

1 Michael St. James, CSB No. 95653
ST. JAMES LAW, P.C.
2 22 Battery Street, Suite 888
San Francisco, California 94111
3 (415) 391-7566 Telephone
(415) 391-7568 Facsimile
4 michael@stjames-law.com

5 Counsel for Debtor
6

7
8 **UNITED STATES BANKRUPTCY COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
10 San Francisco Division
11

12 In re
13 **POST GREEN FELL LLC**
14 Debtor

Case No. **17-30314 DM**
Chapter 11
DATE: November 2, 2017
TIME: 11:00 a.m.
JUDGE: Honorable Dennis Montali

17
18 **MOTION FOR ORDER AUTHORIZING**
19 **USE OF CASH COLLATERAL**

20
21 **Respondents: Green & Post Partners, L.P.**
22 **Lone Oak Fund, L.P.**
23 **Grand Pacific Financing Corporation**
Denise Nasey
24 **Internal Revenue Service**

25 The Motion of Post Green Fell LLC, Debtor and Debtor-in-Possession, for an Order authorizing
26 it to use cash collateral in the form of accumulated rents to fund a post-petition retainer for substitute
27 counsel, respectfully represents as follows:
28

1 **I. RELEVANT FACTS**

2 **A. Background**

3 In 1984, Laurence F. Nasey purchased a garage and automotive repair business located at 2035
4 Divisadero Street, San Francisco, California, named the Automotive Clinic, Inc. ("ACI"). Mr. Nasey's
5 operation of ACI was successful, enabling him personally to purchase four properties in the late 1980s
6 that would ultimately be occupied by ACI as a tenant: 2360 Post Street, 1776 Green Street and
7 1213 Fell Street (collectively, the "PGF Properties") and 624 Stanyan Street ("Stanyan" and collectively
8 with the PGF Properties, the "4 Properties").
9

10 In 2006, Mr. Nasey and his wife Denise divorced. Denise was to receive \$2 million to pay off
11 her community property rights in, *inter alia*, ACI and the 4 Properties. In 2007, Mr. Nasey arranged to
12 refinance the 4 Properties, extracting \$250,000 in net proceeds from each property to pay down the
13 obligation to Denise. The remaining \$1 million obligation to Denise took the form of a judgment lien
14 encumbering the 4 Properties; the balance currently outstanding on that judgment lien is approximately
15 \$486,000.
16

17 One of the lenders in the 2007 refinance transactions required that each of the 4 Properties be
18 placed in its own single asset entity (collectively, the "Single Asset Entities"). ACI entered into triple-
19 net leases with each of the Single Asset Entities, under which its base rent obligation approximated the
20 mortgage payment for the property.
21

22 **B. Financial Problems**

23 Commencing in approximately 2009, ACI failed to pay payroll taxes timely and in full. The
24 IRS, and ultimately certain other taxing authorities, undertook active collection and enforcement efforts.
25 In recent years, ACI has been subjected to numerous levies on its bank accounts, which severely
26
27
28

1 disrupted its ability to pay rent to the Single Asset Entities, and consequently their ability to pay their
2 mortgages.

3 In the fall of 2015, the IRS recorded "nominee tax liens" against the four Single Asset Entities
4 and their 4 Properties. The first set of nominee tax liens sought to recover all taxes owed by ACI,
5 aggregating approximately \$7 million, on the theory that the Single Asset Entities held the 4 Properties
6 as the "nominee" of ACI. The second set of nominee tax liens sought to recover approximately
7 \$2.5 million of "100% penalty" taxes owed by Mr. Nasey, on the premise that the Single Asset Entities
8 held the 4 Properties as the "nominee" of Mr. Nasey.
9

10 With each of the 4 Properties encumbered by almost \$10 million in duplicative nominee tax
11 liens, it was impossible to refinance the properties so as to attempt to satisfy the tax debt.
12

13
14 ***C. The Chapter 11 Filings***

15 The mortgage held by Grand Pacific Financing Corporation secured by a first deed of trust
16 against the Stanyan property came due according to its terms. As a result of the nominee tax liens, it
17 could not be refinanced, so on September 1, 2016, immediately prior to a scheduled foreclosure sale,
18 624 Stanyan Street LLC filed a Chapter 11 petition, commencing Case No. 16-30965.
19

20 The Green & Post Partners debt, secured by first deeds of trust on the Green and Post properties,
21 went into default and those properties were scheduled for a foreclosure sale on April 4, 2017. Shortly
22 before that, the Debtor was formed, the Post, Green and Fell properties were transferred into it, and it
23 filed the instant Chapter 11 case.
24

25 ***D. Current Circumstances of the 4 Properties***

26 In the course of their efforts to sell or refinance the 4 properties, the Debtors obtained appraisals
27 of each of the PGF Properties as of December 21, 2016. Copies of those appraisals are attached as
28

1 Exhibits A, B and C to the accompanying Declaration of Lawrence F. Nasey. In addition, as part of the
2 refinance process, the Debtors obtained a copy of a broker's opinion of value which identified the "quick
3 sale" (60 to 90 days) value of all 4 Properties. Nasey Dec., Exhibit D.

4 As part of the sale or refinance effort, the Debtors have solicited current pay-off demands from
5 the secured creditors. Approximations of those demands are set forth below, without prejudice to the
6 Debtors' right to dispute the demands.

7 Specifically, the relevant secured debts are as follows:

8 Green & Post Partners holds a claim for approximately \$6 million, secured by a first deed
9 of trust on the Post property and a first deed of trust on the Green property.

10 Lone Oak Fund holds a claim for approximately \$3.4 million, secured by a first deed of
11 trust against the Fell property.

12 Grand Pacific Financing Corporation holds a claim for approximately \$3.2 million,
13 secured by a first deed of trust against the Stanyan property and a second deed of trust against the
14 Fell property.

15 Denise Nasey holds a claim for approximately \$486,000, secured by a judgment lien
16 against all of the properties, junior to the foregoing mortgages.

17 The Internal Revenue Service asserts nominee tax liens against all of the properties
18 aggregating approximately \$7 million, junior to the foregoing debts.

19 As noted, certain debts secured by the 4 Properties were cross-collateralized: the same
20 obligation, to Green & Post Partners, was secured by first deeds of trust on both the Post Street property
21 and the Green Street property; the obligation to Grand Pacific Financing Corporation, secured by a first
22 deed of trust encumbering the Stanyan property, was also secured by a second deed of trust encumbering
23 the Fell property. Denise Nasey holds a judgment lien encumbering all 4 Properties, and the IRS asserts
24 nominee tax liens against all 4 Properties.
25
26
27
28

1 The appraised values of the 3 PGF Properties and, in the case of the Stanyan property, the quick
 2 sale value, and the debts encumbering the properties can be summarized as follows:

Property	Post	Green	Fell	Stanyan
Value	\$ 4,840,000	\$ 5,600,000	\$ 7,000,000	\$ 5,000,000
Mortgage	\$ 6,000,000		\$ 3,400,000	\$ 3,200,000
Denise Nasey			\$ 486,000	
Equity Cushion ¹	\$ 1,718,500	\$ 2,478,500	\$ 3,478,500	\$ 1,678,500

11
 12
 13 **E. The Rents**

14 From and after July of 2017, Post Green Fell has collected \$36,000 per month in rents for its
 15 properties from a related entity, ACI. The Debtor's expenditures to date have been *de minimis*,
 16 consisting of less than \$1,000 for signage and bank charges. See, September Monthly Operating Report,
 17 Dkt #91.

18 The Debtor's current cash on hand is approximately \$140,000, and after receipt of the November
 19 rents will be approximately \$175,000 (the "Rents").

20
 21 **F. Substitute Counsel**

22 At the commencement of the case, the Debtor sought and obtained an Order of the Court
 23 authorizing it to employ St. James Law, P.C. as its Chapter 11 counsel; Dkt #25.

24 On October 10, 2017, St. James Law, P.C. filed its Motion to Withdraw as counsel in the case;
 25 Dkt #86; and in the associated Adversary Proceeding 17-3033; Dkt #19.

1 At a hearing conducted on October 13, 2017, the Court considered and discussed the Motion to
2 Withdraw, orally setting it for hearing on November 2, 2017 at 11:00 a.m. (the "November Hearing").
3 The Court advised that it would grant the Motion to Withdraw at the November Hearing, but that, since
4 entities can prosecute Chapter 11 cases only through counsel, if the Debtor had not engaged substitute
5 counsel by the November Hearing, the Court was highly likely at that hearing to appoint a trustee to
6 administer the Debtor's estate.
7

8 The Debtor has been diligently engaged in efforts to retain substitute counsel. The Debtor has
9 concluded that any capable substitute counsel it seeks to engage will require a material post-petition
10 retainer as a condition of accepting employment. The Rents constitute the Debtor's only liquid assets
11 and potential source of funding for a post-petition retainer. Through an accompanying Motion, the
12 Debtor seeks authorization to pay all or a portion of the Rents as a post-petition retainer to substitute
13 counsel, provided the Court authorizes the employment of substitute counsel. Through the instant
14 Motion, the Debtor seek authorization to use cash collateral in the form of the Rents to fund the post-
15 petition retainer, if it is authorized by the Court.
16

17 **II. ARGUMENT**

18 The Debtor acknowledges that the Rents constitute the cash collateral of the holders of deeds of
19 trust encumbering the PGF Properties; it is less clear that they constitute cash collateral for the holder of
20 a judgment lien or a disputed nominee tax lien.

21 The Bankruptcy Code provides that the debtor "may not use... cash collateral... unless... the
22 court... authorizes" it. Section 363(c)(2). The use of cash collateral is to be prohibited or conditioned
23 "as is necessary to provide adequate protection" to creditors having an interest in the cash collateral.
24 Section 363(e). Secured creditors are entitled to adequate protection only against diminution in the
25 value of their collateral. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S.

26
27 ¹ For these purposes, the Grand Pacific mortgage was allocated entirely to the Stanyan property, and the
28 Green & Post Partners mortgage and the Denise Nasey judgment lien was allocated equally against their
collateral.

1 365, 370 (1988). The determination of whether a secured creditor’s interests are adequately protected
2 requires “an individual determination of the *value* of that interest and whether a proposed use of cash
3 collateral threatens that value.” *In re George Ruggiere Chrysler-Plymouth, Inc.*, 727 F.2d 1017,
4 1019 (11th Cir. 1984) (emphasis in original). “The protection afforded secured creditors is not
5 absolute...” and the Bankruptcy Code “allow[s] the debtor to use cash collateral while ensuring that the
6 creditor will ultimately receive the full value of that collateral.” *In re Proalert, LLC*, 314 B.R. 436,
7 441(B.A.P. 9th Cir. 2004).

8 Here, two forms of adequate protection are offered.

9 First, the holders of the mortgages and the judgment lien enjoy a very substantial equity cushion,
10 such that their interests are adequately protected without regard to the disposition of the Rents. The
11 Ninth Circuit has explained that:

12 Although the existence of an equity cushion as a method of adequate protection is not
13 specifically mentioned in § 361, it is the classic form of protection for a secured debt
14 justifying the restraint of lien enforcement by a bankruptcy court. [cite omitted] In fact, it
15 has been held that the existence of an equity cushion, standing alone, can provide
16 adequate protection. [cites omitted]. A sufficient equity cushion has been found to exist
17 although not a single mortgage payment had been made.

18 *In re Mellor*, 734 F.2d 1396, 1401 (9th Cir. 1984) (equity cushion of approximately 20% provides
19 adequate protection.). And see, *In re Pikes Peak*, 779 F.2d 1456, 1459 (10th Cir. 1985) (no interest or
20 principal payments for up to three years justified by substantial equity cushion); *In re Pine Mountain,*
21 *Ltd.*, 80 B.R. 171 (BAP 9th Cir 1987) (interest accrual without payment for up to three years warranted
22 by substantial equity cushion). As reflected above, each property enjoys an equity cushion of more than
23 \$1.5 million, affording ample adequate protection.

24 Second, all creditors and parties in interest will benefit from an orderly disposition or
25 reorganization of the Debtor’s estate, but that can be accomplished only if substitute counsel is engaged.
26 The use of cash collateral to engage substitute counsel itself provides adequate protection to all parties.
27 *In re Proalert, LLC*, 314 B.R. 436, 444-445 (BAP 9th Cir. 2004) (plain language of Bankruptcy Code
28

1 Section 363 allows a debtor to use cash collateral to pay professionals if the secured creditor's interest is
2 adequately protected; showing of reasonableness, necessity and benefit to estate under Bankruptcy Code
3 Section 506(c) not required).

4 WHEREFORE, the Debtor prays that the Court make and enter its Order:

- 5 1. Determining that, under the circumstances, parties in interest and all parties asserting an
6 interest in the Rents have received adequate notice and an opportunity to be heard;
- 7 2. Authorizing and approving the use of cash collateral to fund a post-petition retainer to
8 substitute Chapter 11 counsel herein; and
- 9 3. Granting such other and further relief as may be just and proper.

10 Respectfully submitted,

11 POST GREEN FELL LLC.

12
13 By: /s/ Laurence F. Nasey
14 Laurence F. Nasey, Managing Member

15
16 DATED: October 23, 2017

ST. JAMES LAW, P.C.

17
18 By: /s/ Michael St James
19 Michael St. James
20 Counsel for the Debtor