

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION**

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In re:	:	Chapter 11
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Chieftain Steel, LLC, et al	:	Case No. 16-10407-jal
	:	
	:	Honorable Joan A. Lloyd
Debtors.	:	
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**SECOND AMENDED FINAL AGREED ORDER (I) AUTHORIZING DEBTOR TO
UTILIZE CASH COLLATERAL OF PREPETITION LENDER; AND (II) GRANTING
ADEQUATE PROTECTION TO PREPETITION LENDER PURSUANT TO 11 USC. §§
105, 361 AND 363**

* * * * *

THIS MATTER is before the Court upon the motion (the “Motion”), dated September 19, 2016, of Floyd Industries, LLC (the “Debtor”), the debtor and debtor in possession herein and with the agreement of the United Cumberland Bank (“United Cumberland”) and Axis Capital, Inc. (“Axis,” and together with the Debtor and United Cumberland, the “Parties,” and each a “Party”) for entry of an order authorizing the Debtor to utilize cash collateral, and to grant adequate protection and security interests pursuant to sections 105(a), 361, 362, and 363 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”), and Rule 2002, 4001, and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”); and the Court having previously entered interim Orders permitting the use of cash collateral on the terms and conditions stated therein [ECF No. 128], and having further amended that final order [ECF No. 177] ; and the Parties having negotiated the terms of the further use of cash collateral in good faith; and United Cumberland having agreed to allow the utilization of its cash collateral under the terms,

conditions and protections contained herein (this order being referred to herein as the “Order”); it has been represented to the Court by the Parties as follows:

NOW, THEREFORE, THE COURT HEREBY FINDS THAT:

A. Petition Date. On September 19, 2016 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “Chapter 11 Case”). Since the Petition Date, the Debtor has remained in possession of its property and continues to manage its business as a debtor-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

B. Jurisdiction; Venue. This Court has jurisdiction over this proceeding and the Parties and property affected hereby pursuant to 28 U.S.C. §§ 157 and 1334. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409.

C. Notice. Notice of the hearing on this Motion was provided by the Debtor to: (i) the United States Trustee; (ii) all known secured creditors of the Debtor claiming or asserting an interest in the proceeds; and (iv) all creditors and other parties in interest that have filed notices of appearance in this Chapter 11 Case pursuant to Rule 2002 of the Bankruptcy Rules.

D. Debtor’s Stipulations. In connection with the relief provided for herein, the Debtor permanently, immediately and irrevocably acknowledges, represents, stipulates and agrees that:

- (i) From time to time prior to the Petition Date, the Debtor borrowed money and received other financial accommodations from United Cumberland (the “United Cumberland Credit”). United Cumberland was granted security interests and liens on, among other things, all of the Debtor’s accounts receivable, inventory, equipment, chattel paper, general intangibles and real estate (collectively, the “United Cumberland Pre-Petition Collateral”). The obligations and indebtedness arising from the United Cumberland Pre-Petition Credit shall be referred to as the “United Cumberland Pre-Petition Indebtedness.” As of the Petition Date, the outstanding United Cumberland Pre-Petition Indebtedness was as follows:

Loan #75110	\$2,390,281.30
Loan #75441	\$753,551.15
Loan #755803	\$548,346.23

- (ii) The United Cumberland Pre-Petition Indebtedness is evidenced by various promissory notes and security agreements (the “United Cumberland Loan Documents”). Pursuant to the United Cumberland Loan Documents, United Cumberland holds, among other things, a properly filed and perfected first priority lien on the United Cumberland Pre-Petition Collateral (the “United Cumberland Pre-Petition Liens”), subject to valid, perfected, enforceable, and non-avoidable liens and security interest in the Debtor’s assets held by parties other than United

Cumberland as of the Petition Date (the “Prior Permitted Liens”), including, without limitation, any property perfected purchase money security interests.

- (iii) United Cumberland perfected its security interests and liens in and to the United Cumberland Pre-Petition Collateral by filing a certain financing statement with the Office of the Secretary of State of the Commonwealth of Kentucky, which statement has been timely continued and remains in full force and effect; and by filing title lien statements, which remain in full force and effect.
- (iv) The United Cumberland Pre-Petition Collateral constitutes “Cash Collateral” within the meaning of section 363(a) of the Bankruptcy Code.
- (v) United Cumberland is not a control person or insider of the Debtor by virtue of making decisions with respect to the Debtor’s use of Cash Collateral and/or this Order; and
- (vi) The Debtor forever and irrevocably releases, discharges, and acquits United Cumberland, and each of its respective former, current or future officers, employees, directors, agents, representatives, owners, members, partners, financial advisors, legal advisors, shareholders, managers, consultants, accountants, attorneys, affiliates, and predecessors in interest (collectively, the “Releasees”) of and from any and all claims, demands, liabilities, responsibilities, disputes, remedies, causes of action, indebtedness and obligations, rights, assertions, allegations, actions, suits, controversies, proceedings, losses, damages, injuries, attorneys’ fees, costs, expenses, or judgments of every type, whether known, unknown, asserted, unasserted, suspected, unsuspected, accrued, unaccrued, fixed, contingent, pending, or threatened including, without limitation, all legal and equitable theories of recovery, arising under common law, statute or regulation or by contract, of every nature and description, including, without limitation, (i) with respect to the United Cumberland Pre-Petition Indebtedness and/or the Debtor’s attempts to refinance the United Cumberland Pre-Petition Indebtedness, any so-called “lender liability” or equitable subordination claims or defenses, (ii) any and all claims and causes of action arising under the Bankruptcy Code, and (iii) any and all claims and causes of action regarding the validity, priority, perfection or avoidability of the liens or claims of United Cumberland, and all such liens and security interests will be deemed to be irrevocably and unconditionally valid, enforceable and perfected first priority liens on the Debtor’s property, subject to the Prior Permitted Liens.

E. Purpose and Necessity of Utilization of Cash Collateral. The Debtor desires to continue to operate its business. Vital to this goal is, among other things, the Debtor’s continued ability to use United Cumberland’s cash collateral pursuant to the terms of this Order in order to meet its post-petition obligations. It is in the best interests of the Debtor, its estate and its creditors for the Debtor to have continued access to United Cumberland’s cash collateral pursuant to the terms set forth herein. Without use of United Cumberland’s cash collateral, the Debtor could not operate. The relief authorized herein is necessary to avoid immediate and irreparable harm (within

the meaning of Bankruptcy Rule 4001(b)(2)) to the Debtor. The Debtor has demonstrated sufficient cause to grant the relief authorized herein.

F. Agreement of United Cumberland. United Cumberland is willing to permit the Debtor to use its cash collateral through and including March 1, 2017, provided that this Court, pursuant to section 361 of the Bankruptcy Code authorizes the Debtor to make adequate protection payments to United Cumberland during the term of this Order and provided that the Debtor is allowed to use United Cumberland's cash collateral only upon the terms, conditions and limitations set forth in this Order.

G. Agreement of Axis. Axis is willing to permit the Debtor to use its cash collateral, subject to paragraph 23, below.

H. Good Faith. The terms of this Order have been negotiated at arms' length with the Parties represented by experienced counsel, are fair and reasonable under the circumstances, are for reasonably equivalent value and fair consideration, and have been entered into in good faith as that term is used in the Bankruptcy Code.

I. Good Cause. Good cause has been shown for the entry of this Order. Among other things, entry of this Order will minimize further disruption of the Debtor's business, will enable the Debtor to preserve and maintain its assets and will avoid immediate and irreparable harm to, and is in the best interests of the Debtor, its creditors and its estate.

J. Immediate Entry of Order. The Debtor has requested immediate entry of this Order pursuant to Bankruptcy Rule 4001(c)(2). This Court concludes that entry of this Order is in the best interest of the Debtor's estate and creditors as its implementation will, among other things, allow for the retention of the Debtor's employees as well as the purchase of supplies and services necessary for the Debtor to sustain the operation of its existing business.

Based upon the foregoing findings, agreements, acknowledgements, stipulations, and conclusions, and upon the record made before this Court at the final hearing, and good and sufficient cause appearing therefor;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The findings contained in paragraphs A through J of this Order are incorporated herein by reference thereto.

2. United Cumberland and Axis consent to the use by the Debtor of, and the Debtor is hereby authorized to use United Cumberland's and Axis's cash collateral only upon the terms and conditions contained herein.

3. This Order shall be valid and binding on all persons and entities, and fully effective immediately upon entry notwithstanding the possible application of Bankruptcy Rules 6004(h),

7062, and 9014 or other law, rule or regulation. No obligation, payment, transfer or grant of security under this Order shall be stayed, restrained, disallowed, voidable or recoverable under the Bankruptcy Code or under any applicable law or subject to any avoidance, reduction, setoff, recoupment, offset, recharacterization, subordination (whether equitable, contractual or otherwise), counterclaims, cross-claims, defenses, disallowance, impairment or any other challenges under the Bankruptcy Code or any other applicable law or regulation by any person or entity. The Debtor is immediately authorized to utilize the cash collateral of United Cumberland and Axis, pursuant to the terms of this Order. In addition to the other terms and conditions contained herein, the Debtor's use of United Cumberland's and Axis's cash collateral is expressly conditioned upon the following:

- (a) except as otherwise provided herein or waived by United Cumberland in its sole discretion, the cash collateral may be used by the Debtor solely to pay normal trade payables, payroll, insurance premiums, taxes and utilities that are necessary to preserve and maintain the assets and business operations of the Debtor (collectively, the "Approved Operating Expenses") of its business during the period of December 31, 2016 through March 1, 2017 (the "Budget Period") set forth on the Cash Budget (defined in Paragraph 12 hereinbelow); the Debtor's use of cash collateral may not exceed the amount set forth for such type of expense in the line item on the Cash Budget unless approved by United Cumberland; the Debtor should not be permitted to use United Cumberland's cash collateral for any other expenditures, such as the purchase of fixed or capital assets, or other expenses without prior written approval of United Cumberland;
- (b) the Debtor shall timely make all adequate protection payments to United Cumberland required under the terms of this Order.
- (c) the Debtor shall maintain at United Cumberland all of its debtor-in-possession bank accounts (collectively, the "DIP Bank Accounts") and the Debtor shall deposit into the DIP Bank Accounts all proceeds of the United Cumberland Pre-Petition Collateral and the post-petition collateral.

4. In addition to the foregoing and, as adequate protection to United Cumberland for the Debtor's use of cash collateral, United Cumberland is hereby granted first priority post-petition replacement security interests and liens upon all of the post-petition property of the Debtor that is similar to the property on which it held its pre-petition liens, including, without limitation, all post-petition property of the types constituting the collateral of their pre-petition liens, all proceeds and products thereof to secure the amount of the cash collateral used by the Debtor ("Post-petition Replacement Lien"). Such security interests, liens and other rights granted to United Cumberland, shall be and are deemed to be effective, valid, perfected and enforceable as of the Petition Date without the necessity of taking any other act or filing or recording any security agreements, financing statements or any other instruments or documents and no further notice, filing, recordation or order shall be required to effect such validity, perfection and enforceability. For the avoidance of doubt, United Cumberland's first priority post-petition replacement security interests and liens shall not attach to asset types that United Cumberland did not properly perfect a security

interest on before the Petition Date, including, but not limited to, vehicles, avoidance actions under chapter 5 of the Bankruptcy Code and applicable state law, and causes of action belonging to the Debtor's bankruptcy estate. For the further avoidance of doubt, the Post-petition Replacement Lien granted to United Cumberland under this Section 4 is subject to the Prior Permitted Liens.

5. Subject to the Carve-Out and the Prior Permitted Liens, United Cumberland's post-petition liens on the post-petition collateral of the Debtor shall at all times be senior to the rights of all other persons, including, without limitation, the Debtor and any successor trustee in this case or any subsequent case under the Bankruptcy Code.

6. Subject to the Carve-Out, in the event that the adequate protection granted to United Cumberland hereunder fails to adequately protect United Cumberland's interests in the cash collateral, the United Cumberland Pre-Petition Collateral and/or the post-petition collateral, United Cumberland is hereby granted, without further order of the Court, an administrative expense claim which shall have priority of the kind specified in section 507(b) of the Bankruptcy Code over any and all administrative expenses of the kind specified in section 507(a)(1) of the Bankruptcy Code.

7. United Cumberland's consent to the Debtor's use of the cash collateral and the Debtor's authorization to use the cash collateral of United Cumberland shall terminate, unless waived by United Cumberland or immediately cured by the Debtor:

- (i) upon seven (7) business days' written notice to the Debtor in the event that the Debtor shall fail to make any payment to United Cumberland required hereunder; or
- (ii) upon fourteen (14) business days' written notice to the Debtor in the event that the Debtor breaches any non-payment term, condition or covenant set forth in this Order; or
- (iii) upon the entry of a final order dismissing this Chapter 11 Case, appointing a trustee in this Chapter 11 Case, converting this Chapter 11 Case to a case under Chapter 7 of the Bankruptcy Code or transfer of venue of this Chapter 11 Case to another district.

8. In the event of default under paragraph 7(i)-(ii) of this Order that is not cured by the Debtor, United Cumberland may file a motion for relief from the automatic stay and the Debtor shall not object to such motion be heard on shortened notice. In the event of default under paragraph 7(iii) of this Order that is not cured by the Debtor, the automatic stay shall be terminated as to United Cumberland without further order of this Court. In order to effectuate the termination of the automatic stay, United Cumberland shall be required to file an Affidavit of Default under this Order with this Court and serve it upon the Debtor, Debtor's counsel, the Office of the United States Trustee, and all other parties requesting notice in this Chapter 11 Case. The automatic stay shall be terminated immediately upon the filing of such Affidavit of Default without further order of this Court.

9. Carve-Out; Other.

(a) Payment of any amounts on account of the Post-Petition Replacement Liens, the United Cumberland Pre-Petition Indebtedness, and the United Cumberland Pre-Petition Liens, shall be subject and subordinate to payment of the Carve-Out. For purposes of this Agreed Order, the Carve-Out shall mean (i) any, fees, costs, disbursements, charges and expenses (as allowed by the Bankruptcy Court) of attorneys, accountants and other professionals of the Debtor retained in the Chapter 11 Case pursuant to Sections 327, 328, 330, 331 and 1103 of the Bankruptcy Code. The Debtor shall pay the Carve-Out as funds permit without causing an overdraft.

(b) Nothing herein shall limit any rights of United Cumberland to challenge the allowance, reasonableness or appropriateness of, or otherwise object to, any request for compensation subject to the Carve-Out, which rights are specifically preserved.

10. Cash Management Systems. The Debtor is authorized to maintain its cash management system in a manner consistent with the United Cumberland Loan Documents, this Agreed Order, and an order of this Court (if any) approving the maintenance of the Debtor's cash management system, *provided, however*, that such order is on terms and conditions acceptable to United Cumberland and to the extent that it is not inconsistent with the terms specified herein, the United Cumberland Loan Documents.

11. In addition to all reports required under the United Cumberland Loan Documents, the Debtor shall provide United Cumberland with: (i) all reports and documents made available to this Court, the United States Trustee, and any other parties in interest; (ii) all financial records requested by United Cumberland including, without limitation (x) on each Tuesday, beginning on Tuesday, October 11, 2016, a borrowing base certificate setting forth the Borrowing Base calculated as of the Friday before, setting forth information required by United Cumberland, (y) on each Tuesday, beginning on Tuesday, October 11, 2016, a three-week cash budget setting forth the Debtor's budgeted revenues and expenses, as may be amended by agreement of the parties (the "Cash Budget") and calculating the Debtor's performance as compared to the Cash Budget, and (z) balance sheets, operating statements and projections; (iii) on each Tuesday, beginning on Tuesday, October 11, 2016, a report detailing the uses of cash by the Debtor for the prior week in a form acceptable to United Cumberland; and (iv) on each Tuesday, beginning on Tuesday, October 11, 2016, an aging of all accounts receivable by customer. All budgets submitted pursuant to this paragraph shall be on a cash basis and shall separate any funds being held in trust for others, such as trust fund taxes and employee health insurance contributions.

12. Adequate Protection Payments. During the Budget Period, the Debtor shall make interest only payments to United Cumberland under Loan # 75110 and Loan # 75441. Payments of interest shall be calculated based upon the pre-Petition Date, non-default interest rates set in the applicable United Cumberland Loan Documents, which as of the Petition Date totaled \$9,250 per month. The Debtor shall further make principal payments to Cumberland under Loan # 755803 in the amount of \$3,500 per month. The Debtor shall make the adequate protection payments on loan #75110 and Loan #75441 and the principal payment on Loan #755803 on the first business day of each month thereafter. Failure to make such payments on or before such dates shall automatically be a default under this Order.

13. Borrowing Base. The Debtor shall be required to maintain a collateral base consisting of the cash collateral ("Borrowing Base") in an amount not less than \$750,000.00 and it shall automatically be a default under this Order if the sum of the Borrowing Base is less than or equal to \$750,000.00. Borrowing Base shall mean the sum of (a) 75% of Borrower's Eligible Accounts Receivable (defined below); (b) 50% of Borrower's Eligible Inventory (defined below) of finished goods valued at the lower of cost or market value. For purposes of this paragraph of the Order, (a) Eligible Accounts Receivable shall mean all accounts receivable of the Borrower except (1) those rights to payment which are greater than or equal to ninety (90) days past the first date on which the invoice for such accounts receivable was initially billed, (2) those accounts receivable from or against a debtor which has instituted bankruptcy, insolvency, reorganization, liquidation, or receivership proceedings, or against which a petition for any such proceeding has been filed and not contested within thirty (30) days thereafter, (3) those accounts receivable due from the United States Government (or any agency state or instrumentality thereof), (4) any accounts receivable which under applicable federal, state and/or local law (x) may not be assigned to United Cumberland, or (y) whose assignment to United Cumberland is restricted or limited in any way, or (z) United Cumberland may not assert or recover against its account debtor, and (5) any account receivable evidenced by a note or other instrument which has not been endorsed and delivered to United Cumberland; and (b) Eligible Inventory shall mean the Debtor's inventory excluding inventory that is older than twelve (12) months.

14. Relief from Automatic Stay. In the event of default under paragraph 7(i)-(ii) of this Order that is not cured by the Debtor, United Cumberland may file a motion for relief from the automatic stay and the Debtor shall not object to such motion be heard on shortened notice. In the event of default under paragraph 7(iii) of this Order that is not cured by the Debtor, the automatic stay shall be terminated as to United Cumberland without further order of this Court. In order to effectuate the termination of the automatic stay, United Cumberland shall be required to file an Affidavit of Default under this Order with this Court and serve it upon the Debtor, Debtor's counsel, the Office of the United States Trustee, and all other parties requesting notice in this Chapter 11 Case. The automatic stay shall be terminated immediately upon the filing of such Affidavit of Default without further order of this Court.

15. Insurance. The Debtor shall maintain adequate insurance on its assets including, general liability coverage naming United Cumberland as a lender's loss payee and the Debtor shall provide proof of such insurance within five (5) business days of entry of this Agreed Order.

16. No Modification of Liens. The liens and security interests granted to United Cumberland pursuant to this Agreed Order shall not be modified, altered, or affected in any manner except with United Cumberland's express written consent.

17. Effect of Modification, Vacation or Stay of Agreed Order. Except as otherwise provided herein, if any or all of the provisions of this Agreed Order are hereafter modified, vacated or stayed by a subsequent order of this or any other Court, such stay, modification or vacation shall not affect the validity of the secured claims of United Cumberland incurred by the use of the cash collateral of United Cumberland, the United Cumberland Pre-Petition Collateral, or the post-petition collateral pursuant to this Agreed Order; and United Cumberland shall be entitled to all

the rights, privileges and benefits, including the security interests and priorities granted herein and all rights specifically granted by the Bankruptcy Code.

18. Waiver. In consideration of the terms of this Agreed Order, the Debtor hereby irrevocably waives and is barred from asserting or exercising any right, without (a) United Cumberland prior written consent or (b) prior indefeasible payment and satisfaction in full of the United Cumberland Indebtedness, to (i) grant or impose, under section 364 of the Bankruptcy Code or otherwise, senior or equal liens on or security interests in the pre-petition or post-petition collateral of United Cumberland; or (ii) modify or affect any of the rights of United Cumberland under this Agreed Order or the United Cumberland Loan Documents.

19. No Disposition Outside Ordinary Course. No sale, lease or other disposition of United Cumberland collateral outside of the ordinary course of business (including collection of accounts receivable or any liquidation, auction or other similar sales) may be done without United Cumberland's prior written consent.

20. Access to Information. The Debtor shall permit United Cumberland and any authorized representatives designated by United Cumberland to visit and inspect any of the properties of the Debtor, to review the Debtor's financial and accounting records, and to make copies and take extracts therefrom, and to discuss the Debtor's affairs, finances and business with the Debtor's officers, consultants and accountants, at such times and as often as may be reasonably requested, subject to any applicable order of this Court. Without limiting the generality of the foregoing, the Debtor shall promptly provide United Cumberland any information or data reasonably requested to monitor the Debtor's compliance with the covenants and the other provisions of this Agreed Order, the United Cumberland Loan Documents, and the Budget; and to perform appraisals or other valuation analyses of any property of the Debtor.

21. No Extension of Maturity Date. Nothing in this Agreed Order shall commit United Cumberland to extend the maturity date of the United Cumberland Pre-Petition Indebtedness.

22. No Waiver by United Cumberland. Except to the extent otherwise provided herein, nothing contained herein shall constitute a waiver by United Cumberland of any rights, claims or privileges or interests under any agreements, documents, instruments or by virtue of any law, and nothing contained herein shall prejudice any right of United Cumberland to seek additional adequate protection, relief from the automatic stay, appointment of a trustee or examiner, conversion of this case to a case under chapter 7 of the Bankruptcy Code or to exercise any other rights afforded United Cumberland by the Bankruptcy Code or applicable non-bankruptcy law.

23. No Waiver by Axis. The entry of this Order and the granting of the Motion is not and shall not be deemed a waiver of any of Axis's rights and remedies, including, without limitation, Axis's rights to object to the entry of a final order regarding the Motion, to challenge at any time the Debtor's assertion that Axis Capital, Inc. is not entitled to adequate protection with regard to the Debtor's use of Cash Collateral and/or to move for adequate protection with regard to Cash Collateral or any of the Debtor's other assets at any later date.

24. In making decisions with respect to the Debtor's use of United Cumberland cash collateral, or in taking any other actions related to or in connection with this Agreed Order, the United Cumberland Pre-Petition Indebtedness and/or the United Cumberland Loan Documents, United Cumberland shall have no liability and shall not be deemed to be in control of the operations of the Debtor or to be acting as a "responsible person" with respect to the operation(s) and/or management of the Debtor.

AGREED AND CONSENTED TO:

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