

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NORTH DAKOTA**

In Re: Vanity Shop of Grand Forks, Inc., Debtor.	Case No.: 17-30112 Chapter 11
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**ORDER GRANTING DEBTOR’S MOTION FOR USE OF CASH COLLATERAL
AND ADEQUATE PROTECTION**

Debtor filed a Motion for Interim and Final Orders (I) Authorizing the Debtor to Use Cash Collateral Pursuant to 11 U.S.C. § 363, (II) Granting Adequate Protection to Wells Fargo Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 503, 507, and 552, and (III) Modifying the Automatic Stay, and (IV) Granting Related Relief (“**Motion**”). [Doc. 23]. The Court held a hearing on the Debtor’s request for interim use of cash collateral and adequate protection on March 3, 2017. On March 3, 2017 the Court entered its order allowing interim use of cash collateral by the Debtor. [Doc. 76].

A final hearing on the motion was held on March 23, 2017. Prior to the hearing, the Official Committee of Unsecured Creditors filed a statement of its position on this motion. The Committee’s concern about preserving language in the Order allowing it to object to the amount of the Lender’s claim or to challenge the priority, validity or extend of the Lender’s interest is satisfied. See ¶ 3. For the reasons stated on the record, the Committee’s objection to reporting requirements is overruled.



Anfield Apparel Group, Inc. also asserted objections to this motion at the March 23, 2017, hearing. For the reasons stated on the record, Anfield Apparel Group, Inc.'s untimely objections are overruled and its request for additional language is denied.

Based on all the files and pleadings in this case and the evidence presented during the course of the hearings, the Court finds that Debtor met the requirements of Rule 4001(b)(1). The relief provided in this Order is necessary to maintain the business during the liquidation process. Wells Fargo Bank National Association, which holds a senior lien on cash collateral, consented to the use of cash collateral under the terms outlined in the parties' Stipulation. Accordingly, the Court finds cause exists to grant relief to Debtor on its Motion. Therefore, IT IS ORDERED that the Motion is granted and the relief provided is as follows:

1. The Stipulation between Debtor and Wells Fargo Bank National Association (the "**Lender**") concerning Interim Use of Cash Collateral and Adequate Protection (the "**Stipulation**"), which is Exhibit 1 to the Motion and filed separately as Document 67, is approved and the terms of the Stipulation incorporated by reference.

2. In accord with the terms of the Stipulation, Debtor waived offsets, defenses, claims or counterclaims against Lender or Lender's officers, directors, employees, attorneys, representatives, parent affiliates, predecessors, successors or assigns with respect to the pre-petition indebtedness owed by Debtor to Lender or otherwise and/or any such offsets, defenses, claims or counterclaims are waived and released by Debtor. Subject to paragraph 3 below, any challenges by Debtor to the validity, sufficiency, priority or amount of Lender's claim, the perfection of Lender's security interests in liens in its collateral and any transfers received by Lender pre-petition, are barred.

3. Notwithstanding the provisions of Paragraph 2, above, any subsequently appointed Creditors' Committee or Trustee, may file an objection to the amount of the Lender's claim or file (or seek authority to file, as the case may be) a complaint on behalf of the estate under §§ 506(c), 544, 547, 548, 549, 550 or 553 of the Bankruptcy Code challenging the validity, priority, or extent of the Lender's security interest in the collateral or otherwise seeking to avoid or recover any transfers received by the Lender. Any such objection or complaint (as is applicable) shall set forth the basis for the objection or complaint, and the reason why the claim should not be allowed in full. If no such objection or complaint (as is applicable) is filed: (a) by the Creditors' Committee on or before sixty (60) days after Bankruptcy Court approval of the retention of counsel to the Creditors' Committee, or if no such Committee has been formed then (b) by a Trustee on or before sixty (60) days after the appointment of a Trustee, any and all challenges by any party to the claim, the Lender's security interest or liens against the collateral or transfers received by the Lender including, but not limited to, those under §§ 506(c), 544, 547, 548, 549, 550 and 553 of the Bankruptcy Code shall be forever barred.

4. Debtor, subject to the terms of the Stipulation, may use the Lender's cash and non-cash collateral solely to pay its ordinary and necessary business expenses as well as costs and expenses to be incurred in connection with Debtor's liquidation and going-out-of-business sales, in accord with the Budget attached to the Stipulation as Exhibit A (the "**Budget**"). Doc. 23 p. 28.

5. Debtor shall not use any of the Lender's cash collateral to pay items:
- (i) not contained in the Budget, except as approved by this Court after written notice to the Lender and a hearing or after written request to the Lender and the Lender's written consent;

- (ii) in excess of one hundred ten percent (110%) of the amount set forth in the Budget, whether by line item, category, or in the aggregate from the Petition Date; and
- (iii) in advance of the week in which such expense is scheduled to be paid under the Budget.

6. During the period Debtor is utilizing the Lender's cash collateral, Debtor will not knowingly or intentionally incur any administrative expenses other than as set forth in the Budget, exclusive of professional fees approved by this Court pursuant to 11 U.S.C. § 330, 331, or 503(b) and fees payable pursuant to 28 U.S.C. §1930, without the prior written consent of the Lender or approval by this Court after notice to the Lender and a hearing.

7. Debtor's existing cash management system shall remain in place. Notwithstanding the foregoing, and the payment procedures for certain credit cards (as detailed below), and during the period Debtor is utilizing Lender's cash collateral, on Tuesday of each week (or on a different day of such week mutually agreeable to the Lender, Debtor, and for any week during which Debtor has received proceeds of Additional Merchandise (as defined in the Consulting Agreement between Debtor and Tiger Capital Group, LLC (the "**Sale Consultant**")), Debtor is authorized, until the occurrence of a Termination Event (as defined below), (i) to transfer from Debtor's concentration account maintained at the Lender ending in 4458 (the "**Concentration Account**") to Debtor's operating account at the Lender ending in 0258 an amount equal to the sum of (A) the amount for such week set forth in the Budget for such week or otherwise approved by the Lender in its reasonable discretion less any surplus funds in the Debtor's operating account ("**Weekly Budget Payments**"), plus (B) amounts due to the Sale Consultant pursuant to the most recent weekly reconciliation in accordance with the Consulting Agreement (the

“**Consulting Agreement**”) by and between Debtor and the Sale Consultant dated as of February 28, 2017 (“**Weekly Sale Consultant Payments**”), plus (C) an amount necessary to maintain up to \$2,500.00 after giving effect to any checks issued in accordance with the Budget for prior weeks which have yet to clear (“**Weekly Transfers**”) and (ii) to transfer all amounts remaining in the Concentration Account in excess of the aggregate of the Weekly Budget Payments, Weekly Sale Consultant Payments and Weekly Transfers (the “**Excess Proceeds**”) to the Lender to be applied to the pre-petition indebtedness of Debtor to Lender; provided that, with respect to such transfer occurring during the week immediately preceding the “**Sale Termination Date**” (as defined in the Consulting Agreement), as such Sale Termination Date may be changed in accordance with the Consulting Agreement, Debtor shall retain an amount equal to an estimate (as agreed by Debtor, the Lender and the Sale Consultant) of the amount that will be due to the Sale Consultant under the immediately following weekly reconciliation. Upon occurrence of a Termination Event, all amounts constituting proceeds of the Lender’s prepetition collateral and post-petition collateral (as defined below) in the Concentration Account shall be transferred to the Lender. The Lender may, at any time, send notice to Debtor’s other banks to authorize and direct such banks to direct all available funds to whichever account and at such times as the Lender may direct in writing to such banks. Debtor’s other banks are authorized and directed to comply with any and all orders, notices, requests and other instructions originated by the Lender directing disposition of the funds in accordance with the Budget, the loan documents between Debtor and Lender (the “**Loan Documents**”) and the Stipulation.

8. In consideration of and as adequate protection for any diminution in the value of the Lender’s cash and non-cash collateral:

- (a) Debtor granted the Lender a security interest to the extent of any diminution in the value of the Lender's cash and non-cash Collateral in all of the Debtor's post-petition assets, including, but not limited to, accounts, inventory, equipment, general intangibles, and goods, motor vehicles, real estate, as well as all products and proceeds thereof, together with the products and proceeds of leases and leasehold interests, but not the leases or leasehold interests themselves (collectively, the "**Post-Petition Collateral**"). The lien granted to the Lender herein may not be primed by any other lien or encumbrance, whether by order of this Court or the passage of time. The lien and security interest granted herein shall be deemed valid and perfected notwithstanding the requirements of non-bankruptcy law with respect to perfection, and although not required of the Lender, the automatic stay imposed by § 362 of the Bankruptcy Code is modified to the extent necessary for the Lender to perfect the security interest granted herein. The post-petition grant of the security interest shall be supplemental of, and in addition to, the security interest which the Lender possesses pursuant to the Loan Documents. Notwithstanding anything contained herein the Post-Petition Collateral shall not include any cause of action or proceeds thereof recovered pursuant to Chapter 5 of the Bankruptcy Code.
- (b) The lien and security interest created herein shall continue in full force and effect until the obligations to Lender have been paid in full, including all principal and, to the extent authorized by §506(b) of the Bankruptcy Code, such interest, fees, costs, and expenses, including reasonable attorneys' fees, whether currently existing or hereafter accrued and incurred, as provided for by the Loan Documents.
- (c) The lien and security interest granted and created herein and the priorities of same shall not be affected by the incurrence of indebtedness pursuant §364 of the Bankruptcy Code, or otherwise.
- (d) No expenses of administration of the Debtor's estate shall be charged pursuant to §506(c) of the Bankruptcy Code, or otherwise, against the collateral or the Post-Petition Collateral. Nothing contained herein shall be deemed to be the consent by the Lender, whether express or implied, to any claims against the Collateral or the Post-Petition Collateral under § 506(c) of the Bankruptcy Code.
- (e) If and to the extent (i) the cash collateral used by the Debtor *less* (ii) the reduction in the pre-petition indebtedness exceeds the value of the Post-Petition Collateral (the "**Post-Petition Shortfall**"), then the Lender shall have a claim under §503(b) of the Bankruptcy Code in the amount of the Post-Petition Shortfall which shall, pursuant to §507(b) of the

Bankruptcy Code, have priority over all other claims entitled to priority under §507(a)(1), with the sole exception of quarterly fees due to the United States Trustee pursuant to 28 U.S.C. §1930.

- (f) The Debtor shall maintain all necessary insurance, including, without limitation, life, fire, hazard, comprehensive, public liability, and workmen's compensation as may be currently in effect, and obtain such additional insurance in an amount as is appropriate for the business in which the Debtor is engaged, naming the Lender as loss payee with respect thereto. The Debtor shall provide the Lender, upon entry of this Order, with proof of all such coverage, as well as prompt notification of any change in such coverage which may hereafter occur.
- (g) The Lender shall have the right to inspect the collateral as well as the Debtor's books and records during normal business hours.
- (h) Effective as of the Petition Date, the Debtor has terminated all credit card and purchase card facilities with the Lender other than the purchase cards previously identified by the Debtor to the Lender in writing prior to the Petition Date that the Debtor intends to continue to use from and after the Petition Date (the "**Specified Cards**"). The Debtor acknowledges and agrees that, from and after the Petition Date, neither the Debtor nor any of its employees shall have the ability to use any credit card or purchase card facilities with the Lender other than the Specified Cards, and the Lender shall have no obligation to honor any charges incurred from and after the Petition Date in connection with any such facilities other than with respect to the Specified Cards. All amounts outstanding in connection with the Specified Cards as of the end of each day shall be repaid by the Debtor in cash on the next business day. The failure to repay in the balances of the Specified Cards as set forth above shall be a Termination Event.
- (i) On Monday of each week commencing on March 6, 2017, the Debtor shall pay to the Lender a fee in the amount of \$2,500.00 each.
- (j) The Debtor shall deposit with the Lender the sum of \$25,000.00 (the "**Indemnification Reserve Funds**") on the date the Claim is otherwise being paid in full as cash collateral for any contingent obligations under the Credit Agreement between the Debtor and Lender, including without limitation, the Debtor's indemnification obligations. Within ten (10) business days following the expiration of all applicable challenge periods in Paragraph 3, the Lender shall return to the Debtor all remaining Indemnification Reserve Funds, if any.

9. During the period Debtor is using Lender's cash collateral, Debtor shall furnish to the Lender such financial and other information as the Lender shall reasonably request including, but not limited to, the following:

- (b) By Monday of each week, commencing March 6, 2017,
 - (i) a reconciliation report which sets forth in reasonable detail:
 - (A) a comparison of the Debtor's actual performance with the Budget and the projections contained therein for the prior week and on a cumulative basis since the Petition Date in a form and substance acceptable to the Lender; and
 - (B) a statement of the value at cost of all categories of the Debtor's inventory.
 - (ii) Borrowing Base Certificate in such form and substance provided by the Debtor to the Lender pre-petition.
- (c) Any financial information and pleadings filed with this Court, shall be served upon the Lender and its counsel within one (1) business day after such information or pleading has been filed with this Court.
- (d) All other financial information and reports prepared by the Debtor in the ordinary course of its business, including any financial information required by this Court or by the Operating Guidelines and Reporting Requirements of the United States Trustee's Office.
- (e) All other reports and financial information required by the Loan Documents or historically provided to the Lender, and any additional reports as may be requested by the Lender from time to time, including, without limitation, the monthly statements received by Debtor or any of its affiliates from any acceptable credit card issuers (as defined in the Credit Agreement) or credit card processors or clearinghouses, together with such additional information with respect thereto as shall be sufficient to enable the Lender to monitor the Debtor's credit card transactions.

10. The Automatic Stay is modified to permit the Lender and Debtor to carry out the terms and conditions of the Stipulation and this Order, and Debtor is authorized to

execute any additional agreements as may be deemed necessary to further effectuate and confirm the terms and conditions of the Stipulation and this Order.

11. The Lender and Debtor may agree to nonmaterial modifications or amendments to the Stipulation without further order of this Court. Further, the Lender and the Debtor may modify the Budget, to take effect upon five (5) business days' written notice to the Creditors' Committee, if any, the United States Trustee, and this Court.

12. As of the date of this Order, Debtor has paid in full all principal and accrued interest due to Lender. Debtor has also funded the Indemnification Reserve Funds provided for under the terms of the Stipulation. With respect to Lender's claims, the only matters remaining at issue are:

- (a) attorneys fees and costs requested by Lender in the sum of \$79,646.91; and
- (b) a reserve in the sum of \$25,000 requested by Lender as adequate protection for Debtor's use of the Specified Cards.

13. As adequate protection for the above claims of Lender, the Debtor will escrow the sum of \$103,000.00 in a separate bank account with Lender. No withdrawal shall be permitted from that account absent the agreement of the Debtor and Lender or further order of this Court. Upon the funding of the escrow, Lender's liens and security interests in any collateral, including, but not limited to, pre or Post-Petition Collateral and cash collateral are terminated, provided, however, that (i) as to any terms under the Loan Documents which expressly survive the repayment in full of the obligations, those terms shall continue to be in full force and effect, including without limitation, the Debtor's indemnification obligations under the Loan Documents, and (ii) the Lender's lien and security interest on the Indemnification Reserve Funds and the monies escrowed shall continue in full force and

effect subject to the release of those funds pursuant to the Stipulation or the provisions of this Order. Other than as provided above, Lender shall take all actions necessary to release its liens and security interests. Additionally, Lender shall take all actions necessary to insure that all monies previously being deposited in the Concentration Account are deposited in Debtor's operating account.

Dated this 25th day of March, 2017.

A handwritten signature in black ink that reads "Shon Hastings". The signature is written in a cursive, flowing style.

SHON HASTINGS, JUDGE
UNITED STATES BANKRUPTCY COURT