

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

ADVANCED EDUCATIONAL
PRODUCTS, INC.,

Debtor.¹

Chapter 11

BK No. 1-17-12576-CLB

Hon. Carl L. Bucki

MOTION PURSUANT TO 11 U.S.C. §§ 105, 361, AND 363 FOR
AUTHORITY TO USE CASH COLLATERAL, INCLUDING USE ON *EX PARTE*
EMERGENCY BASIS, PROVIDE ADEQUATE PROTECTION, AND
TO SCHEDULE INTERIM AND FINAL HEARINGS

Advanced Educational Products, Inc. (“Advanced” or, the “Debtor”), the Debtor in the above-captioned proceedings voluntarily commenced under Chapter 11 of title 11 of the United States Code (the “Code”), by and through its proposed counsel, Baumeister Denz LLP, as and for its motion (the “Motion”), pursuant to Code sections 105, 361, and 363, and rule 4001 of the Federal Rules of Bankruptcy Procedure (the “Rules”), (a) granting authority to use cash collateral on an emergency basis, in accordance with the emergency *ex parte* Order (the “Ex Parte Order”), and (b) scheduling interim and final hearings on further use of cash collateral, respectfully represents as follows:

PRELIMINARY STATEMENT

1. Advanced is a New York corporation formed on or about September 13, 2000, which has operated since that time, and continues to operate, as a supplier of books and educational resources to U.S. and state governmental agencies and local school districts. It

¹ The last four digits of the Debtor’s federal tax identification number are 7345. See 11 U.S.C. §342(c).

office and principal place of business is located at 2495 Main Street, Suite 230, Buffalo, New York 14214.

2. Kenneth A. Pronti holds a one hundred (100%) percent shareholder interest in Advanced, and is its sole office and director. As President, Mr. Pronti is the responsible person in the above-captioned proceeding.

3. As of the Petition Date (defined below), Advanced was indebted to the following creditors holding secured claims that are or may be liens against cash and accounts:

- a. TFS RT, Inc. ("TFS"), in the aggregate amount of approximately \$624,000 (the "TFS Prepetition Indebtedness"); and
- b. American Express Bank, FSB ("AMEX"), in the aggregate amount of approximately \$73,814 (the "AMEX Prepetition Indebtedness"); and
- c. Foxii Funding, Inc. ("Foxii"), in the aggregate amount of approximately \$325,000 (the "Foxii Prepetition Indebtedness" and together with the TF Prepetition Indebtedness and the AMEX Prepetition Indebtedness, the "Prepetition Indebtedness").

4. The exact amount of the Prepetition Indebtedness is subject to review by the Debtor, the United States Trustee, any official committee appointed in the case, or any other party in interest, and in the event that any of the Prepetition Indebtedness is listed as "disputed" on the Debtor's Schedule, the reason therefor is to reserve review of the amount thereof.

5. TFS Prepetition Indebtedness arises from a certain Master Accounts

Receivable Loan Agreement and Security Agreement dated as of October 30, 2015, and extended through January 31, 2018 by agreement dated as of October 17, 2017 the ("TFS Loan Documents"). TFS currently holds a lien against Advanced's cash collateral, as evidenced by the TFS Loan Documents and that certain UCC Financing Statement, filed on November 17, 2015 with the office of the New York State Department of State (the "TFS UCC Statement"), which notices a lien against "All personal property ... including all accounts ... deposit accounts" of Advanced (the "Prepetition TFS Lien").

6. The TFS Prepetition Indebtedness arises from direct asset based lending from TFS in the form of a pledge of specific accounts receivables. Simply stated, the mechanics of the credit facility start with the submission by Advanced of its outstanding invoices and a request to advance extensions of credit on certain invoices. Advanced is not required to request and receive advances on all invoices and TFS is entitled to identify certain invoices as ineligible collateral. There are monthly fees associated with the credit facility whether Advanced requests advances or not in consideration for the availability of the TFS credit facility. On those invoices that Advanced requests and TFS accepts for lending, TFS immediately lends 85% of the total invoice. Payment of all invoices by Advanced's customers are paid into a lockbox maintain as an account at Wells Fargo under the control of TFS (the "TFS Wells Fargo Account"). Upon receipt of payments from Advanced's customers, TFS provides a periodic reconciliation that provides for repayment to TFS of the 85% previously extended on certain invoices, interest on outstanding borrowings and certain additional fees. The advances that Advanced receives from TFS consist of loan advances as well as receivables not subject to borrowing.

7. AMEX Prepetition Indebtedness arises from a certain Business Loan and Security Agreement dated as of December 26, 2016 the ("AMEX Loan Documents"). AMEX currently holds a lien against Advanced's cash collateral, as evidenced by the AMEX Loan Documents and that certain UCC Financing Statement, filed on December 15, 2015 with the office of the New York State Department of State (the "AMEX UCC Statement"), which notices a lien against "All assets" of Advanced (the "Prepetition TFS Lien").

8. Foxii Prepetition Indebtedness arises from a Merchant Agreement dated as of August 16, 2017 the ("Foxii Loan Documents"). Foxii currently holds a lien against Advanced's cash collateral, as evidenced by the Foxii Loan Documents and that certain UCC Financing Statement, filed on January 9, 2017 with the office of the New York State Department of State (the "Foxii UCC Statement"), which notices a lien against "'Future Receipts' [as defined therein] . . . all personal property of Debtor that relates to the Future Receipts, such as accounts" of Advanced (the "Prepetition Foxii Lien").

9. Copies of the TFS UCC Statement, AMEX UCC Statement and Foxii UCC Statement are collectively attached as Exhibit A.

10. Advanced further submits that its cash collateral is not subject to any other claims or liens, including those by any trust fund beneficiaries, as such term is defined by any such applicable state or federal law.

11. To maintain the liquidity necessary to administer this Chapter 11 case and continue its operations in the ordinary course of business, the Debtor respectfully requests authority: (i) to continue using cash collateral in the ordinary course of business, subject to the Prepetition TFS Lien, the Prepetition AMEX Lien and the Prepetition Foxii Lien, during

the pendency of this Chapter 11 case (the “Cash Collateral”), in accordance with (a) the emergency budget covering week 1, i.e., the period through December 12, 2017 (the “Emergency Budget”, (b) the interim budget covering weeks 1-4, i.e., the period through January 2, 2018 (the “Interim Budget”), and (c) the final thirteen (13) week budget covering weeks 1-13, i.e., the period through March 6, 2018 (the “Final Budget” and collectively with the Emergency Budget and the Interim Budget, the “Budgets”, all of which are collectively attached as Exhibit B); (ii) to grant adequate protection to TFS, AMEX and Foxii, with respect to any potential diminution in value to the extent the Cash Collateral is actually used during the pendency of this Chapter 11 case, pursuant to the Budgets, and as set forth more fully below (collectively, the “Adequate Protection”); and (iii) to schedule interim and final hearings on the relief sought by this Motion.

12. A copy of the *Ex Parte* Order is attached as Exhibit C.

BACKGROUND

13. On December 4, 2017 (the “Petition Date”), the Debtor voluntarily filed its petition and commenced the above-captioned Chapter 11 proceeding.

14. The Debtor is authorized to continue to operate its business and manage its property as a debtor in possession pursuant to Code sections 1107(a) and 1108.

15. No trustee, examiner, or statutory committee of creditors has been appointed in this Chapter 11 case.

JURISDICTION AND VENUE

16. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a), and the Standing Order of Reference so ordered by Hon.

William M. Skretny, Chief Judge, United States District Court for the Western District of New York, on February 29, 2012. This is a “core proceeding” pursuant to 28 U.S.C. § 157(b)(2)(A) and (b)(2)(M). Venue of this proceeding is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

THE RELIEF REQUESTED
SHOULD BE GRANTED BY THE COURT

17. By this Motion, the Debtor seeks authority to use cash collateral and requests entry of an *Ex Parte* Order, pending interim and final hearings, (i) granting authority to use the Cash Collateral on an emergency basis; and (ii) scheduling an interim and final hearing on the relief sought in this Motion. Specifically, the Debtor seeks the following:

- a. authority to use the Cash Collateral subject to the Prepetition TFS Lien, the Prepetition AMEX Lien and the Prepetition Foxii, on an emergency basis pursuant to the Emergency Budget, so as to meet basic operating costs and payroll obligations of the Debtor during this Chapter 11 case, in exchange for granting Adequate Protection to TFS, AMEX and Foxii in the form of roll-over or replacement liens granting security to the same extent, to the same relative priority, and with respect to the same assets as served as collateral for the TFS Prepetition Indebtedness, the AMEX Prepetition Indebtedness and the Foxii Prepetition Indebtedness to the extent the Cash Collateral is actually used, without the need of any further recordation to perfect such liens or security interests (the “Adequate Protection Liens”); and
- b. scheduling interim and final hearings on this Motion.

18. Upon interim and final hearings on the relief sought by this Motion, the Debtor further seeks authority to (i) continue using the Cash Collateral in accordance with the Budgets, with the Adequate Protection Liens continuing as the Cash Collateral is actually

used during this Chapter 11 case; and (ii) provide adequate protection in the form of monthly cash payments, as follows:

- a. Advanced's prepetition invoices against which extensions of credit have been made under the TFS Loan Documents to be collected in full and retained by TFS out of the TFS Wells Fargo Account in reduction of the TFS Prepetition Indebtedness, until paid in full. Advanced's prepetition invoices against which extensions of credit **were not** made under the TFS Credit Facility to be immediately turned over by TFS to Advanced out of the TFS Wells Fargo Account. Postpetition invoices of Advanced will not be directed to the TFS Wells Fargo Account, but rather shall be paid directly to Advanced.
- b. \$1,496.68 per month to AMEX, representing the balance of the AMEX Prepetition Indebtedness, amortized over a period of 60 months at 8% interest per annum; and
- c. \$6,589.83 per month to Foxxi, representing the balance of the Foxii Prepetition Indebtedness, amortized over a period of 60 months at 8% interest per annum (collectively, the "Adequate Protection Cash Payments").

A. The Debtor should be authorized to use the Cash Collateral and to Provide the Adequate Protection.

19. Code section 363(c) provides that a debtor may use cash collateral in the ordinary course of business, after a preliminary hearing scheduled in accordance with the needs of the debtor. *See* 11 U.S.C. § 363(c) (2016). Parties with an interest in cash collateral are entitled to adequate protection. *See* 11 U.S.C. § 363(e) (2016). Adequate protection may

be provided in various forms, including granting roll-over or replacement liens and providing cash payments. *See generally* 11 U.S.C. § 361 (2016); *see also* 495 *Cent. Park*, 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992); *In re Beker Indus. Corp.*, 58 B.R. 725, 736 (Bankr. S.D.N.Y. 1986); *In re Hubbard Power & Light*, 202 B.R. 680, 685 (Bankr. E.D.N.Y. 1996). An *ex parte* order authorizing the use of cash collateral may be appropriate so as to maintain the status quo of the debtor's operations. *See generally, Armstrong v. Norwest Bank, Minneapolis, N.A.*, 964 F.2d 797, 801 (8th Cir. 1992).

20. Prior to the Petition Date, the Debtor used cash collateral in the ordinary course of business to pay its ongoing operating costs and payroll obligations, the latter of which are called in to the Debtor's payroll processing company during the week and covering the prior week through Saturday, and then payable each Friday.

21. In the event the Debtor is not authorized to use the Cash Collateral on an emergency basis, the Debtor will be unable to meet its various obligations as they become due, including its weekly payroll due and payable December 8, 2017.

22. The Debtor believes and submits that the Adequate Protection Liens and proposed Adequate Protection Cash Payments are sufficient to protect TFS, AMEX and Foxxi from any potential diminution in value of their collateral with respect to any prepetition indebtedness and their respective prepetition liens, including the relative priority of any such liens, to the extent the Cash Collateral is actually used during this Chapter 11 case.

23. Accordingly, for the reasons set forth above, entry of an *Ex Parte* Order granting the above relief on an emergency basis, pending interim and final hearings on the

additional relief sought herein, is necessary to preserve the status quo of the Debtor's operations and to avert immediate and irreparable harm to the Debtor's estate.

B. Request for an Interim and Final Hearing

24. Pursuant to Rule 4001(b)(2), the Debtor requests (a) the Court set a date within seven (7) days after entry of the *Ex Parte* Order as a hearing for consideration of entry of an interim order on the relief sought by this Motion; and (b) the Court set a date more than twenty-one (21) days after entry of the *Ex Parte* Order as a hearing for consideration of entry of a final order on the relief sought by this Motion.

25. The Debtor requests that it be authorized to serve a copy of the signed *Ex Parte* Order, which fixes the time and date for the interim and final hearings, by first class mail upon the notice parties listed below. The Debtor further requests that the Court consider such notice of the Interim Hearing to be sufficient notice under Rule 4001(c)(2).

THE DEBTOR SATISFIES BANKRUPTCY RULE 6003

26. Rule 6003 provides that, "[e]xcept to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within twenty-one (21) days after the filing of the petition, issue an order granting the following: . . . a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate" FED. R. BANKR. P. 6003(b) (2016). The Debtor submits that, because the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtor for the reasons set forth herein, Rule 6003 has been satisfied. The Debtor only seeks authorization to pay amounts due and owing in the first twenty-one (21) days after the filing of the petition and do not seek to accelerate any payments.

RESERVATION OF RIGHTS

27. Nothing contained herein is intended to be or shall be construed as (i) an admission as to the validity of any claim against the Debtor, except as expressly set forth herein; or an estoppel of any creditor to assert any against the Debtor, (ii) a waiver of the Debtor's or any appropriate party in interest's rights to dispute any claim, or (iii) an approval or assumption of any agreement, contract, program, policy, or lease under Code section 365. Likewise, if the Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended to be and should not be construed as an admission to the validity of any claim or a waiver of the Debtor's rights to dispute such claim, except as expressly set forth herein; nor is it intended to preclude any secured creditor from later asserting that it is not adequately protected.

NOTICE

28. The Debtor proposes that the *Ex Parte* Order and the Motion for interim and final hearings be provided to (i) the Office of the U.S. Trustee for Region 2: Western District of New York (Buffalo Division) (Attn.: Mr. Joseph W. Allen, Esq.); (ii) the TFS RT, Inc., secured creditor of the Debtor; (iii) American Express Bank FSB, secured creditor of the Debtor; (iv) Foxxi Funding, Inc.; and (v) the holders of the twenty (20) largest unsecured claims against the Debtor. The Debtor submits that, in view of the facts and circumstances, such notice is sufficient and no other or further notice need be provided.

WHEREFORE the Debtor respectfully requests entry of the *Ex Parte* Order, as well as interim and final orders, granting the relief requested herein and such other and further relief as the Court may deem just and proper.

DATED: Buffalo, New York
December 4, 2017

BAUMEISTER DENZ LLP

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