Hearing Date and Time: July 29, 2009 at 10:00 a.m.
Objection Deadline: July 22, 2009 at 4:00 p.m.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	**Chapter 11**
CRABTREE & EVELYN, LTD.,	**Case No. 09-14267 (BRL)**
Debtor.	

LIMITED OBJECTION OF THE MACERICH COMPANY, THE RELATED COMPANIES, COUSINS PROPERTIES, INC., AND RREEF MANAGEMENT COMPANY TO THE DEBTOR'S MOTION AND MEMORANDUM OF LAW FOR INTERIM AND FINAL (I) APPROVAL OF POSTPETITION FINANCING, (II) AUTHORITY TO USE CASH COLLATERAL, (III) GRANTING OF LIENS AND PROVIDING SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS, (IV) GRANTING ADEQUATE PROTECTION, (V) MODIFYING AUTOMATIC STAY, AND (VI) SCHEDULING A FINAL HEARING

The Macerich Company, The Related Companies, Cousins Properties, Inc., and RREEF Management Company (collectively, the "Landlords") hereby file this limited objection to the Debtor's Motion And Memorandum Of Law For Interim And Final (I) Approval Of Postpetition Financing, (II) Authority To Use Cash Collateral, (III) Granting Of Liens And Providing Superpriority Administrative Expense Status, (IV) Granting Adequate Protection, (V) Modifying

Automatic Stay, And (VI) Scheduling A Final Hearing (the "Financing Motion"),[1] and respectfully represent as follows:

I. BACKGROUND FACTS

1. Crabtree & Evelyn, Ltd. (the "Debtor") filed a voluntary petition for relief under Chapter 11 of Title 11[2] of the United States Code on July 1, 2009. The Debtor has continued to operate its businesses and manage its properties as debtor-in-possession pursuant to Sections 1107(a) and 1108.

2. The Debtor leases retail space (the "Premises") from the Landlords where it continues to operate retail stores as a tenant pursuant to unexpired leases of nonresidential real property (the "Leases") at the shopping center locations (the "Centers") described in the attached Schedule A.

3. The Leases are each a "lease of real property in a shopping center" as that term is used in Section 365(b)(3). See In re Joshua Slocum, Ltd., 922 F.2d 1081, 1086-1087 (3d Cir. 1990).

4. On July 1, 2009, the Debtors filed the Financing Motion. On July 2, 2009, the Court heard first day motions and entered its order approving the Financing Motion on an interim basis (the "Interim Order"). In the Interim Order, the security interest on the Leases is limited to only the proceeds of leasehold interests, and there is no direct lien on the Leases themselves. See Interim Order at ¶ 4. Additionally, the Interim Order contains the following language to limit access to the Premises by the DIP Lender: "Notwithstanding anything to the contrary in this Order, the Motion, the DIP Agreement, the Post-Petition Financing Documents, or any other pre-petition or post-petition agreements, prior to entry of a final order approving the

[1] Terms not otherwise defined herein shall have the meanings ascribed to them in the Financing Motion and related documents.

[2] Unless otherwise specified, all statutory references to "Section" are to 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code").

Motion, neither the DIP Lender nor its agents shall enter onto the Debtor's leased premises to access the DIP Lender's Collateral unless (i) the DIP Lender has the right to enter onto the leased premises to access the Collateral pursuant to applicable non-bankruptcy law, (ii) the applicable landlord consents, or (iii) the Debtor or DIP Lender returns to Court on appropriate notice to the affected landlords and obtains entry of a subsequent order authorizing such access to the leased premises." See Interim Order ¶ 13. To date, the Landlords have not seen a proposed final order and cannot ascertain whether the final order will continue to include these necessary protections. As a result, this objection is necessary. To the extent the above limitation on the liens on the Leases and limitations on access to the Premises are included in the proposed final order, the Landlords will withdraw their objection to the final financing order.

5. To the extent that there is any attempt to modify or remove these protections, the Landlords object to any attempt to mortgage, encumber, hypothecate, or otherwise pledge the Leases, as well as any attempt to grant access rights to the Premises beyond those granted in the Interim Order. Any attempt to encumber the Leases violates the terms of the Leases, which prohibit the Debtor from unilaterally encumbering the Leases and the Premises. In addition, there is no authority under the Bankruptcy Code to render these legitimate lease provisions invalid or unenforceable.

II. ARGUMENT

A. The Bankruptcy Code does not invalidate lease provisions that prohibit or restrict pledging, encumbering or otherwise hypothecating the Leases.

6. The Financing Motion and related documents seek authority to encumber substantially all of the Debtor's assets. Neither the Leases nor the Bankruptcy Code create a right to grant a lien against the Leases where none existed pre-petition, and neither support such wholesale voiding of Landlords' state law contractual rights. The Interim Order recognized this and did not provide for a direct lien on the Leases, limited the lien to only the proceeds of a disposition of the Leases. See Interim Order at ¶ 4.

7. The Leases contain specific and bargained-for language that prohibit or restrict the Debtor's ability to grant a lien in the Leases and the Premises. The pledge of the Leases as part of the Collateral would effectively strike the "anti-pledging" language of the Leases, or at the least, force this Court to deem the language inconsistent with the provisions of the Bankruptcy Code vis-à-vis the Debtor's request for financing. Granting the Debtor's request requires this Court to ignore these specific prohibitions, negotiated at arms-length, and which are enforceable under state law.

8. Provisions that restrict the ability to encumber leases are critical to Landlords' ability to control their property, to comply with their own financing and investment covenants, and any compromise of these provisions detract from the marketability of the Centers as a whole.

9. Given the sweeping remedies granted under the financing documents, in the event that the Debtor defaults under its obligations, a grant of a security interest in the Leases, and any attendant exercise of remedies following a default, creates a de facto assignment of the Leases. There is no authority for the proposition that such an assignment (under the guise of pledging the Leases as collateral), independent of the safeguards of Sections 365(b)(3) and (f)(2), is permissible.[3]

10. This Court must not allow the Debtor to jettison the anti-pledging restrictions of the Leases, while enjoying the benefits of continued use of the properties during the course of their reorganization efforts. The Leases' provisions controlling the transfer of an interest in the Leases are material, negotiated at arms-length, and enforceable under the Bankruptcy Code.

11. A provision that restricts the Debtor's ability to pledge the Leases as collateral is not an anti-assignment provision and is not contrary to any bankruptcy policy. Rather, it is a

[3] Because these are shopping center leases, the Debtor must comply with the heightened protections granted to shopping centers landlords in connection with any such transfer of an interest in the Leases. Therefore, section 365(b)(3) (applicable to an assignment of a lease through Section 365(f)) applies, and any assignment of the Leases requires compliance with the special adequate assurance of future performance protections set forth in Sections 365(b)(3)(A) - (D). See 11 U.S.C. § 365(b)(3).

reasonable and legitimate restriction that allows Landlords to preserve clear title to their Leases. As a result, the Landlords object to any encumbrance, lien, hypothecation or other pledge of the Leases, and Landlords request this Court exclude the Leases from the Collateral.

B. The DIP Lender does not need a security interest in the Leases to protect its interests.

12. Prior to filing for bankruptcy protection, the Debtor did not encumber the Leases because such a lien is prohibited by the Leases. There is no legitimate reason to now grant a lien that violates the Leases where no such right existed under state law and no such liens existed pre-petition. Nothing in the Bankruptcy Code gives the DIP Lender such rights where they did not exist pre-petition.

13. Moreover, the DIP Lender does not need a security interest in the Leases in order to liquidate its collateral should the Debtor default. All rights to realize upon the Collateral are preserved through both the Bankruptcy Court and state law remedies, none of which contemplate granting a lien or other possessory right in the Landlords' property.

14. The Premises and Centers are owned by the Landlords, not the Debtor. The DIP Lender has no right or need to force Landlords to relinquish control over the Premises to the DIP Lender or accept a cloud to the Landlords' title to the Leases. The value in the Leases to the Debtor (and the DIP Lender) is that which may be realized from their proceeds in a sale or other disposition of the leasehold interests. Granting a security interest in the Leases – even if it were not specifically prohibited by the Leases – serves no economic purpose, and should not be a component of any post-petition financing.

C. The Court should limit any remedies that the DIP Lender may exercise with respect to the Collateral at the Premises in accordance with the protections provided to Landlords in the Leases and Bankruptcy Code.

15. The Interim Order limited the DIP Lender's rights to proceed against the Collateral upon a default by the Debtor. See Interim Order at ¶ 13. As set forth above, such access was limited to where: "(i) the DIP Lender has the right to enter onto the leased premises to access the Collateral pursuant to applicable non-bankruptcy law, (ii) the applicable landlord

consents, or (iii) the Debtor or DIP Lender returns to Court on appropriate notice to the affected landlords and obtains entry of a subsequent order authorizing such access to the leased premises." Id. The Court should order that these limitations carry over to any Final Order.

16. If these limitations are not maintained, the DIP Lender receives unfettered access and occupancy rights with respect to the Premises to liquidate the Collateral and conduct going out-of-business sales. The granting of such rights though a financing order is excessive and inappropriate. Any grant of the right to conduct store closing sales should be pursuant to a noticed motion and provide Landlords a meaningful opportunity to object and protect their interests. To the extent that a liquidation of the Collateral would include any attempt to conduct any sale at the Premises, such use or sales are governed by the Leases, and the Debtor and any assignee (including a foreclosing lender) are bound by the terms of the Leases. See 11 U.S.C. §§ 365(b)(3) and (d)(3). Only the Bankruptcy Court can authorize the Debtor to conduct such sale, and it may do so only after carefully weighing the competing interests of the landlords and the debtor-tenant through a separate motion by the Debtor. See, e.g., In re Ames Department Stores, Inc., 136 B.R. 357 (Bankr. S.D.N.Y. 1992). The wholesale disregard of the terms of the Leases is simply not supportable by the Bankruptcy Code or any caselaw. The Debtor has not, and cannot, justify exempting the DIP Lender from the restrictions in the Leases, or the explicit requirements of the Bankruptcy Code.

17. Any request for authority to enter onto the Centers for an indeterminate amount of time also exposes the Landlords and the Centers to unnecessary prejudice. The DIP Lender is not a party to the Leases and has no right to occupy and use Landlords' property. If this Court is inclined to grant any ability to enter onto the Premises other than as previously set forth in the Interim Order, it should be specifically circumscribed as follows:

- Only after ten (10) days written notice to the Landlords;
- For the limited purpose of collecting and removing the Collateral;
- Pursuant to a written agreement on terms acceptable to the Landlords and in accordance with the Leases;

- DIP Lender is responsible for the charges coming due under the Leases, monthly in advance, for any period of occupancy;
- DIP Lender, its agents, or any entering party must provide Landlords with a certificate of insurance with respect to such entry, which certificate shall list the Landlords as an additional named insured, which insurance covers both personal injury and property damage;
- DIP Lender is subject to any provision of the Leases regarding re-imbursement and/or indemnification of the Landlords; and
- Access to the Premises shall be limited to a period not to exceed thirty (30) days.

18. As stated above, the Debtor does not own the Premises and the Leases explicitly prohibit or restrict this attempted usurpation of Landlords' property rights. The Landlords provide Debtor a right to occupy certain space in the Centers which is specifically circumscribed by the terms of the Leases. The Debtor possesses no right to use the Premises beyond those rights granted within the Leases. The DIP Lender is not a party to the Leases and has no possessory right to the Premises.

19. Finally, the DIP Lender must bear full financial responsibility, not only for all charges arising under the Leases going forward, but also for prior unpaid rent or other charges for any limited access to the Premises. To the extent the DIP Lender seeks authority to essentially step into the shoes of the Debtor following a default, there is no reason to allow the DIP Lender to exercise rights which would otherwise be prohibited by the Leases and "assume" the Leases for an indeterminate period of time without being required to cure outstanding post-petition defaults. The DIP Lender should not, on the one hand, receive a superpriority administrative claim, and on the other hand be relieved from liability for the Debtor's failure to remain current on post-petition rent obligations while the DIP Lender attempts to realize upon its collateral. This result compels Landlords to continue to suffer as an involuntary post-petition creditor, the very result that Section 365(d)(3) was intended to counteract. See In re Warehouse Club, Inc., 184 B.R. 316, 318 (Bankr. N.D. Ill. 1994).

20. In addition to the foregoing, and to the extent not inconsistent with the relief sought herein, the Landlords also join in the objection(s) of other real property lessors to the relief proposed by the Financing Motion, and any final financing order.

III. CONCLUSION

The Debtor provides no authority for, and demonstrates no necessity to, disregard the terms of the Leases and the protections that the Bankruptcy Code and the Leases provide to Landlords. The Landlords did not create Debtor's financial maladies, and should not bear the consequences of this bankruptcy through loss of their contractual rights. The Court should limit any lien in favor of the DIP Lender with respect to the Leases to only the proceeds obtained through the sale or other disposition of the Leases, should circumscribe the DIP Lender's collateral access rights with respect to the Premises as set forth in the Interim Order, and grant such other and further relief that it deems just and proper.

Dated: July 22, 2009

KATTEN MUCHIN ROSENMAN LLP
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By: /s/ Merritt A. Pardini

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SCHEDULE A

The Macerich Company		
Arden Fair Mall	Sacramento, CA	Store No. Unknown
Broadway Plaza	Walnut Creek, CA	Store No. Unknown
Chandler Fashion Square	Chandler, AZ	Store No. Unknown
Danbury Fair mall	Danbury, CT	Store No. Unknown
The Oaks	Thousand Oaks, CA	Store No. Unknown
Scottsdale Fashion Square	Scottsdale, AZ	Store No. Unknown
Tysons Corner Center	McLean, VA	Store No. Unknown
Washington Square	Portland, OR	Store No. Unknown
The Related Companies		
Columbus Circle/Time Warner Center	New York, NY	Store No. Unknown
Cousins Properties, Inc.		
Ave. Murfreesboro	Murfreesboro, TN	Store No. Unknown
RREEF Management Company		
Galleria Mall	Pittsburgh, PA	Store No. Unknown