

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

IN RE:)	
)	
SOUTHERN REDI-MIX)	Chapter 11
CORPORATION,)	
)	Case No. 17-13790-FJB
Debtor .)	
)	

**SECOND MOTION BY DEBTOR FOR CONTINUED AUTHORIZATION OF (1) USE
OF CASH COLLATERAL, (2) THE GRANTING OF REPLACEMENT LIENS, AND (3)
ADDITIONAL RELIEF**

Pursuant to Sections 105 and 363 of Title 11 of the United States Code, Federal Rules of Bankruptcy Procedure 2002, 4001 and 9014 and MLBR 4001-2, SOUTHERN REDI-MIX CORPORATION, the above-captioned debtor and debtor-in-possession in this proceeding (the “Debtor”), hereby moves this Honorable Court for entry of an order authorizing the further use of cash collateral within the meaning of Section 363 of the Bankruptcy Code generated by receipts, sales, and operations (hereinafter “Cash Collateral”) to maintain the value of the property in order to reorganize. Pursuant to this motion, the Debtor respectfully requests the entry of an order:

- (1) Authorizing the continued use of Cash Collateral in the ordinary course of business through December 31, 2017 in accordance with the previously approved Supplemental Budget (Docket No. 59);
- (2) The granting of replacement liens to those remaining creditors¹ asserting liens on the Debtors’ Cash Collateral: (1) to the same extent, priority and

¹ This Court has already authorized the granting of replacement liens to first priority creditor Mechanic Cooperative Bank on a final basis and authorized the granting of replacement liens to

validity of such liens that existed as of the Petition Date (as defined below), (2) to be recognized only to the extent of any diminution in the value of the creditor's prepetition collateral arising from the Debtors' use of Cash Collateral, (3) on the same types on the same types of collateral that the creditors had valid liens on as of the Petition Date;

- (3) The entry of a final order authorizing the continued use of Cash Collateral after hearing on or before December 31, 2017.

I. Factual Background

A. Debtor's Business and Background

1. The Debtor is a concrete manufacturing and sales corporation located in Marshfield, Massachusetts. The business operates under the name "Southern Redi-Mix". The corporation has been in continuous operations since its founding in 1986.

2. The Debtor leases premises in Marshfield, which contains approximately three (3) acres of improved land with buildings and a concrete manufacturing plant. The Debtor has approximately 80 years left on the lease and a level rent payment of \$1.00/annually. In 2012 additional yard space was leased for \$5,000 per month with a 60 month term. This lease expired in July 2017 and the Debtor remains as a holdover tenant on a use and occupancy basis.

3. In February 2010, Gregory Keelan ("Keelan") and Henry Stout ("Stout") formed an equal partnership, Northern Yankee, LLC ("Northern Yankee"). Northern Yankee acquired 100% of the Debtor. The purpose was to continue to operate the business and lease the premises.

second priority creditor Commercial Credit Group on an interim basis with a hearing for final authorization scheduled for November 28, 2017.

4. In February 2012, Gilbert Lopes (“Lopes”) of Taunton, Massachusetts, acquired Stout’s ownership and in 2013, together with Keelan, formed Bristol Yankee, LLC in order to acquire McCabe Sand and Gravel in Taunton, MA (“McCabe Sand”).

5. The Debtor and McCabe Sand integrated business operations with the sales efforts pushed toward the McCabe Sand facility at the behest of Lopes. Lopes controlled all financial reporting during the partnership period and fired all the Debtor’s salesman, without replacement, leaving the Debtor’s facility without sales representation in the trade. These actions made the Debtor reliant on McCabe Sand for operational support.

10. In or around June 2015, Lopes formed a new entity, Redi-Mix Services (“Redi-Mix Svcs”), which holds all the assets of McCabe Sand. Keelan, the Debtor and Northern Yankee have no equity interest in Redi-Mix Svcs.

11. In July 2015, Keelan and Lopes agreed to separate the existing business operations with each owning one business. Keelan became the owner of the Debtor and Lopes became the owner of McCabe Sand (i.e. Redi Mix Svcs).

12. As part of the partnership termination, the Debtor *inter alia* (1) would pay Lopes approximately \$100,000 +/-, from July 2015 through December 2015; (2) would be responsible for the MCB loan; (3) and would pay Lopes approximately \$450,000 payable in installments of \$3,000/week. This agreement was not beneficial to the Debtor or its creditors and is not fair or equitable. This agreement has resulted in the uses of its cash exceeding available sources and precipitating, along with other events, this chapter 11 filing.

14. Due to the lack of cash flow, and pressure from various lenders, it became increasingly difficult for Debtor to operate.

15. Additionally, MCB commenced proceedings against the Debtor and Keelan which sought, *inter alia*, to prevent the Debtor from meeting its payroll obligations or funding further operations and requested the issuance of an after hours capias and the incarceration of Keelan until MCB's claim was paid in full.

16. Because nonpayment of wages when due would drastically increase the Debtor's liabilities and the cessation of all business operations would irreparably harm the Debtor's Estate to the detriment of all creditors, MCB's aggressive prosecution of its claim contributed to Debtor's filing of its bankruptcy petition.

17. Debtor currently has approximately 13 employees on the Petition Date.

B. Debtor's Bankruptcy Filing and Procedural History

18. On October 12, 2017 (the "Petition Date") the Debtor filed a voluntary for relief under Chapter 11 of the United States Bankruptcy Code (the "Code") in the United States Bankruptcy Court for the District of Massachusetts (the "Court").

19. The Debtor continues to operate as a debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

20. On October 12, 2017, the Debtor filed an Expedited Motion for Authorization of (1) Use of Cash Collateral, (2) The Granting of Replacement Liens, (3) Scheduling a Hearing on the Further Use of Cash Collateral, and (4) Additional Relief (hereinafter the "First Cash Collateral Motion"). See Docket No. 5.

21. The only replacement liens offered by and through the First Cash Collateral Motion related to MCB, which held the first priority secured interest in Debtor's Cash Collateral.

22. The First Cash Collateral Motion included a budget with projected cash collections and expenses through the end of November, 2017, which budget proposed a monthly

payment to MCB in the amount of \$1,906. The budget also proposed a monthly payment to CCGI in the amount of \$4,620.21. The budget did not propose payments to any other creditors secured in Debtor's Cash Collateral at that time.

23. The First Cash Collateral Motion was heard on an emergency basis on October 13, 2017, along with other "first day" motions, and was allowed on an interim basis with the Debtor to thereafter file an amended budget. A further hearing on Debtor's First Cash Collateral Motion was scheduled for November 9, 2017 and notice of same was served upon all parties in interest. Docket Nos. 20, 37, 40, 44.

24. The Debtor filed an amended budget on October 23, 2017 (the "Amended Budget"), which repeated the proposed monthly payment to MCB in the amount of \$1,906, proposed a Week 6 payment to CCGI in the amount of \$8,500, and did not propose payments to any other creditors secured in Debtor's Cash Collateral at that time. See Docket No. 41.

25. On October 16, 2017, secured creditor Lehigh Cement Company objected to Debtor's First Cash Collateral Motion on the grounds that Debtor's proposed use of Cash Collateral did not provide Lehigh with a replacement lien.

26. On November 3, 2017, the Debtor filed a motion to approve a stipulation by and between itself and CCGI, which stipulation resolved CCGI's anticipated objections to Debtor's First Cash Collateral Motion. See Docket No. 51. Instead of attaching the Amended Budget, however, the proposed stipulation incorrectly contained the original budget that was filed on October 12. Id.

27. On November 8, 2017, CCGI filed its objection to Debtor's First Cash Collateral Motion on the grounds that the Amended Budget had not been docketed with the proposed stipulation. See Docket No. 57.

28. On November 8, 2017, the Debtor filed a supplemental budget (the “Supplemental Budget”) with respect to its First Cash Collateral Motion and its proposed stipulation with CCGI. See Docket No. 59.

29. The Supplemental Budget included a budget with Week One, Two, and Three actual cash collections and expenses, along with projected cash collections and expenses through the end of December, 2017. Id. The Supplemental Budget repeated its proposed monthly payment to MCB in the amount of \$1,906. Id. The Supplemental Budget repeated its proposed Week Six payment to CCGI in the amount of \$8,500, but added additional payments of \$8,500 to CCGI for Week 8 and Week 10. Id.

30. After further hearing on Debtor’s First Cash Collateral Motion, the Court approved Debtor’s First Cash Collateral Motion on a final basis, and approved the proposed payments to CCGI on an interim basis pending further hearing on the proposed stipulation. See Docket Nos. 66, 67. On November 17, 2017, the proposed stipulation between the Debtor and CCGI was amended, see Docket No. 97, but still maintains the previously proposed payment amounts and schedule. Id. The further hearing on approval of the stipulation with CCGI is scheduled for November 28, 2017 at 11:00 A.M. See Docket No. 85.

31. Nothing within this Motion is intended to alter or amend the terms of the Orders and Stipulations already filed and/or entered relating to MCB and CCGI described above, but this Motion includes summaries of MCB and CCGI’s claims, collateral, and terms of adequate protection for context as the Debtor now seeks to provide certain adequate protection to those remaining creditors with an alleged interest in its Cash Collateral, on the terms set forth below.

C. Debtor's Cash Collateral and Related Equity.

32. As of the Petition Date, the Debtor's possessed approximately \$27,632 in cash or cash equivalents maintained in its checking account. See Docket No. 56, Schedule A/B.
31. As of the Petition Date, the Debtor's accounts receivables totaled approximately \$341,000. Id.
32. As identified below, several creditors secured in Debtor's Cash Collateral are also secured in Debtor's other assets, including its inventory, equipment, and leasehold interest.
33. As of the Petition Date, the Debtor had approximately \$159,000 in inventory. Id.
34. As of the Petition Date, the Debtor had approximately \$23,423 in office furniture, fixtures, and equipment. Id.
35. As identified on its Schedules, the Debtor possess a large amount of machinery, vehicles and equipment and asserts that, considered as a group there is an approximate 50% loan to value ratio in such equipment.
36. More specifically and as identified on its Schedules, the value of Debtor's machinery, vehicles and equipment totals approximately \$1,598,000. Claims of first lienholders against this equipment total approximately \$844,700, resulting in approximately \$753,000 of equity remaining for the Debtor's Estate and those junior secured creditors whose security extends to such assets, as identified below. Cf. Docket No. 56, Schedule A/B and D.
37. The Debtor has been in discussions and negotiations with the first lienholders of various vehicles and pieces of equipment, identifying equipment that is unnecessary

- for the Debtor's continued operations and reorganization, and negotiating the sale or abandonment of unnecessary equipment while preserving the Debtor's interest in the remaining equity, if any, for the benefit of the estate and all creditors.
38. The Debtor continues to operate its business post-petition and has generated post-petition products and accounts receivable, the value of which fluctuates daily.
39. Through the week of November 6, 2017, however, the value of Debtor's outstanding receivables was substantially similar to the value on the receivables on the Petition Date, having declined an insignificant amount (approximately 3.9%, or approximately \$13,000).
40. The Debtor's Schedules also identify potentially contingent unliquidated claims against four of its secured creditors, specifically MCB, and the three "merchant creditors", Forward Financing, LLC, Libertas Funding, and Capital Stack, LLC, the value of which is uncertain at this time.

CLAIMS ALLEGEDLY SECURED AGAINST CASH COLLATERAL

1. Mechanics Cooperative Bank (MCB):

41. In or around, August 14, 2012, the Debtor executed and delivered to MCB a certain Commercial "Demand" Promissory Note and Security Agreement in the original principal amount of \$170,000.00 (hereinafter "the Secured Note").
42. MCB claims a first-priority security interest in all of Debtor's Cash Collateral and inventory, and a blanket junior lien in all of Debtor's vehicles and equipment.
43. MCB perfected its security interest in the collateral by recording a certain UCC-1 Financing Statement on August 21, 2012 (hereinafter "First Lien") recorded with the Massachusetts Secretary of State's Office (hereinafter "MASOS").

44. As of this date there remains approximately \$156,000 due and owing. Debtor reserves the right to object to the validity, extent and priority all claims and amounts due to MCB, but has entered into a stipulation with MCB that is currently pending court approval, see Docket Nos. 63, 87 88, and substantially conforms to the Court's final authorization of Debtor's First Cash Collateral Motion.

2. Commercial Credit Group, Inc. (CCGI)

45. In or about April, 2013, the Debtor obtained pre-petition financing from CCGI; executed and entered into the following instruments, documents and agreements with CCGI; and granted CCGI pre-petition liens and security interests in the Debtor's assets as follows:

- (i) The Debtor granted CCGI a security interest in the particular items of equipment financed by CCGI as well as a security interest in all of the Debtor's assets including all accounts, accounts receivable, chattel paper, contract rights, documents, equipment, fixtures, general intangibles, goods, instruments, inventory, and other property in which the Debtor has an interest. In connection with the foregoing, CCGI filed financing statements with the Office of the Massachusetts Secretary of State on April 30, 2013 (No. 201303630950); May 7, 2013 (No. 201303795190) and November 28, 2014 (No. 201416210470) describing all such assets of the Debtor.
- (ii) On November 20, 2015, the Debtor executed in favor of CCGI a Negotiable Promissory Note in the stated amount of \$368,190.00 (the "First Note"). As security for payment of the First Note, the Debtor and CCGI also entered into a Security Agreement, dated November 20, 2015, pursuant to which the Debtor

granted CCGI a security interest in all of the Debtor's assets including ten specifically identified vehicles and items of equipment described on Schedule A to said Security Agreement. In addition to the previously filed financing statements described above, CCGI arranged for its lien to be noted on the titles of certain titled vehicles and CCGI filed a further financing statement with the Office of the Massachusetts Secretary of State on, November 20, 2015, describing said vehicles and equipment (No. 201524235480).

46. Also, on November 20, 2015, the Debtor executed in favor of CCGI a Negotiable Promissory Note in the stated amount of \$253,020.00 (the "Second Note"). As security for payment of the Second Note, the Debtor and CCGI entered into a Security Agreement, dated November 20, 2015, pursuant to which the Debtor granted CCGI a security interest in all of the Debtor's assets including five specifically identified vehicles described in Schedule A to the Security Agreement. In addition to the previously filed financing statements described above, CCGI arranged for its lien to be noted on the titles of certain titled vehicles and CCGI filed a further financing statement with the Office of the Massachusetts Secretary of State on November 24, 2015 describing said vehicles (No. 201524314220).

47. CCGI asserts a perfected first priority security interest in the specific vehicles and equipment and a second priority interest in all of the other assets of the Debtor described in the Security Agreement securing the First Notes and the Second Note, including Debtor's Cash Collateral.

48. CCGI claims the outstanding balance due and owing under the First Note totals \$263,654.17 and the outstanding balance due and owing under the Second Note totals

\$173,550.31. The Debtor and CCGI have complied with the provisions of MLBR 4001-2(d) and stipulated to the validity, extent, and priority of CCGI's lien, which stipulation is currently pending court approval. See Docket Nos. 51, 97.

3. Corporation Service Company, as Representative:

49. On or about February 2, 2016, Corporation Service Company, as Representative, filed a UCC-1 financing statement with the Office of the Secretary of State of Massachusetts, thereby allegedly perfecting its interests in all of the Debtor's assets, including its Cash Collateral.

50. The Debtor is unaware who Corporation Service Company is a representative of, what debt their UCC purports to relate, or the amount of such debt.

51. Accordingly, for the purposes of this Motion Debtor will treat such claim as a third priority secured claim as to all assets including the Debtor's Cash Collateral, and shall value such claim at \$0. The Debtor reserves the right to object to the validity, extent and priority of all claims and amounts due to Corporation Service Company.

4. Forward Financing, LLC:

52. On or about May 17, 2017, the Debtor granted Forward Financing LLC a security interest in the Debtor's Cash Collateral.

53. On or about May 17, 2016, Forward Financing filed a UCC-1 financing statement with the Office of the Secretary of State of Massachusetts, thereby perfecting its interests in the Debtor's Cash Collateral.

54. Accordingly, Forward Financing claims a fourth priority security interest in all of Debtor's Cash Collateral.

55. As of this date there remains approximately \$35,000 due and owing. Debtor reserves the right to object to the validity, extent and priority of all claims and amounts due to Forward Financing.

5. Lehigh Cement Company, LLC (“Lehigh):

56. On or about or about June 24, 2015, the Debtor executed a Security Agreement granting Lehigh a security interest in all assets, including Cash Collateral.

57. On or about September 28, 2016, Lehigh filed a UCC-1 financing statement with the Office of the Secretary of State of Massachusetts, thereby perfecting its interests in the Debtor’s assets, including Cash Collateral.

58. Accordingly, Lehigh claims a fifth priority security interest in all of Debtor’s Cash Collateral, and a fourth priority interest in Debtor’s inventory, vehicles, and equipment.

59. As of this date Lehigh claims there remains approximately \$425,000 due and owing to it. Debtor reserves the right to object to the validity, extent and priority of all claims and amounts due to Lehigh.

6. Capital Stack, LLC:

60. In March, 2017 the Debtor and other parties including Keelan and Northern Yankee entered into an agreement with Capital Stack that granted Capital Stack a security interest in all of the borrowers’ assets, including its Cash Collateral.

61. On May 10, 2017 at 8:13 A.M., Capital Stack filed a UCC-1 financing statement with the Office of the Secretary of State of Massachusetts, naming all borrowers collectively as the liable “organization” and allegedly perfecting its interests in the Debtor’s assets, including its Cash Collateral.

62. Accordingly, Capital Stack may claim a sixth-priority security interest in all of Debtor's Cash Collateral and a fifth-priority interest in Debtor's inventory, vehicles, and equipment.

63. As of this date there remains approximately \$47,000 due and owing to Capital Stack. Debtor reserves the right to object to the validity, extent and priority of all claims and amounts due to Capital Stack.

7. Libertas Funding (Libertas):

64. The Debtor entered into an agreement with Libertas which granted Libertas a security interest in the Debtor's future receivables, which allegedly constitutes the Debtor's Cash Collateral.

65. On May 10, 2017 at 8:13 A.M., Libertas filed a UCC-1 financing statement with the Office of the Secretary of State of Massachusetts, thereby perfecting its interests in the Debtor's Cash Collateral.

66. Accordingly, Libertas might claim a sixth or seventh-priority security interest in the Debtor's Cash Collateral.

67. As of this date there remains approximately \$200,000 due and owing. Debtor reserves the right to object to the validity, extent and priority of all claims and amounts due to Libertas.

II. REQUESTED USE OF CASH COLLATERAL AND OFFER OF ADEQUATE PROTECTION

A. Use of Cash Collateral

68. The Debtor requires the use of the Cash Collateral in order to fund the Debtor's ongoing operations pursuant to 11 U.S.C. 363(c)(2)(A). Absent the use of the Cash

Collateral, Debtor will be unable to pay the usual and ordinary operating expenses of the business. The use of the Cash Collateral is therefore necessary to preserve the value of the Debtor's estate.

69. The Debtor requests authority to utilize, substantially in accordance with the Supplemental Budget (attached as Exhibit A), Cash Collateral to fund its operations.

B. Adequate Protection

70. Section 363(e) of the Code provides that a party with an interest in property proposed to be used, sold or leased by a debtor must receive adequate protection for such interest before the debtor may use, sell or lease such property. See 11 U.S.C. § 363(e).

71. Section 361 of the Code provides that when adequate protection is required under Section 363 of the Code, such adequate protection may be provided by, *inter alia*, “providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property.” 11 U.S.C. § 361(2).

72. The entitlement to and measure of the protection required is always determined by the extent of the anticipated or actual decrease, if any, in the value of the secured creditor's collateral during course of the bankruptcy case. See In re First South Savings Assoc., 820 F.2d 700, 710 (5th Cir. 1987). Adequate protection requires only that the value of the creditor's interest in the cash collateral be protected from diminution while the debtor is using the cash collateral. See United Savings Association of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365 (1988). “It is intended by the Bankruptcy Code only to assure that a secured creditor,

during the pendency of a bankruptcy case, does not suffer a loss in the value of its interest in property of the bankruptcy estate.” In re Markos Gurnee Partnership, 252 B.R. 712, 716 (Bankr. N.D. Ill. 1997).

73. Courts uniformly recognize the existence of an equity cushion as adequate protection for the use of cash collateral. See Baybank-Middlesex v. Ralar Distributors, 69 F.3d 1200, 1203 (1st Cir. 1995) (“A sufficient equity cushion is itself a recognized form of adequate protection, thus collateral valuation is a logical step in making an adequate protection determination [in a cash collateral context].”) (citing First Agricultural Bank v. Jug End in the Berkshires, 46 BR 892, 899 (Bankr. D. Mass. 1985)); see also In re SW Boston Hotel Venture LLC, 449 B.R. 156, 176 (Bankr. D. Mass. 2011) (“If collateral securing a claim has value greater than the interest of the secured claim holder, the excess value, referred to as an equity cushion, constitutes adequate protection for the secured party’s interest.”).

74. Where a creditor has a security interest in cycling soft collateral, such as account receivables, the granting of replacement liens may constitute adequate protection. See In re Dynaco, 162 B.R. 389, 394 (Bankr. D.N.H. 1993).

C. Proposed Adequate Protection to Creditors Secured in Cash Collateral

75. As to all secured creditors identified herein, the Debtor proposes to adequately protect their collateral by:

(a) operating its business and pursuing its reorganization in this case to maintain both its going concern and the value of the creditor’s collateral. Debtor believes that its assets are worth far more on a going concern basis than in a hypothetical liquidation.

(b) maintaining insurance on Debtor's personal property and by paying all post-petition vendor and other administrative costs on a timely basis.

76. The Debtor proposes to adequately protect MCB for the use of any Cash Collateral as more fully set forth in the parties' Stipulation and Order (Docket No 87), which terms shall control in the event of any inconsistency with this Motion. For all parties convenience, however, Debtor summarizes the terms relating to Debtor's providing adequate protection as follows:

(a) by the existence of an equity cushion in the collateral secured by MCB's lien;

(b) by granting replacement liens to MCB (1) to the same extent, priority and validity of such liens that existed as of the Petition Date (2) to be recognized only to the extent of any diminution in the value of the creditor's prepetition collateral arising from the Debtors' use of Cash Collateral, (3) on the same types on the same types of collateral that the creditors had valid liens on as of the Petition Date; and

(c) by making a \$1,908.00 monthly payment to MCB. This payment represents the contract rate of payment and will be held in suspense, and not applied to principle or interest, pending further order of the Court and/or confirmation of a plan of reorganization.

77. The Debtor proposes to adequately protect CCGI for the use of any Cash Collateral as more fully set forth in the parties' Stipulation and Order (Docket No. 51), as thereafter amended (Docket No. 97), which terms shall control in the event of any inconsistency with this Motion. For all parties convenience, however, Debtor

summarizes the terms relating to Debtor's providing adequate protection as follows as follows:

- (a) by the existence of an equity cushion in the collateral secured by CCGI's lien;
- (b) by granting replacement liens (1) to the same extent, priority and validity of such liens that existed as of the Petition Date (2) to be recognized only to the extent of any diminution in the value of the creditor's prepetition collateral arising from the Debtors' use of Cash Collateral, (3) on the same types on the same types of collateral that the creditors had valid liens on as of the Petition Date; and
- (c) by making a \$8,500 monthly payment on to CCGI to protect against potential diminution in value relating to the most vital pieces of equipment for the Debtor's business and reorganization efforts, to which CCGI holds the first priority lien.

78. The Debtor proposes to adequately protect Corporate Service Company for the use of any Cash Collateral as follows:

- (a) by the existence of an equity cushion in the collateral secured by Corporate Service Company's lien;
- (b) by granting replacement liens (1) to the same extent, priority and validity of such liens that existed as of the Petition Date (2) to be recognized only to the extent of any diminution in the value of the creditor's prepetition collateral arising from the Debtors' use of Cash Collateral, (3) on the same types on the same types of collateral that the creditors had valid liens on as of the Petition Date.

79. The Debtor proposes to adequately protect Forward Financial, LLC for the use of any Cash Collateral as follows:

- (a) by the existence of an equity cushion in the collateral secured by Forward Financial's lien;
- (b) by granting replacement liens (1) to the same extent, priority and validity of such liens that existed as of the Petition Date (2) to be recognized only to the extent of any diminution in the value of the creditor's prepetition collateral arising from the Debtors' use of Cash Collateral, (3) on the same types on the same types of collateral that the creditors had valid liens on as of the Petition Date.

80. The Debtor proposes to adequately protect Lehigh Cement for the use of any Cash Collateral as follows:

- (a) by the existence of an equity cushion in the collateral secured by Lehigh's lien;
- (b) by granting replacement liens (1) to the same extent, priority and validity of such liens that existed as of the Petition Date (2) to be recognized only to the extent of any diminution in the value of the creditor's prepetition collateral arising from the Debtors' use of Cash Collateral, (3) on the same types on the same types of collateral that the creditors had valid liens on as of the Petition Date.

81. The Debtor proposes to adequately protect Capital Stack, LLC for the use of any Cash Collateral as follows:

- (a) by the existence of an equity cushion in the collateral secured by Capital Stack's lien;

(b) by granting replacement liens (1) to the same extent, priority and validity of such liens that existed as of the Petition Date (2) to be recognized only to the extent of any diminution in the value of the creditor's prepetition collateral arising from the Debtors' use of Cash Collateral, (3) on the same types on the same types of collateral that the creditors had valid liens on as of the Petition Date.

82. The Debtor proposes to adequately protect Libertas Funding for the use of any Cash Collateral as follows:

(a) by the existence of an equity cushion in the collateral secured by Libertas Funding's lien;

(b) by granting replacement liens (1) to the same extent, priority and validity of such liens that existed as of the Petition Date (2) to be recognized only to the extent of any diminution in the value of the creditor's prepetition collateral arising from the Debtors' use of Cash Collateral, (3) on the same types on the same types of collateral that the creditors had valid liens on as of the Petition Date.

83. Based on the foregoing, the secured creditors are entitled to adequate protection of their interest in their collateral to the extent that such interests consists of Cash Collateral, inclusive of accounts receivable, which are likely to revolve into post-petition property of the Debtor and to otherwise diminish in value.

84. The replacement liens proposed herein shall be deemed perfected without the necessity for filing or executing documents which might otherwise be required under non- bankruptcy law for perfection of said security interests.

85. The Cash Collateral will be used as described in Debtor's budget attached. As such, the Cash Collateral is being used to preserve and maintain the Debtor's ongoing

business. The Debtor's use of its income to operate and maintain the business constitutes additional adequate protection. See In re McCann, 140 B.R. 926, 929 (Bankr. D. Mass. 1992) (*citing In re Prichard Plaza, L.P.*, 84 B.R. 298 (Bankr. D. Mass. 1988)).

86. In addition, the Debtor's property is insured at replacement cost. This provides further adequate protection to secured creditors.

87. For all the foregoing reasons, MCB's collateral is not diminishing in value and the use of the Cash Collateral is therefore warranted because MCB's claim of approximately \$156,000 is secured against Cash Collateral in the amount of \$368,600, resulting in an equity cushion.

88. For all the foregoing reasons, CCGI's collateral is not diminishing in value and the use of the Cash Collateral is therefore warranted because CCGI's claim of \$621,210 is fully secured by its first priority lien against the Debtor's equipment and machinery, the value of which equals \$1,598,000 and results in an equity cushion. As described above at Paragraph 37, after claims of all first lienholders against Debtor's equipment, inclusive of CCGI, approximately \$753,000 of equity remains in Debtor's equipment and machinery.

89. For all the foregoing reasons, Corporate Service Company's collateral is not diminishing in value and the use of the Cash Collateral is therefore warranted because, after accounting for MCB and CCGI's claims against collateral, Corporate Service Company's claim of \$0 is adequately protected by the remaining Cash Collateral of \$212,600, Inventory of \$156,000, and equipment and machinery equity of \$753,000, resulting in an equity cushion.

90. For all the foregoing reasons, Forward Financing's collateral is not diminishing in value and the use of the Cash Collateral is therefore warranted because, after accounting for MCB, CCGI, and Corporate Service Company's claims against collateral, Forward Financing's claim of \$35,000 is adequately protected by the remaining Cash Collateral of \$212,600, resulting in an equity cushion.
91. For all the foregoing reasons, Lehigh Cement's collateral is not diminishing in value and the use of the Cash Collateral is therefore warranted because, after accounting for MCB, CCGI, Corporate Service Company, and Forward Financing's claims against collateral, Lehigh's claim of \$425,000 is adequately protected by the remaining Cash Collateral of \$177,600, inventory of \$156,000, and equipment and machinery equity of \$753,000, resulting in an equity cushion.
92. For all the foregoing reasons, Capital Stack's collateral is not diminishing in value and the use of the Cash Collateral is therefore warranted because, after accounting for MCB, CCGI, Corporate Service Company, Forward Financing, and Lehigh's claims against collateral, Capital Stack's claim of \$35,000 is adequately protected by the remaining Cash Collateral of \$0, inventory of \$0, and equipment and machinery equity of \$661,600, resulting in an equity cushion.
93. For all the foregoing reasons, Libertas' collateral is not diminishing in value and the use of the Cash Collateral is therefore warranted because, after accounting for MCB, CCGI, Corporate Service Company, Forward Financing, Lehigh, and Capital Stack's claims against collateral, Libertas' claim of \$200,000 is adequately protected by the remaining Cash Collateral of \$0, inventory of \$0, and equipment and machinery equity of \$626,600, resulting in an equity cushion.

94. For the foregoing reasons, approval of this Motion and the continued use of Cash Collateral on the terms identified in this Motion is in the best interest of the Debtor, the Debtor's Estate and its creditors.

95. Absent the use of the Cash Collateral, Debtor would be unable to meet payroll and would be forced to lay-off their work force and to suspend operations immediately. Without the use of Cash Collateral, Debtor will be forced to commence liquidation proceedings, which would result in a significantly less dividend or no dividend at all, to the unsecured creditors. The continued use of Cash Collateral will allow the Debtor to preserve the going-concern value and effectively reorganize its business.

D. Payment of Debtors' Counsel Fees.

96. Because of the State Court Order prohibiting use of funds beyond the ordinary course, Debtor seeks to carve-out from the use of cash up to \$12,000.00 for Professional fees². Payments would be made in installments \$1,200.00 for the weeks beginning October 22, October 29, November 5, November 12, November 19, November 26, December 3, December 10, December 17 and December 24, 2017.

97. In addition, Debtor seeks to carve-out from the use of cash amounts to pay chapter 11 U.S. Trustee quarterly fees.

98. "A Debtor may use cash collateral to pay professional fees if the secured party is adequately protected..." Security Leasing Partners L.P. v. ProAlert, LLC (In re ProAlert, LLC), 314 B.R. 436 (9th Cir. BAP 2004).

99. "If the underlying collateral is not declining in value, the additional cash collateral may be used by the debtor to pay administrative expenses as well as to maintain and

² All fees are subject to court approval.

improve the underlying collateral.” In re Wrecclesham Grange, Inc., 221 B.R. 978, 981 (M.D. Florida 1997).

100. As previously demonstrated, MCB, CCGI, Corporate Service Company, Forward Financing, Lehigh, Capital Stack, and Libertas are adequately protected with monthly cash payments, replacement liens, insurance, and maintenance and operation of the business. Therefore, as such secured creditors are adequately protected, Debtor may use cash collateral to pay its administrative costs.

101. In addition, pursuant to 11 U.S.C. § 506(c) allow Debtor to pay administrative fees, including Debtor’s counsel fees, from the secured creditors’ collateral that are reasonable costs and expenses of preserving or disposing of, such property.

102. Debtor believes that its reorganization prospects are excellent for many reasons, including primarily the availability of unencumbered assets as a source of DIP financing and the prospects off several new and profitable contracts.

III. NOTICE

89. The Debtor has served this Motion on (a) all known secured creditors; (b) the Office of the United States Trustee; (c) the Debtors’ 20 Largest Unsecured Creditors; and (d) all parties who have filed a notice of appearance and request for notices in this proceeding.

WHEREFORE, the Debtor respectfully requests that this Court enter an Order:

- a. Authorizing the Debtor’s continued use of Cash Collateral;
- b. Granting replacement liens in accordance with the terms of this motion;
- c. Authorizing the Debtor to use the Cash Collateral to pay Debtor’s counsel fees and charge the collateral pursuant to 11 U.S.C. § 506(c) and 11 U.S.C. § 363;

- d. Scheduling additional consideration of the use of the Cash Collateral following the expiration of the authorization in this motion; and
- e. Granting such other relief as is just and proper.

Respectfully submitted
The Debtor,
By its Attorneys,

/s/Michael K. Lane
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