

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

In Re:

**GAETANO ENTERPRISES, LLC
Debtor.**

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**Case No. 19-10115-hcm
(Chapter 11)**

DEBTOR'S MOTION FOR USE OF CASH COLLATERAL

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

COMES NOW Gaetano Enterprises, LLC, Debtor herein, and files this Motion for Use of Cash Collateral, and in support thereof would show the following:

1. By this Motion, the Debtor seeks interim and final relief allowing it to use cash collateral in the continuing operation of its business.

JURISDICTION AND PROCEDURAL BACKGROUND

2. On January 28, 2019 (the "Petition Date"), Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Western District of Texas, Austin Division ("Court"), thereby commencing this Chapter 11 case ("Case"). Debtor continues in possession of its property and it is operating and managing its business as a debtor in possession pursuant to the provisions of 11 U.S.C. §§ 1107(a) and 1108.

3. No trustee or examiner has been appointed in the Debtor's Chapter 11 Case, nor has a creditors' committee or other official committee been appointed pursuant to 11 U.S.C. § 1102.

4. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157.

This Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

5. The basis for the relief herein is primarily grounded in 11 U.S.C. §363.

6. Gaetano Enterprises, LLC *d/b/a* Saccone's Pizza & Subs owns and operates a casual restaurant specializing in the "New Jersey" version of pizza and submarine sandwiches at 11416 RR 620, Suite N, ("Leased Premises" or "Restaurant") in Austin, Texas. Saccone's Pizza & Subs was originally the trade name of DanMarco, Inc., which opened at 2701A S. Hwy 183, Leander, Texas, in February 1997. The trade name was subsequently used by three different entities at three different locations in Austin, Round Rock and Cedar Park, Texas. In or about October of 2007 ownership of all Saccone's Pizza & Subs became held by Debtor Gaetano.

7. Daniel T. Saccone is the sole member of the Debtor.

8. Debtor is operating at its current location pursuant to a Lease Agreement entered into with The Shops at Volente, Ltd. In or about October of 2007. The Lease is currently held by WBCMT 2006-C29 RR 620 North, LLC ("Landlord" or "WBCMT").

9. Gaetano has seven full-time employees and five part-time employees whose weekly payroll averages \$21,000 per month in the aggregate. The Debtor also pays payroll taxes in connection with these employees. Employees are paid each Friday for wages earned through the preceding two weeks. Employees were last paid on January 18, 2019. Debtor also employs Daniel T. Saccone, works business who also works in the business, the sum of \$2,100 per pay period.

Financial Information

10. Debtor's 2017 tax return reflect gross revenue of \$755,094 and taxable income of -\$51,000. Gross revenues for 2018 were approximately \$724,000.

11. The Debtor's secured creditors are as follows:

Creditor	Amount	Collateral	UCC-1 Filing Date
Arrowhead Bank	\$250,000 (bal. appx. \$84,000)	Secured by real property in Lago Vista and Leander owned individually by Daniel T. Saccone	N/A
Arrowhead Bank	\$100,000 (bal. of appx \$88,000.00)	All personal property, goods and fixtures now or hereafter attached to or used in and about the construction and buildings on the following property: 11416 RR 620 North, Suite N, Austin, TX 78726	10/30/08
Corporation Service Company as Representative for On Deck Capital	\$13,603.80	Accounts receivable, inventory, equipment, investment property, instruments, chattel paper, letter of credit rights, accounts, deposit accounts, and general intangibles	12/24/14
WBCMT 2006-C29 RR 620 North, LLC	\$36,865.59	Goods, wares, fixtures, equipment, furniture, improvements and other property of debtor now or hereafter situated in the demised premises.	01/24/19
Celtic Bank Kabbage, Inc.	\$45,878.00	Unknown	None found

Of the four potential secured parties, only OnDeck Capital appears to have a lien on accounts receivable. The reference to personal property in the Arrowhead Bank UCC may extend to food products which could be sold and turned into cash collateral. It appears that the lien of WBCMT 2006-C29 RR 620 North, LLC only attaches to items which do not give rise to cash collateral. Additionally, since this lien was perfected four days before the petition date, it is subject to being avoided.

Reasons for Filing Bankruptcy

11. Debtor currently occupies the Leased Premises pursuant to a Lease Agreement entered into on or about October 18, 2007. The lease was for an initial five (5) years term with three (3) five-year options. Debtor gave notice that it intended to exercise its second option and, after being told by Landlord's attorney to go sign the lease extension being held by the Property Manager, was told by the Property Manager that he was "too late." Instead, on or about

January 22, 2019, he received a Notice of Default and “termination” of its Lease. . On or about January 24, 2019, almost *twelve years* after it occupied said space, Landlord filed a UCC-1 purportedly perfecting a landlord’s lien. Sometime between the evening of January 25th and early morning of January 26th, less than two (2) days later, Debtor was locked out of the Leased Premises. The Property Manager for the Landlord did not answer her telephone or return phone calls from the Debtor’s representative inquiring about access.

13. Debtor was unable to operate its restaurant as long as neither its staff nor its customers had access. Further, all its books and records were located in the business office at the restaurant. Debtor’s bb filed bankruptcy as a direct result of the lock-out in order to preserve the its business, its equity in the business, and its reputation in the community.

Going Forward

14. Debtor seeks an order from the Court that he is entitled to its option period of the Lease or, alternatively, a reasonable period of time to relocate and a judgment for the cost of relocation. With this threshold issue decided, it believes it can submit a Plan of Reorganization providing for the payment of all Allowed Claims in the case.

NECESSITY FOR REQUESTED RELIEF

15. Debtor generates Cash Collateral from the operation of its business when it sells food and beverages and generates cash or accounts receivable. Until a plan of reorganization is confirmed in this case, Debtor must obtain approval for the use of the Cash Collateral. It is critical for Debtor to have access to its cash and other business property to continue to operate in the ordinary course of business and to pay normal operating expenses.

16. Debtor can meet its ongoing post-petition obligations only if it borrows funds post-

petition or obtains authority for use of Cash Collateral. It believes the former will decrease the value of its business. Debtor believes the latter is preferable as it has generated multiple projections and believes it is able to cash flow post-petition if it has the funds available from or generated by its pre-petition cash collateral to pay its post-petition expenses. Thus, in order to continue operations as normal and to preserve the value of the estate pending confirmation of a plan of reorganization, Debtor needs immediate authority to use the Cash Collateral.

**ARGUMENTS AND AUTHORITIES IN SUPPORT OF REQUEST
FOR TEMPORARY AND FINAL USE OF CASH COLLATERAL**

17. Under 11 U.S.C. §363(c)(2), the Debtor may not use, sell, or lease the Cash Collateral without the Court's authority or consent. Section 363(e) allows the Court to grant this authority upon the provision of adequate protection to the secured parties.

18. Debtor requires and therefore requests immediate authority from the Court to use the Cash Collateral in the ordinary course of its business and on an interim basis until there is a final hearing on this Motion. Debtor requires and requests the continued authority to use Cash Collateral beyond the interim period in order to continue its business until a plan of reorganization can be confirmed. Debtor's need to use the Cash Collateral will continue during the pendency of this bankruptcy case.

19. Debtor also requests that this Court schedule a hearing for final approval on the use of Cash Collateral, on notice to creditors and parties in interest, in the event an objection is filed to the terms of the interim order.

20. The immediate and temporary approval for the use of the Cash Collateral is consistent with (i) Bankruptcy Code requirements for maintaining the going concern of a debtor's business operations; (ii) the law under 11 U.S.C. §§ 363 and 361 as to the use of cash collateral and adequate protection; and (iii) facilitating a successful reorganization under chapter 11 of the

Bankruptcy Code.

21. The failure to authorize the immediate use of Cash Collateral on which the secured parties hold liens will result in a swift and significant deterioration of Debtor's business. Failure to gain authority to use, sell, or lease such collateral will result in a cessation of Debtor's business activities, which would expose Debtor to additional liability and would leave unsecured creditors with little hope of distribution in this case.

22. The Bankruptcy Code contemplates a debtor's use of collateral during the reorganization of its business. Sections 102(1) and 363 of the Bankruptcy Code provide that collateral may be used upon notice and opportunity for a hearing appropriate in the particular circumstances. Relief may be authorized without an actual hearing if there is insufficient time available and adequate protection has been provided. 11 U.S.C. § 363(e). The combination of Debtor's emergency needs to satisfy pending obligations and current operating needs, together with the provision of adequate protection are sufficient to authorize the interim use of the collateral as set forth herein.

23. Section 361 of the Bankruptcy Code sets forth various types of adequate protection which Debtor may provide:

- a. making periodic cash payments to the extent that the creditor suffers a decrease in the value of its interest in such property;
- b. granting replacement liens in collateral to compensate the creditor for any decrease in the value of the creditor's interest in such property; or
- c. granting other relief as will result in the realization of the indubitable equivalent of the creditor's interest in collateral.

Additionally, the presence of an equity cushion may be sufficient to provide adequate protection.

24. Debtor proposes to provide adequate protection to the parties with an interest in

cash collateral in the following manner

- a. The Debtor shall provide all creditors with an interest in cash collateral with a replacement lien upon assets obtained post-petition to the same extent, priority and validity as their pre-petition liens.
- b. At the final hearing, the Debtor will provide for adequate protection payments during the pendency of the case in an amount sufficient to protect all parties with an interest in cash collateral from diminishment in the value of their collateral.

25. Debtor requests permission to pay its usual and customary operating expenses of the same type and approximate amounts set forth on its budget. Debtor has attached a budget for the company as Exhibit A.

WHEREFORE, Debtor requests that the Court authorize the use, sale, or lease of Cash Collateral on an interim basis and, upon setting and conducting a final hearing, issue a final order authorizing the use, sale, or lease of such cash collateral with the adequate protection to the secured parties as set forth herein; and grant any other and further relief to which Debtor is entitled.

Dated: January 31, 2019

Respectfully Submitted,

BARRON & NEWBURGER, P.C.

7320 N. Mopac Expy, Suite 400

Austin, Texas 78731

(512) 649-3243

(512) 476-9253 Facsimile

/s/ Stephen Sather

Stephen Sather

State Bar No 17657520

ATTORNEY FOR DEBTOR

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 31, 2019 a true and correct copy of the above and foregoing *Expedited Motion for Cash Collateral* was served upon the parties on the attached Matrix by United States Mail, first class, postage prepaid, or by electronic transmission through the Court's ECF noticing system to those parties-in-interest registered to receive such service and by email to the parties listed below.

Jennifer Francine Wertz

Jackson Walker, L.L.P.

100 Congress Avenue

Suite 1100

Austin, TX 78701

512-236-2247

512-391-2147 (fax)

jwertz@jw.com

/s/ Stephen Sather
Stephen Sather

Label Matrix for local noticing
 0542-1
 Case 19-10115-hcm
 Western District of Texas
 Austin
 Wed Jan 30 15:45:15 CST 2019

Gaetano Enterprises, LLC
 11416 N FM 620 RD STE N
 Austin, TX 78726-1165

United States Trustee (SMG11)
 United States Trustee
 903 San Jacinto Blvd, Suite 230
 Austin, TX 78701-2450

U.S. BANKRUPTCY COURT
 903 SAN JACINTO, SUITE 322
 AUSTIN, TX 78701-2450

Alsco Linens
 449 Vista Ridge Drive
 Kyle, TX 78640-2413

American Express
 PO Box 981535
 El Paso, TX 79998-1535

American Express Bank, FSB
 4315 South 2700 West
 Salt Lake City, UT 84184-0002

Arrowhead Bank
 108 W. Sandstone
 Llano, TX 78643-2396

Austin Provisions, Ltd.
 15901 Earl Bradford Ct.
 Pflugerville, TX 78660-2055

CITI Cards
 PO Box 790046
 St. Louis, MO 63179-0046

Capital One Spark Business
 PO Box 30285
 Salt Lake City, UT 84130-0285

Cawoods Wholesale Produce, Inc.
 2311 W. Rundberg Lane #120
 Austin, TX 78758-5477

Celtic Bank
 268 State St. #300
 Salt Lake City, UT 84111-5314

Daniel T. Saccone
 3836 Crest Lane
 Round Rock, TX 78681-2392

Lisanti Foodservice of Texas, LLC
 2010 Lakeside Parkway
 Flower Mound, TX 75028-4090

Liturgical Publications
 2875 South James Dr.
 New Berlin, WI 53151-3667

Lupton Backflow Testing & Repair, LLC
 PO Box 1779
 Kyle, TX 78640-1779

On Deck Capital
 1400 Broadway
 New York, NY 10018-5300

Phillip J. Saccone, Sr.
 3741 Derby Lane
 Round Rock, TX 78681-2321

Robert Reeb
 Jackson Walker
 777 Main Street, Suite 2100
 Ft. Worth, TX 76102-5366

SOS Liquid Waste
 P.O. Box 201480
 San Antonio, TX 78220-8480

Spectrum Business
 PO Box 460849
 San Antonio, TX 78246-0849

Steven H. Ball
 11 Elizabeth Ave
 Iselin, NJ 08830-2141

United States Trustee - AU12
 United States Trustee
 903 San Jacinto Blvd, Suite 230
 Austin, TX 78701-2450

WBCMT 2006-C29 RR 620 North, LLC
 Jennifer F. Wertz
 Jackson Walker LLP
 100 Congress Avenue, Ste. 1100
 Austin, TX 78701-4042

WBCMT 2006-C29 RR620 North, LLC
 1601 Washington Ave., Suite 700
 Miami Beach, FL 33139-3165

Stephen W. Sather
 Barron & Newburger, P.C.
 7320 N MoPac Expy
 Suite 400
 Austin, TX 78731

End of Label Matrix
 Mailable recipients 26
 Bypassed recipients 0
 Total 26

Gaetano Enterprises, LLC
 DBA Saccone's Pizza Subs

	Jan 29 - Feb 4	Feb 5 - Feb 11	Feb 12 - Feb 18
Lisanti	2500	2500	2500
Austin Provisions	200	200	200
Big Red / 7/up	150	150	150
Cawoods	300	300	300
Brown Distributing	100	100	100
Capital Beverage	50	50	50
Merchant Account Fees	375	375	375
Computer / Internet	200	200	200
Phone	125	125	125
Insurance	200	200	200
Linins	50	50	50
Gas	250	250	250
Electric	250	250	250
Payroll / Taxes	6750	6750	6750
Rent	2000	2000	2000
Total Expences	13500	13500	13500
Gross Sales	13000	13750	14000
Sales Tax	-933	-1110	-1100
Net Sales	12067	12640	12900
Gross Profit	-1433	-860	-600