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1 Deborah D. Williamson
2 Texas State Bar No. 21617500
3 *dwilliamson@coxsmith.com*
4 **COX SMITH MATTHEWS INCORPORATED**
5 112 E. Pecan Street, Suite 1800
6 San Antonio, Texas 78205
7 Telephone: (210) 554-5500
8 Facsimile: (210) 226-8395

M. David Bryant, Jr.
Texas State Bar No. 03281500
dbryant@coxsmith.com
COX SMITH MATTHEWS INCORPORATED
1201 Elm Street, Suite 3300
Dallas, Texas 75270
Telephone: (214) 698-7700
Facsimile: (214) 698-7899

5 James Macdonald
6 Idaho State Bar No. 7257
7 *james@ejame.com*
8 **ELSAESSER JARZABEK ANDERSON MARKS**
9 **ELLIOTT & McHUGH, CHARTERED**
10 123 South Third Street, Second Floor
11 P.O. Box 1049
12 Sandpoint, Idaho 83864
13 Telephone: (208) 263-8517
14 Facsimile: (208) 263-0759

Bruce A. Anderson
Idaho State Bar No. 3392
brucea@ejame.com
ELSAESSER JARZABEK ANDERSON MARKS
ELLIOTT & McHUGH, CHARTERED
1400 Northwood Center Court, Suite C
Coeur d'Alene, Idaho 83814
Telephone: (208) 667-2900
Facsimile: (208) 667-2150

**ATTORNEYS FOR FORD ELSAESSER,
CHAPTER 11 TRUSTEE**

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

13 In re:
14 **JOSEPH D. MILANOWSKI,**
15
16 Debtor.

Chapter 11 – Involuntary
Case No. BK-S-07-13162-LBR

**MOTION FOR ORDER AUTHORIZING
AND APPROVING STIPULATION FOR
POST-PETITION FINANCING
PURSUANT TO 11 U.S.C. § 364(c)(1) - (3)**

Date: September 28, 2007
Time: 1:30 p.m.

21 Ford Elsaesser, the trustee (the “Trustee”) for the estate (the “Estate”) of Joseph D.
22 Milanowski (the “Debtor”), by and through his counsel, Cox Smith Matthews Incorporated and
23 Elsaesser Jarzabek Anderson Marks Elliott & McHugh, Chartered, hereby respectfully submits
24 his *Motion for Order Authorizing and Approving Stipulation for Post-Petition Financing*
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1 Pursuant to 11 U.S.C. § 364(c)(1) - (3) (the “Motion”), and moves this Court for entry of an
2 order:¹

3 A. granting authorization pursuant to section 364(c)(1) - (3) of Title 11 of the United
4 States Code, 11 U.S.C. §§ 101-1532, as amended, (the “Bankruptcy Code”), Rules 2002,
5 4001(c), and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and
6 Local Rule 4001(b) of the Local Rules of Bankruptcy Procedure of the United States Bankruptcy
7 Court for the District of Nevada (the “Local Rules”), for the Trustee, on behalf of the Estate to,
8 *inter alia*:

9
10 (i) obtain secured, post-petition financing (the “Loan”) in the sum of up to
11 Seven Hundred and Fifty Thousand Dollars (\$750,000.00) from the USACM Liquidating Trust
12 (successor in interest to USA Commercial Mortgage Company) (the “Lender” or “USACM
13 Trust”), in accordance with the terms and conditions set forth in the *Stipulation Regarding Post-*
14 *Petition Financing For the Estate of Debtor Joseph D. Milanowski Pursuant to 11 U.S.C. §*
15 *364(c)(1) - (3)* (the “Stipulation”) attached as Exhibit “1” to the *Declaration of Chapter 11*
16 *Trustee Ford Elsaesser Filed in Support of the Motion for Order Authorizing and Approving*
17 *Stipulation for Post-Petition Financing Pursuant to 11 U.S.C. § 364(c)(1) – (3)* (the “Elsaesser
18 Declaration”), filed in support of the Motion for the purpose of paying (a) the fees and costs
19 incurred by the Trustee and his professionals in performing their duties to investigate, locate, and
20 identify assets and to maximize their value on behalf of the Estate and its creditors, (b) quarterly
21 fees owing to the Office of the United States Trustee (“UST”) pursuant to the UST Guidelines,
22 and (c) other expenses necessary to administer the Estate, all in accordance with the interim
23 compensation procedures established pursuant to the Procedures Motion (as defined below) filed
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27 ¹ All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Stipulation
28 defined herein.

1 concurrently herewith;

2 (ii) grant the Lender a secured first priority lien on all Estate assets that
3 currently exist or are recovered in the future that are unencumbered and a junior lien on
4 otherwise encumbered assets pursuant to section 364(c)(2) and (3) of the Bankruptcy Code (the
5 “Lien”);

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7 (iii) grant the Lender a super-priority administrative claim over all
8 administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy
9 Code, up to and including the Loan Amount, pursuant to section 364(c)(1) of the Bankruptcy
10 Code (the “Super-Priority Administrative Claim”);

11 B. finding that the Loan has been negotiated in good faith and at arm’s length
12 between the Trustee, on behalf of the Estate, and the Lender, and the credit extended to fund the
13 Loan to the Trustee has been extended, issued, or made, as the case may be, in good faith by the
14 Lender as required by, and within the meaning of, section 364(e) of the Bankruptcy Code; and

15 C. authorizing the Trustee to execute any additional necessary documentation to
16 effectuate the terms of the Stipulation.

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18 This Motion is made and based on the points and authorities below, the Elsaesser Declaration,
19 the pleadings, papers, and other records on file with the clerk of the above-captioned Court,
20 judicial notice of which is hereby respectfully requested, and the arguments of counsel
21 entertained by the Court at the time of the hearing on this Motion.

22
23 **POINTS AND AUTHORITIES**

24 **I. JURISDICTION AND VENUE**

25 1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and
26 1334. Consideration of this Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A)
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1 and (D). Venue of the above-styled involuntary chapter 11 case (the “Bankruptcy Case”) is
2 proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory basis for the relief set forth
3 herein is section 364(c)(1) - (3) of the Bankruptcy Code; Bankruptcy Rules 2002, 4001(c), and
4 9014; and Local Rule 4001(b).

5
6 **II. STATEMENT OF FACTS**

7 **A. Chapter 11 Case**

8 2. On May 29, 2007 (the “Commencement Date”), USA Capital Diversified Trust
9 Deed Fund LLC (“Diversified”), USACM Trust, and Nevada State Bank (“Nevada Bank” and,
10 collectively with Diversified and USACM Trust, the “Petitioners”) filed an involuntary petition
11 (the “Petition”) for relief under Chapter 11 of the Bankruptcy Code.

12 3. On May 29, 2007, the Petitioners filed the *Emergency (1) Motion Under 11*
13 *U.S.C. §§ 303(f) and (g), 105 and 1104(a) for an Order Appointing an Interim Trustee, and (2)*
14 *Ex Parte Motion for an Order Immediately Restricting the Alleged Debtor’s Business-Related*
15 *Activities Pending Appointment of an Interim Trustee* [Docket No. 20] (the “Trustee Motion”).

16 4. The Trustee Motion came on for hearing on June 4, 2007 and was granted. The
17 *Order for Appointment of an Interim Trustee* [Docket No. 30] was entered on June 8, 2007.
18 The Appointment of Ford Elsaesser as Interim Trustee for the Estate of Joseph D. Milanowski
19 was filed on June 8, 2007, whereby the United States Trustee appointed the Trustee. On June
20 11, 2007, the Court entered the *Order Approving Appointment of Ford Elsaesser as Interim*
21 *Trustee for the Estate of Joseph D. Milanowski* [Docket No. 37], thereby approving the
22 appointment of the Trustee.
23

24 5. On June 25, 2007, the Debtor filed *Joseph D. Milanowski’s Answer to Involuntary*
25 *Chapter 11 Bankruptcy Petition* [Docket No. 88 and refiled as Docket No. 91] (the “Answer,”
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1 as amended by *Joseph D. Milanowski's Amended Answer to Involuntary Chapter 11*
2 *Bankruptcy Petition* [Docket No. 118] filed July 17, 2007). Through the Answer, the Debtor
3 sought to have the Petition dismissed.

4 6. A hearing was held on August 9, 2007, to consider the Petition and Answer. On
5 August 13, 2007, the Bankruptcy Court entered the *Order for Relief and Granting Involuntary*
6 *Chapter 11 Petition* [Docket No. 168] (the "Order for Relief") in the Bankruptcy Case. On
7 August 23, 2007, the Debtor filed a *Notice of Appeal* [Docket No. 183] (the "Appeal") as to the
8 Order for Relief. The Debtor has not sought a stay pending a decision on the Appeal.
9

10 7. No committees have been appointed in this Bankruptcy Case. *See* Elsaesser
11 Declaration ¶ 2.

12 **B. Post-Petition Financing Necessity**

13 8. The Bankruptcy Case involves millions of dollars in assets, real property and
14 holdings, numerous interested business entities and ownership interests, and literally dozens of
15 creditor claims. Administering the Estate has proven to be complicated and time-consuming
16 because of the convoluted ownership interests and transactions. *See* Elsaesser Declaration ¶ 3.
17

18 9. Several of these entities and their affiliates (collectively, the "Milanowski Related
19 Entities") are debtors in separate cases under the Bankruptcy Code (collectively with the
20 Bankruptcy Case, the "Milanowski Related Cases"), including, but not limited to, USA
21 Commercial Mortgage Company (06-10725-LBR); Thomas Hantges ("Hantges") (07-13163-
22 LBR); and USA Investment Partners, LLC ("USAIP") (07-11821-LBR). Most, if not all, of the
23 Milanowski Related Entities were operated out of the same office, may have intermingled
24 property and assets, and share similar legal issues. *See* Elsaesser Declaration ¶ 4.
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1 10. The Trustee and his professionals have been working diligently to attempt to
2 unravel the web of Milanowski Related Entities, in an effort to locate and identify assets, and
3 determine which assets belong to which estate. Unfortunately, at this time, there are limited, if
4 any, funds in the Estate to pay the Trustee and his professionals for their necessary services and
5 costs incurred and to pay quarterly UST fees and other costs of administering the Estate. *See*
6 *Elsaesser Declaration ¶ 7.*

8 11. The Trustee and his professionals have been working together with the trustees of
9 the other debtors in the Milanowski Related Cases (collectively, the “Creditor Representatives”)
10 and will continue to do so to obtain access to information necessary to understand the assets and
11 liabilities of the Milanowski Related Entities without duplicating efforts. Based on what the
12 Trustee has seen to date, an extensive in-depth investigation is necessary to comprehend the
13 various transactions and to locate and identify assets. The investigation of the interests is a
14 huge undertaking, which has been hampered by claims of “Fifth Amendment Implications” by
15 individuals related to the Milanowski Related Entities. *See Elsaesser Declaration ¶ 6.*

17 12. A loan from a third party is necessary to pay the Trustee and his professionals for
18 services rendered in this Bankruptcy Case and costs incurred and to pay quarterly UST fees and
19 other costs of administering the Estate until such time, if ever, the Trustee is able to recover
20 assets and proceeds for the Estate (“Milanowski Estate Proceeds”). The Trustee does not
21 believe he will be able to find any third parties, other than USACM Trust, that are willing to
22 loan the Estate the funds needed on an unsecured or a secured basis. Because USACM Trust is
23 likely a primary direct beneficiary of proceeds that will be collected by the Trustee, if any, or
24 obtained by the Milanowski Related Entities through the efforts of the Trustee and his
25 professionals, it is in USACM Trust’s best interests to fund the loan needed. However,
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1 USACM Trust is only willing to loan funds on a secured basis subject to the terms in the
2 Stipulation. See Elsaesser Declaration ¶¶ 7-9.

3 13. The pertinent provisions of the Loan as set forth in the Stipulation are as follows:

4 a. Loan amount: A Seven Hundred Fifty Thousand dollar (\$750,000.00)
5 Revolver which can only be used to pay the Trustee and his professionals for fees and costs
6 incurred, except for any fees and costs incurred in connection with investigating or pursuing
7 potential claims against the Lender or Geoffrey L. Berman as trustee of the Lender (which
8 together with accrued interest and reasonable fees and costs is referred to as the “Loan
9 Amount”). The Loan Amount shall also include quarterly UST fees and other costs of
10 administering the Estate. After the Trustee requests an advance under the Revolver pursuant to
11 Paragraph 5 of the Stipulation, USACM Trust will have five (5) business days to fund the
12 request. The Trustee may borrow, repay and reborrow Loan Advances under the Revolver at any
13 time prior to the Maturity Date.
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15
16 b. Interest: Interest shall accrue on the outstanding principal amount of the
17 Loan at the JPMorgan Chase prime rate (“Prime Rate”) per annum.² If there is an Event of
18 Default, interest shall accrue at the Prime Rate plus two (2) percent per annum.

19
20 c. Lien: USACM Trust shall have a priority Lien on all unencumbered
21 assets that currently exist or that are recovered on behalf of the Estate and a next-priority junior
22 Lien on otherwise encumbered assets, up to and including the Loan Amount that is outstanding,
23 accrued, and owing as of the Maturity Date.

24 d. Super-Priority Administrative Claim: USACM Trust shall have a Super-
25 Priority Administrative Claim with priority over any and all administrative expenses of the kind
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28 ² The Prime Rate since 6/29/06 pursuant to JPMorgan Chase’s website www.jpmorganchase.com is 8.25%.

1 specified in sections 503(b) and 507(b) of the Bankruptcy Code, up to and including the Loan
2 Amount. No other super-priority administrative expense claims or liens on the Estate's assets
3 shall be allowed without USACM Trust's consent until such time as the Loan Amount is repaid
4 pursuant to the terms of the Stipulation.

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6 e. Maturity Date: The Maturity Date of the Loan shall be the earlier of (a)
7 the effective date of a plan of reorganization confirmed by the Bankruptcy Court; and (b) such
8 other date that final disposition of the Bankruptcy Case is effected, including conversion from a
9 chapter 11 to a chapter 7 case. The outstanding Loan Amount shall be paid in full on the
10 Maturity Date.

11
12 f. Prepayment: Within ten (10) days after (a) recovery by the Estate of the
13 first \$500,000 of Milanowski Estate Proceeds, the Trustee shall apply \$350,000 of such
14 Milanowski Estate Proceeds to the then outstanding Loan Amount; and (b) recovery of any
15 Milanowski Estate Proceeds in excess of the first \$500,000 by the Estate, the Trustee shall apply
16 60% of each such recovery of Milanowski Estate Proceeds to repay the then-outstanding Loan
17 Amount (the "Prepayments"). If \$750,000 is collected, the Prepayments amount would be
18 \$500,000. If \$1,000,000 is collected, then the Prepayments amount would be \$650,000.

19
20 g. Lien Carve-Out: If, after application of the Prepayments, the Trustee and
21 his professionals have outstanding UST quarterly payment obligations or professionals fees and
22 expenses, the Trustee has a carve-out of the Lien in the amount of one-half of the remaining
23 Milanowski Estate Proceeds in the Estate (the "Carve-Out").³ For example, if the Trustee and his
24 professionals obtain this Court's approval of an aggregate of \$1 million dollars in fees and

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27 ³ Concurrently with the filing of this Motion, the Trustee has filed another motion (the "Procedures Motion")
28 seeking an administrative Order to approve certain interim compensation procedures for Professionals (as defined in
the Procedures Motion).

1 expenses and the Trustee draws down \$750,000 from the Revolver, then presuming \$750,000 of
2 Milanowski Estate Proceeds are recovered by the Trustee, the Trustee makes Prepayments of
3 \$500,000 on the Revolver, and of the remaining \$250,000 in the Estate the Carve-Out applies to
4 one-half or \$125,000.

5
6 h. Event of Default: An Event of Default shall be deemed to exist if the
7 Trustee fails to cure, after ten (10) days written notice by USACM Trust to the Trustee, the
8 existence of any default under the provisions of the Stipulation.

9 i. Reservations: The Stipulation is without prejudice to any future financing
10 agreement that may be extended by USACM Trust or any other sources of fee payment or other
11 expenses of the Estate for the Trustee and his professionals as their payment needs may arise.

12
13 14. The Loan is a result of arm's length negotiations between the Trustee and the
14 Lender and is in good faith. The Loan is without any side deals or promises, or payment of
15 consideration to the Lender or its officers or insiders outside of repayment of the Loan. Further,
16 the Trustee and the Lender have not engaged in any fraud, collusion, or attempt to take unfair
17 advantage of other bidders. The Loan is not the result of any improper conduct or ulterior
18 motive. *See* Elsaesser Declaration ¶ 10.

19
20 **III. LEGAL ARGUMENT**

21 15. If post-petition financing is necessary to allow a trustee to perform his duties
22 under section 1106 of the Bankruptcy Code, but unsecured credit is obviously unattainable, as
23 in this case, section 364(c) of the Bankruptcy Code allows a court, after notice and a hearing, to
24 authorize a trustee (a) to incur secured debt outside the ordinary course of business; (b) to grant
25 the lender a lien on unencumbered assets and a junior lien on encumbered assets; and (c) to
26 grant the lender an administrative claim with priority over all other administrative claims under
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1 sections 503(b) and 507(b). *See* 11 U.S.C. § 364(c)(1) - (3); *See also, In re Sobiech*, 125 B.R.
2 110, 115 (Bankr. S.D.N.Y. 1991). In employing their discretionary authority to approve
3 financing under section 364 of the Bankruptcy Code, courts have required debtors to
4 demonstrate (i) that the proposed financing is necessary to preserve the assets of the estate; and
5 (ii) that the terms of the financing are fair and reasonable. *See In re Snowshoe Co.*, 789 F.2d
6 1085, 1088 (4th Cir. 1986) (trustee had demonstrated by good faith effort that credit was not
7 available without a senior lien by unsuccessfully contacting other financial institutions in the
8 immediate geographic area; “the statute imposes no duty to seek credit from every possible
9 lender before concluding that such credit is unavailable.”); *In re Ames Dept. Stores*, 115 B.R.
10 34, 40 (Bankr. S.D.N.Y. 1990) (finding that debtors demonstrated the unavailability of
11 unsecured financing where debtors approached four lending institutions). In this case,
12 unsecured credit is unavailable, financing is necessary and the proposed terms are reasonable.
13 Further, under similar circumstances, such as with respect to certain of the Milanowski Related
14 Cases, this Court has granted post-petition financing.

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17 16. The loan is necessary because the Estate currently has no funds to pay the Trustee
18 and his professionals for the necessary services they are rendering to maximize the value of the
19 Estate or to pay the quarterly UST fees that will be owing or any other costs of administering
20 the Estate. The Debtor has created numerous entities through which funds have flowed. The
21 Trustee and his professionals are diligently pursuing leads, reviewing thousands of documents,
22 and investigating extensive and convoluted transactions. The Trustee is collaborating and
23 communicating with the other Creditor Representatives in an effort not to duplicate efforts, and
24 the Milanowski Related Entities shall benefit from the efforts of the Trustee and his
25 professionals in this Bankruptcy Case. *See* Elsaesser Declaration ¶¶ 5-6.
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1 17. Given the circumstances of this Bankruptcy Case, it would be unlikely for an
2 institutional bank to agree to loan the funds needed by the Trustee in this Bankruptcy Case.
3 The Trustee has communicated with third parties to determine if an unsecured loan can be
4 obtained. The Trustee has determined that neither an unsecured nor secured loan is attainable,
5 except the Loan by USACM Trust. *See* Elsaesser Declaration ¶ 8-10.
6

7 18. As reflected in the Elsaesser Declaration, the Trustee, based on years of
8 experience restructuring companies, believes the terms and conditions set forth in the
9 Stipulation are fair and reflective of the current market. The terms and conditions in the
10 Stipulation have been negotiated in good faith and at arm's length, without any fraud, collusion,
11 or other dealings. The Liens and Super-Priority Administrative Claim, which are allowed under
12 section 364(c) of the Bankruptcy Code, are necessary to induce the Lender to provide the post-
13 petition financing and best protect the Lender pending the allocation of assets recovered for,
14 and resolution of, the Milanowski Related Cases. *See* Elsaesser Declaration ¶ 10.
15

16 19. The facts in this case clearly support granting the Trustee's request to obtain
17 secured post-petition financing on the terms set forth in the Stipulation pursuant to section
18 364(c)(1) - (3) of the Bankruptcy Code. As reflected in the Stipulation, the USAIP and
19 Diversified estates have no objection to the Stipulation.
20

21 **VI. NOTICE**

22 20. The appropriate Notice required by Bankruptcy Rules 2002, 4001(c) and Local
23 Rule 9014(b) ("Notice") has been given to the UST, the Debtor and his counsel, all secured
24 creditors, the twenty (20) largest unsecured creditors, counsel for the Milanowski Related
25 Cases, all professionals employed in this Bankruptcy Case, and all parties requesting special
26 notice.
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V. CONCLUSION

WHEREFORE, the Trustee, through his counsel, respectfully requests that the Court grant the Motion authorizing and approving the Stipulation in its entirety, and grant such further relief as may be deemed necessary.

DATED: August 31, 2007

Respectfully submitted,

COX SMITH MATTHEWS INCORPORATED
112 E. Pecan Street, Suite 1800
San Antonio, Texas 78205
Telephone: (210) 554-5500
Facsimile: (210) 226-8395

By: /s/ Thomas Rice
Deborah D. Williamson
Texas State Bar No. 21617500
Thomas Rice
Texas State Bar No. 24025613

and

**ELSAESSER JARZABEK ANDERSON
MARKS ELLIOTT & McHUGH, CHTD.**
James Macdonald
Idaho State Bar No. 7257
123 South Third Street, Second Floor
P.O. Box 1049
Sandpoint, Idaho 83864
Telephone: (208) 263-8517
Facsimile: (208) 263-0759

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