

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

In re:

HRI HOLDING CORP., et al.,

Debtors.

Chapter 11

Case No. 19-12415
(Jointly Administered)

Hearing Date: December 5, 2019 at 2:00 pm

Ref. Docket Nos.: 12, 66

**LIMITED OBJECTION OF LEVIN MANAGEMENT CORPORATION,
AS AGENT FOR HARMON MEADOW OWNER, LLC
TO ENTRY OF FINAL ORDERS (I) AUTHORIZING THE DEBTORS TO (A) OBTAIN
POSTPETITION FINANCING, (B) GRANT LIENS AND SUPERPRIORITY
ADMINISTRATIVE EXPENSE CLAIMS TO POST-PETITION LENDERS AND (C)
UTILIZE CASH COLLATERAL, (II) PROVIDING ADEQUATE PROTECTION TO
PRE-PETITION SECURED PARTIES, (III) MODIFYING AUTOMATIC STAY, (IV)
GRANTING RELATED RELIEF AND (V) SCHEDULING A FINAL HEARING**

Levin Management Corporation, agent for the Harmon Meadow Plaza Owner, LLC (the “Landlord”), by and through its counsel, hereby files the following limited objection to Debtors’ Motion Seeking Entry of Final Orders to Approve Motion of the Debtors and Debtors-in-Possession for Interim and Final Orders (1) Authorizing the Debtors to (A) Obtain Post-Petition Financing, (B) Grant Liens and Superpriority Administrative Expense Claims to Post-Petition Lenders and (C) Utilize Cash Collateral, (II) Providing adequate Protection to the Pre-Petition Secured Parties, (III) Modifying the Automatic Stay, (IV) Granting Related Relief and (V) Scheduling a Final Hearing [D.I. Nos. 12 and 66] (the “Motion”), and respectfully represents as follows:

BACKGROUND

1. On November 14, 2019 (the “Petition Date”), Debtor filed voluntary petitions under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) with this Court.

2. Upon information and belief, Debtors are operating their businesses as debtors-in-



possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. Landlord and Debtors are parties to unexpired, nonresidential real property lease dated October 13, 1982, between Debtors and Landlord's predecessor in interest for property known as 700 Plaza Drive, Secaucus, NJ at the Plaza at Harmon Meadow, also designated as Store # 233 by the Debtors (the "Lease"), which is owed \$111,256.18, plus any unbilled amounts.

4. The Lease is a lease "of real property in a shopping center" within the meaning of section 365(b)(3) of the Bankruptcy Code. *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081, 1086-87 (3d Cir. 1990).

5. Both pre-petition and post-petition rents for Landlord's Lease have not been paid.

LEGAL DISCUSSION

Stub Rent Should Be Paid Immediately

6. Debtors' Motion seeks to use cash collateral, providing adequate protection to the lien creditors to operate outside the ordinary course of business by selling assets and proceeding with store closing sales.

7. Upon information and belief, the budget apparently fails to provide payment of rent due and owing to Landlord for the stub rent – the amounts between November 14, 2019 through November 30, 2019 (the "Stub Rent").

8. Debtor's Motion authorizes use of the Premises for the benefit of Debtors and Secured Lenders without payment of Stub Rent, immediately, is not supported by applicable law.

9. Landlord should not be required to bear the risk of administrative insolvency by waiting months for payment of the Stub Rent that is currently due, especially when the Premises are being used by the Debtors outside of the ordinary course of business to liquidate their collateral and the Debtors get to pick and choose which stores they want to sell up until the auction.

10. The Court should require that payment be remitted to Landlord for post-petition rent for the use of the Premises for the benefit of the Prepetition Secured Lenders. See e.g., In re ZB Company, Inc., 302 B.R. 316, 320 (Bankr. D. Del. 2003) (holding that rent should be paid to Landlord on a per diem basis during the pre-rejection period in order to avoid the potential that the landlord could be left with an allowed administrative claim against an administratively insolvent estate).

11. Payment of Stub Rent is also warranted as adequate protection pursuant to Section 363(e) of the Bankruptcy Code. This provision of the Bankruptcy Code serves as a basis to grant adequate protection to real property lessors. See, e.g., Matter of Cont'l Airlines, Inc., 154 B.R. 176, 180 (Bankr. D. Del. 1993) (finding that adequate protection is available under § 363(e) for a decrease in value due to the use, sale, or lease of an entity's interest in property) (emphasis added); In re P.J. Clarke's Restaurant Corp., 265 B.R. 392, 404 (Bankr. S.D.N.Y. 2001) (providing that a "landlord's right to adequate protection seems to follow clearly from the language of Section 363(e)...").

12. Here, with the likely administrative insolvency of Debtors, Landlord should not be compelled to allow use of their Premises, without payment of Stub Rent, immediately.

Oppose Waiver of § 506(c) and 552(b) Protections

13. Further, Secured Lenders seek waivers of sections 506(c) and 552(b) of the Bankruptcy Code, forcing unsecured creditors, like Landlord to pay for the bankruptcy case. This Court should not allow Debtors and Secured Lenders to misuse the chapter 11 process by disregarding provisions of the Bankruptcy Code they find unfavorable.

14. Currently, Debtors are using Landlord's Premises without payment of rents.

15. Debtors' estate is for all intensive purposes administratively insolvent. Landlord is

effectively providing an interest-free loan to Debtors through Stub Rent. The court should not allow Debtors to place the financing of their case on the backs of Landlord while using Landlord's Premises.

16. The Court should require immediate payment of Stub Rent pursuant to Section 506(c), which authorizes a debtor to surcharge property that serves as collateral for a secured claim the "reasonable, necessary costs and expenses of preserving or disposing of, such property to the extent of any benefit to the holder of such claim" 11 U.S.C. § 506(c).

17. There is substantial authority "...which permits lessors to recover under Section 506(c) provided that the standards for recovery are met." In re World Wines, Ltd., 77 B.R. 653, 658 (Bankr. N.D.Ill.1987). Such standards are that the services provided were necessary and beneficial to the lender. Visual Ind., Inc., 57 F.3d at 325.

18. Here, Debtors and Secured Lenders are the primary beneficiaries of the post-petition sales at the Premises. As such payment should be made for such use of the Premises pursuant to Section 506(c).

19. Although the Debtors list Landlord's Lease in it recent Notice of Assumption and Cure Cost [docket # 89], the Notice is clear that it is "potentially" to be assumed. Meaning that it may not be assumed and rents paid.

20. Finally, the Court may authorize the immediate payment of Stub Rent as an administrative claim under Section 503(b). Section 365(d)(3) does not preclude the Court from ruling that Stub Rent is an administrative expense under Section 503(b)(1). See In re Goody's Family Clothing Inc., 610 F.3d 812, 816 – 819 (3rd. Cir. 2010); In re Garden Ridge Corp., 323 B.R. 136, 142-43 (Bankr. D. Del. 2005) (citing ZB Company Inc., 302 B.R. at 319 (Landlord entitled to prorated rent from the Petition Date – despite the fact that the billing date occurred the day before the petition date).

21. Courts have discretion to determine the timing of payment of administrative claims, and may direct immediate payment of prorated, post-petition rent. See, e.g., Garden Ridge Corp., 323 B.R. at 143 (citing HQ Global Holdings, Inc., 282 B.R. 169, 173 (Bankr. D. Del. 2002) (entering interim orders directing the full contract rent for February 2004 to each landlord); ZB Company, 302 B.R. at 320. “In determining the time of payment, courts consider prejudice to the debtor, hardship to the claimant, and potential detriment to other creditors.” See Garden Ridge Corp., 323 B.R. at 143; see also HQ Global, 282 B.R. at 173.

22. Here, the prejudice to Debtors and other constituents is far outweighed by the hardship to Landlord. Unless Landlord is paid immediately for Stub Rent, it is left exposed to providing use and occupancy at the Premises cost-free, while Debtors and others reap the benefits of the on-going sales. Other constituents are not being compelled to provide post-petition services or goods to Debtors’ estates without payment and Landlord should not be forced to shoulder the burden of the on-going sales as an involuntary lender. See In re Travel 2000, Inc., 264 B.R. 444 (Bankr. W.D. Mich. 2001) (finding that Congress and courts have determined that a landlord should receive the benefit of its bargain and be compensated for being compelled to continue providing a debtor with a critical service).

Stub Rent as Adequate Protection

21. Landlord joins with others in the request that Stub Rent should be made as adequate protection for the condition of the sale that is involving the use of Landlord’s Premises under section 363(e). This section allows the granting of adequate protection to real property lessors, like Landlord. See, e.g., Matter of Cont’l Airlines, Inc., 154 B.R. 176, 180 (Bankr. D. Del. 1993) (adequate protection available under § 363(e) for a decrease in value due to the use, sale, or lease of an entity’s interest in property); In re P.J. Clarke's Restaurant Corp., 265 B.R. 392, 404 (Bankr. S.D.N.Y. 2001) (“landlord’s right to adequate protection seems to follow clearly from the

language of Section 363(e)...”); In re Ernst Home Center, Inc., 209 B.R. 955, 966-67 (Bankr. W.D. Wash. 1997) (finding that adequate protection is available to real property lessors under Section 363(e)).

23. Here, it is appropriate for adequate protection to take the form of immediate cash payments for post-petition use of the Premises. See 11 U.S.C. § 361; In re Kellstrom Indus., Inc., 282 B.R. 787, 794 (Bankr. D. Del. 2002).

**JOINDER IN OBJECTIONS RAISED BY OTHER LANDLORD
AND RESERVATION OF RIGHTS**

24. To the extent consistent with the objections expressed herein, Landlord also joins in the objections of other shopping center lessors to the Motion. Further, Landlord reserves all rights to make further and/or future objections based upon any facts or arguments that come to light prior to the hearing on these issues.

WHEREFORE, for the foregoing reasons, Levin Management Corporation, agent for the Harmon Meadow Owner, LLC respectfully request entry of an order denying the Motion and granting such other relief as is just and proper.

Respectfully submitted,

Dated: December 2, 2019

**STARK & STARK
A Professional Corporation**

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

In re:

HRI HOLDING CORP., et al.,

Debtors.

Chapter 11

Case No. 19-12415
(Jointly Administered)

Hearing Date: December 5, 2019

**CERTIFICATION OF SERVICE OF LIMITED OBJECTION OF LEVIN
MANAGEMENT CORPORATION, AS AGENT FOR HARMON MEADOW PLAZA,
INC. TO ENTRY OF FINAL ORDERS (I) AUTHORIZING THE DEBTORS TO (A)
OBTAIN POSTPETITION FINANCING, (B) GRANT LIENS AND SUPERPRIORITY
ADMINISTRATIVE EXPENSE CLAIMS TO POST-PETITION LENDERS AND (C)
UTILIZE CASH COLLATERAL, (II) PROVIDING ADEQUATE PROTECTION TO PRE-
PETITION SECURED PARTIES, (III) MODIFYING AUTOMATIC STAY, (IV)
GRANTING RELATED RELIEF AND (V) SCHEDULING A FINAL HEARING**

John Weaver, Esquire hereby certifies that on the 2nd day of December, 2019, a true and correct copy of the Limited Objection of Levin Management Corporation as Agent for Harmon Meadow Plaza, Inc. to Entry of Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing, (B) Grant Liens and Superpriority Administrative Expense Claims to Post-Petition Lenders and (C) Utilize Cash Collateral, (II) Providing Adequate Protection to Pre-petition Secured parties, (III) Modifying Automatic Stay, (IV) Granting Related Relief and (V) Scheduling a Final Hearing, was served upon the addressees listed on the attached service list in the manner indicated.

Dated: December 2, 2019

Respectfully submitted,

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