

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF PUERTO RICO

In re:)	
)	Case No. 17-02648 EAG 11
HOGAR CARINO INC.)	
)	
)	Chapter 11
)	
Debtor.)	

MEMORANDUM IN SUPPORT OF
UNITED STATES' MOTION TO PROHIBIT USE OF CASH COLLATERAL

The United States of America moves the Court to prohibit the Debtor's use of cash collateral pursuant to 11 U.S.C. § 363, or to condition the use of cash collateral by the Debtor pursuant to 11 U.S.C. § 361 as is necessary to provide adequate protection of the United States' interests.

Statement of Facts

1. The Debtor filed for Chapter 11 bankruptcy on April 18, 2017. Dkt. No. 1.
2. The Internal Revenue Service (the "Service") filed a proof of claim for unpaid federal employment and unemployment taxes totaling \$324,202.39. Proof of Claim 5-3. The Service's amended proof of claim asserts a secured claim of \$141,698.00, an unsecured priority claim of \$126,336.37, and an unsecured general claim of \$56,168.02.
3. The United States is a secured creditor by virtue of multiple federal tax liens arising against Debtor for unpaid employment and unemployment taxes. These federal tax liens attach to "all property and rights to property, whether real or personal," belonging to the Debtors. 26 U.S.C. § 6321. A federal tax lien arises upon the date of a federal tax assessment. *Id.* The United States filed multiple notices of federal tax liens with the U.S. District Court for the

District of Puerto Rico before the commencement of this bankruptcy proceeding. Proof of Claim 5-3, at p. 6-11.

4. The property secured by the United States' liens includes cash and/or cash equivalents, accounts receivable, and proceeds of the accounts receivable. *See Debtor's Sch. A/B*, Dkt. No. 1 at p. 10, 14. Such property and its proceeds (along with the cash proceeds of other property or rights to property to which the federal tax liens attached) constitute "cash collateral" with the meaning of 11 U.S.C. § 363(a).

5. The debtor "may not use, sell, or lease cash collateral" without either the consent of the party beholding an interest in the cash collateral or court authorization. 11 U.S.C. § 362(c)(2).

6. The United States does not consent to the use of cash collateral and the Debtor has not sought court approval for its use.

Argument

The United States is a secured creditor entitled to adequate protection. Section 6321 of the Internal Revenue Code establishes "a lien in favor of the United States upon all property and rights to property, whether real or personal" belonging to a taxpayer. 26 U.S.C. § 6321. Under 26 U.S.C. § 6322, this broad lien arises "at the time the assessment is made" and continues until the taxes are paid or the lien becomes unenforceable by passage of time. *See Glass City Bank v. United States*, 326 U.S. 265, 268 (1945) ("the lien applies to property owned by the delinquent at any time during the life of the lien"). Pursuant to 26 U.S.C. § 6323, the Internal Revenue Service perfected its liens by filing notices of federal tax liens. *See Claim 5-3*. Among the property securing the United States' claim are cash or cash equivalents, accounts receivable, and proceeds

of the accounts receivable. Such proceeds and cash constitute “cash collateral” within the meaning of 11 U.S.C. 363(a).

Section 363(e) provides that, at any time, on request of an entity that has an interest in property used, sold, or leased, 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. *See In re Builders Group & Development Corp.*, 502 B.R. 95, 121 (Bankr. D.P.R. 2013). It is routinely accepted that “secured creditors are *entitled* to some form of adequate protection in every Chapter 11 case.” *In re B&W Tractor Co., Inc.*, 38 B.R. 613, 617 (Bankr. E.D.N.C. 1984) (emphasis in original); *see also Braunstein v. McCabe*, 571 F.3d 108 (1st Cir. 2009) (*citing United States v. Whiting Pools*, 462 U.S. 198, 207 (1983)) (“The Bankruptcy Code provides secured creditors various rights, including the right to adequate protection.”).

As a secured creditor of Debtor, and pursuant to 11 U.S.C. §§ 361 and 363(e), the United States is entitled to adequate protection of its interest in Debtor’s cash collateral. Consequently, section 363(c)(2) “forbids the trustee (or debtor in possession) from using cash collateral unless each entity with an interest in it consents, or the court, after notice and a hearing, authorizes such use.” *In re National Promoter and Srvs., Inc.*, 2013 Bankr. LEXIS 4267, at *5 (Bankr. D.P.R. Oct. 9, 2013); *see also In re Cross Baking Co.*, 818 F.2d 1027, 1031 (1st Cir. 1987) (“Section 363(c)(2) of the Code permits a debtor-in-possession to use cash collateral *only* if all creditors holding a security interest in the collateral have consented or the court has issued an order authorizing such use.”) (emphasis added).

In this case, the Debtor has not sought or obtained the United States’ approval to use cash collateral, or entered a court-approved plan of adequate protection for the United States allowing for use of that collateral. Debtor should therefore be prohibited from using its cash collateral.

Conclusion

For the foregoing reasons, the United States respectfully requests that the Court prohibit Debtor's use of cash collateral pursuant to 11 U.S.C. § 363(e). In the alternative, the United States requests that the Court condition Debtor's use of cash collateral as needed to provide adequate protection of the United States' interest.

Dated: September 1, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 1, 2017, I filed the foregoing *Motion To Prohibit Use Of Cash Collateral* with the Clerk of Court, using the CM/ECF system, which shall serve notice of this filing on all who are registered to receive such notice. I also served the foregoing via U.S. Mail to the following:

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