

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO**

In re:)	
)	
ALL-STATE FIRE PROTECTION, INC.)	Case No. 17-15844 TBM
Debtor.)	Chapter 11
)	

MOTION TO ASSUME PREMIUM FINANCE AGREEMENT, TO PAY CRITICAL VENDORS AND TO USE CASH COLLATERAL

ALL-STATE FIRE PROTECTION, INC., Debtor-in-Possession herein (“Debtor”), through its undersigned counsel, respectfully moves this Court for an Order Authorizing the Debtor to Assume a Premium Finance Agreement, to Pay certain Critical Vendors and to Use Cash Collateral, and states as follows:

1. The Debtor filed for relief under Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”) on June 23, 2017 (the “Petition Date”), and is operating as a Debtor-in-Possession. 11 U.S.C. §§1107 & 1108.
2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). The statutory basis for the relief requested herein is § 365(b) of the Bankruptcy Code and Fed. R. Bankr. P. 9019.
3. The Debtor specializes in residential and commercial installation of fire sprinkler systems. The Debtor offers in-house design, fabrication and installation for steel, copper and CPVC systems. The Debtor’s staff and crews are able to handle jobs big and small; ranging in size from 500 square foot residences to warehouses over 600,000 square feet.
4. The Debtor currently employs approximately 40 people, which depend on the staffing needs for its jobs. One of the Debtor’s customers is Shaw Construction, Inc., and its affiliates. The Debtor has two large jobs for Shaw Construction known as the Yale Street Station and Legacy Village, along with other jobs for Shaw Construction. The Debtor also has several other jobs for other customers.

The Debtor's Insurance Policies

5. Pre-petition, the Debtor obtained insurance for general liability through Gemini Insurance Company, for Pollution through Lloyd’s of London, and a general umbrella through National Union Fire Insurance Company of Pittsburgh. A copy of

the Certificate of Insurance for such policies is attached hereto as **Exhibit 1** and incorporated herein.

6. The annual premium on such policies is as follows:
 - a. Gemini Insurance Company (general liability): \$80,441.00;
 - b. Lloyd's of London (pollution): \$14002.00;
 - c. National Union Fire Insurance Company of Pittsburgh (umbrella): \$43,990.00.
7. In order to pay the above premiums, on or about December 28, 2016, the Debtor entered into a Premium Finance Agreement with IPFS Corporation ("IPFS") to finance such costs. A copy of the Premium Finance Agreement is attached hereto as **Exhibit 2** and incorporated herein. Under the terms of the Premium Finance Agreement, the Debtor was required to make 9 monthly payments of \$12,129.48. *Id.*
8. Under the terms of the Premium Finance Agreement, the Debtor granted IPFS a security interest in its insurance policies, including any dividends that may become due in connection with those policies. *Id.*
9. Such insurance is necessary for the Debtor's continued operations, including coverage in the event of any loss, coverage for secured creditor's collateral and general business insurance. Moreover, this insurance is required of the Debtor under the guidelines established by the Office of the US Trustee.
10. Post-petition, the Debtor intends to continue to make the monthly installment payments under the Premium Finance Agreement to secure insurance coverage.
11. The Debtor shall pay the cure payments in addition to regular monthly payments under Premium Finance Agreement. The Debtor's Budget for use of Cash Collateral provides for payment of these sums. *Stipulated Motion to Use Cash Collateral and for Adequate Protection, Docket No. 78, Exh. 4.*

Argument for Assumption of Premium Finance Agreement

12. Section 365(b) of the Bankruptcy Code authorizes the Debtor to assume a contract under the following relevant circumstances:
 - (a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b) (1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee-

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

13. The Premium Finance Agreement is essential to the Debtor's continued operations and the Debtor cannot operate without the insurance policies. The insurance policies provide the Debtor with adequate insurance that is a prerequisite to the Debtor's ability to operate in Colorado, confirm a plan, and reorganize. The Debtor can perform and continue to operate under the stipulated terms set forth herein.
14. The Debtor seeks approval of the assumption nunc pro tunc to June 23, 2017, the Petition Date. 11 U.S.C. §365.
15. As IPFS is extending credit to the Debtor post-petition under the Premium Finance Agreement, the Debtor also seeks approval of the Agreement under 11 U.S.C. §364(c).
16. IPFS will consent to assumption of the Premium Finance Agreement under the terms set forth herein. IPFS stipulates that pursuant to 11 U.S.C. § 365(b), the terms set

forth herein provide (a) adequate assurance that the Debtor shall promptly cure the pre-petition monetary default, and (b) adequate assurance of future performance.

17. Certain disclosures are required by Fed.R.Bankr.P. 4001 and Local Bankruptcy Rule 4001-3(a)(1)(A).
 - a. The Debtor shall grant a post-petition first priority lien to IPFS on the same collateral in the Policies including (but only to the extent permitted by applicable law): (i) all money that is or may become due under the Agreement because of a loss under the Policies that reduces unearned premiums (subject to the interest of any applicable mortgagee or loss payee); (ii) any return of premiums or unearned premiums under the Policies; and (iii) any dividends that may become due the Debtors in connection with the Policies (the "Lien").
 - b. In the event that the Debtor defaults under the terms of the Agreement post-petition, IPFS, may, in accordance with the terms of the Agreement, and without further order of the court, cancel the Policies listed in the Agreement or any amendment thereto and receive and apply the unearned or return premiums to the account of the Debtor.
 - c. In the event that returned or unearned premiums or other amounts due under the Policies are insufficient to pay the total amount owing by the Debtor to IPFS, any remaining amount owing to IPFS, including reasonable attorneys' fees and costs, shall be an allowed claim in this case with priority as an administrative expense pursuant to Section 503(b) (1) of the Bankruptcy Code.
18. The Debtor may enter into future financing arrangement with IPFS for similar financing of its insurance premiums. The Debtor seeks approval to enter into such arrangements without further Court approval with IPFS under the following terms (11 U.S.C. §§365 & 364):
 - a. Copies of the proposed financing agreement will be forwarded to counsel for the Official Committee of Unsecured Creditors (the "Committee"), and counsel to the Debtor's Senior Lenders ("Senior Lenders"); and
 - b. Unless the Debtor receives notice in writing from the Committee and/or the Senior Lenders within five (5) business days of receipt by the Committee and the Senior Lenders of the Financing Agreement, the Debtor will proceed to enter into said Financing Agreement.

Payment of a Critical Vendor

19. Pre-petition, the Debtor purchased goods and supplies from The Reliable Automatic Sprinkler Co., Inc. (“Reliable”) on a net 60 day basis. Reliable is the Debtor’s primary supplier of parts for installation into the Debtor’s projects. Reliable asserts that it is owed a total of \$841,056.94 from the Debtor for goods purchased and delivered.
20. Within the 45 days prior to the Petition Date, Reliable delivered to the Debtor goods and materials in the total amount of \$85,740.80.
21. Reliable has made a Reclamation Demand upon the Debtor for the amount of \$85,740.80. See Docket No. 32. Reliable also asserts that a portion of the Reclamation Demand is an administrative priority claim under 11 U.S.C. §503(b)(9) in the amount of \$16,923.90. *Id.*
22. The Debtor depends on obtaining supplies and materials from Reliable for its use. Reliable offers the Debtor its materials with a discount because of the large volume purchased by the Debtor and on favorable repayment terms. Other suppliers do not offer the Debtor such generous discount or payment terms.
23. Post-petition, the Debtor has obtained material from other suppliers which are more expensive and require advanced cash payment. Such purchases can create cash flow issues for the Debtor as it does not receive payment from its customers until the Debtor completes portions of its projects.
24. Post-petition, Reliable has offered to extend the Debtor the same pricing and payment terms. As a condition to agreeing to provide payment terms to the Debtor post-petition, Reliable has requested that the Debtor pay all of its Reclamation Claim as well as an additional \$54,259.20 towards past due sums. In accepting this payment, Reliable expressly reserves and does not waive the balance of its pre-petition claim or otherwise waive any other right to payment.
25. The Debtor is also working with several of its customers, including Shaw Construction, to obtain payment on jobs where Reliable’s materials were incorporated. The Debtor believes that it is owed approximately \$188,000 from Shaw Construction for Reliable’s materials on several jobs and a combined total of \$841,056.94 on all jobs. As the Debtor obtains payment from its customers, including Shaw Constructions, on projects for which Reliable is owed funds, the Debtor shall pay the respective pre- and post-petition amounts to Reliable under Colorado’s Mechanic’s Trust Fund Statute, C.R.S. §38-22-127 (2016). Such funds are not property of the Debtor or the estate, but rather funds held in trust for the benefit of subcontractors and suppliers. *Id.*
26. Reliable and Debtor have agreed to enter into a a Vendor Trade Agreement. Among other things, the terms of such Vendor Trade Agreement shall limit the account

balance for new product supplied by Reliable not to exceed \$50,000.00 at any given time. A copy of the Vendor Trade Agreement is attached hereto as **Exhibit 3** and incorporated herein. Moreover, as a condition precedent to Reliable's acceptance of a purchase order submitted by Debtor, the General Contractor on the project for which the product ordered is to be supplied, must approve the purchase order and agree to a joint check agreement. Debtor's default of the provisions of any Order of the Court approving this Motion or a default of any provision of the Vendor Trade Agreement shall release Reliable of any and all further obligations to provide payment terms for any further materials provided to the Debtor post-petition.

Argument for Use of Estate Property to Pay Pre-Petition Claims

27. Additionally, the terms of 11 U.S.C. § 363(b)(1) allows for the use of property of the estate other than in the ordinary course of business after notice and a hearing.
28. 11 U.S.C. § 105(a) states, in pertinent part that “the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”
29. Pursuant to the “Necessity of Payment” doctrine which has evolved under § 105(a), the court may authorize the payment of pre-petition claims if (i) they are necessary to the continued operation of the debtor; (ii) it is in the best interest of debtor's creditors and employees; and (iii) it is necessary for the debtor's successful reorganization. *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989); *In re Chateaugay Corp.*, 80 B.R. 279, 281 (S.D.N.Y. 1987).
30. Numerous courts have authorized a chapter 11 debtor to make payment on nonpriority general unsecured critical vendor prepetition claims where necessary to preserve or enhance the value of the debtor's estate to the benefit of all creditors. *See, e.g., In re Just for Feet, Inc.*, 242 B.R. 821 (D. Del. 1999) (authorizing payment of certain critical trade vendors); *In re Tropical Sportswear Int'l Corp.*, 320 B.R. 15 (M.D. Fla. 2005) (authorizing payment of amounts owing to certain critical vendors).
31. Pursuant to 11 U.S.C. §§363(b), 503(b) and 105(a), the Debtor seeks authority to pay the pre-petition claim of Reliable in the amount of \$140,000.00, which includes Reliable's Reclamation Claim and Administrative Priority Claim.
32. The payment of such sums to Reliable will allow the Debtor to purchase supplies on favorable terms and permit the Debtor to obtain a 60 day repayment term on such purchases subject to the terms set forth above and further set out in the Vendor Trade Agreement.

Argument for Use of Cash Collateral for Post-Petition Payments

33. The Debtor has also determined that it should also seek Court approval to use Estate property, namely the Debtor's cash and accounts receivable pursuant to 11 U.S.C. §363(b), in order to pay the post-petition premium payments to IPFS and to pay Reliable.
34. Pre-petition, in or around October of 2014, the Debtor entered into a Revolving Line of Credit with Wells Fargo Bank, N.A. in the principal amount of \$1,500,000 (the "Loan"). The Loan replaced a prior loan with Wells Fargo Bank and has been extended several times. To secure the Loan, the Debtor granted Wells Fargo Bank a lien on substantially all of its assets, excluding any purchase money financed equipment, including its accounts, accounts receivable and cash. Well Fargo Bank recorded a Financing Statement with the Colorado Secretary of State, which was continued several times, including most recently, on June 27, 2016 at Reception No. 20162057739. Copies of the Loan documents and the Financing Statement are voluminous and therefore available upon request. The Debtor will introduce such documents into evidence at a final hearing on this Motion, if necessary.
35. The Debtor understands that Wells Fargo Bank therefore asserts a lien on the Debtor's cash which the Debtor intends to use to make the post-petition premium payments to IPFS and to pay Reliable.
36. The Debtor therefore seeks authority, pursuant to 11 U.S.C. §363(b) to use its cash and accounts receiveable. Section 363(b)(1) of the Bankruptcy Code provides that "[t]he trustee, after notice and hearing may use, sell or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. §363(b)(1). In addition, section 105(a) of the Bankruptcy Code allows this Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code]" 11 U.S.C. §105(a).
37. To the extent that the Debtor's cash and accounts receivable are cash collateral, however, the Debtor submits that entry of an order authorizing the use of such assets is appropriate under the provisions of 11 U.S.C. § 363(c)(2) and the rationale articulated in *Chaussee v. Morning Star Ranch Resorts Company*, 64 B.R. 818, 825 (Bankr.D.Colo. 1986). The Debtor seeks authority to use its cash and accounts receivable during the pendency of the instant bankruptcy proceeding.
38. The Debtor's Budget for use of Cash Collateral provides for payment of these sums. *Stipulated Motion to Use Cash Collateral and for Adequate Protection*, Docket No. 78, Exh. 4. Wells Fargo Bank, N.A. has consented to the use of its Cash Collateral for these purposes.
39. 11 U.S.C. § 363(c)(2) provides that "the court, after notice and a hearing [may authorize the use of cash collateral] in accordance with the provisions of this section." The Debtor needs immediate use of its cash and accounts receivable to

operate its business and to keep its employees on the jobs. The Debtor's business depends upon uninterrupted access to funds that were held in its accounts necessary to operate, meet payroll, and fund its other operating expenses necessary to maintaining its ordinary course of business. In order to pay its necessary operating expenses, the Debtor must immediately use funds in which Wells Fargo Bank may claim a security interest. In addition, the Debtor will use its cash and accounts receivable in order to generate revenue and fund its post-petition operations over the next few months, including payment to IPFS and Reliable.

40. Similarly, the Debtor will use cash collateral to generate new business and accounts receivables during the bankruptcy case.
41. Under *Morning Star Ranch*, a debtor-in-possession may use a secured creditor's cash collateral in much the same fashion as a receiver would be permitted to use cash from operations under state law. The court reasoned that "there would be no proceeds to fight over if the property were not operated," the debtor has fiduciary obligations to its creditors to "operate the property in good fashion," and, absent bankruptcy, the secured creditor would have to pay the expenses of the receivership prior to applying monies received to the debtor's obligation. *See Id.*, 64 B.R. at 822.
42. The *Morning Star* court authorized the debtor to continue to operate in the ordinary course its business and to use funds received from such operations to "pay the ordinary and necessary expenses of operation of the property and the costs of care, preservation and maintenance which shall include the following: the costs of propane for heating, electricity, water, sewer and telephone charges; maid service to the extent contracted from non-affiliated employees; laundry expense, cleaning, upkeep, maintenance and repairs; insurance; purchase of necessary supplies; and general landscaping and groundskeeping expense." *Id.* at 823. The court also authorized the debtor to pay salaries to its managers. *See Id.*
43. Absent authorization to use the Debtor's cash and accounts receivable, the Debtor will be unable to continue its operations and to proceed with the reorganization of its debts in an orderly fashion, which could result in a significantly reduced recovery for the Debtor's estate. Alternatively, if the Debtor is authorized to use its cash and accounts receivable, the Debtor will be able to maximize the value of its estate through the continuation of the Debtor's business.
44. The Debtor asserts that its use of cash collateral is in the best interest of the Debtor, its creditors, and the estate. The Policy provides a necessary benefit to the estate because it will assist the Debtor in its continued operations and reorganization.
45. The Debtor is therefore seeks an order allowing the Debtor to use cash collateral to make the premium payments to IPFS and to pay Reliable as a Critical Vendor pursuant to 11 U.S.C. §363(b).

46. Prior to filing the Motion, the Debtor conferred with Wells Fargo Bank, N.A. and Wells Fargo Equipment Finance, who consent to the use of Cash Collateral for the payments to IPFS and Reliable.
47. The payment Reliable in the amount of \$140,000, shall be paid within 60 days following an Order approving this Motion. Such time will permit the Debtor to collect sufficient accounts receivables to fund such payment.
48. The Debtor is exploring debtor-in-possession financing with several lender to further allow the Debtor to manage its operational cash flow. To the extent the Debtor obtains such financing, the Debtor will seek approval under 11 U.S.C. §364. In such event, the Debtor will access the financing funds to also pay Reliable and IPFS.

WHEREFORE, the Debtor respectfully requests that this Court enter its Order authorizing the Debtor to assume the Premium Finance Agreement pursuant to 11 U.S.C. §365(a) and (b) under the provisions set forth herein, nunc pro tunc to June 23, 2017; authorize the Debtor to use cash collateral for the purposes of making the post-petition payments to IPFS, and to make a Critical Vendor payment to Reliable in the amount of \$140,000.00, within 60 days of the date of an Order approving this Motion, pursuant to 11 U.S.C. §§363(b), 503(b) and 105(a), as set forth above, and enter such other and further relief as the Court deems necessary.

Dated: September 15, 2017

Respectfully submitted,
BUECHLER & GARBER, LLC

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