

1 KEVIN A. DARBY, ESQ. (NV BAR #7670)
2 TRICIA M. DARBY (NV BAR #7956)
3 DARBY LAW PRACTICE, LTD.
4 4777 Caughlin Parkway
5 Reno, Nevada 89519
6 Phone: (775)322-1237
7 Facsimile: (775) 996-7290
8 kevin@darbylawpractice.com

E-Filed January 3rd, 2011

9 [Proposed] Counsel for Debtor and
10 Debtor in Possession

11 **UNITED STATES BANKRUPTCY COURT**
12 **FOR THE DISTRICT OF NEVADA**

13 In re:
14 KCXP INVESTMENTS, LLC,
15 Debtor.

Case No.: BK-N-10-54847-gwz
Chapter 11

**MOTION TO APPROVE DEBTOR’S USE
OF CASH COLLATERAL PURSUANT TO
11 U.S.C. §363**

Hearing Date: OST REQUESTED
Hearing Time: TBD

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17 Debtor and Debtor in Possession, KCXP INVESTMENTS, LLC, by and through its
18 proposed counsel, KEVIN A. DARBY, ESQ. of Darby Law Practice, Ltd., hereby moves this
19 court for an order authorizing the Debtor to use cash collateral (the “Motion”). This Motion is made
20 pursuant to 11 U.S.C. §363 and is supported by the Declaration of Tom McManus and the following
21 points and authorities.

22 **POINTS AND AUTHORITIES**

23 **I. Concise Statement of Requested Relief Per Fed. R. Bankr. P. 4001(b)(1)(B).**

24 1. This Motion seeks authority for the Debtor to use cash collateral and for an order
25 granting Security First Bank adequate protection on an emergency interim basis pursuant to
26 Bankruptcy Rule 4001(b) and LR 4001(b). This Motion further requests that the Court schedule a
27 final hearing for approval of the use of cash collateral at least twenty (20) days out.

28 2. The Debtor intends to use the cash collateral for Ordinary Operating Expenses
and in accordance with the budget attached as Exhibit A to the proposed Order attached to this
Motion as Exhibit 1.

1 3. With regard to adequate protection Debtor believes that First Security Bank is
2 adequately protected by virtue of a substantial equity cushion. While the Debtor is in the process
3 of commissioning an up-to-date appraisal, the most recent formal valuation of First Security
4 Bank's collateral valued it at \$13,000,000.00 as of May 1, 2009. As First Security Bank is owed
5 approximately \$3,380,000.00, it has an equity cushion of almost 300%, which is more than
6 sufficient to adequately protect First Security Bank's interests as required by 11 U.S.C. §§ 361 &
7 363.

8 **II. Procedural Background.**

9 4. On December 14, 2010 (the "Petition Date"), Debtor filed its voluntary petition
10 under Chapter 11 of the Bankruptcy Code. Debtor plans to continue to operate its business and as
11 debtor and debtor-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.
12 Namely, Debtor owns and operates an airplane hangar complex at the Carson City Airport,
13 Carson City, Nevada (the "Subject Property").

14 5. No request has been made for the appointment of a trustee or examiner, and no
15 official committees have been established in these cases.

16 **III. Jurisdiction and Venue.**

17 6. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and
18 1134. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (D) and (M). The bases
19 for the relief sought herein are Sections 361 and 363 of the Bankruptcy Code, Bankruptcy Rule
20 4001(b), and LR 4001(b). Venue of Debtor's Chapter 11 case in this District is proper pursuant to
21 28 U.S.C. §§ 1408 and 1409.

22 **IV. Factual Background.**

23 ***A. Debtor's Financial Situation.***

24 7. Debtor owns and operates an airplane hangar located at the Carson City Airport in
25 Carson City, Nevada. which consists of 12-buildings totaling 82,400 square feet of hangar and
26 office space situated on 3.3 acres of leased real estate at the east end of the Carson City Airport
27 (the "Jet Ranch Complex").

28 ///

1 8. Based on an appraisal of the Jet Ranch Complex dated August 21, 2008, it was
2 worth \$9,600,000.00 in as-is condition on that date. At that time, construction on the Jet Ranch
3 Complex was not completed. The August 21, 2008, Appraisal, the property would be worth
4 \$13,000,000 on May 1, 2009, in a fully completed as-is condition. Based on the Debtor's
5 opinion, the property is currently worth approximately \$13,000,000.00. It is well settled that an
6 owner's opinion is admissible evidence in determining the value of real estate or personal
7 property. *See, e.g., Kestenbaum v. Falstaff Brewing Corp.*, 514 F2d 690 (5th Cir. 1975); *Justice v.*
8 *Pennzoil Co.*, 598 F2d 1339 (4th Cir. 1979). Debtor is seeking to employ an appraiser to conduct
9 an up-to-date appraisal of the Jet Ranch Complex, which the Debtor anticipates will be completed
10 in 4-6 weeks from the date of this Motion. *See Declaration of Tom McManus*, filed herewith.

11 9. The Jet Ranch Complex is encumbered by a first priority deed of trust in favor of
12 Security First Bank with a current balance of approximately \$3,380,000.00 (the "Security First
13 Loan I"). In addition, the Jet Ranch Complex is encumbered by a second priority deed of trust in
14 favor of Security First Bank with a current balance of approximately \$2,320,000.00 (the "Security
15 First Loan II").

16 10. Debtor has secured debt totaling approximately \$5,700,000.00, priority unsecured
17 debt totaling approximately \$92,135.20 and unsecured debt totaling approximately \$235,509.52.

18 11. Currently, Debtor receives monthly rental income and other related fees of
19 \$6,500.00. Based on year to date numbers, Debtor estimates it will have average monthly
20 operating expenses going forward, without counting debt payments, of approximately \$6,500.00.

21 **V. Legal Argument.**

22 ***A. Debtor Should Be Permitted To Use Cash Collateral.***

23 12. Section 363(c)(2) of the Bankruptcy Code provides that a debtor-in-possession
24 may not use cash collateral under unless: (A) each entity that has an interest in such cash
25 collateral consents; or (B) the court, after notice and a hearing, authorizes such use. 11 U.S.C. §
26 363(c)(2).

27 13. The term "cash collateral" is defined in Section 363(a) of the Bankruptcy Code as
28 including the following:

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[C]ash, 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, whether existing before or after the commencement of a case under this title.

11 U.S.C. § 363(a).

14. If, pursuant to Section 363(c)(2) of the Bankruptcy Code, a debtor is permitted to use cash collateral, the debtor-in-possession may still be required to provide adequate protection to an entity with an interest in the cash collateral. Section 363(e) of the Bankruptcy Code provides, in pertinent part, as follows:

(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. . . .

11 U.S.C. § 363(e).

15. As applied to the case at hand, Security First Bank is the only party with a properly perfected security interest in Debtor’s Cash Collateral.

16. Without the use of Cash Collateral, Debtor will not be able to maximize and preserve the value of its business, which may result in Security First Bank foreclosing on its collateral and lower priority secured claims and all unsecured creditors receiving nothing.

17. The Debtor should be allowed to use of cash collateral in existence as of the Petition Date or subsequently collected in the ordinary course of the Debtor’s business from the

1 Petition Date until further order of the Court for the following purposes:

2 (a) To make payments for postpetition operating expenses of the Debtor
3 incurred in the ordinary course of business, and in accordance of with the budget attached as
4 Exhibit A to the proposed Order attached hereto as Exhibit 1 (the “Budget”) so long as the total
5 amount actually expended in that period for such line does not exceed 125% of the amount
6 budgeted for such line item in the Budget; and

7 (b) Any other use of cash collateral approved by this Court or Security First
8 Bank.

9 ***B. Adequate Protection For Security First Bank.***

10 18. Pursuant to 11 U.S.C. §361, when adequate protection is required under §363 of
11 this Code, such adequate protection may be provided by—

12 (1) requiring the debtor to make periodic cash payments to such entity, to the
13 extent that the use under section 363 of this title, or any grant of a lien under
14 section 364 of this title results in a decrease in the value of such entity’s
15 interest in such property;

16 (2) providing to such entity an additional or replacement lien to the extent that
17 such stay, use, sale, lease, or grant results in a decrease in the value of such
18 entity’s interest in such property; or

19 (3) granting such other relief, other than entitling such entity to compensation
20 allowable under section 503 (b)(1) of this title as an administrative expense, as
21 will result in the realization by such entity of the indubitable equivalent of such
22 entity’s interest in such property.

23 19. Although the existence of an equity cushion as a method of adequate protection is
24 not specifically mentioned in §361, it is “the classic form” of adequate protection. In re Mellor,
25 734 F.2d 1396, 1400 (9th Cir. 1984). In fact, it has been held that the existence of an equity
26 cushion, standing alone, can provide adequate protection. In re San Clemente Estates, 5 B.R. 605,
27 610 (Bankr. S.D.Cal. 1980); In re Tucker, 5 B.R. 180, 182 (Bankr.S.D.N.Y. 1980). A sufficient
28 equity cushion has been found to exist although not a single mortgage payment had been made.
In re Curtis, 9 B.R. at 111. According to the Ninth Circuit, a 20% cushion is sufficient adequate

1 protection for a secured creditor. In re Mellor, 734 F.2d. at 1400.

2 20. In the present case, Security First Bank is currently owed \$3,380,000.00, but has
3 collateral valued at \$13,000,000.00. Thus, Security First Bank currently enjoys an equity cushion
4 in the Jet Ranch Complex of approximately \$9,620,000.00, or over 285%, which is substantially
5 more than the twenty percent (20%) traditionally required to establish adequate protection.
6 Therefore, Security First Bank is adequately protected by an equity cushion.

7 21. In addition, Debtor will continue maintain and insure all of its property and
8 provide proof of continuous insurance upon request of Security First Bank.

9 **VI. Conclusion.**

10 22. Debtor respectfully request that the Court:

11 1. Enter the attached order granting this Motion, and thereby granting interim
12 approval of the Debtor's use of cash collateral pursuant to 11 U.S.C. §363.;

13 2. Schedule a final hearing for approval of the Motion at least twenty (20) days
14 hereafter;

15 3. Approve adequate protection for Security First Bank in the form of an equity
16 cushion; and

17 4. Grant such other relief as is just and proper.

18 DATED this 3rd day of January, 2011.

19 DARBY LAW PRACTICE, LTD.

20 By: /s/ Kevin A. Darby
21 Kevin A. Darby (NV BAR #7670)
22 4777 Caughlin Parkway
Reno, Nevada 89519

23 Counsel for Debtor and Debtor in
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Exhibit 1
PROPOSED ORDER

EXHIBIT 1
PROPOSED ORDER

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Kevin A. Darby (NV BAR #7670)
Tricia M. Darby (NV BAR #7956)
DARBY LAW PRACTICE, LTD.
4777 Caughlin Parkway
Reno, Nevada 89519
Phone: (775)322-1237
Facsimile: (775) 996-7290
kevin@darbylawpractice.com

Attorney for Debtor

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA**

In re:
KCXP INVESTMENTS, LLC,

Debtor.

Case No.: BK-N-10-54847-gwz

Chapter 11

**ORDER GRANTING MOTION TO
APPROVE DEBTOR’S USE OF CASH
COLLATERAL PURSUANT TO 11 U.S.C.
§363**

Hearing Date: TBD

Hearing Time: TBD

Upon the Motion, dated December 2, 2011 (the “Motion”), of debtor and debtor in possession (the “Debtor”) in the above-captioned Chapter 11 case, for an order pursuant to Section 363 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the “Bankruptcy Code”), authorizing the debtor to use cash collateral of Security First Bank; and the Court having jurisdiction to consider the Application and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief

1 requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being
2 proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of
3 the Motion having been provided, and it appearing that no other or further notice need be
4 provided; and the relief requested in the Motion being in the best interests of the Debtor and their
5 estate and creditors; and the Court having determined that the legal and factual bases set forth in
6 the Motion establish just cause for the relief granted herein; it is hereby

7 **ORDERED** that the Motion is granted;

8 **ORDERED** that Debtor is hereby authorized and approved to use cash collateral on an
9 interim basis pursuant Fed. R. Bankr. P. 4001(b) and LR 4001(b) for a period up to and including
10 the date of entry of a final order relating to cash collateral, in accordance with the budget attached
11 to this Order as Exhibit A;

12 **ORDERED** that the Court shall schedule a final hearing relating to cash collateral on a
13 date that is more than twenty (20) days after the entry of this Interim Order;

14 **ORDERED** that Debtor shall serve notice of the final hearing regarding cash collateral
15 promptly upon the United States Trustee; the Internal Revenue Service; Debtors' top twenty (20)
16 unsecured creditors and any official creditors committee of unsecured creditors, if one is
17 appointed pursuant to 11 U.S.C. § 1102; Security First Bank; and any entity which files and
18 serves on Debtor a request for special notice.
19

20 **IT IS SO ORDERED.**

21 SUBMITTED BY :

22 DARBY LAW PRACTICE, LTD.
23

24 By: /s/ Kevin A. Darby
25 Kevin A. Darby (NV SBN 7670)
26 Counsel for Debtor and Debtor in Possession

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EXHIBIT A

TO:

**ORDER GRANTING DEBTOR'S THIRD MOTION TO APPROVE DEBTOR'S USE OF
CASH COLLATERAL PURSUANT TO 11 U.S.C. §363**

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DEBTOR-IN-POSSESSION'S FIRST CASH COLLATERAL BUDGET

Current Monthly Income: **\$6,500.00**

Current Monthly Expenses:

Fuel Island Rental \$550.00

Liability Insurance: \$1,350.00

Property Insurance: \$1,000.00

Maintenance & Repairs: \$500.00

Gas & Electric Service: \$2,300.00

Water: \$250.00

Misc Services: \$550.00
(Cleaning, Moving Planes
Alarm/Security, etc.)

Total Monthly Expenses: **\$6,500.00**