

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

In re:

Capitol Supply, Inc.,

Chapter 11

Debtor.

Case No.: 17-21544-EPK

DEBTOR'S EXPEDITED MOTION FOR AUTHORITY TO USE CASH COLLATERAL PURSUANT TO 11 U.S.C. § 363 AND FINAL HEARING

**** Expedited Hearing Requested Pursuant to Local Rule 9013-1(F), (G)****

Basis for Expedited Relief

The Debtor will suffer immediate and irreparable harm if it is not authorized to use cash collateral to operate its business. Absent such authorization, the Debtor will not be able to retain key personnel, and otherwise maintain and protect its business. Therefore, the Debtor respectfully requests that this motion be set for hearing on or before October 19, 2017.

Debtor-in-possession, Capitol Supply, Inc. (the "Debtor"), by and through its undersigned proposed counsel, hereby files this *Expedited Motion for Authority to Use Cash Collateral Pursuant to 11 U.S.C. § 363 and Final Hearing* (the "Motion") and in support thereof, respectfully states as follows:

BACKGROUND

1. On September 20, 2017, the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the "Petition Date"). Pursuant to Bankruptcy Code sections 1107(a) and 1108, the Debtor is operating its business and managing its affairs as a debtor in possession. As of the date hereof, no trustee, examiner, or statutory committee has been appointed in this chapter 11 case.

2. The Debtor is in the business of providing office and technology products to the United States Government, and businesses.

3. The Debtor's business operations are located at 851 Broken Sound Parkway, Suite 280 Boca Raton, FL 33487. As of the Petition Date, the Debtor has *inter alia* \$481,517.05 in net sale proceeds from the sale of real property located at NW 124th Avenue, Coral Springs, Florida 33065 (the "Sale Proceeds").

4. The Debtor's secured creditor is Bank of America, N.A. (the "Bank") with whom it entered into a \$2,000,000 term loan agreement in September 2013, and \$2,000,000 line of credit in July 2014. The Debtor estimates that the Bank will assert a secured claim against the Debtor in the amount of \$2,000,000, and will assert a security interest certain cash of the Debtor.

5. The Debtor's proposed expenses for a 30-day period are set forth in the budget (the "Budget") attached hereto as **EXHIBIT A**. The Debtor proposes to use the cash collateral in accordance with the terms of the Budget. The Debtor also requests that it be authorized: i) to exceed any line item on the Budget by an amount equal to ten (10%) percent of each such line item; or ii) to exceed any line item by more than ten (10%) percent so long as the total of all amounts in excess of all line items for the Budget do not exceed ten (10%) percent in the aggregate of the total Budget.

6. As set forth in the Budget, the Debtor requires the use of cash collateral to, among other things, pay the Debtor's employees that are critical to the Debtor's ability to reorganize and fund all necessary operating expenses of the Debtor's business.

7. The Debtor proposes to provide the Bank with a one-time adequate protection payment in the amount of \$200,000 (the "Adequate Protection Payment") from the Sale Proceeds (the "Adequate Protection Payment") to hold in trust pending the earlier of the entry of either (a) a final and non-appealable final order approving the Debtor's use of cash collateral (the "Final Order") or (b) a final and non-appealable order authorizing the amendment and novation to Office Depot, Inc. of the Debtor's contract DTFAC-16-D-00008 with the Federal Aviation

Administration (the “Novation Order”), as contemplated in the *Order Granting Debtor’s Expedited Motion For Order Authorizing The Debtor To (A) Perform Under Interim Agreement With Office Depot Permitting Office Depot To Fulfill Purchase Orders Under The Debtor’s Contract; And (B) Establish And Maintain Segregated Debtor In Possession Account For This Purpose* [ECF No. 32]. The Debtor further proposes that upon the earlier of the entry of either the Final Order or the Novation Order, counsel for the Bank shall provide the Adequate Protection Payment to the Bank, and such amount shall be applied to the principal of the indebtedness owed by the Debtor to the Bank.

8. Upon entry of a final order approving the Adequate Protection Payment, the Bank has agreed to waive any and all claims, interests and encumbrances it has, or may have, whether known or unknown, with respect to the remainder of the Sale Proceeds in the amount of \$281,517.05 (the “Remaining Proceeds”); provided, however, that the Bank does not waive any right to a pro rata distribution of the Remaining Proceeds on account of any allowed unsecured claim that the Bank may have. Further, upon the entry of a final order approving the Adequate Protection Payment, the Bank has agreed to consent to the Debtor’s sale of its interest in an agreement with the Federal Aviation Administration to Office Depot, Inc. A copy of such agreement is attached to the *Debtor’s Expedited Motion for Order Authorizing the Debtor to (a) Perform Under Interim Agreement with Office Depot Permitting Office Depot to Fulfill Purchase Orders Under the Debtor’s Contract; and (b) Establish and Maintain Segregated Debtor in Possession Account for this Purpose* [ECF No. 24].

9. The Debtor believes that the relief sought in the Motion should be approved because the agreed upon terms set forth herein and in the proposed order attached hereto as **EXHIBIT B**: i) resolves what would otherwise be a contested request to use cash collateral, ii) clears the way for the Debtor to seek entry of the Novation Order without objection, which

contemplated novation would provide for a significant payment to the Bank and reduction of its claim, iii) avoids an adversary to determine the validity, priority or extent of the Bank's lien with respect to the Sale Proceeds, and iv) reduces the Bank's claim by the amount of the Adequate Protection Payment.

10. Through this Motion, the Debtor seeks the entry of an Order, substantially in the same form as the proposed order attached hereto as Exhibit B, which has been agreed to by the Bank, providing the following relief: i) approving the use cash collateral pursuant to the terms of the Budget and additional terms described herein, ii) approving the Adequate Protection Payment, iii) granting the Bank the replacement liens as described herein, and iv) granting the Debtor such other and further relief as is just and proper.

RELIEF REQUESTED AND BASIS THEREFOR

11. The Debtor's use of property of its estate is governed by section 363, which provides in pertinent part that:

If the business of the debtor is authorized to be operated under section . . . 1108 . . . of this title and unless the court orders otherwise, the [debtor] may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

11 U.S.C. § 363(c)(1). A debtor in possession has all of the rights and powers of a trustee with respect to property of the estate, including the right to use property of the estate in compliance with § 363. *See* 11 U.S.C. § 1107(a).

12. When a Chapter 11 debtor in possession is authorized to operate its business, it may use property of estate in the ordinary course of business, but is prohibited from using cash collateral absent consent of the secured creditor or court authorization. *In re Kahn*, 86 B.R. 506 (Bankr. W.D. Mich. 1988).

13. “Cash collateral” is defined by the Bankruptcy Code as, “cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest” 11 U.S.C. § 363(a). Any cash collateral generated by the Debtor may constitute the cash collateral of the alleged secured creditors.¹

APPLICABLE AUTHORITY FOR RELIEF REQUESTED

A. The Court Should Enter an Order Authorizing the Continued Use of Cash Collateral Because the Debtor is Providing the Bank with Adequate Protection.

17. The Bankruptcy Code does not explicitly define “adequate protection” but does provide a non-exclusive list of the means by which a debtor may provide adequate protection, including “other relief” resulting in the “indubitable equivalent” of the secured creditors’ interest in such property. *See* 11 U.S.C. § 361; *see In re Potvin Lumber Company, Inc.*, 24 B.R. 54 (Bankr. D. Vt. 1982) (ordering that the debtor could use cash collateral, and finding that the bank was adequately protected because the total value of the debtor’s personal property exceeded the bank’s indebtedness); *see also In re Coventry Commons Associates*, 149 B.R. 109 (Bankr. E.D. Mich. 1992); *In re Resolution Trust Company v. Swedeland Development Group, Inc. (In re Swedeland Development Group, Inc.)*, 16 F.3d 552, 564 (3d Cir. 1994).

18. Adequate protection is to be determined on a case-by-case factual analysis. *See Mbank Dallas, N.A. v. O’Connor (In re O’Connor)*, 808 F.2d 1393, 1396 (10th Cir. 1987); *In re Martin*, 761 F.2d 472 (8th Cir. 1985); *see also* S. Rep. No. 95-989, 95th Cong., 2d Sess. 54 (1978). For example, in *O’Connor*, the court held that “[i]n order to encourage the Debtors’ efforts in the formative period prior to the proposal of a reorganization, the court must be flexible in applying the adequate protection standard.” *O’Connor*, 808 F.2d at 1396. (citations

¹ The Debtor reserves the right to challenge the validity, priority and extent of any alleged secured creditors’ liens against the Debtor’s assets.

omitted). *See also In re Quality Interiors, Inc.*, 127 BR. 391 (Bankr. N.D. Ohio 1991) (holding that the granting of a replacement lien provided adequate protection).

19. Adequate protection is meant to ensure that the secured creditors receive the value for which it originally bargained pre-bankruptcy. *Swedeland Dev. Group., Inc.*, 16 F.3d 552, 564 (3d Cir. 1994) (citing *In re O'Connor*, 808 F.2d 393, 1396–97 (10th Cir. 1987)). Courts have noted that the essence of adequate protection is the assurance of the maintenance and continued responsibility of the lien value during the interim between the filing and the confirmation. *In re Arriens*, 25 B.R. 79, 81 (Bankr. D. or. 1982). The focus of the requirement is to protect secured creditors from diminution in value during the use period. *See In Re Kain*, 86 B.R. 506, 513 (Bankr. W.D. Mich. 1988); *In re Becker Indus. Corp.*, 58 B.R. 725, 736 (Bankr. S.D.N.Y. 1986); *In re Ledgmere Land Corp.*, 116 B.R. 338, 343 (Bankr. D. Mass. 1990).

20. Adequate protection provided to the Bank includes the Debtor's anticipated cash flow positive position, the Adequate Protection Payment, and a replacement lien against the property of the Debtor for any use of cash collateral, with such liens having the same seniority and entitled to the same level of priority as the priority of the Bank's liens against the Debtor's property that existed prior to the Petition Date; provided that, however, under no circumstances shall the Bank have a lien on any causes of action arising under 11 U.S.C. § 542 *et seq.*, 547, 548, 549, 550, 551.

21. The Debtor's requested use of cash collateral and the protections afforded to the Bank herein are reasonable, appropriate, and sufficient to satisfy the legal standard of "adequate protection" and will serve to maintain the value of the Bank's alleged collateral.

B. The Use of Cash Collateral Will Preserve the Debtor's Going Concern Value, Which will Inure to the Benefit of the Bank and Other Creditors.

22. The continued operation of the Debtor's business will preserve its going concern value, enable the Debtor to capitalize on that value through a reorganization strategy, and

ultimately facilitate the Debtor's ability to confirm a chapter 11 plan. However, if the Debtor is not allowed to use cash collateral, it will be unable to operate.

23. The Debtor will use the cash collateral during the interim cash collateral period to fund operating expenses in order to maintain its business.

24. It is well established that a bankruptcy court, where possible, should resolve issues in favor of preserving the business of the debtor as a going concern.

A debtor, attempting to reorganize a business under Chapter 11, clearly has a compelling need to use "cash collateral" in its efforts to rebuild. Without the availability of cash to meet daily operating expenses such as rent, payroll, utilities, etc., the congressional policy favoring rehabilitation over economic failure would be frustrated.

In re George Ruggiere Chrysler-Plymouth, Inc., 727 F.2d 1017, 1019 (11th Cir. 1984).

25. Accordingly, courts authorize the use of cash collateral to enhance or preserve the debtor's going concern value. For example, in *In re Stein*, 19 B.R. 458 (Bankr. E.D. Pa. 1982), the court allowed a debtor to use cash collateral where the secured party was undersecured, finding that the use of cash collateral was necessary to the debtors' continued operations and the creditor's secured position can only be enhanced by the continued operation of the debtor's business. *Id.* at 460; *see also Federal Nat. Mort. v. Dacon Bolingbrook Assos.*, 153 B.R. 204, 214 (N.D. Ill. 1993) (security interest protected to extent debtor reinvested rents in operation and maintenance of the property); *In re Constable Plaza Assoc.*, 125 B.R. 98, 105 (Bankr. S.D.N.Y. 1991) (debtor's reinvestment of rents to maintain and operate office building will serve to preserve or enhance the value of the building which, in turn, will protect the collateral covered by [the] mortgage); *In re Dynaco Corp.*, 162 B.R. 389, 395-96 (Bankr. D. N.H. 1983) (finding that the alternative to the debtor's use of cash collateral, termination of its business, would doom reorganization and any chance to maximize value for all creditors); *In re Karl A. Neise, Inc.*, 156 B.R. 600, 602 (Bankr. S.D. Fla. 1981) (marginally secured creditor adequately protected by lien

on postpetition property acquired by debtor, debtors can use cash collateral in the normal operation of their business).

26. If the Debtor cannot use cash collateral, it will be forced to cease operations, which will severely disrupt the Debtor's entire operations. By contrast, granting authority will allow the Debtor's to maintain operations and preserve the going concern value of its business which will inure to the benefit of any secured creditors and all other creditors.

27. Courts in this district have granted relief similar to the relief sought in the Motion in other recent chapter 11 cases. *See, e.g., In re Touse, Inc.*, No. 08-10928, Docket No. 113 (Bankr. S.D. Fla. Jan. 31, 2008); *see also In re All American Semiconductor, Inc.*, No. 07-12963 (Bankr. S.D. Fla. May 21, 2007) (authorizing the use of cash collateral in accordance with the terms of the DIP credit documents and the approved budget for DIP financing); *In re ITG Vegas, Inc.*, No. 06-16350, Docket No. 20 (Bankr. S.D. Fla. Dec. 7, 2006); *In re Gemini Cargo Logistics, Inc.*, No. 06-10870 (Bankr. S.D. Fla. Apr. 10, 2006).

28. The Debtor believes that use of cash collateral pursuant to the terms and conditions set forth above is fair and reasonable and adequately protects the Bank. The combination of: i) the Debtor's ability to preserve the going concern value of the business with the use of cash collateral, ii) providing the Bank with the Adequate Protection Payment, iii) the Debtor's anticipated cash flow positive position, and iv) providing the Bank with the replacement liens set forth herein adequately protects its alleged secured position under section 361(2). For the reasons stated herein, the Court's approval of the Debtor's use of cash collateral is proper.

29. The Debtor believes that the approval of the Motion is in the best interests of the Debtor, creditors and the estate because it will enable the Debtor to: i) continue the orderly operation of its business and avoid an immediate total shutdown of operations; ii) meet its

obligations for payment of employees, necessary ordinary course expenditures, and other operating expenses; and iii) make payments authorized under other orders entered by this Court, thereby avoiding immediate and irreparable harm to the Debtor's estate.

WHEREFORE, the Debtor respectfully requests that this Court enter an order substantially in the same form as the proposed order attached hereto as Exhibit B: i) granting the Motion; ii) authorizing the Debtor's use of cash collateral in accordance with the attached Budget and the terms set forth herein for a period of thirty (30) days from the date the Court grants the Motion; iii) granting the replacement liens set forth above in connection with the use thereof as set forth herein; iv) approving the payment of the Adequate Protection Payment, v) scheduling a final hearing; and vi) granting the Debtor such other and further relief as is just and proper.

Respectfully submitted,

SHRAIBERG, LANDAU & PAGE P.A.
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By: /s/ Bradley S. Shraiberg
Bradley S. Shraiberg
Florida Bar. No. 121622
Bernice C. Lee
Florida Bar No. 0073535

ATTORNEY CERTIFICATION

I HEREBY CERTIFY that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this Court set forth in Local Rule 2090-1(A).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via Notice of Electronic Filing this 18th day of October, 2017.

/s/ Bradley S. Shraiberg
Bradley S. Shraiberg

EXHIBIT A

	30- days	
INCOME:	\$	-
Pending Credit Card Sales		(\$105,000.00)
Future Recivables		(\$95,000.00)
COSTS:		
COGS for Pending CC sales	\$	89,259.00
Deposit for Sales shipping in furture months	\$	75,000.00
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Rent-PA	\$	4,129.16
Rent-FL	\$	4,000.00
Payroll	\$	54,000.00
Website	\$	800.00
Office supplies-FL	\$	1,000.00
Utilities-PA	\$	1,400.00
Utilities-FL	\$	1,000.00
Verizon-PA	\$	615.00
new phones PA	\$	1,222.72
Equipment rental	\$	654.49
Sales taxes	\$	1,200.00
Bank Fees	\$	150.00
Moving expenses-FL	\$	7,500.00
IT services	\$	12,000.00
Mastraco Ent - Intl	\$	1,500.00
GSA-IFF fee	\$	1,700.00
Accounting Fees	\$	1,000.00
Officer's Salary (2)	\$	27,000.00
United State's Trustee's Fees	\$	-
Total	\$	<u>85,130.37</u>

rent for October
 rent for October
 PA/FL staff plus temps
 website fee for October
 phone setup and service for October
 PA office internet
 printer leases
 misc state sales taxes
 truck rental, manpower
 Est invoice from Fox Computing to move phones and servers
 professional fees
 quarterly payment due 10/25/17
 Estimated

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

In re:

Capitol Supply, Inc.,

Chapter 11

Debtor.

Case No.: 17-21544-EPK

**ORDER GRANTING DEBTOR'S *EXPEDITED* MOTION FOR AUTHORITY TO USE
CASH COLLATERAL PURSUANT TO 11 U.S.C. § 363 AND FINAL
HEARING AND SCHEDULING FINAL HEARING**

THIS MATTER came before the Court for hearing on October ____, 2017 upon Capitol Supply, Inc.'s (the "Debtor") *Expedited Motion for Authority to Use Cash Collateral Pursuant to 11 U.S.C. § 363 and Final Hearing* (the "Motion") [ECF No. ____]. The Court, having considered the Motion, the argument of counsel, and the record in this case, hereby

ORDERS AND ADJUDGES as follows:

1. The Motion is **GRANTED** on an interim basis subject to a final hearing.
2. Use of Cash Collateral. The Debtor shall be entitled to use cash collateral to pay all ordinary and necessary expenses in the ordinary course of its business for the purposes contained in the budget attached hereto as **EXHIBIT A** (the "Budget") for a period of thirty days. The Debtor is also authorized: i) to exceed any line item on the Budget by an amount equal to ten (10%) percent of each such line item; or ii) to exceed any line item by more than ten (10%) percent so long as the total of all amounts in excess of all line items for the Budget do not exceed ten (10%) percent in the aggregate of the total Budget.
3. Adequate Protection. As adequate protection for the Debtor's use of cash collateral, the Debtor shall provide to counsel for Bank of America, N.A. (the "Bank") \$200,000 from the net proceeds from the sale of real property located at NW 124th Avenue, Coral Springs, Florida 33065 (the "Adequate Protection Payment") to hold in trust pending the earlier of the entry of either (a) a final and non-appealable final order approving the Debtor's use of cash collateral (the "Final Order") or (b) a final and non-appealable order authorizing the amendment and novation to Office Depot of the Debtor's contract DTFAC-16-D-00008 with the Federal Aviation Administration (the "Novation Order"), as contemplated in the *Order Granting Debtor's Expedited Motion For Order Authorizing The Debtor To (A) Perform Under Interim Agreement With Office Depot Permitting Office Depot To Fulfill Purchase Orders Under The Debtor's Contract; And (B) Establish And Maintain Segregated Debtor In Possession Account For This Purpose* [ECF No. 32]. Upon the earlier of the entry of either the Final Order of the Novation Order, counsel for the Bank shall provide the Adequate Protection Payment to the

Bank, and such amount shall be applied to the principal of the indebtedness owed by the Debtor to the Bank.

4. Replacement Liens. Notwithstanding the provisions of section 552(a) of the Bankruptcy Code, and in addition to the security interests preserved by Section 552(b) of the Bankruptcy Code, the Debtor grants in favor of the Bank, as security for all indebtedness that is owed by the Debtor to the Bank, under the secured documentation, but only to the extent that the Bank's cash collateral is used by the Debtor, a post-petition security interest and lien in, to and against any and all assets of the Debtor, to the same extent and priority that the Bank held a properly perfected pre-petition security interest in such assets; provided that, however, under no circumstances shall the Bank have a lien on any causes of action arising under 11 U.S.C. § 542 *et seq.*, 547, 548, 549, 550, 551.

5. Remaining Sale Proceeds are Free and Clear. Upon the entry of a final order approving the Adequate Protection Payment, the Bank agrees to waive any and all claims, interests and encumbrances it has, or may have, whether known or unknown, with respect to the remainder of the net proceeds from the sale of real property located at NW 124th Avenue, Coral Springs, Florida 33065, in the amount of \$281,517.05 (the "Remaining Proceeds"); provided, however, that the Bank does not waive any right to a pro rata distribution of the Remaining Proceeds on account of any allowed unsecured claim that the Bank may have.

6. Consent to Sale of FAA Contract. Upon the entry of a final order approving the Adequate Protection Payment, the Bank shall consent to the Debtor's sale of its interest in an agreement with the Federal Aviation Administration to Office Depot, Inc. A copy of such agreement is attached to the *Debtor's Expedited Motion for Order Authorizing the Debtor to (a) Perform Under Interim Agreement with Office Depot Permitting Office Depot to Fulfill Purchase*

Orders Under the Debtor's Contract; and (b) Establish and Maintain Segregated Debtor in Possession Account for this Purpose [ECF No. 24].

7. Final Hearing. This Court shall hold a final hearing on cash collateral on _____, **2017** at ____:____.m. at the at 1515 North Flagler Drive, 8th Floor, Courtroom B, West Palm Beach, FL 33401 (the "Final Hearing").

8. Duration. The use of cash collateral provisions in this Order shall remain in effect until the Final Hearing, or until otherwise ordered by the Court.

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Submitted by:

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Copy to: Bernice C. Lee, Esq., 2385 N.W. Executive Center Dr., Suite 300, Boca Raton, Florida 33431. [Attorney Lee is directed to serve a copy of this Order upon all interested parties.]