

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In Re:	:	Case No.	16-50257
All Phase Steel Works, LLC, Debtor	:	Chapter	11
All Phase Steel Works, LLC, Movant	:		
v.	:		
State of Connecticut Department of Labor, Internal Revenue Service, CapCall, LLC, Corporate Service Co., as representative, Superior Capital, Respondents	:	Re: ECF No.	3

**NINTH PRELIMINARY ORDER AUTHORIZING THE DEBTOR TO USE
COLLATERAL AND CASH COLLATERAL, GRANTING ADEQUATE PROTECTION
AND SCHEDULING FURTHER HEARINGS WITH RESPECT THERETO**

UPON CONSIDERATION of the motion of All Phase Steel Works, LLC (the “Debtor”), for an order authorizing Debtor to use cash collateral (the “Motion”), and to schedule a final hearing thereon; and the Court having authority under 11 U.S.C. §§ 363 and 552 and Fed. R. Bankr. P. 4001 to authorize the Debtor to use cash collateral to avoid irreparable harm to Debtor and to grant adequate protection to such secured creditors as may be necessary to Debtor's secured creditors; and upon notice to the parties in interest and after due notice and a hearing having been held; and the Court having considered this matter herein; it is found that:

A. On February 23, 2016 (the "Petition Date"), the Debtor filed a voluntary petition for reorganization under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) in the District of Connecticut. The Debtor has retained possession

of its assets and is authorized to continue the operation and management of its business and properties as Debtor and Debtor-in-Possession, pursuant to §§1107 and 1108 of the Bankruptcy Code.

B. Consideration of the motion constitutes a core proceeding as defined in 28 U.S.C. §§ 157 (b)(2)(A) and (M) and, therefore, the Court has jurisdiction over this proceeding and the property affected hereby.

C. Debtor is a steel contractor and is engaged in the business of the fabrication and installation of steel primarily on commercial construction projects. The Debtor's offices and property are located at 480 Bunnell Street, Bridgeport, CT.

D. Secured creditor claims are as follows:

1. The IRS filed liens pre-petition on the Debtor's assets recorded at the Conn. Sec. of State's office for withholding taxes and other federal taxes owed. The IRS claims that it is owed \$895,000.00.

2. Prior to the Petition Date, the Debtor and CapCall LLC were parties to Loan and Security Agreements pursuant to which, among other things, CapCall LLC provided the Debtor with a credit facility (the "Loan Facility") secured by liens and/or security interests in substantially all of the Debtor's assets (the "Pre-Petition Collateral"). As of the Petition Date, CapCall LLC claims that it is owed \$294,067.00.

3. Prior to the Petition Date, the Debtor and Superior were parties to Loan and Security Agreements pursuant to which, among other things, Superior Capital provided the Debtor with a credit facility (the "Loan Facility") secured by liens and/or security interests in substantially all of the Debtor's assets (the "Pre-Petition Collateral"). As of the Petition Date,

Superior Capital claims that it is owed \$69,147.75.

4. Another lien is filed of record by an entity called Corporate Service Co., as representative. It cannot be determined who the agent is acting on behalf of. No other liens are recorded of record.

5. Metal Perreault Inc. claims it is secured in the amount of \$225,000.00 as to certain specific account receivables.

6. Allegheny Casualty Company ("Surety") issued surety bonds to Debtor in regard to eleven of its projects ("Bonded Projects" or "Bonded Subcontracts"). A list of these Bonds is attached hereto as Exhibit 1. Certain of the Bonded Projects are being actively completed and certain are in punch-list / close out with remaining obligations. The active Bonded Projects include:

Obligee: C.E. Floyd Company, Inc. ("Masonicare Contractor")

Project: Masonicare at Mystic, Job# 15205 ("Masonicare Project")

Subcontract: Structural Steel and Miscellaneous Metals, #15205-017

Bond No.: BOACSU0677277 ("Masonicare Bonds")

Debtor has rejected and has been terminated on the following Bonded Subcontract:

Obligee: FIP Construction, Inc. ("Hospital Contractor")

Project: Hartford Hospital Center for Education, Simulation and Innovation ("Hospital Project")

Bond No.: BOACSU0677278

The Surety claims a priority to the undisbursed contract funds from the Bonded Subcontracts in three respects:

a. The undisbursed contract funds from a bonded project is the surety's security against losses that may be incurred by the surety on that project in the form of payment bond claims for unpaid obligations to its principal's laborers, subcontractors or vendors or performance bond claims by the project owner due to the principal's failure to properly complete the project. See, e.g., Pennsylvania National Mutual Casualty Insurance Co. v. City of Pine Bluff, 354 F.3d 945 (8th Cir. 2004); Transamerica Premier Insurance Co. v. United States, 32 Fed.Cl. 308 (1994).

b. Debtor, inter alios, executed an Agreement of Indemnity in favor of the Surety under which the undisbursed contract funds from bonded projects are trust funds to be used in the first instance to pay subcontractors and vendors who provided services or materials for the particular bonded project and then for the direct overhead costs associated with that project. See, e.g., In re Poynter, 535 Fed. Appx. 479, 481-83 (6th Cir. 2013); Developers Surety and Indemnity Co. v. Bi-Tech Construction, Inc., 979 F.Supp.2d 1307, 1318 (S.D.Fla. 2013); In re Fox, 357 B.R. 770, 778 (Bankr. E.D.Ark. 2006).

c. Under certain of the Payment Bonds issued by the Surety, including the Masonicare Payment Bond, the Debtor and the Obligees agreed in favor of the Surety that all earned contract funds would be applied in the first instance to pay amounts owed to Debtors' subcontractors and vendors for materials and services provided to that Bonded Project, subject to the Obligee's right to use these funds to complete the work secured by the Surety's Performance Bond.

E. Substantially all of the Debtor's revenue is derived from contracts and receivables obtained from operating its steel construction business.

F. The Debtor has represented that it has an immediate and continuing need for the use of the pre-petition collateral and the proceeds thereof constituting "Cash Collateral" as such term is defined in 11 U.S.C. §363(a) ("Cash Collateral") in order to continue the operation of, and avoid immediate and irreparable harm to its business, and to maintain and preserve going concern value. Accordingly, without the ability to use the Pre-Petition Collateral and the Cash Collateral, the Debtor submits that it will be unable to pay ongoing management, payroll, raw material, insurance, utilities and other necessary expenses related to the continued operation of the Debtor's business, to generate cash flow, and to maintain the value of Debtor's assets. In that event, its employees will be terminated.

G. The Debtor represents that it is in the best interest of all secured creditors holding valid, perfected, enforceable liens that the use by it of the Pre-Petition Collateral and the Cash Collateral on the terms and conditions set forth herein be approved and ordered by the Court; and therefore,

Based upon the foregoing, and upon the stipulation of the parties, the representations of counsel, and the arguments presented,

IT IS THEREFORE ORDERED THAT:

1. Subject to the terms and conditions of this Order, the Debtor is authorized, pursuant to 11 U.S.C. § 363(c)(2), to collect and use the Pre-Petition Collateral including without limitation the Cash Collateral from the date of this Order through June 30, 2016 (the "Preliminary Period") to continue the usual and ordinary operations of the Debtor in the ordinary course of its business by paying those budgeted expenditures (the "Expenditures")

set forth on the budget, annexed hereto as Exhibit A (the "Budget"), provided, however, that the Expenditures shall not be used for any other purpose, except the expense of administration of the Debtor's estate or otherwise, and no amount or expenses shall be paid, transferred or expended by the Debtor, except as set forth in the Budget or except as may be due pursuant to 28 U.S.C. 1930, or by further order of this Court. The Debtor shall be allowed a 8% variance per line item for expenses and to that extent, it may transfer between line items but in no event shall the aggregate Expenditures for any Budget period exceed the total amount of Expenditures for such Budget period set forth on the Budget.

2. As adequate protection for any post-petition diminution in value of the Pre-Petition Collateral Post-Petition Collateral and the Cash Collateral arising out of the Debtor's use thereof and/or the continuance of the automatic stay, pursuant to 11 U.S.C. §§ 361, 362 and 363, The Internal Revenue Service and CapCall, LLC are granted post-petition claims against the Debtor's estate (the "Adequate Protection Claims"), which shall have priority in payment over any other indebtedness and/or obligations now in existence or incurred hereafter by the Debtor and over all administrative expenses or charges against property of the kind specified in 11 U.S.C. §§ 503(b), 507(a) and (b), subject only to the Carve-Out (as such term is defined below). As security for the Adequate Protection Claim, pursuant to 11 U.S.C. §§ 361, 362 and 363, the Debtor hereby grants to the IRS and CapCall LLC, an enforceable and perfected replacement lien and/or security interest (the "Replacement Lien") in the post-petition assets of the Debtor's estate equivalent in nature, priority and extent to the liens and/or security interests of the IRS and CapCall LLC, in the Pre-Petition Collateral and the proceeds and products thereof (the "Post-Petition Collateral"), subject to the Carve-Out. The

Replacement Lien shall be deemed valid and perfected without the necessity for the execution, delivery and filing or recordation of any further documentation otherwise required under non-bankruptcy law for the perfection of security interests and recordation of liens, with such perfection being binding upon any subsequently appointed Trustee, either in Chapter 11 or under any other Chapter of the Bankruptcy Code, and upon all creditors of the Debtor who have extended, or may hereafter extend, secured or unsecured credit to the Debtor; provided, however, that the IRS and CapCall LLC, may, in their sole discretion, file such financing statements as it may require with respect to the Replacement Lien. The Debtor shall also pay \$4,000.00 to the IRS in July as adequate protection.

3. As adequate protection for the interest of Allegheny Casualty Co., the following is Ordered for its interest in undisbursed contract funds from the Bonded Projects:

a. Debtor represents that it has limited its use of bonded contract funds received from the Bonded Projects to pay laborers, subcontractors and vendors for their post-petition labor, services and materials provided to each Project, and has used excess funds to pay the overhead costs directly attributable to the costs incurred in completing its work for that Project with the balance to the Debtor and is Ordered to continuing such use of the bonded contract funds. The Surety is afforded the right to monitor Debtor's compliance by reasonable access to the Debtor's books and records. *See In re Maxon Engineering Services, Inc.*, 332 B.R. 495 (Bankr. D.P.R. 2005). Debtor previously entered into one joint check agreement ("Joint Check Agreement") with one supplier, Bushwick Metals LLC requiring that to the extent that contract funds are owed to Debtor as a result of materials or services provided to the Masonicare Project by Bushwick Metals LLC, payment to Debtor will issue in the form of a joint check

made payable to Debtor and Bushwick Metals LLC.

b. Debtor may discharge the obligation herein to afford adequate protection to the Surety in regard to the undisbursed contract funds from the Masonicare Project to the extent of all parties' continued compliance with the Joint Check Agreement and shall enter into such other or further joint check agreements associated with contract funds owed to Debtor as a result of labor, materials or services provided to the Project by other subcontractor or vendors.

c. Notwithstanding any other provision of this Cash Collateral Order, including rights otherwise afforded herein to other secured creditors, all of the Surety's rights, claims, and priorities to undisbursed contract funds from the Bonded Projects are fully reserved and the Debtor reserves all of its rights, and claims to contract funds owed from any bonded project still in existence.

4. The Debtor shall, and is hereby authorized to, collect and deposit such Cash Collateral in a segregated DIP bank account, subject to the replacement lien granted in this Order.

5. The entry of this Order does not constitute an admission or concession by any party effected by it and all parties reserve all claims, rights and defenses. Except as otherwise specifically provided herein and under the Bankruptcy Code, nothing in this Order shall be deemed to be a waiver of any rights any party may have. The rights and obligations of the Debtor and the rights and security interests of the lien creditors arising under this Order are in addition to, and not intended as a waiver or substitution for any right, remedy, lien or security interest they previously had.

6. Regardless of the date and time that this Preliminary Order is entered by

the Clerk of the Court, the Order shall take affect and is binding upon the parties as of the Petition Date with respect to transactions on and after that time.

7. The Debtor's authority pursuant to this Order to use Cash Collateral, shall expire on the date which is the earlier of:

- a. October 31, 2016, or
- b. The date on which the Debtor fails in any material respect to

comply with the terms, conditions or provisions of this order.

8. Notwithstanding anything contained herein to the contrary, the following limited expenses of the Debtor's estate (Collectively the "Carve-Out") shall be deemed to have a lien prior in right to satisfaction from the Debtor's property generated post petition, including Cash Collateral, which lien shall be senior to the replacement liens or any other liens granted herein;

- a. the allowed administrative claims of attorneys and other professionals retained by the Debtor in this Case pursuant to Code §327 and 1103 in the aggregate amount of \$35,000.00;

- b. amounts payable to pursuant to 28 U.S.C. §1930(a)(6);
- c. any wages owed for the period covered by this Order.

9. The Debtor shall continue to keep the Collateral fully insured against all loss, peril and hazards.

10. The terms and provisions of this Order, as well as the priorities, liens, security interests and assignments created hereunder, shall continue in this or any superseding case under the Bankruptcy Code, and such liens, security interests and

assignments shall maintain their priority provided for by this Order until satisfied and discharged in full.

11. On the date this Interim Order is signed by the Court, the Debtor shall mail fax or email copies of this Interim Order to the U.S. Trustee, the Debtor's twenty largest unsecured creditors, and all parties who have requested notice in this case pursuant to Fed. R. Bankr. P. 2002.

12. Any objection to the continued use of cash collateral must be filed and served no later than October 20, 2016 at 4:00 p.m.

13. A further hearing on continued use of cash collateral shall be held on October 25, 2016 at 2:00 p.m. at the U. S. Bankruptcy Court, 915 Lafayette Boulevard Room 123, Bridgeport, Connecticut.

DATED: September 30, 2016

Julie A. Manning
Chief United States Bankruptcy Judge
District of Connecticut

EXHIBIT A

All Phase Steel Works, LLC

October

Budget

Income - Other	\$210,000.00
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	\$210,000.00
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Cost of Sales - Materials	\$8,500.00
Cost of Sales - Equipment	\$3,000.00
Cost of Sales - Subcontra	\$9,500.00
Payroll Expense	\$85,000.00
Auto Exp - Fuel	\$3,500.00
Misc / Contingency	\$5,000.00
Office & Cleaning Sup	\$500.00
Utilities Expense	\$3,000.00
Telephone / Internet	\$2,500.00
Software & Comp Expense	\$500.00
Shop Supplies	\$4,000.00
Insurance	\$21,000.00
Lease / Rental	\$3,500.00
Rent	\$8,000.00
Property Taxes	\$4,500.00
Owner Draw	\$10,000.00
IRS / Interest	\$4,000.00
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	\$176,000.00
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