

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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In re:) Chapter 11
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SPORTS AUTHORITY HOLDINGS, INC., *et al.*,¹) Case No. 16-10527 (MFW)
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Debtors.) (Jointly Administered)
))
)) Related to Docket Nos. 20 & 157
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**JOINDER AND OBJECTION OF KIMCO REALTY CORPORATION TO
OBJECTIONS TO DEBTORS’ MOTION FOR INTERIM AND FINAL ORDERS
(I) AUTHORIZING DEBTORS TO OBTAIN POST-PETITION SECURED FINANCING
PURSUANT TO 11 U.S.C. §§ 105, 362, 363, AND 364; (II) GRANTING LIENS AND
SUPERPRIORITY CLAIMS TO POST-PETITION LENDERS PURSUANT TO 11 U.S.C.
§§ 364 AND 507; (III) AUTHORIZING THE USE OF CASH COLLATERAL AND
PROVIDING ADEQUATE PROTECTION TO PREPETITION SECURED PARTIES
AND MODIFYING THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. §§ 361, 362,
363, AND 364; AND (IV) SCHEDULING A FINAL HEARING PURSUANT TO
BANKRUPTCY RULES 4001(B) AND (C) AND LOCAL RULE 4001-2**

Kimco Realty Corporation and certain of its affiliates (collectively, “Kimco”), by their attorneys, hereby submit this *Joinder and Objection to Debtors’ Motion for Interim and Final Orders (I) Authorizing Debtors to Obtain Post-Petition Secured Financing Pursuant to 11 U.S.C. §§ 105, 362, 363, and 364; (II) Granting Liens and Superpriority Claims to Post-Petition Lenders Pursuant to 11 U.S.C. §§ 364 and 507; (III) Authorizing the Use of Cash Collateral and Providing Adequate Protection to Prepetition Secured Parties and Modifying the Automatic Stay Pursuant to 11 U.S.C. §§ 361, 362, 363, and 364; and (IV) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(B) and (C) and Local Rule 4001-2* (the “Objection”), and respectfully state as follows:

¹ The above-captioned debtors and the last four digits of their respective taxpayer identification numbers are as follows: Sports Authority Holdings, Inc. (9008); Slap Shot Holdings, Corp. (8209); The Sports Authority, Inc. (2802); TSA Stores, Inc. (1120); TSA Gift Card, Inc. (1918); TSA Ponce, Inc. (4817); and TSA Caribe, Inc. (5664) (collectively, the “Debtors”). The Debtors’ headquarters is located at 1050 West Hampden Avenue, Englewood, Colorado 80110.



BACKGROUND

1. Kimco is landlord to the Debtors pursuant to certain leases for non-residential real property (the “Kimco Leases”).² With over 20 leases, Kimco is one of the Debtors’ largest landlords. To date, the Debtors have not assumed or rejected any of the Kimco Leases.

2. On March 2, 2016, the Debtors filed the Motion for Interim and Final Orders (I) Authorizing Debtors to Obtain Post-Petition Secured Financing Pursuant to 11 U.S.C. §§ 105, 362, 363, and 364; (II) Granting Liens and Superpriority Claims to Post-Petition Lenders Pursuant to 11 U.S.C. §§ 364 and 507; (III) Authorizing the Use of Cash Collateral and Providing Adequate Protection to Prepetition Secured Parties and Modifying the Automatic Stay Pursuant to 11 U.S.C. 361, 362, 363, and 364; and (IV) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(B) and (C) and Local Rule 4001-2 (Docket No. 20) (the “DIP Motion”) seeking interim and final authority for the Debtors to enter into the DIP Loan. On March 3, 2016, the Bankruptcy Court granted the DIP Motion on an interim basis pursuant to the *Interim Order (I) Authorizing Debtors to Obtain Post-Petition Secured Financing Pursuant to 11 U.S.C. §§ 105, 362, 363, and 364; (II) Granting Liens and Superpriority Claims to Post-Petition Lenders Pursuant to 11 U.S.C. §§ 364 and 507; (III) Authorizing the Use of Cash Collateral and Providing Adequate Protection to Prepetition Secured Parties and Modifying the Automatic Stay Pursuant to 11 U.S.C. 361, 362, 363, and 364; and (IV) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(B) and (C) and Local Rule 4001-2 (Docket No. 157) (the “Interim DIP Order”)*.

3. Under the DIP Motion, the Debtors seek to grant the DIP Lenders (as defined in the DIP Motion) various rights and remedies, including, among other things, the Debtors’ waiver

² The Kimco Leases and related documentation are voluminous and, therefore, have not been attached to this Joinder. Kimco will provide copies of the Kimco Leases and related documentation to this Court and parties in interest upon request.

of “any rights to charge costs and expenses against the collateral of the Prepetition Secured Parties.” DIP Motion, ¶ 73.

4. As of the date of this Objection, the Debtors have failed to pay not only the pre-petition rent for February, but also the post-petition rent due under the Kimco Leases for the month of March 2016 and remaining after the March 2, 2016 petition date (the “Stub Rent”). The proposed budget contemplated by the DIP Motion (the “DIP Budget”) does not include payment of Stub Rent on the Kimco Leases (or any leases for that matter), despite the Debtors’ continued post-petition use of the properties subject to the Kimco Leases (the “Kimco Properties”). Additionally, the DIP Motion makes no provision for adequate protection for Kimco in connection with the Kimco Leases.

OBJECTION

I. The Debtors Must Pay the Stub Rent Before Waiving Rights under § 506(c).

5. The DIP Motion seeks court approval of the Debtors’ waiver of any rights to charge costs and expenses against the collateral of the Prepetition Secured Parties (as defined in the DIP Motion), but makes no provision for payment of the Stub Rent and related charges arising out of the Kimco Leases. The Debtors’ request to compel Kimco to provide free, post-petition use of the Kimco Properties, while the DIP Lenders, the Debtors’ advisors (including the liquidator) and the Debtors themselves reap all the benefits, is outrageous.

6. The court may require payment of the Stub Rent under Bankruptcy Code section 506(c), which provides that a trustee or debtor in possession may recover from property securing an allowed 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); In re Visual Ind., Inc., 57 F.3d 321, 325 (3d Cir. 1995). The premise underlying section 506(c) is that unsecured creditors, including landlords like Kimco, should not

be required to bear the costs of preserving a secured creditor's collateral. See In re Evanston Beauty Supply Inc., 136 B.R. 171, 175 (Bankr. N.D. Ill. 1992) (holding that professionals had standing to seek the benefit of section 506(c)). "Ample case authority exists 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).

7. The standards for recovery by Kimco under section 506(c) are that the services were necessary and beneficial to the lender. Visual Ind., Inc., 57 F.3d at 325. The post-petition use of the Kimco Properties is necessary and beneficial to the Debtors' continued operations of their going-concern business and will maximize the DIP Lenders' recoveries under the going-out-of-business sales (of which Kimco has six such GOB locations generating proceeds to the DIP Lenders without compensation). All rent amounts that accrue under the Kimco Leases post-petition, including the Stub Rent, are reasonable and necessary to the preservation and disposal of the DIP Lenders' collateral and provide a direct benefit to the DIP Lenders, thus no section 506(c) waiver is appropriate.

8. Without the continued benefit of the Kimco Properties, the Debtors and the DIP Lenders would have to find other locations to store and liquidate their inventory (likely at diminished prices), not to mention the costs associated with removing the inventory and finding new properties. Moreover, allowing the DIP Lenders to benefit *at no cost* from the storage and preservation of collateral at the Kimco Properties will "result in a windfall benefit to the secured creditor to the detriment of a third party." In re So Good South Potato Chip Co., 116 B.R. 144, 146 (Bankr. E.D. Mo. 1990). The court should mandate the payment of the Stub Rent due under the Kimco Leases and deny the Debtors' request for a section 506(c) waiver until such rent amounts are paid.

II. Kimco's Interests in their Leases Must Be Adequately Protected.

9. The Debtors may not use or lease the Kimco Properties without providing adequate protection to Kimco on account of Kimco's interests in the Kimco Leases. The Bankruptcy Code specifically provides that the court “*shall prohibit or condition such use*, sale, or *lease* [of property] as is necessary to provide adequate protection of such interest.” (Emphasis added.) 11 U.S.C. § 363(e). See In re P.J. Clarke's Rest. Corp., 265 B.R. 392, 404 (Bankr. S.D.N.Y. 2001) (“A landlord's right to adequate protection seems to follow clearly from the language of § 363(e) of the Bankruptcy Code....”); see also In re Ernst Home Center, Inc., 209 B.R. 955, 966 (Bankr.W.D.Wash.1997) (real property lessors may request adequate protection under § 363(e); court noted that the right to payment under § 365(d)(3) would be hollow without a remedy); In re Mr. Gatti's, Inc., 164 B.R. 929, 946 (Bankr.W.D.Tex.1994) (the enactment of § 365(d)(3) abrogated any argument against the entitlement of a landlord to adequate protection); In re MS Freight Distribution, Inc., 172 B.R. 976, 980 (Bankr.W.D.Wash.1994) (landlord's right to be kept current on post-petition obligations is entitled to adequate protection).

10. Despite the mandatory language of section 363(e), the DIP Motion fails to provide for adequate protection to Kimco on account of Kimco's interest in the Kimco Leases. The Debtors must not be permitted to enjoy the benefit of the use of the Kimco Properties in the absence of such adequate protection. Pursuant to section 363(e), the court should condition the Debtors' continued use of the Kimco Properties upon payment of adequate protection in the form of rent due under the Kimco Leases, including payment of the Stub Rent.

III. The DIP Motion Does Not Satisfy the “Pay to Play” Doctrine.

11. The Debtors and the DIP Lenders cannot escape obligations owed to Kimco under the so-called “pay to play” doctrine, which has been recognized by this court on the record in a number of cases, beginning with the *Pinnacle Brands* bankruptcy cases. See, e.g., In re NEC

Holdings Corp., No. 10-11890 (Bankr. D. Del. July 13, 2010 (PJW); In re Lang Holdings, Inc., No. 09-12543 (Bankr. D. Del. Oct. 1, 2009) (KJC); In re Zohar Waterworks, LLC, No. 09-11179 (Bankr. D. Del. May 28, 2009) (BLS); In re Badanco Acquisition LLC, No. 09-11638 (Bankr. D. Del. May 13, 2009) (CSS); In re Fluid Routing Solutions Intermediate Holding Corp., No. 09-10384 (Bankr. D. Del. March 13, 2009) (CSS); In re Interlake Material Handling, Inc., No. 09-10019 (Bankr. D. Del. Jan 7, 2009) (KJC); In re: Pinnacle Brands, Inc., No. 9801716 (Bankr. D. Del. October 2, 1998) (MFW). The DIP Motion and the DIP Credit Agreement (as defined in the DIP Motion) contemplate a sale process (the “Proposed Sale Transactions”) under section 363 of the Bankruptcy Code. Under the “pay to play” doctrine, however, the DIP Lenders may not use the chapter 11 process to liquidate the DIP Lenders’ collateral for the primary (if not sole) benefit³ of the same lenders without the Debtors and the DIP Lenders ensuring that 100% of all chapter 11 administration costs from the petition date through the date of the closing of the Proposed Sale Transactions (including the Stub Rent due under the Kimco Leases) are paid.

12. The Debtors have not demonstrated that the Proposed Sale Transactions will be sufficient to prevent these chapter 11 cases from becoming administratively insolvent. To the contrary, administrative insolvency looms like a growing black cloud that will prejudice Kimco and all other parties entitled to payment of administrative expenses. Incredibly, the DIP Budget does not contemplate payment of post-petition rent, including the Stub Rent, due under the Kimco Leases (or any other landlords’ leases). If the DIP Lenders seek to liquidate their collateral through the Proposed Sale Transactions, they must ensure payment in full of the administrative costs for doing so. Under the “do no harm” aspect of the pay to play doctrine, the DIP Lenders cannot be allowed to create administrative claims they refuse to pay while enjoying

³ The Debtors’ first day pleadings evidence over \$1 billion in secured debt and collateral value of far less, thus the DIP Lenders very well may be the only party receiving any recovery on their claims. As such, the DIP Lenders must fund the full cost of the chapter 11 process being run for their benefit.

the use and benefits of chapter 11. See e.g., In re Encore Healthcare Associates, 312 B.R. 52, 57 (Bankr. E.D. Pa. 2004) (denying motion to approve bid procedures where “sale not only generates funds solely for the secured creditor ... but more significantly advances no purpose of a Chapter 11 proceeding”).

13. To the extent that the DIP Budget fails to take into account administrative costs like the Stub Rent, the DIP Motion and the relief sought pursuant thereto should be denied.

IV. **Kimco Joins in Other Landlords’ Objections.**

14. Kimco hereby joins in and incorporates all of the arguments raised by the other objecting landlords as if set forth in detail herein.

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WHEREFORE, Kimco respectfully requests that the Court enter an order (i) denying approval of the DIP Motion unless the Debtors agree to pay all amounts that come due under the Kimco Leases for the Kimco Properties that the Debtors continue to use and occupy post-petition, including, without limitation, the Stub Rent; and (ii) granting such other and further relief as the Court deems just and proper.

Dated: March 22, 2016

Respectfully submitted,

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