

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION**

In re:

Chapter 11

FORTRESS RESOURCES, LLC,

Case No. 15-70730-TNW

Debtor.

**AGREED ORDER REGARDING DEBTOR'S INTERIM USE OF CASH COLLATERAL
AND NOTICE OF HEARING DATE ON FINAL ORDER**

FORTRESS RESOURCES, LLC, (hereinafter, the "Debtor") having filed a Motion for Interim and Final Orders Authorizing Use of Cash Collateral (the "Motion"), and Callidus Capital Corporation ("Callidus") having objected to the Motion but agreeing to the terms contained herein on an interim basis, and the Court having heard this Motion on shortened notice on November 10, 2015, and the Court being sufficiently advised, it is ORDERED AND ADJUDGED as follows:

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue of the Debtor's case and this Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), (A), (D), (G), (K), (M) and (O).

2. Notice of the hearing on the Motion has been given to (i) the Office of the United States Trustee, (ii) all Secured Creditors and (iii) certain of the unsecured creditors of the Debtor, all as more fully provided in the Certificate of Service submitted in conjunction with the Motion. Under the circumstances, such notice of the hearing and the specific relief requested in the Motion complies with the requirements of Bankruptcy Code § 102(1) and Bankruptcy Rule

2002. The Debtor has provided adequate notice under the circumstances pursuant to Bankruptcy Rule 4001 of the hearing to consider entry of this Order to all persons who are entitled to receive such notice.

3. Based on the Debtor's allegations set forth in the Motion and the record at the November 10, 2015 hearing, the Motion is granted in part as provided in this Order. The terms of this Order, including the terms of the use of Cash Collateral (as defined in the Motion) and the security interests, liens, rights and priorities granted hereunder are justified under the circumstances.

4. The Debtor is authorized to use Cash Collateral only in accordance with this Order from the Petition Date through November 24, 2015 (the "Termination Date"). The Debtor may only use Cash Collateral as set forth in the Debtor's Budget attached hereto as **Exhibit A**. The Debtor is specifically authorized to expend such amounts identified in the Budget to maintain the insurance policies described in Docket No. 18.

5. In the event this Order is terminated or expires, Callidus and the Debtor reserve any and all rights afforded them under applicable bankruptcy laws as to the use of Cash Collateral or otherwise. In particular, Callidus reserves all rights, including, without limitation, (i) the right to move the Court for appropriate relief, including the provision of additional adequate protection, or the modification, termination and lifting of the automatic stay of Bankruptcy Code § 362 and authorization to foreclose and collect upon any of Callidus' collateral, (ii) the right to demand that all of the Cash Collateral be segregated and accounted for as provided in Bankruptcy Code § 363(c)(4), and (iii) the right to refuse to consent to the use of the Cash Collateral or condition such consent upon such terms and conditions as Callidus shall deem appropriate.

6. In addition to the usual monthly operating reports, the Debtor shall provide weekly reports to Callidus (including its attorneys and financial consultants), and the attorneys for any Committee of Unsecured Creditors appointed in this case. The reports, among other things, shall describe all receipts and expenditures for such period, including a list of each check, payee, purpose and amount thereof, and an actual to budget analysis and report. This procedure shall continue until the expiration of this Order. To the extent the Debtor's records allow, the Debtor shall identify the source of all Cash Collateral on hand as of the Petition Date and all assets (including additional coal inventory) received or generated during the pendency of the case.

7. In consideration of Callidus' consent to the use of Cash Collateral by the Debtor, to the extent of the diminution in the value of Callidus' collateral (including Cash Collateral), and as part of the adequate protection for such diminution in the value of Callidus' collateral (including Cash Collateral), pursuant to Code §§ 361 and 363, (the "Adequate Protection Claim"), the Debtor hereby grants and re-grants to Callidus (as its interest may appear) a first priority lien upon all prepetition and postpetition Collateral (as defined in the Security Agreement dated September 5, 2014), all property subject to the Term Loan and Revolving Credit Fee Mortgage, Assignment of Leases and Subleases, Security Agreement and Fixture Filing dated January 21, 2015, and Cash Collateral, including, but not limited to, the accounts receivable, inventory, as-extracted collateral, cash proceeds of all coal sold by the Debtor postpetition and upon all coal added to the Debtor's inventory postpetition, and the proceeds of all of the foregoing (hereinafter, the "Replacement Lien"), subject only to any valid and enforceable, perfected and non-avoidable existing liens, if any, as of the Petition Date in favor of any other party, if any. Without limiting the foregoing, the Replacement Lien shall

attach to the Debtor's DIP Account at Community Trust Bank ending in the last four digits 6657 and to any other accounts established by the Debtor, and to all funds in the accounts. The property in which a Replacement Lien is granted pursuant to this paragraph shall be herein referred to collectively as the "Post-Petition Callidus Collateral." The security interest and lien herein granted to Callidus in the Post-Petition Callidus Collateral shall be junior and subordinate only to any existing liens and carve-outs of the fees of the United States Trustee and the Debtor's counsel in this case as the parties may later agree to or as fixed by the Court.

8. The Adequate Protection Claim of Callidus shall further be entitled under Bankruptcy Code § 507(b) to priority over any or all administrative expenses of the kind specified in Bankruptcy Code §§ 503(b) or 507, including all professional fees allowed pursuant to Bankruptcy Code §§ 330 and 331, except (a) the fees of the United States Trustee and (2) those professionals fees allowed under a carve-out, which carve-out shall be negotiated in good faith by and among Callidus, the Debtor and any other professionals appointed by this Court on or before the Termination Date, or if not agreed upon, then fixed by the Court upon motion, notice and a hearing.

9. The Debtor's right to use the Cash Collateral shall cease and terminate immediately, and without further notice, upon the Termination Date, unless Callidus and the Debtor agree in writing to an extension of this Order, or unless this Court determines otherwise at the hearing on November 24, 2015.

10. All liens and security interests granted or continued as provided in this Order shall be deemed effective, valid and perfected as of the Petition Date without the necessity of the filing or lodging by or with any entity of any documents or instruments otherwise required to be filed or lodged under applicable non-bankruptcy law. This Order shall be deemed to be a security agreement for purposes of creation, attachment and perfection of the liens on and the security

interests in, to and against the Post-Petition Callidus Collateral.

11. Except as otherwise specifically provided herein, neither Callidus nor the Debtor waives any rights they have pursuant to the existing agreements between the Debtor, Callidus or any other party in interest, each retaining all rights available pursuant to the Bankruptcy Code or any other applicable law.

12. The rights, claims, security interests, liens and priorities of Callidus arising under this Order are in addition to, and not in lieu or substitution of, the rights, obligations, claims, security interests, Callidus' liens and priorities granted under the existing agreements between the parties.

13. The obligations of the Debtor and the rights, claims, security interests, liens and priorities of Callidus, and all other transactions which occurred prior to the termination of this Order, shall remain unimpaired and unaffected by any such termination, modification, reversal or appeal of this Order and shall survive any such termination, modification, reversal or appeal. Without limiting the foregoing, the terms of this Order and the attached budget were negotiated at arm's length and in good faith between the parties and Callidus is entitled to the protections of Bankruptcy Code §§ 363(m) and/or 364(e) to the extent applicable.

14. The Debtor acknowledges and agrees that, as of the Petition Date: (a) all agreements between the Debtor and Callidus (collectively, the "Agreements"), which include but are not necessarily limited to the loan documents incorporated in Debtor's Notice of Filing of Loan Documents [Doc. No. 23], are valid and binding agreements and obligations of the Debtor, (b) the amount of the prepetition debt due and payable by the Debtor to Callidus is no less than \$19,000,000.00 (the "Prepetition Callidus Debt"), (c) Callidus' respective security interests and liens set forth in the Agreements, including, but not limited to, the Security Agreement dated September 5, 2014 and the Term Loan and Revolving Credit Fee Mortgage, Assignment of

Leases and Subleases, Security Agreement and Fixture Filing dated January 21, 2015, are valid, perfected, enforceable and non-avoidable, and (d) **the Debtor does not possess and may not assert any claim, counterclaim, setoff or defense of any kind or nature which would in any way affect the validity, enforceability, and non-avoidability of the Prepetition Callidus Debt and Callidus' prepetition security interests and liens or reduce or affect the obligation of the Debtor to pay the Prepetition Callidus Debt.** Other than the Debtor, nothing in this paragraph will be binding on other creditors and parties-in-interest.

15. Any objection to the Debtor's Cash Collateral Motion or to entry of this Order on a final basis shall be filed no later than 5:00 p.m. on Friday, November 20, 2015. A final hearing upon the Debtor's Cash Collateral Motion and entry of this order on a final basis shall be held before this Court on Tuesday, November 24, 2015, at 9:30 a.m. EST (the "Hearing Date") at the U.S. Bankruptcy Court for the Eastern District of Kentucky, Third Floor Courtroom, 100 East Vine Street, Lexington, Kentucky 40507. Prior to the Hearing Date, the Debtor is authorized and directed to execute and comply with the terms of this Order and is further authorized to use Cash Collateral solely under all of the terms and conditions provided in this Order.

16. During the pendency of this bankruptcy case, the Debtor shall reasonably cooperate with Callidus, and its consultants and designees, to provide reasonable access, upon reasonable notice, to the Debtor's operations, books, records and management personnel to review all aspects of the Debtor's operations and financial condition.

17. The terms and conditions of this Order vary from the requirements of Local Rule 4001-2(d). Pursuant to Local Rule 4001-2(e), the terms of this Order govern and are enforceable.

AGREED TO AND TENDERED BY:

BUNCH & BROCK

BY: /s/ W. Thomas Bunch II
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*PROPOSED ATTORNEYS FOR THE
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