

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY	
Caption in Compliance with D.N.J. LBR 9004-1(b)	
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In Re:	Case No.: 17-18977 (JKS)
New Jersey Micro-Electronic Testing, Inc.,	Chapter: 11
Debtor.	Judge: Hon. John K. Sherwood

**MEMORANDUM OF LAW IN SUPPORT OF MOTION OF DEBTOR FOR THE  
ENTRY OF AN INTERIM ORDER PURSUANT TO 11 U.S.C. §§ 105 AND 363, FED. R.  
BANKR. P. 4001(b) AND D.N.J. LBR 4001-3 AUTHORIZING DEBTOR TO USE CASH  
COLLATERAL**

New Jersey Micro-Electronic Testing, Inc., the above-captioned debtor-in-possession (the “Debtor”), by and through its proposed attorneys, Norris, McLaughlin & Marcus, P.A., respectfully submits this memorandum of law in support of its Motion for Entry of an Interim Order Pursuant to 11 U.S.C. §§ 105 and 363, Rule 4001(b) of the Federal Rules of Bankruptcy Procedure and D.N.J. LBR 4001-3 Authorizing the Debtor to Use Cash Collateral (the “Motion”).

**JURISDICTION**

The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

Venue of this proceeding and this Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

The statutory predicate for the relief requested in this Motion is 11 U.S.C. §§ 105 and 363, Rule 4001(b) of the Federal Rule of Bankruptcy Procedure (“Bankruptcy Rule”) and D.N.J. LBR 4001-3.

### **FACTUAL BACKGROUND & PROCEDURAL HISTORY**

On May 1, 2017 (the “Petition Date”), the Debtor filed a voluntary petition under chapter 11 of the United States Bankruptcy Code (the “Bankruptcy Code”), commencing this chapter 11 case (the “Chapter 11 Case”). The Debtor continues to operate its business and manage its property as a debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code. An official committee of unsecured creditors has not been formed nor has a trustee or examiner been appointed in this matter.

The factual background relating to the Debtor’s commencement of this Chapter 11 Case is set forth in detail in the *Declaration of Giacomo Federico in Support of First Day Motions* filed contemporaneously herewith and incorporated herein.

#### **Debtor’s Pre-Petition Secured Debt**

##### **A. Spencer Savings Bank. SLA**

On or about April 7, 2014, the Debtor and Spencer Savings Bank, SLA (“Spencer”) entered into a Loan and Security Agreement (the “Agreement”) pursuant to which Spencer agreed to make revolving loans to the Debtor in an amount of up to \$250,000.00. To secure its obligations under the Agreement, the Debtor granted Spencer a blanket security interest in substantially all of the Debtor’s assets, including, among other things, cash, accounts receivable, present and future accounts, general intangibles, inventory, and machinery & equipment (the “Collateral”).

The Debtor pays Spencer \$805.56 monthly under the Agreement. As of the Petition Date, the Debtor owed Spencer \$250,000. The Debtor's assets subject to Spencer's security interest have an aggregate value in excess of \$450,000. Thus, the Debtor believes that Spencer's claim is over-secured based upon the value of its collateral.

Notwithstanding the fact that the equity cushion enjoyed by Spencer is sufficient to provide it with adequate protection without more, the Debtor proposes to (a) continue its payments to Spencer as required under the Agreement and (b) provide Spencer with replacement liens on certain of its post-Petition assets to protect Spencer from any diminution in the value of its collateral.

#### **REQUEST FOR RELIEF AND BASIS THEREFORE**

The Debtor should be authorized to use its cash collateral in the ordinary course of its business. Spencer is adequately protected by the assets securing its debt, the replacement liens proposed to be granted to Spencer and the periodic payments to be made thereto.

#### **The Debtor Requires Use of the Cash Collateral**

The Debtor has an urgent need for the use of cash collateral pending the final hearing on this Motion. Cash collateral in this case consists of Spencer's interests in the Debtor's cash and accounts receivable (the "Cash Collateral"). Accordingly, the Debtor seeks to use Cash Collateral existing on or after the Petition Date that is the subject of the Spencer's pre-petition liens.

As of the Petition Date, the Debtor does not have sufficient unencumbered cash to fund its business operations. Absent the ability to use Cash Collateral, the Debtor will be unable to pay insurance, wages, rent, utility charges, and other critical operating expenses. Consequently, without access to Cash Collateral, the Debtor will not be able to maintain its business operations and continue its restructuring efforts, and would likely be forced to cease

operations and liquidate. In such event, the Debtor's estate would be immediately and irreparably harmed. The Debtor cannot obtain funds sufficient to administer its estates and operate its business other than by obtaining the relief requested herein pursuant to section 363 of the Bankruptcy Code.

The Debtor's management has formulated a budget for the use of Cash Collateral from the Petition Date through the end of the 12th week thereafter, a copy of which is attached hereto as Exhibit "A." The Debtor believes that the budget includes all reasonable, necessary and foreseeable expenses to be incurred in the ordinary course in connection with the operation of its business for the period set forth in the budget.

#### **Spencer's Interest is Adequately Protected**

Pursuant to Bankruptcy Code section 363(a), cash collateral is defined as "cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents . . . and the proceeds thereof." 11 U.S.C. § 363(a). By operation of Bankruptcy Code section 363(c)(2) and Bankruptcy Rule 4001(b), a debtor-in-possession may only use "cash collateral" with the consent of the secured party with an interest therein or court approval. 11 U.S.C. § 362(c)(2). Section 363(e) of the Bankruptcy Code provides that, upon request of an entity that has an interest in cash collateral sought to be used by a debtor, the court shall prohibit or condition such use of cash collateral as is necessary to provide adequate protection of such entity's interest. See 11 U.S.C. § 363(e).

By adequate protection, the Bankruptcy Code seeks to shield a secured creditor from diminution in the value of its interest in the particular collateral during the period of use. See In re 495 Cent. Park Ave. Corp., 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992); In re Beker Indus. Corp., 58 B.R. 725, 736 (Bankr. S.D.N.Y. 1986); In re Hubbard Power & Light, 202 B.R. 680

(Bankr. E.D.N.Y. 1996); see also In re Nice, 355 B.R. 554, 563 (Bankr. N.D. Va. 2006) (“adequate protection is solely a function of preserving the value of the creditor’s secured claim as of the petition date due to a debtor’s continued use of collateral”).

Although adequate assurance is not defined in the Bankruptcy Code, section 361 of the Bankruptcy Code provides the following three (3) nonexclusive examples of what may constitute adequate protection:

- (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;
- (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity’s interest in such property; or
- (3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

11 U.S.C. § 361.

While section 361 of the Bankruptcy Code provides examples of forms of adequate protection, such as granting replacement liens and administrative claims, courts decide what constitutes sufficient adequate protection on a case-by case basis. See In re Columbia Gas Sys., Inc., 1992 WL 79323, at \*2 (Bankr. D. Del. Feb. 18, 1992); In re Swedeland Dev. Grp., Inc., 16 F.3d 552, 564 (3d Cir. 1994); In re N.J. Affordable Homes Corp., 2006 WL 2128624, at \*14 (Bankr. D.N.J. June 29, 2006); see also In re Snowshoe Co., 789 F.2d 1085, 1088 (4th Cir. 1986); In re Mosello, 195 B.R. 277, 289 (Bankr. S.D.N.Y. 1996); see also In re JKJ Chevrolet, Inc., 190 B.R. 542, 545 (Bankr. E.D. Va. 1995) (adequate protection is a flexible concept that is

determined by considering the facts of each case) (citing In re O'Connor, 808 F.2d 1393, 1396-97 (10th Cir. 1987); In re Carson, 34 B.R. 502, 505 (Bankr. D. Kan. 1983) (citation omitted); In re 5-Leaf Cover Corp., 6 B.R. 463, 466 (Bankr. S.D. W. Va. 1980); In re Dynaco Corp., 162 B.R. 389, 394 (Bankr. D.N.H. 1993) (citing 2 Collier on Bankruptcy § 361.01[1] at 361-66 (15<sup>th</sup> ed. 1993)) (explaining that what constitutes adequate protection is not defined, and “must be determined based upon equitable considerations arising from the particular facts of each proceeding”).

### Equity Cushion

Courts have held that an equity cushion in the collateral securing the debt at issue can alone be sufficient adequate protection. In re Curtis, 9 B.R. 110, 112 (Bankr. E.D. Pa. 1981) (“The conclusion that an equity cushion created by the excess of security over debt can itself constitute adequate protection with nothing more has been widely accepted”) (citing In re San Clemente Estates, 5 B.R. 605, 6 (Bankr. S.D. Cal. 1980); In re Tucker, 5 B.R. 180, 6 B.C.D. 699 (Bankr. S.D.N.Y. 1980); In re Rogers Development Corp., 2 B.R. 679, 5 B.C.D. 1392 (Bankr. E.D. Va. 1980); In re Sulzer, 2 B.R. 680, 5 B.C.D. 1314 (Bankr. S.D.N.Y. 1980); In re Pitts, 2 B.R. 476, 5 B.C.D. 1129 (Bankr. C.D. Cal. 1979); 2 Collier on Bankruptcy, s 361.01(3); s 362.01(1) (15th ed.).

As set forth above, Spencer was adequately protected as of the Petition Date by an equity cushion in its collateral in an amount in the approximate amount of \$200,000 (the “Equity Cushion”). Based on the Equity Cushion alone, the Debtor should be granted authority to use the Cash Collateral. However, as set forth below, the Debtor proposes to grant to Spencer replacement liens on its collateral and provide it with period payments going forward.

### Replacement Liens

Courts have also held that replacement liens constitute sufficient adequate protection. See In re Mt. Olive Hospitality, LLC, 2014 WL 1309953, at \*3, n. 6 (D.N.J. March 31, 2014); see also In re Airport Inn Assocs., Ltd., 132 B.R. 951, 960 (Bankr. D. Col. 1990) (“The court could order a lien in postpetition accounts receivable as adequate protection if that relief was requested . . . .”); In re Int’l Design & Display Grp., Inc., 154 B.R. 362, 364 (Bankr. S.D. Fla. 1993) (court authorized debtor to use cash collateral and, as adequate protection, granted secured creditor replacement lien on all postpetition accounts receivable, inventory and contracts to the extent the creditor’s collateral was depleted).

As protection for any diminution in value of Spencer’s interests, the Debtor requests that the Court grant Spencer security interests (“Replacement Liens”) in and upon the Debtor’s post-Petition cash and accounts receivable. If granted, the Replacement Liens will adequately protect Spencer from any potential depreciation and deterioration in its collateral base.

### Periodic Payments to Spencer

In addition to the proposed Replacement Liens and its Equity Cushion, Spencer shall be protected as a result of the continuation of the Debtor’s payments under the Agreement with Spencer. These payments will avoid any increase in the amount of Spencer’s claim on a going forward basis, while the Debtor formulates its reorganization plan.

The Debtor’s use of the Cash Collateral will allow the Debtor to continue its operations while Spencer’s interests are protected. Courts have recognized that the preservation of the going concern value of secured lender’s collateral constitutes adequate protection of such creditor’s interest in the collateral. See, e.g., In re Pursuit Athletic Footwear, Inc., 193 B.R. 713, 716 (Bankr. D. Del. 1996) (holding that if there is no actual diminution of value of collateral and the debtor can operate profitably post-petition, then the secured creditor is

adequately protected); In re 499 W. Warren Street Assocs., Ltd. P'ship, 142 B.R. 53, 56 (Bankr. N.D.N.Y. 1992) (where the court found a secured creditor's interest in collateral adequately protected when cash collateral was applied to normal operating and maintenance expenditures on the collateral property); In re Willowood E. Apartments of Indianapolis II, Ltd., 114 B.R. 138, 143 (Bankr. S.D. Ohio 1990) (same); In re Stein, 19 B.R. 458, 460 (Bankr. E.D. Pa. 1982) (creditor's secured position would be enhanced by the continued operation of the debtor's business); In re Aqua Assocs., 124 B.R. 192, 196 (Bankr. E.D. Pa. 1991) ("The important question, in determining whether the protection to a creditor's secured interest is adequate, is whether that interest, whatever it is, is being unjustifiably jeopardized.") (citation omitted).

Without the use of the Cash Collateral, the Debtor would forego business opportunities and its operations would be irreparably harmed. The Debtor will likely be unable to pay its ordinary business expenses, including employee wages. In that event, all operations will cease, employees will be terminated, and all assets on which Spencer's asserts a lien will be liquidated. Those pledged assets will be worth less in liquidation than they will be worth as a going concern reorganization. Since the Debtor has generated positive EBITDA in the past and projects positive EBITDA for the future, use of cash collateral to operate the business and maintain going concern value provides adequate protection to Spencer.

Based on the above, the Debtor submits that the Interim Order provides adequate protection of the interests of Spencer in the form of (a) the Equity Cushion, (b) valid, binding, enforceable, non-avoidable and automatically perfected replacement liens on the Debtor's post-petition cash and accounts receivable to the same extent, validity and priority that existed as of



the Petition Date, and (c) the continuation of payments by the Debtor to Spencer under the Agreement.

**Local Bankruptcy Rule 4001-3**

The provisions described in D.N.J. LBR 4001-3 are set forth above and/or the Interim Order:

**A. D.N.J. LBR 4001-3(a)**

- i. *Budget* – See Budget attached hereto as **Exhibit A**.
- ii. *Amount of cash collateral sought* – up to \$250,000

**B. D.N.J. LBR 4001-3(c)**

- i. *Effect of the relief sought on existing liens* – Spencer shall retain its liens on the Debtor's collateral to the same extent enjoyed prior to the Petition Date. No other liens are affected by this Motion.
- ii. *Concessions to Validity of Prepetition Debt* – Lien validity and debt amount acknowledged.
- iii. *Elevation of prepetition debt* – Not applicable.
- iv. *506(c) Waiver* – Not applicable.
- v. *Other Waivers* – Not applicable.
- vi. *Events of Default* – Per Interim Order and Loan Documents.
- vii. *Adequate Protection* – Interim Order provides adequate protection of the interests of Spencer in the form of (a) Equity Cushion, (b) valid, binding, enforceable, non-avoidable and automatically perfected replacement lien on the Debtor's post-petition assets to the same extent, validity and priority that existed as of the Petition Date, and (c) the Debtor's continued payments under its Agreement with Spencer.

- viii. *Lien Priority* – The priority of liens remains unchanged by this Motion.
- ix. *Deadline to File Plan* – Not applicable.
- x. *Limitations on Court's Authority* – Not applicable.
- xi. *Grant of Interest in Causes of Action* – Not applicable.
- xii. *Carve-outs from liens or super-priorities* – Not applicable.
- xiii. *Change of Control* – Not applicable.
- xiv. *Cross-Collateralization* – Not applicable.
- xv. *Funding of Non-Debtor* – Not applicable.
- xvi. *Related Debtor Case Provisions* – Not applicable.

**INTERIM APPROVAL SHOULD BE GRANTED**

Bankruptcy Rule 4001(b) provides that a final hearing on a motion to use cash collateral may not be commenced earlier than 14 days after service of such motion. The Court, however, may conduct an expedited hearing prior to the expiration of such 14-day period and authorize the use of cash collateral where, as here, such relief is necessary to avoid immediate and irreparable harm to a debtor's estate.

For the reasons set forth above, the failure to obtain approval of the use of cash collateral on an expedited basis would very likely lead to immediate and irreparable harm to the Debtor's business and the value of the Debtor's assets. Accordingly, the Debtor seeks immediate entry of the Interim Order to prevent immediate and irreparable harm pending the Final Hearing, pursuant to Bankruptcy Rule 4001(b).

**REQUEST FOR FINAL HEARING**

Pursuant to Bankruptcy Rule 4001(b)(2), the Debtor requests that the Court set a date for the Final Hearing that is as soon as practicable, and fix the time and date prior to the final hearing for parties to file objections to the Motion.

**REQUEST FOR WAIVER OF STAY**

The Debtor also requests that the Court waive the stay imposed by Bankruptcy Rule 6004(h), which provides an "order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." As described above, the relief that the Debtor seeks in this Motion is immediately necessary in order for the Debtor to be able to continue to operate its business and preserve value for the benefit of creditors. The Debtor respectfully requests that the Court waive the 14-day stay imposed by Bankruptcy Rule 6004(h), as the critical nature of the relief sought herein justifies immediate relief.

**NOTICE**

The Debtor shall serve this Motion in accordance with D.N.J. LBR 9013-5(f).

**CONCLUSION**

Based on the above, the Debtor respectfully requests that this Court enter an Interim Order pursuant to 11 U.S.C. §§ 105 and 363, Rule 4001(b) of the Federal Rules of Bankruptcy Procedure, and D.N.J. LBR 4001-3 authorizing the Debtor to Use Cash Collateral, and granting such other and further relief as this Court deems just and proper.

NORRIS McLAUGHLIN & MARCUS, P.A.  
Proposed Attorneys for Debtor-in-Possession

Dated: May 1, 2017

By: /s/ Bruce J. Wisotsky  
Bruce J. Wisotsky

# EXHIBIT A

New Jersey Micro Electronic Testing, Inc  
 Weekly Cash Flow Budget

	Week Ending												12 Week Total
	5/16/2017	5/13/2017	5/20/2017	5/27/2017	6/3/2017	6/10/2017	6/17/2017	6/24/2017	7/1/2017	7/8/2017	7/15/2017	7/22/2017	
Beginning Cash	83,555	83,965	83,975	83,985	83,995	84,155	84,315	84,475	84,635	84,795	84,955	85,115	83,955
Collection of Customer Receipts	28,800	28,800	28,800	28,800	28,500	28,500	28,500	28,500	28,500	28,500	28,500	28,500	343,200
<b>Operating Disbursements</b>	<b>3,500</b>	<b>3,500</b>	<b>3,500</b>	<b>3,500</b>	<b>3,500</b>	<b>3,500</b>	<b>3,500</b>	<b>3,500</b>	<b>3,500</b>	<b>3,500</b>	<b>3,500</b>	<b>3,500</b>	<b>42,000</b>
Cost of Goods Sold	50	50	50	50	50	50	50	50	50	50	50	50	600
Advertising Expenses	459	459	459	459	459	459	459	459	459	459	459	459	5,508
Bank Service Charges	79	79	79	79	79	79	79	79	79	79	79	79	948
Auto Lease	41	41	41	41	41	41	41	41	41	41	41	41	492
Gas & Repairs & Maint	69	69	69	69	69	69	69	69	69	69	69	69	828
401k Admin Fees	397	397	397	397	397	397	397	397	397	397	397	397	4,764
401k Company Match	700	700	700	700	700	700	700	700	700	700	700	700	8,400
Computer Consulting	100	100	100	100	100	100	100	100	100	100	100	100	1,200
Dues, Subscr & Registrations	28	28	28	28	28	28	28	28	28	28	28	28	336
Life Insurance	598	598	598	598	598	598	598	598	598	598	598	598	7,176
Medical Insurance	808	808	808	808	808	808	808	808	808	808	808	808	9,696
Insurance	237	237	237	237	237	237	237	237	237	237	237	237	2,844
Interest Expense	81	81	81	81	81	81	81	81	81	81	81	81	972
Internet Expense	143	143	143	143	143	143	143	143	143	143	143	143	1,716
Lease for copier	15	15	15	15	15	15	15	15	15	15	15	15	180
Licenses and Permits	100	100	100	100	100	100	100	100	100	100	100	100	1,200
Meals & Entertainment	350	350	350	350	350	350	350	350	350	350	350	350	4,200
Office Expense	296	296	296	296	296	296	296	296	296	296	296	296	3,552
Outside Services Expense	11,570	11,570	11,570	11,570	11,570	11,570	11,570	11,570	11,570	11,570	11,570	11,570	138,840
Gross Payroll	4,976	4,976	4,976	4,976	4,976	4,976	4,976	4,976	4,976	4,976	4,976	4,976	59,712
Officers Payroll	1,524	1,524	1,524	1,524	1,524	1,524	1,524	1,524	1,524	1,524	1,524	1,524	18,288
Payroll Taxes Employer	302	302	302	302	302	302	302	302	302	302	302	302	3,624
Payroll Processing Fees	98	98	98	98	98	98	98	98	98	98	98	98	1,176
Printing and Reproduction	600	600	600	600	600	600	600	600	600	600	600	600	7,200
Accounting Fees	45	45	45	45	45	45	45	45	45	45	45	45	540
Rent	29	29	29	29	29	29	29	29	29	29	29	29	348
Research Database	27	27	27	27	27	27	27	27	27	27	27	27	324
Security Expense	6	6	6	6	6	6	6	6	6	6	6	6	72
Business Taxes	422	422	422	422	422	422	422	422	422	422	422	422	5,064
Telephone and Fax	900	900	900	900	900	900	900	900	900	900	900	900	10,800
Travel	450	450	450	450	450	450	450	450	450	450	450	450	5,400
<b>Total Operating Disbursements</b>	<b>28,550</b>	<b>28,550</b>	<b>28,550</b>	<b>28,550</b>	<b>28,100</b>	<b>28,100</b>	<b>28,100</b>	<b>28,100</b>	<b>28,100</b>	<b>28,100</b>	<b>28,100</b>	<b>28,100</b>	<b>339,000</b>
Non Operating Expenses/ Loan Repayments	240	240	240	240	240	240	240	240	240	240	240	240	2,880
Spencer Line of Credit	240	240	240	240	240	240	240	240	240	240	240	240	2,880
<b>Non Operating Disbursements</b>	<b>83,965</b>	<b>83,975</b>	<b>83,985</b>	<b>83,995</b>	<b>84,155</b>	<b>84,315</b>	<b>84,475</b>	<b>84,635</b>	<b>84,795</b>	<b>84,955</b>	<b>85,115</b>	<b>85,275</b>	<b>85,275</b>
<b>Ending Cash</b>	<b>83,965</b>	<b>83,975</b>	<b>83,985</b>	<b>83,995</b>	<b>84,155</b>	<b>84,315</b>	<b>84,475</b>	<b>84,635</b>	<b>84,795</b>	<b>84,955</b>	<b>85,115</b>	<b>85,275</b>	<b>85,275</b>