

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:)
)
COMPLETE HYDRAULIC)
SERVICE & SALES, INC.,) Case No.: 13-04677-JKC-11
)
Debtor.)

**THE HUNTINGTON NATIONAL BANK'S OBJECTION TO EMERGENCY MOTION
FOR ENTRY OF INTERIM ORDER AUTHORIZING DEBTOR
(A) TO UTILIZE CASH COLLATERAL PURSUANT TO 11 U.S.C. §363, AND
(B) GRANTING ADEQUATE PROTECTION TO PREPETITION SECURED
LENDER PURSUANT TO 11 U.S.C. §361, *NUNC PRO TUNC* TO PETITION DATE**

The Huntington National Bank ("Huntington"), by and through counsel, objects to the *Motion for Entry of Interim Order Authorizing Debtor (A) to Utilize Cash Collateral Pursuant to 11 U.S.C. §363, and (B) Granting Adequate Protection to Prepetition Secured Lender Pursuant to 11 U.S.C. §361, Nunc Pro Tunc to Petition Date* [Docket No. 9] ("Motion") and states as follows:

Preliminary Statement

Huntington, a secured creditor in this case, believes Complete Hydraulic Service & Sales, Inc.'s (the "Debtor") business is beyond rescue and that its operations cannot result in a successful reorganization. The Debtor has provided several self-serving unattested statements that the relief is "necessary" and "prudent" but has wholly failed to provide any proof that the offered protection is adequate. Huntington does not consent to relief requested in the Motion because the Motion fails to provide any reasonable mechanism by which Huntington's interests will be adequately protected. The Motion even fails to provide the budget which would govern the Debtor's use of Huntington's cash collateral.

Facts and Background

1. Huntington is the holder and party entitled to enforce that certain Promissory Note, dated July 28, 2011 (as amended, modified, renewed, replaced or substituted from time to time, the “2011 Note”), executed and delivered by Debtor in the original principal amount of \$606,095.06 and that certain Promissory Note, dated April 25, 2012 (as amended, modified, renewed, replaced or substituted from time to time, the “2012 Note” and together with the 2011 Note, the “Notes”), executed and delivered by Debtor in the original principal amount of \$500,000.00.

2. Debtor has defaulted on its obligations under Notes and other agreements between it and Huntington by, *inter alia*, failing to make payments when and as due under the terms of Notes.

3. Debtor’s obligations under the Notes are secured by that certain Commercial Security Agreement dated April 22, 2011 (as amended, modified or substituted from time to time, the “Security Agreement”), by and between Debtor and Huntington.

4. Pursuant to the terms of the Security Agreement, Debtor granted Huntington, a continuing security interest in virtually all of Debtor’s assets, including its cash and all cash proceeds, as described in detail in the Security Agreement (“Collateral”).

5. Huntington perfected its interest in the Collateral by the filing of a financing statement with the Office of the Indiana Secretary of State on April 29, 2011 as instrument number 201100003744042.

6. In light of Huntington’s perfected security interests in and liens on all of the Debtor’s revenue producing assets, including any cash proceeds from accounts receivable collections and rents generated from the Collateral, any cash generated by Debtor is

Huntington's cash collateral, as defined in 11 U.S.C. § 363 (the "Cash Collateral").

7. On March 26, 2013, as a result of various events of default, Huntington commenced the action currently pending in the Johnson Superior Court as cause number 41D01-1303-MF-00165 to enforce its rights against the Debtor and insiders of the Debtor.

8. On May 2, 2013 (the "Petition Date"), Debtor filed its 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 Southern District of Indiana (this "Court").

9. On May 10, 2013, Debtor filed the Motion requesting, among other things, that this Court authorize and approve the Debtor's use Huntington's Cash Collateral.

**The Collateral Constitutes Cash Collateral
Pursuant To Section 363 Of The Bankruptcy Code**

10. Section 363(a) of the Bankruptcy Code defines cash collateral as "cash . . . or other cash equivalents whenever acquired . . . and includes the proceeds, products, offspring, rents or profits . . . 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).

11. Section 552(b) of the Bankruptcy Code specifically provides, in pertinent part, that:

if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, products, offspring, or profits of such property, then such security interest extends to such proceeds, products, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement . . .

11 U.S.C. § 552(b).

12. The Collateral clearly includes the "cash collateral" of Huntington within the

meaning of section 363(a) of the Bankruptcy Code.

13. Huntington is not aware of any other party that could arguably claim an interest in Huntington's Cash Collateral.

Objection to Debtor's Use of Huntington's Cash Collateral

14. Under section 363(c)(2) of the Bankruptcy Code, the Debtor may not use 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 . . . in accordance with the provisions of this section." 11 U.S.C. § 363(c)(2)(B). For the reasons set forth herein, Huntington does not consent to the Debtor's use of Cash Collateral, and asserts that it is not appropriate for this Court to authorize the use of Cash Collateral by the Debtor.

15. Use of Huntington's Cash Collateral may be granted only if, among other things, Huntington receives adequate protection of its interests in the Cash collateral. 11 U.S.C. § 363(c)(2); *see also Fed. Nat'l Mortg. Ass'n v. Dacon Bolingbrook Assocs. Ltd. P'ship*, 153 B.R. 204, 210 (N.D. Ill. 1993). The phrase "in accordance with the provisions of this section" used in section 363(c)(2)(B) of the Bankruptcy Code incorporates the adequate protection requirement of section 363(e) of the Bankruptcy Code, which requires that this Court "prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest." 11 U.S.C. § 363(e); *see also* 3 COLLIER ON BANKRUPTCY ¶363.05[2] (16th ed. 2012) ("if a trustee seeks to use cash collateral and cannot obtain the consent of the entity with an interest in the collateral, adequate protection must be furnished before the cash collateral can be used.").

16. Because cash collateral is of a highly volatile nature and subject to rapid dissipation, the Bankruptcy Code requires special protective safeguards by this Court in order to assure that Huntington is not deprived of its collateral through the unrestricted use of the cash

collateral by the Debtor.

17. Pursuant to section 363(p) of the Bankruptcy Code, the Debtor has the burden of establishing that Huntington is adequately protected. 11 U.S.C. § 363(p); *In re Swedeland Dev. Group, Inc.*, 16 F.3d 552, 564 (3d Cir. 1994); *See also In re 5877 Poplar, L.P.*, 268 B.R. 140, 145 (Bankr. W.D. Tenn. 2001) (holding that the debtor has the burden of proof on the issue of adequate protection). Indeed, “the [d]ebtors’ standard in cash collateral cases is a high one.” *First Bank of Miller v. Wieseler*, 45 B.R. 871, 876 (D.S.D. 1985). The Debtor, and not the court, must frame the adequate protection package. *In re Blehm Land and Cattle Co.*, 859 F.2d 137 (10th Cir. 1988); *see also* H.R. REP. NO. 595, 95th Cong., 1st Sess. 339 (1977) (“the debtor in possession will provide or propose a protection method”). The standard in cash collateral cases is high because cash, once spent, is permanently removed from a secured Huntington’s collateral base. Cash is the highest, best, and most secure form of collateral. *See, In re S. Side House, LLC*, 474 B.R. 391, 408 (Bankr. E.D.N.Y. 2012) (“The special treatment afforded cash collateral recognizes its unique status as the highest and best form of collateral”)(citing 3 COLLIER ON BANKRUPTCY ¶363.05[3] (16th ed. 2012)).

18. Although the Bankruptcy Code does not define adequate protection, section 361 of the Bankruptcy Code provides that adequate protection may be provided by (i) periodic cash payments; (ii) additional or replacement liens; or (iii) other relief resulting in the indubitable equivalent of the secured creditor’s interest in the property. *See* 11 U.S.C. § 361. Adequate protection should ensure that Huntington receives the value for which Huntington bargained for prior to the initiation of the Debtor’s bankruptcy case. *Swedeland*, 16 F.3d at 564.

19. In exchange for the exceedingly uncertain use of Huntington’s cash collateral, the only protection being offered to Hunting by the Debtor is the granting of replacement liens.

20. Debtor has wholly failed to provide any evidence that the proposed protections are adequate in the circumstances of this case. The Motion does not allege, let alone provide evidence of, the value of Huntington's security interest, which is necessary in any adequate protection analysis. *See, e.g., Chrysler Credit Corp v. Ruggiere (In re George Ruggiere Chrysler-Plymouth, Inc.)*, 727 F.2d 1017, 1019 (11th Cir. 1984) ("In determining whether a creditor's secured interests are [] protected, there must be an individual determination of the value of that interest and whether a proposed use of cash collateral threatens that value.").

21. Further, simply "needing" the use of cash collateral for continued operations is not a basis for allowing Debtor to use Huntington's Cash Collateral. *In re McCutchen*, 115 B.R. 126, 133 (Bankr. W.D. Tenn. 1990) (denying use of cash collateral, holding that "mere need does not satisfy the requirements of sections 361 and 363"); *see also In re Goode*, 235 B.R. 584, 590 (Bankr. E.D. Tenn. 1999) ("While the Court understands the ramifications of failing to get [cash collateral] authorization can be devastating to a debtor's case, that fact alone simply cannot suffice as the sole means by which to justify the use of a creditor's cash collateral . . .").

22. Despite this case law, Debtor simply asserts that it should be able to use the Cash Collateral because such use is "necessary" in order to continue operating and that the replacement liens are "fair". (Motion at ¶6 and 8). The Motion lacks any other justification and fails to establish that Huntington is adequately protected.

23. Likewise, the Motion provides no support for the relief requested being *nuc pro tunc* to the Petition Date. If the Debtor has used Huntington's Cash Collateral it is in violation of the provisions of the Bankruptcy Code and such violations should be punished not now condoned by this Court.

24. The Debtor has suggested that it will operate in accordance with a budget which

will be attached to the order granting the Motion, but has not given this Court, Huntington or any other party in interest a copy of the proposed budget. Without providing a budget, the Debtor is essentially asking for an open-ended free for all use of the Cash Collateral. The one item of information related to the Debtor's ability to effectively manage its cash, its schedules, and shows that it has no confidence that it can collect a single dollar of its outstanding accounts receivable. By the Debtor's apparent math $\$0 - \$\text{infinity} = \text{adequate protection}$. This illogical proposal should be rejected by this Court.

25. For the foregoing reasons, Huntington does not believe that it is appropriate to authorize the Debtor to use Huntington's Cash Collateral. Notwithstanding the Debtor's clear obligation to prove that Huntington's interest in cash collateral is adequately protected, the Debtor has not met, and cannot meet, its burden of demonstrating that Huntington will be adequately protected from the diminution in value of the Collateral that may occur from the Debtor's use of Huntington's Cash Collateral.

26. Without waiving any objection to the Debtor's use of Huntington's Cash Collateral, Huntington believes that to be adequately protected against the Debtor's use of the Cash Collateral, the Debtor must:

- a. make monthly payments equal to the nondefault rate of interest under the Notes;
- b. submit a budget acceptable to Huntington for all periods for which the Debtor uses the Cash Collateral, prior to such use, and to adhere to such budget within certain tolerances;
- c. provide Huntington with detailed bi-weekly reports of its operations showing how the Cash Collateral was used;

d. grant a perfected first priority security interests (deemed perfected upon entry of an order of this Court) and liens in all property and assets of any kind and nature in which the Debtor has an interest, and all proceeds, products, rents and profits thereof, (the "Postpetition Collateral"); provided, however, that the Postpetition Collateral shall not include any claims or causes of action arising under sections 544, 545, 547, 548 and 550 of the Bankruptcy Code;

e. permit representatives, agents, and/or employees of the Huntington, including professionals retained by the Huntington's counsel, to have reasonable access to its management, premises and records during normal business hours (without interference with the proper operation of the Debtor's business) and cooperate, consult with, and provide to such persons all such non-privileged information as they may reasonably request; and

f. agree to immediately terminate use of Huntington's Cash Collateral upon a failure to fully abide by this Court's order granting such use or by a date to be set by this Court, whichever comes first.

27. Huntington specifically reserves the right to assert at a later time that its interests in the Collateral, including the Cash Collateral, are or are not adequately protected.

28. Huntington also reserves the right to initiate proceedings seeking relief from the automatic stay or for adequate protection of its interests in the Collateral, or to take any other legal action, enforce or foreclose upon its interest in the Collateral.

WHEREFORE, Huntington respectfully requests that this Court enter an order denying the Motion and for all other relief just and proper under the circumstances

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties through the Court's electronic case filing system. Parties may access this filing through the Court's system.

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