



CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

THE DATE OF ENTRY IS ON
THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed October 14, 2016


United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE	§	
	§	
NEW PHOENIX METALS, LTD.,	§	CASE No. 16-32075-SCJ
	§	
CARL EQUIPMENT, LTD.	§	CASE No. 16-32076-SCJ
	§	
DEBTORS.	§	(JOINTLY ADMINISTERED UNDER CASE
	§	No. 16-32075-SCJ)

THIRD INTERIM ORDER FOR USE OF CASH COLLATERAL PURSUANT TO SECTION 363 OF THE BANKRUPTCY CODE AND PROVIDING ADEQUATE PROTECTION AND GRANTING LIENS AND SECURITY INTERESTS

Upon the Emergency Motion for Use of Cash Collateral (the “Motion”) pursuant to Sections 105, 361, 363 and 364 of Title 11 of the United States Bankruptcy Code (the “Bankruptcy Code”) and Federal Rule of Bankruptcy Procedure 4001, filed by New Phoenix Metals, Ltd. (“Debtor”), subject to the terms and conditions set forth herein, including the (i) grant of mortgages, security interests, liens and claims for the benefit of Branch Banking & Trust Co.

(“BB&T” or the “Secured Lender”), Post-petition which are co-extensive with its Pre-petition liens (to the extent of such liens, if any) and (ii) grant of mortgages, security interests, liens and claims in order to provide adequate protection to the Secured Lender as more fully set forth herein, and upon the proceedings held before this Court and good and sufficient cause appearing therefore,

THE COURT HEREBY FINDS:

A. On May 26, 2016 (the “Petition Date”), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor is now operating its business and managing its property as a debtor-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code. No request has been made for the appointment of a trustee or examiner and no official committee has yet been appointed.

B. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue of the Chapter 11 Case and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

C. The Debtor asserts that an immediate and critical need exists for the Debtor to obtain funds in order to continue the operation of its business. Without such funds, the Debtor will not be able to pay its direct operating expenses and obtain goods and services needed to carry on its business during this sensitive period in a manner that will avoid irreparable harm to the Debtor’s estate. At this time, the Debtor’s ability to use Cash Collateral is vital to the confidence of the Debtor’s vendors and suppliers of the goods and services, to the customers and to the preservation and maintenance of the going concern value of the Debtor’s estate. The Secured Lender does not contest the Debtor’s assertion for this interim order, but reserves all rights in the event of a contested final hearing on cash collateral.

D. The Lien Objection Deadline set forth in the Court's *Second Interim Order for Use of Cash Collateral Pursuant to Section 363 of the Bankruptcy Code and Providing Adequate Protection and Granting Liens and Security Interests* (the "Second Interim Order") filed at **docket no. 83** expired and no timely objection was filed by the Debtors (individually or together) to Secured Lender and/or BB&T Equipment Finance Corporation secured claims and any such objection is therefore barred pursuant to the terms of the Second Interim Order.

E. The Debtor has requested immediate entry of this Order pursuant to Bankruptcy Rule 4001(b)(2) and (c)(2). The permission granted herein to allow the Debtor to obtain the use of Cash Collateral financing is necessary to avoid immediate and irreparable harm to the Debtor. This Court concludes that entry of this Order is in the Debtor's best interest and its estate and creditors as its implementation will, among other things, allow for the continued operation and rehabilitation of the Debtor's existing business in the interim period.

THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the Debtor be, and hereby is, authorized to enter into all agreements pursuant to the terms of this Order necessary to allow the Debtor to use Cash Collateral subject to the protections and consideration described in this Order in the amounts and for the expenses set forth on the monthly budget attached hereto provided no event of default exists under the Order. The Debtor, without the prior written approval of the Secured Lender shall not incur expenses for any line item for an amount that exceeds the lesser of the amount for such line item in the budget and the actual expenditure for such line item. The Debtor is authorized to collect and receive all cash funds. The Debtor shall account each month to the Secured Lender for all funds received. For purposes of this Order, "proceeds" of any of the Secured Lender's collateral shall mean Proceeds (as defined in the Uniform Commercial Code) of such collateral security for all Cash Collateral permitted to be used

hereunder by the Debtor. The Secured Lenders is hereby granted valid, binding, enforceable, and perfected liens (the “Post-petition Liens”) co-extensive with the Secured Lender’s pre-petition liens in all currently owned or hereafter acquired property and assets of the Debtor, of any kind or nature, whether real or personal, tangible or intangible, wherever located, now owned or hereafter acquired or arising and all proceeds and products, including, without limitation, all accounts receivable, general intangibles, inventory, and deposit accounts coextensive with their pre-petition liens. Nothing herein shall grant a lien on, interest in or claim on Chapter 5 causes of action. Nothing herein shall prime the liens of the taxing authorities. The Debtor is permitted to pay U.S. Trustee fees incurred during this case; it is further

ORDERED that as adequate protection for the diminution in value of the interests of the Secured Lender, the Secured Lender is hereby granted replacement liens and security interests, in accordance with Bankruptcy Code Sections 361, 363, 364(c)(2), 364(e), and 552, co-extensive with its pre-petition liens; it is further

ORDERED that the replacement liens granted to the Secured Lender in this Order are automatically perfected without the need for filing of a UCC-1 financing statement with the Secretary of State’s Office or any other such act of perfection; it is further

ORDERED that all cash accounts of Debtor and all accounts receivable collections by Debtor post-petition shall be deposited in a separate cash collateral account, being Debtor’s debtor-in-possession accounts; it is further

ORDERED that as adequate protection in accordance with Section 363(e) of the Bankruptcy Code, the Debtor shall pay to BB&T and BB&T Equipment Finance Corporation on October 20, 2016 and for each month thereafter on the 20th day of the month the total of \$45,000.00 *plus* all Net Monthly Income (as defined on the Budget) up to a total payment of

\$54,448.80. The use of cash collateral permitted by this interim order shall extend to a final hearing on the Motion in the date set below, notwithstanding any extensions or continuances unless agreed to in writing by the Secured Lender. The application of the adequate protection payments is subject to further Order of this Court; it is further

ORDERED, that the approval of any line item in the attached budget shall not prejudice any party from raising any objection to such line item for any allowable basis at any final hearing on the use of cash collateral. Additionally, and without limitation, any line item contained in the budget and approved by this interim order for the interim period for legal fees of the Debtor shall not be deemed an allowance of such fees and all parties reserve all rights to object to such fees at any future application for compensation which must be filed pursuant to the bankruptcy code. Further, the inclusion of the line item for a CRO of the Debtor(s) shall not be deemed an agreement to such professional's employment nor authorization by this Order to pay any CRO; rather any payment of the CRO line item shall remain subject to 1) any order approving a CRO, 2) application to this Court for payment if a CRO is approved and 3) any objection BB&T may raise to the use of cash collateral for the purpose of paying a CRO at any final hearing on the use of cash collateral. It is further,

ORDERED, that the Debtors shall provide reasonable access to their books and records to Secured Lender, or its agents, for inspection during normal business hours and further permit Secured Lender, or its agents, to inspect and copy such records. It is further,

ORDERED that from and after the Petition Date, the proceeds of the Pre-petition Collateral and the Post-petition Collateral shall not, directly or indirectly, be used to pay expenses of the Debtor or otherwise disbursed except for those expenses and/or disbursements that are expressly permitted herein and as shown on the Debtor's Budget attached hereto as **Exhibit "1"**

plus 10% per line item provided however, that in no event shall the total budget allowable expenses exceed 5% of its current total. During the pendency of this order, the Debtor will maintain insurance on the Secured Lender's collateral and pay taxes when due. The Debtor shall promptly provide evidence of insurance which lists BB&T as loss payee as to its collateral. The automatic stay under Section 362(a) of the Bankruptcy Code shall be, and it hereby is, modified to the extent necessary to permit the Secured Lender to retrieve, collect and apply payments and proceeds in respect of the Pre-petition Collateral and Post-petition Collateral in accordance with the terms and provisions of this Order. The Debtor shall execute and deliver to the Secured Lender all such agreements, financing statements, instruments and other documents as the Secured Lender may reasonably request to evidence, confirm, validate or perfect the liens granted pursuant hereto. The Debtor shall deliver a copy of its Monthly Operating Report to the Secured Lender's counsel by the 20th day of each month for the prior month; it is further

ORDERED that, in addition to any other required disclosures and production under this Order, the Debtor shall provide to Secured Lender (through counsel) the following reports kept in the Debtor's ordinary course of business on or before the 20th day of the month for the prior month:

- The Debtor's accounts receivable aging report,
- The Debtors' income statement,
- The Debtors' bank statement(s),
- The Debtor's inventory list,

It is further,

ORDERED that this order shall not prejudice Secured Lender and/or BB&T Equipment Finance Corp. from seeking additional adequate protection from the Court. It is further,

ORDERED, that the Debtor shall reasonably cooperate and reasonably accommodate the Secured Lender with access to the Debtor's location for the purposes of inspecting collateral during normal business hours and in a manner that does not disturb the Debtor's normal operations. It is further

ORDERED that the Debtor shall not engage in any operations or sales outside of normal business terms or the normal business practice of the Debtor. It is further,

ORDERED that any use of cash collateral by the Debtors not expressly authorized by this Order is prohibited. It is further,

ORDERED that a failure by either of the Debtors (or both of them) to perform an obligation under this order (including, but not limited to, timely payment of adequate protection) shall be default under this order if not cured within 3 business days following notice to Debtors' counsel by email of such default. Upon default by the Debtor(s) authority to use cash collateral by the Debtor(s) shall immediately terminate. Time is of the essence with regard to the Debtors' obligations under this Order.

ORDERED that the provisions of this Order shall be binding upon and inure to the benefit of the Secured Lender and the Debtor. However, nothing herein shall prevent the Secured Lender from seeking any form of relief under the Bankruptcy Code. The Debtor shall, on or before October 20, 2016, serve by U. S. mail, first class postage prepaid, copies of the Motion, this Order, the proposed Final Order and a notice of the hearing (the "Final Hearing Notice") to be held on November 2, 2016, at 9:30 a.m. to consider entry of the proposed Final Order on, (a) the Office of the U. S. Trustee; (b) counsel to BB&T; (c) all creditors in this case on the Matrix and (d) all parties requesting notice in this case. Copies of the Motion, this Order and the proposed Final Order and the Final Hearing Notice shall be served upon all persons requesting service of papers

pursuant to Bankruptcy Rule 2002 by U. S. mail, first class postage prepaid, within one business day following the receipt of such request. The Final Hearing Notice shall state that any party in interest objecting to the entry of the proposed Final Order shall file written objections no later than 4:00 p.m., October 26, 2016, which objections shall be served so that the same are received on or before such date by Joyce W. Lindauer, Joyce W. Lindauer Attorney, PLLC, 12720 Hillcrest Road, Suite 625, Dallas, Texas 75230.

END OF ORDER

Submitted by:

Joyce W. Lindauer
State Bar No. 21555700
Joyce W. Lindauer Attorney, PLLC
12720 Hillcrest Road, Suite 625
Dallas, Texas 75230
Attorneys for Debtor

New Phoenix Metals, Ltd.
Case No. 16-32075-SGJ11

Monthly Budget / Forecast
(Cash Basis)

	Sep-16	Oct-16	Nov-16
	Prelim Est.	Forecast	Forecast
Revenues	<u>\$ 399,936</u>	<u>\$ 475,000</u>	<u>\$ 500,000</u>
Operating Expenses:			
Payroll, Net	55,996	40,000	40,000
Payroll Taxes	22,887	17,500	17,900
Inventory Purchases	183,206	205,000	220,000
Fuel	7,752	13,000	13,000
Utilities	3,000	4,200	4,200
Warehouse / Office Supplies & Ex	1,402	9,000	9,000
Repairs & Maintenance	11,604	20,000	20,000
Vehicle Operating Expense		300	300
Freight / Hauling-3rd Party	16,131	32,000	33,000
Equipment Rent / Lease	2,765	4,000	4,000
Insurance	12,120	13,500	13,500
Permits		500	500
Total Operating Expense	<u>316,863</u>	<u>359,000</u>	<u>375,400</u>
Cash Flow From Operations	83,073	116,000	124,600
Adequate Protection Payments:			
BB&T	45,000	45,000	45,000
Wells Fargo	25,000	13,000	13,000
Total Adequate Protection	<u>70,000</u>	<u>58,000</u>	<u>58,000</u>
Administrative Payments:			
PJ Trailers	7,500	7,500	7,500
Legal - J. Lindauer	-	3,000	3,000
CRO			12,000
Total Administrative	<u>7,500</u>	<u>10,500</u>	<u>22,500</u>
U.S. Trustee Fees	-	6,500	-
Total Reorganization Expenses	<u>77,500</u>	<u>75,000</u>	<u>80,500</u>
Net Cash Flow	<u><u>\$ 5,573</u></u>	<u><u>\$ 41,000</u></u>	<u><u>\$ 44,100</u></u>

EXHIBIT "1"