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7 UNITED STATES BANKRUPTCY COURT
8 DISTRICT OF NEVADA

9 In re:
10 JJs IN THE DESERT ONE, LLC,
a Nevada limited liability company,
11 dba JIMMY JOHNS,
12 Debtor.

Case No. 17-13269-btb
Chapter 11

Hearing Date: OST Pending
Hearing Time: OST Pending

13 **DEBTOR’S EMERGENCY MOTION FOR INTERIM AND FINAL USE**
14 **OF CASH COLLATERAL *NUNC PRO TUNC* TO THE PETITION DATE**

15 JJs in the Desert One LLC (“Debtor”), by and through its proposed counsel Kaempfer
16 Crowell, moves this Court on an emergency basis (the “Motion”), pursuant to Sections 105(a), 361
17 and 363 of title 11 of the United States Code (the “Bankruptcy Code”), Rules 2002, 4001, and
18 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), and Local Rule
19 4001 of the Local Rules for the United States Bankruptcy Court for the District of Nevada (the
20 “Local Rules”) for the immediate entry of an interim order (the “Interim Cash Collateral Order”)
21 and, after further notice and a hearing, the entry of a final order (the “Final Cash Collateral Order”)
22 authorizing the Debtor to (a) use the cash collateral (as defined in section 363(a) of the Bankruptcy
23 Code) in which ARF Financial (“ARF”), Stearns Bank, N.A. (“Stearns”), or RAJARATAKA, LLC
24 (“Raj”) (collectively “Secured Parties”) may hold an interest (the “Cash Collateral”); and (b)

1 provide and grant replacements liens and other adequate protection and relief to the Secured
2 Parties. This Motion is supported by the legal memorandum contained herein, the attached
3 Exhibits, the Declaration of Veronica Turner (the “Turner Declaration”), all pleadings and papers
4 in file, and the argument of counsel upon hearing.

5 **Jurisdiction**

6 1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and
7 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

8 2. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

9 **Background**

10 3. Debtor filed its voluntary petition under Chapter 11 of the United States Bankruptcy
11 Code on June 16, 2017. The Debtor owns and operates one Jimmy Johns gourmet sandwich
12 restaurant located in Las Vegas, Nevada.

13 4. Debtor currently operates at 7331 W. Lake Mead Blvd., Las Vegas, Nevada 89128.

14 5. Debtor is indebted to ARF, Stearns, and Raj, each of whom may hold secured
15 claims against the Debtor’s assets. These secured claims may comprise of cash collateral.

16 6. The Debtor requires the use of cash collateral to pay for: (a) the costs of operating
17 its business, and (b) the costs of administration of the Debtor’s chapter 11 case, including Debtor’s
18 attorneys’ fees and U.S. Trustee’s fees. *See* Turner Declaration at ¶ 6.

19 7. The value of Debtor’s personal property is approximately \$22,838.69. Debtor’s
20 equipment, whose value is included in the \$22,838.69, was appraised on June 14, 2017 by certified
21 appraiser Daniel C. Watson at \$14,000.00. *See* Turner Declaration at ¶ 3.

22 8. As stated in the Turner Declaration, the Debtor depends on the revenues from the
23 business, in part, to purchase products to make its sandwiches, to maintain its lease obligations, to
24 pay payroll, and to meet other necessary expenses for the business. The Debtor anticipates that

1 over the next six months, the revenues generated will be sufficient to maintain and fund the
2 expenses of the business. The Debtor will be unable to maintain its business and the income
3 stream generated therefrom, however, if it is denied the ability to use cash collateral. Moreover,
4 without the ability to use the cash collateral, the Debtor will be forced to abandon its business to
5 the detriment of the Debtor's estate, its creditors and other parties in interest.

6 **Relief Requested**

7 9. The Debtor seeks entry of interim and final orders (a)(i) authorizing the Debtor's
8 use of cash, whether or not such constitutes Cash Collateral, (ii) finding that the interests of ARF,
9 Stearns, Raj, and any other purportedly secured party are adequately protected, and (iii) granting
10 related relief or (b) alternatively, authorizing the Debtor to surcharge the prepetition collateral, and
11 (c) scheduling interim and final hearings. Specifically, the Debtor proposes that the Court
12 authorize the use of Cash Collateral on an interim basis in accordance with the Interim Order
13 which, in summary, provides for the following:

- 14 a. The Debtor may use cash collateral in accordance with the budget, attached
15 hereto as Exhibit A, provided, that for any expenditure line item provided in
16 the Budget in any given month, the Debtor may use cash collateral in excess
17 of such amount set forth in the budget, so long as the percentage deviation
18 for all expenditures during such month shall not exceed 15%, in the
19 aggregate, of the total amount set forth in the budget for all expenditures.
The Budget provides for payment of postpetition operating expenses and
expenses of administrating the Chapter 11 Case including, mainly, costs and
expenses necessary to maintain and operate the restaurant, other expenses in
respect of the Debtor's day-to-day operations, and professional fees and
expenses associated with the administration of this chapter 11 case.

20 **Basis for Relief**

21 **A. The Proposed Use of Cash Collateral Is Appropriate and Should Be Authorized**

22 The Court should authorize the Debtor to use cash collateral, whether such cash collateral
23 exists as of the Petition Date or arises thereafter. A copy of a proposed budget for the use of cash
24 during the next six (6) months (the "Budget") is attached hereto as Exhibit A. It is essential to the

1 continued operation of the Debtor’s business that the Debtor obtains authority to use cash
2 collateral to maintain its business, for payment of lease obligations, insurance premiums, utilities,
3 payroll and other maintenance expenses and to fund the cost of administering this chapter 11 case.
4 The Debtor currently projects that ordinary and anticipated cash flows will be able to cover
5 expenses for the foreseeable future. Thus, upon receiving authorization to use cash collateral, the
6 Debtor can continue to run its business successfully. Without such authorization, the detrimental
7 result to the estate will be rapid and ultimately disastrous given the nature of the Debtor’s business.

8 Section 363(c)(2) of the Bankruptcy Code sets forth the requirements for a debtor’s
9 proposed use of cash collateral, and provides, in pertinent part that:

10 [t]he trustee [or debtor in possession] may not use, sell, or lease cash collateral ...
11 unless – (A) each entity that has an interest in such cash collateral consents; or
12 (B) the court, after notice and a hearing, authorizes such use, sale, or lease in
13 accordance with the provisions of this section.

14 11 U.S.C. § 363(c)(2). Section 363(a) of the Bankruptcy Code defines “cash collateral” as:

15 [C]ash, negotiable instruments, documents of title, securities, deposit accounts, or
16 other cash equivalents whenever acquired in which the estate and an entity other
17 than the estate have an interest and includes the proceeds, products, offspring,
18 rents, or profits of property . . . subject to a security interest as provided in section
19 552(b) of this title, whether existing before or after the commencement of a case
20 under this title[.]

21 11 U.S.C. § 363(a).

22 Section 105(a) of the Bankruptcy Code also allows that “[t]he court may issue any order,
23 process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy
24 Code].” 11 U.S.C. § 105(a). The Debtor respectfully submits that the proposed use of cash
collateral is necessary to preserve the Debtor’s business during the chapter 11 case, and will avoid
immediate and irreparable harm to the Debtor’s estate and creditors. Such use prejudices no one; it
affirmatively and directly benefits the estate and creditors by enhancing the prospects of a
successful outcome of the chapter 11 case.

1 Additionally, section 363(e) of the Bankruptcy Code provides that “on request of an entity
2 that has an interest in property . . . proposed to be used, sold, or leased, by the trustee [or debtor in
3 possession], the court, with or without a hearing, shall prohibit or condition such use, sale, or lease
4 as is necessary to provide adequate protection of such interest.” 11 U.S.C. § 363(e). Examples of
5 adequate protection are provided in section 361 of the Bankruptcy Code and include, but are not
6 limited to: (1) “periodic cash payments” to the extent that such use “results in a decrease in value
7 of such entity’s interest in the property;” (2) “additional or replacement lien[s] to the extent that
8 the use [of cash collateral] will cause a decrease in the value of such entity’s interest in the
9 property;” and (3) “granting such other relief . . . as results in the realization by the entity of the
10 indubitable equivalent of such entity’s interest in the property.” 11 U.S.C. § 361.

11 Moreover, the relief requested in this Motion is appropriate under section 105(a) of the
12 Bankruptcy Code, which provides that “[t]he court may issue any order, process, or judgment that
13 is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. §
14 105(a).

15 **B. Secured Creditors are Adequately Protected**

16 Adequate protection under the Bankruptcy Code is designed to protect the secured lender
17 from diminution in the value of its interest in the collateral as a result of a debtor’s proposed use or
18 disposition of such collateral. The legislative history of section 361 of the Bankruptcy Code makes
19 clear that bankruptcy courts are given broad flexibility in deciding what constitutes adequate
20 protection on a case-by-case basis. Specifically, the legislative history provides:

21 This section specifies the means by which adequate protection may be provided. It
22 does not require the court to provide it. To do so would place the court in an
23 administrative role. Instead, the trustee or debtor in possession will provide or
24 propose a protection method. If the party that is affected by the proposed action
objects, the court will determine whether the protection provided is adequate. The
purpose of this section is to illustrate means by which it may be provided and to
define the contours of the concept.

1 H.R. Rep. No. 95-595, at 338, 95th Cong., 1st Sess. (1977); see also Resolution Trust Corp. v.
2 Swedeland Dev. Group, Inc. (In re Swedeland Dev. Group, Inc.), 16 F.3d 552, 564 (3d Cir. 1994)
3 (“[A] determination of whether there is adequate protection is made on a case by case basis.”).

4 The principal purpose of adequate protection is to safeguard the interest of the secured
5 creditor in the particular collateral against diminution in the value of such interest. See In re
6 Swedeland Dev. Group, Inc., 16 F.3d at 564 (“[T]he whole purpose of adequate protection for a
7 creditor is to insure that the creditor receives the value for which he bargained prebankruptcy.”)
8 (quoting In re O’Connor, 808 F.2d 1393, 1396 (10th Cir. 1987)); accord In re DeSardi, 340 B.R.
9 790, 804 (Bankr. S.D. Tex. 2006) (“The purpose of adequate protection is to assure that the
10 lender’s economic position is not worsened because of the bankruptcy case.”); In re Hollins, 185
11 B.R. 523, 528 (Bankr. N.D. Tex. 1995) (“Adequate protection seeks to protect a creditor from an
12 [sic] decline in the value of its collateral . . .”).

13 Nevertheless, the “Court is not obligated to protect the creditor better than it did itself when
14 making the loan and obtaining security.” In re Heatron, Inc., 6 B.R. 493, 496 (Bankr. W.D. Mo.
15 1980). The interest to be protected by virtue of the adequate protection requirement is the lesser of
16 the amount of the debt or the value of assets securing the debt as of the Petition Date. See In re
17 Alyucan Interstate Corp., 12 B.R. 803, 808 (Bankr. D. Utah 1981) (“[T]he ‘interest in property’
18 entitled to protection is not measured by the amount of the debt but by the value of the lien.”). The
19 Debtor has the burden of proof on the issue of adequate protection. See 11 U.S.C. § 363(p)(1).

20 a. **Secured Creditors are Adequately Protected by the**
21 **Debtor’s Continued Operation of Its Businesses**

22 Courts have routinely held that adequate protection may be demonstrated by a showing that
23 the going concern value of the debtor’s, or the value of the lender’s collateral, is preserved by the
24 debtor’s continuing operations and use of cash collateral. See, e.g., In re JKJ Chevrolet, Inc., 117
F.3d 1413, 1413 (4th Cir. 1997) (allowing use of cash collateral to operate automobile dealership

1 as long as continued operations maintained the value of the business); In re Snowshoe Co., Inc.,
2 789 F.2d 1085, 1087-89 (4th Cir. 1986) (allowing use of cash collateral to operate ski resorts
3 where trustee reported that ski resort would lose 50% to 90% of its fair market value if it ceased
4 operations); In re 499 W. Warren St. Assocs., Ltd. P'ship, 142 B.R. 53, 56-57 (Bankr. N.D.N.Y.
5 1992) (finding secured creditor's interest in collateral adequately protected when cash collateral
6 was applied to normal operating and maintenance expenditures on collateral property); In re
7 Constable Plaza Assocs., L.P., 125 B.R. 98, 105 (Bankr. S.D.N.Y. 1991) (debtor entitled to use
8 cash collateral to operate and maintain office building, thereby protecting secured lender's
9 collateral).

10 In the present case, Secured Parties are adequately protected by virtue of the Debtor's
11 continued operation of its business and the expenditure of cash on maintaining its business. In
12 stark contrast to a going concern, in a liquidation or foreclosure scenario the value of the Debtor's
13 business will be severely impacted. The value of Debtor's property in which Secured Creditors
14 have an interest is approximately \$29,134.69. Even under the most conservative multiples for
15 going concern value, going concern value generally exceeds liquidation value. Accordingly,
16 expenditures of cash collateral to preserve and maintain the underlying business operations provide
17 additional adequate protection to a secured creditor. See, e.g., In re 499 W. Warren St. Assocs.,
18 Ltd. P'ship, 142 B.R. 53, 56-57 (Bankr. N.D.N.Y. 1992) (finding secured creditor's interest in
19 collateral adequately protected when cash collateral applied to normal operating and maintenance
20 expenditures on collateral property); In re Willowood East Apartments of Indianapolis II, Ltd., 114
21 B.R. 138, 143 (Bankr. S.D. Ohio 1990) (finding secured creditor's interest in assigned rents
22 extended only to net rents after payment of ordinary, necessary expenses required to maintain and
23 operate the property to preserve its value.). Thus, it is essential to the maintenance of the Debtor's
24 business that the Debtor's operations are maintained as a going concern.

1 Without the ability to use cash collateral, the Debtor will be unable to maintain its business
2 and the income stream generated therefrom. Moreover, without the use of cash collateral, the
3 Debtor would be forced to cease its business operations to the detriment of the Debtor's estate, its
4 creditors and other parties in interest. See, e.g., In re Aqua Assocs., 123 B.R. 192, 196 (Bankr.
5 E.D. Pa. 1991) ("The important question, in determination of whether the protection to a creditor's
6 secured interest is adequate, is whether that interest, whatever it is, is being unjustifiably
7 jeopardized.") (citing In re Grant Broad. of Philadelphia, Inc., 71 B.R. 376, 386-89 (Bankr.
8 E.D. Pa. 1987), aff'd, 75 B.R. 819 (E.D. Pa. 1987), and In re Alyucan Interstate Corp., 12 B.R. at
9 809-12); accord In re Triplett, 87 B.R. at 27 ("[R]estriction of the use of cash collateral should
10 only occur where the facts show that failure to restrict use may 'impair' the creditor and deny the
11 creditor adequate protection.").

12 Accordingly, the interests of the Secured Parties (as well as those of the Debtor's other
13 creditors and parties in interest) will be best served by permitting the Debtor's continued use of
14 cash, including cash collateral. If the Debtor is allowed to continue the use of its cash generated
15 from the business, the Debtor will continue to operate and maximize the value of its bankruptcy
16 estate for its creditors.

17 **b. Grant of Replacement Liens Provides Adequate Protection to ARF, Stearns,**
18 **and Raj.**

19 The Debtor anticipates generating positive cash flow from operating its business. Thus,
20 new cash and cash-generating assets, including accounts receivable, will become available for
21 replacement liens at a greater rate than cash is spent. This form of adequate protection is
22 commonplace. See 11 U.S.C. § 361(2) (providing for replacement liens as a form of adequate
23 protection); MBank Dallas, N.A. v. O'Connor (In re O'Connor), 808 F.2d 1393, 1396-98 (10th
24 Cir. 1987) (allowing the debtor to replace a lien on cash with a lien on property likely to be worth

1 five times as much); In re Center Wholesale, Inc., 759 F.2d 1440, 1450 (9th Cir. 1985) (observing
2 that a lien on additional property of the debtor would likely constitute adequate protection for the
3 secured creditor). Therefore, adequate protection to ARF, Stearns, and Raj can be provided and
4 maintained through a grant of post-petition replacement liens and security interests to the extent of
5 any diminution in value of the Prepetition Collateral (the “Adequate Protection Liens”).

6 **c. Limitation on Grant of Adequate Protection Liens and Reservation of Rights**

7 As of the date hereof, the Debtor has not performed a perfection analysis to determine the
8 validity and enforceability of the liens of ARF, Stearns, and Raj, including the liens on purported
9 cash collateral. Accordingly, the request for relief herein should not be construed as an admission
10 by the Debtor as to the validity and enforceability of any of liens and the Debtor is
11 not waiving its right to challenge the extent, priority, or validity of any lien secured by the
12 Debtor’s assets or any right to avoid any lien secured by the Debtor’s assets pursuant to sections
13 542 and 551 of the Bankruptcy Code. Additionally, the Debtor is not waiving the right to dispute
14 the issue of what portion, if any, of its funds constitute cash collateral or the right to dispute the
15 debt or lien of any other creditor.

16 Furthermore, as stated herein, the grant of adequate protection, including the grant of
17 Adequate Protection Liens, should be limited to the diminution of the value of the secured lender’s
18 collateral, and solely to the extent such secured lender establishes valid and fully perfected liens in
19 such collateral.

20 **Notice**

21 Notice of this Motion has been provided to: (a) the Office of the United States Trustee for
22 the District of Nevada; (b) the Debtor’s 20 largest unsecured creditors (including counsel if
23 known); and (c) all parties requesting notices pursuant to Bankruptcy Rule 2002. The Debtor
24 submits that no other or further notice need be provided.

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No previous motion for the relief sought herein has been made to this or any other court.

WHEREFORE, the Debtor respectfully requests entry of an order granting the relief requested herein, including (A)(i) authorizing the Debtor’s use of cash collateral, (ii) finding that the interests of the any purportedly secured party are adequately protected, (iii) granting related relief, and (iv) granting the Debtor such other and further relief as the Court deems just and proper.

DATED this 28th day of July, 2017.

KAEMPFER CROWELL

By: /s/ Bryan M. Viellion
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Proposed Attorneys for Debtor

EXHIBIT A

EXHIBIT A

JJs in the Desert One, LLC Budget

Operating Expense							Total
	<u>July 1 - July 31</u>	<u>Aug 1 - Aug 30</u>	<u>Sep 1 - Sep 30</u>	<u>Oct 1 - Oct 31</u>	<u>Nov 1 - Nov 30</u>	<u>Dec 1 - Dec 31</u>	<u>July 1 - Oct 31</u>
Projected Sales	\$60,000.00	\$65,000.00	\$70,000.00	\$75,000.00	\$75,000.00	\$70,000.00	\$415,000.00
Sysco	\$15,500.00	\$16,000.00	\$16,250.00	\$16,250.00	\$16,250.00	\$16,000.00	\$96,250.00
Franchise Royalties	\$6,000.00	\$6,500.00	\$7,000.00	\$7,500.00	\$7,500.00	\$7,000.00	\$41,500.00
PDQ (Point of Sale system)	\$275.00	\$275.00	\$275.00	\$275.00	\$275.00	\$275.00	\$1,650.00
Rent	\$3,790.80	\$3,790.80	\$3,790.80	\$3,790.80	\$3,790.80	\$3,790.80	\$22,744.80
Energy	\$850.00	\$850.00	\$850.00	\$850.00	\$850.00	\$850.00	\$5,100.00
Produce	\$2,000.00	\$2,000.00	\$2,000.00	\$2,000.00	\$2,000.00	\$2,000.00	\$12,000.00
Credit Card Processing fees	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$1,400.00	\$8,400.00
Sales Tax	\$4,860.00	\$5,265.00	\$5,670.00	\$6,075.00	\$6,075.00	\$5,670.00	\$33,615.00
Payroll	\$16,500.00	\$16,500.00	\$16,500.00	\$16,500.00	\$16,500.00	\$16,500.00	\$16,500.00
Payroll Tax	\$3,500.00	\$3,500.00	\$3,500.00	\$3,500.00	\$3,500.00	\$3,500.00	\$21,000.00
Cintas (linens and towels)	\$275.00	\$275.00	\$275.00	\$275.00	\$275.00	\$275.00	\$1,650.00
Insurances	\$1,115.00	\$1,115.00	\$1,115.00	\$1,115.00	\$1,115.00	\$1,115.00	\$6,690.00
TV/Internet/phone	\$450.00	\$450.00	\$450.00	\$450.00	\$450.00	\$450.00	\$2,700.00
Alarm	\$55.00	\$55.00	\$55.00	\$55.00	\$55.00	\$55.00	\$330.00
CO2 for softdrinks	\$75.00	\$75.00	\$75.00	\$75.00	\$75.00	\$75.00	\$450.00
Pest Control	\$40.00	\$40.00	\$40.00	\$40.00	\$40.00	\$40.00	\$240.00
HR and Payroll Company	\$275.00	\$275.00	\$275.00	\$275.00	\$275.00	\$275.00	\$1,650.00
Miscellaneous	\$300.00	\$300.00	\$300.00	\$300.00	\$300.00	\$300.00	\$1,800.00
Total Expense	\$57,260.80	\$58,665.80	\$59,820.80	\$60,725.80	\$60,725.80	\$59,570.80	\$274,269.80
Net Cash Flow	<u>\$2,739.20</u>	<u>\$6,334.20</u>	<u>\$10,179.20</u>	<u>\$14,274.20</u>	<u>\$14,274.20</u>	<u>\$10,429.20</u>	<u>\$140,730.20</u>
Cash Balance	\$2,739.20	\$9,073.40	\$19,252.60	\$33,526.80	\$47,801.00	\$58,230.20	\$58,230.20