CASH COLLATERAL

By Bruce L. Weiner
Rosenberg, Musso & Weiner, L.L.P., Brooklyn, New York

§ 363. Use, sale, or lease of property

(a) *In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties 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.*

(b)(1) *The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless--*

(A) *such sale or such lease is consistent with such policy; or*
(B) *after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease--*
(i) *giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and*
(ii) *finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.*
(2) *If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then--*

(A) *notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and*
(B) *notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended--*
(i) *pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;*
(ii) *pursuant to subsection (g)(2) of such section; or*
(iii) *by the court after notice and a hearing.*

(c)(1) *If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.*
(2) *The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection*

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, sale, or lease in accordance with the provisions of this section.*

(3) *Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.*

(4) *Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.*

(d) *The trustee may use, sell, or lease property under subsection (b) or (c) of this section only--*

(1) *in accordance with applicable nonbankruptcy law that governs the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust; and*

(2) *to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.*

(e) *Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).*

(f) *The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if--*

(1) *applicable nonbankruptcy law permits sale of such property free and clear of such interest;*

(2) *such entity consents;*

(3) *such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;*

(4) *such interest is in bona fide dispute; or*

(5) *such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.*

(g) *Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.*

(h) *Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if--*

(1) *partition in kind of such property among the estate and such co-owners is impracticable;*

(2) *sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;*

(3) *the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and*

(4) *such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.*

(i) *Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.*

(j) *After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs*

efore a "smaller" business debtor and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) *At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.*

(l) *Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.*

(m) *The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.*

(n) *The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.*

(o) *Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.*

(p) *In any hearing under this section–*

(1) *the trustee has the burden of proof on the issue of adequate protection; and*
(2) *the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.*

RULE 4001(b)
(b) Use of cash collateral
(1) Motion; Service
(A) Motion
A motion for authority to use cash collateral shall be made in accordance with Rule 9014 and shall be accompanied by a proposed form of order.

(B) Contents
The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions, including:
(i) the name of each entity with an interest in the cash collateral;
(ii) the purposes for the use of the cash collateral;
(iii) the material terms, including duration, of the use of the cash collateral; and
(iv) any liens, cash payments, or other adequate protection that will be provided to each entity with an interest in the cash collateral or, if no additional adequate protection is proposed, an explanation of why each entity's interest is adequately protected.

(C) Service

The motion shall be served on: (1) any entity with an interest in the cash collateral; (2) any committee elected under § 705 or appointed under § 1102 of the Code, or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed under § 1102, the creditors included on the list filed under Rule 1007(d); and (3) any other entity that the court directs.

(2) Hearing

The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

(3) Notice

Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.

After a small business debtor files for relief under chapter 11 it must have operating capital if it plans on surviving long enough to reorganize its business or sell its assets on a going-concern basis. The debtor's current secured creditor usually has a security interest encumbering all of the debtor's cash, accounts receivable, or other cash equivalents, which the Bankruptcy code defines as "cash collateral." Cash collateral includes rents collected by a debtor that owns real estate, if the rents were pledged to the lender, usually in an assignment of rents. Section 363 states that the debtor must obtain authority to use cash collateral to continue to operate its business. Section 363 also states that the secured creditor is entitled to "adequate protection" if the debtor wants to use the creditor's cash collateral. Absent such authority—from either the secured creditor or the court—the debtor often will not have enough operating capital to pay its ordinary expenses such as payroll, utilities, materials or goods, and services. Without operating capital the debtor cannot do the things that are necessary and essential for the continued operation of its business. The debtor will need to enter into a cash collateral agreement with its secured creditor, or absent an agreement, obtain a court order. Since most debtors cannot afford the time and expense of a fight with the secured creditor, most debtors enter into a cash collateral agreement. Cash collateral agreements invariably comes with a hefty price; either the debtor agrees to the secured creditor's expansive definition of what it considers "adequate protection" under Section 361 or is forced to seek court approval through a contested cash collateral hearing. Under either scenario, the debtor may be forced to agree to onerous terms that may later haunt the debtor, or more importantly, its administrative and general unsecured creditors the future. Since the debtor is faced with the choice of agreeing to the secured creditors's onerous terms or expending a considerable amount of resources, including time and money, obtaining that authorization when those resources are extremely limited and would be better spent in operating the business. Many, if not most, debtors

simply give in to the secured creditor hoping that its concessions will not haunt it later in the case.

Courts and the United States Trustee have recognized the problem and taken steps to "level the playing field." Many bankruptcy courts have enacted local rules and/or guidelines (collectively, the Cash Collateral Guidelines) that establish what a court will or may approve in a cash collateral order, and these Cash Collateral Guidelines can be used by the debtor as a negotiation tool against a secured creditor attempting to obtain an expansive definition of adequate protection in a cash collateral order to the detriment of the debtor, administrative creditors and its general unsecured creditors. A copy of the guidelines established by the United States Bankruptcy Court for the Southern District of New York is included below. Knowing what provisions courts in different jurisdictions, as well as the jurisdiction that you are in, consider to be "extraordinary" can help the debtor negotiate a fair and reasonable cash collateral order, which provides the debtor with the needed cash to continue operating its business and the secured creditor's need for protection. Rule 4001 provides additional procedural mechanisms regarding the approval of consensual cash collateral orders requiring any debtor to highlight the material terms of the agreement, and as result, all extraordinary terms should be underscored to the court and other constituencies.

Under §363(c) of the Code, a chapter 11 debtor in possession may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without court approval, and may use property of the estate in the ordinary course of business without notice or a hearing if the continued operation of the business is authorized. When that property is cash collateral, however, the Code requires the DIP to obtain authorization, either from the secured creditor that has a security interest in the debtor's cash or from the bankruptcy court, prior to such use. The Bankruptcy Code provides a balance between the debtor's need to use its cash (or cash

equivalents) to continue its operations and the secured creditor's need for adequate protection, assuring the secured creditor that its collateral position will not be diminished during the course of the bankruptcy case. Indeed, a secured creditor should not be forced to continue to "finance" a struggling debtor without its interest being adequately protected. But at the same time, the debtor should not be forced to give anything more than that which would adequately protect the secured creditor's interest.

Section 361 provides a nonexclusive list of items that can constitute adequate protection. These include:

> (i) cash payments or periodic cash payments to the secured creditor—usually in the form of post-petition interest;
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> (ii) additional or replacement liens to the extent that the debtor's use, sale, lease or grant of the secured creditor's collateral results in a decrease in the value of the secured creditor's interest; or
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> (iii) the indubitable equivalent of its interest.

When negotiating the use of cash collateral, the secured creditor will always request at least one form of adequate protection listed in Section 361 and in many instances may request other forms not enumerated in Section 361. As stated above, the debtor will often agree to almost anything requested by the secured creditor because it needs cash to operate. But the smaller business debtor—or any debtor for that matter— should not be forced to give more than "adequate" protection to the secured creditor in exchange for its consent to use its cash collateral. What is deemed adequate will depend on the facts of each case.

If the debtor and the secured creditor can reach an agreement on the terms of the use of cash collateral, and no party in interest objects under Bankruptcy Rule 4001(d), the debtor will be able

to use its cash without going through a contested hearing and without spending valuable resources in obtaining authorization through a contested cash collateral hearing. In exchange for its consent, the secured creditor may request or demand one or more of the following, in addition to the adequate protection methods found in Section 361:

(a) provisions that bind the debtor and third parties as to the validity and enforcement of pre-petition liens;

(b) waiver of §506(c) surcharge claims;

(c) superpriority administrative claims;

(d) liens on avoidance actions;

(e) provisions prohibiting third-party financing;

(f) automatic relief from stay upon an event of default; or

(g) payment of the secured creditor's professional fees.

Many of these additional adequate assurance terms listed above are considered by many courts to be "extraordinary provisions" that generally will not be approved. See Section IIA of the SDNY guidelines for the provisions that the SDNY considers "extraordinary," and what the debtor and the secured creditor must show before the court will approve the "extraordinary" provisions. Provisions considered "extraordinary" in the SDNY include cross-collateralization, rollups (using post-petition financing to pay pre-petition secured debt), concessions as to the validity of secured debt, liens on avoidance actions, and termination on default.

Under Bankruptcy Rule 4001(d), a motion for authority to use cash collateral must be accompanied by a copy of the agreement and a copy of the proposed order. In addition, the motion must include a concise statement of the relief requested, not to exceed five pages, that summarizes all of the material provisions of the agreement, and specifies their location. These material

provisions include, among other things:

> (i) the terms, including duration, of the use of the cash collateral; and
>
> (ii) any liens, cash payments or other adequate protection that will be provided to each entity with an interest in the cash collateral, or, if no additional adequate protection is proposed, an explanation of why each entity's interest is adequately protected.

If the material terms are not highlighted in the summary (or motion) as required by Rule 4001(d), courts have the authority to reconsider and vacate the order approving the agreement under Bankruptcy Rule 9024, which incorporates Rule 60 of the Federal Rules of Civil Procedure at any reasonable time because, presumably and likely, such failure to highlight the material terms in accordance with the Rule would constitute a misrepresentation, and therefore, the one-year reconsideration period in Rule 60 would not be applicable. Thus, not only would a secured creditor lose the "adequate protection" provided by the non-highlighted material terms, but the secured creditor would also risk losing all of the adequate protection provided by the debtor.

Conclusion

It is important for a small business debtor to obtain authorization to use cash collateral in order to keep the debtor's business operating long enough to either reorganize as an ongoing viable business entity, consummate a going concern sale, or to liquidate its assets in an orderly fashion. Obtaining the secured creditor's consent to use cash collateral, although initially less expensive and time consuming, does come with a cost—and not just the cost of providing the enumerated

adequate protection found in Section 361. Knowledge of the Bankruptcy Rules and various local rules found throughout the country, as well as each particular court's customs and practices, can facilitate a small business debtor in obtaining creditor approval for use of cash collateral on reasonable terms.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
GUIDELINES FOR FINANCING REQUESTS

The purpose of this document is to establish guidelines for cash collateral and financing requests under sections 363 and 364 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the "Court"). Although it is recognized that each case is different, the Guidelines are designed to help practitioners identify common material issues that typically are of concern to the Court (at least on the first day of a case and/or where there is limited notice), and to highlight such matters so that, among other things, determinations can be made, if necessary, on an expedited basis. Substantively, these Guidelines do not purport to establish rules that cannot be varied, but they do require disclosure of the "Extraordinary Provisions," discussed below, that ordinarily will not be approved in interim orders without substantial cause shown, compelling circumstances and reasonable notice. It will be evident that many of the following guidelines are designed to deal with debtor in possession financing requests documented with a loan agreement and (for want of a better term) a long-form financing order. However, the Court would welcome the use of simplified orders, whenever possible, particularly in smaller cases and in connection with the debtor's use of cash collateral not involving the extension of new funds. These guidelines are intended to supplement the requirements of sections 363 and 364 of the Bankruptcy Code and Bankruptcy Rules 4001(b) and (c).

I. MOTIONS

A. MOTION CONTENT

1. Single motion.

(a) A single motion may be filed seeking entry of an interim order and a final order, which

orders would be normally entered at the conclusion of the preliminary hearing and the final hearing, respectively, as those terms are used in Bankruptcy Rules 4001(b)(2) and (c)(2). In addition, the debtor may seek emergency relief for financing limited to the amount necessary to avoid immediate and irreparable harm to the estate pending the preliminary hearing.

(b) If the financing is to be extended pursuant to a loan agreement or similar agreement ("Agreement"), the Agreement should be attached to the motion or be separately filed with the Court and made available to interested parties.

(c) The motion should also include a copy of any proposed order for which entry is sought.

(d) Motions must be double-spaced and in a form that complies with all applicable rules of the Court.

2. Description of use of cash collateral or the material provisions of DIP financing. The motion should ordinarily contain the following disclosure relative to the use of cash collateral or the financing, either in the text of the motion or in an attached term sheet:

(a) amount of cash to be used or borrowed, including (if applicable) committed amount, maximum borrowings (if less), any borrowing base formula, availability under the formula, and the purpose of the borrowing;

(b) material conditions to closing and borrowing, including any budget provisions;

(c) pricing and economic terms, including interest rates, letter of credit fees, commitment fees, any other fees, and the treatment of costs and expenses of the lender (and its professionals);

(d) collateral or adequate protection provided to the lender and any priority or superpriority provisions, including the effect thereof on existing liens, and any carve-outs from liens or superpriorities;

(e) maturity, termination and default provisions, including events of default, effect on an

automatic stay and any cross-default provisions; and

(f) any other material provisions, including any Extraordinary Provisions, as defined in Section II(A), any provisions relating to change of control, and key covenants.

3. Adequacy of Budget. Any motion for new financing or use of cash collateral must also include disclosure by the debtor as to whether it has reason to believe that any budget to which the debtor will be subject under the order will be adequate (in the context of all assets available to the debtor) to pay all administrative expenses during the period covered by the financing or the budget. Where the motion is made with the consent of the lender or the entity with an interest in cash collateral, the lender shall disclose whether it has reason to believe that the budget will not be adequate to cover reasonably anticipated administrative expenses, except that nothing herein is intended to impose a duty to investigate on the lender.

4. Extraordinary Provisions. The motion must disclose prominently whether the financing includes any of the Extraordinary Provisions set forth in section II(A) of these Guidelines, and any accompanying order must also set forth these provisions prominently and conspicuously.

5. Efforts to Obtain Financing. The motion should describe the debtor's efforts to obtain financing, the basis on which the debtor determined that the proposed financing was on the best terms available, and material facts bearing on the issue of whether the extension of credit was in good faith.

6. Emergency Applications. A motion that seeks entry of an Emergency Order or Interim Order should also describe the amount and purpose of funds sought 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 on an emergency basis.

B. NOTICE

1. Notice of the hearing on (i) the Interim and (ii) the Final Order shall be given to the persons required by Rules 4001(b)(3) and 4001(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 after the best notice available under the circumstances; however, emergency and interim relief will ordinarily not be considered unless the United States Trustee and the Court have had a reasonable opportunity to review the motion, the financing agreement, and the proposed interim order, and the Court normally will not approve provisions that directly affect the interests of landlords, taxing and environmental authorities and other third-parties without notice to them.

2. Prospective debtors may provide substantially complete drafts of the motion, interim order, and related financing documents to the Office of the United States Trustee in advance of a filing, and the United States Trustee will hold such documents in confidence and without prejudice to the prospective debtor and attempt to comment on such documents on or shortly after the filing. Debtors are strongly encouraged to provide drafts of financing requests, including proposed orders, to the United States Trustee as early as possible in advance of filing.

3. The hearing on a Final Order will not commence earlier than 15 days after service of the motion, in accordance with Bankruptcy Rules 4001(b)(2) and 4001(c)(2), and ordinarily will not commence until there has been a reasonable opportunity for the formation of a Creditors Committee under 11 U.S.C. §1102 and either the Creditors' Committee's

appointment of counsel or reasonable opportunity to do so.

C. PRESENCE AT HEARING.

Except as otherwise ordered by the Court:

1. Counsel for the postpetition lender (or the entity whose cash collateral is to be consensually used) must be present at any hearing with respect to its financing or its collateral;

and 2. A business representative of such entity with appropriate authority must also be present at such hearing or available by telephone.

II. ORDERS

A. EXTRAORDINARY PROVISIONS.

The following provisions in a cash collateral or DIP financing order, or in a financing agreement to be approved under such an order, called "Extraordinary Provisions," must be disclosed conspicuously in the motion and order and justification therefor separately set forth:

1. Cross-Collateralization. Extraordinary Provisions include all provisions that elevate prepetition debt to administrative expense (or higher) status or secure prepetition debt with liens on post-petition assets that such debt would not have by virtue of the prepetition security agreement or applicable law (for the purposes of these Guidelines, "Cross-Collateralization"), unless such status and liens are limited in extent to that necessary to accord the prepetition lender in a reorganization case 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 will consider, among other factors:

(i) the extent of the notice provided;[1]

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[1] *See Otte v. Manufacturers Hanover Commercial Corp., (In re Texlon Corp.) 596 F.2d 1092 (2d Cir. 1979).*

(ii) the terms of the DIP financing and a comparison to the terms that would be available absent the Cross-Collateralization;

(iii) the degree of consensus supportive of Cross-Collateralization;

(iv) the extent and value of the prepetition liens held by the prepetition lender (and in particular the amount of any "equity cushion" that the prepetition lender may have), and

(v) whether Cross-Collateralization will give an undue advantage to some prepetition debt without a countervailing benefit to the estate. An order approving Cross-Collateralization must ordinarily reserve the right of the Court to unwind the post-petition protection provided to prepetition debt in the event that there is a timely and successful challenge to the validity, enforceability, extent, perfection, and (where appropriate) priority of the prepetition lender's claims or liens, or a determination that the prepetition debt was undersecured, and the Cross-Collateralization unduly advantaged the lender.

2. "Rollups." Rollups include the use of postpetition financing to pay, in whole or in part, prepetition secured debt. Determination of the propriety of a rollup will normally take into account, to the extent applicable, the factors mentioned above in connection with Cross- Collateralization, and, in addition, the following:

(a) the nature and amount of new credit to be extended, beyond the amount to be used to repay the prepetition debt;

(b) whether the advantages of the postpetition financing justify the loss to the estate of the opportunity to satisfy the prepetition secured debt otherwise 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, if necessary;

(d) the extent to which the debtor would have availability in the absence of a rollup;

(e) the extent to which prepetition and postpetition collateral can, as a practical matter, be identified and/or segregated;

(f) the extent to which difficult "priming" issues would have to be addressed in the absence of a rollup; and

(g) whether the postpetition advances are used to repay a pre-bankruptcy, "emergency" liquidity facility secured by first priority liens on the same collateral as the postpetition financing, where the prepetition facility was provided in anticipation of, or in an effort to avoid, a bankruptcy filing. An order approving a rollup must ordinarily reserve the right of the Court to unwind the paydown of the prepetition debt in the event that there is a timely and successful challenge to the validity, enforceability, extent, perfection, and (where appropriate) priority of the prepetition lender's claims or liens, or a determination that the prepetition debt was undersecured. In cases where prepetition debt is paid down with postpetition debt, the Court will consider the availability of section 364(e) protection for the portion of the gross borrowing that does not represent "new" or additional credit on a case-by-case basis.

3. Waivers and concessions as to validity of prepetition debt. The Court will not consider as extraordinary the debtor's stipulation as to validity, perfection, enforceability, priority and non-avoidability of a prepetition lender's claim and liens, and the lack of any defense thereto, provided that: (a) the Official Committee of Unsecured Creditors (the "Committee"), appointed under section 1102 of the Bankruptcy Code, has a minimum of 90 days (or such longer period as the Committee may obtain for cause shown) from the date of the order approving the appointment of counsel for the Committee to investigate the facts and bring any appropriate proceedings as representative of the estate; or

(b) if no Committee is appointed, any party in interest has a minimum of 90 days (or a longer period for cause shown) from the entry of the final financing order to investigate the facts and file a motion seeking authority to bring any appropriate proceedings as representative of the estate.

4. Waivers. Extraordinary Provisions include those that divest the Court of its power or discretion in a material way, or interfere with the exercise of the fiduciary duties of the debtor or Creditors' Committee in connection with the operation of the business, administration of the estate, or the formulation of a reorganization plan, such as provisions that deprive the debtor or the Creditors' Committee of the ability to file a request for relief with the Court, to grant a junior postpetition lien, or to obtain future use of cash collateral. Notwithstanding the foregoing, and where duly disclosed, it will not be considered "extraordinary" for the debtor to agree to repay the postpetition financing in connection with any plan; for the debtor to waive any right to prime liens granted under section 364; for a financing order to contain reasonable limitations and conditions regarding future borrowings under section 364 or cash collateral usage under section 363 (including consent of the lender, subordination of future borrowings to the priorities and liens given to the initial lender, and repayment of the initial loan with the proceeds of a subsequent borrowing); and for an order to provide that the lender has no obligation to fund certain activities of the debtor or the Committee, so long as the debtor or Committee is free to engage therein.

5. Section 506(c) waivers. Extraordinary Provisions include any waiver of the debtor's rights under section 506(c); factors to be considered in connection with any order seeking such a waiver include whether the debtor's rights are delegated to the Committee (or, if a Committee is not appointed, to any party in interest) and whether the carve-out includes

expenses under section 726(b) (see below).

6. Liens on avoidance actions. Extraordinary Provisions include the granting of liens on the debtor's claims and causes of action arising under sections 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 postpetition lien), and the proceeds thereof.

7. Carve-outs. Provisions relating to a carve-out that will be considered "extraordinary" include those that provide disparate treatment for the professionals retained by the Committee compared to professionals retained by the debtor or that do not include the fees of the U.S. Trustee, the reasonable expenses of Committee members, and reasonable fees and expenses of a trustee under section 726(b); however, reasonable allocations among such expenses can be proposed, and the lender may refuse to include in a carve-out the costs of litigation against it (but not the costs of investigating whether any claims or causes of action exist). Provisions relating to carve-outs should make clear when the carve-out takes effect (and, in this connection, 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 under the postpetition loan.

8. Termination; Default; Remedies. Extraordinary Provisions include terms that provide that the use of cash collateral will cease, or the financing agreement will default, on (i) the filing of a challenge to the lender's lien or to the lender's prepetition conduct; (ii) an order granting relief from the automatic stay (except as to material assets); (iii) conversion of the case (unless reasonable provisions are made in the carve-out or otherwise for section 726(b) expenses);

(iv) the grant of a change of venue with respect to the case or any adversary proceeding; (v)

the making of a motion by a party in interest seeking any relief (as distinct from an order granting such relief); and (vi) management changes or the departure, from the debtor, of any identified employees. Clauses providing a reasonable maturity date for the post-petition debt and for termination of the loan or default of the post-petition debt (if not repaid) on dismissal of the case or on confirmation of a plan of reorganization, or on conversion to Chapter 7 (if a carve-out for section 726(b) expenses is included), or on the appointment of a trustee or an examiner with expanded powers, will not be considered to be extraordinary. Termination of the postpetition lender's commitment to continue to advance funds after an event of default will not be considered extraordinary, but the following provisions will:

(a) failure to provide at least five business days' notice to the debtor and the Committee before the automatic stay terminates and the lender's remedies can be enforced;

(b) failure to provide at least three business days' notice before use of cash collateral ceases;

(c) any restriction on the right of the Court to reimpose the automatic stay or grant other relief for cause, with the party seeking such relief to have the burden of proof; and

(d) foreclosure remedies not provided for in the prepetition loan documentation or in applicable non-bankruptcy law.

B. INTERIM ORDERS.

An Interim Order should ordinarily provide that the Court will not be precluded from entering a Final Order containing provisions inconsistent with or contrary to the terms of the Interim Order, provided that the lender will be afforded all the benefits and protections of the Interim Order, including a DIP lender's section 364(e) protection with respect to funds advanced during the interim period.

C. FORMAL PROVISIONS OF ORDERS

1. Findings of Fact. The order should limit recitation of findings to essential facts, including the facts required under section 364 regarding efforts to obtain financing on a less onerous basis and (where required) facts sufficient to support a finding of good faith under section 364(e). Non-essential facts regarding prepetition dealings and agreements may be included under the rubric of "stipulations" between the debtor and the lender or "background." Any emergency or interim order should include a finding that immediate and irreparable loss or damage will be caused to the estate if immediate DIP financing is not obtained, and should state with respect to notice only that the hearing was held pursuant to Rule 4001(b)(2) or (c)(2), that notice was given to the particular parties who actually received notice, 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 should not incorporate by reference or refer to specific sections of a pre- or post- petition financing loan agreement or other document without a statement of the section's import. The Order should not contain any findings or provisions extraneous to the use of cash collateral or to the DIP financing.

2. Decretal Provisions. The Order should 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 the prepetition 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 and consents under amendments to the DIP loan agreement so long as the agreement as so modified is not materially different from that approved and so long as notice of all amendments are provided

in advance to any Committee, all parties requesting notice, and the U.S. Trustee and filed with the Court.

3. Conclusions of Law. The interim order should not state that the Court has examined and approved the Loan Agreement; it may say, however, that the debtor is authorized to enter into it. Normally, the Interim and Final orders are sufficient if they state that the debtor is authorized to borrow on the term and conditions of the loan or other Agreement.

4. Order to Control. The order should ordinarily state that to the extent the loan agreement differs from the order, the order will control.

5. Statutory Provisions Affected. The order should specify those sections of the Bankruptcy Code that are being relied on, and identify those sections that are being limited or abridged.

6. Conclusions re Notice. The Final Order may contain conclusions with respect to the adequacy of notice under section 364 and Rule 4001.