems just and equitable.

Respectfully submitted,
Hanish, LLC
Chapter 11 Debtor-In-Possession
By its attorneys,
Notinger Law, PLLC

Dated: September 13, 2017

By: /s/ Steven M. Notinger
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CERTIFICATE OF SERVICE

I, Steven M. Notinger, certify that I have as of this date forwarded the above Motion to the following parties via CM/ECF:

Via CM/ECF to the following parties:

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Dated: September 13, 2017

By: /s/ Steven M. Notinger
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