

**REQUESTS FOR USE OF CASH COLLATERAL OR TO OBTAIN CREDIT --
Amended [December 1, 2009]**

(a) *Contents of Motion.* The following provisions, to the extent applicable, are added to the enumerated lists of material provisions set forth in Bankruptcy Rule 4001(b)(1)(B), (c)(1)(B), and (d)(1)(B):

- (1) the amount of cash collateral the party seeks permission to use or the amount of credit the party seeks to obtain, including any committed amount or the existence of a borrowing base formula and the estimated availability under the formula;
- (2) material conditions to closing and borrowing, including budget provisions;
- (3) pricing and economic terms, including letter of credit fees, commitment fees, any other fees, and the treatment of costs and expenses of the lender, any agent for the lender, and their respective professionals;
- (4) any effect on existing liens of the granting of collateral or adequate protection provided to the lender and any priority or superpriority provisions;
- (5) any carve-outs from liens or superpriorities;
- (6) any cross-collateralization provision that elevates prepetition debt to administrative expense (or higher) status or that secures prepetition debt with liens on postpetition assets (which liens the creditor would not otherwise have by virtue of the prepetition security agreement or applicable law);
- (7) any roll-up provision which applies the proceeds of postpetition financing to pay, in whole or in part, prepetition debt or which otherwise has the effect of converting prepetition debt to postpetition debt;
- (8) any provision that would limit the Court's power or discretion in a material way, or would interfere with the exercise of the fiduciary duties, or restrict the rights and powers, of the trustee, debtor in possession, or a committee appointed under § 1102 or § 1114 of the Bankruptcy Code, or any other fiduciary of the estate, in connection with the operation, financing, use or sale of the business or property of the estate, but excluding any agreement to repay postpetition financing in connection with a plan or to waive any right to incur liens that prime or are *pari passu* with liens granted under § 364;
- (9) any limitation on the lender's obligation to fund certain activities of the trustee, debtor in possession, or a committee appointed under § 1102 or § 1114 of the Bankruptcy Code;
- (10) termination or default provisions, including events of default, any effect of termination or default on the automatic stay or the lender's ability to enforce remedies, any cross-default provision, and any terms that provide that the use of cash collateral or the availability of credit will cease on (i) the filing of a challenge to the lender's prepetition lien or the lender's prepetition claim based on the lender's prepetition conduct; (ii) entry of an order granting relief from the automatic stay other than an order granting relief from the stay with respect to material assets; (iii) the grant of a change of venue with respect to the case or any adversary proceeding; (iv) management changes or the departure, from the debtor, of any identified employees; (v) the expiration of a specified time for filing a plan; or (vi) the making of a motion by a party in interest seeking any relief (as distinct from an order granting such relief);

(11) any change-of-control provisions;

(12) any provision establishing a deadline for, or otherwise requiring, the sale of property of the estate;

(13) any provision that affects the debtor's right or ability to repay the financing in full during the course of the chapter 11 reorganization case;

(14) in jointly administered cases, terms that govern the joint liability of debtors including any provision described in subdivision (e) of this rule; and

(15) any provision for the funding of non-debtor affiliates with cash collateral or proceeds of the loan, as applicable, and the approximate amount of such funding.

(b) *Disclosure of Efforts to Obtain Financing and Good Faith.* A motion for authority to obtain credit shall describe in general terms the efforts of the trustee or debtor in possession to obtain financing, the basis on which the debtor determined that the proposed financing is on the best terms available, and material facts bearing on the issue of whether the extension of credit is being extended in good faith.

(c) *Inadequacy of Notice After Event of Default.*

(1) If the proposed order contains a provision that modifies or terminates the automatic stay or permits the lender to enforce remedies after an event of default, either the proposed order shall require at least seven days' notice to the trustee or debtor in possession, the United States Trustee and each committee appointed under § 1102 or § 1114 of the Bankruptcy Code (or the 20 largest creditors if no committee has been appointed under § 1102 of the Bankruptcy Code), before the modification or termination of the automatic stay or the enforcement of the lender's remedies, or the motion shall explain why such notice provision is not contained in the proposed order.

(2) If the proposed order contains a provision that terminates the use of cash collateral, either the proposed order shall require at least five days' notice before the use of cash collateral ceases (provided that the use of cash collateral conforms to any budget in effect) or the motion shall explain why such notice provision is not contained in the proposed order.

(d) *Carve-Outs.* Any provision in a motion or proposed order relating to a carve-out from liens or superpriorities shall disclose when a carve-out takes effect, whether it remains unaltered after payment of interim fees made before an event of default, and any effect of the carve-out on any borrowing base or borrowing availability under the postpetition loan. If a provision relating to a carve-out provides disparate treatment for the professionals retained by a committee appointed under § 1102 or § 1114 of the Bankruptcy Code, when compared with the treatment for professionals retained by the trustee or debtor in possession, or if the carve-out does not include fees payable to either the Bankruptcy Court or the United States Trustee, reasonable expenses of committee members (excluding fees and expenses of professionals employed by such committee members individually), and reasonable post-conversion fees and expenses of a chapter 7 trustee, or if a carve-out does not include the costs of investigating whether any claims or causes of action against the lender exist, there shall be disclosure thereof under subdivision (a) of this Local Rule and the motion shall contain a detailed explanation of the reasons therefor.

(e) *Joint Obligations.* In jointly-administered cases, if one or more debtors will be liable for the repayment of indebtedness for funds advanced to or for the benefit of another debtor, the

motion and the proposed order shall describe, with specificity, any provisions of the agreement or proposed order that would affect the nature and priority, if any, of any interdebtor claims that would result if a debtor were to repay debt incurred by or for the benefit of another debtor.

(f) *Investigation Period Relating to Waivers and Concessions as to Prepetition Debt.* If a motion seeks entry of an order in which the debtor stipulates, acknowledges or otherwise admits to the validity, enforceability, priority, or amount of a claim that arose before the commencement of the case, or of any lien securing the claim, either the proposed order shall include a provision that permits a committee appointed under § 1102 of the Bankruptcy Code and other parties in interest to undertake an investigation of the facts relating thereto, and proceedings relating to such determination, or the motion shall explain why the proposed order does not contain such a provision. The minimum time period for such committee or other party in interest to commence, or to file a motion to obtain authority to commence, any related proceedings as representative of the estate shall ordinarily be 60 days from the date of entry of the final order authorizing the use of cash collateral or the obtaining of credit, or such longer period as the Court orders for cause shown prior to the expiration of such period.

(g) *Content of Interim Orders.* A motion that seeks entry of an emergency or interim order before a final hearing under Bankruptcy Rule 4001(b)(2) or (c)(2) shall describe the amount and purpose of funds sought to be used or borrowed on an emergency or interim basis and shall set forth facts to support a finding that immediate or irreparable harm will be caused to the estate if immediate relief is not granted before the final hearing.

(h) *Adequacy of Budget.* If the debtor in possession or trustee will be subject to a budget under a proposed cash collateral or financing order or agreement, the motion filed under Bankruptcy Rule 4001(b), (c), or (d) shall include a statement by the trustee or debtor in possession as to whether it has reason to believe that the budget will be adequate, considering all available assets, to pay all administrative expenses due or accruing during the period covered by the financing or the budget.

(i) *Notice.* Notice of a preliminary or final hearing shall be given to the persons required by Bankruptcy 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.

(j) *Presence at Hearing.* Unless the court directs otherwise,

(1) counsel for each proposed lender, or for an agent representing such lender, shall be present at all preliminary and final hearings on the authority to obtain credit from such lender, and counsel for each entity, or for an agent of such entity, with an interest in cash collateral to be used with the entity's consent shall be present at all preliminary and final hearings on the authority to use such cash collateral; and

(2) a business representative of the trustee or debtor in possession, the proposed lender or an agent representing such lender, and any party objecting to the motion for authority to obtain credit, each with appropriate authority, must be present at, or reasonably available by telephone for, all preliminary and final hearings for the purpose of making necessary decisions with respect to the proposed financing.

(k) *Provisions of the Proposed Order.*

(1) *Findings of Fact.*

(A) A proposed order approving the use of cash collateral under § 363(c) of the Bankruptcy Code, or granting authority to obtain credit under § 364 of the Bankruptcy Code, shall limit the recitation of findings to essential facts,

including the facts required under § 364 of the Bankruptcy Code regarding efforts to obtain financing on a less onerous basis and (where required) facts sufficient to support a finding of good faith under § 364(e) of the Bankruptcy Code, and shall not include any findings extraneous to the use of cash collateral or to the financing.

(B) A proposed emergency or interim order shall include a finding that immediate and irreparable loss or damage will be caused to the estate if immediate financing is not obtained and should state with respect to notice only that the hearing was held pursuant to Bankruptcy Rule 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.

(C) A proposed final order may include factual findings as to notice and the adequacy thereof.

(D) To the extent that a proposed order incorporates by reference to, or refers to a specific section of, a prepetition or postpetition loan agreement or other document, the proposed order shall also include a statement of such section's import.

(2) *Mandatory Provisions.* The proposed order shall contain all applicable provisions included in the enumerated lists of material provisions set forth in Bankruptcy Rule 4001(b)(1)(B), (c)(1)(B), and (d)(1)(B), as supplemented by subsection (a) of this Local Rule.

(3) *Cross-Collateralization and Rollups.* A proposed order approving cross-collateralization or a rollup shall include language that reserves the right of the Court to unwind, after notice and hearing, the postpetition protection provided to the prepetition lender or the paydown of the prepetition debt, whichever is applicable, in the event that there is a timely and successful challenge to the validity, enforceability, extent, perfection, or priority of the prepetition lender's claims or liens, or a determination that the prepetition debt was undersecured as of the petition date, and the cross-collateralization or rollup unduly advantaged the lender.

(4) *Waivers, Consents or Amendments with Respect to the Loan Agreement.* A proposed order may permit the parties to enter into waivers or consents with respect to the loan agreement or amendments thereof without the need for further court approval provided that (i) the agreement as so modified is not materially different from that approved, (ii) notice of all amendments is filed with the Court, and (iii) notice of all amendments (other than those that are ministerial or technical and do not adversely affect the debtor) are provided in advance to counsel for any committee appointed under § 1102 or § 1114 of the Bankruptcy Code, all parties requesting notice, and the United States Trustee.

(5) *Conclusions of Law.* A proposed interim order may provide that the debtor is authorized to enter into the loan or other agreement, but it shall not state that the Court has examined and approved the loan or other agreement.

(6) *Order to Control.* The proposed order shall state that to the extent that a loan or other agreement differs from the order, the order shall control.

(7) *Statutory Provisions Affected.* The proposed order shall specify those provisions of the Bankruptcy Code, Bankruptcy Rules and Local Rules relied upon as authority for

granting relief, and shall identify those sections that are, to the extent permitted by law, being limited or abridged.

(8) *Conclusions of Law Regarding Notice.* A proposed final order may contain conclusions of law with respect to the adequacy of notice under § 364 of the Bankruptcy Code and Rule 4001.

Comment

This rule was amended in its entirety in 2008 to conform to the 2007 amendments to Bankruptcy Rule 4001 and to replace the procedures for requests for the use of cash collateral or to obtain credit that were governed by former General Order [M-274](#). Thus, this rule should be read in conjunction with Bankruptcy Rule 4001 as the requirements contained in this rule are meant to supplement, but not duplicate, Bankruptcy Rule 4001. This rule is not intended to fundamentally change practice under former General Order M-274, except as expressly provided.

As provided in former General Order M 274, 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, where circumstances warrant, 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, but in the usual case, only a preliminary and a final hearing will be required.

Notwithstanding the provisions of subsection (i), 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.

As suggested in former General Order M 274, prospective debtors may provide substantially complete drafts of the motion, interim order, and related financing documents to the United States Trustee in advance of a filing, on a confidential basis. Debtors are encouraged to provide drafts of financing requests, including proposed orders, to the United States Trustee as early as possible in advance of filing to provide that office with the opportunity to comment.

The hearing on a final order for use of cash collateral under § 363(c) of the Bankruptcy Code, or for authority to obtain credit under § 364 of the Bankruptcy Code will ordinarily not commence until there has been a reasonable opportunity for

the formation of a creditors committee under § 1102 of the Bankruptcy Code and either the creditors committee's appointment of counsel or reasonable opportunity to do so.

Reasonable allocations in a carve-out provision may be proposed among (i) expenses of professionals retained by committees appointed in the case, (ii) expenses of professionals retained by the debtor, (iii) fees payable to either the Bankruptcy Court or the United States Trustee, (iv) the reasonable expenses of committee members, and (v) reasonable post-conversion fees and expenses of a chapter 7 trustee, and the lender may refuse to include in a carve-out the costs of litigation or other assertions of claims against it.

As provided in former General Order M 274, non-essential facts regarding prepetition dealings and agreements may be included in an order approving the use of cash collateral or granting authority to obtain credit under a heading entitled "stipulations between the debtor and the lender" or "background."

As provided in former General Order M 274, an interim order will not ordinarily bind the Court with respect to the provisions of the final order provided that (i) the lender will be afforded all the benefits and protections of the interim order, including a lender's § 364(e) and § 363(m) protection with respect to funds advanced during the interim period, and (ii) the interim order will not bind the lender to advance funds pursuant to a final order that contains provisions contrary to or inconsistent with the interim order.

Subdivision (c)(1) of this rule was amended in 2009 to change the time period from five to seven days. The purpose of the amendment was to conform the time period in this rule to the 2009 time-related amendments to the Federal Rules of Bankruptcy Procedure. Throughout the Bankruptcy Rules, as well as the Local Bankruptcy Rules, most time periods that are shorter than 30 days were changed so that the number of days is in multiples of seven, thereby reducing the likelihood that time periods will end on a Saturday or Sunday.

The deadlines in subdivisions (c)(1) and (c)(2) of this rule were also amended in 2009 to delete the references to "business" days so that the time periods will be computed by calendar days, consistent with the 2009 amendments to Bankruptcy Rule 9006(a). The three day deadline in subdivision (c)(2) of this rule was amended in 2009 to change the time to five days to compensate for the change in the computation of time under the 2009 amendments to Bankruptcy Rule 9006(a).