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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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In re	:
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ADVANCED CONTRACTING SOLUTIONS LLC,:	:
	:
	:
Debtor.	:
-----X	

Chapter 11
Case No. 17-13147 (SHL)

**EMERGENCY MOTION PURSUANT TO 11 U.S.C. §§ 361, 362 AND 363 AND
RULES 4001(b), 4001(d) AND 9014 OF THE FEDERAL RULES OF BANKRUPTCY
PROCEDURE (I) AUTHORIZING DEBTOR’S USE OF CASH COLLATERAL, (II)
PROVIDING ADEQUATE PROTECTION THEREOF
AND (III) SCHEDULING A FINAL HEARING**

**TO THE HONORABLE SEAN H. LANE,
UNITED STATES BANKRUPTCY JUDGE:**

Advanced Contracting Solutions, LLC (the “Debtor” or “ACS”)¹, as debtor and debtor in possession, hereby moves (the “Cash Collateral Motion”) pursuant to sections 105, 361, 362 and 363 of Title 11 of the United States Code (as amended, the “Bankruptcy Code”), Rules 4001(b), 4001(d) and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and Local Rule 4001-2, seeking: inter alia: (i) entry of an emergency interim order and a final order

¹ The Debtor’s Federal Employer Identification Number is 46-3203359.

authorizing the Debtor to use cash collateral in accordance with an approved budget; (ii) the grant of adequate protection to Signature Bank, N.A. ("Signature"), the Debtor's prepetition lender; and (iii) a final hearing (the "Final Hearing") on the Motion to be held within 20 days after entry of the entry of the Interim Order to consider entry of a final order (the "Final Order").

PRELIMINARY STATEMENT

The Debtor is a large open-shop concrete foundation and concrete super-structure contractor. On average, the Debtor employs approximately 450 persons and has annual revenues of in excess of \$100 million. Signature is the Debtor's only traditional secured lender. On or about September 28, 2017, following several years of positive relations, Signature terminated all additional lending under its line of credit with the Debtor as a result of the entry of an approximately \$76 million judgment entered against the Debtor by various union and benefit funds. On or around October 6, 2017, Signature froze the Debtor's operating account which it subsequently released in exchange for significant reductions to the Signature indebtedness. In the past four weeks, the Debtor has paid its line of credit with Signature down significantly and reduced its exposure from approximately \$3 million to approximately \$1.8 million.

The Debtor requires the use of Cash Collateral to make its next regular payroll on Friday, November 10, 2017, and make other necessary payments on an emergency basis. The Debtor does not have Signature's consent to do so at the time of filing, but intends to seek that consent prior to any emergency hearing. The Debtor further seeks authority to use Cash Collateral going forward on a final basis upon sufficient notice to parties in interest including any creditors' committee, if and when one is appointed by the United States Trustee.

JURISDICTION

1. This Court has jurisdiction to consider this Cash Collateral Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief requested herein are sections 105, 361, 362 and 363 of the Bankruptcy Code and Bankruptcy Rules 4001(b), 4001(d) and 9014.

BACKGROUND

A. The Bankruptcy Case

3. On November 6, 2017 (the "Petition Date"), the Debtor filed a voluntary petition in this Court for relief under Chapter 11 of the Bankruptcy Code commencing the instant bankruptcy case (the "Bankruptcy Case").

4. The Debtor continues to operate its business and manage its respective properties as a debtor in possession pursuant to section 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the Bankruptcy Case. As of the date of this Cash Collateral Motion, the United States Trustee has not yet appointed an official committee of unsecured creditors in the Bankruptcy Case.

5. The Court and interested parties are respectfully referred to the Declaration of Jeffrey T. Varsalone Pursuant to Local Bankruptcy Rule 1007-2 in Support of First Day Motions, dated November 6, 2017 (the "Varsalone Declaration") for background on the Debtor, its operation, and the events leading to the filing of the Bankruptcy Case.

B. The Debtor's Business

6. ACS was founded by Eoin Moriarty in July 2013 as an open-shop concrete foundation and concrete super-structure contractor. Since inception, ACS has completed over

\$250 million in work within the five boroughs of New York City. Its clients are some of the most prominent and reputable property developers in the area.

7. ACS was founded upon quality, experience, impeccable references, and best-of-class staffing and services. ACS's construction services are performed by a staff of team-oriented individuals who share the common goal of exceeding the expectations of ACS's clients. ACS uses leading-edge construction technology combined with hard work to realize its clients' goals and expectations. ACS delivers value through meticulous planning and strong plan execution and maintains a commitment of excellence, client satisfaction, and high value.

8. ACS has grown from a nascent idea in 2013 to a significant construction company that currently employs approximately four hundred fifty (450) employees and as many as seven hundred people, during peak times. ACS is currently engaged on fifteen (15) construction jobs across New York City. Estimated future revenues from ACS's ongoing jobs is approximately \$100 million.

C. Events Leading to the Filing

9. On October 17, 2014, trustees of four union funds ("Union Funds") commenced an action in the United States District Court for the Southern District of New York ("District Court") which was thereafter consolidated with a later-filed case brought by a separate fund. (*See* No. 1:14-cv-08326-CM-JLC, ECF Nos. 1, 204). The Union Funds claimed that three non-union construction companies - ACS, Time Square Construction, Inc. ("TSC"), and HDK Construction, LLC ("HDK")—were established by Navillus Tile, Inc. ("Navillus") for the purpose of evading its obligations to contribute pension and welfare benefits under collective bargaining agreements. The Union Funds' theory was that, in establishing these entities, covered union work was performed by non-union labor. The Union Funds also alleged that Navillus breached its

collective bargaining agreements and that Donal O'Sullivan, Navillus' CEO, should be individually liable. A seven-day bench trial was held in the District Court before the Honorable Colleen McMahon in August, 2017. About a month after closing arguments, the District Court issued its written decision and ruled that ACS and TSC were alter egos of Navillus, even though it acknowledged that neither company had been established or was operated to evade obligations.

10. On September 22, 2017, the District Court entered a judgment in the amount of \$73.4 million ("Judgment") against ACS, Navillus and another co-defendants holding that ACS was an alter-ego of the unionized Navillus, and holding each jointly and severally liable for satisfaction of the Judgment. As a result of the Judgment, ACS is required to make fringe benefit contributions to the Union Funds in the amount of \$73.4 million. ACS has commenced an appeal from the Judgment, but has been unable to post a supersedes bond in order to stay enforcement of the Judgment.

11. On September 28, 2017, Signature terminated all advances under the Prepetition LOC (defined below).

12. On September 30, 2017, ACS moved before the United States Court of Appeals for the Second Circuit for a stay of enforcement of the Judgment. On October 5, 2017, the Second Circuit issued a temporary stay of the judgment pending determination of the motion by a three-judge panel. However, on October 31, 2017, the Second Circuit denied ACS's motion. As a result, the Union Funds have the ability to execute upon the Judgment. A subsequent request for a stay on November 2, 2017 was also denied.

13. On October 6, 2017, Signature froze the ACS's operating account, but subsequently lifted the freeze upon agreement to reduce the Prepetition Obligations (defined below) significantly.

14. The Union Funds' ability to restrain ACS's cash and receivables threatens to destroy ACS's business, and accordingly, ACS had no option but to commence this case in order to afford itself with the breathing spell necessary to reorganize its business and financial affairs.

D. The Prepetition Secured Creditor

15. ACS began its borrowing relationship with Signature in February 2015. At that time, Signature agreed to open a \$1,500,000 line of credit for short term loans to allow ACS to finance its operations. In February 2015, ACS issued a promissory note in the amount of \$1,500,000, which was the limit of the line of credit ("Prepetition LOC"). In consideration of the Prepetition LOC, ACS and Signature entered into a Continuing Security Agreement on February 25, 2015 ("Security Agreement"), wherein ACS granted to Signature liens and security interests (the "Prepetition Liens") in substantially all of its assets ("Pre-Petition Collateral"), including without limitation its cash ("Cash Collateral").

16. The Prepetition LOC was increased to \$4,000,000 in April 2017 at the request of ACS. As a result, on or about April 7, 2017², Signature delivered to ACS a line of credit letter agreement to ACS and ACS issued a promissory note to Signature in the amount of \$4,000,000 ("Prepetition LOC Note", and together with the Security Agreement, the "Prepetition LOC Documents").

17. As of the Petition Date, ACS's liability to Signature under the Prepetition LOC Note was alleged to be approximately \$1.8 million.

RELIEF REQUESTED

18. By this Cash Collateral Motion, the Debtor respectfully requests, pursuant to sections 105, 361, 362 and 363 of the Bankruptcy Code and Bankruptcy Rules 4001(b), 4001(d)

² Although the line of credit letter agreement is dated April 7, 2017, the signature page indicates that the agreement was executed on April 25, 2017.

and 9014 the entry of an emergency interim and a final order, inter alia: (i) authorizing Debtor to utilize Cash Collateral in accordance with the terms of an approved budget, and grant adequate protection to Signature; (ii) modifying the automatic stay; and (iii) scheduling a hearing pursuant to bankruptcy rule 4001(b).

AUTHORITY FOR USE OF CASH COLLATERAL

19. A debtor in possession may be authorized pursuant to court order, to use cash collateral in the ordinary course of its business operations under Bankruptcy Code §§ 363(c) and 1107. The Court may condition such use, pursuant to Bankruptcy Code § 363(e), as is necessary to provide adequate protection of any interest held therein by any entity other than the debtor in possession.

20. Courts repeatedly have recognized that use of cash collateral is appropriate where necessary to preserve a debtor's ability to reorganize and thus maximize the value of an estate for all interested parties. See In re Realty Southwest Assoc., 140 B.R. 360, 366 (Bankr. S.D.N.Y. 1992); H.R. Rep. No. 595, 95th Cong., 1st Sess. 344 (1977); 3 Collier on Bankruptcy 363.03 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2006); see also In re Dynaco, 162 B.R. 389, 396; In re Stein, 19 B.R. 458 (Bankr. E.D. Pa. 1982). Bankruptcy Rule 4001(b) governs authorization for utilizing cash collateral and provides that the court may permit the debtor in possession to use cash collateral prior to a final hearing to the extent necessary to avoid immediate and irreparable harm. After a final hearing held on at least fourteen days' notice, the court may grant the authority to use cash collateral on a permanent basis and other permanent relief requested herein.

21. A chapter 11 debtor may not use cash collateral unless “(A) each entity that has an interest in such 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.” 11 U.S.C. § 363(c)(2).

22. The Debtor has determined, in the exercise of its business judgment, with the assistance of its advisors, that it requires the use of cash collateral. The Debtor has an immediate and critical need to use cash collateral to pay, in accordance with the Budget, various parties in the ordinary course of business and/or as authorized by the Court. Among other things, the continued use of Cash Collateral will enable the Debtor to continue to operate its concrete construction business, maintain relationships with its vendors and creditors, pay its employees, and satisfy other ordinary operational costs that are essential to preserve estate value by continuing to operate its business in the ordinary course. In the absence of the continued authorization to use Cash Collateral, the Debtor’s ability to operate its business will be jeopardized, causing immediate and irreparable harm to the Debtor’s estate, creditors, employees, and all other stakeholders by virtue of the loss of significant revenue. Thus, the Debtor’s continued use of Cash Collateral is essential in order to enable the Debtor to meet the obligations of their ordinary operating costs and expenses during the pendency of the Chapter 11 Case.

A. Adequate Protection

23. Section 363(e) of the Bankruptcy Code provides that, “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.” 11 U.S.C. § 363(e). Permissible forms of adequate protection include periodic cash payments, additional liens, replacement liens,

and other forms of relief. 11 U.S.C. § 361. The purpose of adequate protection is to protect a secured creditor from diminution in the value of its property interest in its collateral during the period of use, sale, or lease. In re Kain, 86 B.R. 506, 513 (Bankr. W.D. Mich. 1988); see also Delbridge v. Production Credit Assoc. and Fed. Land Bank, 104 B.R. 824, 827-28 (E.D. Mich. 1989); In re Ledgemere Land Corp., 116 B.R. 338, 343 (Bankr. D. Mass. 1990). The appropriate form of adequate protection must be determined on a case-by-case basis. See In re O'Connor, 808 F.2d 1393, 1396 (10th Cir. 1987); In re Martin, 761 F.2d 472, 474 (8th Cir. 1985).

24. Pursuant to sections 361 and 363(e) of the Bankruptcy Code, as adequate protection of the interests of Signature in Cash Collateral to the extent of any diminution in value from and after the Petition Date resulting from the use by the Debtor of the Cash Collateral (collectively, the “Diminution in Value”), the Debtor proposes to grant to Signature, in all cases subject to the Carve-Out (as defined below), continuing, valid, binding, enforceable and automatically perfected postpetition additional and replacement security interests in and liens and mortgages (collectively, the “Adequate Protection Liens”) as follows:

- i. a first priority perfected security interest in, and lien and mortgage on, all prepetition and postpetition property of the Debtor, whether tangible or intangible, not subject to a valid, perfected, enforceable and unavoidable lien or security interest on the Petition Date and;
- ii. a junior perfected security interest in and lien and mortgage on all prepetition and postpetition property of the Debtor, whether tangible or intangible, that is subject to (i) a valid, perfected, enforceable and unavoidable consensual lien or security interest in existence on the Petition Date or (ii) a valid and unavoidable consensual lien or

security interest in existence on the Petition Date that is perfected subsequent thereto as permitted by section 546(b) of the Bankruptcy Code; provided, however, that subject to the Carve-Out, the Adequate Protection Liens shall be senior to any other liens, including, without limitation, any other adequate protection replacement liens. The Adequate Protection Liens shall not be secured by any avoidance actions under Chapter 5 of the Bankruptcy Code (the “Avoidance Actions”).

25. As further adequate protection, the Debtor shall pay \$50,000 per week to Signature in reduction of the principal Prepetition Obligations, plus approximately \$9,000 each month in interest (the “Adequate Protection Payments”, and together with the Adequate Protection Liens, the “Adequate Protection”).

26. Further, use of Cash Collateral will enable the Debtor to preserve, enhance, and realize the value of the Cash Collateral, by allowing the Debtor to continue operations in the near term, thereby enabling the Debtor to continue to collect the proceeds of its ongoing construction projects. As set forth in the Budget, the anticipated receivables that will be generated from the Debtor’s ongoing construction projects over the next 7 weeks is approximately \$18.6 million. The Debtor’s ability to continue to create and collect receivables by continuing operations provides additional adequate protection.

27. The Debtor respectfully submits that the Adequate Protection will sufficiently protect Signature’s interests in the Cash Collateral from any diminution in value and should be approved.

B. Carve-Out

28. The Debtor respectfully requests that the Court implement a “Carve-Out” from the Adequate Protection. The Debtor proposes that the “Carve-Out” include (i) the quarterly fees

and interest thereon required to be paid pursuant to 28 U.S.C. §1930(a)(6); (ii) any fees payable to the Clerk of the Court; (iii) all reasonable fees and expenses incurred by a trustee under section 726(b) of the Bankruptcy Code in an aggregate amount not to exceed \$10,000; (iv) the accrued and unpaid fees and expenses incurred by the professionals retained by the Debtor or any Creditors' Committee, up to the amounts provided for in the Budget (the "Permitted Professional Fees"); provided, however, that with respect to the foregoing clause (iv), such fees and expenses (A) shall be net of any unused retainers held by the respective professionals; (B) will only be paid to the extent allowed by the Court; and (C) will be subject to the rights of Signature and any other party in interest to object to the allowance thereof.

C. Budget

29. In connection with its emergency motion, the Debtor has prepared an 8 week budget (the "Budget"), which identifies anticipated receipts and disbursements over the next 8 weeks. A copy of the Budget is annexed to the Interim Order as Exhibit A. The Debtor believes the Budget will be adequate, considering all available assets, to pay all administrative expenses due or accruing during the period covered by the Budget.

D. Termination

30. The Debtor shall be entitled to use Cash Collateral in accordance with the Budget, effective upon entry of the Interim Order through the day that is one-day after the date on which the Court schedules a continued hearing on the Cash Collateral Motion (the "Termination Date").

E. The Automatic Stay Should Be Modified on a Limited Basis

31. The relief requested herein contemplates a modification of the automatic stay (to the extent applicable) to permit the Debtor to grant the security interests and liens, described

above and to perform such acts as may be requested to assure the perfection and priority of such security interests and liens.

32. Stay modifications of this kind are ordinary and standard features of cash collateral motions, in the Debtor's business judgment, are reasonable and fair under the present circumstances.

F. Interim Approval Should Be Granted

33. Bankruptcy Rule 4001(b) provides that a final hearing on a motion to use cash collateral may not be commenced earlier than 14 days after the service of such motion. Upon request, however, the Court is empowered to conduct a preliminary expedited hearing on the motion and the use of cash collateral to the extent necessary to avoid immediate and irreparable harm to a debtor's estate pending a final hearing.

34. Pursuant to Bankruptcy Rule 4001(b), the Debtor requests that the Court conduct an expedited interim hearing on this motion and (i) authorize the Debtor to use Cash Collateral in on an interim basis in accordance with the Budget, pending entry of a final order, in order to (a) maintain ongoing operations of the Debtors; (b) fund the administration of the Bankruptcy Case; and (c) avoid immediate and irreparable harm and prejudice to the Debtor's estate, business operations and all parties in interest, and (ii) schedule the Final Hearing.

35. The Debtor has urgent and immediate need for cash to continue to operate. Currently, the Debtor does not have sufficient funds with which to operate its business and fund ongoing construction projects, which is critical to maintaining the value of the Debtor's estate. Absent authorization from the Court to use Cash Collateral, as requested, on an interim basis pending the Final Hearing, the Debtor will be immediately and irreparably harmed. The ability to use Cash Collateral will allow the Debtor to protect its revenue streams by performing under

its contractual obligations on the numerous ongoing projects. The Debtor's inability to fund its operations and fund its payroll would have a disastrous effect on the value of the Debtor's Estate to the detriment of all parties in interest. Accordingly, the interim relief requested is critical to preserving the Debtor's ability to reorganize its affairs through a plan.

G. Compliance with Rule 4001-2 of the Local Rules

36. Rule 4001-2 of the Local Rules requires that certain provisions contained in the financing documents and/or Interim Order be highlighted, and that the Debtor must provide justification for the inclusion of such highlighted provision(s). The Debtor believes that certain provisions of Local Rule 4001-2 are implicated, but that the Cash Collateral Motion provides adequate disclosure regarding such provisions. The Debtor has set forth each of the subsections of Rule 4001-2 of the Local Rules and have detailed whether or not, this Cash Collateral Motion contain or contemplate provisions which would fall within the ambit thereof:

- Local Rule 4001-2(a)(1): This Cash Collateral Motion and the Budget sets forth the amount of Cash Collateral the Debtor seeks to use.
- Local Rule 4001-2(a)(2): This Cash Collateral Motion provides that the Debtor's may use Cash Collateral in accordance with the Budget.
- Local Rule 4001-2(a)(3): The Debtor is not seeking authority to pay any fees as part of the Cash Collateral Motion.
- Local Rule 4001-2(a)(4): The Cash Collateral Motion describes the effects on existing liens of the granting of collateral or adequate protection provided to Signature.
- Local Rule 4001-2(a)(5): The Cash Collateral Motion describes the proposed carve-outs.
- Local Rule 4001-2(a)(6): There are no cross-collateralization provisions, which elevate prepetition debt to administrative expense (or higher) status. The Cash Collateral Motion provides that Signature shall receive on all of the Debtor's postpetition property.
- Local Rule 4001-2(a)(7): The Debtor is not seeking approval of any roll-up provisions.

- Local Rule 4001-2(a)(8): The Debtor does not believe it is seeking approval of any provision that would limit the Court's power or discretion in a material way, or would interfere with the exercise of the fiduciary duties, or restrict the rights and powers, of the trustee, debtor in possession, or a committee or other fiduciary.
- Local Rule 4001-2(a)(9): The Debtor is not seeking approval of any limitation on Signature's obligation to fund certain activities of the trustee, debtor in possession, or a committee appointed under sections 1102 or 1114 of the Bankruptcy Code.
- Local Rule 4001-2(a)(10): The termination date is set forth in paragraph 20 of this Cash Collateral Motion.
- Local Rule 4001-2(a)(11): The Debtor is not seeking approval of any provisions relating to change of control.
- Local Rule 4001-2(a)(12): The Debtor is not seeking approval of any provision establishing a deadline for, or otherwise requiring, the sale of property of the estate.
- Local Rule 4001-2(a)(13): Not applicable.
- Local Rule 4001-2(a)(14): Not applicable.
- Local Rule 4001-2(a)(15): The Debtor is not seeking approval of any provision for the funding of non-debtor affiliates with cash collateral.
- Local Rule 4001-2(b): Not applicable.

NOTICE OF FINAL HEARING

37. Notice of this Cash Collateral Motion and proposed Interim Financing Order was given by email, facsimile or overnight delivery of a copy to (a) counsel to Signature, Attn: John E. Westerman, Esq., Westerman Ball Ederer Miller Zucker & Sharfstein, LLP, 1201 RXR Plaza, Uniondale, New York 11556; (ii); the Office of the United States Trustee for the Southern District of New York, Attn: Richard Morrissey, Esq., U.S. Federal Office Building, 201 Varick Street, Room 1006, New York, New York 10014, and (iii) each of the Debtor's twenty (20) largest unsecured creditors. Pursuant to Bankruptcy Rule 4001, the Debtor respectfully requests that it be authorized to serve notice of the Final Hearing and a proposed Final Cash Collateral

Order upon: (a) the parties having been given notice of the Interim Hearing; (b) any party which has filed prior to such date a request for notices with this Court; (c) counsel for any Creditors' Committee, if appointed by such date; and (d) any other party to whom notice is required to be given pursuant to Bankruptcy Rules 2002 and 4001 and the Local Rules. In light of the nature of the relief requested herein, the Debtor submits that no other or further notice need be given.

NO PRIOR REQUEST

38. No previous request for the relief sought in this Cash Collateral Motion has been made to this or any other court.

WHEREFORE, the Debtor respectfully requests entry of the Interim Order and, following the Final Hearing, entry of a Final Order.

Dated: New York, New York
November 6, 2017

**KLESTADT WINTERS JURELLER
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