

CULLEN AND DYKMAN LLP

Maureen T. Bass, Esq.
44 Wall Street
New York, New York 10005
Telephone: (212) 701-4131
E-mail: mbass@cullenanddykman.com

- and -

GRIFFIN HAMERSKY LLP

420 Lexington Avenue, Suite 400
New York, New York 10170
Telephone: (646) 998-5580
Facsimile: (646) 998-8284
Scott A. Griffin (*Pro Hac Vice* Pending)
Michael D. Hamersky (*Pro Hac Vice* Pending)

Proposed Counsel for the Debtor and Debtor in Possession

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

-----X	:	
	:	
In re:	:	Chapter 11
	:	
HERB PHILIPSON’S ARMY AND NAVY	:	
STORES INC.,	:	
	:	Case No. 18-61376 ()
Debtor. ¹	:	
	:	
-----X	:	

DEBTOR’S MOTION FOR ENTRY OF AN INTERIM AND FINAL ORDER PURSUANT TO SECTIONS 105, 361, 362, 363, 507 AND 552 OF THE BANKRUPTCY CODE, BANKRUPTCY RULES 2002, 4001, 6003, 6004 AND 9014 (I) AUTHORIZING THE DEBTOR TO USE CASH COLLATERAL; (II) GRANTING ADEQUATE PROTECTION; AND (III) SCHEDULING A FINAL HEARING

The debtor and debtor in possession in the above-captioned case (the “Debtor”) hereby moves (the “Motion”) for entry of an interim order (the “Interim Order”) and final order

¹ The last four digits of the Debtor’s federal tax identification number are 4814.

in substantially the form of the Interim Order (the “Final Order”), under sections 105, 361, 362, 363, 507(b) and 552 of title 11 of the United States Code (the “Bankruptcy Code”), Rules 2002, 4001, 6003, 6004 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) (a) authorizing the use of cash collateral as that term is defined in section 363 of the Bankruptcy Code (the “Cash Collateral”), in which the Secured Parties (as defined below) have a Lien or other interest, whether existing on the Petition Date (as defined below) or arising pursuant to this Interim Order or otherwise, (b) granting adequate protection to the Secured Parties, (c) modifying the automatic stay imposed under section 362 of the Bankruptcy Code to the extent necessary to permit the Debtor to implement the terms of the Interim Order and the Final Order, and (d) scheduling a final hearing for approval of the Final Order (the “Final Hearing”).

In support of this Motion, the Debtor relies upon and incorporates by reference the *Affidavit of Guy Viti*, filed under Local Bankruptcy Rule 2015-2 in support of the Debtor’s chapter 11 petition and various first day applications and motions (the “Affidavit”), filed with the Court on October 8, 2018 (the “Petition Date”). In further support of this Motion, the Debtor respectfully represents:

Jurisdiction and Venue

1. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b). Venue of this case and this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief requested herein are sections 105, 361, 362, 363, 507(b) and 552 of the Bankruptcy Code, Bankruptcy Rules 2002, 4001, 6003, 6004 and 9014.

Background

3. On the Petition Date, the Debtor filed a voluntary petition (the “Chapter 11 Case”) in this Court for relief under chapter 11 of the Bankruptcy Code.

4. The Debtor continues to manage and operate its business as a debtor in possession under sections 1107 and 1108 of the Bankruptcy Code.

5. The factual background regarding the Debtor, including its operations, its capital and debt structure, and the events leading to the filing of this Chapter 11 Case, is set forth in detail in the Affidavit, which is deemed fully incorporated herein by reference.²

Relief Requested

6. By this Motion, the Debtor seeks entry of an Interim Order authorizing the unencumbered use of Cash Collateral that may be subject to the Loan Agreement (as defined below) and granting adequate protection in connection with the use of such Cash Collateral. The Debtor proposes to serve a copy of the Interim Order granting this Motion within three (3) business days after entry thereof. The Debtor further requests that the Court set a deadline for filing objections to the Motion and entry of the Final Order thereon, set a final hearing on the Motion, and enter the Final Order on this Motion at or after such final hearing.

The Second Avenue Secured Claim

7. On July 31, 2018, the Debtor and Second Avenue Capital Partners LLC (“Second Avenue”) entered into that certain Loan and Security Agreement (the “Second Avenue Loan Agreement”) and a related Equity and Security Pledge Agreement (collectively, the “Second Avenue Loan Documents”) to fund the Debtor’s operations. As of the Petition Date, the Debtor

² Capitalized terms used herein, but not otherwise defined, shall have the meanings ascribed to them in the Affidavit.

owed approximately \$2.05 million (the “Second Avenue Secured Amount”) in secured debt under the Second Avenue Loan Documents.

The Philipson Secured Claims

1. In March 2018 the Debtor and Gary L. Philipson (“GL Philipson”) entered into that certain Security Agreement, as amended (the “GL Philipson Loan Agreement”), and a related secured promissory note, as amended, collectively, the “GL Philipson Loan Documents”), for all business purposes. As of the Petition Date, the Debtor owed approximately \$637,500 (the “GL Philipson Secured Amount”) in secured debt under the GL Philipson Loan Documents.

2. In March 2018 the Debtor and Aviva Philipson (“A Philipson,” together with Second Avenue and GL Philipson, the “Secured Parties”) entered into that certain Security Agreement, as amended (the “A Philipson Loan Agreement,”), and a related secured promissory note, as amended (collectively, the “A Philipson Loan Documents,” together with the Second Avenue Loan Documents and the GL Philipson Loan Documents, the “Loan Documents”), for all purposes. As of the Petition Date, the Debtor owed approximately \$612,500 (the “A Philipson Secured Amount,” together with the Second Avenue Secured Amount and the GL Philipson Secured Amount, the “Secured Amount”) in secured debt under the A Philipson Loan Documents.

3. As set forth in the Affidavit, Second Avenue has threatened to exercise its rights and remedies under the Second Avenue Loan Documents (including a threat to liquidate the Debtor and cease its operations), with such threat precipitating the Debtor chapter 11 filing.

Concise Statement of Relief Requested³

4. In accordance with Bankruptcy Rule 4001(b), the following is a summary of the relief requested and set forth in the proposed form of Interim Order, together with references to the applicable sections of the Interim Order.⁴

<p>Entities with Interest in the Cash Collateral <i>Bankruptcy Rule 4001(b)(1)(B)(i)</i></p>	<p>Secured Parties under the Loan Documents. (Interim Order, Section E.)</p>
<p>Purposes for Use of Cash Collateral <i>Bankruptcy Rule 4001(b)(1)(B)(ii)</i></p>	<p>The Debtor requests interim authorization to use only the amount of Cash Collateral that is necessary to avoid immediate and irreparable harm to the Debtor’s bankruptcy estate, pending a final hearing. The use of Cash Collateral will be used by the Debtor to continue operations and preserve the value of its assets and for the operating costs and expenses of the Chapter 11 Case, fees owed to the United States Trustee, and restructuring expenses, including professional fees and expenses, pursuant to and consistent with the budget attached to the proposed Interim Order (the “Budget”). The Debtor believes that the Budget will be adequate, considering all available assets, to pay all administrative expenses due or accruing during the period covered by the Budget. (Interim Order, Section 2.)</p>
<p>Material Terms: Duration and Use of Cash Collateral <i>Bankruptcy Rule 4001(b)(1)(B)(iii)</i></p>	<p>The Interim Order contemplates the use of Cash Collateral through the week ending December 29, 2018. (Interim Order, Section 2.)</p>

³ The description of the terms of the proposed Interim Order provided in this Motion is intended only as a summary. In the event of any inconsistency between the descriptions set forth herein and the terms of the Interim Order, the terms of the Interim Order shall govern.

⁴ The Debtor intends that the terms of the Final Order will be substantially similar to the terms of the Interim Order.

<p>Material Terms: Termination Events <i>Bankruptcy Rule 4001(b)(1)(B)(iii)</i></p>	<p>The passing of seven (7) business days (except in instances where a longer period is specifically indicated) after written notice by the Secured Parties to the Debtor of occurrence of any of the following shall constitute a “Termination Event,” unless waived in writing by the Secured Parties:</p> <ul style="list-style-type: none"> (a) this Chapter 11 Case shall be dismissed or converted to a chapter 7 case, or a chapter 11 trustee or an examiner with expanded powers pursuant to section 1106(b) shall be appointed in this Chapter 11 Case; or (b) the Debtor fails to comply with any other provision of the Interim Order and such failure shall continue unremedied for ten (10) business days following written notice from the Secured Parties. <p>(Interim Order, Sections 3 and 4.)</p>
<p>Liens, Cash Payments or Adequate Protection Provided for Use of Cash Collateral <i>Bankruptcy Rule 4001(b)(1)(B)(iv)</i></p>	<ul style="list-style-type: none"> (a) The Secured Parties shall be granted a lien against the Debtor and its assets that is encumbered under the Loan Agreement: Subject to the Carve-Out and the terms of any postpetition financing approved in this case, (i) allowed senior administrative expense claims (the “Superpriority Claims”) with priority over any and all other claims against the Debtor, now existing or hereafter arising, of any kind whatsoever, as provided under section 507(b) of the Bankruptcy Code; and (ii) adequate protection liens, including replacement liens, liens on certain unencumbered property (provided that unencumbered property shall not include avoidance actions under Chapter 5 of the Bankruptcy Code or the proceeds thereof) (collectively, the “Adequate Protection Liens”). (Interim Order, Section 5(a)-(b).) (b) The Adequate Protection Liens will not be subject or subordinate to any lien or security interest that is avoided and preserved for the benefit of the Debtor and their estates under section 551 of the Bankruptcy Code except for the Carve-Out, to the extent postpetition financing is approved by the Court, or as otherwise provided in the Interim Order or Final Order, subordinated to any other lien or security interest under sections 363 or 364 of the Bankruptcy Code or otherwise.

	(Interim Order, Section 5(c).)
Modification of the Automatic Stay <i>Bankruptcy Rule 4001(b)(1)(B)(iii)</i>	The automatic stay is modified as necessary to effectuate all the terms of the Interim Order, including the granting of liens contemplated by the Interim Order. (Interim Order, Section 11.)
Carve-Out <i>Bankruptcy Rule 4001(b)(1)(B)(iii)</i>	The liens and claims of, or granted to, the Secured Parties in the Interim Order will be subject and subordinate to the payment, without duplication, of the following fees and claims (the amounts set forth below, together with the limitations set forth therein, collectively, the “Carve-Out”): (a) (i) the claims of the Retained Professionals for fees and expenses which were incurred on and after the occurrence of a Termination Event; provided that, in each case, such fees and expenses of the Retained Professionals are ultimately allowed on a final basis by this Court under sections 327, 328, 330, 331 or 363 of the Bankruptcy Code and do not exceed \$250,000 in the aggregate plus (ii) the fees and expenses incurred by any professionals engaged by any successor to the Debtor, including, without limitation, any trustee or examiner with expanded powers appointed under chapter 11 in an aggregate amount not to exceed \$25,000, or a trustee appointed under chapter 7 in an aggregate amount not to exceed \$15,000. (Interim Order, Section 9(a).) (b) the unpaid fees payable to the United States Trustee and Clerk of the Bankruptcy Court pursuant to section 1930 of title 28 of the United States Code and any interest due and owing pursuant to section 3717 of title 31 of the United States Code. (Interim Order, Section 9(b).)
Preservation of Rights <i>Bankruptcy Rule 4001(b)(1)(B)(iii)</i>	Any and all rights of the Debtor or any other party in interest (i) to contest the extent, validity, priority or perfection of any and all liens of the Secured Parties, (ii) to contest the amount of the Secured Parties’ asserted claims, (iii) to seek the avoidance, recharacterization or subordination of the Secured Parties’ claims or interests, (iv) to seek the avoidance of any transfer to the Secured Parties or to otherwise contest the claims, rights and liens of the Secured Parties by any party in this Chapter 11 Case, are preserved, and nothing herein shall prejudice any party asserting any such challenge; <u>provided</u> that the Debtor and any statutory committee of

	<p>unsecured creditors shall each have standing to bring any such challenge, and each may do so on or before sixty (60) days from the date of entry of the Final Order (the “Challenge Period Expiration Date”), or such challenge shall be deemed waived, released and forever barred, <u>provided</u> that nothing herein shall limit the right of any party in interest to object to the Secured Parties’ secured claims under section 506 of the Bankruptcy Code based on the value of the collateral therefor or to seek reallocation of any payment hereunder based on the collateral therefor.</p> <p>(Interim Order, Section 8.)</p>
--	--

Basis for Relief

Cash Collateral Use Is Necessary

5. As of the Petition Date, without access to the Cash Collateral, the Debtor will have insufficient liquidity to continue to operate its business and pay restructuring costs associated with this Chapter 11 Case.

6. The Debtor’s access to the Cash Collateral is necessary to ensure that it has sufficient working capital and liquidity to operate its business and thus preserve and maintain the going concern value of its estate while the Debtor seeks to reorganize its business under the protections of the Bankruptcy Code.

7. Thus, the need for the immediate use of Cash Collateral pending the final hearing is paramount. The Debtor and its estate will suffer irreparable harm if such use is not immediately authorized. The Debtor submits that the terms and conditions set forth in the Interim and ultimately the Final Order: (a) are, taken as a whole, fair and reasonable under the circumstances; (b) reflect the Debtor’s reasonable exercise of business judgment consistent with its fiduciary duties; and (c) are supported by reasonably equivalent value and fair consideration. Accordingly, the relief is warranted under the circumstances.

The Secured Parties' Interest is Adequately Protected

8. The Debtor believes that the Secured Parties is adequately protected in connection with the Debtor's proposed use of Cash Collateral. What constitutes adequate protection is determined on a case-by-case basis. Although the Bankruptcy Code does not define the term "adequate protection," it provides a non-exhaustive list of types of adequate protection, including "other relief" resulting in the "indubitable equivalent" of the secured creditor's interest in such property. See 11 U.S.C. § 361. Specifically, section 361 of the Bankruptcy Code provides the following non-exclusive examples of what may constitute adequate protection:

- (1) requiring the trustee to make 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.

Id.

9. The Bankruptcy Code intends "adequate protection" to shield a secured creditor from diminution in the value of its interest in the particular collateral during the period of use by the debtor. In re Pine Lake Vill. Apartment Co., 19 B.R. 819, 825-26 (Bankr. S.D.N.Y. 1982) (noting that a secured creditor has the right to receive adequate protection for any decline in value of its collateral). The Debtor's requested use of Cash Collateral and the protections afforded to the Secured Parties, in light of the circumstances, are reasonable, appropriate, and sufficient to satisfy the legal standard of "adequate protection" and will serve to maintain the value of the Prepetition Collateral.

10. As set forth above, the Cash Collateral will be used to sustain the Debtor's business operations, while it seeks to reorganize of its business. If Cash Collateral is not available for this purpose, the Debtor will not have the ability to maintain its operations. As such, the Debtor's inability to use Cash Collateral could potentially result in a piecemeal liquidation of its assets leading to severely diminished recoveries for parties in interest in this Chapter 11 Case. The Court's authorization of the use of Cash Collateral, therefore, will protect the Secured Parties' security interest by preserving the value of its collateral. In re Cardinal Indus. Inc., 118 B.R. 971, 981 (Bankr. S.D. Ohio 1990) (ruling that secured lenders were adequately protected by debtor's use of funds to maintain and manage encumbered properties).

11. Courts have routinely recognized that the preservation of the going concern value of secured lenders' collateral constitutes adequate protection of such creditors' interest in the collateral. See, e.g., In re 499 W. Warren St. Assocs., Ltd. P'ship, 142 B.R. 53, 56 (Bankr. N.D.N.Y. 1992) (finding 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 Stein, 19 B.R. 458, 460 (Bankr. E.D. Pa. 1982) (creditors' secured position would be enhanced by the continued operation of the Debtors' business); 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 postpetition, then the secured creditor is adequately protected).

12. Further, the Bankruptcy Code expressly provides that granting a replacement lien is a means of adequate protection. 11 U.S.C. § 361(2). Granting replacement liens provides adequate protection of secured creditors' interest in cash collateral. See In re Island Helicopter Corp., 63 B.R. 515, 523 (Bankr. E.D.N.Y. 1986) (holding that secured party

was adequately protected when granted replacement liens on new helicopters and components). Here, the Debtor will adequately protect the Secured Parties' interest in the Prepetition Collateral, including the Cash Collateral by, among other things, granting the Adequate Protection Liens, which consist of replacement liens, including liens on any unencumbered prepetition property of the Debtor, to the extent it may exist, liens on any unencumbered postpetition property of the Debtor

13. The Secured Parties will also be granted allowed administrative expense claims having the priority specified in section 507(b) of the Bankruptcy Code. These claims provide the Secured Parties additional adequate protection.

14. For the foregoing reasons, the Debtor's requested use of Cash Collateral and the protections provided to the Secured Parties in order to protect the Secured Parties' interest in the Prepetition Collateral are reasonable, appropriate, and sufficient to satisfy the legal standard of "adequate protection".

Modification of the Automatic Stay

15. Section 362 of the Bankruptcy Code provides for an automatic stay upon the filing of a bankruptcy petition. The Interim Order contemplates a modification of the automatic stay (to the extent applicable) to permit the Debtor to (i) grant the security interests, liens, and superpriority claims described above and to perform such acts as may be requested to assure the perfection and priority of such security interests and liens, and (ii) implement the terms of the proposed Interim Order and Final Order.

16. Stay modification provisions of this kind are ordinary and standard features of postpetition debtor in possession cash collateral orders, and are, in the Debtor's business judgment, reasonable under the present circumstances. Accordingly, the Debtor respectfully

requests that the Court authorize the modification of the automatic stay in accordance with the terms set forth in the proposed Interim and Final Order.

Immediate Relief Is Necessary to Avoid Immediate and Irreparable Harm

17. Bankruptcy Rule 4001(b)(2) governs the procedures for obtaining authorization to use cash collateral and provides, in relevant part:

The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing

Fed. R. Bankr. P. 4001(b)(2).

18. It is indisputable, based on the record before the Court, that the Debtor has an immediate need to use the Cash Collateral. Accordingly, the Debtor requests that the Court conduct a preliminary hearing on the Motion and authorize the Debtor, from the entry of the Interim Order until the Final Hearing, to use Cash Collateral and obtain the necessary credit to avoid irreparable harm to its estate.

Request for a Final Hearing

19. Pursuant to Bankruptcy Rule 4001(b)(2), which requires that a final hearing on a motion to use cash collateral be commenced no earlier than fourteen (14) days after service of the motion, the Debtor requests that the Court schedule the final hearing for a date that is as soon as practicable, but in no event later than twenty-one (21) days following the entry of the Interim Order, and establish the deadline prior to the final hearing for parties to file objections to the Motion pursuant to the terms of the Interim Order.

Notice

20. Notice of this Motion has been provided either by facsimile, electronic transmission, overnight delivery, or hand delivery to: (i) the United States Trustee; (ii) the United States Attorney for the Northern District of New York; (iii) the Internal Revenue Service; (iv) the New York State Department of Taxation and Finance; (v) the Securities and Exchange Commission; (vi) the parties listed on the Debtor's List of Creditors Holding the 20 Largest Unsecured Claims filed pursuant to Bankruptcy Rule 1007(d); (vii) the Secured Parties; (viii) the Debtor's prepetition banking institutions; (ix) the Debtor's prepetition secured lenders; and (x) any parties required to be served under any applicable Bankruptcy Rule or Local Rule (the "Initial Notice Parties"). The Debtor submits that, under the circumstances, no other or further notice is necessary.

21. The Debtor further respectfully asks that the Court schedule the Final Hearing and authorize it to mail copies of the signed Interim Order, which fixes the time, date and manner for filing objections to: (a) the Initial Notice Parties; (b) counsel to the Debtor, Griffin Hamersky LLP, Attn: Scott A. Griffin, Esq. and Michael D. Hamersky, Esq. 420 Lexington Ave, Suite 400, New York, New York, 10170; (c) counsel to any statutory committees appointed in this Chapter 11 Case; and (d) any party who filed a request for notices in this Chapter 11 Case pursuant to Bankruptcy Rule 2002 at least three (3) business days prior to the date set forth in the Interim Order for the Final Hearing.

No Prior Request

22. No prior request for the relief requested herein has been made to this or any other Court.

Conclusion

WHEREFORE, the Debtor respectfully requests the Court enter an order, substantially in the form annexed hereto as Exhibit “A,” granting the relief requested in this Motion and such other and further relief as may be just and proper.

Dated: New York, New York
October 8, 2018

CULLEN AND DYKMAN LLP

By: /s/ Maureen T. Bass
Maureen T. Bass, Esq.
44 Wall Street
New York, New York 10005
Telephone: (212) 701-4131
E-mail: mbass@cullenanddykman.com

- and -

GRIFFIN HAMERSKY LLP
420 Lexington Avenue, Suite 400
New York, New York 10170
Telephone: (646) 998-5580
Facsimile: (646) 998-8284
Scott A. Griffin (*Pro Hac Vice* Pending)
Michael D. Hamersky (*Pro Hac Vice* Pending)

Proposed Counsel for the Debtor and Debtor
in Possession