

CASH COLLATERAL PROCEDURES AND RECOMMENDED FORM MOTION

Counsel and parties should follow these procedures for cash collateral motions filed in the District of New Mexico. A recommended form of cash collateral motion is attached.

A. Cash Collateral Motion. In accordance with Bankruptcy Rule 4001(b), there should be only one motion for use of cash collateral at the outset of the case. The motion may include a request pursuant to Bankruptcy Rule 4001(b)(2) for emergency use of cash collateral pending a final hearing on the motion to prevent immediate and irreparable harm to the estate. As required by Bankruptcy Rule 4001(b)(1)(A), a proposed form of order should be attached as an exhibit to the motion. If the motion includes a request for emergency use of cash collateral pending a final hearing, both the proposed emergency interim order and the proposed final order should be attached to the motion. The proposed order(s) should include, as an attachment, a summary of projected revenue and a line item expense budget during the proposed cash collateral period. The budget ordinarily should be weekly for the emergency interim period and monthly for the cash collateral period.

B. Service of the Motion and Notice. Debtor should serve the motion and notice together on any party holding or claiming an interest in cash collateral; the United States Trustee; the official committee of unsecured creditors or, if no such committee has been appointed, on the creditors included on the list of 20 largest unsecured creditors prepared under Bankruptcy Rule 1007(d); and on counsel who have entered an appearance in the case. *See* Bankruptcy Rule 4001(b)(1)(C). The notice should include: (1) notice of the hearing on any request for emergency interim use of cash collateral; (2) a 21-day objection period to the requested final cash collateral order (unless the Court orders otherwise or Bankruptcy Rule 4001(d) providing for a 14-day objection period applies); and (3) notice of the final hearing.

C. Notice of Hearings. In addition to serving the motion and notice, if emergency relief is sought counsel for the Debtor should also call the local office of the United States Trustee and any known counsel for a cash collateral creditor to alert them that the motion has been filed, and of the date and time of any emergency hearing.

D. Preliminary (“Emergency”) Hearing on the Motion. Pursuant to Bankruptcy Rule 4001(b)(2), the Court will hold an emergency hearing on use of cash collateral, if needed, to consider authorizing use of cash collateral necessary to avoid immediate and irreparable harm to the estate pending a final hearing. Debtor’s counsel is encouraged to plan a chapter 11 case, if possible, such that an emergency hearing is not needed the same day the case is commenced, or the next day. Counsel is also encouraged to call Chambers staff to obtain a hearing on use of cash collateral before or shortly after the cash collateral motion is filed. The Debtor should present testimony and/or other evidence at a hearing for emergency interim use of a cash collateral.

The Court highly recommends that prior to the cash collateral hearing the Debtor file a sworn declaration or affidavit in support of any first day motions, which may include a motion to use cash collateral, a utilities motion, or a motion to make pre-petition payroll. If the declarant/affiant is in the courtroom, the Debtor may offer the declaration/affidavit in evidence in lieu of or as part of such person’s direct oral testimony.

E. Final Hearing on the Motion. If a notice of the motion is given that specifies an objection period, the notice should include notice of the hearing. All cash collateral hearings, except emergency hearings, ordinarily will be final hearings. The final hearing cannot be sooner than 14 days after the motion is filed and served. *See* Bankruptcy Rule 4001(b)(2).

F. Contents of Cash Collateral Orders. The Court will review certain provisions in a cash collateral order with heightened scrutiny, such as provisions validating pre-petition claims or the extent, validity and priority of pre-petition liens; provisions granting liens against avoidance actions or avoidance action recoveries; cross-collateralization of debt not cross-collateralized pre-petition, unless necessary to provide adequate protection; waiver of surcharge rights under Bankruptcy Code §506(c); and provisions converting pre-petition debt to post-petition debt. If a motion seeks entry of an order containing any of the above provisions, the notice of the motion should specifically disclose that the motion seeks such relief. The Court will not approve the above provisions in an emergency cash collateral order absent extraordinary and compelling circumstances.

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

In re:

Case No.

Debtor.

**DEBTOR'S FIRST MOTION FOR USE OF CASH COLLATERAL
INCLUDING REQUEST FOR EMERGENCY USE OF CASH
COLLATERAL PENDING A FINAL HEARING**

[*Insert name of Debtor*], Debtor-in-Possession (“Debtor”), pursuant to 11 U.S.C. §§ 105(a), 361 and 363(c) and Fed. R. Bankr. P. 4001(b),¹ by this motion (“Motion”) moves the Court for (i) entry of an order in the form attached as Exhibit A authorizing Debtor to use cash collateral from [*insert date*] through [*insert date*] (“Cash Collateral Period”); and (ii) entry of an order in the form attached as Exhibit B authorizing Debtor to use cash collateral on an emergency basis to avoid immediate and irreparable harm to the estate pending a final hearing on this Motion. [*Note: attach monthly budget to Exhibit A and weekly budget to Exhibit B.*]

In support of the Motion, Debtor states:

1. Debtor Requires Use of Cash Collateral to Continue to Operate.

Debtor operates [*describe type of Debtor's business*]. Debtor requires the use of cash collateral to continue the operation of its business. Use of cash collateral is necessary to make payments in the ordinary course of Debtor's business for, among other things, [*insert such things as payroll, payroll taxes, gross receipts taxes, insurance, the purchase of inventory, professional fees and expenses incurred in connection with this case, etc.*]. Debtor also requires use of cash

¹ Unless otherwise indicated, all future references to “Code,” “Section,” and “§” are to the Bankruptcy Code, Title 11 of the United States Code, and all references to “Rule” or “Rules” are to the Federal Rules of Bankruptcy Procedure.

collateral pending a final hearing on the Motion. Without such authority Debtor will be forced to close, resulting in immediate and irreparable harm to the estate.

2. Commencement of the Bankruptcy Case.

Debtor filed this chapter 11 case on [*insert date*]. Pursuant to Bankruptcy Code §§ 1107 and 1108, Debtor has retained possession of its property and continues to operate its business as debtor in possession.

3. Nature of the Debtor's Business and Principal Assets.

[Explain Debtor's business and principal assets, including for example, the nature of the business, the principal assets, the number of locations (if more than one), the number of employees, the Debtor's management structure, etc.]

4. Summary of Debts and Cash Collateral Creditors.

[Describe the secured claims in the case and the amount of priority unsecured debt and non-priority unsecured debt. Identify the cash collateral creditors and describe their lien priority, collateral and the amount owed to each.]

5. Events Giving Rise to the Bankruptcy Filing.

[Explain what led to Debtor's commencement of the chapter 11 case.]

6. Jurisdiction.

This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334, and Miscellaneous Order No. 84-0324 filed in the United States District Court for the District of New Mexico on March 19, 1992. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

7. Debtor's Request for Authority to Use Cash Collateral.

(a) Request to enter cash collateral orders. Debtor seeks the entry of an order in the form attached as Exhibit A approving the use of cash collateral and granting adequate protection during the Cash Collateral Period. In addition, Debtor seeks the entry of an order in the form attached as Exhibit B approving the use of cash collateral and granting adequate protection on an emergency basis to avoid immediate and irreparable harm to the estate pending a final hearing on this Motion.

(b) Summary of proposed uses of cash collateral.

[Summarize the principal provisions of the attached proposed orders authorizing use of cash collateral.]

(c) Summary of proposed adequate protection.

[Summarize the principal provisions of the orders regarding the proposed adequate protection. Explain why the adequate protection is reasonable under the circumstances, including for example, any replacement or additional liens, compliance with a budget, default provisions, insurance, recordkeeping, insider salary limits, etc.]

WHEREFORE, Debtor requests the following relief:

- A. Emergency authority to use cash collateral in accordance with the order attached as Exhibit B;
- B. Authority to use cash collateral for the Cash Collateral Period in accordance with the order attached as Exhibit A; and
- C. Such other and further relief as the Court deems just and proper.

Respectfully submitted,

[Insert signature block for Debtor's counsel.]

This certifies that a copy of the foregoing Motion, including all exhibits, was served in accordance with Bankruptcy Rules 4001(b)(1)(C) as follows:

Electronically by use of the bankruptcy court's electronic transmission facilities on *[insert date]* on all parties who had entered an appearance in this case prior to the time of such service.

By United States mail, postage prepaid, on *[insert date]* to:
[Insert parties on whom service was made by United States mail]

[If applicable] By e-mail on *[insert date]* to:
[Insert parties on whom service was made by e-mail]

[If applicable] By facsimile on *[insert date]* to:
[Insert parties on whom service was made by facsimile]

this ___ day of _____, 20__

s/ filed electronically
[Insert name of counsel]