



Dated: 9/29/2017

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

IN RE:)
)
PHOENIX OF TENNESSEE, INC.,) Case No. 3:17-bk-06102
) Chapter 11
) Judge Marian F. Harrison
Debtor.)

**FINAL AGREED ORDER AUTHORIZING USE OF CASH COLLATERAL,
GRANTING ADEQUATE PROTECTION,
AND PROVIDING OTHER RELATED RELIEF**

This matter is before the Court on the Debtor's *Expedited Motion for Authority to Use Cash Collateral* (the "Motion") [Doc. No. 13] pursuant to Bankruptcy Rule 4001(b) and 11 U.S.C. § 363(c)(2)(B). The Court granted interim relief on September 14, 2017 [Doc. No. 30]. The Interim Order set a final hearing on the Motion for September 27, 2017, with objections due on or before September 25, 2017. On September 15, 2017, the Interim Order was served on all creditors. *See Certificate of Service*, Docket No. 46.

The Debtor has made the following disclosures:

COMPLIANCE WITH LOCAL RULE 2081-1 NOTICE

Pursuant to Local Rule 2081-1(f), the Debtor provided notice of the following relief in the Motion:

1. *Granting surcharge or "carve-out" rights to professionals or any restrictions (other than court approval) on the surcharge or carve-out rights granted to professionals—for example, a restriction on investigation or pursuit of causes of action against a lender or secured creditor. See Budget, attached to the Motion as Exhibit A.*
2. *Findings, conclusions or holdings as to the amount of a debt or the validity, priority or extent of a lien or security interest that purport to affect the rights of any entity other than the*

debtor-in-possession and the creditor. For the limited purpose of obtaining the interim relief requested in the Motion, the Debtor does not dispute the validity or extent of liens in favor of Pinnacle Bank with respect to cash collateral (as that term is defined in 11 U.S.C. § 363(a)). The Debtor reserves the right to challenge the validity or extent of any such liens at or before the final hearing on the Motion. (See p.2 of the Motion).

3. *Payment of prepetition wages, salary or other compensation to any insider or equity holder.* The Budget contains a line item for wages of the Debtor. No employee shall be paid in excess of the Bankruptcy Code's priority amount on account of a pre-petition wage claim. Wage payments will be made to insiders, namely Kyle and Joline Waites. Both insiders are budgeted to receive compensation at an amount equal to the amount received prior to the petition date, which represents a below-market rate for a similarly situated executive in the case of Mr. Waites. No insider will receive an increase in compensation rate absent approval by the Court.

FINDINGS AND CONCLUSIONS

No objections were filed to the Motion, and the Debtor and Pinnacle Bank submitted an Agreed Order prior to the Final Hearing. On September 27, 2017, the Court conducted a final hearing on the Motion. No parties in interest appeared in opposition. The Court, having reviewed the Motion and having determined that the relief requested is in the best interest of the Debtor, its estate, its creditors, and other parties in interest, it is hereby ORDERED as follows.

1. Notice of the Motion has been served in accordance with Federal Rule of Bankruptcy Procedure 4001(d) and the applicable Local Bankruptcy Rules, which notice is appropriate in the particular circumstances and is sufficient for all purposes under the Bankruptcy Code and the applicable Bankruptcy Rules in respect to the relief requested.

2. The United States Trustee filed an objection to the Motion, which Motion was resolved by the amendment of the Agreed Order granting interim relief [Doc. No. 30].

3. One party asserts a lien on the Debtor's cash collateral (as that term is defined in 11 U.S.C. § 363(a)). That party is hereinafter referred to as the "Secured Creditor."

a. **Pinnacle Bank.** On September 11, 2014, Pinnacle Bank filed a UCC-1 financing statement, Document No. 422124109, with the Tennessee Secretary of State, asserting a lien on all of the Debtor's assets.

4. The Secured Creditor asserts a valid, perfected security interest in the Debtor's property, including its cash collateral, which would entitle it to adequate protection for any diminution in the value of its respective collateral arising from the Debtor's post-petition use thereof.

5. The Debtor requires continued use of cash collateral in order to continue its business operations without interruption, and to avoid immediate and irreparable harm to the estate that would result in the absence of the use of cash.

6. Prior to submitting this order, counsel for the Debtor coordinated with counsel for the Secured Creditor, and the Secured Creditor consents to the relief provided herein.

IT IS HEREBY ORDERED as follows:

1. **Use of Cash Collateral.** Absent any order to the contrary, the Debtor is authorized to use cash collateral in accordance with the Budget during the pendency of this bankruptcy case. The Debtor is authorized to spend up to a maximum of 110% of the total amount set forth on the Budget (attached hereto as Exhibit A) and to pay the expenses reflected on the Budget. Debtor may seek advance permission, in writing, from the Secured Creditor to spend in excess of this

allowed amount, but nothing herein shall require the Secured Creditor to permit such use of its cash collateral.

2. **Continued Use of Cash Collateral.** On or before November 22, 2017, the Debtor shall submit to the Court a supplemental budget projecting income and expenses for the period from December 1, 2017 through January 31, 2018. Upon the filing of the supplemental budget, any party that has an interest in the Debtor's cash collateral reserves the right to request the Court to terminate use of cash if circumstances warrant such termination. Failure to object to the Debtor's continued use of cash collateral prior to December 15, 2017 shall constitute consent to the Debtor's use on the terms set forth in the supplemental budget.

3. **Adequate Protection in Favor of the Secured Creditor.** As adequate protection for use of and any diminution in the value of the collateral, the Secured Creditor is granted the following:

a. *Replacement Lien.* A senior perfected replacement security interest under Section 361(2) of the Bankruptcy Code in the Debtor's post-petition property and proceeds thereof (excluding the Debtors' rights under Sections 544, 545, 546, 547, 548, 549 and 550 of the Bankruptcy Code), to the same extent and priority as the Secured Creditor's finally determined security interests in the Debtor's pre-petition property and the proceeds thereof.

b. *Deemed Perfected.* The replacement lien and security interest granted herein is automatically deemed perfected upon entry of this Order without the necessity of the Secured Creditor taking possession, filing financing statements, mortgages or other documents. Although not required, upon reasonable request by the Secured Creditor, the Debtor shall execute and deliver such instruments or documents considered by the Secured Creditor to be reasonably

necessary in order to perfect the security interests and liens in the Debtor's post-petition collateral and proceeds granted by this Order.

4. **Insurance; Reporting; Creditor's Rights of Inspection and Audit.** The Debtor shall keep its assets insured by reasonable and sufficient insurance coverage acceptable as required under the terms of the Secured Creditor's loan documents with the Debtor, and shall, upon request and reasonable notice, provide the Secured Creditor with proof of the ongoing existence of such insurance. The Debtor shall, upon request and reasonable notice, further provide the Secured Creditor with financial statements setting forth the Debtor's revenue and expenses to permit the Secured Creditor to determine the extent to which the Debtor is complying with the Budget. Upon reasonable notice by the Secured Creditor, the Debtor shall permit the Secured Creditor and any of its agents reasonable and free access (during non-operating hours to the extent practicable) to the Debtor's records and place of business to verify the existence, condition and location of collateral in which the Secured Creditor holds a security interest and to audit Debtor's cash receipts and disbursements.

5. **Financial Reports.** The Debtor shall provide to the Secured Creditor weekly financial reports by 3:00 p.m. on the Wednesday following the prior week, with the first report due on Wednesday, October 4, 2017 for the week ending Friday, September 29, 2017. Such reports shall contain and reflect the following minimum items: (a) the cash revenues collected and the cash expenditures made by Debtor during the preceding week; (b) a comparison of the actual revenues and expenditures to the budgeted amounts; and (c) such other information as may be reasonably requested by Secured Creditor. The Debtor shall also provide to the Secured Creditor copies of the Chapter 11 Monthly Operating Reports filed by the Debtor.

6. **Default.** Any of the following events or occurrences shall constitute an event of default (“Default”) hereunder:

- a. Any failure to comply with any of the terms of this Order or any agreement executed in connection therewith; or
- b. The Debtor submits any materially inaccurate information to Secured Creditor or to the Court.

Upon the occurrence of a Default, the Secured Creditor shall be entitled to file a Notice of Default with the Court. Unless the Notice of Default is withdrawn by the Secured Creditor or stayed or overruled by the Court, the Debtor’s authority to use cash collateral shall terminate three (3) days after the Secured Creditor files the Notice of Default. Upon declaring and noticing a Default, the Secured Creditor may seek an expedited termination of the automatic stay provided for in 11 U.S.C. § 362 and may additionally seek an expedited declaration from the Court that the Collateral be deemed abandoned from the Debtor’s estate. Notwithstanding the foregoing, the Secured Creditor shall provide a minimum of three (3) days’ notice to Debtor and to all parties in interest prior to any hearing to terminate the automatic stay or declare the Collateral abandoned.

7. **Miscellaneous Provisions.**

a. *Final Order.* This is a final Order and supersedes any interim orders in connection with the Motion. Notice of the hearing on the Motion complied with all applicable rules. *See* Docket No. 58.

b. *No Limitation.* Nothing contained herein shall be deemed or construed to (i) limit the Debtor or the Secured Creditor to the relief granted herein; (ii) bar the Debtor or the Secured Creditor from seeking other and further relief for cause shown on appropriate notice to parties-in-interest entitled to notice of same, (provided, however, that any such relief constituting

a modification of this Order shall be permitted only to the extent consistent with the terms of the this Order, (iii) require the Secured Creditor to make any loans or advances to the Debtor, or (iv) be the Secured Creditor's acceptance of any plan of reorganization or liquidation submitted at any time by the Debtor or any other party, and (v) nothing contained herein shall work in derogation of any other rights possessed by the Secured Creditor under any and all applicable provisions of Title 11 of the United States Code.

c. *Surcharge/Carveout.* The Debtors acknowledge and agree that except as contained in the Budget, any party's consent to the entry of this Order does not constitute an agreement, consent or acknowledgment that (i) any cost or expenses of administration may be imposed against a party in interest or its collateral under Sections 506(c) or 552 of the Bankruptcy Code or otherwise by the Debtor, or (ii) to the carve-out from any party in interest's collateral any amounts to be utilized for the payment of any professional fees incurred by the Debtor or any Committee appointed under Section 1102 of the Bankruptcy Code. The Debtor reserves its right to seek a surcharge against a secured party's collateral as permitted by the Bankruptcy Code.

IT IS SO ORDERED.

THIS ORDER WAS SIGNED AND ENTERED
ELECTRONICALLY AS INDICATED AT THE TOP OF THIS PAGE.

APPROVED FOR ENTRY:

/s/ R. Alex Payne
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CERTIFICATE OF SERVICE

On September 27, 2017, I served the foregoing document on all parties consenting to electronic service via the Court's CM/ECF electronic system.

/s/ R. Alex Payne
R. Alex Payne

Phoenix of Tennessee: Cash Collateral Budget (in thousands 000's)

	(\$'s in Thousands)								
	1 9/27/17- 9/30/17	2 10/07/17	3 10/14/17	4 10/21/17	5 10/28/17	6 11/04/17	7 11/11/17	8 11/18/17	FORECAST 11/25/17
Week Ending									
Beginning Cash	\$ 183.1	\$ 142.7	\$ 42.7	\$ 8.6	\$ 49.4	\$ 69.9	\$ 25.1	\$ 100.5	\$ 131.2
Operating Revenue Collections									
Revenue Collection	\$ 24.6	\$ 37.7	\$ 22.9	\$ 109.3	\$ 102.3	\$ 74.5	\$ 99.3	\$ 40.0	\$ 117.1
Total Revenue Collection	\$ 24.6	\$ 37.7	\$ 22.9	\$ 109.3	\$ 102.3	\$ 74.5	\$ 99.3	\$ 40.0	\$ 117.1
Disbursements									
Payroll (Incl. Payroll Tax - Current)	\$ (46.0)	\$ (49.8)	\$ (47.8)	\$ (47.8)	\$ (47.8)	\$ (47.8)	\$ (8.8)	\$ (3.2)	\$ -
Sub Contractor Labor	-	-	-	-	\$ (26.0)	-	-	-	-
Priority Tax Payments	-	-	-	-	-	-	-	-	-
Material and Equipment Rental	\$ (13.0)	\$ (24.7)	\$ (8.5)	\$ (17.3)	\$ (5.5)	\$ (24.7)	\$ (8.5)	-	-
Bank Fees	-	-	-	-	-	-	-	-	-
Building Rent	-	\$ (1.2)	-	-	-	\$ (1.2)	-	-	-
Building Repair & Maint.	-	\$ (1.5)	-	-	\$ (1.5)	-	-	-	-
Group Health	-	\$ (10.0)	-	-	\$ (10.0)	-	-	-	-
Group Life	\$ (0.5)	-	-	\$ (0.5)	-	-	-	-	\$ (0.5)
Employee Paid Benefits	\$ (4.7)	-	-	-	-	-	\$ (3.0)	-	-
Insurance Vehicle	-	\$ (8.5)	-	-	-	-	-	-	-
Office Supplies / Software	\$ (0.8)	-	-	-	\$ (0.8)	-	-	-	\$ (0.8)
Officer's Life Insurance	-	-	-	-	-	-	-	-	-
Telephone and Cell Phones	-	-	-	-	\$ (2.7)	-	-	-	-
Utilities	-	\$ (3.0)	\$ (0.6)	\$ (1.1)	\$ (1.1)	\$ (3.0)	\$ (0.6)	\$ (0.4)	\$ (1.1)
Workers Comp & GL	-	-	-	-	-	-	-	-	-
Relocation Expenses	-	\$ (23.9)	-	-	-	\$ (13.0)	-	-	-
Secured Purchasing Card	-	-	-	-	-	-	-	-	-
Total Disbursements	\$ (65.0)	\$ (137.6)	\$ (56.9)	\$ (68.2)	\$ (81.8)	\$ (119.2)	\$ (23.9)	\$ (9.3)	\$ (5.5)
Total Operating Cash Flow	\$ (40.4)	\$ (100.0)	\$ (34.1)	\$ 41.1	\$ 20.5	\$ (44.8)	\$ 75.4	\$ 30.7	\$ 111.6
Bankruptcy Costs									
US Trustees Fees	-	-	-	\$ (0.3)	-	-	-	-	-
Legal Fees	-	-	-	-	-	-	-	-	-
CPA Fees	-	-	-	-	-	-	-	-	-
Total Bankruptcy Costs	\$ -	\$ -	\$ -	\$ (0.3)	-	-	-	-	-
Net Cash Activity	\$ (40.4)	\$ (100.0)	\$ (34.1)	\$ 40.8	\$ 20.5	\$ (44.8)	\$ 75.4	\$ 30.7	\$ 111.6
Ending Cash	\$ 142.7	\$ 42.7	\$ 8.6	\$ 49.4	\$ 69.9	\$ 25.1	\$ 100.5	\$ 131.2	\$ 242.8

This Order has been electronically signed. The Judge's signature and Court's seal appear at the top of the first page.
United States Bankruptcy Court.