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8 **UNITED STATES BANKRUPTCY COURT**
9 **DISTRICT OF ARIZONA**

10 In re:

11 NAUGHTON PLUMBING SALES CO.,
12 INC.,

13 Debtor.

Chapter 11 Proceedings

Case No. 4:16-bk-13201-SHG

**EMERGENCY MOTION FOR
INTERIM ORDER AUTHORIZING
USE OF CASH COLLATERAL,
GRANTING ADEQUATE
PROTECTION, AND SETTING
FURTHER HEARINGS**

15 Naughton Plumbing Sales Co., Inc., Debtor and Debtor-in-Possession (the
16 “**Debtor**”), in the above-referenced chapter 11 case (the “**Bankruptcy Case**”) submits this
17 motion (the “**Cash Collateral Motion**”), under Sections¹ 105(a), 361, 362, and 363 of the
18 Bankruptcy Code, Bankruptcy Rules² 4001, 6003 and 6004, and Local Rules³ 4001-3 and
19 4001-4(b), and respectfully requests this Court (1) enter a limited stipulated interim order
20 (i) authorizing the use of cash collateral necessary for the Debtor to continue its ongoing
21 operations and successfully reorganize, (ii) granting the Debtor’s pre-petition lender,
22 Alliance Bank of Arizona (“**Alliance Bank**”) and Orgill, Inc. (“**Orgill**”), adequate
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27 ¹ As used herein, “**Section**” refers to a section of chapter 11 of title 11 of the United
28 States Code, 11 U.S.C. §§ 101 *et seq.* (the “**Bankruptcy Code**”).

² As used herein, “**Bankruptcy Rule**” refers to a rule of the Federal Rules of
Bankruptcy Procedure, Bankruptcy Rules 1001-9037.

³ As used herein, “**Local Rule**” refers to a rule of the Local Rules of Bankruptcy
Procedure for the District of Arizona.

1 protection, (2) scheduling interim and final hearings on cash collateral, and (3) granting
2 related relief.
3

4 **Local Rule 4001-4(b) Statement**

5 Local Rule 4001-4(b), among other things, requires that the Debtor conspicuously
6 state within the first two paragraphs of its Cash Collateral Motion whether the Debtor is
7 requesting that the Court permit the Debtor to use unencumbered assets as collateral in the
8 bankruptcy case. Because the Debtor understands that the Court is unlikely to grant relief
9 provided therein until an official committee of unsecured creditors (the “**Committee**”) has
10 been appointed and had a sufficient time to analyze the cash collateral motion and related
11 relief, at this time, *the Debtor does not request the Court’s permission to use*
12 *unencumbered assets as collateral at this time.*
13
14

15 The need for a committee to analyze the Cash Collateral Motion must be balanced
16 with the Debtor’s need to function in the ordinary course at the start of the case. The
17 Debtor seeks to infringe as little as possible on the Committee’s rights under Local Rule
18 4001-4(b). Therefore, the Debtor proposes that the Court grant the relief requested herein
19 for 30 days. In the future, the Debtor, the Committee, and Alliance Bank will discuss cash
20 collateral going forward and, if necessary, request a further hearing with the Court.⁴
21
22

23 The Cash Collateral Motion is further supported by the (1) *Declaration of Frank W.*
24 *Naughton in Support of First-Day Pleadings* (the “**Naughton Declaration**”); (2) the
25 following Memorandum of Points and Authorities; (3) the documents referenced herein;
26

27 ⁴ To the extent implicated in Local Rule 4001-4(b)(6), the Debtor discloses that it will
28 in due course file a motion requesting to be paid professional fees in the ordinary
course of business consistent with the decision in *In re Knudsen Corp.*, 84 B.R. 668,
(B.A.P. 9th Cir. 1988), locally referred to as a “Knudsen Motion.”

1 and (4) the entire record before the Court in this case. In support hereof, the Debtor
2 respectfully states as follows:
3

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. JURISDICTION**

6 1. This Court has subject matter jurisdiction over this Motion under 28 U.S.C.
7 §§ 157 and 1334, and the standing order of reference of bankruptcy matters to the
8 bankruptcy court signed by Chief Judge Stephen M. McNamee Dated June 29, 2001.
9

10 2. This matter constitutes a core proceeding within the meaning of 28 U.S.C. §
11 157(b)(2).
12

13 3. Venue is proper under 28 U.S.C. §§ 1408 and 1409.

14 **II. FACTUAL BACKGROUND**

15 **A. Factual Background and Chapter 11 Filing**

16 1. On November 17, 2016 (the “**Petition Date**”), Naughton Plumbing Sales
17 Co., Inc., an Arizona corporation, filed a voluntary petition for relief under Chapter 11 of
18 the Bankruptcy Code commencing Case No. 4:16-bk-13201-SHG.
19

20 2. Since the commencement of the Bankruptcy Case, the Debtor has continued
21 in possession of its properties and is operating and managing its business as debtor-in-
22 possession pursuant to Sections 1107(a) and 1108.
23

24 3. No request has been made for the appointment of a trustee or an examiner
25 and none has been appointed in this case. No official committee of unsecured creditors
26 has been appointed in this case.
27
28

1 4. The Debtor’s primary business is sale of plumbing, heating, and cooling
2 supplies.
3

4 5. In 2016, the Debtor has generated approximately \$2,845,481.96 in gross
5 profit to date.

6 6. Additional information regarding the circumstances leading to the
7 commencement of this case and information relating to the Debtor’s business are set forth
8 in detail in the Naughton Declaration filed contemporaneously herewith.
9

10 **B. The Loan Agreements with Alliance Bank and Orgill**

11 7. Alliance Bank and Orgill⁵ have a security interest in certain of the Debtor’s
12 personal and real property, and Alliance Bank has contended that funds generated in the
13 normal course of operating the Debtor’s business is cash collateral (the “**Cash**
14 **Collateral**”), as that term is defined in Section 363. *See also Notice of Non-Consent to*
15 *Use of Cash Collateral* [Bk. Dkt. No. 7]. The Debtor has not had sufficient time to
16 determine the validity and extent of Alliance Bank’s lien and Orgill’s lien, and Alliance
17 Bank and Orgill have yet had an opportunity to satisfy their burden of proving the
18 “existence and extent of its interest in the property it claims as cash collateral.” *Far East*
19 *Nat’l Bank v. United States Trustee (In re Premier Golf Props., LP)*, 477 B.R. 767,
20 (B.A.P. 9th Cir. 2012) (creditor “has the burden of establishing the existence and the
21 extent of its interest in the property it claims as cash collateral”). A thorough review is
22
23
24

25 _____
26 ⁵ On October 21, 2016, Orgill filed a UCC Financing Statement with the Arizona
27 Secretary of State’s office. The stated collateral secured by the financing statement
28 included “all goods, equipment, accounts receivable, chattel paper and inventory” as well
as “any and all proceeds or products thereof. It appears Orgill has a second position on the
Debtor’s cash collateral, as that term is defined herein. The Debtor reserves all rights to
object to Orgill’s purported security interest.⁴

1 required to show that its security interest extends to the Debtor's revenue generated from
2 its business. It has yet to do so.

3
4 8. The Debtor takes no position at the present moment with regard to the Cash
5 Collateral issues, and reserves all rights regarding same. For the purpose of the Cash
6 Collateral Motion *only*, the Debtor assumes any alleged lien of Alliance Bank and Orgill
7 Bank are valid and enforceable and all revenue constitutes Cash Collateral.

8
9 9. The Debtor proposes to use revenue from the business and prepetition cash
10 deposited in a debtor-in-possession account to pay operating expenses.⁶ The Debtor has
11 attached a proposed budget as **Exhibit A** in accordance with the specific judicial
12 procedures of the Hon. Judge Scott H. Gan.

13
14 **III. RELIEF REQUESTED AND LEGAL GROUNDS FOR RELIEF**

15 By this Cash Collateral Motion, the Debtor respectfully requests entry of an interim
16 order authorizing the Debtor to use Cash Collateral subject to the Budget attached hereto
17 as **Exhibit A** for the purpose of avoiding immediate and irreparable harm to the Debtor's
18 bankruptcy estate. To be clear, the Debtor's ability to use the Cash Collateral is essential
19 to its operations. The statutory predicates for relief are Sections 105(a), 361, 362 and 363.

20
21 **A. The Debtor's Need to Use Cash Collateral to Avoid Irreparable Harm**
22 **to Its Estate**

23 The Bankruptcy Code authorizes a debtor-in-possession to use cash collateral if the
24 entity holding an interest in such collateral either consents, or after notice and a hearing,
25 the Bankruptcy Court authorizes its use. *See* 11 U.S.C. § 363(c)(2) (a debtor "may not
26

27
28

⁶ The Debtor will provide the Court with information concerning its DIP account once
finalized.

1 use, sell, or lease cash collateral ... unless (A) each entity that has an interest in such
2 cash collateral consents; or (B) the court, after notice and a hearing, authorizes such use,
3 sale, or lease in accordance with the provisions of this section.”). The secured creditor is
4 entitled to adequate protection only if the proposed use of cash collateral decreases the
5 value of the creditor’s interest in the property. *See* 11 U.S.C. § 361; *see also United*
6 *Savs. Ass’n of Texas v. Timbers of Inwood Forest Ass’n Ltd.*, 444 U.S. 365, 369-73
7 (1988). “[N]o monetary protection is required to be provided by the debtor in possession
8 to the secured creditor to the extent that the rents are applied for the maintenance of the
9 property in the manner a receiver would apply the rents.” *In re Princeton Square*
10 *Assocs., L.P.*, 201 B.R. 90, 96 (Bankr. S.D. N.Y. 1996). The use of cash collateral to
11 maintain the property and business provides the secured creditor with the indubitable
12 equivalent of its interest because it preserves the value of the property. *See In re Mocco*,
13 176 B.R. 335, 348 (Bankr. D. N.J. 1995).

14
15
16
17 The Debtor needs immediate authority to use the Cash Collateral to fund Debtor’s
18 day-to-day operations and ultimately achieve a successful reorganization. The Debtor
19 requires the use of Cash Collateral for the payment of the operating expenses included in
20 the Budget. The foregoing expenses are reasonable and necessary business expenses
21 which must be paid in order to maintain and preserve its assets and to continue the
22 operation of its business.
23
24

25 Without the ability to use Cash Collateral, the Debtor will be forced to terminate
26 its employees and close the business. Alliance Bank and Orgill are adequately protected
27 by the Debtor’s proposed use of Cash Collateral to maintain the operation of its business
28

1 by paying for maintenance, insurance, taxes, and other operating expenses. The Debtor
2 is in the best position to operate its business and by allowing it to use cash collateral to
3 continue and to increase the business, Alliance Bank and Orgill are more likely to
4 recover on their claims. The use of Cash Collateral will not decrease the value of the
5 creditor's interest in the property, but rather will reduce the possibility that the business
6 and property will decrease in value.
7

8
9 Finally, the Debtor currently has no present alternative borrowing source from
10 which it can secure additional funding to operate its business. In sum, the failure to
11 obtain authorization for the use of the Cash Collateral will be fatal to Debtor and
12 disastrous to its creditors, both secured and unsecured.
13

14 **B. The Debtor Requests Immediate Relief and Waiver of Stay**

15 Under Bankruptcy Rules 6003(b) and 6004(h), the Debtor seeks (i) immediate
16 entry of an order granting the relief sought herein and (ii) a waiver of any stay of the
17 effectiveness of such an order. Bankruptcy Rule 6003(b) provides, in pertinent part, that
18 “[e]xcept to the extent that relief is necessary to avoid immediate and irreparable harm,
19 the court shall not, within 21 days after the filing of the petition, grant relief regarding ...
20 a motion to pay all or part of a claim that arose before the filing of the petition.” FED. R.
21 BANKR. P. 6003(b).
22

23 Consequently, where the failure to grant any such requested relief would result in
24 immediate and irreparable harm to the Debtor's estate, the Court may allow the Debtor to
25 pay all or part of a claim that arose before the Petition Date prior to the twenty-first day
26 following the Petition Date. Bankruptcy Rule 6004(h) provides that “[a]n order
27 authorizing the use, sale, or lease of property other than cash collateral is stayed until the
28

1 expiration of 14 days after entry of the order, unless the court orders otherwise.” FED. R.
2 BANKR. P. 6004(h).

3 WHEREFORE, the Debtor respectfully requests that the Court enter an interim
4 order granting the relief sought herein, and granting the Debtor such other and further
5 relief as the Court may deem proper.
6

7 DATED this 23rd day of November, 2016.

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