

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

ZONE 5, INC. f/k/a ZONE V LITHOGRAPHIC
PRE-PRESS, INC.,

Chapter 11

Case No: 17-11087

Debtor.

**BERKSHIRE BANK'S MOTION (i) PROHIBITING USE OF
CASH COLLATERAL AND/OR FOR ADEQUATE PROTECTION, OR IN THE
ALTERNATIVE, (ii) FOR RELIEF FROM THE AUTOMATIC STAY**

Berkshire Bank ("Berkshire"), by and through its attorneys Lemery Greisler LLC, submits this motion in the chapter 11 case of Zone 5, Inc. f/k/a Zone V Lithographic Pre-Press, Inc. ("Debtor"), for entry of an Order (i) prohibiting the use of cash collateral and/or for adequate protection pursuant to 11 U.S.C. § 363(e), or in the alternative, (ii) granting Berkshire Bank relief from the automatic stay, for cause, pursuant to 11 U.S.C. § 362(d)(1), and (iii) granting Berkshire Bank such other and further relief as this Court may deem just and proper (the "Motion"). In support of its Motion, Berkshire Bank respectfully states as follows:

PRELIMINARY STATEMENT

1. Debtor filed its voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Code") with this Court on June 8, 2017.
2. As set forth more fully below and in Berkshire's Proof of Claim (Claim No.: 9), Berkshire Bank is a secured creditor of the Debtor.
3. Upon information and belief, following the commencement of the Debtor's Chapter 11 case, the Debtor has been using Berkshire's "cash collateral" as such term is defined in Bankruptcy Code section 363(a) ("Cash Collateral").
4. The Debtor has not yet obtained Berkshire's consent to the use of such cash collateral or authorization from this Court to use Cash Collateral as is required by Bankruptcy

Code section 363(c)(2)(A) and (B).

5. As set forth herein, the Debtor has failed to make monthly adequate protection payments to Berkshire since commencing this Chapter 11 case.

6. Berkshire seeks an order of this Court prohibiting the Debtor's further use of its Cash Collateral and/or for adequate protection pursuant to 11 U.S.C. § 363(e).

7. In the alternative, Berkshire seeks to pursue its non-bankruptcy rights and remedies with respect to Berkshire's collateral, including continuing its State Court replevin action.

8. Given the lack of payments and the failure to reach an agreement on use of Cash Collateral, there is ample "cause" to grant Berkshire's motion for relief from the stay to continue its State Court action.

JURISDICTION & VENUE

9. This Court has jurisdiction over this case and this motion, which is a core proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(2)(A) and (G). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

10. The Debtor is an integrated marketing, branding and public relations agency located in Albany, New York.

11. Debtor, for good and valuable consideration, executed and delivered to Berkshire a Revolving Term Note dated December 21, 2007 ("Revolving Note"), in the original principal amount of \$300,000.00, together with interest on the unpaid outstanding principal balance, as more particularly set forth in the Revolving Note (see Revolving Note, annexed as Exhibit "A" hereto).

12. Debtor, for good and valuable consideration, executed and delivered to Berkshire a Term Note dated December 21, 2007 ("Term Note"), in the original principal amount of

\$350,000.00, together with interest on the unpaid outstanding principal balance, as more fully set forth in the Term Note (see Term Note, annexed as Exhibit “B” hereto).

13. As security for the Revolving Note and Term Note, Debtor executed and delivered to Berkshire a Loan and Security Agreement dated December 21, 2007 (“Security Agreement #1”), granting Berkshire a security interest in all of Debtor’s collateral, whether then owned or thereafter acquired and wherever located, as more particularly set forth therein (see Security Agreement #1, annexed as Exhibit “C” hereto).

14. Berkshire properly perfected its security interest in the pledged collateral by filing a UCC-1 Financing Statement with the New York Secretary of State on December 24, 2007 (see UCC-1, annexed as Exhibit “D” hereto).

15. In order to induce Berkshire to lend Debtor the funds referenced in Revolving Note and Term Note, Todd E. Mosher (“Guarantor”)¹, for good and valuable consideration, executed and delivered to Berkshire an Unlimited Guaranty dated December 21, 2007 (the “Guaranty”), pursuant to which he unconditionally guaranteed payment to Berkshire of all indebtedness owing by Debtor, as more particularly set forth therein (see Guaranty, annexed as Exhibit “E” hereto).

16. On August 12, 2008, Debtor entered into a Modification Agreement with Berkshire (“Modification Agreement #1”), wherein they agreed to modify the Term Note, as more particularly set forth therein (see Modification Agreement #1, attached as Exhibit “F” hereto).

17. Upon information and belief, on or about August 10, 2009, Debtor filed paperwork with the New York State Department of State Division of Corporations to change its name from Zone V Lithographic Pre-Press, Inc. to Zone 5, Inc.

¹ Guarantor filed his own voluntary petition for relief under Chapter 13 of the Bankruptcy Code with this Court on April 24, 2017 – Case Number: 17-10742-1-rel.

18. Thereafter, Debtor requested that Berkshire consent to the transfer from Zone V Lithographic Pre-Press, Inc. to Zone 5, Inc. of all the collateral securing the Revolving Note and Term Note, and on November 30, 2010, Debtor and Berkshire entered into an Assumption and Consent Agreement (“Consent Agreement”) wherein Berkshire consented to that transfer pursuant to the terms more fully set forth in the Consent Agreement (see Consent Agreement, annexed as Exhibit “G” hereto).

19. On March 4, 2011, Debtor entered into a Loan Modification Agreement with Berkshire (“Modification Agreement #2”), wherein they agreed to modify the Revolving Note, as more particularly set forth therein (see Modification Agreement #2, attached as Exhibit “H” hereto).

20. Pursuant to the Consent Agreement and as security for the Modification Agreement #2, Borrower executed and delivered to Berkshire a Loan and Security Agreement dated March 4, 2011 (“Security Agreement #2”), wherein Berkshire agreed to make loans and extend financial accommodations to or for the benefit of the Debtor in the original principal amount of up to \$650,00000, and in consideration thereof, Debtor granted Berkshire a first priority security interest in all of Debtor’s collateral, whether then owned or thereafter acquired and wherever located, as more particularly set forth therein (see Security Agreement #2, annexed as Exhibit “I” hereto).

21. Berkshire properly perfected its security interest in the pledged collateral by prospectively filing a UCC-3 Financing Statement Amendment with the New York Secretary of State on January 18, 2011, and a Continuation of the Financing Statement was filed on December 20, 2012 (see UCC-3 Financing Statement Amendment and Continuation, collectively annexed as Exhibit “J” hereto).

22. On December 30, 2015, Berkshire, Debtor and Guarantor entered into a Loan Modification and Note Consolidation Agreement, wherein Debtor and Guarantor acknowledged

that \$156,334.92 was due under the Revolving Note and Term Note, and they all agreed to modify and consolidate the Revolving Note and Term Note to form one Note, collateralized by the aforementioned loan documents, as more fully set forth therein (see Loan Modification and Note Consolidation Agreement, annexed as Exhibit “K” hereto).

23. In accordance therewith, Debtor, for good and valuable consideration, executed and delivered to Berkshire a Consolidated Restated Note dated December 30, 2015 (“Consolidated Note”), wherein and whereby Debtor agreed to pay Berkshire the principal amount of \$156,334.92 with interest thereon, all as more particularly set forth in the said note (see Consolidated Note, annexed as Exhibit “L” hereto).

24. The Revolving Note, Term Note, Security Agreement #1, Guaranty, Security Agreement #2, Modification Agreement #1, Consent Agreement, Modification Agreement #2, Security Agreement #2, the aforementioned UCCs, the Loan Modification and Note Consolidation Agreement and the Consolidated Note shall hereinafter be collectively referred to as the “Loan Documents.”

25. Interest accrues on the unpaid principal balance due under the Consolidated Note at a rate of 6.50% (the “Note Rate”) as set forth more fully in the Consolidated Note.

26. Pursuant to the Consolidated Note, the Debtor agreed to pay an interest only payment on January 15, 2016, and to make monthly principal and interest payments of \$4,798.76 each, commencing on February 15, 2016 and continuing on the same day of each successive month thereafter up to and including January 15, 2019. The Debtor agreed to make a final payment of all unpaid principal, together with accrued interest, accrued late charges and all other sums due thereunder and under the Loan Documents on January 15, 2019.

27. As per the Consolidated Note, if payments are 10 days or more late, the Debtor shall be obligated to pay Berkshire a late charge equal to five cents (\$.05) for each one dollar (\$1.00) so overdue.

28. The Consolidated Note also specifies that after the Maturity Date or the occurrence of an event of a default, the interest rate on the unpaid principal sum shall be increased by 4.0% per year above the Note Rate (the "Default Rate").

29. The Loan Documents further provide that upon default, the Debtor and Guarantor are liable for all costs, expenses, and attorney's fees incurred by Berkshire in collecting the amounts due.

30. The Debtor defaulted under the Loan Documents and Consolidated Note by omitting and failing to pay the installment for principal and interest that became due on May 15, 2016, and each and every month thereafter.

31. Guarantor failed to comply with the terms of the Guaranty by failing to pay all amounts owed by Debtor under the Consolidated Note.

32. As a result of the aforementioned defaults, on November 17, 2016, Berkshire commenced an action against the Debtor and the Guarantor in Albany County Supreme Court (Index No. 907076-16), which sought, among other things, judgment against the Debtor and Guarantor for the amounts owed on the various Loan Documents, as well as replevin of the collateral pledged by the Debtor, including, but not limited to, directing the Sheriff of any County within the State of New York where the Collateral is located to break in and enter upon the Borrower's premises for purposes of delivering the Collateral to Berkshire for liquidation.

33. On March 31, 2017, Berkshire made a motion for an Order granting default and/or summary judgment, an order of replevin and seizure, and awarding attorney's fees, costs and expenses.

34. The aforementioned action and motion were stayed due to the filing of the Debtor's bankruptcy petition.

35. As of June 8, 2017, the date Debtor filed for bankruptcy protection, there was due and owing from Debtor to Berkshire under the Loan Documents the sum of \$154,850.72,

consisting of principal of \$140,517.82, plus interest in the amount of \$10,013.98, and late fees of \$2,159.46. Interest accrues at the daily non-default rate of \$25.37 for each day after June 8, 2017.

36. Upon information and belief, the Debtor has been using Berkshire's Cash Collateral since the petition date – more than two months ago now.

37. The Debtor has not made a motion to this Court that would permit the Debtor to use Berkshire's Cash Collateral.

38. Debtor's counsel and Berkshire's counsel have not yet reached an agreement on the terms of a Cash Collateral agreement and adequate protection.

39. Berkshire and its counsel tried to proactively negotiate for use of Cash Collateral. However, the Debtor's failure to make monthly adequate protection payments has impacted Berkshire's willingness to permit use of Cash Collateral.

40. Additionally, the figures presented by the Debtor for the proposed budget result in the Debtor being in the red by approximately \$5,682.63 each month, making completion of any agreement on Cash Collateral impossible.

41. To the extent the value of the Collateral is greater than the amount of Berkshire's claim, pursuant to 11 U.S.C. § 506(b), Berkshire hereby reserves the right to seek post-petition interest, default rate interest, late fees, costs and other expenses as may be recoverable under the parties' Loan Documents and as may be allowed by the Court.

RELIEF REQUESTED

42. By this Motion, Berkshire respectfully requests entry of an Order (a) prohibiting the use of cash collateral and/or for adequate protection pursuant to 11 U.S.C. § 363(e), or in the alternative, (b) granting Berkshire relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1).

BASIS FOR RELIEF REQUESTED

A. The Court Should Prohibit the Use of Cash Collateral, or Alternatively, Grant Berkshire Adequate Protection

43. Section 363(c)(2) of the Bankruptcy Code, specifically states that a Debtor “may not use, sell, or lease cash collateral” in the ordinary course of business, unless the secured creditor consents or court authorization is obtained. 11 U.S.C. § 363(c)(2).

44. Additionally, section 363(e) provides that when a creditor objects to a debtor's use of its cash collateral, the bankruptcy court “shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.” 11 U.S.C. § 363(e).

45. As set forth above, Berkshire has a duly perfected security interests in all of the Debtor’s assets, including, but not limited to, all accounts, chattel paper, equipment, fixtures, inventory, and general intangibles, whether now owned or hereafter acquired or arising all as more particularly described therein. The Debtor’s accounts, chattel paper, and general intangibles constitute Cash Collateral as that term is defined by 11 U.S.C. § 363(a).

46. Upon information and belief, the Debtor has been using Berkshire’s Cash Collateral for the past two months without proper authority.

47. Debtor did not make a motion to use Cash Collateral with this Court.

48. The Debtor and Berkshire have not reached an agreement regarding the Debtor’s use of Cash Collateral, through no fault of Berkshire or its counsel, who have diligently and proactively tried to negotiate the terms of a cash collateral agreement.

49. However, the Debtor has failed to make monthly adequate protection payments to Berkshire since commencing this case.

50. While the Debtor did pay \$3,122.90 to Berkshire on or about June 29, 2017, that payment only resulted because the Debtor sold certain furniture that Berkshire had a security interest in.

51. Additionally, the figures presented by the Debtor for the proposed budget result in the Debtor being in the red by approximately \$5,682.63 each month, making completion of any Cash Collateral agreement virtually impossible.

52. Interest, fees, and expenses on the Loan Documents continue to mount while the automatic stay remains in place.

53. As such, the Debtor's continued use of its assets in the absence of adequate protection of Berkshire's interest is substantially harmful to Berkshire and is diminishing the value of Berkshire's assets.

54. Therefore, the Court should issue an order prohibiting the Debtor from using Berkshire's Cash Collateral.

55. Alternatively, Berkshire is entitled to adequate protection of its security interest.

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

- (1) requiring the [debtor] to make a cash payment or periodic cash payments to such entity, to the extent that the...use...under section 363...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...use...results in a decrease in the value of such entity's interest in such property; or
- (3) granting such other relief...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.

57. In Berkshire's view adequate protection of its interest should include, at minimum, timely payments of \$2,932.63 each month for the amounts due under the Loan Documents, a complete list of collateral, a strict budget, roll over liens, financial reporting, proof of insurance on all of Berkshire's collateral, and, to the extent necessary, replacement liens, and

such other protections as the court may deem appropriate and necessary.

B. The Court Should Grant Berkshire Relief from the Automatic Stay

58. Bankruptcy Code section 362(d)(1) provides that the court shall grant relief from the automatic stay “for cause, including the lack of adequate protection of an interest in property of such party in interest.” 11 U.S.C. § 362(d)(1).

59. The moving party bears the initial burden of showing “cause” for relief, but once a *prima facie* case has been established, the debtor has the ultimate burden of proof to show that cause does not exist to grant relief from the stay. In re Montague Pipeline Technologies Corp., 209 B.R. 295, 305 (Bankr. E.D.N.Y. 1997).

60. A debtor’s failure to make post-petition payments required under its loan documents constitutes cause for relief from the automatic stay pursuant to section 362 of the Bankruptcy Code. See In re Balco Equities Ltd., Inc., 312 B.R. 734, 749 (Bankr. S.D.N.Y. 2004); In re Elmira Litho, 174 B.R. 892, 903 (Bankr. S.D.N.Y. 1994) (noting that a *prima facie* case is established by demonstrating debtor has completely failed or substantially failed to make post-petition payments

61. As set forth above, the Debtor granted to Berkshire duly perfected security interests in all of his inventory, accounts, equipment, fixtures, investment property, chattel paper documents and general intangibles, wherever located, now owned or hereafter acquired or arising all as more particularly described therein.

62. As previously discussed, the Debtor has failed to provide adequate protection of Berkshire’s interest in the Debtor’s assets. The Debtor’s failure to make the required payments under the Loan Documents and failure to protect Berkshire’s collateral, creates substantial “cause” for this Court to grant this Motion for relief from the stay.

63. Accordingly, Berkshire should be granted relief from the automatic stay so that it may pursue its non-bankruptcy rights and remedies with respect to Berkshire’s assets, including

continuing the State Court replevin action.

WHEREFORE, it is respectfully requested that this Court issue an Order (i) prohibiting the use of cash collateral and/or for adequate protection pursuant to 11 U.S.C. § 363(e), or in the alternative, (ii) granting Berkshire relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1), and (iii) granting Berkshire such other and further relief as this Court may deem just and proper.

Dated: August 11, 2017
Albany, New York

LEMERY GREISLER LLC

s/Peter M. Damin
Peter M. Damin, Esq.
Attorneys for Berkshire Bank
50 Beaver Street, Second Floor
Albany, New York 12207
(518) 433-8800