

**UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

In re:  DENNIS RAY JOHNSON, II, et al Debtor.	Bankruptcy Case No.: 3:16-bk- 30227 Chapter 11  Jointly Administered
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**EMERGENCY MOTION TO AUTHORIZE USE OF CASH COLLATERAL OF JOINT VENTURE DEVELOPMENT, LLC, ESTABLISH ADEQUATE PROTECTION, FOR ALLOWANCE OF DEBTOR IN POSSESSION FINANCING, AND FOR ALLOWANCE OF SUPER PRIORITY ADMINISTRATIVE CLAIM  
PURSUANT TO SECTION 364 OF THE BANKRUPTCY CODE**

Thomas H. Fluharty, the chapter 11 trustee for the consolidated bankruptcy case of Dennis Ray Johnson, II, and his attorney, Joe Supple, file this *Emergency Motion to Authorize Use of Cash Collateral of Joint Venture Development, LLC, Establish Adequate Protection, for Allowance of Debtor in Possession Financing, and for Allowance of Super Priority Administrative Claim Pursuant to Section 364 of the Bankruptcy Code* (this “**Motion**”), and in support of the Motion states as follows:

**Background**

1. On August 31, 2016 (the “**Petition Date**”), Joint Venture Development, LLC (the “**Debtor**”) by Zachary B. Burkons, the Special Receiver appointed by order of the Circuit Court of Cabell County, West Virginia, Business Division, case number 15-C-807, entered on August 16, 2016, commenced this bankruptcy case by filing a voluntary petition for relief under chapter 11 of title 11 of the United States Code (as amended, the “**Bankruptcy Code**”) in the United States Bankruptcy Court for the Southern District of West Virginia, Bankruptcy Case Number 16-30403(the “**Court**”). [Doc 1]

2. On November 3, 2106, the United States Trustee, Judy A. Robbins, by her Assistant United States Trustee, Debra A. Wertman, applied to the Court for an order approving the appointment of a chapter 11 trustee. [Doc 48]

3. On November 7, 2016, the Court entered the *Order Approving Appointment of a Chapter 11 Trustee* appointing Thomas H. Fluharty chapter 11 trustee of the Debtor (the “*Trustee*”). [Doc 52]

4. By Order entered November 7, 2016, Joint Venture Development, LLC was administratively consolidated with the chapter 11 case of Dennis Ray Johnson, II.

5. The Debtor is a Kentucky limited liability company and the owner of an office building located at 1550 Wolohan Drive, Ashland, Kentucky (the “*Office Building*”). The Office Building is leased to the Commonwealth of Kentucky under two separate leases: (a) a lease to the Kentucky Energy and Environment Cabinet, and (b) a lease to the Kentucky State Police (together with the Kentucky Energy and Environmental Cabinet (the “*Tenants*”).

#### **The JVD Loan**

6. As of the Petition Date, Peoples Bank claims that the Debtor was indebted to Peoples Bank in the total amount of \$776,900.24. On or about September 5, 2012, JVD executed a Loan Agreement and a Promissory Note, pursuant to which Peoples loaned \$948,841.00 to JVD (the “*JVD Loan*”). The JVD Loan was to be repaid in fifty-nine (59) regular consecutive monthly payments of \$7,289.69 and one (1) irregular last monthly payment, with the first such payment due on October 5, 2012, and each successive payment due on the same day of each succeeding month thereafter until paid in full. Under the terms and provisions of the JVD Loan, Peoples Bank is entitled to recovery any costs and expenses, including reasonable attorneys’ fees, incurred in pursuing an action for any breach or default under the JVD Loan.

7. Peoples Bank asserts that the JVD Loan is secured by:
  - a. A first Mortgage, dated September 5, 2012 (the “*JVD First Mortgage*”), and a second Mortgage, dated April 9, 2015 (the. “*JVD Second Mortgage*” and together with the JVD First Mortgage, the “*Mortgages*”), both being upon approximately 3.56-acres of the same real property located in Boyd County, Kentucky, as more fully described in the Mortgages (the “*JVD Mortgaged Realty*”).
  - b. An Assignment of Rents, dated September 5, 2012, as recorded on or about September 11, 2012 in Book M1225-663, by which JVD assigned all rents (the “*JVD Rents*” and together with the JVD Mortgaged Realty, the “*Collateral*”) from JVD to Peoples Bank.

8. Peoples Bank asserts that JVD defaulted on the payments due under the JVD Loan.

9. In summary, Peoples Bank asserts that the JVD Loan is secured by a perfected first lien on the JVD Mortgaged Realty and a perfected first lien on the JVD Rents, which are the “*Pre-petition Liens*”.

10. As of August 31, 2016, the JVD Loan had an outstanding balance of \$776,900.24, plus interest that continues to accrue on the outstanding principal balance at the rate of \$140.2737 per day until paid, plus additional costs and expenses, including, without limitation, attorneys’ fees and expenses.

### **Jurisdiction and Legal Authority**

11. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b). Venue is appropriate in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

12. The statutory predicates for the relief sought herein are sections 361 and 363 of the Bankruptcy Code.

### **Relief Sought**

#### **A. Use of Peoples Bank’s Cash Collateral**

13. Pursuant to section 363 of the Bankruptcy Code, the Debtor seeks to use “Cash Collateral” (as defined by section 363(a) the Bankruptcy Code) in the ordinary course of its business. As of the Petition Date, the Cash Collateral of the Debtor totaled \$XX,XXX, but certain rents are due from the Tenants for the quarter beginning of January 1, 2017. As shown on its 6 month cash flow budget, attached as Exhibit A to the Order (as hereinafter defined) (the “**Budget**”), the Debtor will have sufficient funds to pay operational expenses during the 6 month period and the Cash Collateral will not deteriorate assuming that the Debtor is permitted to obtain debtor-in-possession financing from Peoples Bank.

14. To adequately protect Peoples Bank’s interest in Cash Collateral, the Debtor will provide adequate protection to Peoples Bank under the following terms and as more fully described in the *Order Authorizing Interim Use of Cash Collateral of Joint Venture Development, LLC, Establishing Adequate Protection, Allowing Debtor In Possession Financing and Allowing of Super Priority Administrative Claim Pursuant to Section 364 of the Bankruptcy Code* (“**Order**”), substantially in the form attached hereto:

- a. The Debtor shall make its normal, non-default debt service payments to Peoples Bank of \$7,289.69 per month beginning January 5, 2017 or as soon as the Order granting this Motion has entered on an interim basis;
- b. The Debtor shall pay four past due debt service payments totaling \$,29,158.76 to Peoples Bank as soon as the Order granting this Motion has been entered on an interim basis;
- c. The Debtor shall grant Peoples Bank a post-petition security interest in, and a lien upon, all categories and types of collateral in which it held a security interest as of the Petition Date (the “**Adequate Protection Liens**”). The post-petition security interest shall only be to the same extent, and have the same priority, as Peoples Bank’s security interest as of the Petition Date. All security interests to be granted to Peoples Bank under this Motion as adequate protection will, to the extent they are properly perfected as of the Petition Date, be deemed duly perfected under all applicable laws, and no further notice, filing, recordation or Order will be required to perfect such interest;

- d. The Pre-Petition Liens and the Adequate Protection Liens shall be junior, in each case, only to (collectively, the “*Carve Out*”): (i) the payment of fees pursuant to 28 U.S.C. § 1930; (ii) the payment of Chapter 11 Trustee fees pursuant to 11 U.S.C. § 326 up to the amount of \$60,000, less any allowed and approved professional legal fees in subparagraph iii below; and (iii) all unpaid professional legal fees and expenses (regardless of when such fees and expenses are allowed) to the extent such fees and expenses do not exceed the amounts budgeted therefor in the Budget (the “*Budgeted Amounts*”); provided, however, that the Carve-Out Expenses shall not include (a) any other claims that are or may be senior to or *pari passu* with any of the Carve-Out, (b) any fees or expenses of a chapter 7 trustee, (c) any fees or disbursements arising after the conversion of the Bankruptcy Case to a case under chapter 7 of the Bankruptcy Code, (d) any fees or disbursements related to the investigation of, preparation for, or commencement or prosecution of any litigation, proceeding or adverse action against, or challenge to the rights, validity and/or the first-priority status of liens and prepetition secured claims of Peoples Bank, or (e) any fees or disbursements related to any challenge or objection to the debt or collateral position of Peoples Bank or hindering or delaying Peoples Bank’s enforcement or realization upon the Collateral once an Event of Default has occurred and is continuing. For the avoidance of doubt, and solely for the purpose of confirming that professionals will not be subject to disgorgement in the event of any administrative insolvency of the Debtor, all professional fees and expenses that do not exceed the Budgeted Amounts shall be deemed to come within (and shall be entitled to the benefit of) the subordination provided herein in favor of pertinent professionals;
- e. In the event that the above granted adequate protection fails to protect the interest of Peoples Bank in the Cash Collateral, Peoples Bank will be granted a superpriority administrative claim, which will have priority of the kind specified in section 507(b) of the Bankruptcy Code over any and all administrative expenses specified in section 507(a)(1) of the Bankruptcy Code, except that such superpriority administrative claim will be subject to and subordinate to the Carve Out; and
- f. Adequate protection payments made to Peoples Bank shall not be subject to disgorgement.
- g. The Trustee’s authority to use Cash Collateral shall terminate if the Trustee has not filed a section 363 motion to sell the Office Building and assume and assign the Tenants’ leases pursuant to section 365 on or before June 30, 2017 for an amount of not less than the total amount outstanding of all of Peoples Bank’s liens, including the monies advance pursuant to this Motion, or a sale otherwise approved by Peoples Bank. However, any unpaid professional legal fees and expenses to the extent such legal fees and expenses do not exceed the amounts budgeted therefor in the Budget shall be paid from the Cash Collateral.

## B. Allowance of Debtor-in-Possession Financing

15. Section 364 of the Bankruptcy Code allows a debtor-in-possession to obtain financing, in relevant part, as follows:

(c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt –

- (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;
- (2) secured by a lien on property of the estate that is otherwise subject to a lien; or
- (3) secured by a junior lien on property that is subject to a lien.

11 U.S.C. § 364(c)

16. The Debtor seeks authority to obtain debtor-in-possession financing in the maximum principal amount of \$75,000 (the “**DIP Loan**”) from Peoples Bank (the “**DIP Lender**”). The Debtor needs the DIP Loan in order to fund the replacement of a heating and air-conditioning unit for the Office Building and fund the Debtor’s prospective 363 sale of the Office Building; and the DIP Lender is willing to provide the DIP Loan on the terms set forth below.

17. The DIP Lender has agreed to enter into the DIP Loan under the following terms and conditions (as more fully set forth in the Debtor-In-Possession Promissory Note (the “**Note**”), attached as Exhibit “B” and the Order):

- a. The DIP Loan shall bear interest beginning on the date any such financing is advanced at a rate of ten percent (10%) *per annum* and will mature on the earlier of (i) June 30, 2017 (the “**DIP Maturity Date**”), (ii) conversion or dismissal of this case, (iii) the sale of the Office Building, or (iv) upon a sooner material adverse event in these proceedings including, but not limited to, the failure of this Interim Order to be confirmed by the Court on a final basis within thirty (30) days hereof. Upon the DIP Maturity Date, the DIP Lender, upon request of the Debtor, reserves the right to extend the Maturity Date and/or provide additional financing necessary to fund the continued operations of the Debtor upon approval by this Court.

- b. Interest will accrue only upon the amount of financing actually advanced by the DIP Lender pursuant to this Interim Order, and there shall not be any other financing charges associated with the DIP Loan.
- c. Pursuant to section 364(c) of the Bankruptcy Code, the obligations of the Debtor to the DIP Lender under the DIP Loan shall: (i) constitute an allowed administrative expense claim which shall have priority over all administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy Code; (ii) at all times be senior to any rights arising under section 546(c) of the Bankruptcy Code; and (iii) pursuant to section 364(c)(2) of the Bankruptcy Code, at all times be secured by a perfected priority lien and security interest on all assets of the Debtor, superior in priority to all properly perfected liens, security interests, including the lien and security interest of Peoples Bank.
- d. The administrative priority claim of the DIP Lender resulting from the DIP Loan shall also be subordinate only to: (i) the payment of quarterly fees to the Office of the United States Trustee; (ii) the claims of Peoples Bank granted by this Court pursuant to the approval of the Cash Collateral Order; and (iii) the fees and expenses of the chapter 11 trustee and his professionals in the Budgeted Amounts.
- e. The Debtor reaffirms and ratifies all of the JVD Loan, including all terms, conditions and obligations thereunder and further acknowledges and agrees that as of the Petition Date the indebtedness under the terms of the JVD Loan totaled at least \$776,900.24, subject to the rights set forth in Paragraph 18 of the Order (relating to the challenge period to contest Peoples Bank's liens), the Debtor does not have, and hereby releases, any defenses, claims, demands, setoffs, causes of action, or counterclaims, whether arising under the Bankruptcy Code or otherwise, relating in any way against Peoples Bank with respect to the Loans described herein or to Peoples Bank's rights or the exercise of remedies thereunder, or Peoples Bank's respective officers, directors, agents, employees, affiliates, or attorneys..

18. The Order proposes to make adequate protection payments to Peoples Bank and to grant Peoples Bank post-petition liens on its collateral.

19. Upon entry of the attached proposed Order, such Order shall constitute the security agreement between the Debtor and the DIP Lender and no further action is required to perfect the security interests of the DIP Lender.

20. The Debtor intends to use the proceeds of the DIP Loan to fund the replacement of one of the Debtor's heating and air-conditioning units and to fund operations pending sale of the Office Building .

21. Moreover, the Debtor is unable to obtain debtor-in-possession financing under terms more favorable than those proposed by the DIP Lender.

22. Therefore, the Debtor requests the authority to enter into the DIP Loan under the terms described herein and as set forth in the Order attached hereto.

### **Request for Interim Relief**

23. Rule 4001(b)(2) of the Federal Rules of Bankruptcy Procedure provides, in part, that “[t]he court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion.” However, the court may conduct a preliminary hearing “before such 14 day period, but the court may authorize the use of only that amount of cash collateral that is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.” Fed.R.Bankr.P. 4001(b)(2).

24. The Debtor’s inability to use Cash Collateral would cause immediate and irreparable harm to the estate. If the Debtor cannot pay certain of its vendors or repair the Office Building’s heating and air-conditioning system, the Debtor will simply have no business to reorganize. As such, the Debtor requests that, pending final hearing on this Motion, it be permitted to use Cash Collateral to pay its ordinary course post-petition vendor claims in accordance with the Budget.

### **Notice**

25. Copies of this Motion were served on the following parties: (a) the Office of the United States Trustee for the Southern District of West Virginia; (b) Peoples Bank and its attorneys; and (c) the Debtor’s unsecured creditors. In light of the fact that no examiner or committee of creditors has been appointed in this case, The Debtor submits that no further notice be given.

WHEREFORE, for the reasons set forth above, the Trustee respectfully requests that it be permitted to use Cash Collateral and authorize the debtor-in-possession financing on the terms proposed in this Motion.

Thomas H. Fluharty, Chapter 11 Trustee  
By Counsel,

/s/ Joe M. Supple  
Supple Law Office PLLC  
801 Viand Street  
Point Pleasant, WV 25550  
304.675.6249  
joe.supple@supplelaw.net

**CERTIFICATE OF SERVICE**

I, Joe M. Supple, certify that a true copy of the foregoing EMERGENCY MOTION TO AUTHORIZE USE OF CASH COLLATERAL OF JOINT VENTURE DEVELOPMENT, LLC, ESTABLISH ADEQUATE PROTECTION, FOR ALLOWANCE OF DEBTOR IN POSSESSION FINANCING, AND FOR ALLOWANCE OF SUPER PRIORITY ADMINISTRATIVE CLAIM PURSUANT TO SECTION 364 OF THE BANKRUPTCY CODE was served by this Court's CM/ECF system on December 30, 2016 to all parties having registered in this case under the Court's CM/ECF system.

**And by U.S. Mail on December 30, 2016 to the following:**

**Appalachian Coal**  
P. O. Box 1067  
Huntington, WV 25713

**Big Properties III**  
P. O. Box 1067  
Huntington, WV 25713

**Boyd County Sheriff**  
Hon. Daniel King, authorized agent  
P.O. Box 425  
Catlettsburg, Ky. 41129

**Commonwealth of Kentucky**  
Dept for Facilities & Support Services

403 Wapping Street  
Frankfort, KY 40601

**Dennis Johnson**  
P. O. Box 1067  
Huntington, WV 25713

**Department of the Treasury**  
Internal Revenue Service  
P O Box 7346  
Philadelphia, PA 19101

**East Pea Ridge**  
P. O. Box 1067  
Huntington, WV 25713

**Peoples Bank, NA**  
138 Putnam St.  
Marietta, OH 45750-2923

**Peoples Insurance**  
124 Putnam Street  
Marietta, OH 45750

/s/ Joe M. Supple  
Joe M. Supple  
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