

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

CHAPTER 11

Sky-Skan Incorporated

Case Number 17-11540-BAH

Debtor

**DEBTOR'S EX PARTE MOTION FOR
INTERIM AND FINAL AUTHORITY TO USE CASH COLLATERAL**

The debtor-in-possession, Sky-Skan Incorporated (the “Debtor”) respectfully moves pursuant to Sections 363(c)(2)(B), 105(a), 361, and 362 of title 11 of the United States Code (the “Bankruptcy Code”), and Rule 4001(b) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Local Bankruptcy Rule 4001-2, for an order authorizing the limited use of cash collateral to pay the costs and expenses incurred by the Debtor in the ordinary course of business on a limited interim basis to avoid immediate and irreparable harm pending a final hearing at least 14 days, but not more than 30 days, after the filing of the Cash Collateral Motion; authorizing the Debtor to use cash collateral on a final basis during the period between November 9, 2017 through _____, 2018 (the “Use Period”) or until the date on which the Court enters an order revoking the Debtor’s right to use Cash Collateral. The Debtor’s secured creditor in its cash collateral, the Internal Revenue Service (the “IRS”) has not provided its assent to the relief requested herein. It should be noted that Coastal Capital, LLC (“Coastal”) has alleged in State Court that it has a lien in the Debtor’s cash collateral, but that lien appears to be entirely subordinate to the liens of the IRS pursuant to 26 U.S.C. § 6321. The Debtor believes Coastal has no security interest in the Debtor’s cash collateral.

As shown on the budget attached as Exhibit A (the “Budget”), use of the cash collateral is necessary to operate the Debtor’s business through confirmation of a chapter 11 plan of reorganization to: (i) make payroll to Debtor’s employees essential to its continued operations; (ii) pay insurance premiums as necessary to ensure continuation of the necessary insurance coverage, (iii) pay vendors, suppliers and utilities for ongoing supplies and services; (iv) pay other ordinary and necessary expenses to prevent an immediate cessation of the business; and (v) pay the Debtor’s professionals and the fees of the United States Trustee. The Debtor does not anticipate requiring any funds beyond what it will collect and what it has in its possession.

Accompanying this Motion is an Affidavit of Bill Gray of SquareTail Advisors, LLC in Support of Debtor’s *Ex Parte* Motion for Interim Authority to Use Cash Collateral, as well as a Budget of Cash Collateral Usage, and Order Concerning Interim Use of Cash Collateral. In further support of this Motion the Debtor hereby states as follows:

I. Factual Background

1. On November 1, 2017 (the “Petition Date”) the Debtor filed a voluntary petition under Title 11, Chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of New Hampshire.

2. The Debtor filed this case to restructure its secured and unsecured debts through a plan of reorganization.

3. The Debtor is a New York limited liability company formed in 1967. The Debtor conducts its business at 51 Lake Street, Nashua, New Hampshire, which it rents from two entities (one of which is Steven Savage, the Debtor’s President and 100% owner). The Debtor designs and builds the world's most advanced digital full-dome planetariums and visualization theaters, together with the software and content for customers throughout the

globe. The Debtor has consulted on hundreds of projects spanning every size, location, timeline, scope, and budget. The Debtor employs 20 individuals.

4. The Debtor was forced to seek relief before this Court because Coastal obtained an order from the Superior Court authorizing it to take possession of the Debtor's cash and accounts receivable, in which it alleged to the Court it had a perfected security interest. Although Coastal promised the Debtor that it would help the Debtor use its assets to continue in operations, it soon became clear that Coastal simply wanted to bleed off for itself all of the Debtor's free cash flow and drive the Debtor into insolvency for Coastal's own enrichment. Coastal took possession of approximately \$126,239, but it did not take any action available under the Uniform Commercial Code to convey or take title to any of the Debtor's assets and remains in possession of the funds. The Debtor has requested the return of this property of the estate pursuant to the Debtor's rights under 11 USC § 542.

5. The Debtor filed this case primarily for the purpose of restructuring its secured and unsecured debt through a plan of reorganization. The Debtor also plans to pursue claims against Coastal for harming the Debtor's business while it controlled the Debtor's cash. In particular, Coastal prohibited the Debtor from making the first installment of an approved offer in compromise with the IRS which would have reduced the IRS secured claim from \$679,814.78 to \$185,619 to be paid over six months. The IRS subsequently withdrew the OIC and the Debtor intends to pursue Coastal for the difference between the OIC and the secured claim of the IRS, or \$494,195.

6. As of the Petition Date, the IRS has a first position secured claim against the Debtor's cash collateral in the amount of \$679,814.78. The accounts receivable

securing the IRS's claim total *approximately* \$377,000. See recorded liens of the IRS attached hereto as Exhibit B.

II Jurisdiction and Venue

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

8. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(M).

9. No trustee or examiner has been appointed in the Debtor's case and no official statutory committee has yet been appointed or designated by the U.S. Trustee.

III. The Debtor's Need for the Use of Cash Collateral and Protection of Same

10. Without access to cash collateral generated from the collection of accounts receivable, the Debtor will be unable to pay its modest payroll, utilities and suppliers, insurance premiums, and other ordinary and necessary operating expenses. This would cause the Debtor to abruptly cease operations because without these critical supplies and services the Debtor would not be able to pay its employees and fulfill customer orders.

11. The Debtor, accordingly, requests authority to use the IRS's cash collateral as shown in the Budget at Exhibit A for the Use Period. During the Use Period, the Debtor intends to: (i) continue fulfilling orders, servicing its customers and performing all aspects of its operations; (ii) continue to make payroll and to pay its necessary suppliers, utilities, insurance premiums and service providers as shown on Exhibit A; (iii) and pay its professionals according to Exhibit A (upon approval by this Court of appropriate fee applications). As provided in the Budget, the Debtor seeks authorization to use all cash on hand plus all accounts receivable collected in the ordinary course of its business through the Use Period.

12. Allowing the Debtor to continue to use its cash collateral, and therefore, operate in the ordinary course is in the best interest of the Debtor, its employees and its customers and will preserve the value of the estate for the benefit of creditors.

13. Such interim relief is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

14. The Debtor proposes and believes that the cash collateral will be adequately replaced during the Use Period such that the IRS will be in a better position by allowing this use, than it would be if there were an immediate cessation of the business. Even though the Debtor's cash collateral position will increase, rather than diminish, during the Use Period, the Debtor proposes to pay the IRS the sum of \$1,000 per month as additional adequate protection during the Use Period.

15. The Debtor also grants the IRS, as adequate protection for its interest in the cash collateral, replacement security liens in, to and on the Debtor's post-petition cash collateral and inventory with the same perfection and priority that the IRS had on such assets prior the Petition Date, as well as the proceeds thereof. These replacement liens shall be deemed valid and perfected.

16. The Debtor believes its limited use of cash collateral during the Use Period will permit it to maintain essential business operations, thereby preserving the value of the estate, until confirmation of a plan of reorganization.

IV. Legal Authority for Use of Cash Collateral

17. The use of cash collateral is conditioned on adequate protection of the lender in its cash collateral. Adequate protection is a flexible concept that requires a court to make decisions on a case-by-case basis. *In re Harrington & Richardson, Inc.*, 48 B.R. 431, 433 (Bankr. D. Mass, 1985).

18. The types of adequate protection available to protect a secured creditor whose cash collateral is going to be used by a debtor pursuant to §363(c)(2)(B) are enumerated in §361 of the Bankruptcy Code, as well as by case law. That section envisions adequate protection to be provided either by cash payments, replacement liens, or other relief that will result in the realization by the secured creditor of the indubitable equivalent of the secured creditor's interest in such property. See *In re: Isaacson Steel* (Bankr.D.N.H. 2013) citing *Baybank-Middlesex v. Ralar Distribs (In re Ralar Distribs., Inc.)*, 182 B.R. 81, 85 (D. Mass. 1995). In each instance, the focus of the Bankruptcy Code is on making sure that any decrease in the value of the collateral during the period involved is adequately protected.

19. Since the Debtor intends to use the cash collateral in the normal course of its business operations during the Use Period, it is reasonable to expect that the amount of cash on hand will decrease. In this case, the Debtor will continue to operate its business in the ordinary course and will undertake to obtain new contracts and continue selling goods and services as it has in the past. As such, the Debtor expects that the cash collateral it uses will be replaced by incoming revenues.

IV. Notice

20. In accordance with the requirements of LBR 4001-2(b) relating to the interim use of cash collateral, the Debtor provides the following information:

- a. The names and addresses of all creditors holding a secured interest in the cash collateral, and their attorneys if known:

The Internal Revenue Service
PO Box 7346
Philadelphia, PA 19101-7346

And its counsel:

Gail Irving

Bankruptcy Specialist
Gail.A.Irving@irs.gov.

Coastal Capital LLC (disputed)
226 Lowell St.
Wilmington, MA 01887

Its counsel:
Peter Antonelli
Curran Antonelli, LLP
260 Franklin St.
Boston, MA 02110
pantonelli@curranantonelli.com

- b. The efforts made to contact such secured creditors or their attorneys and any appointed committee or, if no committee has been appointed, the twenty (20) largest unsecured creditors with regard to the application to use cash collateral:
- The Debtor has emailed a copy of this motion to Gail Irving and Peter Antonelli.
 - No committee has yet been appointed in this case.
 - A copy of this Motion has been emailed (to the extent possible) and transmitted via facsimile on this date to each of the Debtor's twenty (20) largest creditors.
- c. The nature of the emergency requiring an *ex parte* order:
- The Debtor's payroll is weekly. Without immediate access to cash collateral generated from the collections of accounts receivable, the Debtor will be unable to pay its modest payroll on a weekly basis. The Debtor would miss several payroll deadlines if it must wait until a final order on cash collateral. Also, some of its critical utilities and suppliers, insurance premiums, and other ordinary and necessary operating expenses would become overdue. Being unable to pay its employees, utilities and suppliers when due would jeopardize those relationships and could cause the Debtor to have to abruptly cease operations.
- d. The total dollar amount of cash collateral use requested to be authorized:
- In accordance with the Budget, the sum of \$1,207,000 in cash collateral will be used during the Use Period.

e. A description of the adequate protection which will be provided to such secured creditor:

- The budget reflects no decrease in the IRS's cash collateral over the Use Period. Nevertheless, the Debtor proposes to pay the IRS the monthly sum of \$1,000 as a good faith adequate protection payment

21. Attached as Exhibit C is the *Affidavit of Paul Hebert In Support of Debtor's Ex Parte Motion for Interim Authority to Use Cash Collateral* required by LBR 4001-2(b).

22. The proposed cash collateral order does not include any of the provisions required to be highlighted pursuant to LBR 4001-2(c).

V. Waiver of Memorandum of Law

23. Based upon the legal authority cited herein and the lack of any novel issues of law, the Debtor respectfully requests that the requirement of Local Bankruptcy Rule 7102(3) be waived.

VI. No Prior Request

24. No prior request for the relief sought in this Motion has been made to this or any other court.

VII. Relief Requested

WHEREFORE, the Debtor respectfully requests that the Court enter an order, substantially in the form of the proposed interim order filed herewith, granting the Debtor the following relief:

- a. Authority to use the cash collateral of the IRS, on an interim basis during the Use Period in accordance with the Budget;
- b. Schedule a final hearing on this Motion in such a fashion that the Debtor can provide at least fourteen (14) days' notice as required by Bankruptcy Rule 4001-b(2);

c. At the Final Hearing, continue the authorization to use cash collateral as has been provided on an interim basis through the Use Period; and

d. Grant such other and further relief as may be appropriate and just.

Respectfully submitted,

SKY-SKAN INCORPORATED

By its Attorney,

Dated: November 9, 2017

/s/ Peter N. Tamposi
Peter N. Tamposi, BNH 04931

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