

Dated: December 19, 2011



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*Sarah S. Curley*

Sarah S. Curley, Bankruptcy Judge

8 Attorneys for MIDFIRST BANK

9 **IN THE UNITED STATES BANKRUPTCY COURT**  
10 **FOR THE DISTRICT OF ARIZONA**

11 In re  
12 **OPPENHEIMER PARTNERS PROPERTIES,**  
13 **LLP,**  
14  
15 Debtor.

16 Case No. 2:11-bk-33139-SSC  
17 Chapter 11

18 **INTERIM ORDER REGARDING LIMITED**  
19 **USE OF MIDFIRST BANK'S CASH**  
20 **COLLATERAL, AND GRANTING OTHER**  
21 **RELATED RELIEF**

22 **Hearing Date: December 14, 2011**  
23 **Hearing Time: 1:30 p.m.**  
24 **Location: Courtroom #701**  
25 **230 N First Ave**  
26 **Phoenix AZ 85003**

27  
28 THIS MATTER came before the Court on December 14, 2011 at 11:00 a.m. for an interim hearing (the "**Interim Hearing**") on the *Motion for Entry of Order Authorizing Use of Cash Collateral* (Docket #5) (the "**Motion**") filed by Oppenheimer Partners Properties, LLP ("**Oppenheimer**" or "**Debtor**"), and the objection thereto filed by MidFirst Bank ("**MidFirst**") (Docket #17) (the "**Objection**"). MidFirst is a creditor secured by a lien on a residential apartment complex located at 1502 East Osborn Road, Phoenix, Arizona ("**Apartment Complex**") and the cash collateral it generates. Pursuant to the Motion, Oppenheimer sought, among other things, authority to use MidFirst's cash collateral. Oppenheimer and MidFirst have agreed to Oppenheimer's limited use of cash collateral under the terms and conditions set forth in this stipulated interim Order.

After due and sufficient notice of the Motion under the circumstances, and considering the agreement of Debtor and MidFirst to the terms of this Order, all evidence proffered or presented regarding the Motion, and the entire record before this Court; and good and sufficient cause appearing therefor,

1 The Court HEREBY FINDS AND CONCLUDES as follows:

2 A. On December 2, 2011 (the "**Petition Date**"), Debtor filed its voluntary petition  
3 commencing the above-captioned Chapter 11 case. Since the Petition Date, Debtor has continued  
4 operating its businesses as debtor-in-possession pursuant to 11 U.S.C. §§1107 and 1108.

5 B. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§157(b) and 1334.  
6 The Motion presents a core proceeding as defined in 28 U.S.C. §157(b)(2).

7 C. Oppenheimer is a Arizona limited liability company engaged in the ownership and  
8 operation of a residential apartment complex in Phoenix, Arizona.

9 D. Oppenheimer owns the Apartment Complex consisting of 184 residential apartment  
10 units located in 3 buildings.

11 E. On or around June 1, 2007, MidFirst made a loan to Oppenheimer in the original  
12 principal amount of \$12,400,000.00 (the "Loan").

13 F. The Loan is evidenced and secured by (i) that certain Construction Loan Agreement  
14 dated June 1, 2007 (the "**CLA**"), executed by Debtor, in MidFirst's favor, in the original principal  
15 amount of \$12,400,000.00; (ii) that certain Secured Promissory Note, dated as of June 1, 2007 (the  
16 "**Note**"), executed by Debtor, in MidFirst's favor, in the original principal amount of \$12,400,000.00;  
17 (iii) that certain First Modification Agreement, dated as of July 8, 2008 (the "**First Modification**"),  
18 executed by Debtor, in MidFirst's favor; and (iv) that certain Second Modification Agreement, dated  
19 as of June 1, 2010 (the "**Second Modification**"), executed by Debtor, in MidFirst's favor. True and  
20 correct copies of the CLA, Note, First Modification, and Second Modification are attached as **Exhibits**  
21 **A, B, C, and D** to the Objection.

22 G. In addition to the Note, the Loan is further secured by, among other things, (i) that  
23 certain Construction Deed of Trust and Fixture Filing (With Assignment of Rents and Security  
24 Agreement), executed by Debtor, for MidFirst's benefit, which was recorded in the Official Records of  
25 Maricopa County, Arizona (the "**Official Records**") on June 12, 2007, as Instrument No.  
26 20070678388 (the "**Deed of Trust**"). A true and correct copy of the Deed of Trust is attached as  
27 **Exhibit E** to the Objection.

1 H. MidFirst alleges that the Deed of Trust encumbers the Apartment Complex together  
2 with all easements, rights, privileges, structures, improvements, leases, rents, furniture, fixtures, and  
3 other personal property pertaining or affixed thereon (the "**Property**").

4 I. The CLA, Note, First Modification, Second Modification, and Deed of Trust, and all  
5 related loan, security and other documents are referred to herein collectively as the "**Loan**  
6 **Documents**" and the principal, interest, fees, expenses and other amounts owing under the Loan  
7 Documents are referred to herein as the "**Indebtedness.**" \

8 J. MidFirst owns the Loan and the Loan Documents, and among other things, is the  
9 beneficiary under the Deed of Trust.

10 K. Pursuant to the Deed of Trust and the Loan Documents, Oppenheimer granted, and  
11 MidFirst now holds, liens on collateral including, but not limited to, the Property and all  
12 improvements, and fixtures, leases, rents, and Debtor's accounts, rights to payment, contract rights,  
13 chattel paper, documents, instruments, licenses, agreements, and general intangibles related to the  
14 Property. (All collateral for the Loan under the Loan Documents is referred to herein collectively as  
15 the "**MidFirst Collateral**").

16 L. MidFirst alleges that the MidFirst Collateral includes rents and other cash proceeds and  
17 cash equivalents that are "cash collateral" as defined in 11 U.S.C. § 363(a) (collectively, the "**Cash**  
18 **Collateral**"). The Cash Collateral includes, without limitation, all such rents and other cash proceeds  
19 from the Property held by Oppenheimer as of the Petition Date

20 M. MidFirst alleges that Oppenheimer has defaulted on the obligations under the Loan  
21 Documents by, among other things, using its operating account to pay the personal expenses of the  
22 Debtor's principals unrelated to the Property, failing to maintain certain debt service coverage ratios  
23 specified in the Second Modification, and by failing to pay in full the amount due to MidFirst under  
24 the Note upon its maturity on June 1, 2011.

25 N. As of the Petition Date, the Indebtedness owing by Oppenheimer to MidFirst under the  
26 Loan Documents totaled the principal amount of \$12,400,000.00, plus accrued and accruing interest,  
27 costs, and attorneys fees, and other amounts due and owing under the Loan Documents.

1 Good cause exists for immediate approval of this Order as an interim order, subject to  
2 subsequent objection as provided below.

3 Based on the foregoing, and the entire record before the Court; and good cause appearing, it is  
4 hereby ORDERED as follows:

5 1. **Incorporation of Findings and Conclusions.** The paragraphs contained in the  
6 foregoing preamble and findings and conclusions are incorporated by reference in this Order, and the  
7 Oppenheimer and MidFirst consent and stipulate to the facts contained in such preamble and findings  
8 and conclusions and to the entry of this interim Order.

9 2. **Term of Effectiveness of this Order.**

10 a. The Motion is granted to the extent, and under the terms and conditions,  
11 stated in this Interim Order. This Order shall become effective immediately upon the entry of this  
12 Order by the Court (the "**Entry Date**").

13 b. Pursuant to 11 U.S.C. § 363(c), Oppenheimer is hereby authorized to use  
14 Cash Collateral only as provided in this Order. Unless terminated earlier under the terms of this Order,  
15 Oppenheimer's authorization to use Cash Collateral shall terminate on January 25, 2012 (the date  
16 scheduled for the Final Hearing on the Motion as stated below) (the "**Term**"), unless this Order is  
17 extended by written agreement of Oppenheimer and MidFirst or by further Order of this Court (after  
18 appropriate notice and a hearing). If an Event of Default under this Order occurs (and is not waived in  
19 writing by MidFirst, in its sole discretion), MidFirst objects to any subsequent use of its Cash  
20 Collateral and Oppenheimer's authorization to use the Cash Collateral for any purpose is terminated;  
21 provided, however, that Oppenheimer may thereafter obtain an emergency hearing on further authority  
22 to use Cash Collateral at a hearing set on at least two (2) business days' notice to MidFirst.

23 3. **Limited Use of Cash Collateral.** Oppenheimer is authorized to use Cash  
24 Collateral during the Term of this Order only (i) to pay ordinary, necessary and actual operating  
25 expenses for the purposes and up to the Cumulative Monthly Amounts set forth in the budget attached  
26 hereto as **Exhibit "1"** (the "**Budget**"), (ii) to pay any other expenses approved by the prior written  
27 consent of MidFirst, in its sole discretion, and (iii) one-third (1/3) of the current management fee;  
28 provided however, Oppenheimer is not authorized to and shall not without the express written consent

1 of MidFirst, pay any of the following: (i) any salary, management fees, personal expenses (including  
2 permits, fees and bonds related to Debtor's General Contracting License), reimbursement (including  
3 meals, vehicle expense and health care), or other forms of remuneration to Karl D. Haytcher, Eric M.  
4 Hamburger or any insiders of the Debtor (ii) capital improvements; (iii) the fees and costs of  
5 professionals employed by the Debtor "**Cumulative Monthly Amounts**" means the aggregate total  
6 amounts designated to be paid by Oppenheimer during a calendar month for a specific line item in the  
7 Budget or to MidFirst as designated in this Order. The use of Cash Collateral to pay any expense in  
8 excess of the approved Cumulative Monthly Amounts shall require the prior written approval of  
9 MidFirst, or further order of the Court with appropriate notice to MidFirst; provided, however, that  
10 Oppenheimer may use Cash Collateral to pay up to 105% of the amount for a month in any line item  
11 category.

12 4. **Cash Collateral Bank Account.** Oppenheimer shall deposit, sequester, and  
13 segregate all Cash Collateral in a separate DIP account (the "**Cash Collateral Bank Account**").  
14 MidFirst's liens and security interests in funds constituting Cash Collateral will continue in full force  
15 and effect notwithstanding deposit in the Cash Collateral Bank Account. Debtor may withdraw funds  
16 from the Cash Collateral Bank Account only as necessary to pay expenses in accordance with the  
17 Budget and this Order. Cash Collateral in excess of budgeted amounts shall remain in the Cash  
18 Collateral Bank Account pending further Court order.

19 5. **Replacement Lien.** Notwithstanding anything in 11 U.S.C. § 552 to the  
20 contrary, and in addition to its liens and security interests under the existing Loan Documents with  
21 respect to the MidFirst Collateral (which are fully reserved, and continue in full force and effect),  
22 MidFirst shall have and is hereby granted as and for adequate protection (effective and continuing  
23 without the necessity of the execution, filing and/or recordation of mortgages, deeds of trust, security  
24 agreements, deposit account control agreements, pledge agreements, financing statements or  
25 otherwise), a valid and perfected security interest and lien (the "**Replacement Lien**") in all of  
26 Oppenheimer's now owned or after acquired personal property of all types related solely to the  
27 Property, including, without limitation, all accounts, accounts receivable, rents, general intangibles and  
28 other rights to payment of any type, and all proceeds of the foregoing; provided, however, that the

1 Replacement Lien does not encumber any avoidance actions pursuant to 11 U.S.C. §§ 544, 545, 547,  
2 548, and 553(b) and any proceeds therefrom. The Replacement Lien granted to MidFirst will be  
3 evidenced by the existing Loan Documents and this Order. The Replacement Lien will secure  
4 repayment of the full amount of the Loans and the Indebtedness, but will be limited in amount to the  
5 amount of Cash Collateral used by Oppenheimer from and after the Petition Date, and will have the  
6 same validity and priority as MidFirst's existing liens and security interests in MidFirst Collateral  
7 under the Loan Documents as of the Petition Date..

8           6.       **Superpriority Administrative Expense Claim.** To the extent that MidFirst's  
9 interest in the Cash Collateral is not adequately protected by the terms of this Order, MidFirst shall  
10 have an allowed superpriority administrative expense claim pursuant to 11 U.S.C. § 507(b) (the  
11 "**Super-Priority Claim**").

12           7.       **Payments to MidFirst.** Oppenheimer will pay to MidFirst from Cash  
13 Collateral a monthly payment beginning with payment of \$26,910.35, which shall be paid to MidFirst  
14 within two (2) business days of the date of the entry of this Order. Thereafter, Oppenheimer will pay  
15 to MidFirst from Cash Collateral, the regular monthly payment due under the Loan Documents<sup>1</sup>.

16           8.       **Accounting/Information.**

17           a.       Within three (3) business days after the date of this Order, Oppenheimer  
18 shall provide to MidFirst (if not provided previously) the following: (i) monthly property management  
19 reports regarding the Property, operating statements and financial statements for periods from and after  
20 December 30, 2011; (ii) a current rent roll for the Property; (iii) copies of all leases, lease  
21 amendments, or other agreements relating to the leases at the Property; and (iv) confirmation that all  
22 Cash Collateral has been deposited in the DIP Account and disclosure of the identification of such  
23 account, including bank and account number and the balance therein existing as of the Petition Date.

24           b.       In addition, Oppenheimer shall promptly provide to MidFirst all other  
25 financial information relating to the Property reasonably requested by MidFirst or its attorneys or other  
26 representatives, including, but not limited, information regarding Oppenheimer's efforts to sell

27 \_\_\_\_\_  
28 <sup>1</sup> The monthly payment amount fluctuates each month and MidFirst will notify Oppenheimer of the proper amount  
for each subsequent month.

1 MidFirst Collateral. Further, without limiting the rights of access and information afforded MidFirst  
2 under the Loan Documents and subject to Oppenheimer 's right to seek an order from this Court to  
3 restrict access to Oppenheimer's premises and information, Oppenheimer shall provide representatives,  
4 agents and/or employees of MidFirst reasonable access (upon three (3) business days' notice) to  
5 Oppenheimer 's premises and records and shall otherwise cooperate, consult with, and provide to such  
6 persons all such non-privileged information and information not subject to a binding confidentiality  
7 agreement as they may reasonably request. Oppenheimer shall also provide to MidFirst, at the time  
8 filed or provided, all statements, schedules or financial reports which Oppenheimer file in the  
9 Bankruptcy Case or provide to the United States Trustee in accordance with applicable Bankruptcy  
10 Rules, local bankruptcy rules, or guidelines of the United States Trustee.

11 9. **Event of Default.** An Event of Default shall be deemed to have occurred under  
12 this Order, upon the occurrence of any one or more of the following:

13 a. Oppenheimer fails to make the full amount of the monthly payment to  
14 MidFirst required under this Order when due;

15 b. Oppenheimer uses Cash Collateral in a manner that is not authorized  
16 under this Order, or Oppenheimer fails to deposit Cash Collateral in the Cash Collateral Bank Account;

17 c. Upon Oppenheimer 's receipt of written notice from MidFirst of its  
18 failure to perform in accordance with any of the other terms and conditions of this Order, unless such  
19 failure to perform is cured no later than seven (7) business days after Oppenheimer 's receipt of such  
20 written notice;

21 d. The Oppenheimer Bankruptcy Case is dismissed or converted to a case  
22 under Chapter 7 of the Bankruptcy Code;

23 e. A Chapter 11 trustee or examiner with expanded powers is appointed in  
24 the Oppenheimer Bankruptcy Case;

25 f. Without MidFirst 's prior written consent, Oppenheimer requests an  
26 Order (or any such Order is entered) which authorizes (under 11 U.S.C. §§ 105, 363, or 364, or  
27 otherwise) the granting of any lien or security interest in any of the MidFirst Collateral in favor of any  
28

1 party other than MidFirst that is senior or equal in priority to any lien or security interest held by  
2 MidFirst, or (ii) the use of Cash Collateral other than as provided in this Order;

3 g. The date that a plan of reorganization is confirmed by this Court in the  
4 Oppenheimer Bankruptcy Case; and

5 h. The date that an order is entered granting MidFirst relief from the  
6 automatic stay pursuant to Bankruptcy Code Section 362 in the Oppenheimer Bankruptcy Case.

7 10. **Effect of Order.** The provisions of this Order will be binding upon and inure to  
8 the benefit of MidFirst, Oppenheimer, Oppenheimer 's estates, and their respective successors and  
9 assigns (including, but not limited to, any trustee hereinafter appointed in either Bankruptcy Case),  
10 including, without limitation, the express findings relating to the determination and allowance of the  
11 Indebtedness secured by the MidFirst Collateral and the validity and extent of MidFirst 's liens and  
12 security interests in the MidFirst Collateral. As such, Oppenheimer is bound by its stipulations and  
13 may not object to, challenge, or seek to avoid the amount, validity, or enforceability of the  
14 Indebtedness or MidFirst 's liens and security interests in the MidFirst Collateral. By agreeing to the  
15 terms of this Order, and except to the extent expressly set forth in this Order, neither MidFirst nor  
16 Oppenheimer waives any of its rights and remedies under the Loan Documents and/or the applicable  
17 law, including those rights set forth in the Bankruptcy Code. Nothing in this Order will be deemed or  
18 construed as an admission or waiver by MidFirst or Oppenheimer as to adequate protection, or any  
19 other issue in the case, and this Order will not constitute consent by MidFirst to the use of its Cash  
20 Collateral other than for the limited purpose and during the limited period expressly provided herein.  
21 In addition, nothing contained in this Order will prejudice the rights of MidFirst to: (i) withdraw its  
22 consent to Oppenheimer 's use of Cash Collateral and seek to obtain the Court's order prohibiting  
23 Oppenheimer 's use of Cash Collateral after authority under this Order terminates; (ii) seek relief from  
24 the automatic stay of Section 362(a) of the Bankruptcy Code; (iii) oppose the sale or disposition of any  
25 asset pursuant to Section 363 of the Bankruptcy Code; (iv) oppose confirmation of any plan of  
26 reorganization filed by Oppenheimer or any other party in interest; (v) seek a dismissal of this case;  
27 (vi) seek allowance of an administrative claim or additional adequate protection in connection with the  
28 use of MidFirst Cash Collateral; or (vii) seek any other relief that MidFirst may deem necessary and



1 appropriate under the circumstances. Moreover, nothing contained in this Order will be deemed to  
2 waive or diminish any rights of MidFirst under the Loan Documents.

3 11. **Notice.** To the extent notice is required under the terms of this Order, notice  
4 shall be provided via facsimile or electronic mail and by regular first class U.S. mail, postage paid, at  
5 the following addresses:

6 If to Oppenheimer:

7 Robert C. Warnicke  
8 GORDON SILVER  
9 One E Washington St #400  
10 Phoenix, Arizona 85005  
11 Facsimile No.: (602) 256-0345  
12 E-mail: robert.warnicke@gordonsilver.com

13 If to MidFirst:

14 Alan A. Meda  
15 STINSON MORRISON HECKER LLP  
16 1850 N Central Ave #2100  
17 Phoenix, AZ 85004-4594  
18 Facsimile No.: (602) 240-6925  
19 E-mail: ameda@stinson.com

20 12. **Notice of Order.** Within two (2) business days after this interim Order is  
21 entered, MidFirst shall provide notice of this Order and the Final Hearing to all creditors and parties-  
22 in-interest, all parties who have requested notice, and the United States Trustee.

23 13. **Final Hearing.** A final hearing (the "**Final Hearing**") to consider approval of  
24 the Motion and this interim Order on a final basis will be held on January 25, 2012, at 1:30 p.m. before  
25 the Court.

26 14. **Objections.** Any party in interest objecting to the Court's final approval of the  
27 Motion shall file a written objection with this Court on or before January 18, 2012, which objections  
28 shall be served so that the same are received by the Court, the United States Trustee, counsel to the  
Oppenheimer, and counsel to MidFirst on or before such date.

15 15. **Retention of Jurisdiction.** This Court hereby retains jurisdiction to hear and  
16 determine all matters arising from or related to the implementation, interpretation and/or enforcement  
17 of this Order.

18 DATED AND SIGNED ABOVE.

1 AGREED:

2 **GORDON SILVER**

**STINSON MORRISON HECKER LLP**

3 /s/ Robert C. Warnicke

/s/ A Meda (#009213)

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