

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

CHAPTER 11

Sky-Skan Incorporated

Case Number 17-11540-BAH

Debtor

**DEBTOR’S PARTIALLY ASSENTED-TO MOTION REQUESTING
ORDER AUTHORIZING CONTINUED USE OF CASH COLLATERAL**

The debtor-in-possession, Sky-Skan Incorporated (the “Debtor”) respectfully moves pursuant to Sections 363(c)(2)(B), 105(a), 361, and 362 of title 11 of the United States Code (the “Bankruptcy Code”), and Rule 4001(b) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Local Bankruptcy Rule 4001-2, for an order authorizing the continued use of cash collateral to pay the costs and expenses incurred by the Debtor in the ordinary course of business during the period between February 3, 2018 through May 4, 2018 (the “Use Period”) or until the date on which the Court enters an order revoking the Debtor’s right to use Cash Collateral.

The Debtor’s secured creditor in its cash collateral, the Internal Revenue Service (the “IRS”) has provided its assent to the relief requested herein. It should be noted that Coastal Capital, LLC (“Coastal”) has asserted an interest in the cash collateral which the Debtor disputes¹. Coastal has not provided its assent to this Motion.

¹ Bank of America (through CT Lien Solutions) filed Financing Statement 78525 with the New York Secretary of State on August 5, 2011. It filed a Continuation Statement 718090 on February 15, 2016. **The statement lapsed on February 6, 2016.** Before BoA or Coastal filed the Continuation Statement, the five (5) or more Notices of Lien filed by IRS automatically took priority over any security interests held by BoA or Coastal. The Debtor therefore believes that Coastal is entirely unsecured. Further, the IRS Liens primed the Coastal security interests long before the Petition Date.

As shown on the budget attached as Exhibit A (the “Budget”), use of the cash collateral is necessary to operate the Debtor’s business through confirmation of a chapter 11 plan of reorganization to: (i) make payroll to Debtor’s employees essential to its continued operations; (ii) pay insurance premiums as necessary to ensure continuation of the necessary insurance coverage, (iii) pay vendors, suppliers and utilities for ongoing supplies and services; (iv) pay other ordinary and necessary expenses to prevent an immediate cessation of the business; and (v) pay the Debtor’s professionals and the fees of the United States Trustee. The Debtor does not anticipate requiring any funds beyond what it will collect and what it has in its possession.

In further support of this Motion the Debtor hereby states as follows:

I. Jurisdiction and Venue

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.
2. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(M).
3. No trustee or examiner has been appointed in the Debtor’s case and no official statutory committee has yet been appointed or designated by the U.S. Trustee.

II. The Debtor’s Need for the Use of Cash Collateral and Protection of Same

4. Without access to cash collateral generated from the collection of accounts receivable, the Debtor will be unable to pay its modest payroll, utilities and suppliers, insurance premiums, and other ordinary and necessary operating expenses. This would cause the Debtor to abruptly cease operations because without these critical supplies and services the Debtor would not be able to pay its employees and fulfill customer orders. The work in process would become a liability instead of an asset.

5. The Debtor, accordingly, requests authority to use the IRS's cash collateral as shown in the Budget at Exhibit A for the Use Period. During the Use Period, the Debtor intends to: (i) continue fulfilling orders, servicing its customers and performing all aspects of its operations; (ii) continue to make payroll and to pay its necessary suppliers, utilities, insurance premiums and service providers as shown on Exhibit A; (iii) and pay its professionals according to Exhibit A (upon approval by this Court of appropriate fee applications). As provided in the Budget, the Debtor seeks authorization to use all cash on hand plus all accounts receivable collected in the ordinary course of its business through the Use Period.

6. Allowing the Debtor to continue to use its cash collateral, and therefore, operate in the ordinary course is in the best interest of the Debtor, its employees and its customers and will preserve the value of the estate for the benefit of creditors.

7. The Budget shows, among other things, that:

a. The Debtor proposes to use \$2,528,908 (the "Maximum Use Amount") of its \$2,716,173 in revenue during the Use Period to pay costs and expenses incurred in the ordinary course of business and as otherwise described herein;

b. The Debtor will be able to pay the costs and expenses incurred in the ordinary course of business during the Use Period if it has the ability to spend the Maximum Use Amount.

c. The Debtor should have a remaining positive cash flow of \$397,247 during the Use Period. See Exhibit A.

8. The Debtor proposes and believes that the cash collateral will be adequately replaced during the Use Period such that the IRS will be in a better position by allowing this use, than it would be if there were an immediate cessation of the business.

9. The Debtor has communicated with the IRS and the IRS and the Debtor have agreed to the following terms requested by the IRS (and others) which have been incorporated in the proposed order filed herewith:

- a. The IRS is granted a continuing post-petition security interest in all assets the Debtor owned at the time the Chapter 11 was filed, or acquired subsequent to the filing of the Chapter 11 case to the same extent and priority as the liens held at the commencement of the case.
- b. The IRS shall be granted a “rollover” replacement lien, effective as of the Filing Date, on all post-petition inventory, accounts, equipment (including vehicles), cash, and cash equivalents, contracts rights, general intangibles and all other post-petition personal property of the Debtor, including proceeds and products thereof the other same extent and priority as existed as of the date of filing.
- c. The federal tax liens continue to attach to the newly arising assets and protect the secured federal tax claim to the same extent and priority as existed as of the filing date.
- d. The Debtor represents that as of the Petition Date, all of the assets were subject to the federal tax liens, the value and nature of such assets are set forth in the Debtor’s Schedules.
- e. The Internal Revenue Service, by and through its agents or representatives, shall have access to and the right to inspect the Debtor’s assets and properties during normal business hours, with at least 24 hours advance notice being given and with a right of the Debtor to propose an alternative, if required for business reasons.
- f. Upon reasonable notice, the Debtor will permit the Internal Revenue Service to inspect, review and copy any financial records of the Debtor. These records will be made available at the Debtor’s place of business.
- g. Beginning in February, 2018 the Debtor will make minimum monthly payments of \$14,053.84 to the IRS on the secured pre-petition tax debt. Payments will be made on the 15th day of each month. The first payment shall be due on February 15, 2018, and payments shall continue each month thereafter until confirmation of Debtor’s Chapter 11 Plan. Adequate Protection Payments to the Internal Revenue Service shall be made payable to the U.S. Treasury and sent to the Internal Revenue Service, P.O. Box 9502, Portsmouth, NH, 03802 Attn: Gail Irving. Payments shall be applied by the Internal Revenue Service as the Service, in its sole discretion, determines to be in its best interests.

10. The Debtor believes its limited use of cash collateral during the Use Period will permit it to maintain essential business operations, thereby preserving the value of the estate, until confirmation of a plan of reorganization.

11. Until further order of the Court, IRS's and Coastal's pre-petition liens (if any) are proposed to remain enforceable against the Debtor's post-petition assets to the same extent and amount, if any, they were enforceable pre-petition.

12. As adequate protection for any diminution occurring subsequent to the Petition Date in the value of the IRS's and Coastal's interests in cash collateral (if any), and to the extent of such diminution (the "Diminution in Value"), including without limitation such diminution in the value thereof as may be caused by the imposition of the automatic stay under section 362(a) of the Bankruptcy Code or the Debtor's use of cash collateral, the Debtor proposes to give the IRS and Coastal valid, binding, enforceable and automatically perfected liens (the "Adequate Protection Lien") on all of the Debtor's after acquired cash collateral arising post-petition to the same extent and in the same priority as such lien existed prior to the Petition Date, notwithstanding the provisions of section 552 of the Bankruptcy Code.

13. The Adequate Protection Liens shall not be subject to any lien which is avoided, which shall otherwise be preserved for the benefit of the Debtor's estate under section 551 of the Bankruptcy Code

IV. Legal Authority for Use of Cash Collateral

14. The use of cash collateral is conditioned on adequate protection of the lender in its cash collateral. Adequate protection is a flexible concept that requires a court to make decisions on a case-by-case basis. *In re Harrington & Richardson, Inc.*, 48 B.R. 431, 433 (Bankr. D. Mass, 1985).

15. The types of adequate protection available to protect a secured creditor whose cash collateral is going to be used by a debtor pursuant to §363(c)(2)(B) are enumerated in §361 of the Bankruptcy Code, as well as by case law. That section envisions adequate protection to be provided either by cash payments, replacement liens, or other relief that will result in the realization by the secured creditor of the indubitable equivalent of the secured creditor's interest in such property. *See In re: Isaacson Steel* (Bankr.D.N.H. 2013) *citing Baybank-Middlesex v. Ralar Distribs (In re Ralar Distribs., Inc.)*, 182 B.R. 81, 85 (D. Mass. 1995). In each instance, the focus of the Bankruptcy Code is on making sure that any decrease in the value of the collateral during the period involved is adequately protected.

16. Since the Debtor intends to use the cash collateral in the normal course of its business operations during the Use Period, it is reasonable to expect that the amount of cash on hand will decrease. In this case, the Debtor will continue to operate its business in the ordinary course and will undertake to obtain new contracts and continue selling goods and services as it has in the past. As such, the Debtor expects that the cash collateral it uses will be replaced by incoming revenues.

17. Pursuant to LBR 4001-2(c) the Debtor states that the proposed cash collateral order does include a proposed finding of fact that affirms that all of the assets of the Debtor were subject to the federal tax liens at the time of filing and that the value and nature of the assets are set forth in the Debtor's Schedules.

V. Waiver of Memorandum of Law

18. Based upon the legal authority cited herein and the lack of any novel issues of law, the Debtor respectfully requests that the requirement of Local Bankruptcy Rule 7102(3) be waived.

VI. No Prior Request

19. This is the Debtor's first request for continued use of cash collateral (since the initial interim order which then became final). The Debtor also has pending a request to modify the first cash collateral order.

VII. Relief Requested

WHEREFORE, the Debtor respectfully requests that the Court enter an order, substantially in the form of the proposed order filed herewith, granting the Debtor the following relief:

- a. Authority to use the cash collateral of the IRS and Costal, during the Use Period in accordance with the Budget;
- b. Such other and further relief as may be appropriate and just.

Respectfully submitted,

SKY-SKAN INCORPORATED

By its Attorney,

Dated: January 17, 2018

/s/ Peter N. Tamposi
Peter N. Tamposi, BNH 04931

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CERTIFICATE OF SERVICE

I, Peter N. Tamposi, do hereby certify that on this 17th day of January 2018 a copy of the foregoing *Debtor's Partially Assented to Motion Requesting Continued Use of Cash Collateral* with Exhibit A, the proposed order, and the contingent notice of hearing were this day forwarded to the following parties as indicated below:

Electronically via the CM/ECF System to:

Peter Antonelli on behalf of Creditor Coastal Capital, LLC
pantonelli@curranantonelli.com

Cheryl C. Deshaies on behalf of Debtor Sky-Skan Incorporated
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Niamh E. Doherty on behalf of Creditor Secretary of Labor U.S. Department of Labor
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Anne M. Edwards on behalf of Interested Party State of New Hampshire Department of Revenue Administration
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Geraldine Karonis on behalf of U.S. Trustee Office of the U.S. Trustee
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Walter L. Maroney on behalf of Creditor State of NH Department of Employment Security
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Peter N. Tamposi on behalf of Debtor Sky-Skan Incorporated
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Via Direct Email to:

Michael McCormack on behalf of the Internal Revenue Service
Michael.McCormack2@usdoj.gov

Dated: January 18, 2018

/s/ Peter N. Tamposi
Peter N. Tamposi