



ORDERED in the Southern District of Florida on December 5, 2011.

A. Jay Cristol, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division
www.flsb.uscourts.gov

In re:
SAGAMORE PARTNERS, LTD.,¹

Case No. 11-37867-AJC
Chapter 11

Debtor.

**THIRD INTERIM ORDER GRANTING DEBTOR'S EMERGENCY MOTION
PURSUANT TO 11 U.S.C. §§ 361, 362, 363, 542 AND 552 AND FED. R. BANKR. P. 4001,
6003 AND 9014 FOR AN ORDER (I) AUTHORIZING USE OF CASH COLLATERAL;
(II) GRANTING ADEQUATE PROTECTION; AND (III) APPROVING PAYMENTS
TO CRITICAL VENDORS; AND AGREED *ORE TENUS* MOTION FOR AN
ORDER (I) AUTHORIZING USE OF CASH COLLATERAL AND
(II) GRANTING ADEQUATE PROTECTION
AND SETTING FURTHER HEARING *g/l***

THIS MATTER came before the court on November 29, 2011 at 2:00 p.m., upon the
Debtor's Emergency Motion Pursuant to 11 U.S.C. §§ 361, 362, 363, 542 and 552 and Fed.

¹The Debtor's current mailing address is 1177 Kane Concourse, Ste 201, Bay Harbor, FL 33154. The last four digits of the Debtor's TID number is 1420.

Bankr. P. 4001, 6003, and 9014, for an Order (i) Authorizing Use of Cash Collateral;² (ii) Granting Adequate Protection, and (iii) Approving Payments to Critical Vendors [ECF No. 10] (the “*Emergency Motion*”), and upon the Agreed *Ore Tenus* Motion for an Order (i) Authorizing Use of Cash Collateral and (ii) Granting Adequate Protection (the “*Motion*”). The Court having reviewed the Motion and having heard the statements of counsel in support of the relief requested in the Motion at the hearing before the Court (the “*Hearing*”); and the Court finding that: (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; (b) venue is proper before this Court pursuant to 28 U.S.C. § 1408; (c) this matter is core pursuant to 28 U.S.C. § 157(b)(2); (d) notice of the Motion and the Hearing was sufficient under the circumstances; and (e) the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein, it is accordingly:

ORDERED AND ADJUDGED as follows:

1. The Motion is **GRANTED** as set forth herein.
2. Use of Cash Collateral. Subject to the terms of this Order, the Debtor is authorized, to continue to use cash collateral as defined in section 363(a) of the Bankruptcy Code on an interim basis to pay for the operating expenses and costs of administration incurred by the Debtor strictly in accordance with the revised budget attached hereto as Exhibit A (the “*Budget*”), for the period of time (the “*Interim Period*”) from the date hereof until the earliest to occur of (a) the date that this Order ceases to be in full force and effect, or (b) the occurrence of a “*Termination Event*,” as defined below. Notwithstanding the foregoing, the Debtor shall not be permitted to pay management fees to an “insider” unless (x) it has provided the Secured Lender with copies of all agreements or other documents providing for such payments; and (y) the

² All capitalized terms utilized but not otherwise defined herein shall have the meaning ascribed to such terms in the Emergency Motion.

amount of each such payment is consistent with or less than the prepetition payment history of the Debtor in respect of such “insider.” The Debtor shall also provide the Secured Lender with copies of all other agreements to which it and any “insider” is a party in respect of which payments are provided for in the Budget. The Debtor's authority to use the Cash Collateral shall terminate (A) automatically upon the occurrence of a Termination Event as set forth below in paragraphs 3 (a), (b), (c), (d), (e), (f), (g), (h)(i), and (h)(ii) (all such Termination events being referred to as the "*Automatic Termination Events*"); or, (B) upon further order or relief from the Court upon the occurrence of any other Termination Event. Notwithstanding anything herein, on the occurrence of a Termination Event, all of the rights, remedies, benefits, and protections provided to the Secured Lender under this Order shall survive such Termination Event.

3. Termination Event. A Termination Event shall constitute any of the following:
 - a) January 5, 2012 (the "*Outside Date*");
 - b) the Debtor shall fail to comply with the provisions set forth in paragraph 3 of the *Order Granting Agreed Emergency Motion to Clarify and Modify Interim Order Granting Debtor's Emergency Motion Pursuant to 11 U.S.C. §§ 361, 362, 363, 542 and 552 and Fed. R. Bankr. P. 4001, 6003 and 9014 for an Order (I) Authorizing Use of Cash Collateral; (II) Granting Adequate Protection; (III) Approving Payments to Critical Vendors [ECF No. 21]; and to Authorize Maintenance of Pre-Petition Bank Account (the "Clarification Order")*, which provisions are incorporated herein and made a part of this Interim Order, including, without limitation, failure to deposit its revenues in the DIP Lockbox Account (as defined in the Clarification Order);
 - c) the Debtor shall fail to make any adequate protection payment to the Secured Lender as provided in paragraph 14 of this Order;

d) any order shall be entered, other than with the consent of the Secured Lender, reversing, amending, supplementing, staying, vacating, or otherwise modifying this Order in any material respect or terminating the use of Cash Collateral by the Debtor pursuant to this Order;

e) an application shall be filed by the Debtor for the approval of any Superpriority Claim (as defined below) or any lien in the Chapter 11 Case (as defined below) which is *pari passu* with or senior to the Adequate Protection Obligations (as defined below) or Adequate Protection Liens (as defined below), or there shall be granted any such *pari passu* or senior Superpriority Claim or lien in each case, except any such Superpriority Claim or lien arising hereunder;

f) any order shall be entered granting relief from the automatic stay applicable under section 362 of the Bankruptcy Code to the holder or holders of any security interest, lien or right of setoff other than a security interest, lien or right of setoff of the Secured Lender, to permit foreclosure (or the granting of a deed in lieu of foreclosure or the like), possession, set-off or any similar remedy with respect to any Collateral or any assets of the Debtor necessary to the conduct of its businesses;

g) except as permitted by any order of this Court and included in the Budget, the Debtor shall make any payment in respect of a prepetition claim;

h) (i) the Debtor's chapter 11 case (the "*Chapter 11 Case*") shall be dismissed or converted to a case under chapter 7 of the Bankruptcy Code; (ii) the Debtor shall file a motion or other pleading seeking the dismissal of any of the Chapter 11 Case pursuant to section 1112 of the Bankruptcy Code or otherwise; or (iii) a trustee under chapter 11 of the Bankruptcy Code, a responsible officer, or an examiner with enlarged powers relating to the operation of the business (powers beyond those set forth in section

1106(a)(3) and (4) of the Bankruptcy Code) under section 1106(b) of the Bankruptcy Code shall be appointed or elected in the Chapter 11 Case;

i) except as would not reasonably be expected, individually or in the aggregate, to have a material adverse effect, the Debtor fails to keep and maintain all property in good working order and condition, ordinary wear and tear excepted;

j) the Debtor (i) fails to maintain, with financially sound and reputable insurance companies (x) insurance in such amounts and against such risks as are customarily maintained by companies of established repute engaged in the same or similar businesses operating in the same or similar locations and (y) all insurance required to be maintained pursuant to the Loan Documents, or (ii) fails to furnish to the Secured Lender, upon reasonable request, information in reasonable detail as to the insurance so maintained;

k) the Debtor fails to comply with all laws, rules, regulations, and orders of any Governmental Authority applicable to it, its operations or its property, except where the failure to do so, individually or in the aggregate, would not reasonably be expected to result in a material adverse effect, provided, that the Debtor shall be entitled to contest in good faith any laws, rules, regulations and order of any Governmental Authority so long as, prior to contesting such matters, the Debtor notifies and obtains written consent of the Secured Lender, which consent shall not be unreasonably withheld; or

l) other than as provided in subparagraphs (a) through (h) of this paragraph 3, the Debtor fails to comply with any of the terms or conditions of this Order; provided, however, that the Secured Lender may waive, in writing, any Termination Event.

4. Variiances. The Debtor shall not exceed any line item on the Budget by an amount exceeding five percent (5%) of each such line item; *provided, however*, that the Debtor

may make expenditures up to five percent (5%) in excess of the total budgeted expenses for that month in the Budget so long as actual disbursements do not exceed one hundred and five percent (105%) of the budgeted total expenses for such month of the Budget (collectively, the “*Allowed Variance*”).

5. Requisitions. On a weekly basis, the Debtor shall submit to the Secured Lender a requisition for the expenses it intends to pay during such week consistent with the Budget, in the form prescribed by the Secured Lender prior to the Petition Date, together with a certificate signed by an authorized officer of the Company’s certifying that no Termination Event has occurred.

6. Advances. Upon approval by the Secured Lender of a requisition submitted pursuant to paragraph 5 above, Secured Lender shall cause funds to be transferred to the DIP Operating Account in accordance with the Clarification Order. The Budget has been provisionally approved by Secured Lender to avert disruption of the Debtor's business subject to the Debtor providing to the Secured Lender by December 6, 2011 such further information Secured Lender may reasonably require to finally approve the Budget. Until such final approval is provided, the Secured Lender may refuse to approve any proposed expenditure subject of a requisition submitted pursuant to paragraph 5 above and, if the Debtor and the Secured Lender are unable to resolve any such disputed expenditure, the Debtor may file a motion with the Court seeking approval of the payment thereof. Such motion may seek expedited hearing thereon should the circumstances so warrant.

7. Additional Advances. In the event that an expense arises which is not within any of the approved line items in the Budget, or the Debtor anticipates that any line item will need to be exceeded by more than the Allowed Variance, the Debtor shall request approval from the Secured Lender, together with such back up and documentation as the Secured Lender may

reasonably request, and the Secured Lender shall have three (3) business days after the provision of the request and the required back up and documentation within which to consent or object; provided, however, in the event that the Secured Lender does not consent or if the requested expenditure presents an immediate threat to the business or property of the Debtor requiring action or remediation before the expiration of three (3) business days, the Debtor may file a motion with the Court seeking amendment of the Budget and approval of the additional expense. Provided, further, however, that prior to making any such application to the Court, the Debtor shall have requested the Secured Lender make an expedited determination whether to approve the Debtor's proposed expenditure and provided the Secured Lender with sufficient information and documentation to consider the Debtor's request for approval. The Debtor shall not incur such additional expense absent any such approval by the Secured Lender or the Court.

8. Professional Fees. Notwithstanding anything to the contrary in this Order, no Debtor's Professionals' Fees Carveout payments (including but not limited to those for the Debtor's attorneys) shall be paid during the Interim Period from Cash Collateral until the retainers paid to such professionals have been exhausted, and such payments shall not in any event be made without prior notice, hearing, and approval of this Court. In no event, shall the Professionals' Fees Carveout be applicable to any official committee appointed in this case absent agreement with the Secured Lender directly or Court order.

9. Reporting. Within fifteen (15) days after the last business day of each month commencing October 31, 2011 (each such date being referred to as a "**Reference Date**"), the Debtor shall provide the Secured Lender with a comparison of its actual expenditures in the month then ending to the Budget, on a line-by-line basis, in a form reasonably acceptable to the Secured Lender, consistent with the parties' prepetition practice.

10. Adequate Protection. The Secured Lender is entitled, under section 363(e) of the Bankruptcy Code, to adequate protection of its interest in the collateral securing the Debtor's obligations under the Loan Documents (the "*Prepetition Obligations*"), including the Cash Collateral (the "*Prepetition Collateral*"), for and equal in amount to the amount of Cash Collateral used from and after the Petition Date, and the aggregate diminution in the value of the Secured Lender's interests in the Prepetition Collateral from and after the Petition Date, including any such diminution resulting from (a) the use of Cash Collateral, (b) the sale, lease, or use by the Debtors (or other decline in value) of the Prepetition Collateral, and (c) although disputed by the Debtor, the imposition of the automatic stay under section 362 of the Bankruptcy Code (the aggregate amount of such diminution, which shall expressly include, among other things, the aggregate amount of the Cash Collateral used by the Debtors from and after the Petition Date (the "*Adequate Protection Obligations*")).³ The Secured Lender contends that the Debtor has not offered, and cannot offer, adequate protection for its use of Cash Collateral, and the Debtor disputes such contention. The Secured Lender has, however, consented to the Debtor's use of Cash Collateral, subject to and expressly conditioned upon the granting of protections as provided for in this Order.

11. Replacement Liens as Adequate Protection to the Secured Lender. Notwithstanding the provisions of section 552(a) of the Bankruptcy Code, and in addition to the security interests preserved by section 552(b) of the Bankruptcy Code, the Debtor grants, in favor of the Secured Lender and as security for all indebtedness that is owed by the Debtor to the Secured Lender, under the Loan Documents, but only to the extent of the

³ The capitalized terms "Adequate Protection Obligations" and "Adequate Protection Liens" are used in this Order for convenience only, and those terms or any other reference to adequate protection in this Order do not constitute a finding or otherwise imply that the protections and liens granted to the Secured Lender constitute adequate protection under sections 361, 362, 363, or 364 of the Bankruptcy Code.

Adequate Protection Obligations, a first priority post-petition security interest and lien in, to and against all of the Debtor's assets, to the same priority, validity and extent that the Secured Lender held a properly perfected pre-petition security interest in such assets, which are or have been acquired, generated or received by the Debtor subsequent to the Petition Date, as well as in all presently owned and hereafter acquired property which is not subject to a prior perfected and enforceable pre-petition lien or security interest, but excluding any claims or recoveries (the "*Avoidance Recoveries*") by or on behalf of the Debtor, its estate or any trustee appointed herein arising under sections 544 through 550, inclusive, of the Bankruptcy Code (collectively, the "*Postpetition Collateral*;" the Prepetition Collateral and the Postpetition Collateral are collectively referred to as the "*Collateral*").

12. Perfection. The liens and security interests granted in this Order (the "*Adequate Protection Liens*") are deemed perfected without the necessity for filing or execution of documents which might otherwise be required under non-bankruptcy law for the perfection of said security interests. Notwithstanding, the Secured Lender is hereby authorized, but not required, to file or record financing statements, trademark filings, copyright filings, mortgages, notices of lien or similar instruments in any jurisdiction, or take any other action in order to validate and perfect the liens granted to it hereunder. The Debtor shall execute and deliver to the Secured Lender all such agreements, financing statements, instruments, and other documents as the Secured Lender may reasonably request to evidence, confirm, validate, or perfect the liens granted pursuant hereto (other than mortgages) and all such financing statements, control agreements, notices of liens, or other similar instruments and documents shall be deemed to have been executed, filed and/or recorded at the time and on the date of the Petition Date. A certified copy of this Order may, in the discretion of the Secured Lender, be filed with or recorded in

filing or recording offices in addition to or in lieu of such financing statements, mortgages, notices of lien or similar instruments. Each and every federal, state, and local government agency or department may accept the entry by this Court of this Order as evidence of the validity, enforceability, and perfection on the Petition Date of the Adequate Protection Liens granted herein to or for the benefit of the Secured Lender. The Debtor shall not sell, transfer, lease, encumber, or otherwise dispose of any portion of the Collateral without the prior written consent of the Secured Lender (and no such consent shall be implied from any other action, inaction, or acquiescence by the Secured Lender) or an order of this Court.

13. Inspection. Upon reasonable notice and at such reasonable times during normal business hours and otherwise as may reasonably be requested so as not to interfere with the conduct of the Debtor's business, the Debtor shall permit any representatives designated by the Secured Lender, to inspect, copy, and take extracts from their financial and accounting records and all records and files of the Debtor pertaining to the Collateral, and to discuss its affairs, finances, and accounts with its officers, financial advisors, and independent public accountants.

14. Adequate Protection Payments: As additional protection, on each Reference Date, the Debtor shall make an interest payment to the Secured Lender, calculated at the contract rate of 6.54%, based on the outstanding principal amount of the Prepetition Obligations, as provided in the Budget.

15. Superpriority Claim. The Secured Lender is hereby granted an allowed, superpriority administrative expense claim (the "*Superpriority Claim*") under section 507(b) of the Bankruptcy Code with respect to the Adequate Protection Obligations. The Superpriority Claim shall have priority over all administrative expenses of the kind specified in, or ordered pursuant to, any provision of the Bankruptcy Code, including, without limitation, those specified in, or ordered pursuant to, sections 326, 328, 330, 503(b),

506(c), 507(a), 507(b), 546(c), 726, and 1114 of the Bankruptcy Code, or otherwise (whether incurred in any of the Chapter 11 Cases or any conversion thereof to a case under chapter 7 of the Bankruptcy Code or any other proceeding related hereto or thereto), except statutory fees prescribed by 28 U.S.C. Section 1930, clerk of the Court fees and postpetition ad valorem taxes which are to be paid in the ordinary course, which Superpriority Claim shall be payable from and have recourse to all prepetition and postpetition property of the Debtor and all proceeds thereof, (including the Avoidance Recoveries.

16. No Surcharge. No administrative expense claims, including fees and expenses of professionals, that are or have been incurred from the Petition Date through and including the date of any Termination Event shall be charged or assessed against or recovered from the Collateral or attributed to the Secured Lender with respect to its interests in the Collateral pursuant to the provisions of section 506(c) of the Bankruptcy Code or otherwise by, through, or on behalf of the Debtor, without the prior written consent of the Secured Lender, and no such consent shall be implied from any action, inaction, or acquiescence by, either with or without notice to, the Secured Lender. Except as set forth herein, the Secured Lender has not consented or agreed to the use of Cash Collateral subsequent to the Petition Date.

17. Notwithstanding the above or anything to the contrary in this Order, the Secured Lender may seek modification of the adequate protection provided in this Order, without prejudice to the rights of the Debtor or any party in interest to contest any such modification.

18. No Novation. This Order shall not cause a novation of any of the Secured Lender's secured documentation or Loan Documents.

19. Creditor Not Deemed Owner or Operator. Solely by agreeing to the use of cash collateral by the Debtor, the Secured Lender shall not be deemed to have assumed any liability to

any third person, and shall not be deemed to be in control of the operations of the Debtor or to be acting as a “responsible person” or “owner or operator” with respect to the operation or management of the Debtor or of its assets.

20. Non-Waiver of Rights and Remedies.

(a) This Order is not intended to and shall not prejudice, alter, affect or waive any rights and/or remedies of the Debtor or the Secured Lender (with respect to liens, claims, value determinations, and all other matters) under the Bankruptcy Code or applicable non-bankruptcy law (including, but not limited to, all matters pertaining to cash and other collateral) and does not bind any subsequently appointed trustee or committee.

(b) This Order and the Budget shall constitute valid and binding obligations of the Debtor and the Secured Lender, enforceable against the Debtor and the Secured Lender in accordance with their terms. No obligation, payment, transfer, or grant of security under this Order shall be stayed, restrained, voidable, or recoverable under the Bankruptcy Code or any applicable nonbankruptcy law, or subject to any defense, reduction, setoff, recoupment, or counterclaim.

(c) The failure or delay by the Secured Lender to exercise its rights and remedies under this Order shall not constitute a waiver of any of the rights of the Secured Lender hereunder or otherwise, and any single or partial exercise of such rights and remedies against any of the Debtors or the Collateral shall not be construed to limit any further exercise of such rights and remedies against any or all of the other Debtor and/or Collateral.

(d) Notwithstanding anything herein to the contrary, the entry of this Order is without prejudice to, and does not constitute a waiver of, expressly or implicitly, or otherwise impair (i) any of the rights of any of the Secured Lender under the Bankruptcy Code or under non-bankruptcy law, including, without limitation, the right of any of the Secured Lender to (A)

request termination or modification of the automatic stay of section 362 of the Bankruptcy Code, (B) request dismissal or conversion to chapter 7 of the Chapter 11 Case, or appointment of a chapter 11 trustee or examiner (including with expanded powers), or (C) propose, subject to the provisions of section 1121 of the Bankruptcy Code, a chapter 11 plan or plans upon the expiration or termination of the Debtor's exclusive period, (ii) any other rights, claims, or privileges (whether legal, equitable, or otherwise) of the Secured Lender, (iii) the rights of the Debtor to oppose any requests made in accordance with clauses (i)(A), (B) and (C) above, (iv) upon a Termination Event, the right of the Debtor to request approval of this Court for use of Cash Collateral, subject to the right of the Secured Lender to object and the need for the Debtor to obtain Court approval (and meet all applicable legal standards) prior to any further use of Cash Collateral after the Termination Event, and (v) any right of any party in interest to object to the terms and conditions of any subsequent request by the Debtor for use of cash collateral.

(e) **The provisions of this Order shall be binding upon and inure to the benefit of each of the Secured Lender, the Debtor and their respective successors and assigns (including any estate representative, chapter 7 trustee, or other trustee or fiduciary hereafter appointed as a legal representative of the Debtors or with respect to the property of the estates of the Debtors).**

21. No Priming. The Adequate Protection Liens shall not be (a) subject or junior to any lien that is avoided and preserved for the benefit of the Debtor's estate under section 551 of the Bankruptcy Code, or (b) subordinated to or made *pari passu* with any other lien, whether under section 364(d) of the Bankruptcy Code or otherwise. No lien having a priority superior to or *pari passu* with those granted by this Order with respect to the Adequate Protection Obligations shall be granted or allowed until the indefeasible payment in full in cash and satisfaction in the manner provided in this Order of the Adequate Protection Obligations, with

the exception of prepetition or postpetition ad valorem taxes that may be owed to the Miami-Dade County Tax Collector. No claim having a priority superior to or *pari passu* with the Superpriority Claims granted by this Order with respect to the Adequate Protection Obligations shall be granted or allowed until the indefeasible payment in full in cash and satisfaction in the manner provided in this Order of the Adequate Protection Obligations.

22. **Relief from Automatic Stay.** The automatic stay provisions of section 362 of the Bankruptcy Code are hereby vacated and modified to the extent necessary to permit the Secured Lender to exercise, upon the occurrence and during the continuation of an Automatic Termination Event, all rights and remedies provided for hereunder, and to take any or all of the following actions without further order of or application to this Court: (a) terminate the Debtor's use of Cash Collateral; (b) declare all Adequate Protection Obligations to be immediately due and payable; and (c) take any other actions or exercise any other rights or remedies permitted under this Order or applicable law to effect the repayment and satisfaction of the Adequate Protection Obligations; provided, however, that the Secured Lender shall provide five (5) business days written notice (by facsimile, telecopy, electronic mail, or otherwise) to the Office of the United States Trustee, counsel to the Debtor, and counsel to any appointed official committee prior to exercising any enforcement rights or remedies in respect of the Collateral (other than the rights described in clauses (a) or (b) above (to the extent they might be deemed remedies in respect of the Collateral) and other than with respect to freezing any deposit accounts or securities accounts, provided, that such a freeze shall only be as to items drawn on such deposit accounts from and after the giving of such notice. In the event of any Termination Event which is not an Automatic Termination Event, the Secured Lender shall be entitled to a hearing on three (3) business days' notice to seek relief in respect thereof. The rights and

remedies of the Secured Lender specified herein are cumulative and not exclusive of any rights or remedies that they may otherwise have.

23. Payment of Taxes. The Debtor is authorized to use the tax escrow account maintained by the Secured Lender to pay the 2011 Real Estate taxes and 2011 Personal Property taxes (in the aggregate amount of \$381,998.90), by November 30, 2011, in order to take advantage of the early payment discount..

24. Further Hearing. A final hearing or a further interim hearing on the Debtor's continued use of Cash Collateral shall be conducted by the Court on January 4, 2012 at 2:00pm., at the United States Bankruptcy Courthouse, Claude Pepper Federal Building, 51 SW First Ave, Courtroom 1410, Miami, FL 33130. The notice of such hearing shall be delivered by the Debtor and state that any party in interest objecting to the entry of the Final Order or interim order, as the case may be, shall file written objections with the Court no later than 4:00 p.m. two (2) business days prior to the hearing, which objections shall be served so that the same are received by hand delivery or electronic mail on or before such date and time by: Bilzin Sumberg

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Scott L. Baena, Esq. (sbaena@bilzin.com).

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Submitted By:

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Copies Furnished To:

Peter D. Russin, Esquire, is directed to serve copies of this Order on all parties in interest and to file a Certificate of Service.

