

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(GREENBELT DIVISION)**

In re:

CREATIVE HAIRDRESSERS, INC.,
et al.,¹

Debtors.

Chapter 11

Case Nos. 20-14583, 20-14584-TJC

(Jointly Administered)

**LIMITED OBJECTION OF WASHINGTON PRIME GROUP INC.
TO THE EMERGENCY MOTION OF THE DEBTORS FOR ENTRY
OF AN ORDER (I) APPROVING RELIEF RELATED TO THE INTERIM
BUDGET, (II) TEMPORARILY ADJOURNING CERTAIN MOTIONS AND
APPLICATIONS FOR PAYMENT, AND (III) GRANTING RELATED RELIEF**

Washington Prime Group Inc. (“WPG”), as managing agent for the owners of the properties identified herein, by its undersigned counsel, hereby submits this limited objection (this “Limited Objection”) to the *Emergency Motion of the Debtors for Entry of an Order (I) Approving Relief Related to the Interim Budget, (II) Temporarily Adjourning Certain Motions and Applications for Payments, and (III) Granting Related Relief* (Docket No. 12) (the “Interim Budget Motion”).² In support of this Limited Objection, WPG respectfully states:

BACKGROUND

1. On April 23, 2020 (the “Petition Date”), the above-captioned debtors (the “Debtors”) filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Maryland (this “Court”).

2. Upon information and belief, the Debtors are operating their businesses and

¹ The Debtors in these chapter 11 cases are: (i) Creative Hairdressers, Inc. and (ii) Ratner Companies, L.C.

² Capitalized terms not otherwise defined herein shall have the meaning ascribed to such terms in the Interim

managing their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. WPG is the managing agent for the owners of certain real properties in which the Debtors lease retail space (the “Leased Premises”) pursuant to those certain unexpired leases (the “Leases”). Specifically, the Debtors lease the following retail space from WPG:³

Shopping Center	Location
West Town Corners	Altamonte Springs, Florida
Gaitway Plaza	Ocala, Florida
Bowie Town Center Strip	Bowie, Maryland
Waterford Lakes Town Center	Orlando, Florida

4. The Debtors’ monthly base rent obligations under the Leases are as follows:

Shopping Center	Monthly Base Rent
West Town Corners	\$6,013.33
Gaitway Plaza	\$3,620.29
Bowie Town Center Strip	\$4,199.55
Waterford Lakes Town Center	\$4,522.88
TOTAL	\$18,356.05

5. Additionally, pursuant to the Leases, WPG pays expenses related to the maintenance of the Leased Premises, including, but not limited to, electricity, insurance, taxes, sprinkler, water and trash (collectively, the “Maintenance Expenses”), in the following monthly amounts, and then seeks reimbursement from the Debtors. As of the date of this Limited Objection, the Debtors have not reimbursed WPG for any of the post-Petition Date Maintenance Expenses incurred by WPG.

Budget Motion or Financing Motion (defined herein).

³ Pursuant to the Order (I) Authorizing the Rejection of Certain Unexpired Leases as of the Date of This Order, (II) Establishing Rejection Procedures for the Rejection of Certain Leases of Non-Residential Real Estate, and (III) Authorizing the Debtors to Take all Actions Necessary to Implement the Rejection Procedures, Including the Rejection of the Leases and the Abandonment of the Remaining Property (Docket No. 75), the Debtors rejected the Lease at Royal Eagle Plaza and Bloomingdale Court effective April 28, 2020.

Shopping Center	Monthly Maintenance Expense Amount
West Town Corners	\$1,294.24
Gaitway Plaza	\$487.49
Bowie Town Center Strip	\$1,676.46
Waterford Lakes Town Center	\$677.12
TOTAL	\$4,135.31

6. The Leased Premises are located in “shopping centers” as that term is used in section 365(b)(3) of the Bankruptcy Code. *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081, 1086-87 (3d Cir. 1990).

7. On the Petition Date, the Debtors filed Interim Budget Motion seeking, among other things, authorization to defer payment of post-Petition Date rent pursuant to sections 105 and 365(d)(3) of the Bankruptcy Code, and to temporarily adjourn any request for relief related thereto until not less than 45 days after the Limited Operation Period or ordered by this Court.⁴

8. Also on the Petition Date, the Debtors filed the *Motion of the Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors to Obtain Post-Petition Secured Financing, (II) Authorizing Use of Cash Collateral, (III) Granting Adequate Protection to Pre-Petition Secured Parties, (IV) Scheduling a Final Hearing, and (V) Granting Related* (Docket No. 23) (the “Financing Motion”) seeking this Court’s approval of debtor-in-possession financing on an interim and final basis. Attached as Exhibit B to the proposed interim order approving the Financing Motion is the Debtors’ three-week budget (the “Three Week Budget”). The Three Week Budget contains a line item for rent but the Debtors have not budgeted any amounts for the payment of rent.

9. On April 28, 2020, this Court entered its *Interim Order (I) Authorizing the Debtor to*

⁴ Also, as noted by the United States Trustee in his Objection (Docket No. 237) to the Debtors’ Interim Budget Motion, it is unclear why the Debtors are seeking the relief requested in the Interim Budget Motion since Standing Order 2020-07 lengthens the filing deadlines, in all cases, set to fall between March 16, 2020 and June 5, 2020 by 84

Obtain Postpetition Secured Financing, (II) Authorizing use of Cash Collateral, (III) Granting Adequate Protection to Prepetition Secured Parties, (IV) Scheduling a Final Hearing, and (V) Granting Related Relief (Docket No. 79) approving the Financing Motion and Three Week Budget on an interim basis and scheduling a further hearing on May 11, 2020.

10. On May 8, 2020, WPG filed its *Limited Objection to the Entry of a Final Order in Connection with the Debtors' Motion to Obtain Postpetition Secured Financing* (Docket No. 183), objecting to, among other things, the entry of a final order on the Financing Motion that waives the Debtors' rights under section 506(c) and 552(b) of the Bankruptcy Code and fails to pay WPG for the Debtors' ongoing post-petition occupancy of the Leased Premises.

11. On May 11, 2020, the Debtors filed a proposed final order to the Financing Motion (Docket No. 207) that includes as Exhibit B a six-week budget through June 20, 2020 (the "Six Week Budget") and together with the Three Week Budget, the "Budget"). The same day, the Court granted the Financing Motion on an interim basis with a further hearing to be held on May 20, 2020.

12. On May 9, 2020, Florida Governor Ron DeSantis issued Executive Order 20-120 (the "Executive Order") addressing the reopening of barbershops, hair salons and nail salons.⁵ Pursuant to the Executive Order and as part of the State's *Phase 1: Safe. Smart. Step-by-Step. Plan for Florida's Recovery*, barbershops, cosmetology salons and cosmetology specialty salons that adopt appropriate social distancing and precautionary measures were permitted to reopen for

days. See Standing Order 2020-07.

⁵ See Executive Order 20-120, <http://www.myfloridalicense.com/DBPR/os/documents/2020.05.09%20EO%2020-120%20re%20Expanding%20Phase%201%20Plan%20for%20Florida%20Recovery.pdf> (last visited May 14, 2020).

business on May 11, 2020.⁶ As noted above, three of the four Leased Premises are located in Florida. However, there is nothing in the record of these chapter 11 cases indicating that Debtors have reopened their Florida salons or explaining why the Debtors have not and are not reopening their salons in Florida.

LIMITED OBJECTION

13. WPG submits that the relief requested in the Interim Budget Motion should be denied because it violates section 365(d)(3) of the Bankruptcy Code and unfairly prejudices WPG and the Debtors' other landlords by forcing them to act as involuntary lenders to the estate, and for the sole benefit of the DIP Lender, without any assurances of ever being paid and without the ability to seek timely relief from this Court. Nowhere in the Interim Budget Motion or Budget do the Debtors indicate how long the Limited Operation Period will last; that sufficient funds exist to pay the deferred post-Petition Date rent following the Limited Operation Period; or exactly when or if the Debtors will pay the deferred post-Petition Date rent.

14. WPG acknowledges that other retail debtors, such as *Pier 1 Imports, Inc.*, *Chino Holdings, Inc.* and *Stage Stores, Inc.*, have recently sought, and in *Pier 1 Imports, Inc.* obtained, court approval to defer payment of postpetition rent on their leases during these unprecedented times in order to preserve liquidity. And even though WPG opposes such relief, in those cases the debtors all provided clear repayment plans, either allocating funds in their budget for the payment of rent at a later date and/or providing sufficient assurances that post-petition will be paid at a later date. In fact, the debtors in *Stage Stores, Inc.* tailored their request to defer the payment of postpetition rent to

⁶ *Id.*

only those stores that they are unable to reopen during the proposed deferment period.⁷ Here, the Debtors offer no clear repayment plan in what appears to be a blatant attempt by the Debtors to evade their obligation under the Bankruptcy Code to pay all administrative expense claims in full.

15. However, to the extent the Court grants the Interim Budget Motion, any relief should be (a) conditioned on the Debtors providing adequate protection to WPG and compensating WPG for (i) the Debtors' ongoing occupancy of the Leased Premises during any Limited Operation Period and (ii) any Maintenance Expenses incurred by WPG relating to the Leased Premises, and/or (b) tailored to set forth the specific length of the Limited Operation Period and to provide a clear repayment plan, with the exact date all deferred post-Petition Date rent will be paid and demonstrating funds have been allocated in the Budget to pay all deferred post-Petition Date rent.

A. Debtors Seek to Circumvent Their Obligations Under Section 365(d)(3) of the Bankruptcy Code

16. Section 365(d)(3) of the Bankruptcy Code provides, in relevant part, that

[t]he Trustee shall timely perform all the obligations of the debtor... arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order relief, but the time for performance shall not be extended beyond such 60-day period.

11 U.S.C. § 365(d)(3). Thus, under section 365(d)(3) of the Bankruptcy Code, the Debtors have an affirmative obligation to stay current with their post-petition obligations to WPG under the Leases and to the extent such time for performance is extended for cause by this Court, the Debtors are still

⁷ *In re Stage Stores, Inc., et al.*, No. 20-32564 (DRJ) (Bankr. S.D. Texas, May 11, 2020), *Debtors' Emergency Motion for entry of an Order (I) Extending Time for Performance Under Certain Unexpired Leases, (II) Setting Administrative Procedures With Respect to Certain Motions and Applications for Payments, and (III) Granting Related Relief* (Docket No. 22).

obligated to perform under the Leases and pay all accrued post-Petition Date rent by June 22, 2020.

17. However, notwithstanding the Debtors' obligations under the Bankruptcy Code, the Debtors seek to extend their time to perform under the Leases to an undetermined date well beyond the 60-day limit imposed by section 365(d)(3) of the Bankruptcy Code. As set forth in the proposed order to the Interim Budget Motion, the Debtors will "make reasonable best efforts" to pay deferred post-Petition Date rent within 45 days following the Limited Operation Period, which commences upon the entry of an order granting the Interim Budget Motion and terminates upon the earlier of (i) the Debtors filing a notice of termination upon the re-opening of one or more Debtors' salons and/or their operations generally or (ii) such other time as ordered by this Court. Not only is this relief contrary to section 365(d)(3) of Bankruptcy Code since it will extend the Debtors' performance under the Leases beyond 60 days from the Petition Date, but it also forces WPG, and other landlords, to bear a disproportionate amount of the risks, including the risks of nonpayment of post-Petition Date rent, diminution in value of the leased premises and administrative insolvency in these chapter 11 cases. "The purpose of § 365(d)(3) is to prevent landlords from becoming involuntary post-petition creditors of the bankruptcy estate. A landlord cannot be required to provide post-petition services without current payments for those services." *In re Warehouse Club, Inc.*, 184 B.R. 316, 317 (Bankr. N.D. Ill. 1995). Further, there is no reason to extend the Debtors' rent deferment beyond June 22, 2020, since the Debtors' sale of substantially all of their assets to their secured lender, HC Salon Holdings, Inc., is scheduled to close no later than May 29, 2020.

18. Here, the Debtors have provided no assurances that they will pay their post-Petition Date obligations under the Leases nor have they demonstrated that they will ever have the necessary funds to make these payments to WPG. Pursuant to the Interim Budget Motion, the

Debtors will only make “reasonable best efforts” to pay the deferred, post-Petition Date rent within 45 days following Limited Operation Period, which will likely happen well after the anticipated closing of the proposed sale at the end of May and beyond the last week funds are allocated in the Budget. Moreover, the Budget does not contemplate the payment of all post-Petition Date rent. The Debtors brazenly assume no post-Petition Date rent will be owed for non-rejected leases and allocates only a nominal amount (\$75,000) the week ending May 30, 2020 for post-Petition Date rent for what appears to be rejected leases.

19. Moreover, since the filing of the Interim Budget Motion in late April, many states have begun lifting, in phased approaches, their mandated closures and “shelter in place” orders that required the Debtors’ salons to close in the first place. In fact, salons have been permitted to reopen in some of the states in which the Debtors operate, including Indiana, West Virginia and Florida. There is a strong possibility that the Debtors’ salons in these states could be open very soon, if not already. As a result, the Debtors should not be permitted to defer the payment of post-Petition Date rent at salons that have opened or are permitted to re-open under applicable state laws or guidelines.

20. Finally, the Debtors cannot rely on section 105 of the Bankruptcy Code as a basis for their requested relief. While section 105 of the Bankruptcy Code permits the Court to “issue any order, process, or judgment that is necessary or appropriate to carry out of the provisions of the [Bankruptcy Code]”, section 105 of the Bankruptcy Code “does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code.” *Law v. Siegel*, 571 U.S. 415, 421, 134 S. Ct. 1188, 1194, 188 L. Ed. 2d 146 (2014) (*citing* 2 Collier on Bankruptcy ¶ 105.01[2], p. 105-6 (16th ed. 2013)).

21. In short, section 105 of the Bankruptcy Code does not permit the Debtors to defer payment of post-Petition Date rent beyond June 22, 2020 since such relief would be inconsistent with section 365(d)(3) of the Bankruptcy Code and alter the substantive rights of WPG and all the Debtors' landlords. *See In re Rose*, 512 B.R. 790, 795 (Bankr. W.D.N.C. 2014) (section 105 "does not allow courts to alter the substantive rights of the parties").

B. The Debtors Must Provide WPG with Adequate Protection for Their Post-Petition Use and Occupancy of the Leased Premises

22. Where, as in these chapter 11 cases, there is an extreme risk of administrative insolvency, the payment of the Maintenance Expenses retroactive to the Petition Date is warranted as adequate protection for the Debtors' continued use and occupancy of the Leased Premises under section 363(e) of the Bankruptcy Code, which provides:

Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

11 U.S.C. § 363(e).

23. Section 363(e) of the Bankruptcy Code provides a basis to grant adequate protection to real property lessors. *See, e.g., In re Knight Jewelry*, 168 B.R. 199 (Bankr. W.D. Mo. 1994) (granting relief from the automatic stay because, among other things, retail debtor did not provide adequate protection to landlord creditor); *Matter of Cont'l Airlines, Inc.*, 154 B.R. 176, 180 (Bankr. D. Del. 1993) (concluding that adequate protection is available under § 363(e) of the Bankruptcy Code 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 (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)...”); *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)).

24. Pursuant to section 361 of the Bankruptcy Code, a debtor may provide adequate protection by: (i) making a cash payment; (ii) granting an additional or replace lien; or (iii) granting such other relief (other than an administrative expense claim) that is the indubitable equivalent of the party’s interest in the property. 11 U.S.C. § 361.

25. Here, it is appropriate for adequate protection to take the form of timely cash payments for the Debtors’ post-Petition Date occupancy of the Leased Premises. *See* 11 U.S.C. § 361; *In re Kellstrom Indus., Inc.*, 282 B.R. 787, 794 (Bankr. D. Del. 2002). Any administrative expense claim granted to WPG for the Maintenance Expenses cannot serve as adequate protection, particularly due to the real possibility of nonpayment or significant delays in the payment of the Maintenance Expenses to WPG and risk of administrative insolvency.⁸

26. The Debtors continue to have occupancy rights in the Leased Premises for the benefit of their estates and the DIP Lender (which is also the proposed stalking horse bidder for substantially all of the assets of the Debtors). Because of the commencement of these chapter 11 cases, WPG has no choice but to allow the continued occupancy of the Leased Premises by the Debtor. WPG should not be expected to bear these risks without the Debtors’ providing adequate protection. As a result, while the Debtors’ salons remain closed, the Debtors must be required to immediately pay WPG the monthly Maintenance Expenses that WPG continues to incur at each

⁸ *See* 11 U.S.C. § 361(3) (adequate protection may not take the form of a deferred administrative expense claim).

Leased Premise to preserve the value of the Leased Premises and to protect the Debtors' property stored therein. Upon the Debtors' reopening their salons at the Leased Premises, or having the right to re-open under applicable state law and administrative orders, this Court should require the Debtors to immediately resume full payment of all their obligations under the Leases and pay all accrued amounts thereunder.

JOINDER

27. WPG joins in any objections to the entry of a final order filed by the Debtors' other shopping center landlords, to the extent that such objections are not inconsistent with this Limited Objection.

RESERVATION OF RIGHTS

28. WPG reserves any and all rights to supplement and/or amend this Limited Objection and expressly reserves the right to assert any further objections with respect to the Interim Budget Motion as it deems necessary or appropriate.

CONCLUSION

WHEREFORE, WPG respectfully requests that this Court: (a) deny the Interim Budget Motion or (b) to the extent the Interim Budget Motion is granted, condition such relief to be consistent with this Limited Objection; and (c) grant WPG such other and further relief as this Court deems just and appropriate under the circumstances.

Dated: May 15, 2020

Respectfully submitted,

/s/ David G. Sommer

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2020, I reviewed the Court's CM/ECF system, and it reported that an electronic copy of the foregoing *Limited Objection of Washington Prime Group Inc. to the Emergency Motion of the Debtors for Entry of an Order (I) Approving Relief Related to the Interim Budget, (II) Temporarily Adjourning Certain Motions and Applications for Payments, and (III) Granting Related Relief* will be served electronically by the Court's CM/ECF system on the following:

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