

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

In re:

HUBBARD PROPERTIES, LLC,

Case No. 8:11-bk-1274-KRM

Chapter 11

Debtor.

**DEBTOR'S EMERGENCY MOTION FOR ENTRY OF INTERIM AND FINAL  
ORDERS AUTHORIZING USE OF CASH COLLATERAL  
AND PROVIDING ADEQUATE PROTECTION**

**(Emergency Hearing Scheduled for Monday, January 31, 2011 at 1:30 p.m.)**

**STATEMENT OF RELIEF REQUESTED**

Pursuant to Fed.R.Bankr.P. 4001(b), the Debtor provides this statement of the relief requested in this Motion. Through the Motion, the Debtor seeks authority to use cash collateral consisting of cash, lease, and rent payments and other income derived from the Debtor's Property (see ¶ 15) to fund its operating expenses and costs of administration in this Chapter 11 case pursuant to a Budget (see ¶ 19) for the duration of the chapter 11 case and to provide replacement liens as described below as adequate protection for the interests in its Cash Collateral. The Debtor believes that IWA (as defined below) may assert liens or security interests in Cash Collateral. The Debtor proposes to grant as adequate protection the collection and disbursement of all Cash Collateral through the Debtor's property manager, periodic reporting and the grant of replacement liens on all Cash Collateral acquired by the Debtor or the estate on or the Petition Date to the same extent, validity, and priority held as of the Petition Date (see ¶ 19).

Debtor, Hubbard Properties, LLC ("Hubbard" or "Debtor"), as debtor and debtor-in-possession, pursuant to sections 105 and 363 of title 11 of the United States Code, 11 U.S.C. § 101 *et. seq.* as amended (the "Bankruptcy Code") and Rule 4001(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), moves this Court to (1) schedule an immediate preliminary hearing on an emergency basis (the "Preliminary Hearing") to consider the entry of an interim order, substantially similar to the proposed

form of order attached as **Exhibit “A,”** authorizing the Debtor’s immediate use of property that may constitute “cash collateral,” *nunc pro tunc* from January 27, 2011, and providing adequate protection to entities that may have an interest in such property (the “Interim Order”), and (2) schedule a subsequent final hearing at least fifteen (15) days after service of this Motion (the “Final Hearing”) to consider entry of a final order approving all of the relief requested in this Motion (the “Final Order”). In support of this Motion, the Debtor states as follows:

### **JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. The subject matter of this Motion 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.

### **PROCEDURAL POSTURE**

2. On January 27, 2011 (the “Petition Date”), the Debtor filed its Voluntary Petition for relief under Chapter 11 of the Bankruptcy Code.

3. The Debtor continues to operate its businesses and manage its properties as debtor-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

### **FACTUAL BACKGROUND**

4. The Debtor is a Florida limited liability company that owns and operates a retail and entertainment complex located in Madeira Beach, Florida, commonly known as the John’s Pass Boardwalk (the “Property”). The Property consists of approximately 39,862 square feet of retail space located in five buildings and a 322-car parking garage.

Portions of the Property are currently leased to (i) Happy Feet, USA,; (ii) Florida Fisherman, Inc.; (iii) Caribongo, LLC; (iv) Butterfield Bros., LLC d/b/a Kilwin's of John's Pass; (v) Natural Comfort Footwear, Inc. d/b/a Florida Footwear; (vi) Denim Enterprises; (vii) Myorleans, LLC d/b/a Addicted to the Bean; (viii) Friendly Fisherman Restaurant; (ix) Nagasti, Inc. d/b/a Gray Jewelers; (x) Hooter's of John's Pass;<sup>1</sup> and (xi) Bubba Gump Shrimp Co. Restaurants, Inc. (collectively, the "Tenants").

5. The Debtor acquired the Property from an affiliated entity, Hubbard Enterprises, Inc. in 2004 in connection with a \$20,000,000 redevelopment project that substantially rebuilt the Hubbard family's properties located at John's Pass Village in Madeira Beach (the "Redevelopment"). The Hubbard family has owned and operated the Property and related businesses including a marina and the Friendly Fisherman Restaurant since 1976. The Redevelopment that was completed in 2008 included the construction of a parking garage, new restaurants, and retail space.

6. The Redevelopment was financed from loans from the Members and related entities and an initial \$16,500,000 construction loan (the "Redevelopment Debt") from Bank of America, N.A. ("BoA"), which refinanced an existing mortgage loan and funded various construction costs.<sup>2</sup> To the Debtor's best information, the Redevelopment Debt is now held by IWA. The Redevelopment Debt is secured by a mortgage on the Property and an assignment of rents and related security interests. Since October of 2007, the

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<sup>1</sup> The Hooter's location is currently in the final stages of a build-out with an anticipated opening date in early February 2011.

<sup>2</sup> The total Redevelopment Debt amount was ultimately increased to a principal amount of \$23,457,759 through future advances during the Redevelopment process. The ownership of the Redevelopment Debt has purportedly been assigned through various assignments and allonges from BoA to Transamerica Financial Life Insurance Company ("Transamerica") to IWA.

Redevelopment Debt has been serviced by AEGON USA Realty Advisors, Inc. (“AEGON”) who has acted as the lender’s agent for virtually all purposes, including with respect to management decisions relating to the Property.<sup>3</sup>

7. The Redevelopment Debt is currently evidenced by a *Second Amended and Restated Renewal Promissory Note* in the amount \$23,457,759.59 payable to Transamerica Financial Life Insurance Company (“Transamerica”) (the “Transamerica Note”). The Transamerica Note is secured by one or more mortgages encumbering the Property, evidenced by, among other documents, a Mortgage and Security Agreement dated October 1, 2007, as modified (the “Transamerica Mortgage”) and an Assignment of Rents dated October 7, 2007 (the “Transamerica Assignment”) and other related loan documentation.

8. IWA claims that the principal amount owed under the Redevelopment Debt is approximately \$22,605,044 secured by mortgages and security interests in the Property.

9. In January 2009, Transamerica, through AEGON, sent notification to the Debtor and all of the Tenants of a “Revocation” of the Debtor’s “License” to collect rents derived from the Property (the “Notice of Revocation”). Following the issuance of the Notice of Revocation, substantial “workout” negotiations ensued, conducted almost exclusively between the Debtor and AEGON.

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<sup>3</sup> On information and belief, IWA, Transamerica, and AEGON are all affiliates of AEGON, NA, a Netherlands based company that owns Transamerica.

10. As of the Petition Date, pursuant to an unsigned “workout” agreement between the Debtor and AEGON, the rents and other income derived from the Property are to be deposited into a “lockbox” account (the “Lockbox”) maintained by IWA and/or AEGON at BoA. The Debtor assumes that the Lockbox account is maintained in the name of the Debtor or the Debtor is otherwise designated as the owner of the Lockbox account and the Lockbox account contains only deposits of the rents and income derived from the Property. As of the Petition Date, neither the Debtor nor CFM have been provided with the actual bank statements reflecting all deposits and disbursements into the Lockbox account. However, AEGON does provide to the Debtor and CFM a report reflecting the rents and income deposited into the Lockbox account and the authorized disbursements that AEGON has made from the Lockbox accounts. Those disbursements are transmitted by AEGON to CFM and are then used to pay the approved expenses of operating the Property.

11. As of the Petition Date, AEGON had not obtained any order of the Circuit Court authorizing its continued possession or control or transferring title to the rents and the rents remain property of the Debtor and its Chapter 11 estate.

12. The Debtor has hired Commercial Florida Management, LLC (“CFM”) as property manager for the Property effective as of February 19, 2009. Since that time, CFM has managed the day-to-day operations of the Property and, with AEGON’s permission, has paid the operating expenses of the Property from the Rents deposited into

the Lockbox.<sup>4</sup> The Debtor, primarily through Patricia Hubbard, is responsible for the leasing and tenant relations process.

13. While CFM receives a report as to rents collected and expenses that AEGON allows to be paid, the Debtor is uncertain as to the disposition of the other funds in the Lockbox reported as various times as being between \$200,000 and \$600,000. The Debtor has requested that counsel for IWA provide the bank statements reflecting all deposits into and disbursements from the Lockbox, including any amounts paid to or applied by Lender on account of the Redevelopment Debt.

14. The Debtor's consolidated annual revenues for 2010 were approximately \$1,086,719.

#### **RELIEF REQUESTED AND GROUNDS FOR RELIEF**

15. The Transamerica Mortgage and Transamerica Assignment purport to grant liens and security interests in substantially all of the Debtor's personal property.<sup>5</sup> Those liens and security interests, if valid and properly perfected, would arguably encumber personal property of the Debtor including rents, accounts, deposit accounts, cash, and cash equivalents that may constitute "cash collateral" as that term is defined in Section 363(a) of the Bankruptcy Code (the "Cash Collateral").

16. By this Motion, to avoid immediate and irreparable harm to the Debtor's estate pending the Final Hearing, the Debtor respectfully requests (a) an emergency

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<sup>4</sup> While CFM receives a report as to rents collected and expenses that AEGON allows to be paid, the Debtor is uncertain as to the disposition of the other funds in the Lockbox reported as various times as being between \$200,000 and \$600,000. The Debtor has requested that counsel for IWA provide the bank statements reflecting all deposits into and disbursements from the Lockbox, including any amounts paid to or applied by Lender on account of the Redevelopment Debt.

Preliminary Hearing to consider the immediate entry of an Interim Order authorizing the Debtor's limited use of Cash Collateral to the extent needed to avoid immediate and irreparable harm until a subsequent Final Hearing can be conducted to consider the relief requested in this Motion; and (b) a subsequent Final Hearing to consider the full relief requested by this Motion. Pursuant to Bankruptcy Rule 4001 and this Court's Administrative Order TPA- 2005-2, the Debtor provides the following information:

**A. Identification of Secured Creditors Asserting an Interest in Cash Collateral**

17. As set forth above, the Debtor believes that only IWA (as successor to Transamerica, as successor of BoA) claims a security interest and lien in the Debtor's personal property that may constitute Cash Collateral by virtue of the Transamerica Mortgage, the Transamerica Assignment, and related security agreements. The Debtor estimates that the amount IWA claims it is currently owed is approximately \$22,000,000 in principal.

**B. Terms of Use of Cash Collateral, Reporting, and Offer of Adequate Protection**

18. The Debtor requests this Court's authorization to use any rents or other income derived from the Property to the extent such property is Cash Collateral.

19. In order to adequately protect any interest of IWA in the Cash Collateral, the Debtor proposes as follows:

(a) all rents and income derived from the Property will be paid directly by the Tenants or other payors to CFM to be deposited into a segregated interest bearing account

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<sup>5</sup> The description of the specific collateral is contained in the respective security agreements entered into

or accounts, which shall not be commingled with any other funds or accounts of or controlled by CFM (“Rents Account”).

(b) CFM will disburse funds from the Rents Account to pay the reasonable and customary expenses associated with the management and operation of the Property in accordance with the Budget attached as **Exhibit “B”** to this Motion (the “Budget”)

(c) CFM will provide periodic reports to the Debtor and IWA with respect to all expenses, receipts, and disbursements from the Rents Account in the same form and manner as provided between the Debtor, CFM, and IWA prior to the Petition Date.

20. The Debtor proposes to provide IWA with written reporting as to the status of their operations, collections, generation of accounts receivable, and disbursements in the same or similar format as has been historically been provided by the Debtor pursuant to the BoA Loan. The Debtor submits that such deposit segregation and reporting requirements serve to adequately protect the interests of IWA, especially when coupled with the reporting requirements under the Bankruptcy Code and Bankruptcy Rules (such as monthly operating reports).<sup>6</sup>

21. To provide further adequate protection of the interests of IWA, the Debtor proposes the granting of replacement liens in the Debtor’s post-petition cash collateral, notwithstanding the provision of Section 552 of the Bankruptcy Code to the same extent, validity, and priority of their respective liens in such Cash Collateral as of the Petition Date.

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between the Debtor, BoA, and Transamerica.

<sup>6</sup> As IWA proposed that a CFM employee or affiliate serve as Receiver in the Foreclosure Matter, the Debtor assumes that IWA will not object to CFM’s holding of all funds derived from the Property as proposed could not adequately protects all parties claiming or interest in the Funds including the Debtor.



**C. Amount and Types of Cash Collateral as of the Petition Date**

22. The Debtor is uncertain as to the amounts held in the Lockbox. As of December 31, 2010, CFM reported that there was \$11,706.07 in their operating account and \$227,645.93 in the Lockbox. These amounts are presented as estimates as of the date of the filing of this Motion to allow the Debtor and CFM to obtain additional information and bank statements regarding the Lockbox account and reconcile those amounts.

**D. Purposes for the Use of Cash Collateral and Cash Flow Budget**

23. From the date of the Preliminary Hearing through date of a Final Hearing, the Debtor must have access to and authorization to use Cash Collateral in the amounts and for the purposes set forth in Budget. The Budget reflects Debtor's immediate cash needs for the next several weeks. The use of such Cash Collateral is necessary to avoid immediate and irreparable harm to the Debtor's estate, in order to maintain business operations and preserve value of all creditors. Among other things, the Debtor proposes to use Cash Collateral in accordance with the Budget for payment of necessary suppliers, utilities, maintenance, and other ordinary business expenses related to the Property. This Motion is filed without prejudice to the Debtor's right to request further authority to use Cash Collateral in excess of the amounts sought herein.<sup>7</sup>

24. The Debtor requests authority to use Cash Collateral immediately to pay the expenses set forth in the Budget as payment of such expenses is necessary to maintain their business, to maximize the return on its assets, and to otherwise avoid irreparable

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<sup>7</sup> The Budget reflects general line items reflecting the projections of the Debtor's normal operating expenses for the period covered by the Budget. The Debtor believes that IWA and AEGON have approved the Budget in connection with pre-petition operations.

harm and injury to its estate. In making this request, the Debtor neither acknowledges nor contests that IWA has a valid, perfected security interest in or lien upon any assets of the Debtor.

**BASIS AND NEED FOR EMERGENCY PRELIMINARY HEARING  
AND IMMEDIATE RELIEF**

25. If the Debtor is denied the ability to immediately use Cash Collateral, there will be direct, immediate, and irreparable harm to the Debtor's ability to continue business operations, perform its obligations, service its Tenants, and to maximize its assets and distributions to its creditors. Given the Debtor's daily cash needs for its continued operations, any delay or denial of access to the Cash Collateral would, diminish the value of the Property. The primary recoveries of creditors in these cases will derive from the Debtor's maximizing the value of its Property and business. For those reasons, the Debtor requests the Preliminary hearing on an emergency basis and the entry of the Interim Order, to be followed by a Final Hearing to consider entry of the Final Order.

26. A copy of this Motion is being sent to IWA and its counsel, and to the parties on the L.B.R. Rule 1007(d) Service List for this Chapter 11 case. Accordingly, the Debtor requests that the Court enter an order finding that such notice of this Motion is adequate and sufficient and complies with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the Local Rules of this Court.

**WHEREFORE**, the Debtor respectfully requests that the Court (1) enter an order granting this Motion on an emergency interim basis that (a) authorizes the continued use of Cash Collateral in substantial conformity with the Budget (without prejudice to further

requests for authority to use Cash Collateral) and subject to the provisions set forth in this Motion, and (b) grant replacement liens to IWA as adequate protection as described in this Motion, (c) schedules a final hearing in compliance with Fed.R.Bankr.P. 4001 to consider the entry of a final order granting the relief set forth in this Motion, (2) following a Final Hearing, enters a final order granting the relief requested in this Motion, and (3) grants such other and further relief as the Court deems fair and just under the circumstances.

Dated: January 28, 2011.

/s/ David S. Jennis

David S. Jennis

Florida Bar No. 775940

Chad S. Bowen

Florida Bar No. 0138290

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by facsimile, electronic service and/or U.S. Mail, postage prepaid to **Investors Warranty of America, Inc.**, c/o its Registered Agent, C T Corporation System, 1200 S. Pine Island Rd., Plantation, FL 33324, and its counsel **Keith Fendrick**, Holland & Knight, LLP, 100 N. Tampa Street, Suite 4100, Tampa, FL 33602, and **United States Trustee**, 501 E. Polk St., Ste. 1200, Tampa, FL 33602, to those parties listed on the Court's L.B.R. 1007-2 Parties in Interest List, and any parties receiving CM/ECF service on this 28<sup>th</sup> day of January 2011.

/s/ David S. Jennis

EXHIBIT "A"

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

In re:

HUBBARD PROPERTIES, LLC,

Case No. 8:11-bk-1274-KRM

Chapter 11

Debtor.

**INTERIM ORDER AUTHORIZING DEBTOR'S USE OF  
CASH COLLATERAL AND GRANTING REPLACEMENT LIENS**

THIS CASE came before the Court for a preliminary hearing on \_\_\_\_\_, 2011 at \_\_\_\_\_.m. (the "**Preliminary Hearing**") on the *Debtor's Emergency Motion for Entry of Interim and Final Orders Authorizing Use of Cash Collateral and Providing Adequate Protection* (Doc. No. \_\_\_\_ ) (the "**Motion**") filed by Hubbard Properties, LLC ("**Hubbard**" or "**Debtor**"). Through the Motion, the Debtor (1) seeks the entry of an interim order (this "**Interim Order**") immediately authorizing its use of property that may constitute "cash collateral" (as that term is defined in 11 U.S.C. § 363(a)) *nunc pro tunc* to the filing date of January 27, 2011, (2) proposes certain adequate protection to entities that may have an interest in such property, and (3) requests that a subsequent final hearing be conducted at least fifteen (15) days after service of the Motion (the "**Final Hearing**") to consider entry of a final order approving all of the relief requested in the Motion (the "**Final Order**"). The Court, having considered the Motion, the arguments and proffers of counsel, the record, and for the reasons stated orally and recorded in open court that shall constitute the Court's record, finds it appropriate to grant the relief requested. Accordingly, it is

**ORDERED:**

1. The Motion is **GRANTED**, on an interim basis subject to the terms and conditions set forth below.
2. The Preliminary Hearing is continued to \_\_\_\_\_, **2011** at \_\_\_\_\_**.m.** (the “**Continued Preliminary Hearing**”).
3. The Court will schedule a subsequent Final Hearing on the Motion at the Continued Preliminary Hearing. At the Continued Preliminary Hearing and/or the Final Hearing, the Court may modify some or all of the provisions of this Interim Order. The Debtor is authorized to continue to use Cash Collateral pursuant to the terms of this Interim Order until the entry of an Order following the Continued Preliminary Hearing.
4. Subject to the terms and conditions of this Interim Order, the Debtor is authorized *nunc pro tunc* to January 27, 2011, to use Cash Collateral for ordinary expenses in compliance with the budget, attached as **Exhibit “A”** and incorporated herein (the “**Budget**”). Without the express written consent of IWA (as defined below), the Debtor shall not exceed the Budget cumulatively, nor any individual line item by more than five percent (5%).
5. As adequate protection of its asserted interest in the Debtor’s Cash Collateral, Investors Warranty of America, Inc. (“**IWA**”) is hereby granted a replacement lien, to the same extent, validity, and priority as existed on the Petition Date, in Cash Collateral of the Debtor owned as of or acquired after the Petition Date, which replacement liens shall be deemed perfected without the need for further action.

6. Pending further Order of this Court, the Debtor shall not be required to make any adequate protection payments to IWA; provided however that this Interim Order is without prejudice to the rights of the Debtor, IWA, or any other party in interest with respect to the matters set forth in the Motion and this Interim Order.

7. The subject of this Interim Order is a “core” proceeding within the meaning of 28 U.S.C. § 157. Notice of the Preliminary Hearing on the Motion was adequate and appropriate under the circumstances of this chapter 11 case as contemplated by 11 U.S.C. §102(l) and Fed.R.Bankr.P. 4001(b)(2).

8. Any use of Cash Collateral since the Petition Date in accordance with the Budget and this Interim Order is hereby authorized pursuant to the applicable provisions of Section 363(c) of the Bankruptcy Code and Fed.R.Bankr.P. 4001(b)(2) as necessary to avoid immediate and irreparable harm to the estate, and all adequate protection provided for herein is enforceable to the extent of any use of Cash Collateral by the Debtors pursuant to this Interim Order.

**DONE** and **ORDERED** in Chambers at Tampa, Florida on \_\_\_\_\_.

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K. Rodney May  
United States Bankruptcy Judge

Copies furnished to:

**David S. Jennis**, Jennis & Bowen, P.L., 400 N. Ashley Drive, Suite 2540, Tampa, FL 33602  
**United States Trustee**, 501 E. Polk St., Ste. 1200, Tampa, FL 33602

## EXHIBIT "B"

<u>Account #</u>	<u>Jan-11</u>	<u>Feb-11</u>
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**INCOME**

Gross Potential Rent	96,775	82,820
Expense Reimbursements	25,633	36,189
Other Rental Income	0	0
Less: Concessions	0	0
<b>TOTAL INCOME</b>	<b>122,408</b>	<b>119,009</b>

**OPERATING EXPENSES**

Property Taxes	0	0
Property Insurance	0	0
Utilities	24,100	35,000
Janitorial	10,800	8,800
Landscape	450	450
Grounds & Parking Lot	3,500	100
HVAC Maintenance	8,241	33,035
Elevator Maintenance	0	0
Safety & Life Security	150	1,750
Repairs & Maintenance	22,858	33,008
Parking Garage R&M	20,458	20,516
Management Fees	4,896	4,760
<b>TOTAL OPERATING EXPENSES</b>	<b>95,453</b>	<b>137,419</b>

<b>NET OPERATING INCOME (LOSS)</b>	<b>26,955</b>	<b>(18,410)</b>
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**NON-OPERATING EXPENSES**

General & Administrative	1,755	4,555
Marketing & Leasing	2,000	10,000
Non-Recoverable Expenses	0	0
Debt Service	0	0
Depreciation / Amortization Expense	0	0
Capital Expenditures	0	50,000
<b>TOTAL NON-OPERATING EXPENSES</b>	<b>3,755</b>	<b>64,555</b>