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E-FILED March 8, 2017

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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:

C & S COMPANY, INC.,

Debtor.

Case No. BK-S-16-14155-MKN
Chapter 11

Hearing Date: March 15, 2017
Hearing Time: 9:30am

**OPPOSITION TO MOTION TO USE CASH COLLATERAL AND
MOTION FOR ORDER TO PAY POST-PETITION EXPENSES**

COMES NOW, FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR COLONIAL BANK, N.A. ("FDIC" or "Secured Creditor") hereby submits its opposition to Debtor's Motion to Use Cash Collateral and Motion for Order to Pay Post-Petition Expenses.¹

This motion is made and based upon the attached points and authorities, the papers and pleadings on file herein, and any oral argument that the Court may entertain at the time of any hearing of this motion.

¹ While the caption of the Motion suggests that the Debtor is seeking consent to pay expenses that the "Trustee" has not paid, the motion is not supported by a detailed request or a proposed budget as is required pursuant to FRBP 4001(b)(1)(B)(ii).

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **FACTUAL BACKGROUND**

4
5 1. Debtor was the borrower pursuant to that certain Promissory Note dated as of April
6 5, 2006, in the aggregate principal of \$1,500,000 (together with all amendments and modifications
7 and replacements thereto, collectively the “Original Note”), evidencing payment of that certain
8 loan (“Loan”) made to the Debtor on or about April 5, 2006, by Colonial Bank, N.A. (“Colonial
9 Bank”) in the principal amount of \$1,500,000 and other obligations of Debtor.

10 2. The obligations of the Debtor evidenced by the Original Note were secured by a
11 Security Agreement and UCC Financing Statement filed on April 17, 2006, with the Nevada
12 Secretary of State. Additionally, the principals of the Debtor, Stacey Lindburg and Brad
13 Lindburg (the “Guarantors”), absolutely and unconditionally guaranteed the Debtor’s full and
14 faithful performance of the Loan.

15 3. On August 14, 2009, Colonial Bank was closed by the Alabama State Banking
16 Department and the FDIC was named Receiver. Accordingly, the FDIC, as Receiver, was the
17 payee and holder of the Original Note and the Secured Party with respect to any assets of the
18 Debtor securing the Loan and Debtor’s obligations under the Loan and Original Note.

19 **The Debtor’s First Bankruptcy**

20
21 4. On October 28, 2008, Debtor filed in the United States Bankruptcy Court for the
22 District of Nevada a Voluntary Petition for relief under Chapter 11 of the Bankruptcy Code, Case
23 No. 08-22796–MKN (the “First Bankruptcy”).

24
25 5. On February 9, 2009, Colonial Bank filed a Proof of Claim, identifying as the
26 amount of its claim, as of the petition date, the sum of \$1,854,288.46 plus interest and attorneys’
27 fees and costs.
28

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6. Pursuant to the Order Confirming Debtor's Amended Chapter 11 Plan of Reorganization #2 Dated April 20, 2012, entered November 15, 2012, and four years after its petition for relief, the Debtor confirmed its Amended Chapter 11 Plan of Reorganization (the "Plan").

7. Pursuant to a Stipulation to Distribute Funds Held in Court Registry, on January 8, 2014, the sum of \$1,494,800.06 was distributed to the FDIC, as Receiver for Colonial Bank.

8. As of February 1, 2014, the outstanding, unpaid principal balance of the FDIC's claim was \$1,163,117.71.

9. Pursuant to the terms and conditions of the Plan, the Debtor was required to execute and deliver an Amended and Restated Promissory Note (the "Restated Note") amending and restating the Original Note and promising to pay to the FDIC the sum of \$1,163,117.71 in monthly principal and interest payments in the amount of \$5,552.90 commencing March 1, 2014, and continuing each month thereafter until February 1, 2044 (the "Maturity Date").

10. Additionally, in order to secure the obligations owing to the FDIC pursuant to the Restated Note, the Debtor was required to execute and deliver to the FDIC an Amended and Restated Security Agreement (the "Restated Security Agreement") granting the FDIC a security interest and continuing lien on all of the Debtor's right, title, and interest in and to the following:

All Accounts, whether any of the foregoing is now owned or acquired later; all accessions, additions, replacements, and substitutions relating to any of the foregoing; all records of any kind relating to the foregoing; all proceeds relating to any of the foregoing (including insurance, general intangibles and other account proceeds).

11. Post confirmation, the Debtor refused, and continued to refuse, to execute and deliver the Amended and Restated Note and Restated Security Agreement. Accordingly, on May 15, 2014, the FDIC filed a Motion to Compel Plan Compliance 11 U.S.C. §1142 [Docket No. 836] seeking an order compelling the Debtor to execute and deliver the Amended and Restated Note and Restated Security Agreement – attaching thereto the proposed form of the documents.

1 12. On July 9, 2014, this Court entered an Order Compelling Plan Compliance 11
2 U.S.C. §1142(b) requiring the Debtor, within 5 days, to execute the Amended and Restated Note
3 and Security Agreement and deliver the same to counsel for the FDIC. [Docket No. 852]

4 13. Pursuant to the Order Compelling Compliance, the Debtor executed and delivered
5 the Amended and Restated Note and Security Agreement.
6

7 14. The FDIC perfected its security interest in the collateral by filing a UCC Financing
8 Statement with the Nevada Secretary of State.

9 15. The Restated Note and the Restated Security Agreement were executed by Stacey
10 Lindburg, president of the Debtor. True and accurate copies of the Restated Note and Restated
11 Security Agreement are annexed to Claim 3-1 filed by the FDIC on August 17, 2016.

12 **The Guarantors' First Bankruptcy**

13 16. During the pendency of the First Bankruptcy, the Guarantors filed bankruptcy
14 under Chapter 11 on February 18, 2009, as case No. 09-12129-MKN (the "Guarantors' First
15 Bankruptcy").
16

17 17. On February 17, 2012, the United States Trustee moved for dismissal for failure to
18 file monthly operating reports, failure to pay U.S. Trustee fees, and failure to confirm a plan within
19 a reasonable period of time. The Court entered an order of March 27, 2012, granting the motion
20 to dismiss and dismissing the Guarantors' First Bankruptcy.
21

22 **The Guarantors' Second Bankruptcy**

23 18. Less than 2 months after the Guarantors' First Bankruptcy was dismissed, on May
24 16, 2012, the Guarantors again filed bankruptcy under Chapter 11 of the United States Code (the
25 "Guarantors' Second Bankruptcy").

26 19. On January 29, 2013, the United States Trustee moved to dismiss the Guarantors'
27 Second Bankruptcy for failure to file monthly operating reports and failure to pay U.S. Trustee
28

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1 fees. Again, the Court entered an order granting the motion and dismissing the Guarantors'
2 Second Bankruptcy.

3 **The Default**

4 20. The Debtor breached the terms and conditions of the Restated Note by failing to
5 remit *any* payments required to be made thereunder.
6

7 21. By correspondence dated April 2, 2015, the FDIC provided notice of default and
8 demanded the Debtor cure all defaults then existing by paying the sum of \$77,740.60.

9 22. Despite demand, the Debtor failed and refused, and continued to fail and refuse, to
10 cure the default under the terms and conditions of the Restated Note.

11 **The Debtors' Second Bankruptcy**

12 23. Debtor commenced this case by filing a voluntary petition for relief under Chapter
13 11 of the United States Code on July 28, 2016. The petition is signed by Stacey Lindburg,
14 president of the Debtor.
15

16 24. Following an extension, the Debtor filed its schedules on September 29, 2016.
17 [Docket No. 41]

18 25. Despite having executed the Restated Note and the Restated Security Agreement
19 acknowledging (a) the amount of the indebtedness, and (b) the security interest in the collateral
20 just 15 months earlier, the Debtor listed the FDIC as a disputed, unsecured creditor.
21

22 **The Cash Collateral Stipulation**

23 26. On September 8, 2016, the FDIC filed a Notice of Non-Consent to Unauthorized
24 Use of Cash Collateral. [Docket No. 34]

25 27. On October 4, 2016, the FDIC and the Debtor filed a Stipulation Providing for Use
26 of Cash Collateral and Adequate Protection of Secured Creditor's Lien on an Interim Basis
27 through and including December 31, 2016 (the "Cash Collateral Stipulation"). [Docket No. 59]
28

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28. While reserving its right to object, the Debtor stipulated that the FDIC held a secured claim against the Debtor in the amount of \$1,498,483.32 - which was secured by a valid and perfected security interest in all of the Debtor's pre-petition accounts, and all proceeds relating to the same. Id.

29. As of the petition date, the Debtor scheduled its accounts receivable as having a value of \$1,481,732.91. [Docket No. 41]

30. The Cash Collateral Stipulation permitted the Debtor to use the FDIC's cash collateral, on an interim basis, provided (a) the expenditures were in accordance with the proposed budget; (b) the Debtor continued to remain current on its payroll taxes, union dues, and payment to the U.S. Trustee's Office; (c) the Debtor timely filed its monthly operating reports; (d) the Debtor paid the FDIC the sum of \$25,000 on or before November 30, 2016; and, (e) the Debtor paid, monthly, the sum of \$5,552.90 as and for adequate protection.

31. As additional adequate protection, the Debtor granted the FDIC a replacement lien on the Debtor's post-petition receivables pursuant to 11 U.S.C. § 361(2).

32. The Cash Collateral Stipulation expired by its terms on December 31, 2016.

33. The Debtor has not requested, and the FDIC has not authorized, the Debtor's continued use of the FDIC's cash collateral. On January 26, 2017, the FDIC notified the Debtor that the Cash Collateral Stipulation had expired and that it did not consent to its continued use. Additionally, the FDIC requested confirmation that the Debtor was no longer using the cash collateral and requested evidence of segregation.

The Debtor's Post-Petition Operations

34. Post-petition, the Debtor's bonding limit was revoked and, resultantly, the Debtor is no longer permitted to act in the capacity of a general contractor. (See 2004 Examination Transcript dated February 17, 2017 at p. 28, attached hereto as *Exhibit "A"*).

1 35. As a direct result of the revocation of the Debtor's bond, the Debtor has been
 2 unable to procure any post-petition contracts. (See 2004 Examination Transcript dated February
 3 17, 2017 at p. 28, attached hereto as *Exhibit "A"*) Rather, the Debtor is merely completing its
 4 pre-petition contracts.
 5

6 36. From a review of the Debtor's monthly operating statements, it appears that the
 7 Debtor is exhausting cash and is not generating sufficient post-petition receivables. A cash
 8 collateral comparison and analysis from a review of the Debtor's September [Docket No. 66] and
 9 December [Docket No. 76] operating reports follows:

	9/30	12/31
Accounts Receivable:	1,343,533	\$611,810
Cash:	<u>\$237,627</u>	<u>\$107,916</u>
Total current assets:	\$1,581,160	\$719,726

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 15 37. The table above shows that the accounts receivable has been reduced from
 16 \$1,343,533 as of 9/30/16 to \$611,810 as of 12/31/16, or a reduction of \$731,723 in three months.

17 38. The cash has decreased from \$237,627 to \$107,726.

18 39. Therefore the net decrease in the collateral value between the accounts receivables
 19 and cash combined was **\$861,434** in the three months from 9/30/16 to 12/31/16.
 20

21 40. As of the filing of this opposition, the Debtor has yet to file its January monthly
 22 operating report.

23 41. While the Debtor states that it is operating profitably, the most recent operating
 24 report filed by the Debtor reflects a net loss of \$347,470 from operations in the month of December
 25 2016. [Docket 76]

26 42. As post-petition receivables are not keeping pace with the diminution of the
 27 pre-petition collateral, coupled with the fact that the Debtor is operating at a loss, the FDIC is not
 28

1 adequately protected.

2 **Payment of Pre-Petition Debt**

3 43. As of the Petition date, the Debtor reflected unsecured, pre-petition debt in the
4 amount of \$871,470.29 in its accounts payable ledger. Attached hereto is a copy of the Debtor's
5 accounts payable ledger as of July 28, 2016.

6 44. During the 2004 examination, the Debtor testified that it has made payments on the
7 pre-petition debt. (See 2004 Examination Transcript dated February 17, 2017 at p. 158, attached
8 hereto as *Exhibit "B"*).

9 45. The Debtor further testified that all pre-petition creditors of the estate have been
10 paid in full. (See 2004 Examination Transcript dated February 17, 2017 at p. 159, attached hereto
11 as *Exhibit "C"*).

12
13
14 **II.**

15 **LEGAL STANDARD**

16 **A. The FDIC Does Not Consent to Use of its Cash Collateral.**

17 Section 363(c)(2) prohibits a debtor-in-possession from using cash collateral without either
18 (1) the consent of each creditor with an interest in the collateral; or (2) court authorization, granted
19 after notice and a hearing. *See Wattson Pac. Ventures v. Valley Fed. Sav. & Loan (In re*
20 *Safeguard Self-Storage Trust)*, 2 F.3d 967, 969 (9th Cir.1993); *Scottsdale Med. Pavilion v. Mut.*
21 *Benefit Life Ins. Co. (In re Scottsdale Med. Pavilion)*, 159 B.R. 295, 297 (9th Cir. BAP 1993),
22 *aff'd*, 52 F.3d 244 (9th Cir.1995). Section 363(a) defines "cash collateral" as:

23
24 [C]ash, negotiable instruments, documents of title, securities, deposit accounts, or other
25 cash equivalents whenever acquired in which the estate and an entity other than the estate
26 have an interest and includes the proceeds, products, offspring, rents, or profits of property
27 and the fees, charges, accounts or other payments for the use or occupancy of rooms and
28 other public facilities in hotels, motels, or other lodging properties subject to a security
interest as provided in section 552(b) of this title, whether existing before or after the
commencement of a case under this title.

1 11 U.S.C. § 363(a).

2 In the Ninth Circuit, a debtor-in-possession seeking to use cash collateral is required to
3 obtain the “affirmative *express* consent” of each entity having an interest in the cash collateral.
4 *Freightliner Mkt. Dev. Corp. v. Silver Wheel Freightlines, Inc.*, 823 F.2d 362, 368–69 (9th
5 Cir.1987) (finding that implied consent is insufficient to satisfy the requirements of § 363(c)(2)
6 without deciding whether the secured creditor either impliedly consented to the use of its cash
7 collateral or was estopped from denying that it had consented). In other words, a secured creditor's
8 failure to object to the unauthorized use of cash collateral is not, in itself, tantamount to that
9 creditor's consent to the use of its cash collateral. *Id.* at 368–69

10 As noted above, the Cash Collateral Stipulation expired by its non-accelerated terms on
11 December 31, 2016. As of that date, the Debtor was prohibited from using the cash collateral
12 without the FDIC’s consent or this Court’s authorization following a notice and hearing. On
13 January 26, 2017, the FDIC objected to the continued use of the cash collateral and demanded
14 evidence of segregation. Additionally, though not required to do so, the FDIC filed a Renewed
15 Notice of Non-Consent to the Use of Cash Collateral. [Docket No. 83] As the FDIC has not
16 consented to, and this Court has not authorized, the Debtor’s continued use of cash collateral, the
17 FDIC is entitled to an order prohibiting the Debtor from continuing to use the cash collateral.

18 During the 2004 examination, the Debtor confirmed that it has continued to use the cash
19 collateral and has failed to segregate the same. The Debtor testified as follows:

20 Q. Okay. Just so I’m clear and I don’t consider this a dispute, you are continuing to
21 use the cash collateral of the FDIC despite the fact that you don’t have the expressed authority by
22 the FDIC to use those funds?

23 A. Yes.

24 Q. Okay.

1 A. And if I didn't use it, then I would have to close my doors.

2 Tr.at p. 115.

3 **B. The Debtor is Required to Segregate, and Account For, Cash Collateral in its**
4 **Possession.**

5 Absent consent or court authorization, a debtor-in-possession has an affirmative duty to
6 segregate and account for any cash collateral in its possession, custody, or control. 11 U.S.C §
7 363(c)(4). Segregation of cash collateral is mandatory under the statute. *Scottsdale Med. Pavilion*,
8 159 B.R. at 302. Segregation of cash collateral is important to secured creditors, particularly in
9 view of the state-law requirement that a creditor be able to identify cash proceeds to maintain an
10 interest in such proceeds. *See generally 3 Collier on Bankruptcy* ¶ 363.03[4][b], at 363–35 (Alan
11 N. Resnick & Henry J. Sommer eds., 15th ed. rev.2003). Section 363(c)(2)'s proscription
12 recognizes the “unique nature of cash collateral, and the risk to the entity with an interest in such
13 collateral, arising from the dissipation or consumption of the collateral in a rehabilitative effort in
14 bankruptcy.” *Id.* ¶ 363.03[4][c], at 363–36.

15
16 As noted, the FDIC has demanded evidence that its cash collateral is being segregated, but
17 the Debtor has failed to respond. Moreover, though the Debtor was required to segregate the cash
18 collateral upon expiration of the stipulation, it has no understanding of what is required of the
19 Debtor in that regard. (See 2004 Examination Transcript dated February 17, 2017 at p. 119-120,
20 attached hereto as *Exhibit “D”*)

21
22 As a result, an order compelling the Debtor to comply with its affirmative obligation is
23 necessary.

24 **C. The FDIC is Not Adequately Protected.**

25 Under § 363(c)(2), a debtor may not use cash collateral unless consented to by the entity
26 that has an interest in the cash collateral or with court authorization. Section 363(e) provides that
27 on request of an entity that has an interest in property to be used by the debtor, the court shall
28

1 prohibit or condition the use “as is necessary to provide adequate protection of such interest.” The
 2 debtor has the burden of proof on the issue of adequate protection. § 363(p)(1).

3
 4 The Code does not define adequate protection but sets forth three alternative non-exclusive
 5 methods by which adequate protection may be provided when required under § 363: (1) periodic
 6 cash payments; (2) additional or replacement liens; or (3) other relief resulting in the “indubitable
 7 equivalent” of the secured creditor's interest in such property. § 361. The determination of
 8 adequate protection is a question of fact for the trial court. *In re Bear River Orchards*, 56 B.R. 976,
 9 979 (Bankr.E.D.Calif.1986).

10 Courts have recognized the breadth of adequate protection. “The goal of adequate
 11 protection is to safeguard the secured creditor from diminution in the value of its interest during
 12 the Chapter 11 reorganization.” “*In re Mosello*, 195 B.R. 277, 288 (Bankr.S.D.N.Y.1996) (quoting
 13 *In re 495 Central Park Avenue Corp.*, 136 B.R. 626, 631 (Bankr.S.D.N.Y.1992)). “The concept of
 14 adequate protection was designed to ‘insure that the secured creditor receives the *value* for which
 15 he bargained.’ “*In re Martin*, 761 F.2d 472, 474 (8th Cir.1985) (quoting S.Rep. No. 989, 95th
 16 Cong., 2d Sess. 53, *reprinted* in 1978 U.S.Code Cong. & Ad.News 5787, 5839 (emphasis added)).
 17 “Secured creditors should not be deprived of the benefit of their bargain.” *In re Am. Mariner*
 18 *Indus., Inc.*, 734 F.2d 426, 431 (9th Cir.1984), effectively overruled on other grounds by *United*
 19 *Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 368, 108 S.Ct. 626, 98
 20 L.Ed.2d 740 (1988). As the Ninth Circuit Court of Appeals set forth from the House Report,
 21

22
 23 There may be situations in bankruptcy where giving a secured creditor an absolute
 24 right to his bargain may be impossible or seriously detrimental to the bankruptcy laws.
 25 Thus, this section recognizes the availability of alternate means of protecting a secured
 26 creditor's interest. Though the creditor might not receive his bargain in kind, the purpose of
 27 the section is to insure that the secured creditor receives in value essentially what he
 28 bargained for. *American Mariner*, 734 F.2d at 431 (quoting H.R.Rep. No. 595 at 339,
 1978 U.S.Code Cong. & Ad. News at 6295).

“Whether protection is adequate depends directly on how effectively it compensates the

1 secured creditor for loss of value.” *American Mariner*, 734 F.2d at 432. While sections 361(1) and
2 (2) by their own terms compensate for a decrease in value, the “compensatory nature of adequate
3 protection is even more apparent from the catch-all alternative of section 361(3).” *American*
4 *Mariner*, 734 F.2d at 432.

5
6 While the Debtor proffers the continued payment of \$5,500 per month, it has failed to meet
7 its statutory burden to establish that the periodic cash payment will adequately protect its interest.
8 Additionally, the Debtor does not offer to provide replacement liens on any post-petition
9 receivables – to that extent such receivables were generated. As noted above, post-petition, the
10 debtor accounts receivable have been reduced from \$1,343,533 as of 9/30/16 to \$611,810 as of
11 12/31/16, or a reduction of \$731,723 in three months. The cash has decreased from \$237,627 to
12 \$107,726. Therefore the net decrease in the collateral value between the accounts receivables and
13 cash combined was **\$861,434** in the three months from 9/30/16 to 12/31/16.

14
15 As the debtor is operating at a loss post-petition, and inasmuch as the receivables are not
16 keeping pace with the diminution of the pre-petition collateral, the FDIC is not adequately
17 protected. This fact, coupled with the facts that the Debtor has, post-petition, lost its ability to act
18 in the capacity of a general contractor and has failed to enter into any new contracts during the 6
19 months it has been in bankruptcy, demonstrates that the FDIC is not adequately protected.

20
21 **D. The FDIC is a Secured Creditor.**

22 On August 17, 2016, the FDIC filed its Proof of Claim 3-1 attaching thereto the Restated
23 Note and the Restated Security Agreement executed by Stacey Lindburg, president of the Debtor.
24 As noted above, post confirmation of the Debtor’s First Bankruptcy, the debtor refused, and
25 continued to refuse, to execute and deliver the Amended and Restated Note and Restated Security
26 Agreement. Accordingly, on May 15, 2014, the FDIC filed a Motion to Compel Plan Compliance
27 11 U.S.C. 1142 [Docket No. 836] seeking an order compelling the Debtor to execute and deliver
28

1 the Amended and Restated Note and Restated Security Agreement – attaching thereto the
2 proposed form of the documents.

3 On July 9, 2014, this Court entered an Order Compelling Plan Compliance 11 U.S.C.
4 1142(b) requiring the Debtor, within 5 days, to execute the Amended and Restated Note and
5 Security Agreement and deliver the same to counsel for the FDIC. [Docket No. 852]
6

7 Pursuant to the Order Compelling Compliance, the Debtor executed and delivered the
8 Amended and Restated Note and Security Agreement. The Debtor now argues, without evidence,
9 that the note is not secured and the amount of the indebtedness is disputed. The Debtor has failed
10 to satisfy its burden.

11 Section 502(a) of the Bankruptcy Code provides that a proof of claim is deemed allowed
12 unless a party-in-interest objects. This concept was expanded by *In re Holm*, 931 F.2d 620, 623
13 (9th Cir.1991) where the court stated “[i]f those allegations in [the proof of claim] set forth all of
14 the necessary facts to establish a claim and are not self-contradictory, they *prima facie* establish
15 the claim(emphasis supplied).” The claimant must first allege facts sufficient to support its claim;
16 if the averments in the filed proof of claim are sufficient to do so, then the proof of claim is entitled
17 to *prima facie* validity. *In re Consolidated Pioneer Mortgage*, 178 B.R. 222, 226 (9th Cir. BAP
18 1995), citing *In re Allegheny International*, 954 F.2d 167, 173–74 (3rd Cir.1992).
19

20
21 As of the date of this Opposition, the Debtor has not filed an objection to the Proof
22 of Claim filed by the FDIC. And, even if it had, it has not produced any evidence to rebut the
23 *prima facie* validity of the claim. Moreover, even if there was an objection filed to the claim, the
24 evidentiary effect of Rule 3001(f) remains in force. *In re Wells*, 51 B.R. 563, 566
25 (Bankr.D.Col.1985). The objecting party carries the burden of going forward with evidence in
26 support of its objection which must be of probative force equal to that of the allegations of the
27 creditor's proof of claim. *Id.* “[T]he objector must produce evidence which, if believed, would
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refute at least one of the allegations that is essential to the claim's legal sufficiency.” *In re Allegheny International, Inc.*, 954 F.2d 167, 173–74 (3d Cir.1992). If the objecting party succeeds in overcoming the *prima facie* effect of the proof of claim, the ultimate burden of persuasion then rests on the Claimant. *Id.* at 174.

The Debtor offers no evidence, admissible or otherwise, to support its contention that the FDIC is unsecured. Rather, it argues that the claim in the First Bankruptcy may have been under-secured and that the plan treatment did not permit the FDIC to accrue interest, costs and attorney fees. The argument is simultaneously untimely and belied by the fully executed Amended and Restated Note and Security Agreement – which the Debtor acknowledges having signed following the entry of the Order Compelling Plan Compliance.

III.
CONCLUSION

The Debtor has failed to comply with the mandate of 11 USC § 4001 as it has not supported the motion with the intended use of funds or the duration of the request. Nor has the Debtor satisfied its burden to establish that the FDIC will be adequately protected. Accordingly, the Debtor’s motion must be denied.

Additionally, as the FDIC has not consented to the continued use of its cash collateral, it is entitled to an order of this Court compelling the Debtor to segregate and account for all cash collateral in its possession.

DATED this 8th day of March, 2017.

SYLVESTER & POLEDNAK, LTD.
By: _____
Jeffrey R. Sylvester, Esq.
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Attorneys for Creditor FDIC-R for Colonial Bank, N.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of March, 2017, I served a copies of the above and foregoing, via ELECTRONIC SERVICE ECF System, where an email address is provided and by depositing the same in the United States Mail, first class, postage prepaid, addressed to those not electronically mailed.

ANTHONY CIULLA on behalf of Creditor DEAN AND PENNY BRUNNER 1985 TRUST
aciulla@deanerlaw.com, ddickinson@deanerlaw.com

EDWARD M. MCDONALD on behalf of U.S. Trustee U.S. TRUSTEE - LV - 11
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SAM E TAYLOR, JR on behalf of Creditor FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR COLONIAL BANK, N.A.
SaTaylor@FDIC.gov

U.S. TRUSTEE - LV - 11
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DAVID J. WINTERTON on behalf of Debtor C & S COMPANY, INC.
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An employee of SYLVESTER & POLEDNAK, LTD.

LANDS COMPANY, INC

A/P Aging Summary

As of July 28, 2016

	<u>Current</u>	<u>> 0</u>	<u>TOTAL</u>
4MAC Contracting	24,635.00	34,413.60	59,048.60
A Storage On Wheels, Inc.	0.00	1,227.96	1,227.96
Ahern Rentals	7,275.15	41,521.22	48,796.37
APCO Equipment	0.00	37,509.27	37,509.27
Badger Daylighting Corp.	0.00	9,112.50	9,112.50
Cashman Equipment Company	78,262.54	54,947.91	133,210.45
Caterpillar Financial Services Corp.	3,140.46	0.00	3,140.46
Dana Kepner Company, Inc.	0.00	2,618.10	2,618.10
Department of Motor Vehicles	1,031.00	0.00	1,031.00
Digital Modeling Services	0.00	340.00	340.00
Ferguson Enterprises, Inc.	478.91	156,712.91	157,191.82
Grainger	0.00	886.34	886.34
Impact Sand and Gravel	1,398.08	1,825.82	3,223.90
Jensen Precast	6,563.23	65,803.72	72,366.95
Las Vegas Chamber of Commerce	0.00	674.00	674.00
Mobile Materials-LV	0.00	600.23	600.23
Mundee Trucking, Inc.	0.00	9,089.38	9,089.38
National Trench Safety, LLC	0.00	5,031.64	5,031.64
Nevada Tap Master, Inc.	0.00	945.00	945.00
Olson Precast Company	0.00	100,132.75	100,132.75
Pacific Corrugated Pipe Co.	0.00	8,003.82	8,003.82
Penhall Company	0.00	2,820.00	2,820.00
Rinker Materials - Concrete Div.	0.00	74,580.24	74,580.24
Service Rock Products	0.00	4,585.30	4,585.30
Shawn Lucchesi	0.00	392.75	392.75
Shotcrete Constructors, LLC	0.00	86,534.93	86,534.93
Sierra Ready Mix	0.00	5,910.92	5,910.92
Sierra Transportation & Tech.	0.00	6,712.88	6,712.88
Sign Solutions	0.00	259.56	259.56
Stimulus Technologies	0.00	45.07	45.07
Sun Valley Electric Supply Co.	0.00	1,782.79	1,782.79
Trench Shoring	0.00	908.46	908.46
Vermeer Sales Southwest, Inc.	0.00	9,788.58	9,788.58
Weathernet, LLC	0.00	718.12	718.12
Wells Cargo	0.00	22,250.15	22,250.15
TOTAL	<u>122,784.37</u>	<u>748,685.92</u>	<u>871,470.29</u>

EXHIBIT
A

EXHIBIT
A

1 that a little bit.

2 Is it your understanding, your testimony
3 that as of the petition date the bond was revoked?

4 A. Yeah, my bonding limit was revoked.

5 Q. And does that then -- are you not then
6 permitted to perform construction related services?

7 A. A lot of them I am not. I am limited by
8 the amount of work that I can do due to the fact
9 that I filed.

10 Q. Okay. So I don't know how it works.

11 A. Right.

12 Q. And so I'll ask you for your expertise in
13 that area. You had to have -- or you have to as a
14 general Class A engineering contractor required to
15 have a bond, right?

16 A. That's correct.

17 Q. And what was the bond amount requirement?
18 Do you recall?

19 A. I think on my license is 25 or 50. I'm
20 not sure.

21 Q. Million?

22 A. No. That's what I have to have to carry
23 my license through the State Contractors Board.

24 Q. Uh-huh.

25 A. And --

**EXHIBIT
B**

**EXHIBIT
B**

1 them?

2 A. Right.

3 (Whereupon, Exhibit No. 16 was marked for
4 identification.)

5 BY MR. SYLVESTER:

6 Q. Now we're at the December 31st, the
7 December operating report, right?

8 A. Yes.

9 Q. And we show the accounts receivable of
10 three seventy-two four seventy, right?

11 A. Correct.

12 Q. But if we look at page three of 33, it
13 looks like your A/R is six eleven.

14 Do you know why that is?

15 A. Six eleven. Hang on.

16 Q. Three seventy-two.

17 A. Yeah. Because the -- because it's six
18 eleven eight ten.

19 Q. Do you know why there's that discrepancy?

20 A. Huh-uh.

21 Q. Are you generally aware of the idea that
22 you're not permitted to pay pre-petition debt
23 post-petition without authority of the court?

24 A. Rephrase that.

25 Q. Sure. Are you generally aware that

EXHIBIT
C

EXHIBIT
C

1 you're not permitted to pay pre-petition debt
2 post-petition without authority of the bankruptcy
3 court?

4 A. Yes.

5 Q. And so when we were talking about the
6 payment of the A/P that existed as of the petition
7 date, did you seek authority from the bankruptcy
8 court to make all or any portions of those
9 pre-petition payments?

10 A. I think we did. Because they were due.
11 I know we talked to the trust -- I know we had
12 talked to the trustee about this.

13 Q. Uh-huh.

14 A. Because these were actually due to my --
15 although we were aging them at time of delivery,
16 they're due when I receive my payment. So because I
17 had no payments -- I hadn't because we're a pay -- a
18 paid state.

19 Q. Uh-huh.

20 A. So when I got paid, I was required to
21 pay. That would make them due. So they -- they're
22 not my aging, they were due on payables.

23 Q. Well, are there any outstanding
24 pre-petition payments -- I'm sorry. Let me start a
25 question.

**EXHIBIT
D**

**EXHIBIT
D**

1 docket?

2 A. No.

3 Q. Okay. And this is the first time that
4 you've seen a copy of the renewed notice of
5 nonconsent to unauthorized use of cash collateral?

6 A. Yes.

7 Q. Okay. When you first learned it, I'm not
8 really sure when it was, but when you first learned
9 the FDIC has taken the position that you were no
10 longer authorized to use cash collateral, did you
11 seek to segregate or hold all or any portion of its
12 cash collateral?

13 MR. WINTERTON: Objection. Asked and
14 answered

15 BY MR. SYLVESTER:

16 Q. You can answer.

17 A. No, I don't, I don't -- when Dave and I
18 had a conversation regarding this hearing and
19 renewing the cash lateral --

20 MR. WINTERTON: Yeah. You can't talk
21 about what we talked about.

22 THE WITNESS: Okay.

23 BY MR. SYLVESTER:

24 Q. I don't want to know what you guys talked
25 about. I just want to know why --

1 A. No.

2 Q. -- you didn't do it, why you didn't
3 segregate it.

4 Have you ever heard of the word
5 segregation in the context of cash collateral
6 before?

7 A. No.

8 Q. Did you have an understanding as to
9 debtor possession that --

10 A. I am -- I am going to tell you if you
11 look at it in the way my December billings and
12 January billings was, the payments that I sent for
13 \$5500 was probably all of my profit.

14 Q. So let me just --

15 A. So if you -- without -- if that's what
16 you're saying the cash collateral is, I mean.

17 Q. Let me just finish my question. Did you
18 understand as a debtor in possession that without
19 the consent of the secured creditor that you had to
20 segregate its cash collateral?

21 A. I did not.

22 Q. As of the petition date, let me ask
23 you -- let me withdraw the question.

24 Have you made any payments post-petition
25 to any pre-petition creditors?