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UNITED STATE BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

**Interim Hearing Date and Time:
10:00 a.m. October 3, 2018**

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In re:

MEYZEN FAMILY REALTY
ASSOCIATES, LLC

Case No.:18-23419 (RDD)
Chapter 11

Debtor,

-----X

DEBTOR’S MOTION FOR AN ORDER (A) AUTHORIZING THE USE OF CASH COLLATERAL PURSUANT TO BANKRUPTCY CODE SECTION 363(c)(2) AND BANKRUPTCY RULES 4001 ON AN INTERIM BASIS AND PROVIDING ADEQUATE PROTECTION THEREFOR PURSUANT TO 11 U.S.C. §§361 AND 362, (B) APPROVING A LEASE BY AND BETWEEN THE DEBTOR AND THE RESTAURANT PURSUANT TO BANKRUPTCY CODE SECTION 363 (C) SCHEDULING A FINAL HEARING; (D) AND SUCH OTHER AND FURTHER RELIEF AS THE COURT DEEMS JUST AND PROPER

**TO THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE:**

MEYZEN FAMILY REALTY ASSOCIATES, LLC, the debtor and debtor-in-possession (the “**Debtor**”), by its proposed attorneys, the Bronson Law Offices, P.C. submits this motion (the “**Motion**”) for an order (a) authorizing the use of cash collateral pursuant to bankruptcy code section 363(c)(2) and bankruptcy rules 4001 on an interim basis and providing adequate protection therefor pursuant to 11 U.S.C. §§361 and 362, (b) approving a lease by and between the Debtor and the Restaurant, as defined below,

pursuant to Bankruptcy Code §363; (c) scheduling a final hearing; and (d) such other relief as the Court finds just and proper. In support of the Motion, the Debtor represents as follows:

SUMMARY OF RELIEF REQUESTED

1. By this Motion, the Debtor seeks authority to utilize the rents it collects to fund its ongoing operations and to enable it to reorganize. Absent approval of the Debtor's use of cash collateral, the Debtor would be unable to fund its operations and would be unable to meet its obligations as landlord to its sole tenant, a related party that operates a restaurant known as La Cremaillere (the "**Restaurant**"), which comprises the source of all of the Debtor's revenue. The Debtor's use of the cash collateral pursuant to the proposed enclosed budget will enable the Debtor to reorganize its operations while at the same time adequately protecting the senior secured lender. Furthermore, the Debtor's continued operations will ensure the continued operation of the Restaurant that is a co-borrower on and collection of rent post-petition will greatly enhance their going concern value and their ability to successfully reorganize.

JURISDICTION AND VENUE

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

3. The statutory predicate for the relief requested in this Motion is §§ 105, 361, 362 and 363 of the United States Code, 11 U.S.C. §§ 101, et seq. (the "**Bankruptcy**

Code”) and Rule 4001 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

BACKGROUND

4. On September 13, 2018 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.*, in the United States Bankruptcy Court for the Southern District of New York.

5. The Debtor is a single asset real estate company as defined by the Bankruptcy Code and owns its Property as a debtor and debtor-in-possession pursuant to Bankruptcy Code sections 1107 and 1108.

6. To date, no trustee, examiner or statutory creditors’ committee has been appointed in the Debtor’s chapter 11 case.

7. The Debtor owns the property located at 46 Bedford-Banksville Road, Bedford, NY 10506 (“Property”). This Property has been in the Meyzen family¹ for over forty (40) years and is estimated to be valued at \$3,100,000 to \$3,300,000. A valuation is attached hereto as “Exhibit A”.

8. The Property is rented to the Restaurant; however, in the past no money was paid to Debtor, but rather the Restaurant would make the necessary payments related to the ownership of the Property and there would be a bookkeeping entry as to Debtor’s receipt of income. The Debtor has now set up a debtor-in-possession (“DIP”) account at Webster Bank and the rent will be paid to Debtor on a monthly basis in an amount sufficient to pay the mortgage and to make property tax payments as they come due.

¹ Robert Meyzen and Barbara Meyzen, husband and wife, are the current owners of the Debtor and the Restaurant and they are also guarantors of the Loan.

9. On September 16, 2013 Celtic Bank Corporation (“**Celtic Bank**”) and Debtor entered into a first lien mortgage and note² in the amount of \$905,000.00, as well as an assignment of rents that is recorded in Westchester County, in favor of Celtic Bank. Purportedly the amount currently owed is in excess of \$1,230,238.10 (the “**Senior Loan**”). A copy of the Note, Mortgage and Assignment of Rents is attached as “**Exhibit B**”.

10. Pursuant to the mortgage with Celtic Bank and the collateral assignment of rents, Celtic Bank has a lien on the cash the Debtor receives from the Restaurant (“**Cash Collateral**” or “**Collateral**”). The monthly payment on the mortgage is currently \$6,874.35 based upon the August statement of Celtic Bank.

11. On or about April 7, 2017, Celtic Bank filed an action in the Supreme Court of the State of New York, County of Westchester, which is captioned *Celtic Bank Corporation vs. Myzen Family Realty Associates, LLC, Lacremaillere Restaurant Corp., et. al.* (Index No. 54658/2017), which is still pending.

12. L&J Smith Investments LLP (“**L&J**”), holds a second mortgage on the Property that was originally in the amount of \$155,000. See “**Exhibit C**”. L&J is owned by Judy Smith who is Barbara Meyzen’s Aunt. The monthly payment on this loan was \$1,543.29.

13. On or about February 15, 2018, an action commenced in Supreme Court of the State of New York, County of Westchester captioned *L&J Smith Investments, LP v. Meyzen Family Realty Associates, LLC, La Cremaillere Restaurant Corp. et. al.* (Index No. 52165/2018) to reinstate L&J’s mortgage for which there had been a filing releasing

² The note was a US Small Business Administration Note, made and executed by Meyzen Family Realty Associates LLC and La Cremaillere Restaurant Corp. in favor of Celtic Bank Corporation

the mortgage which release was alleged to be improper. L&J's mortgage has now been re-recorded in Westchester County.

14. Celtic Bank and L&J are jointly referred to as the "**Secured Lenders**".

RELIEF REQUESTED AND BASIS THEREFOR

15. The Debtor seeks (a) entry of an interim order for the interim use of cash collateral, attached as "**Exhibit D**"; (b) entry of a final order authorizing the use of cash collateral and granting adequate protection to Lender.

The Proposed Use of Cash Collateral Is Appropriate and Should Be Authorized

16. Section 363(c)(2) of the Bankruptcy Code sets forth the requirements for a debtor's proposed use of cash collateral, and provides, in pertinent part that: "[t]he trustee may not use, sell, or lease cash collateral ... 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." 11 U.S.C. § 363(c)(2).

17. Section 105(a) of the Bankruptcy Code also allows that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).

18. The Debtor's proposed use of Cash Collateral is necessary to preserve the Property during this Case, and will avoid immediate and irreparable harm to the Debtor's estate and its creditors, and will provide adequate protection to Celtic Bank and L&J.

19. Specifically, the Debtor proposes to use all rental proceeds derived from the Restaurant to maintain the Property, pay insurance and property taxes, Celtic Bank

\$6,874.35 per month and pay L&J **\$1,543.29** per month. Such use affirmatively and directly benefits the estate and the Debtors' creditors by enhancing the prospect of a successful outcome of this Case. *In re South Side House, LLC*, 474 B.R. 391, 411-12 (Bankr. E.D.N.Y. 2012). In *South Side House*, this Court held that tenant rents were properties of the Debtor's estate, and that under New York's "lien" theory of mortgages, title to the debtor's property or the income generated thereon does not transfer to the mortgagee. *Id.* at 403.

20. The Debtor submits the enclosed proposed budget for its use of the Cash Collateral (the "**Budget**"). A copy of the Budget is attached as "**Exhibit E**". As detailed in the Budget, the Debtor proposes to deposit its collection of rents into its DIP account and to use the proceeds to pay only the estate expenses detailed in the Budget, subject to a 10% variance to allow for reasonable business requirements.

21. The Debtor proposes to use Collateral on an interim basis only for ordinary and necessary limited operating expenses in connection with the ordinary business operations of the Debtor's business and assets substantially in accordance with the 30-day interim operating Budget. The Debtor believes that the Interim Budget includes all reasonable, necessary and foreseeable expenses to be incurred in the ordinary course of operating the Debtor's business for the interim period set forth in the Budget. The Debtor believes that the interim use of Collateral in accordance with the Budget will provide the Debtor with adequate liquidity to pay ordinary course payable administrative expenses as they become due and payable during the period covered by the Budget without any significant diminution in value of the collateral. In advance of the Final Hearing on this Motion, the Debtor will file a 13-week budget.

22. The relief sought by this Motion will allow the Debtor to use its rents in accordance with the Budget and for the benefit of all creditors, including the Secured Lenders.

23. By controlling the Properties and utilizing the Budget as attached, the Debtor can pursue refinancing which should ultimately repay the Secured Lenders in full.

Authority to enter into a new commercial lease with Restaurant is desirable to establish the Restaurant's obligations.

25. In order to properly document the arrangements by and between the Debtor and the Restaurant, it is requested that the Court approve the Debtor's entry into the attached lease ("**Exhibit F**"), pursuant to 363 of the Bankruptcy Code, which will supersede all prior agreements by and between the Debtor and the Restaurant (the "**Lease**"). The Lease is necessary to reflect the financial agreements being made by the Debtor and the Restaurant to ensure adequate funding of the Debtor. Bankruptcy Code section 363(e) provides that "on request of an entity that has an interest in property . . . proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, 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).

The Proposed Adequate Protection is Appropriate

26. Bankruptcy courts have broad flexibility under 11 U.S.C. § 361 in deciding what constitutes adequate protection. Section 361 specifies the means by which adequate protection may be provided. It does not require the court to provide it. To do so would place the court in an administrative role. Instead, the trustee or debtor in possession will provide or propose a protection method. If the party that is affected by the proposed

action objects, the court will determine whether the protection provided is adequate. The purpose of this section is to illustrate means by which it may be provided and to define the contours of the concept H.R. Rep. No. 95-595, at 338, 95th Cong., 1st Sess. (1977); *see also Resolution Trust Corp. v. Swedeland Dev. Group, Inc. (In re Swedeland Dev. Group, Inc.)*, 16 F.3d 552, 564 (3d Cir. 1994) (“[A] determination of whether there is adequate protection is made on a case by case basis.”).

27. The principal purpose of adequate protection is to safeguard the interest of the secured creditor in the particular collateral against diminution in the value of such interest. *Id* at 564 (“[T]he whole purpose of adequate protection for a creditor is to ensure that the creditor receives the value for which he bargained prebankruptcy.”) (quoting *In re O’Connor*, 808 F.2d 1393, 1396 (10th Cir. 1987)); accord *In re DeSardi*, 340 B.R. 790, 804 (Bankr. S.D. Tex. 2006) (“The purpose of adequate protection is to assure that the lender’s economic position is not worsened because of the bankruptcy case.”); *In re Hollins*, 185 B.R. 523, 528 (Bankr. N.D. Tex. 1995) (“Adequate protection seeks to protect a creditor from an [sic] decline in the value of its collateral . . .”).

28. However, Courts are “not obligated to protect the creditor better than it did itself when making the loan and obtaining security.” *In re Heatron, Inc.*, 6 B.R. 493, 496 (Bankr. W.D. Mo. 1980). The interest to be protected by virtue of the adequate protection requirement is the lesser of the amount of the debt or the value of assets securing the debt as of the Petition Date. See *In re Alyucan Interstate Corp.*, 12 B.R. 803, 808 (Bankr. D. Utah 1981) (“[T]he ‘interest in property’ entitled to protection is not measured by the amount of the debt but by the value of the lien.”).

29. Here, the value of the Secured Lenders liens is more than adequately protected by the value of the Property as there is a significant equity cushion. Moreover, the proposed Budget provides for the maintenance and operation of the Property, thereby further protecting the Secured Lenders' liens.

30. In essence, therefore, the Secured Lenders' liens are protected by two layers; each on its own should be deemed adequate. It is respectfully submitted that the two together are more than adequate.

The Proposed Budget Will Allow the Debtor to Maintain the Property thereby Adequately Protecting the Interests of Celtic Bank and L&J.

31. As noted, even in the absence of any payments post-petition to Celtic Bank, the value of the Property, alone, provides for adequate protection for the Lender's claim.

32. The Debtor's Budget provides a second level of adequate protection to the Lender. As a threshold matter, the Budget provides for expenditures to fund the Debtor's necessary and essential day-to-day operations. Such expenditures include payments required to maintain the Property, including insurance and real property taxes

33. Courts have routinely held that adequate protection may be demonstrated by a showing that the going concern value of a debtor, or that the value of the lender's collateral, is preserved by the debtor's continued operations and use of cash collateral. *See, e.g., In re JKJ Chevrolet, Inc.*, 117 F.3d 1413, 1413 (4th Cir. 1997) (allowing use of cash collateral to operate automobile dealership as long as continued operations maintained the value of the business); *In re Snowshoe Co., Inc.*, 789 F.2d 1085, 1087 (4th Cir. 1986) (allowing use of cash collateral to operate ski resorts where trustee reported that ski resort would lose 50% to 90% of its fair market value if it ceased operations); *In*

re 499 W. Warren St. Assocs., Ltd. P'ship, 142 B.R. 53, 56-57 (Bankr. N.D.N.Y. 1992) (finding secured creditor's interest in collateral adequately protected when cash collateral was applied to normal operating and maintenance expenditures on collateral properties); *In re Constable Plaza Assocs., L.P.*, 125 B.R. 98, 105 (Bankr. S.D.N.Y. 1991) (debtor entitled to use cash collateral to operate and maintain office building, thereby protecting secured lender's collateral).

34. Here, the cash expenditures proposed in the Budget will directly serve to preserve and maintain the pre-petition value of Lender's secured claim. Moreover, use of the Cash Collateral consistent with the Budget will maintain the overall value of the Debtor and the Restaurant as an ongoing enterprise and enhance the chances of a successful outcome for this case. Further the Debtor and the Restaurant have good prospects of refinancing, which would allow for the successful conclusion of this case.

35. If the Debtor is precluded from making expenditures necessary to maintain its assets and conduct operations in the ordinary course, the Debtor's estate will lose considerable value and all creditors — secured and unsecured — will be harmed. *See, e.g., In re Aqua Assocs.*, 123 B.R. 192, 196 (Bankr. E.D. Pa. 1991) (“The important question, in determination of whether the protection to a creditor's secured interest is adequate, is whether that interest, whatever it is, is being unjustifiably jeopardized.”) (citing *In re Grant Broad. of Philadelphia, Inc.*, 71 B.R. 376, 386-89 (Bankr. E.D. Pa. 1987), *aff'd*, 75 B.R. 819 (E.D. Pa. 1987), and *In re Alyucan Interstate Corp.*, 12 B.R. at 809-12).

36. The Order provides that, as adequate protection for the Debtor's use of the Secured Lenders' collateral and in consideration for the use of the Collateral, the Debtor shall grant replacement liens in all of the Debtor's pre-petition and post-petition assets and proceeds, only to the extent that the Secured Lenders have a valid security interest in the pre-petition assets on the Petition Date and in the continuing order of priority that existed as of the Petition Date (the "**Replacement Liens**").

37. The Replacement Liens shall be subject and subordinate only to: (a) United States Trustee fees payable under 28 U.S.C. §1930 and 31 U.S.C. §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 section 502(d), 544, 545, 548, 549, 550 or 553 ("Avoidance Actions") of the Bankruptcy Code (collectively, the "Carve-Outs").

NOTICE

38. The Debtor has received a court date of October 3, 2018 and has served by U.S. mail and through the ECF system this motion on the United States Trustee, the secured lenders, all parties that have filed a notice of appearance and all unsecured creditors and accordingly the Debtor submits that no further notice is necessary under the facts and circumstances of this matter.

39. No prior application has been made for the relief sought herein.

40. By this motion the Debtor does not concede the validity of the secured creditors, Celtic Bank and L&J claim and specifically reserves all of its rights to object to the nature, extent and validity of such claims.

WHEREFORE, the Debtor respectfully requests that the Court enter an Order granting the relief requested, including (i) authorizing the Debtor's use of cash, including Cash Collateral, pursuant to the terms of the Order (including the Budget); (ii) finding that the interests of Celtic Bank and L&J are adequately protected; (iii) approving the lease between Debtor and the Restaurant (iv) scheduling for final relief and (v) such other and further relief as the Court deems just and proper.

Dated: Harrison, NY
September 24, 2018

Bronson Law Offices, P.C.

By: /s/ H. Bruce Bronson
H. Bruce Bronson, Esq.