

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

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

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**STIPULATED MOTION TO USE CASH COLLATERAL AND FOR ADEQUATE  
PROTECTION**

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ALL-STATE FIRE PROTECTION, INC., Debtor-in-Possession herein (“Debtor”), through its counsel, and Wells Fargo Bank, N.A. (“Wells Fargo”), and Wells Fargo Equipment Finance, Inc. (“WFEF”), through their counsel, respectfully move this Court for an Order Authorizing the Debtor to Use Cash Collateral and providing adequate protection to Wells Fargo and WFEF, and states as follows:

**Background**

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.

**Pre-Petition Loans**

*A. Wells Fargo Bank, N.A.*

5. Pre-petition, in or around October of 2014, the Debtor entered into a Revolving Line of Credit with Wells Fargo in the principal amount of \$1,500,000 (the “Loan”). The Loan replaced a prior loan with Wells Fargo and has been extended several times. Copies of the Loan and the extensions are collectively attached as **Exhibit 1** and incorporated herein.
6. To secure the Loan, the Debtor granted Wells Fargo a lien on substantially all of its assets, including its accounts, accounts receivable and cash, as more specifically set forth in the Financing Statement filed 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 Financing Statements are collectively attached hereto as **Exhibit 2** and incorporated herein.
7. The Debtor understands that Wells Fargo therefore asserts a lien on the Debtor’s cash and cash equivalents which the Debtor intends to use to, among other things, fund its operations, make the post-petition premium payments to its worker’s compensation insurance provider, Pinnacol Assurance, as well as the cure of the pre-petition arrears to Pinnacol Assurance.
8. Wells Fargo also asserts that it also has a perfected security interest in the furniture, fixtures, equipment, accounts receivable, cash, general intangibles, etc., of the Debtor (the “Bank Collateral”).
9. Pre-petition, the Debtor’s cash was maintained at Wells Fargo (the “Operating Account”). The Debtor’s Operating Account funds and any remaining checks, credit card receipts and cash are collectively referred to as the “Operating Funds.”
10. As of the Petition Date, according to information provided to the Debtor by Wells Fargo, the principal balance owed on the Loan was \$1,200,000.00.
11. Post-petition, the Debtor opened up a debtor-in-possession bank account at Bank of the West (the “DIP Account”). The Debtor will deposit all post-petition receipts into the DIP Account and pay all expenses through this account.

*B. Wells Fargo Equipment Finance*

12. On or about September 22, 2015, the Debtor executed a Single Sided Lease Agreement -\$1 Purchase Option (the “Lease”) with WFEF for the lease of a New 2015 Nissan PF80YLP Forklift (the “Equipment”). A copy of the Lease is attached hereto as **Exhibit 3** and incorporated herein. WFEF asserts that the present balance

owed on the Lease is \$30,540.40.

13. Under the terms of the Lease, the Debtor is required to make monthly payments of \$792. At the end of the Lease, the Debtor may purchase the Equipment for \$1. WFEF recorded a Financing Statement with the Colorado Secretary of State on October 28, 2015 at Reception No. 20152098816. *See Exh. 3, pp. 4-5.* WFEF therefore asserts a lien on the Equipment.
14. The Debtor asserts that the Lease is a disguised secured transaction such that the Lease is not a true lease under C.R.S. §4-2.5-101, *et seq.* *See Colorado Leasing Corp. v. Borquez*, 738 P.2d 377 (Colo. App. 1986).

### **Relief Requested**

15. In the event some or all of the Operating Funds, the Bank Collateral and the Equipment (collectively the “Cash Collateral”) are cash collateral, the Debtor submits that entry of an order authorizing the use of the Cash Collateral 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). 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 seeks authority to use the Cash Collateral during the pendency of the instant bankruptcy proceeding.
16. The Debtor therefore seeks authority, pursuant to 11 U.S.C. §363(b) to use its Cash Collateral. 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).
17. 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. The Debtor will use cash collateral to generate new business and accounts receivables during the bankruptcy case.
18. Similarly, the Debtor requires ongoing use of the Cash Collateral to maintain its operations and perform work for its customers. Such uses include using its shop equipment to fabricate pipe, using its tools and site equipment to perform installation and testing, and its vehicles to provide transportation of employees and materials to the job site.

19. The Debtor proposes to use the Cash Collateral in substantial accordance with the Budget as set forth in **Exhibit 4**, which is attached hereto and incorporated herein by reference.
20. To the extent Wells Fargo and WFEF (the “Secured Lenders”) are properly perfected secured creditors, they are entitled, pursuant to Bankruptcy Code sections 361, 363(c)(2) and 363(e), to adequate protection of their interests in the pre-petition collateral, including the Operating Funds, the Bank Collateral, and Equipment, in an amount equal to the aggregate post-petition diminution in value of the pre-petition collateral, including without limitation, any such diminution resulting from the sale, lease or use by the Debtor (or other decline in value) of the pre-petition collateral and the imposition of the automatic stay pursuant to Bankruptcy Code section 362 (such diminution in value, an “Adequate Protection Obligation”). The Adequate Protection Obligations shall commence August 1, 2017 and be due on the first of each month thereafter for the term of this Order. The Adequate Protection Obligations are as follows:
  - a. Wells Fargo: \$7,050 per month;
  - b. WFEF: \$792 per month;
21. Adequate Protection. As further adequate protection, the Debtor proposes to grant the Secured Lenders the following claims, liens, rights and benefits:
  - a. *Section 507(b) Claim*. The Adequate Protection Obligations due to the Secured Lenders shall constitute a superpriority claim against the Debtor as provided in Bankruptcy Code section 507(b), with priority in payment over any and all unsecured claims and administrative expense claims against the Debtor, now existing or hereafter arising, of the kinds specified or ordered pursuant to any provision of the Bankruptcy Code, including without limitation, sections 105, 326, 328, 330, 331, 503(b), 506(c), 507(a), 507(b), 726, 1113 or 1114, and shall at all times be senior to the rights of the Debtor, and any successor trustee or any creditor, in the Chapter 11 Case or any subsequent proceeding, including without limitation a Chapter 7 proceeding, under the Bankruptcy Code (the “First Lien 507(b) Claim”), subject and subordinate only to the Carve Out (as defined in paragraph 6 below). Payment of the Adequate Protection Obligations shall commence on the first day of the first month following the entry of this Order.
  - b. *Replacement Lien*. To the extent that any of the Secured Lenders have a properly perfected pre-petition lien on the Cash Collateral, the Debtor consents to a replacement lien on all post-petition Cash Collateral in order for the Debtor to continue to operate to the extent that there is a decrease in value of any Secured Lender’s interest in the Cash Collateral in the same

extent and priority that existed on the Petition Date. The Secured Lenders are hereby authorized, but not required, to file or record financing statements, intellectual property filings, mortgages, depository account control agreements, notices of lien or similar instruments in any jurisdiction in order to validate and perfect the liens and security interests granted to them hereunder. Whether or not the Secured Lenders shall, in their respective sole discretion, choose to file such financing statements, intellectual property filings, mortgages, notices of lien or similar instruments, such liens and security interests shall be deemed valid, perfected, allowed, enforceable, non-avoidable and not subject to challenge, dispute or subordination as of the date of entry of a Final Order approving this Motion. If the Secured Lenders determine to file or execute any financing statements, agreements, notice of liens or similar instruments, the Debtor will cooperate and assist in any such execution and/or filings as reasonably requested by the Secured Lenders, and the automatic stay shall be modified to allow such filings.

22. Carve Out. Subject to Court approval, certain expenditures shall be allowed to be paid from Cash Collateral (the “Carve Out”). The “Carve Out” shall include the following expenses: (i) all statutory fees required to be paid by the Debtor to the Clerk of the Bankruptcy Court and to the Office of the U.S. Trustee under section 1930(a) of title 28 of the United States Code (irrespective of whether the Carve Out Notice (as defined below in this paragraph) has been delivered); (ii) the disbursements set forth in the Budget for “Professional Fees” to the extent accrued during the period covered by the Budget and remaining unpaid upon termination of the use of Cash Collateral under this Order; and, (iii) (A) the Professional Fees allowed by this Court, and (B) fees and expenses incurred by a trustee under section 726(b) of the Bankruptcy Code; provided that the Carve Out shall not be available to pay any Professional Fees unless allowed this Court and payable under Bankruptcy Code sections 328, 330 and 331.
23. Covenants. The Debtor shall:
  - a. Only use Cash Collateral consistent with the Budget;
  - b. Maintain and retain in good repair all Cash Collateral in which the Secured Lenders claim an interest;
  - c. Not pay any pre-petition debts or obligations of the Debtor or its estate without further order of the Court;
  - d. Not grant any other post-petition liens to any other party without the consent of the Secured Lenders or an order of the Court on property that is Cash Collateral.
24. Termination. The Debtor’s use of Cash Collateral shall terminate on the earlier of:
  - a. the Debtor’s failure to make any of the Adequate Protection Obligations or

- b. otherwise cure such payments after 7 days written notice;
  - b. this Court's appointment of a chapter 11 trustee or examiner;
  - c. conversion of the Debtor's chapter 11 case to a chapter 7 case;
  - d. the Debtor's failure to comply with the requirements set forth in the Order approving this Motion;
  - e. a material adverse change in the Debtor's financial condition or business operations; or
  - f. six (6) months from the date of the Court's Order approving this Motion.
25. The Debtor shall also provide the Secured Lenders and other creditors with reasonable access to its books, records and physical premises, and shall timely supply the Secured Creditors with copies of its Schedules, Statements of Financial Affairs, and Monthly Operating Reports contemporaneously with the filing of same. If Debtor fails to provide the information set forth above, any creditor may deliver via Email, in care of the Debtor's legal counsel (with copies to counsel for the other parties to this Order), a default notice, identifying any alleged reporting deficiency. Thereafter, the Debtor shall have three business days to cure such alleged reporting default. If the Debtor fails to timely cure such reporting default, the Debtor's authority to use Cash Collateral shall cease.
26. Certain disclosures are required in this Motion under Local Bankruptcy Rule 4001-3(a)(1)(A):
- a. Paragraph 3 of the proposed order provides the Debtor continued authorization to use Cash Collateral consistent with the terms of its Final Budget (**Exhibit 4**), including payment of ordinary expense, employee payroll obligations, general corporate purposes and administrative costs and expenses, including the US Trustee fees.
  - b. Paragraphs 4 and 5 of the proposed order provide for monthly adequate protection payments to each of the secured creditors, as required by 11 U.S.C. §§361 and 363, as follows:
    - i. To Wells Fargo: \$7,050.00;
    - ii. To WFEF: \$792.00.
  - c. Paragraph 5 of the proposed order provide for replacement liens for the secured creditors on the Debtor's assets to the same extent and priority as they existed pre-petition. as required by 11 U.S.C. §§361 and 363.
  - d. Paragraph 7 of the proposed order imposes certain covenants on the Debtor, specifically that the Debtor will:
    - i. Only use Cash Collateral consistent with the Budget presented at the hearing;
    - ii. Maintain and retain in good repair all Cash Collateral in which the Secured Lenders claim an interest;
    - iii. Not pay any pre-petition debts or obligations of the Debtor or its estate without further order of the Court;

- iv. Not grant any other post-petition liens to any other party without the consent of the Secured Lenders or an order of the Court on property that is Cash Collateral.
  - e. Paragraph 8 of the proposed order provides for termination of the Debtor's authorization to use cash collateral on the following terms and conditions:
    - i. the Debtor's failure to make any of the Adequate Protection Obligations or otherwise cure such payments after 7 days written notice;
    - ii. this Court's appointment of a chapter 11 trustee or examiner;
    - iii. conversion of the Debtor's chapter 11 case to a chapter 7 case;
    - iv. the Debtor's failure to comply with the requirements set forth in the Order;
    - v. a material adverse change in the Debtor's financial condition or business operations; or
    - vi. six (6) months from the date of the Order.
27. Under *Morning Star Ranch, supra*, 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.
28. 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.*
29. Absent authorization to use the Debtor's Cash Collateral, 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.
30. The interests of Wells Fargo and WFEF in protecting any interest it may have in the Cash Collateral are outweighed by strong public policies favoring continuation of jobs, preservation of going concern values, and rehabilitation of distressed debtors. *See H.R. Rep. 834, 103<sup>rd</sup> Cong., 2nd Sess. 27 to 29 (Oct. 4, 1994); 140 Cong. Rec. H10768 (Oct. 4, 1994).*



- 31. Approval of the Debtor's use of the Cash Collateral in accordance with this Motion is in the best interest of the Debtor, its creditors, and the estate as it will allow the Debtor to maintain its ongoing business operations, generate revenue, and provide the Debtor with an opportunity to propose a meaningful plan of reorganization.
- 32. All creditors, including Wells Fargo and WFEF, will be best served by allowing the uninterrupted and continued operations of the Debtor. The Court may fashion an order allowing the use of the Cash Collateral permitting the Debtor's continued operations without prejudicing Wells Fargo or WFEF. *Id.*

WHEREFORE, for the reasons set forth herein, the Debtor, Wells Fargo and WFEF respectfully requests that the Court enter an Order Authorizing the Debtor to Use Cash Collateral on the terms set forth herein and grant such other relief as deemed appropriate.

Respectfully submitted July 31, 2017.

<p>BUECHLER &amp; GARBER, LLC</p> <p><i>/s/ Kenneth J. Buechler</i></p> <hr/> <p>Kenneth J. Buechler, #30906 999 18<sup>th</sup> Street, Suite 1230-S Denver, Colorado 80202 Tel: 720-381-0045 Fax: 720-381-0382 <a href="mailto:ken@BandGlawoffice.com">ken@BandGlawoffice.com</a></p>	<p>COAN, PAYTON &amp; PAYNE, LLC</p> <p><i>/s/ Robert D. Lantz</i></p> <hr/> <p>Robert D. Lantz, #30825 999 18th Street, Suite S1500 Denver, Colorado 80202 Phone: (303) 861-8888 Fax: (970) 232-9927 E-mail: <a href="mailto:rlantz@cp2law.com">rlantz@cp2law.com</a></p>
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