

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:

SUFFOLK READY MIX, LLC,

Debtor.

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Chapter 11

Case No. 09-75473-REG

**FINAL ORDER AUTHORIZING USE OF CASH COLLATERAL GRANTING
ADEQUATE PROTECTION AND SECURITY INTERESTS IN POST-PETITION
PROPERTY**

The motion of Suffolk Ready Mix, LLC (“Suffolk” or “Debtor”), Debtor and Debtor in Possession herein for a Final Order (the “Final Order”) pursuant to Bankruptcy Rule 4001(b) to consider the Debtor’s application to use cash collateral as that term is defined in §363(a) of the Bankruptcy Code, and granting to Financial Federal Credit Inc., (“FFCI”) adequate protection for the use by the Debtor of the cash collateral in which they assert to have an interest, and this matter having come on for an initial emergency hearing on July 29, 2009, and thereafter continued upon consent of the parties (the “Hearing”) and the Debtor by its attorney Michael G. McAuliffe, Esq. having appeared in support of the motion and FFCI by its attorney Clifford A. Katz, Esq., and the Official Committee of Unsecured Creditors (the “Committee”) through its counsel Jager Smith, PC, and the Office of the U.S. Trustee by Stan Yang, Esq. and this Court having considered the motion (the “Motion”) and a hearing having been held on October 19, 2009 with respect to the Motion , and having been fully advised and upon the record the parties have agreed to the following:

A. On July 24, 2009, (the “Filing Date”) the Debtor filed a petition for relief pursuant to Chapter 11 Title 11 of the U.S Code (the “Bankruptcy Code). Pursuant to Bankruptcy Rule 4001(b)(3) the twenty (20) largest unsecured creditors of the Debtor (as set forth on the list filed

pursuant to Bankruptcy Rule 1007(d)), the United States Trustee, all parties filing a request for notices with this court, all parties against whom relief is sought, and all parties asserting a lien upon the Debtor's assets have received notice of the relief requested by the Motion and have been afforded a reasonable opportunity to object to such relief. Such notice and opportunity for a hearing constitute in all respects a "notice and a hearing" within the meaning of §363(C)(2)(B) of the Code. Thereafter, the Office of the United States Trustee formed the Committee. The Committee has retained the law firm of Jager Smith PC as its counsel. The Committee consents to the relief requested herein.

B. An immediate need exists for the Debtor to continue use of Cash Collateral in order to continue the operation of its business. Without the use of the Cash Collateral, the Debtor will not be able to continue to operate, pay its payroll and payroll expenses and obtain required goods and services.

C. FFCI has indicated a willingness to consent to the use by the Debtor of the cash collateral upon the terms and subject to conditions set forth in this Final Order.

D. Good and sufficient cause has been shown for the entry of the Final Order. Among other things, entry of the Order will minimize disruption of the Debtor's business and operations as a going concern and is necessary to avoid immediate and irreparable harm to the Debtor's estate. The terms and conditions respecting the use by the Debtor of the Cash Collateral as authorized herein are fair under the circumstances.

NOW, THEREFORE, on the basis of the foregoing it is ORDERED:

1. All of the recitals set forth above are hereby incorporated into this Final Order as if fully set forth herein, and are made part of this Order. The Debtor has made the appropriate showing of entitlement to the relief requested. The Debtor may use cash collateral consistent

with the budget (the "Budget") to be provided to FFCI and the Committee pursuant to the terms of this Order.

2. The Debtor acknowledges, that as of the Filing Date, its first priority fully secured obligation to FFCI in the amount of \$175,311 together with the accrued interest, late charges, fees, costs and attorney fees which has been incurred or as maybe incurred as pursuant to certain promissory notes, security agreements and other agreements as may be entered into or assigned to FFCI with respect to the Debtor (collectively the "Agreements"). The Debtor further affirms that the aforementioned obligations of the Debtor to FFCI is not subject to any offset, claim or counterclaim of any kind or nature whatsoever by the Debtor. The Debtor recognizes FFCI's claim of the aforementioned obligation of the Debtor to FFCI is secured by a duly perfected first lien on the Collateral (as defined in Agreements and this Order). FFCI asserts and the Debtor acknowledges that it is a fully secured creditor for purposes of section 506(b) of the Bankruptcy Code. Except as limited pursuant to the terms of this Order, there shall not be any further attempt by any party, including but not limited to a chapter 7 trustee, which may be appointed, to avoid FFCI's liens or claims with respect to the Collateral granted hereunder or pursuant to the Agreements.

3. The terms of this Order are fair and reasonable, and have been negotiated in good faith and at arm's length between the Debtor, the Committee and FFCI.

4. That, subject to the terms hereof, the Debtor may use the cash collateral of FFCI, *nunc pro tunc* from the Filing Date. The rights, remedies and protections of this Order shall be effective, *nunc pro tunc* as of the Filing Date. The Debtor's right to continue to use the cash collateral of FFCI shall cease immediately upon the default by the Debtor with respect to the terms of this Order or the terms of the Agreements.

5. The Debtor's use of cash collateral is limited pursuant to the terms of the Budget which shall be provided and agreed to by FFCI and also provided to the Committee. The Budget shall be provided to FFCI and the Committee, on or by the 10th day of the following month, and the Debtor shall also provide FFCI and the Committee with a monthly itemized reconciliation of actual expenditures to the prior monthly budgeted period, which shall be provided to the Committee and FFCI, within thirty (30) days following the conclusion of the preceding month

6. Pursuant to section 361 and 363 of the Bankruptcy Code, as adequate protection for the Debtor's use of cash collateral and as security for and inducement to FFCI to permit the Debtor's use of the cash collateral, FFCI be and hereby is granted a validly perfected and enforceable first priority security interest, subject only to the Carve Out as defined in paragraph "29" herein, in all pre and post petition assets of the Debtor (except for avoidance actions and/or claims which have or may be commenced under Sections 544, 547, 548, 550 and 553 of the Code, the "Avoidance Actions") now owned and hereafter acquired, including but not limited to:

- (i) Goods, inventory, chattels, machinery, equipment, vehicles, accounts, chattel paper, notes receivable, accounts receivables, furniture, fixtures, general intangibles, causes of action, documents, contract rights, tax refunds, insurance proceeds, accounts and property of every kind and nature, wherever located, now or hereafter belonging to the Debtor and all proceeds and any distribution thereof and any insurance thereon; and
- (ii) Proceeds and products of all of the above, as well as the proceeds of any insurance on the collateral with FFCI (collectively, the "Collateral").

7. The Debtor is authorized and directed to execute and deliver to FFCI all such agreements, financing statements, instruments and other documents as are necessary or

reasonably requested by FFCI to evidence, confirm, validate or perfect the security interests and liens granted or continued pursuant to this Final Order, and FFCI is authorized to receive such documents and record or file such documents in such governmental offices as it shall deem appropriate. FFCI shall not be required to file financing statements in any jurisdiction or take any other action in order to validate and perfect the security interests and liens granted to it hereunder. The liens and security interests granted herein to FFCI are hereby deemed fully perfected without the necessity of filing and documents otherwise required under non-bankruptcy law and the perfection being binding upon any subsequently appointed Trustee, either in Chapter 11 or under any other Chapter of the Bankruptcy Code and upon all creditors, the Debtor and parties in interest of the Debtor. The automatic stay of section 362 of the Bankruptcy Code shall be deemed modified as to FFCI to permit any and all such filing or recording without further order of this Court.

8. That the liens and security interests granted to FFCI pursuant to this Order shall at all times be senior to the rights of the Debtor or any successor trustee in this or any subsequent proceeding under the Bankruptcy Code, and that no costs of administration which has been incurred, or may be incurred, in this proceeding, in a Chapter 7 proceeding or any other proceeding shall have priority or parity with the claim of FFCI against the Debtor arising out of the security interests and liens of FFCI on the pre-petition and post-petition collateral, and no such costs of expenses of administration shall be imposed against FFCI, or their collateral, pursuant to any provisions of the Bankruptcy Code, including, but not limited to §§105, 330, 331, 503(b), 506(c), 507.

9. That FFCI is hereby granted a priority administrative claim with priority over all administrative expenses of any kind whatsoever incurred in this reorganization, including, but

not limited to, all administration expenses specific in or grant pursuant to §§105, 330, 331, 503(b), or 507 of the Bankruptcy Code to the extent that the liens granted on the post-petition assets of the Debtor in favor of FFCI pursuant to this Final Order are insufficient to compensate FFCI in full for the pre and post-petition amounts due by the Debtor or any subsequent trustee of the assets of the Debtor.

10. That FFCI shall have the right to inspect their collateral and the books and records of the Debtor, upon forty-eight (48) hours telecopy notice to Debtor and its counsel, said inspection to be made during regular business hours.

11. In order to pay its necessary operating expenses, the Debtor is authorized on the terms and subject to the conditions contained in this Final Order, up to the maximum amount set for each item set forth on the Budget for that period. Notwithstanding anything herein to the contrary, the Debtor's use of cash collateral shall automatically terminate on the date (the "Termination Date") which is the earliest of: (a) March 31, 2010, unless extended upon written consent of FFCI or pursuant to further Order of this Court; (b) the occurrence of a non-emergent Default Event which is uncured after 10 days, such as non-payment; and/or (c) the occurrence of an emergent Default Event, (an "Emergent Default") which shall be any event which places the Collateral in jeopardy, such as cancellation or termination of insurance, conveyance or sale or attempted conveyance or sale of any item of Collateral not properly sought pursuant to the Bankruptcy Code, whereupon the Debtor shall be prohibited from using cash collateral without further Order of this Court.

12. Notwithstanding any termination of the use of cash collateral, any use of cash collateral pursuant to this Final Order prior to the termination of the use of cash collateral by the Debtor, shall be governed in all respects by the original provisions of this Final Order, and FFCI

shall be entitled to all rights, privileges and benefits, including without limitation, the security interests and liens and administrative priorities granted herein, all of which shall survive any such termination.

13. The Debtor shall not use cash collateral in excess of a ten (10) percent deviation of the aggregate amounts set forth in the Budget without the prior written consent of FFCI and then only for the limited purpose set forth in any such consent. If FFCI grants any such consent, such consented to increase in the use of cash collateral shall be governed in all respects by all of the terms and conditions of this Order in respect of such consent including, without limitation, an extension of the liens and security interests granted hereunder to provide adequate protection of FFCI's interest in the cash collateral used pursuant to such consent.

14. That as a condition for the Debtor's use of cash collateral , through March 31, 2010, and thereafter as may be extended upon consent of FFCI, the Debtor shall pay to FFCI on or before the first day of each successive month the sum of \$6,493.00.

15. The Debtor shall cooperate reasonably and fully with FFCI, and shall, among other things, execute any and all documents required by FFCI, including, without limitation, that the Debtor shall execute any documents necessary or desirable in the reasonable judgment of FFCI to effect collection of any tax refunds remitted to the Debtor and not directly set off by the respective taxing authority or insurance proceeds, if any, that may be due or become due.

16. There shall not be any surcharge to the Collateral pursuant to section 506(c) of the Bankruptcy Code. The Debtor hereby waives its rights to assert a claim against the Collateral pursuant to section 506(c) of the Bankruptcy Code.

17. The Debtor is hereby authorized and shall pay, upon receipt of invoice therefor, all of the reasonable costs and expenses (including reasonable attorneys fees) incurred by FFCI

post-Filing Date in connection with this Chapter 11 case, including without limitation, the negotiation, preparation and administration of the Motion, the Order. Copies of all such invoices shall be provided to the United States Trustee, Counsel to the Debtor and counsel the Committee on 7 days prior notice, prior to payment thereof by the Debtor. In the event of a timely objection, said application for payment shall be made to the Bankruptcy Court, on notice to the United States Trustee, counsel to the Debtor and counsel to the Committee.

18. That as additional conditions of the Debtor's use of cash collateral during the period set forth in this Stipulation and any extensions of this period, the Debtor shall:

- (i) Maintain the Collateral in good and workmanlike manner; and
- (ii) Maintain hazard, fire, theft, loss insurance on all of Collateral in (excluding accounts and general intangibles) in an amount equal to at least the fair market value of such collateral and identify FFCI as loss payee.

19. That notwithstanding any provisions herein to the contrary, the obligations of the Debtor shall become immediately due and payable to FFCI and FFCI's consent to use of its collateral, including its cash collateral, shall be immediately revoked without further Order of this Court and shall be deemed a "Default Event" in the event of the earliest of the following:

- (i) Entry of any Order dismissing the within proceeding or converting the within proceeding to Chapter 7 of the Bankruptcy Code;
- (ii) Entry of an Order authorizing the appointment of a Chapter 11 Trustee, or Examiner;
- (iii) Entry of an Order modifying or vacating the automatic stay in favor of FFCI, or any other party with respect to a substantial (determined by FFCI's reasonable discretion) portion of the Collateral;
- (iv) Entry of an Order granting any lessor of Debtor's non-residential real property, possession of such real property;

- (v) The failure of the Debtor to make a required payment hereunder; and the continued failure by the Debtor after ten (10) days notice to cure;
- (vi) Ten (10) days after notice of the default by Debtor on any term or condition set forth in this Order or any extension hereof, or the Agreements;
- (vii) At 5:00 p.m., on March 31, 2010, unless further extended by written consent of FFCI or by Order of the Bankruptcy Court, and
- (viii) An Emergent Default

20. Notices

(a) Any notices in connection herewith may be mailed by the United States first-class mail, postage prepaid, personally delivered, overnight courier, or sent by facsimile transmission to:

If to the Debtor: Suffolk Ready Mix, LLC
131 Old Northport Road
Kings Park, New York 11754
Att: Anthony T. Persico

with a copy to: Michael McAuliffe, Esq.
48 South Service Road, Suite 102
Melville, New York 11747
(631) 465-0045 Fax

If to FFCI: Financial Federal Credit Inc.
733 Third Avenue
New York, New York 10017
Attn: Robert T. Bonsignore, Esq.,
(212) 286-5885 Fax

with a copy to: Platzer, Swergold, Karlin, Levine,
Goldberg & Jaslow, LLP.,
150 East 52nd Street
New York, New York 10022
Attn: Clifford A. Katz, Esq.
(212) 593-0353 Fax

with a copy to: Jager Smith

One Financial Center
Boston, MA 02111
Attn: Stephen C. Reingold, Esq.
(617) 951-2414 Fax

Notices shall be effective upon mailing, emailing, personal delivery or transmission by facsimile. Notices to the Debtor may be sent via email or facsimile to Debtor's Counsel.

21. Upon default, the Debtor hereby consents to relief from the automatic stay and FFCI may submit to the Court a proposed Order Granting Relief From The Automatic Stay in order to obtain possession of its collateral and enforce any and all other rights it may have under its Agreements on five (5) calendar days written notice to the attorneys for the Debtor, FFCI, the attorneys for the Committee and the Office of the United States Trustee.

22. The Debtor hereby forever releases, relieves, forgives and discharges any and/or all pre-petition claims, demands, rights, causes of action, remedies, objections, and avoidance powers, it has, may have, or claim to have against FFCI, their employees, officers, directors, agents, representatives, whether known or unknown, liquidated or unliquidated, matured or unmatured, arising at any time, including, not limited to, any and all claims, demands, causes of action and/or remedies, rights and objections arising out of, or in any way related to (i) extensions of credit by FFCI to the Debtor, (ii) the documents entered into by and between the Debtor and FFCI (iii) FFCI's lending relationships with the Debtor, and (iv) any and all pre-petition conduct and/or representations of FFCI, their employees, officers, directors, agents and/or representatives.

23. That nothing herein shall be deemed to be a finding with respect to adequate

protection as such term is defined in §362 of the Bankruptcy Code, FFCI reserves its right to claim that the protection provided herein is not “adequate protection” for the purposes of section 507(b) of the Bankruptcy Code or otherwise.

24. That the provisions of this Stipulation and any actions taken pursuant hereto, shall survive the entry of any subsequent order which may be entered confirming any Plan of Reorganization with respect to the Debtor, appointing a Trustee or Examiner of the Debtor, or converting this case to Chapter 7 of the Bankruptcy Code. The terms and provisions of this Stipulation, as well as the priorities, liens and security interest created hereunder, shall continue in this or any superseding case under the Bankruptcy Code, and such liens and security interest shall maintain their priority provided for by the Order until indefeasibly satisfied and discharged in full. However, in the event that this proceeding is dismissed or a Plan of Reorganization with respect to the Debtor is confirmed, FFCI will no longer be obligated to provide any notice of default or cure period as set forth herein; rather, the written loan documents and related agreements shall govern.

25. That in the event FFCI assigns its rights against the Debtor to a bank or other lending institution, a person, finance company, or any other third party, any such third party shall have all the rights, benefits and remedies of FFCI hereunder, and any such third party shall be bound by all the terms and conditions of this Stipulation.

26. The obligations of the Debtor and rights of FFCI hereunder are in addition to, and not in lieu or substitution of, the rights and obligations of these parties otherwise existing as of the date of the Filing Date.

27. The consent to this Final Order may be executed in counterparts, with all signatures being considered the entire document. Facsimile signatures shall be deemed original for purposes of execution of this Final Order.

28. Notwithstanding anything to the contrary herein, the entry of this Final Order is without prejudice to, and does not constitute an express or implied waiver of, and does not otherwise impair or effect any rights, claims or privileges (whether legal, equitable or otherwise) of FFCI under the Bankruptcy Code or otherwise with respect to third parties.

29. The term “Carve-Out” means; (a) the quarterly fees due the United States Trustee and other fees due to the clerk of the United States Bankruptcy Court pursuant to 28 U.S.C.1930 (the “UST Fees”); and (c) fees and expenses awarded to professionals retained in this Chapter 11 proceeding awarded by the Court under Sections 328, 329, 330 or 331 of the Bankruptcy Code (“Approved Professional Fees”). The Carve-Out for professionals shall be in an amount up to and not to exceed \$50,000, allocated as follows: \$40,000 for professionals retained by the Committee and \$10,000 for professionals retained by the Debtor. The Carve-Out, except for the carve out for U.S. Trustee Fees, shall be solely from the proceeds of the Debtor’s available cash collateral, and not from the proceeds of FFCI’s equipment collateral, and up to the amount of \$7,000 per month, based upon availability in the Budget. The funding of the Carve Out shall cease upon a default by the Debtor pursuant to the terms of this Final Order and the Carve Out shall be capped at the amount funded as of the time of the default. None of the Carve Out proceeds or proceeds of the FFCI’s cash collateral shall be used to bring any action or challenge the extent, validity, and/or priority of FFCI’s claims or interests asserted against the Debtor.

30. FFCI's pre-Filing Date debt is a valid and binding obligation of the Debtor and the Debtor does not have or assert, and has expressly waived and released, any and all claims, counterclaims, offsets or defenses of any kind or nature against FFCI and which could in any way reduce or affect its obligation to pay the FFCI pre-Filing Date debt, including but not limited to, claims based upon equitable subordination or the "avoiding powers" under sections 522, 544, 547, 548, 549, 550, 553, and 724 of the Bankruptcy Code. FFCI has a first priority validly perfected lien and security interest in the Collateral pursuant to the Agreements, which is valid, and enforceable. Except however, the Committee shall have sixty (60) days from the date of the entry of this Final Order (the "Challenge Period") to contest the extent, validity and/or priority of the pre-Filing Date debt due FFCI and the pre-Filing Date liens and security interests asserted by FFCI. This paragraph shall become binding and effective against all parties in interest, unless (i) the Committee has filed an adversary proceeding against FFCI with respect to FFCI's pre-Filing Date debt or the liens and security interests of FFCI securing within the Challenge Period, and (ii) the Court rules in favor of the Committee in such adversary proceeding.

31. Except as may be specifically set forth in this Final Order, entry of this Order shall not be construed as a waiver of the Debtor's defaults under the Agreements. No delay or omission to exercise any right, power, or remedy accruing to FFCI shall impair any such right, power or remedy nor shall it be construed to be a waiver of any such breach or default. No failure of FFCI to enforce any right granted under this Order or any documents shall represent a waiver of such right.

32. This Final Order shall be binding upon the Debtor, all creditors, and any other parties in interest, their heirs, successors, assigns, and a Chapter 11 or Chapter 7 trustee appointed in this proceeding.

33. As consideration of FFCI consenting to the use of its Cash Collateral consistent with the terms of the Budget and its consent to the Carve-Out, no expenses of administration of the Debtor's Chapter 11 case or any future proceeding which may result from such case, including liquidation in this Chapter 11 case or other proceedings under the Code, shall be charged against FFCI's Collateral pursuant to § 506(c) of the Code, or otherwise, without the prior written consent of FFCI and no such consent shall ever be implied from any other action, inaction or acquiescence by FFCI.

34. Unless FFCI expressly consents, no plan of reorganization confirmed in this case shall impair or otherwise modify the rights of FFCI under this Order or the Agreements.

Dated: Central Islip, New York

November 10, 2009

/s/Robert E. Grossman
Honorable Robert E. Grossman
United States Bankruptcy Judge

Agreed and accepted to:

/s/ Clifford A. Katz
PLATZER, SWERGOLD, KARLIN,
LEVINE, GOLDBERG & JASLOW, LLP.
Attorneys for Financial Federal Credit Inc.

/s/ Michael McAuliffe
Michael McAuliffe
Attorneys for the Debtor and Debtor in Possession

/s/ Francis Conrad

Jager Smith
Attorneys for the Committee