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5 *Proposed Attorneys for Debtor*
6 *and Debtor in Possession*

7
8 **UNITED STATES BANKRUPTCY COURT**
9 **DISTRICT OF NEVADA**

10 In re:)
11 C & S COMPANY INC.,)
12) Case No. 16-14155-MKN
13 Debtor.) Chapter 11
14) Date: April 5, 2017
Time: 9:30 a.m.

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

16 COMES NOW, C & S COMPANY, by and through its counsel of the law firm of David
17 J. Winterton & Assoc., Ltd., hereby files this Motion to Use Cash Collateral and Motion for
18 Order to Pay Post-Petition Expenses. Counsel understands a Trustee has been in place, but there
19 has been no actions taken regarding cash collateral. In addition, there are post-petition expenses
20 that need to be paid and the Trustee has not paid the expenses. This harms the Debtor and its
21 relationship with people that provide services. As a result, counsel is asking that the post-
22 petition expenses be paid. This Motion is made pursuant to 11 U.S.C. §§363(c)(2) and 363(e) of
23 the Bankruptcy Code and Rule 4001(b) of the Federal Rules of Bankruptcy procedure and Local
24 Rule 4001(b).

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1 This Motion is supported by the accompanying Memorandum of Points and Authorities.
2 The pleading and papers of record and any oral argument presented in this matter.

3 DATED this 28th day of February, 2017.

4 DAVID J. WINTERTON & ASSOC., LTD.

5
6 By: /s/ David J. Winterton
7 DAVID J. WINTERTON, ESQ.
8 Nevada Bar No. 004142
9 1140 No. Town Center Drive, Suite 120
10 Las Vegas, Nevada 89144

11 *Attorneys for Debtors*

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 COMES NOW, C & S COMPANY, by and through its counsel of the law firm of David
14 J. Winterton & Assoc., Ltd., hereby files this Memorandum of Points and Authorities in Support
15 of its Motion Use of Cash Collateral and Motion for Order to Pay Post-Petition Expenses.

16 **I.**
STATEMENT OF FACTS

- 17 1. The Debtor owed past taxes and withholdings to the IRS.
- 18 2. The IRS filed a lien on the Debtor's assets including the accounts receivables.
- 19 3. The IRS then filed a levy on the lien and froze the bank accounts of the Debtor.
- 20 4. The Debtor then filed bankruptcy to stop the levy.
- 21 5. The Debtor filed a motion to use the cash collateral and the Debtor reached a deal with
22 the IRS.
- 23 6. The FDIC now claims they have a security interest. Their claim is in dispute.
- 24 7. The Debtor wants to continue to operate but needs the cash collateral to operate.
- 25 8. The FDIC believes it can stop the Debtor from paying the IRS and wants to put leverage
26 on the Debtor.
- 27 9. We have asked for paper work from the FDIC but have not received the documents
28 requested. It has been over four (4) months.

II.
LEGAL AUTHORITY

Under 11 U.S.C. § 363 entitled use, sale, or lease of property it outlines the use of cash collateral. It states:

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title [11 USCS §§ 552(b)], whether existing before or after the commencement of a case under this title.

The Investor in this case has prohibited the use of the cash collateral. Under 11 USC 363(e) it states:

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362 [11 USCS §§ 362]).

The Debtor is now seeking the right to use the cash collateral to preserve the assets under 11 U.S.C.

- (2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless--
 - (A) each entity that has an interest in such cash collateral consents; or
 - (B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

Under Bankruptcy Rules of Procedure 4001 it states:

- (b) Use of cash collateral.
 - (1) *Motion; service.*
 - (A) Motion. A motion for authority to use cash collateral shall be made in accordance with Rule 9014 and shall be accompanied by a proposed form of order.
 - (B) Contents. The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions, including:
 - (i) the name of each entity with an interest in the cash collateral;
 - (ii) the purposes for the use of the cash collateral;
 - (iii) the material terms, including duration, of the use of the cash collateral; and
 - (iv) any liens, cash payments, or other adequate protection that will be provided to each entity with an interest in the cash collateral or, if no additional adequate protection is proposed, an explanation of why each entity's interest is adequately protected.

1 The court's authorization for use of the cash collateral must adequately protect the
2 creditor's interest in the collateral. 11 U.S.C. §363(e); United States v. Whiting Pools, Inc., 462
3 U.S. 198, 203-04, 76 L. Ed. 2d 515, 103 S. Ct. 2309 (1983); In re Zeeway Corp., 71 Bankr. 210,
4 211 (9th Cir. Bap 1987).

5 Under §363(e), the debtor must provide "adequate protection" of the creditor's interest as
6 a condition of using cash collateral. Under 11 U.S.C. § 361 it states:

7 When adequate protection is required under section 362, 363, or 364 of this title
8 [11 USCS §§ 362, 363, or 364] of an interest of an entity in property, such
adequate protection may be provided by--

9 (1) requiring the trustee to make a cash payment or periodic cash payments to
10 such entity, to the extent that the stay under section 362 of this title [11 USCS §§
362], use, sale, or lease under section 363 of this title [11 USCS §§ 363], or any
11 grant of a lien under section 364 of this title [11 USCS §§ 364] results in a
decrease in the value of such entity's interest in such property;

12 The legislative history explicitly provides that the purpose of business reorganization
13 under Chapter 11 is to permit the debtor "to restructure a business' finances so that it may
14 continue to operate, provide its employees with jobs, pay its creditors, and produce a return for
15 stockholders." H.R.Rep. No. 595 at 220, 1978 U.S. Code Cong. & Ad.News at 6179; *In re*
16 *American Mariner Industries, Inc.*, 734 F.2d 426, 431 (9th Cir. 1984). the Court may only allow
17 the debtor to use cash collateral after notice and hearing and upon providing adequate protection
18 of the creditor's interest. *In re Sheehan*, 38 B.R. 859, 863 (Bankr. S.D. 1984).

19 In *Timbers*, the Supreme Court held that the "interest in property" protected by §§ 362(d)(1)
20 does not include a secured party's right to immediate foreclosure. *Id.* at 748. The Court
21 acknowledged that a creditor's interest in property includes "the right of a secured creditor to
22 have the security applied in payment of the debt upon completion of the reorganization; and that
23 interest is not adequately protected if the security is depreciating during the term of the stay." *Id.*
24 The Court then analyzed the Code as a whole to support its decision. For example, it reviewed §§
25 506(a) and determined that the phrase "value of such creditor's interest" means "the value of
26 collateral" and the phrase "value of such entity's interest" in §§ 361(1) and (2) means the same
27 thing. *Id.* at 749. The Court was also influenced by the fact that §§ 506(b) denies interest to the
28 under secured creditor and allows post-petition interest to the over secured creditor to the extent

1 the value of the security covers the claim.
2

3 **III.**
4 **LEGAL SUPPORT AND ANALYSIS**

5 **1. THE DEBTOR SHOULD BE ALLOWED TO USE THE CASH COLLATERAL**

6 Under the Bankruptcy Rule 4001, it states that the Debtor must address four (4) issues.
7 (i) the name of each entity with an interest in the cash collateral; (ii) the purposes for the use of
8 the cash collateral; (iii) the material terms, including duration, of the use of the cash collateral; and
9 (iv) any liens, cash payments, or other adequate protection that will be provided to each entity
10 with an interest in the cash collateral or, if no additional adequate protection is proposed, an
11 explanation of why each entity's interest is adequately protected.

12 *1 The name of each entity with an interest in the cash collateral*

13 The Debtor owed money to the IRS. The IRS then filed a lien on all of the accounts
14 receivables of the Debtor. The levied on the lien which resulted in the filing of the bankruptcy.
15 The IRS is claiming first position in the accounts receivables and the FDIC is in second position.
16 The FDIC reserves its rights in this matter.

17 *2. The purposes for the use of the cash collateral*

18 The purpose of the use of the cash collateral is to preserve the property of the Debtor. It
19 will be used to pay the expenses and fund the operations of the business. The business is
20 operating at a profit and it should generate disposable income to pay off the creditors.

21 *3. The material terms, including duration, of the use of the cash collateral*

22 The material terms of the cash collateral agreement is that the Debtor is to stay within
23 budget. The Debtor is to stay current in its reporting and payroll taxes. the Debtor is to stay
24 current in the union dues. The Debtor is also to pay the United States Trustee's fees that will be
25 due and owing. The funds are to be used to continue the operations of the business.
26
27
28

1 4. *Any liens, cash payments, or other adequate protection that will be provided.*

2 The Creditor should continue to get its regular cash collateral payment of \$5,500 per
3 month payments and the payments are to be held in trust until this dispute is resolved.

4 **2. THE FDIC DOES NOT HAVE A SECURITY INTEREST IN THE CASH
5 PROCEEDS.**

6 The Debtor filed a Chapter 11 petition on or about October 28, 2008. The Plan of
7 Reorganization provided the following:

8 5.2. Class 3: Secured Claim of FDIC (Formerly Colonial Bank). In April of 2006, and
9 again in October of 2006, Colonial Bank provided capital to the Debtor to be used
10 toward the operation of the Company in the form of a credit line in the amount of
11 approximately \$2,000,000.00. To secure the loan, the Debtor executed a
12 Promissory Note, Change in Terms Agreement, and a UCC-1 Financing
Statement. The loan is secured by the Debtor's accounts receivable and other
personal property. On February 4, 2009, Colonial Bank filed its proof of Claim
NO. 31 in the principal amount fo \$1,812,968.67. Subsequently thereafter, on
August 14, 2009, Colonial Bank, N.A., a failed financial institution, was declared
insolvent by the Alabama State Banking Department and the FDIC was appointed
as Receiver.

13 To the extent a Court of Competent Jurisdiction ruled by a final, non-appealable
14 order that the FDIC has an interest which superior to all other claimants to the
15 Arbitration Proceeds, then the FDIC has an interest which is superior to all other
16 claimants to the Arbitration Proceeds, then the FDIC will receive payment in full
17 o fits allowed claim amount. The source of payment will be the Arbitration
18 Proceeds in the Bankruptcy Court Registry. See also Class 4.

19 5.3. Class 4: Contingency Secured Claim of FDIC. This claim is Contingency upon
20 the FDIC being the non-prevailing party of the adversary proceeding described
21 herein (or such other action that may be commenced in a Court of Competent
22 Jurisdiction) to resolve the dispute between Merchants Bonding Company and
23 the FDIC. **The FDIC will be entitled [be entitled] to receive the remaining
24 portion of the Arbitration Proceeds, if any, with the balance of its secured
25 claim to be paid in equal monthly installments of \$8,594.00, with interest
26 accruing at the rate of four (4%) per annum, amortized over thirty (30)
27 years.** Although, it is impossible to predict the balance of what this claim will be,
28 the Debtor's best estimate is approximately \$1,800,000.00. The Debtor will
execute a new Promissory Note for the balance of the claim if this continency
occurs.

23 6.2.5. Class 5 - General Unsecured Non-Priority Claims:

24 Class 6 consists of any unsecured claim against the Debtor that is not an 1)
25 Administrative Claim; 2) Priority Tax Claim; or 3) Super Priority Claim. Each
26 holder of an allowed General Unsecured Claim shall receive pro rata disbursement
27 totaling 5% of this allowed claim. Payment will be made semi-annually over a
28 five (5) year period with the first disbursement to be made on March 1, 2013. The
percentage payout to General Unsecured Non-Priority Creditors may increase
slightly as the Debtor intends to file additional objections seeking disallowance or
reduction in amount of certain Proof of Claim and/or the claims of Creditors listed
on the Debtor's Schedule F.

1 The FDIC was the non-prevailing party in the adversary proceeding so Section 5.3 would
2 apply. The proceeds from the Arbitration Proceedings was \$1,447,049.73. The Plan then read as
3 follows: **“The FDIC will be entitled [be entitled] to receive the remaining portion of the**
4 **Arbitration Proceeds, if any, with the balance of its secured claim to be paid in equal**
5 **monthly installments of \$8,594.00, with interest accruing at the rate of four (4%) per**
6 **annum, amortized over thirty (30) years.”** The FDIC was never granted a post-petition
7 security interest in the accounts receivables of the Debtor. As a result, the FDIC is owed nothing
8 under the secured claim.

9 The Plan of Reorganization further stated “Although, it is impossible to predict the
10 balance of what this claim will be, the Debtor’s best estimate is approximately \$1,800,000.00.
11 The Debtor will execute a new Promissory Note for the balance of the claim if this contingency
12 occurs.” This is where the problem begins. *What is the amount of the secured claim that*
13 *was owed after the proceeds had been paid if any?*

14 Counsel for the Debtor filed a motion to withdraw from the case and would not represent
15 the Debtor any further. The FDIC filed a motion to compel compliance of the plan of
16 reorganization. The court entered an order compelling the Debtor to sign a document but the
17 Debtor disputed the amount owed. The United States Trustee office filed a motion to dismiss the
18 bankruptcy because the Debtor was not represented by counsel. It was granted and the case was
19 dismissed.

20 The Debtor disputes the claim of the FDIC and there has been no accounting to the true
21 amount of the FDIC’s claim. The IRS also has a first priority in the accounts receivables at this
22 point. As a result, the FDIC is in second position and the FDIC is not entitled to any payments.
23 The Debtor as stated above also challenges the amount in the note.

24 **A. THE FDIC WAS ONLY ENTITLED TO A NOTE ON IT’S SECURED**
25 **CLAIM BUT THE FDIC’S REMAINING CLAIM WAS UNSECURED.**

26 The plan of reorganization provided for the following:

27 The FDIC will be entitled [be entitled] to receive the remaining portion of the
28 Arbitration Proceeds, if any, with the balance of its secured claim to be paid in
equal monthly installments of \$8,594.00, with interest accruing at the rate of four
(4%) per annum, amortized over thirty (30) years.

1 Counsel could not find an order that granted a post-petition security interest in the
2 accounts receivables. The issue is that the FDIC will receive a *secured claim* to be paid in equal
3 monthly installment at the rate of four(4%) per annum, amortized over thirty (30) years. *There*
4 *is an issue as to the amount of the balance of its secured claim if any.*

5 **B. THE CLAIM BY THE FDIC INCLUDES INTEREST AND ATTORNEY**
6 **FEES IN AN UNDER SECURED CLAIM UNDER 11 U.S.C. § 506(b).**

7 In the first bankruptcy, the FDIC had a pre-petition claim on the accounts receivables.
8 The FDIC NEVER obtained a cash collateral agreement nor did they get a post-petition lien on
9 the accounts receivables. The Debtor was in bankruptcy for almost four (4) years. When all of
10 the pre-petition accounts receivables were paid, the balance of the claim was unsecured. The
11 claim by the FDIC in the pre-petition accounts receivables was under secured. Since the FDIC is
12 under secured, they were not entitled to interest, costs, and attorney fees arising under contractual
13 agreement as part of the secured claim under 11 U.S.C. § 506(b). (The FDIC could allege it is
14 part of the unsecured class but not part of the secured claim. (11 USCS § 506(b))

15 If the balance of the claim is unsecured, then they are part of the unsecured Class 5 and
16 they are getting paid five (5%) of their outstanding claim. They would not get a new note and a
17 new security interest if they were under secured. This is based upon the fair and equitable
18 treatment of creditors.

19 In addition, it appears the FDIC charged interest post-petition on the under secured claim.
20 In their proof of claim they admit they have been paid \$606,000 dollars worth of interest post-
21 petition. The FDIC may claim they are entitled to attorneys fees and costs on a secured claim but
22 they cannot prove it was a secured claim.

23 Counsel for the Debtor has reviewed the first case. The case had 867 entries. Counsel
24 has not found where the FDIC was granted a replacement lien on the post-petition accounts
25 receivables after notice and a hearing under 11 U.S.C. § 363. The case lasted over four (4) years.
26 The only secured claim to the accounts receivables is the Arbitration Proceedings. The balance
27 was unsecured and there should be no note or security agreement.
28

1 In the first bankruptcy, the FDIC stated the amount of their secured claim was
2 \$1,854,288.46. The FDIC then received a payment in the amount of \$1,447,049.73. This should
3 have reduced the amount of the claim to \$407,238.73 and the claim is an *unsecured amount*.
4 The bank also sweep the Debtor's bank account and took \$233,000. (See Exhibit 2). The FDIC
5 has not accounted for this payment.

6 The FDIC also charged for attorneys fees and costs to an under secured Debtor in the
7 amount of \$146,258.96. Under 11 U.S.C. 506 © it is improper to charge an under secured
8 Debtor for attorneys fees and costs. The court should also determine if the fees and costs were
9 reasonable.

10 **C. THE DEBTOR HAS REQUESTED DOCUMENTATION FROM THE**
11 **FDIC TO SUBSTANTIATE THE AMOUNT OF THEIR CLAIM AND**
12 **THEY HAVE NOT BEEN ABLE TO PRODUCE ANY DOCUMENTS TO**
13 **SUPPORT THEIR CLAIM AMOUNT.**

14 The Debtor has requested from the FDIC an accounting and documentation to support the
15 amount of their claim. The FDIC has not been able to provide the documentation to support their
16 claim to this date. It has been four (4) months since the first request was made to the FDIC.

17 **D. THE FDIC'S CLAIM VIOLATED 1129(b)(2)(A).**

18 The Debtor is only allowed payment equal to the amount of their secured claim as of the
19 date of confirmation pursuant to 11 U.S.C. 1129(b)(2)(A) which reads:

20 (A) With respect to a class of secured claims, the plan provides—

21 (i)

22 (I) that the holders of such claims retain the liens securing such
23 claims, whether the property subject to such liens is retained by the
24 debtor or transferred to another entity, to the extent of the allowed
25 amount of such claims; and

26 (II) that each holder of a claim of such class receive on account of
27 such claim deferred cash payments totaling at least the allowed
28 amount of such claim, of a value, as of the effective date of the
plan, of at least the value of such holder's interest in the estate's
interest in such property;

29 The FDIC is attempting to collect more than they are allowed pursuant to the statute.
30 They cannot establish they have a post-petition security claim in the accounts receivables. After
31 the payment from the Arbitration Proceeds, the balance of the claim was unsecured. They are
32 under secured and attempting to collect more than they are allowed by the above statute.

1 **3. THE IRS IS IN FIRST POSITION AND ENTITLED TO PAYMENTS PURSUANT**
2 **TO A COURT ORDER AND THE ACCOUNTS CANNOT BE SEGREGATED**

3 The Debtor believes that the IRS is in first position. The FDIC needs to establish that
4 they are in first position. The Debtor has an agreement with the IRS and is making the adequate
5 protection payments.

6 **4. THE DEBTOR CONTINUES TO MAKE THE ADEQUATE PROTECTION**
7 **PAYMENTS TO THE FDIC.**

8 The Debtor agreed to make adequate payments to the FDIC. The Debtor continues to
9 make the adequate protection payments and the FDIC keeps accepting the payments. See the
adequate protection agreement attached as Exhibit 6. See the budge in Exhibit 7.

10 DATED this 20th day of February, 2017.

11 DAVID J. WINTERTON & ASSOC., LTD.

12
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