

**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 WORKER’S COMPENSATION INSURANCE POLICY OR  
PAY A CRITICAL VENDOR, TO WAIVE POTENTIAL PREFERENCE CLAIM, 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 Worker’s Compensation Insurance Policy or Pay a Critical Vendor, to Waive certain Potential Preference Claim, 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 Workers' Compensation Policy**

5. Pre-petition, the Debtor was insured for work related injuries to its Employees under a Workers’ Compensation and Employers Liability Insurance Policy (the

"First Policy") issued by Pinnacol Assurance ("Pinnacol"). The First Policy cancelled in December 2016 because the Debtor defaulted under certain payment obligations under the First Policy. The Debtor obtained insurance from a different provider until early this month.

6. The Debtor is obligated under the First Policy for pre-petition amounts totaling \$123,720.
7. Post-petition, Pinnacol has issued a new policy (the "Second Policy") to the Debtor, subject to, among other things, payment of Pinnacol's pre-petition debt. A copy of the Second Policy is attached hereto as **Exhibit 1** and incorporated herein. The Second Policy requires a down payment of \$25,295 and eight monthly premium payments of \$25,299. On July 14, 2017, the Debtor made the down payment and Pinnacol bound the Second Policy, effective the next day, subject to the filing of this Motion by today and its approval on or within 30-days thereafter.
8. The Debtor's premium for the Second Policy is based upon its payroll and number of employees. The Debtor believes that Pinnacol arrived at its premium figure by using the Debtor's pre-petition payroll data. The Debtor however asserts that due to an employee theft and creation of fictitious employees that the figures Pinnacol used were not accurate. Pursuant to the terms and conditions of the policies and Colorado law, the Debtor may revisit its actual payroll and number of employees to determine whether the premium payments can be reduced going forward.
9. The Debtor and Pinnacol have agreed and stipulated that pursuant to 11 U.S.C. § 365(b), to the extent executory, the Debtor may assume the First Policy by curing the pre-petition default with six separate and equal payments of \$20,620 to be paid by the Debtor commencing August 15, 2017, and by the 15th day of each of the five successive months.
10. The Debtor shall pay the cure payments in addition to any other obligations of the Debtor, including in relation to the Second Policy and any other policies Pinnacol may issue in the Debtor's favor.
11. In connection with the Second Policy, the Debtor and its agents acknowledge reading and fully understanding this Motion and all First and Second Policy documents. In addition, they acknowledge:

Any applicant that is associated with canceled policies that have unpaid premiums and/or have not complied with all provisions of such canceled policies may be ineligible for a new policy. If Pinnacol Assurance identifies any canceled policies that are unresolved, a new policy will not be issued or, if issued, may, in Pinnacol Assurance's sole discretion, be canceled. An unresolved policy is one that has an outstanding balance or one in which the policyholder was not compliant with the terms of the policy.

12. Per the Debtor's Statement of Financial Affairs, pre-petition, the Debtor transferred to Pinnacol the amount of \$12,263.00 (the "Transfers"). Such amount was applied by Pinnacol to the oldest amounts owed by the Debtor.
13. In consideration for Pinnacol's accommodations and willingness to continue to provide insurance coverage, the Debtor, on behalf of itself and its estate, seeks to waive any alleged preference claims it or its estate may have in relation to the Transfers. In this regard, the Debtor has analyzed other pre-petition transfers concerning Pinnacol and believes that any alleged preference claim would have little to no chance of success in any event because of the ordinary course defense.
14. The Debtor has investigated alternative workers' compensation insurance, and has concluded that assumption of the Policy under the terms set forth herein is in the estate's best interest because no alternate insurance is available at a lower price, and changing insurers would jeopardize the Debtor's need for immediate workers' compensation insurance coverage.

**Argument for Assumption of Insurance Policy**

15. 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.

16. Pinnacol will consent to assumption of the First Policy under the terms set forth herein. Pinnacol 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. Pinnacol has issued the Second Policy notwithstanding the Debtor's payment default to enable the Debtor sufficient breathing room to meet its post-petition obligations. The Second Policy is essential to the Debtor's continued operations and the Debtor cannot operate without it. The Second Policy provides the Debtor with adequate workers' compensation 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.
18. The Debtor seeks approval of the assumption nunc pro tunc to July 15, 2017, the date the new policy was issued. 11 U.S.C. §365.

**Argument for Use of Estate Property to Pay Pre-Petition Claim**

19. Alternatively to assumption, 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.
20. 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.”
21. 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).
22. 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).

23. Here, as explained above, the Second Policy is essential to the Debtor's operations and reorganization efforts. And Pinnacol will not cause the Second Policy to remain effective unless the Debtor pays the pre-petition debt.<sup>1</sup> Pursuant to 11 U.S.C. §§363(b), 503(b) and 105(a), the Debtor seeks authority to pay the pre-petition claims of Pinnacol, failing which the Debtor risks losing insurance coverage that it absolutely requires.

#### **Cure Rights**

24. If the Debtor defaults under its payment obligations in relation to Pinnacol's pre-petition debt, the Debtor shall be afforded a 30-day notice period to cure, with such notice to be provided via e-mail to undersigned counsel. If any default is not cured within such period of time, Pinnacol may cancel the Second Policy without any further notice to the Debtor. If the Debtor defaults under its payment obligations in relation to the Second Policy, the Debtor shall be afforded a 10-day notice period to cure pursuant to Colorado law. If any default is not cured within such period of time, Pinnacol may cancel the Second Policy pursuant to Colorado law.

#### **Waiver of Potential Preference Claim**

25. In addition, in connection with such assumption, the Debtor proposes waiving any § 547 claims that it or its estate has in relation to the Transfers. To the extent that this implicates Fed. R. Bankr. P. 9019, "[t]he decision of a bankruptcy court to approve a settlement must be 'an informed one based upon an objective evaluation of developed facts.' In considering the propriety of the settlement it is appropriate for the court to consider the probable success of the underlying litigation on the merits, the possible difficulty in collection of a judgment, the complexity and expense of the litigation, and the interests of creditors in deference to their reasonable views." *In re Kopexa Realty Venture Co.*, 213 B.R. 1020, 1022 (B.A.P. 10th Cir. 1997) (citations omitted).
26. Here, the Debtor has analyzed the Transfer in relation to the Debtor's transfers outside the 90-day preference period. The Debtor believes that it could not pursue an 11 U.S.C. § 547 claim after assuming the First Policy, because doing so would violate 11 U.S.C. § 365(b), breach the First Policy, and risk Pinnacol's termination of the Second Policy, which the Debtor requires for its reorganization; similar

---

<sup>1</sup> For the avoidance of doubt, it is the Debtor that has solicited Pinnacol for a new policy, including what conditions would need to be satisfied to obtain one. Post-petition, Pinnacol did not independently contact the Debtor requesting payment on its pre-petition debt.

problems arise if the Debtor deems Pinnacol a critical vendor. The Debtor has no alternate insurance available. Further, Pinnacol has a strong ordinary course defense if the estate did pursue a § 547 demand or claim. Thus, the probability of success on the merits is small. Moreover, given the amount of money potentially at issue (\$12,263.00), it likely is not worth the expense of litigation. Also, in the interests of creditors and the estate, the Debtor requires workers' compensation insurance, which Pinnacol is currently providing, while awaiting the Court's approval of the consideration subject to this Motion.

27. A debtor-in-possession acts as a fiduciary holding the bankruptcy estate and operating the business for the benefit of its creditors and (if the value justifies) equity owners. *Sherr v. Winkler*, 552 F.2d 1367, 1374 (10th Cir. 1977). In this regard, debtors have obtained court approval to pay prepetition obligations under 11 U.S.C. § 363(b) where a sound business purpose exists for doing so. *In re Kmart Corp.*, 359 F.3d 866 (7th Cir. 2004). Therein, the 7<sup>th</sup> Circuit recognized that Section 363(b) should be interpreted "broadly", so as to provide a debtor with enough flexibility to tender payment upon certain pre-petition claims, where supported by an appropriate business justification. *Id.* at 872.

#### **Argument for Use of Cash Collateral for Post-Petition Premiums**

28. 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 pre-petition Pinnacol debt and post-petition premium payments to Pinnacol.
29. 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.
30. 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 Pinnacol, as well as the cure of the pre-petition arrears.
31. The Debtor therefore seeks authority, pursuant to 11 U.S.C. §363(b) to use its cash and accounts receivable. 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).

32. 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. The Debtor has prepared a six month budget setting forth the uses of its cash, including premium payments and cure payments to Pinnacol, as well as adequate protection payments to its secured creditors, a copy of which is attached hereto as **Exhibit 2** and incorporated herein.
33. The Debtor intends to file a separate motion for further authority to use Cash Collateral. The Debtor is in negotiations with Wells Fargo Bank.
34. 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 Pinnacol and certain other critical vendors.
35. Similarly, the Debtor will use cash collateral to generate new business and accounts receivables during the bankruptcy case.
36. 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.
37. 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.*

38. 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.
39. The Debtor asserts that its use of cash collateral is in the best interest of the Debtor, its creditors, and the estate. The Second Policy provides a necessary benefit to the estate because it will assist the Debtor in its continued operations and reorganization.
40. The Debtor is therefore seeks an order allowing the Debtor to use cash collateral to make the premium payments to Pinnacol and cure or otherwise pay the pre-petition arrears, pursuant to 11 U.S.C. §363(b).

WHEREFORE, the Debtor respectfully requests that this Court enter its Order authorizing the Debtor to assume the First Policy pursuant to 11 U.S.C. §365(a) and (b) under the provisions set forth herein, nunc pro tunc to July 15, 2017 or pay Pinnacol its pre-petition claim as a critical vendor; permit the Debtor to waive of any claims related to the Transfers; authorize the Debtor to use cash collateral for the purposes of making the pre- and post-petition payments to Pinnacol 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 July 17, 2017.

Respectfully submitted,  
BUECHLER & GARBER, LLC

*/s/ Kenneth J. Buechler*

---

Kenneth J. Buechler, #30906  
999 18<sup>th</sup> Street, Suite 1230-S  
Denver, Colorado 80202  
Tel: 720-381-0045  
Fax: 720-381-0382  
[ken@BandGlawoffice.com](mailto:ken@BandGlawoffice.com)  
ATTORNEYS FOR THE DEBTOR