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Hearing Date: December 21, 2017
Hearing Time: 10:30 a.m.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:

THE NEW GETHSEMANE BAPTIST CHURCH,

Chapter 11
Case No. 17-46048-ess

Debtor.

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**DEBTOR’S APPLICATION FOR AN ORDER AUTHORIZING
THE USE OF CASH COLLATERAL PURSUANT TO 11 U.S.C.
§363(c)(2) AND BANKRUPTCY RULE 4001 AND PROVIDING
ADEQUATE PROTECTION THEREFORE**

The New Gethsemane Baptist Church (the “Debtor”), the above captioned debtor and debtor-in-possession, by its proposed attorneys, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, files this motion (the “Motion”) for an Order Authorizing Debtor’s Use of Cash Collateral Pursuant to 11 U.S.C. §363 and Providing Adequate Protection Therefor Pursuant to 11 U.S.C. §§361 and 362, respectfully state and represent as follows:

Jurisdiction

1. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 1334. This matter is a core proceeding within the meaning of 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.

2. The statutory bases for the relief requested herein are §§ 105(a), 361 and 363 of title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the “Bankruptcy Code”), and Rules 4001, 6004 and 9006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

Background

3. On or about November 14, 2017, (the “Filing Date”), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor has continued in possession of its property and the management of its business affairs as a debtor-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner or statutory committee has been appointed.

4. The Debtor is a New York not-for-profit religious corporation which operates from two locations; its primary location at 209 Rochester Avenue, Brooklyn, New York (“Kings Property”) and a secondary location at 200-232 Middle Country Road, Middle Island, NY (“Suffolk Property”).

5. The Kings Property consists of four (4) lots which collectively house three (3) multi-family rental buildings as well as the church hall and ancillary facilities. The Suffolk Property is leased and that location is used solely for church services and events.

6. The congregation is approximately fifty-five (55) years old and has operated at the Kings Property practically since its inception. Although the size of the congregation has varied over time, it currently has approximately fifty (50) members.

7. In or about 2012 the church leadership decided that certain renovations and maintenance of the Kings Property were necessary and a construction loan was secured in the amount of \$500,000 from Banco Popular. Unfortunately, problems with the church’s contractor arose which included, but were not limited to, construction expenses exceeding the budget, which excess costs (change orders) the church disputed. Ultimately the contractor filed liens against the Kings Property which triggered a default under the Banco Popular construction loan.

8. The church's legal counsel at the time recommended a resolution with the contractor requiring a large settlement payment because the church simply lacked the funds for a costly and protracted litigation. This was merely one issue in a snowball of events, including the loss of members of the congregation (thus reducing the church's regular collections), vacancies in the rental apartments and the acceleration of the Banco Popular loan, all of which placed the church in a very dangerous financial situation.

9. In 2015, Banco Popular called the loan in default and commenced a foreclosure action against the Debtor in New York Supreme Court, Kings County.

10. Unable to stave off the foreclosure of the Banco Popular loan, the church aggressively tried to market the Kings Property for sale as it was confident that a sale of this valuable asset, with significant equity, would enable the repayment of the church's debts in full with ample proceeds to fund operations going forward.

11. On or about January 8, 2016, Banco Popular allegedly assigned the loan and underlying mortgage to 399 Broadway Holdings LLC ("399"). 399 obtained a judgment of foreclosure on August 11, 2017 and scheduled a foreclosure sale which was ultimately adjourned until November 16, 2017. The sale was stayed by virtue of the filing of the Debtor's Chapter 11 case. As of the Petition Date, it is believed that 399 is owed approximately \$700,000.

12. Although there is multiple interest in the property, the Debtor was not able to execute a contract before the foreclosure proceeded to auction and despite efforts to obtain a stay from the foreclosing bank, they persisted.

13. Facing the sale of the church's primary and valuable asset at a forced "fire" sale, this bankruptcy was filed. The church's goal is to obtain some breathing room from its creditors in order to enter into a contract of sale for the property, to close on that transaction and to pay its creditors in

full.

14. The needs and interests of the Debtor's creditors will best be served by the continued possession of its property and management of its affairs as debtor-in-possession under Chapter 11 until confirmation of a reorganization plan.

Pre-Petition Secured Debt

15. On or about January 16, 2013, the Debtor entered into a Building Loan Note (the "Note") with Banco Popular North America ("Banco Popular") pursuant to which Banco Popular extended credit to the Debtor in the amount of \$500,000 at a variable interest rate based on LIBOR plus 5.25% not to be less than 5.5% in the aggregate. The Note had a maturity date of July 16, 2013. There is currently approximately \$700,000 outstanding on the Note. A copy of the Note is annexed as **Exhibit A**.

16. To secure the Debtor's obligations under the Note, on or about January 16, 2013, the Debtor entered into with Banco Popular (a) a Building Loan Mortgage (the "Mortgage") and (b) Assignment of Leases and Rents (the "Assignment of Rents") which granted Banco Popular a mortgage and security interest in and to, *inter alia*:

- a. The Premises located at 203-209 Rochester Avenue, Brooklyn, NY;
- b. All buildings and improvements located on the Premises;
- c. All easements, rights-of-way, gores of land, streets;
- d. All machinery, apparatus, equipment, fittings, fixtures and other property of every kind and nature whatsoever owned by the Mortgagor, or which the Mortgagor has or shall have an interest, now or hereafter located upon the Mortgaged Property;
- e. All awards or payments, including interest thereon, and the right to receive same, which may be made with respect to the Premises;
- f. All leases and other agreements affecting the use or occupancy of the Mortgaged Property now or hereafter entered into and the right to receive and

apply the rents, issues and profits of the Mortgaged Property to the payment of the Debt;

- g. All proceeds of an any unearned premiums on any insurance policies covering the Mortgaged Property;
- h. The right, in the mane and on behalf of the Mortgagor, to appear in and defend any action or proceeding brought with respect to the Mortgaged Property, and to commence any action or proceeding to protect the interest of the Mortgagee in the mortgaged Property (collectively, the “Pre-Petition Collateral”).

A copy of the Mortgage is annexed hereto as **Exhibit B**. A copy of the Assignment of Rents is annexed hereto as **Exhibit C**.

17. The grant of security by the Debtor to Banco Popular in the aforementioned Collateral was further perfected by the filing a UCC-1 financing statement with the New York Secretary of State on January 18, 2013 and a UCC Continuation Statement on August 15, 2017 (the “UCC Filings”). The UCC Filings have therefore not lapsed. Copies of the UCC Filings are annexed as **Exhibit D**.

18. The Allonge, Assignment of Mortgage and Assignment of Assignment of Rents from Banco Popular to 399 are annexed hereto as **Exhibit E**.

19. The Debtor agrees and acknowledges 399 has properly perfected its first priority liens and security interests in the Pre-Petition Collateral by virtue of the filing and recording of the Mortgage and Assignment of Rents and that its liens in the Pre-Petition Collateral are duly perfected, valid, existing, and legally enforceable.

20. Further, 399 is likely to assert that all rent proceeds and cash equivalents, whether in the form of cash, rents, accounts generated therefrom, or in any other form, whenever acquired, which represent income, proceeds, products, rents, or profits of the Pre-Petition Collateral that are now in the possession, custody or control of the Debtor (or persons in privity

with the Debtor), or in which the Debtor will obtain an interest during the pendency of the Chapter 11 Case, are and shall be treated as the “cash collateral” in which 399 has asserted a security interest for the purposes, and within the meaning, of Bankruptcy Code § 363(a) (collectively, the “Cash Collateral”) and 399, subject to proof of standing, has first priority perfected liens and security interests in the Cash Collateral pursuant to the applicable provisions of the Mortgage and Assignment of Rents and in accordance with Bankruptcy Code §§ 361, 363(a) and 552(b).

21. As per a recent appraisal of the Property, annexed hereto as Exhibit E. the Debtor believes the Property is worth approximately \$3,900,000. Accordingly, 3999 enjoys a significant “equity cushion” and is adequately protected within the meaning of Sections 361, 362 and 363(c)(2) of the Bankruptcy Code.

Relief Requested

22. The Debtor submits this Motion pursuant to Bankruptcy Code §§ 363(c)(2)(B), and 361 and Bankruptcy Rule 4001(b) with respect to the Debtor’s request for authority to use property which may constitute cash Collateral in which 399 is likely to assert a security interest, substantially in accordance with the terms and conditions set forth in the proposed Order (the “Order”) annexed hereto as **Exhibit F**. The Debtor believes that 399 has a perfected security interest in the Debtor’s property which may constitute Cash Collateral. No other creditors or parties in interest have asserted, or can assert, an interest in the Cash Collateral.

23. The proposed Order grants the Debtor the authority to use 399’s Cash Collateral pursuant to Bankruptcy Code §§ 363 (c)(1) and (2) and Bankruptcy Rule 4001(b) to the extent necessary to continue the operation of its business and to preserve the value of the estate during the course of the Chapter 11 case.

24. Section 363(a) of the Bankruptcy Code states as follows:

In this section, “cash collateral” means cash, 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 properties 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.

25. Section 363(c) of the Bankruptcy Code provides as follows:

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1304, 1203, or 1204 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(c)(2) The trustee may not use, sell or lease cash collateral under paragraph (1) of this subsection 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.

26. Section 363(d) of the Bankruptcy Code provides as follows:

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(e), or 362(f) of this title.

27. Accordingly, pursuant to § 363(c)(2) of the Bankruptcy Code, the consent of NBNYC and the Board, or authority from this Court is required to use Collateral in which they have asserted a security interest.

Adequate Protection

28. The purpose of adequate protection is to ensure that the secured creditor receives the value for which it bargained pre-bankruptcy. In re Swedeland Development Group, Inc., 16 F.3d 552 (3rd Cir. 1994); In re Dunes Casino Hotel, 69 B.R. 784, 793 (Bankr. D.N.J. 1986), citing In re Coors of the Cumberland, 19 B.R. 313 (Bankr. M.D. Tenn. 1982). See also, In re 495 Central Park Ave. Corp., 136 B.R. 626 (Bankr. S.D.N.Y. 1992). Adequate protection is designed to safeguard the secured creditor from diminution in the value of its interest during the Chapter 11 reorganization. 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 the collateral”).

29. Because the term “adequate protection” is not defined in the Bankruptcy Code, the precise contours of the concept are necessarily determined on a case-by-case basis. MBank Dallas, N.A. v. O’Connor (In re O’Connor), 808 F.2d 1393 (10th Cir. 1987). In re Snowshoe Co., 789 F.2d 1085, 1088 (4th Cir. 1086); In re Mosello, 195 B.R. 277, 289 (Bankr. S.D.N.Y. 1996); In re Beker Industries Corp., 58 B.R. 725 (Bankr. S.D.N.Y. 1986); 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).

30. The Order provides that, as adequate protection for the Debtor’s use of 399’s Cash Collateral, in consideration for the use of the Cash Collateral and for the purpose of adequately protecting 399 from Collateral Diminution¹, the Debtor shall grant 399 replacement liens in all of the Debtor’s pre-petition and post-petition assets and proceeds, including the cash Collateral and the proceeds of the foregoing, to the extent that 399 had a valid security interest in

¹ For purposes of this Order, “Collateral Diminution” shall mean any diminution in value of the Secured Creditors interests in Debtor’s property as of the Filing Date by reason of Debtor’s use of Cash Collateral in accordance with this Order.

said pre-petition assets on the Petition Date and in the continuing order of priority that existed as of the Filing Date (the “Replacement Liens”).

31. The Replacement Liens shall be subject and subordinate only to: (a) United States Trustee fees payable under 28 U.S.C. Section 1930 and 31 U.S.C Section 3717; (b) professional fees of duly retained professionals in this Chapter 11 case as may be awarded pursuant to Sections 330 or 331 of the Code or pursuant to any monthly fee order entered in the Debtor’s Chapter 11 case; (c) the fees and expenses of a hypothetical Chapter 7 trustee to the extent of \$10,000; and (d) the recovery of funds or proceeds from the successful prosecution of avoidance actions pursuant to sections 502(d), 544, 545, 547, 548, 549, 550 or 553 (“Avoidance Actions”) of the Bankruptcy Code (collectively, the “Carve-Outs”).

32. The Debtor submits that, in order to preserve the Debtor’s estate and ensure the viability of the Debtor during the Chapter 11 case, 399 should be granted Replacement Liens with the same nature, extent and validity of their pre-petition liens, subject to investigation by any creditors or committee appointed in the Debtor’s Chapter 11 case.

The Budget

33. The Debtor proposes to use Collateral only for ordinary and necessary operating expenses substantially in accordance with the operating budgets annexed hereto as **Exhibit G** (the “Budget”). The Debtor believes that the Budget includes all reasonable, necessary and foreseeable expenses to be incurred in the ordinary course of operating the Debtor’s business for the period set forth in the Budget. The Debtor believes that the use of Collateral in accordance with the Budget will provide the Debtor with adequate liquidity to pay administrative expenses as they become due and payable during the period covered by the Budget.

Notice

34. This Motion is being served on notice to counsel for 399, the United States Trustee and all other parties entitled to notice pursuant to Bankruptcy Rule 4001(d), including but not limited to the Debtor's twenty (20) largest unsecured creditors.

WHEREFORE, the Debtor respectfully requests entry of the Order, together with such other and further relief as is just and proper under the circumstances.

Dated: White Plains, New York
November 28, 2017

Respectfully submitted,

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By: /s/ Jonathan S. Pasternak
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