

## **D.N.J. LBR 4001-4 USE OF CASH COLLATERAL; OBTAINING CREDIT**

The Guidelines for Cash Collateral and Financing Requests, set forth in the Appendix to this Rule, apply in chapter 11 cases.

### **APPENDIX**

#### **GUIDELINES FOR CASH COLLATERAL AND FINANCING REQUESTS**

The following guidelines apply in Chapter 11 cases and supplement the requirements of 11 U.S.C. §§ 363 and 364 and Fed.R.Bankr.P. 4001(b) and (c).

#### **I. MOTIONS**

##### **A. MOTION CONTENT**

##### **1. Procedural Requirements**

- (a) The debtor may file a single motion seeking entry of an interim order and a final order, which orders would be usually entered at the conclusion of the preliminary hearing and the final hearing, respectively, as those terms are used in Fed.R.Bankr.P. 4001(b)(2) and (c)(2). In addition, where circumstances warrant, the debtor may seek emergency relief limited to the amount necessary to avoid immediate and irreparable harm to the estate pending the preliminary hearing, but in the usual case, only a preliminary and a final hearing will be required.
- (b) If the relief is to be extended pursuant to a loan or other agreement, a copy of the agreement must be attached to the motion.
- (c) The motion must include a copy of any proposed order of which entry is sought.
- (d) The motion must be double-spaced and in compliance with applicable rules of the Court.
- (e) The motion must be supported by an affidavit.

##### **2. Description of Use of Cash Collateral or Material Provisions of Financing**

The motion must disclose, either in the text of the motion or in an attached term sheet, the following factors, if applicable:

- (a) The purpose of the borrowing or proposed use of cash collateral;
- (b) The amount owed to the lender whose cash collateral is to be used or the amount, if any, owed to the post-petition lender; the value of the collateral in which the lender has a security interest; and whether the lender's debt is undersecured or oversecured;
- (c) The amount of funds to be used or borrowed, including if applicable the committed amount, maximum borrowings (if less), any borrowing base formula, and availability of funds under the formula;
- (d) Material conditions to closing and borrowing, including any budget provisions;

- (e) Pricing and economic terms, including interest rates, letter of credit fees, commitment fees, other fees, and costs and expenses of the lender and its professionals;
- (f) Lien, security interest, or adequate protection provided to the lender; the effect of any such lien on existing liens; deemed perfection of any lien; priority or superpriority provisions; and carve-outs from liens or superpriorities;
- (g) Maturity, termination and default provisions, including events of default, effect of any such provisions on the automatic stay, and cross-default provisions; and
- (h) Any other material provisions, such as a “lockbox” provision or provision relating to allocation of debt repayments, change of control, accountings, and right of inspection; and key covenants.

3. Adequacy of Budget

The motion must disclose whether the debtor has reason to believe, after diligent consideration of all known circumstances, and in its reasonable business judgment, that the budget is achievable and will allow the debtor to operate in Chapter 11 without the accrual of unpaid liabilities.

4. Extraordinary Provisions

The motion must conspicuously disclose the terms of any Extraordinary Provisions set forth in Section II.A.

5. Efforts to Obtain Financing

A financing motion must describe in general terms the debtor’s efforts to obtain financing, the basis on which the debtor determined that the proposed financing is on the best terms available, and any material facts bearing on the issue of whether the extension of credit is being extended in good faith.

6. Emergency Applications

A motion seeking entry of an emergency order or interim order must describe the amount and purpose of funds to be borrowed on an emergency or interim basis and set forth facts to support a finding that immediate or irreparable harm will be caused to the estate if immediate financing is not obtained at a preliminary hearing or on an emergency basis.

**B. NOTICE**

7. Notice of the hearing on (i) the interim and (ii) the final order shall be given to the persons cited in Fed.R.Bankr.P. 4001(b)(3) and (c)(3), as the case may be, the United States Trustee and any other persons whose interests may be directly affected by the outcome of the motion or any provision of the proposed order. Notwithstanding the foregoing, emergency and interim relief may be entered pursuant to Fed.R.Bankr.P. 9006(c) and [D.N.J. LBR 9013-1\(e\)](#) and after the best notice available under the circumstances; emergency and interim relief will not be considered, however, unless the Court and the United States Trustee have had a reasonable opportunity to review the motion, the applicable agreement, and the proposed interim order. Moreover, the Court usually will not approve provisions directly

affecting the interests of landlords, taxing and environmental authorities, and other third-parties without notice to them.

8. Before a filing, a prospective debtor may provide substantially complete drafts of the motion, interim order, and related documents to the Office of the United States Trustee, and the United States Trustee will hold such documents in confidence and without prejudice to the prospective debtor and will attempt to comment on such documents on or shortly after the filing. The debtor is strongly encouraged to provide drafts of financing requests, including proposed orders, to the United States Trustee as early as possible in advance of filing and preferably 24 hours before the hearing.

9. The hearing on a final order will not commence earlier than 14 days after service of the motion, in accordance with Fed.R.Bankr.P. 4001(b)(2) and (c)(2), and usually will not commence until there has been a reasonable opportunity for the formation of an Official Committee of Unsecured Creditors under 11 U.S.C. § 1102 (the "Committee") and appointment of counsel by the Committee.

**C. PRESENCE AT HEARING**

Except as otherwise ordered by the Court:

10. Counsel for the post-petition lender or the entity whose cash collateral is to be used must be present at any hearing relating to its financing or collateral; and

11. A business representative of the debtor, lender, and any party objecting to the financing, respectively, each with appropriate authority, must be present at the hearing or reasonably available by telephone for the purpose of making any necessary decisions relating to the motion.

**II. ORDERS**

**A. EXTRAORDINARY PROVISIONS**

The following provisions in a cash collateral or financing order, or in a financing agreement to be approved under such an order, called "Extraordinary Provisions," and justification therefor, must be conspicuously disclosed in the order. Extraordinary Provisions will not be approved in an interim order without substantial cause, compelling circumstances, and reasonable notice.

**1. Cross-Collateralization**

Extraordinary Provisions include provisions that elevate pre-petition debt to administrative or higher expense status or secure pre-petition debt with liens on post-petition assets where such debt would not have such status or security under the pre-petition security agreement or applicable law (for the purposes of these Guidelines, "Cross-Collateralization"), unless such status or security are limited to that necessary to accord the pre-petition lender adequate protection against a decline in the value of its collateral during the post-petition period. In connection with a request for Cross-Collateralization, the Court may consider the following factors, among others:

- (a) The extent of the notice provided;
- (b) The terms of the relief sought and a comparison to the terms that would be available absent the Cross-Collateralization;
- (c) The degree of consensus among parties in interest supporting the Cross-Collateralization;
- (d) The extent and value of the pre-petition liens held by the pre-petition lender, including in particular the amount of any "equity cushion" held by the pre-petition lender; and

- (e) Whether the Cross-Collateralization will give an undue advantage to pre-petition lender without a countervailing benefit to the estate.

An order approving Cross-Collateralization must reserve the right of the Court to unwind the post-petition protection provided to the pre-petition lender in the event there is a timely and successful challenge to the validity, enforceability, extent, perfection, priority, or amount of the pre-petition lender's claims or liens, or a determination that the pre-petition debt was undersecured as of the petition date, and the Cross-Collateralization unduly advantaged the lender.

## 2. "Rollups"

Rollups include the application of proceeds of post-petition financing to pay, in whole or in part, pre-petition debt. Determination of the propriety of a rollup may take into account, to the extent applicable, the factors mentioned above in connection with Cross-Collateralization, and, in addition, the following factors:

- (a) The nature and amount of new credit to be extended, beyond the application of proceeds of post-petition financing used to pay in whole or in part the pre-petition debt;
- (b) Whether the advantages of the post-petition financing justify the loss to the estate of the opportunity to otherwise satisfy the pre-petition secured debt in accordance with applicable provisions of the Bankruptcy Code, and the burdens on the estate of incurring an administrative claim;
- (c) Whether the rollup can be unwound;
- (d) Availability of funds under the terms of the financing and a comparison to the terms that would be available in the absence of the rollup;
- (e) The extent to which pre-petition and post-petition collateral can, as a practical matter, be identified and/or segregated;
- (f) The extent to which any difficult "priming" issues would have to be addressed in the absence of a rollup; and
- (g) Whether the post-petition advances would be used to repay a pre-bankruptcy, "emergency" liquidity facility secured by first priority liens on the same collateral secured by the post-petition financing, where the pre-petition facility was provided in anticipation of, or in an effort to avoid, a bankruptcy filing.

An order approving a rollup must reserve the right of the Court to unwind the paydown of the pre-petition debt in the event there is a timely and successful challenge to the validity, enforceability, extent, perfection, priority, or amount of the pre-petition lender's claims or liens, or a determination that the pre-petition debt was undersecured as of the petition date.

## 3. Waivers and Concessions as to Validity of Pre-Petition Debt

The Court usually will not consider as extraordinary the debtor's stipulation as to validity, perfection, enforceability, priority, non-avoidability, or amount of a pre-petition lender's claim and liens, and the lack of any defense thereto, provided that:

- (a) The Committee has a minimum of 60 days (or such longer period as the Committee may obtain for cause shown before the expiration of such period) from the date of entry of the order approving the appointment of the

Committee's counsel or the final financing order, whichever is later, to investigate the stipulation and bring as representative of the estate any appropriate proceedings; or

- (b) If no Committee is appointed, any party in interest has a minimum of 75 days (or a longer period for cause shown before the expiration of such period) from the date of entry of the final financing order to investigate the stipulation and file a motion seeking authority to bring as representative of the estate any appropriate proceedings.

The foregoing periods may be shortened in pre-packaged or pre-arranged cases for cause shown.

#### 4. Waivers

Extraordinary Provisions include provisions that divest in a material way the Court of its power or discretion, or interfere with the exercise of the fiduciary duties of the debtor or the Committee in connection with the operation of the debtor's business, administration of the estate, or the formulation of a reorganization plan, such as provisions that deprive the debtor or the Committee of the ability to file a request for relief with the Court, to grant a junior post-petition lien or lien on property of the estate that is not otherwise subject to a lien, to obtain financing or use of cash collateral, to sell property under 11 U.S.C. § 363, or to seek avoidance arising under 11 U.S.C. §§ 544, 545, 547, 548 and 549 of any transfers made to the lender or entity whose cash collateral is to be used. Notwithstanding the foregoing, and where duly disclosed, it will not be considered "extraordinary" for the debtor to agree to repay the post-petition financing in connection with any plan; for the debtor to waive any right to incur liens that prime or that are *pari passu* with liens granted under 11 U.S.C. § 364; and for a financing order to contain reasonable limitations and conditions regarding future borrowings under 11 U.S.C. § 364 or cash collateral usage under 11 U.S.C. § 363 (including limitations and conditions requiring consent of the lender to a particular action, subordination of future borrowings to the priorities and liens given to the initial post-petition lender, and repayment of the initial loan with the proceeds of a subsequent borrowing).

#### 5. Section 506(c) Waivers

Extraordinary Provisions include any release, waiver, or limitation of the debtor's right to a surcharge against collateral under 11 U.S.C. § 506(c); factors to be considered in connection with any motion seeking such a waiver include whether the debtor's rights are to the extent permitted by law delegated to the Committee and whether the carve-out includes expenses under 11 U.S.C. § 726(b).

#### 6. Liens on Avoidance Actions

Extraordinary Provisions include provisions granting liens on the debtor's claims and causes of action arising under 11 U.S.C. §§ 544, 545, 547, 548 and 549 (but not liens on recoveries under section 549 on account of collateral as to which the lender has a post-petition lien), and the proceeds thereof, or a superpriority administrative claim payable from the proceeds of such claims and causes of action.

#### 7. Carve-outs

A provision relating to a carve-out will be considered "extraordinary" if it causes disparate treatment for the professionals retained by the Committee compared to professionals retained by the debtor or fails to include the fees of the U.S. Trustee, the reasonable expenses of Committee members, or reasonable fees and expenses of a trustee under 11 U.S.C. § 726(b); reasonable allocations among such

expenses can be proposed, however, and the lender may refuse to include in a carve-out the costs of litigation against the lender, but not the costs of investigating whether any claims or causes of action exist. A provision relating to a carve-out must make clear when the carve-out takes effect, and whether it remains unaltered after payment of interim fees made before an event of default under the facility, and any effect of the carve-out on availability of funds under the post-petition loan.

8. Termination: Default; Remedies

A provision is “extraordinary” if it provides that the use of cash collateral will cease, or the financing agreement will default, upon (i) the filing of a challenge to the lender’s pre-petition lien or to the lender’s pre-petition conduct; (ii) entry of an order granting relief from the automatic stay, except as to a material asset; (iii) a change of venue with respect to the case or any adversary proceeding; (iv) the filing of a motion by a party in interest seeking any relief, as distinct from an order granting such relief; (v) a management change or the departure from the debtor of any identified employee; (vi) the filing of a plan of reorganization not supported by the lender; or (vii) the appointment of a trustee or an examiner. A clause providing a reasonable maturity date for the post-petition debt or for termination of the loan or default of the post-petition debt on dismissal of the case, confirmation of a plan of reorganization or, conversion to Chapter 7 is not extraordinary. Termination of the post-petition lender’s commitment to continue to advance funds after an event of default will not be considered extraordinary, except that any termination provision must require the lender to:

- (a) provide at least seven days’ notice to the debtor and the Committee before the automatic stay terminates and the lender’s remedies can be enforced; or
- (b) provide at least three business days’ notice before use of cash collateral ceases, provided that the use of cash collateral conforms to any budget in effect.

**B. EFFECT OF INTERIM ORDERS**

9. An interim order will not be binding with respect to the provisions of the final order provided that (i) the lender will be afforded the benefits and protections of the interim order, including a lender’s protection under 11 U.S.C. §§ 364(e) and 363(m) with respect to obligations incurred during the interim period, and (ii) the interim order will not bind the lender to advance funds pursuant to a final order containing provisions contrary to or inconsistent with the interim order.

**C. PROVISIONS IN ORDERS**

10. Local Form

The debtor should submit with the motion, if applicable, the Local Form *Interim Order Authorizing Use of Cash Collateral*.

11. Findings of Fact

The order must limit recitation of findings to essential facts, including the facts required under 11 U.S.C. § 364 regarding efforts to obtain financing on a less onerous basis and, if necessary, facts sufficient to support a finding of good faith under 11 U.S.C. § 364(e). Non-essential facts regarding pre-petition dealings and agreements may be included under the rubric of “stipulations” between the debtor and the lender or “background.” An emergency or interim order must include a finding that immediate and irreparable loss or damage will be caused to the estate if immediate use of cash collateral is not allowed or if immediate financing is not obtained and state with respect to notice only that a hearing

was held pursuant to Fed.R.Bankr.P. 4001(b)(2) or (c)(2), that notice was given to certain parties in the manner described, and that the notice was, in the debtor's belief, the best available under the circumstances. The final order may include factual findings as to notice. The order must not incorporate by reference or refer to specific sections of a pre- or post- petition loan agreement or other document without a summary of the sections. The order must not contain any findings or provisions extraneous to the use of cash collateral or to the financing.

12. Decretal Provisions

The order must specify, in particular: any Extraordinary Provisions; any priorities or collateral granted; any effect of the borrowing on pre-existing liens; bankruptcy-specific events of default and the consequences thereof; any provisions relating to adequate protection; any acknowledgments or stipulations by the debtor as to pre-petition debt; the purpose for which the loan is being made; and any restrictions on use of borrowings. The order may permit the parties to enter into waivers or consents to the loan agreement or amendments thereto provided that (i) the agreement as so modified is not materially different from that approved, (ii) notice of any waivers, consents, or amendments is filed with the Court, and (iii) notice of any waivers, consents, or amendments, other than those that are ministerial or technical and that do not adversely affect the debtor, is provided in advance to the Committee's counsel, all parties requesting notice, and the U.S. Trustee.

13. Conclusions of Law

Unless the court finds otherwise, the interim order must not state that the Court has examined and approved the loan or other agreement; it may say, however, that the debtor is authorized to enter into the agreement. The interim and final orders will be sufficient if they state that the debtor is authorized to borrow on the terms and conditions of the loan or other agreement.

14. Order to Control

The order must state that to the extent the loan or other agreement differs from the order, the order will control.

15. Statutory Provisions Affected

The order must specify those sections of the Bankruptcy Code relied upon, and identify those sections being limited or abridged to the extent permitted by law.

16. Conclusions of Law Relating to Notice

The final order may contain conclusions of law with respect to the adequacy of notice under 11 U.S.C. § 364, Fed.R.Bankr.P. 4001, and D.N.J. LBR 4001-4.

**D. SMALLER CASES**

17. The debtor may submit a simplified order if appropriate, particularly in smaller cases and in connection with the debtor's use of cash collateral not involving the extension of new funds.

## **NEW JERSEY BOARD OF BANKRUPTCY JUDGES NOTES**

2011 Comment: The provisions of the appendix to D.N.J. LBR 4001-4 were previously contained in the Court's General Order Adopting Guidelines for Financing Requests. In September 2009, the Judicial Conference approved a set of Guidelines for Distinguishing Between Matters Appropriate for Standing Orders and Matters Appropriate for Local Rules. In response to these Guidelines, the Board of Bankruptcy Judges concluded that the provisions of the Court's General Order Adopting Guidelines for Financing Requests should be addressed in an appendix to a local rule. As a result, on August 1, 2011, the Court adopted D.N.J. LBR 4001-4 and incorporated the provisions of the General Order, with some minor changes, in an appendix to the rule. Pursuant to D.N.J. LBR 1001-1(b), the Court may modify the Guidelines and any related Forms in order to accommodate a specific case.