

**GAZES LLC**

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re:

Chapter 11

919 PROSPECT AVE LLC,

Case No. 16-13569-scc

Debtor.

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**MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS AUTHORIZING THE  
CHAPTER 11 TRUSTEE TO OBTAIN POST-PETITION FINANCING PURSUANT  
TO BANKRUPTCY CODE SECTION 364 (c)(3)**

Ian J. Gazes, the chapter 11 trustee (the “Trustee”) of 919 Prospect Ave LLC (the “Debtor”), by his undersigned attorneys, submits this motion (the “Motion”), for entry of an interim order, substantially in the form annexed hereto as Exhibit “A”, and, after further notice and hearing, a final order, authorizing the Trustee, *nunc pro tunc* to January 30, 2017, to enter into a post-petition financing agreement with White Oak Profit Sharing Plan pursuant to 11 U.S.C. § 364(c)(3), and respectfully states as follows:

**I. PRELIMINARY STATEMENT**

1. The sole asset in this case is the Debtor’s fee simple interest in certain real property located at 919 Prospect Avenue, Bronx, New York (the “Property”) consisting of thirty-seven residential rental units and additional commercial rental units located on the Property’s ground floor. The Property is in a state of disrepair and over the last several years, various tenants have made myriad complaints concerning the living conditions at the Property and numerous violations have been placed against the building by the City of New York. The Property’s rental income,

which was used pre-petition to service the mortgage on the Property and to pay the Debtor's ordinary course operating expenses, is insufficient to fund the extensive repairs and remediation necessary to address these complaints and violations as well as to pay the other costs of administration. Accordingly, the Trustee seeks the Court's approval of his proposed agreement with White Oak Profit Sharing Plan (the "Lender"), the Debtor's owner and an entity controlled by the Debtor's principal, whereby the Lender has agreed to remit to the estate the sum of One Million Dollars (\$1,000,000.00) (the "Credit Facility") pursuant to the terms and conditions, of the promissory note, attached hereto as Exhibit "B" (the "Note"), the material terms of which are summarized as follows:

<b>Rule Provision</b>	<b>Terms</b>	<b>Location in Note</b>
<b>Interest Rate:</b> Bankruptcy Rule 4001(c)(1)(B)	Internal Revenue Code, imputed interest rate	Section 7(a)
<b>Maturity:</b> Bankruptcy Rule 4001(c)(1)(B)	The earlier of the sale of the Property under a confirmed chapter 11 plan or the sale of the Property by a chapter 7 trustee	Section 1(q)
<b>Events of Default:</b> Bankruptcy Rule 4001(c)(1)(B) and Local Rule 4001-2(a)(10)	(a) Failure to make required payment when due; false or misleading material representation or warranty by borrower; breach of borrower's obligations under note; borrowers commencement of "Adverse Bankruptcy Action"; entry of order granting Adverse Bankruptcy Action; conversion of bankruptcy case to chapter 7 case; occurrence of "Event of Default" under interim Financing Order	Section 14(a)
<b>Liens:</b> Bankruptcy Rule 4001(c)(1)(B) and Bankruptcy Rule 4001(c)(1)(B)(i)	Lender shall have lien on Property junior to all Prior Liens	Section 8(a)
<b>Borrowing Limits:</b> Bankruptcy Rule 4001(c)(1)(B) and Local Rule 4001-2(a)(1)	\$1,000,000.00 subject to increase on consent of Borrower and Lender	Section 3(a)-(c)

<p><b>Borrowing Conditions:</b> Bankruptcy Rule 4001(c)(1)(B) and Local Rule 4001-2(a)(2)</p>	<p>(i) entry of Financing Order; (ii) absence of Adverse Bankruptcy Action; (iii) no Event of Default; (v) Borrower has provided Lender with all required information; (vi) Borrower's compliance with Note; and (vii) accuracy of representations and warranties</p>	<p>Section 9(i)-(vii)</p>
<p><b>Grant of Lien on Property:</b> Bankruptcy Rule 4001(c)(1)(B)(i)</p>	<p>Lender shall have lien on Property junior to all Prior Liens</p>	<p>Section 8(a)</p>
<p><b>Waiver of Nonbankruptcy Law Relating to Perfection of a Lien:</b> Bankruptcy Rule 4001(c)(1)(B)(vii)</p>	<p>No financing statement, notice of lien, mortgage, deed of trust or similar instrument in any jurisdiction or filing office need to be filed or any other action taken to validate and perfect the Liens and security interests granted by or pursuant to this Note or the Financing Order</p>	<p>Section 8(b)</p>
<p><b>Pricing and Economic Terms:</b> Local Rule 4001-2(a)(3)</p>	<p>Internal Revenue Code, imputed interest rate; Lender shall not be paid by Trustee by and through Debtor's case</p>	<p>Section 7(a); Section 5(a)</p>
<p><b>Limitation to Fund Certain Activities:</b> Local Rule 4001-2(a)(9)</p>	<p>Lender not required to fund the relocation of all tenants to another location unless such relocation is pursuant to any vacate order, or at the direction of a city or state regulatory agency, or emergency, or as required to satisfy the legal obligations of the Debtor or Trustee; approximately 70% of all loan proceeds to be allocated to Construction Costs and 30% of all loan proceeds to Chapter 11 Administrative Claims</p>	<p>Section 1(j); Section 11(a)-(b)</p>

**II. JURISDICTION AND VENUE**

2. This Court has jurisdiction to hear the relief requested in this Motion pursuant to sections 157 and 1334 of title 28 of the United States Code, and the Amended Standing Order of

Reference of the United States District Court for the Southern District of New York. This Motion is a core proceeding under section 157 (b)(2)(A), (D) and (M) of title 28 of the United States Code. 28 U.S.C. § 157 (A), (D) and (M).

3. Venue of this bankruptcy case is proper under section 1408 of title 28 of the United States Code. 28 U.S.C. § 1408.

4. The predicates for the relief sought in this Motion are sections 105(a), and 364(c)(3) of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”), Rule 4001 (c) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Local Bankruptcy Rule 4001-2. 11 U.S.C. §§ 105(a) and 36(c)(3), Fed. R. Bankr. P. 4001 (c), and LBR 4001-2.

### **III. BACKGROUND**

#### **A. Procedural Background**

5. On December 22, 2016, the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the “Court”) [Doc. No. 1].

6. Seth Miller (“Miller”) is the managing member of Debtor, and the trustee of the Lender, White Oak Profit Sharing Plan. As indicated in the Debtor’s bankruptcy petition, the Lender is also a member of the Debtor.

7. On January 26, 2017, the Court entered an order directing the appointment of a chapter 11 trustee pursuant to section 1104(a)(2) of the Bankruptcy Code [Doc. No. 34]

8. On January 30, 2017, the Court entered an order approving the United States Trustee's appointment of Ian J. Gazes as chapter 11 trustee which appointment was accepted on February 2, 2017 [Doc. Nos. 39 and 40].

#### **B. Existing Liens on the Debtor’s Real Property**

9. Because the Debtor generates its income solely from rent collected from the Property's tenants and conducts no other business at the Property, the Property is "single asset real estate," within the meaning of Bankruptcy Code section 101(51). 11 U.S.C. § 101(51).

10. On Schedules "A" and "D" to its petition, the Debtor valued the Property at \$5,000,000.00 subject to the secured claim of Flushing Savings Bank, FSB (the "Bank") in the current amount of \$2,400,000.00.

11. The online records of the New York City Department of Finance, Office of the City Registrar show that the Bank (a) holds a mortgage on the Property to secure indebtedness at the time of recording in the amount of \$2,400,000, and (b) is the assignee of all Debtor's right, title and interest in all leases and tenancies of the Property.

12. The claims register maintained by the Clerk of the Court reveals the following entities have asserted secured claims against the Property:

<b>Claim No.</b>	<b>Name</b>	<b>Amt. of Secured Claim</b>
1.1	Department of Housing Preservation and Development	\$698,460.00
3.1	New York City Water Board	\$42,679.34
4.1	New York City Dept. of Finance	\$7,031.61
6.1	NYC Office of Administrative Trials and Hearings	
7.1	Flushing Bank	\$2,221,339.05

C. The Trustee's Need to Obtain Post-Petition Credit

13. The Debtor's monthly rental income is approximately \$52,500.00.<sup>1</sup>

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<sup>1</sup> The rental income is "cash collateral" of the Bank within the meaning 11 U.S.C. § 363(a). The Bank has already consented to the Trustee's limited use of the rental income to pay certain immediately payable operating costs. The Trustee anticipates that a stipulated cash collateral order will be submitted for Court approval within the coming days.

14. The Debtor's projected monthly net income going forward, exclusive of (a) the ongoing costs of repairing the Property and curing all open violations, and (b) the commissions, fees and expenses of the Trustee's professionals, is estimated at \$11,500.00.

15. In light of the Debtor's limited assets and income, the Trustee has recognized that absent third party financing, the estate would soon be administratively insolvent leaving the Trustee unable to pay for necessary repairs and construction at the Property.

16. In his initial meetings with the Debtor and its attorneys, the Trustee identified Lender, as being willing and able to fund the Debtor's operations, construction costs and chapter 11 administrative expenses with a principal loan amount of up to One Million Dollars (\$1,000,000.00), bearing interest at the prevailing Internal Revenue Service imputed rate. The maximum loan amount is subject to increase upon written agreement of Trustee and Lender subject to the terms and conditions of the Note. Seventy (70) per cent of all loan proceeds is allocated to Construction Costs with thirty (30) per cent of all loan proceeds will be allocated to Chapter 11 Administrative Claims.

17. The Trustee has not attempted to obtain unsecured credit from other third parties based on the patent unlikelihood of securing the necessary financing on terms more favorable than those being offer by Lender including the *di minimis* interest being charged by Lender and the Lenders intention not to be "paid by Trustee by and through Debtor's case." See Note, Section 5(a). In addition, the Lender has remitted advances against the Loan in the aggregate amount of \$50,000.00 on an emergency basis.<sup>2</sup>

## **V. LEGAL AUTHORITY**

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<sup>2</sup> The emergency funds were used to pay the February mortgage and necessary repairs and construction work at the Property including ordinary expenses such as Con Edison bills.

18. If a trustee will be incapable of obtaining necessary credit allowable as an unsecured cost of administration, the Court may, among other remedies, authorize the trustee to obtain debt “secured by a junior lien on property that is subject a lien.” 11 U.S.C. §364(c)(3). In considering a proposed credit transaction under subsections 364(b), (c) and (d), “the Court acts in its informed discretion.” *In re Ames Dept. Stores*, 115 B.R. 34, 37 (Bankr. S.D.N.Y. 1990). Moreover, courts generally give considerable deference to a trustee’s business judgment in obtaining post-petition credit. So long as the credit transaction “does not ‘leverage the bankruptcy process’ and unfairly cede control of the reorganization to one party in interest.” *In re Barbara K Enters.*, 2008 Bankr. LEXIS 1917, \*40 (Bankr. S.D.N.Y. June 16, 2008).

19. Based on the Debtor’s limited net income, the extent of the necessary repairs to the Property, and the costs of administration, as well as the need to protect the value of the Property, the Trustee submits, in the exercise of his business judgment, that the estate requires an immediate infusion of capital. The Trustee submits that the Debtor’s limited and essentially fixed income renders the likelihood of obtaining unsecured, non-priority financing an impossibility. Indeed, as a condition to lending, Lender initially sought a super-priority administrative expense claim under subsection 364(c)(1) as well as a junior lien under subsection (c)(3) but withdrew the former request at the instance of the Trustee.

20. Finally, Bankruptcy Rule 4001 provides that a final hearing on a motion to obtain post-petition financing may not be commenced earlier than fourteen (14) days after the service of such motion. Upon request, however, the Court is empowered to conduct a preliminary, expedited hearing on the motion and to authorize the use of the proposed financing to the extent necessary to avoid immediate irreparable harm to a debtor’s estate.

21. Here, the Trustee has an urgent and immediate need for funds to continue to operate the Debtor's business, remediate emergency repairs, and to avoid irreparable harm to the Property. Accordingly, Trustee respectfully requests that the Court conduct a preliminary hearing on the Motion and authorize the Trustee, from the entry of an Interim Order until the Final Hearing, to obtain credit in the amount of \$1,000,000.00 to the extent necessary to avoid immediate and irreparable harm to Debtor's estate and parties in interest.

## **VI. CONCLUSION**

22. For all the reasons set forth herein, Trustee respectfully requests that the Court enter an Order authorizing the Trustee to enter into and approve the Credit Facility on interim basis, *nunc pro tunc* to January 30, 2017, set a final hearing date, and grant such other relief that this Court deems just and proper.

Dated: New York, New York  
February 15, 2017

GAZES LLC

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