

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

**In re: THE HUBBARD GROUP, L.L.C.,  
Debtor.**

**Case No. 18-10073-KHK  
Chapter 11**

**DEBTOR'S MOTION FOR FINAL ORDER  
APPROVING USE OF CASH COLLATERAL AND  
SETTING ADEQUATE PROTECTION PAYMENT AMOUNT**

**COMES NOW** The Hubbard Group, L.L.C. ("**Debtor**"), by counsel, and files this motion pursuant to Bankruptcy Code §§ 105(a), 363, 1107(a) and 1108, and Federal Rule of Bankruptcy Procedure 4001, for entry of a final order authorizing Debtor to use cash collateral and setting adequate protection payment amount, and in support thereof states as follows:

**CONCISE STATEMENT REQUIRED BY RULE 4001(b)(1)(B)**

Debtor requests entry of an Order substantially similar to **Exhibit A**.

- i. Name of each entity with an interest in cash collateral: upon information and belief, Velocity Commercial Capital, LLC ("**Velocity**").
- ii. Purposes for use of cash collateral: reasonable and necessary general operating and administrative expenses during Debtor's reorganization.
- iii. Material terms, including duration, of the use of the cash collateral: *see* **Exhibit A**.
- iv. Debtor proposes no additional adequate protection other than replacement liens in cash collateral as Velocity is adequately protected by an equity cushion in the value of the Property and interests in other collateral.

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*Proposed Counsel for the Debtor*

### Jurisdiction and Venue

1. The Court has jurisdiction over this motion pursuant to 28 U.S.C. § 157(b)(2). Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

### Background

2. On January 7, 2018 (the "**Petition Date**"), the Debtor filed a voluntary petition seeking relief pursuant to Chapter 11 of the United States Bankruptcy Code. The Debtor continues to manage and operate its business as a debtor-in-possession in accordance with 11 U.S.C. §§ 1107 and 1108. No creditor's committee, trustee, or examiner has been appointed herein.

3. The Debtor (a Virginia limited liability company) is a single asset real estate company owned and operated by Leticia Mason (sole member) ("**Ms. Mason**").

4. The Debtor owns real property at 56 Foreston Woods Drive, Stafford, VA 22554 (the "**Property**"). The Debtor leases the Property to Aquia Christian Academy (a Virginia non-stock corporation) (501(c)(3)), also operated by me, which is a licensed day care facility that presently has 88 children of ages ranging from six weeks to twelve years old.

5. In 1999, Ms. Mason purchased the Property for \$900,000 with seller financing. Since that time, the Property has been improved and it has appreciated. Ms. Mason organized the Debtor on January 20, 2004. On or about March 11, 2004, Ms. Mason refinanced the Property and, during that refinance, she transferred the Property to the Debtor. On or about June 19, 2015, the Debtor refinanced the Property with Velocity.

6. In July 2017, the Debtor fell behind in its payments to Velocity. The Debtor filed bankruptcy on January 7, 2018 to stop a foreclosure auction scheduled the next day.

7. The Debtor's use of cash collateral is essential to the Debtor's reorganization success – the Debtor needs use of some of post-petition rental income to pay for Debtor's post-petition operating and administrative expenses.

8. Absent the availability of cash collateral, the Debtor will not be able to pay for expenses necessary for its reorganization. The cash collateral of the Debtor is the only immediate sources of financing available to Debtor.

### **Secured Creditor's Collateral**

9. Upon information and belief, Velocity is the holder of an adjustable rate note (the "Note"), dated June 19, 2015, in the original principal amount of \$1,040,000.00. As of the Petition Date, the non-default rate of interest was 8.49% per annum, the loan purportedly had an unpaid balance of \$1,137,000.00.<sup>1</sup>

10. The Note is secured by the following:<sup>2</sup>

- i. a first priority *Deed of Trust, Security Agreement, and Assignment of Leases and Rents*, dated June 19, 2015, encumbering the Property and rents;
- ii. a UCC Financing Statements (Form UCC1) filed with the Virginia State Corporation Commission; and
- iii. an *Unlimited Guaranty* by Ms. Mason, dated June 19, 2015.

11. As of the Petition Date, the Debtor believes the Property is worth approximately \$2,240,000 based upon the following: an *Appraisal of Real Property*, dated September 27, 2017, by John C. Reyle, MAI, AI-GRS of Bruce W. Reyle and Company, Inc. (appraising the property at \$2,240,000); a *Broker Price Opinion* by Azmi Alkurd, dated September 5, 2017 (opining on a market value of \$2,247,000, and suggesting a list price of \$2,400,000); and the 2016 tax assessment of \$2,268,900 (composed of land \$1,126,800 and buildings \$1,142,100). The

<sup>1</sup> The Debtor disputes the amount owed. The Debtor has asked to a payment history, but has yet to receive it.

<sup>2</sup> Debtor reserves its right to put the secured creditor to its burden of proof.

Property is encumbered by a deed of trust dated June 19, 2015, securing a note payable due by Debtor to Velocity in the face amount of \$1,040,000 (current payoff with accrued interest is purportedly approximately \$1,178,000). Therefore, Ms. Mason believes Velocity has an equity cushion in the Property of more than \$1,000,000.

12. Upon information and belief, the currently monthly escrow payments to Velocity for insurance and taxes are \$465.42, and \$1,871.84, respectively.

**Relief Requested**

13. Velocity has not consented to use of its cash collateral.

14. The Debtor's reorganization is in the best interest of the estate. Debtor needs use of cash collateral to continue operations to prevent imminent harm.

15. By this Motion, the Debtor seeks approval from the Court to use of cash collateral.

16. By this Motion, the debtor also seeks Court determination of the required monthly adequate protection payment.

**Memorandum of Law**

**I. USE OF CASH COLLATERAL.**

17. Bankruptcy Code § 363(a) provides:

“[C]ash collateral” means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

11 U.S.C. § 363(a).

18. Bankruptcy Code § 363(c)(2) provides:

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection 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).

19. This Court has authority to approve use of cash collateral even if the secured creditor does not consent. *See* 11 U.S.C. § 363(c)(2).

**A. The Secured Creditor has the burden of proving it holds an enforceable, non-avoidable security interest.**

20. Post-petition rents are "cash collateral" when they are "subject to a security interest as provided in 552(b)." *See* 11 U.S.C. § 363(a). The concept of "cash collateral" includes the notion a creditor has an enforceable, non-avoidable security interest in the subject collateral. *See HT Pueblo Prop., LLC*, 462 B.R. 812, 818 (Bankr. Colo. 2011). The first question the court must determine, is whether the creditor has an enforceable security interest in the post-petition rent. *Id.*; accord *Colliers ¶ 363.03[3][b][i]*, at 363-32.1 (rights to rents remain subject to avoiding powers) . The entity asserting an interest must establish the validity, priority, and extent of its interest. *See* 11 U.S.C. § 363(p).

**B. Velocity does not need adequate protection for Cash Collateral because it is protected by an Equity Cushion in the Property.**

21. Under the "equity cushion" theory, if a debtor has equity in a property sufficient to shield the creditor from either the declining value of the collateral or an increase in the claim from accrual of interest or expenses, then the creditor is adequately protected. *Equitable Life Assur. Soc. of United States v. James River Assocs. (In re James River Assocs.)*, 148 B.R. 790,

796 (E.D. Va. 1992). The amount of equity cushion sufficient to adequately protect the creditor is determined on a case-by-case basis. *Id.* In this case, the debt due Velocity in the disputed amount of approximately \$1,137,000.00 is secured by Property appraised at \$2,240,000.00. "Case law has almost uniformly held that an equity cushion of 20% or more constitutes adequate protection." *Id.* (quoting *Kost*, 102 B.R. 829, 831-32 (D. Wyo. 1989)).

**C. Velocity's interest in Cash Collateral is protected by replacement liens.**

22. "Although under section 552(a) security interests generally do not extend to property acquired after the commencement of a bankruptcy case, section 552(b) provides that a security interest in rents continues in postpetition rents." *Colliers* ¶ 363.03[3][b][i], at 363-32.1

23. Assuming that the Secured Lender has a properly perfected interest in rent, the Court must value that interest and consider the Debtor's proposed adequate protection before the court may authorize any use of cash collateral. *See SI Grand Traverse LLC*, 450 B.R. 703, 705 (Bankr. W.D. Mich. 2011).

24. To determine whether an entity is entitled to adequate protection and the type and the amount required, a court must evaluate the value of the collateral, the creditor's interest in the collateral, and the extent to which that value will decrease during the course of the bankruptcy case. *In re Wrecclesham Grange, Inc.*, 221 B.R. 978, 981 (Bankr. M.D. Fla. 1997).

With regards to rents, a court must look to the stream of future rents to determine whether adequate protection is required. This is because the lien on each month's rent replaces the lien on the prior month's rents, so there is a replacement lien of equal value under Section 361 of the Bankruptcy Code. Therefore, as long as the debtor generates a continuous income stream, the debtor's use of the rental income does not diminish the value of the collateral. The rationale is that the protected cash proceeds are being used to generate new collateral which will be of at least equivalent value of those replaced. Accordingly, if the underlying collateral is not declining in value, the additional cash collateral may be used by the debtor to pay administrative expenses as well as to maintain and improve the underlying collateral.

...

The primary issue is whether the value of the stream of postpetition rents is decreasing. The burden of proof is on the Creditors to prove that the value of its collateral is declining.

*Id.* at 981-82 (citations omitted).

25. The proper measurement date is the Petition Date. In this case, if the Debtor ceased operations on the Petition Date, its cash collateral would be a nominal amount. Velocity is not harmed if the Debtor uses the cash collateral to continue operations that generate more cash and rents in which Velocity has replacement liens.

26. The Court must value the Secured Creditor's interest in future rental income under section 552(b)(2) based on the secured creditor's proposed use. In this case, Velocity sought to foreclose and sell the Property, so there would be no future rental income stream attributable to the Debtor.

**D. Even if Velocity has an interest in Cash Collateral that is decreasing, the Court should allow the Debtor to use Cash Collateral from Post-Petition rents under the equities of the case.**

27. This is much ado about very little money to a creditor secured by a very large equity cushion. "Notwithstanding the application of section 552(b)(2), the continued validity of a security interest in rents and hotel revenues from prepetition collateral under section 552(b)(2) can be limited or eliminated if ordered by the court 'based on the equities of the case.'" *See* Colliers ¶ 552.03[2], at 552-22. This equity exception permits courts to preserve valid security interests in rents while also protecting the interests of unsecured creditors. *Id.* Accordingly, the Court should protect the interest of unsecured creditors and equity holders by allowing the Debtor to use post-petition rent based on the equities of the case.

28. Entry of a Cash Collateral Order is in the best interests of the Debtor, its Creditors, and the estate. The Debtor is unable to obtain post-petition credit from outside parties.

The Debtor is unable to obtain, in the ordinary course of business or otherwise, unsecured credit allowable pursuant to Bankruptcy Code § 503(b)(1) as an administrative expense in an amount necessary for the maintenance and preservation of its assets and operation of its business on more advantageous economic and non-economic terms than those offered under the Proposed Order.

29. Pursuant to Federal Rule of Bankruptcy Procedure 4001(b)(2), the Debtor respectfully requests that the first hearing be a final hearing on the relief sought in the Motion.<sup>3</sup>

## II. DETERMINATION OF ADEQUATE PROTECTION PAYMENTS.

30. Bankruptcy Code § 101 provides in the relevant part:

(51B) The term “single asset real estate” means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto.

11 U.S.C. § 101(51B).

31. Bankruptcy Code § 362(d) provides in the relevant part:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

...;

<sup>3</sup> Federal Rule of Bankruptcy Procedure 4001(b)(2) provides:

*Hearing.* The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14 day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

FED. R. BANKR. P. 4001(b)(2).



(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that—

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

....

11 U.S.C. § 362(d)(3).

32. "It should be noted that the payments are not necessarily payment of interest, but are in an amount 'equal to' interest at the then applicable nondefault contract rate of interest. This suggests that the payments may be applied to principal rather than interest, . . . ." Colliers ¶ 362.07[5], at 362-122.

**WHEREFORE**, Debtor requests that the Court enter an order in the form annexed hereto as **Exhibit A**, which among other things:

- a. Authorizes Debtor to use the cash collateral of Velocity;
- b. Directs that the Debtor shall pay to Velocity monthly escrow amounts for taxes and insurance commencing immediately upon entry of order;
- c. Directs that the Debtor shall pay to Velocity adequate protection payments under Bankruptcy Code § 362(d)(3) in the amount of \$7,358.00 (*i.e.*, \$1,040,000 (face amount of note) x 8.49% per annum / 12 months per year) (or such other amount to be determined by the Court), commencing 90 days after entry of the order for relief or 30 days after entry of this order, whichever is later, with such payments to be applied to principal; and
- d. Grants such other and further relief as is just and proper.

Date: January 12, 2018

THE HUBBARD GROUP, L.L.C.,  
By Proposed Counsel

/s/ John C Smith

Roy M. Terry, Jr., VSB No. 17764

William A. Gray, VSB No. 46911

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ND4818-9480-6874

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

**In re: THE HUBBARD GROUP, L.L.C.,  
Debtor.**

**Case No. 18-10073-KHK  
Chapter 11**

**ORDER**

This matter comes before the Court, upon the *Debtor's Motion for Final Order Approving Use of Cash Collateral and Setting the Adequate Protection Payment Amount* (ECF No. \_\_) (the "**Motion**") filed by The Hubbard Group, L.L.C. (the "**Debtor**"), and due notice having been provided under the circumstances, and sufficient cause appearing therefore, and

**IT APPEARING** that Debtor is unable to obtain the use of cash collateral or unsecured credit from any source other than its cash collateral, and under the circumstances, no other source of immediate financing exists for the Debtor;

**IT APPEARING** that the relief requested in the motion is necessary, essential, and appropriate for the continued operation of Debtor's business, and the management and preservation of Debtor's assets and property is in the best interest of the Debtor, its Creditors and its estate;

**THE COURT FINDS** that the Debtor is a single asset real estate case;

**IT IS ORDERED** that the Motion is GRANTED;

**IT IS ORDERED** that the Debtor is authorized to use its cash collateral;

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John C. Smith, VSB No. 44556  
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Telephone: 804.648.1636  
*Proposed Counsel for the Debtor*

**IT IS ORDERED** that the Debtor shall commence monthly payments to its escrow account at Velocity Commercial Capital, LLC for insurance and taxes immediately upon entry of this order;

**IT IS ORDERED** that the Debtor shall pay to Velocity Commercial Capital, LLC adequate protection payments under Bankruptcy Code § 362(d)(3) in the amount of \$7,358.00, commencing 90 days after entry of the order for relief or 30 days after entry of this order, whichever is later, with such payments to be applied to principal.

ENTERED:

\_\_\_\_\_  
UNITED STATES BANKRUPTCY JUDGE

ENTERED ON DOCKET:

I ask for this:

/s/ John C. Smith  
Roy M. Terry, Jr., VSB No. 17764  
William A. Gray, VSB No. 46911  
John C. Smith, VSB No. 44556  
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Telephone: 804.648.1636  
*Proposed Counsel for the Debtor*

**LOCAL RULE 9022-1(C) CERTIFICATION**

I hereby certify that the foregoing proposed order has been endorsed by all necessary parties.

/s/ John C. Smith

**Copies to:**

The Hubbard Group  
Attn: Leticia Mason  
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