

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA**

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In re:	)	Chapter 11
	)	
OTB Holding LLC., <i>et al.</i> , <sup>1</sup>	)	Case No. 25-52415 (SMS)
	)	
Debtors.	)	(Jointly Administered)
	)	

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**OBJECTION OF REALTY  
INCOME CORPORATION, KITE REALTY GROUP,  
AND REGENCY CENTERS, L.P. TO THE DEBTORS'  
EMERGENCY MOTION FOR INTERIM AND FINAL ORDERS  
(I) AUTHORIZING THE DEBTORS TO OBTAIN SENIOR SECURED  
SUPERPRIORITY POSTPETITION FINANCING; (II) GRANTING  
(A) LIENS AND SUPERPRIORITY ADMINISTRATIVE EXPENSE  
CLAIMS AND (B) ADEQUATE PROTECTION; (III) AUTHORIZING  
USE OF CASH COLLATERAL; (IV) MODIFYING THE AUTOMATIC STAY;  
(V) SCHEDULING A FINAL HEARING; AND (VI) GRANTING RELATED RELIEF**

Realty Income Corporation, Kite Realty Group, and Regency Centers, L.P. (collectively, the “Landlords”), by and through their undersigned counsel, Kelley Drye & Warren LLP, submit this limited objection (the “Limited Objection”) to the *Debtors’ Emergency Motion for Interim and Final Orders (I) Authorizing the Debtors to Obtain Senior Secured Superpriority Postpetition Financing; (II) Granting (A) Liens and Superpriority Administrative Expense Claims and (B) Adequate Protection; (III) Authorizing Use of Cash Collateral; (IV) Modifying the Automatic Stay; (V) Scheduling a Final Hearing; and (VI) Granting Related Relief* (the “DIP

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, include: OTB Holding LLC (3213), OTB Acquisition LLC (8500), OTB Acquisition of New Jersey LLC (1506), OTB Acquisition of Howard County LLC (9865), Mt. Laurel Restaurant Operations LLC (5100), OTB Acquisition of Kansas LLC (9014), OTB Acquisition of Baltimore County, LLC (6963). OTB Holding LLC’s service address is One Buckhead Plaza, 3060 Peachtree Road, NW, Atlanta, GA 30305.



Motion”)<sup>2</sup> filed by the above-captioned debtors (the “Debtors”). In support of this Limited Objection, the Landlords respectfully state as follows:

### **PRELIMINARY STATEMENT**

1. The Landlords are entitled to payment of all obligations arising under or coming due post-petition pursuant to their leases with the Debtors, including stub rent. The order approving DIP financing on a final basis should be (i) subject to the terms of, and (ii) neither impair, prejudice, nor modify landlord rights under, the leases between the Debtors and their Landlords. However, the current proposed DIP financing does not provide for the payment (or adequate assurance of payment) of unpaid March post-petition “stub” rent in the near term or pursuant to the proposed budget and at the same time, waives the estates’ ability to surcharge the lenders collateral for such expenses pursuant to section 506(c).

2. The Landlords acknowledge that the proposed purchase agreement requires a buyer to pay post-petition rent in these cases. However, there are no guarantees that the proposed sale goes through, nor that the Debtors’ leases will be assumed either in connection with a plan or the proposed sale, nor that the estates are administratively solvent. The Landlords should not be forced to provide a de facto post-petition interest-free loan in the form of deferral of stub rent for the benefit of the DIP Lender without the appropriate protections.

3. The Debtors should not be allowed to waive the estates’ rights under sections 506(c) and 552(b) of the Bankruptcy Code without providing for payment of all rent (including stub rent) and charges related to the Debtors’ post-petition use of the restaurants. If the Court is inclined to grant such waivers, then the Landlords request that post-petition rent and charges be paid in the near term directly to the Landlords or that funds sufficient to cover the

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<sup>2</sup> Docket No. 17. Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to them in the DIP Motion.

amounts due to all landlords in these cases be placed in escrow as adequate protection pursuant to sections 363(e) and 361 of the Bankruptcy Code and budgeted to be paid to the Landlords on a date certain within sixty (60) days of the Petition Date.

4. Given the uncertainty about the quantum of sale proceeds, especially if the sale is through a credit bid, and whether such proceeds will cover administrative expenses, there is a chance stub rent may never be paid in full, while the Landlords would have borne the cost of maintaining the leased premises where the Debtors operated during the post-petition period for the direct benefit of the Debtors and their lender.

### **BACKGROUND**

5. The Landlords are the owners or managing agents for the owners of numerous shopping centers located throughout the United States. The Debtors lease retail space from the Landlords pursuant to written leases (each a “Lease” and, collectively, the “Leases”) for the restaurants at numerous locations throughout the country (collectively, the “Leased Premises”), which are identified on **Exhibit A** attached hereto. Several of the Leased Premises are located in shopping centers as that term is used in section 365(b)(3) of the Bankruptcy Code. *See, e.g., In re Joshua Slocum, Ltd.*, 922 F.2d 1081 (3d Cir. 1990).

6. On March 4, 2025 (the “Petition Date”), each of the Debtors filed a voluntary petition for relief pursuant to chapter 11 of the Bankruptcy Code with this Court. The Debtors filed the DIP Motion the next day on March 5, 2025.

7. The Debtors remain in possession of their properties and continue to manage their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

8. On March 7, 2025, following the first-day hearing in these cases, the Court entered an order (the “Interim DIP Order”)<sup>3</sup> approving the DIP Motion on an interim basis and scheduling a hearing to consider entry of a final order (the “Final DIP Order”) granting the DIP Motion. The Interim DIP Order also approved, on an interim basis, the Debtors’ DIP financing budget (the “Budget”), which was attached as Exhibit 1 to the Interim DIP Order.

9. On March 19, 2025, the United States Trustee for Region 3 (the “U.S. Trustee”) appointed an official committee of unsecured creditors (the “Committee”).<sup>4</sup> No trustee or examiner has been appointed in these chapter 11 cases.

10. Upon information and belief, the Debtors have not paid stub rent. It is unclear at this stage of these cases whether there will be sufficient funds left to satisfy post-petition administrative expense claims.

### **ARGUMENT**

#### **A. The Debtors Should Not Be Permitted to Waive the Estates’ Rights Under Sections 506(c) and 552(b) of the Bankruptcy Code**

11. The Landlords object to the DIP Motion and entry of any final order on the DIP Motion or approval of any budget that (i) includes waivers of sections 506(c) and 552(b) of the Bankruptcy Code and (ii) fails to direct the Debtors to immediately pay to or escrow stub rent for the affected Landlords. Absent modification of the Budget, the waivers should be denied.

12. Waiver of the estates’ rights under sections 506(c) and 552(b) of the Bankruptcy Code would be inappropriate in these cases. Section 506(c) of the Bankruptcy Code allows a debtor to surcharge a lender’s collateral for the cost of preserving or disposing of that collateral. 11 U.S.C. § 506(c). The provision ensures that the cost of liquidating a secured

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<sup>3</sup> Docket No. 65.

<sup>4</sup> Docket No. 115.

lender's collateral is not paid from unsecured creditor recoveries. *See Borrego Springs Bank N.A. v. Skuna River Lumber, L.L.C. (In re Skuna River Lumber, LLC)*, 564 F.3d 353, 355 (5th Cir. 2009) (stating that the Bankruptcy Code protects unsecured creditors from bearing the costs of liquidating secured creditor's collateral by "allow[ing] administrative expenses to be surcharged against a creditor's collateral"); *see also Precision Steel Shearing v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 325 (3d Cir. 1995) ("section 506(c) is designed to prevent a windfall to the secured creditor"); *Kivitz v. CIT Group/Sales Fin., Inc.*, 272 B.R. 332, 334 (D. Md. 2000) ("the reason for [section 506(c)] is that unsecured creditors should not be required to bear the cost of protecting property that is not theirs"); *In re Codesco Inc.*, 18 B.R. 225, 230 (Bankr. S.D.N.Y. 1982) ("[t]he underlying rationale for charging a lienholder with the costs and expenses of preserving or disposing of the secured collateral is that the general estate and unsecured creditors should not be required to bear the cost of protecting what is not theirs").

13. In a tenant-debtor context, courts may surcharge lenders for post-petition rents and storage charges for storing lender's collateral, as necessary and directly beneficial to the lender. *See In re Scopetta-Senra Partnership III*, 129 B.R. 700, 701 (Bankr. S.D. Fla. 1991) (determining that landlord who provided post-petition lease space provided benefit to the secured creditor by storing its collateral and ensuring the debtor's continued operations); *see also In re World Wines, Ltd.*, 77 B.R. 653, 658 (Bankr. N.D. Ill. 1987) (finding that landlord was entitled to payment from the bank for the use and occupancy of its premises for storage of wine pursuant to section 506(c)).

14. Similarly, the "equities of the case" exception in section 552(b) of the Bankruptcy Code allows a debtor, committee, or other party-in-interest to exclude post-petition

proceeds from pre-petition collateral on equitable grounds, including to avoid having unencumbered assets fund the cost of a secured lender's foreclosure. 11 U.S.C. § 552(b).

15. The Debtors have been using the Leased Premises for the direct benefit of their lenders since the Petition Date. The post-petition rent owed to Landlords is a reasonable and necessary cost for the preservation of the lenders' collateral. Without the ability to use the Leased Premises, the Debtors and the lenders would receive no payments from the operations of the Debtors' restaurants at the Leased Premises, and the Debtors would have to find other locations to store and liquidate any inventory and personal property.

16. The preemptive waivers of sections 506(c) and 552(b) could also affect the recoveries for unsecured creditors, where there may be insufficient liquidity to fund administrative claims. It is unreasonable to ask the Landlords to bear any potential shortfall in the payment of administrative claims as a result of the Debtors' waiver of rights under section 506(c). At least one court has refused to enforce such a waiver. *See Hartford Fire Ins. Co. v. Norwest Bank Minn. (In re Lockwood Corp.)*, 223 B.R. 170, 176 (B.A.P. 8th Cir. 1998) (holding that a provision in the financing order purporting to immunize the post-petition lender from section 506(c) surcharge was unenforceable).

17. The Budget provides for periodic rent payments until the projected sale closing; however, it does not appear to provide for payment or escrow of the stub rent due to the Landlords. Absent sufficient funding in a consensual budget that reserves funds for the payment of all stub rent and ensures (i) immediate payment to the Landlords or escrow of the stub rent, (ii) administrative solvency, and (iii) a controlled exit from these chapter 11 cases, the Debtors should not be allowed to waive their statutory ability to surcharge the DIP Lender's collateral and/or recover costs, including stub rent, as adequate protection or under the equities of the case.

*See, e.g., In re Mortgage Lenders Network USA, Inc.*, Case No. 07-10146 (PJW) (Bankr. D. Del. Mar. 20, 2007) [Docket No. 346], Tr. of Hr'g at 20-21, (recognizing that 506(c) waivers require creditor consent); *see also In re Townsends, Inc.*, Case No. 10-14092 (CSS) (Bankr. D. Del. Jan. 21, 2011) [Docket No. 338], Tr. of Hr'g at 23-25 (refusing to approve financing for a sale process that would leave the estate administratively insolvent); *In re NEC Holdings Corp.*, Case No. 10-11890 (PJW) (Bankr. D. Del. July 13, 2010) [Docket No. 224], Tr. of Hr'g at 100 (requiring that secured creditors pay the “freight” of the bankruptcy by ensuring an administratively solvent estate).

18. As the Bankruptcy Court for the District of Delaware did in *In re Sports Authority Holding*, the advance waivers of sections 506(c) and 552(b) sought by the Debtors and DIP Lenders should be denied. *In re Sports Authority Holdings*, Case No. 16-10527 (MFW) (Bankr. D. Del. Apr. 26, 2016) [Docket No. 1415] (the “Hearing Transcript”). In that case, the debtors requested approval of a DIP facility that rolled up the entire prepetition secured debt, proposed to pay off the prepetition lenders immediately upon an expedited sale, granted the DIP lenders a surcharge waiver, and failed to adequately fund administrative and priority claims, including rent and 503(b)(9) claims. In denying the surcharge waiver, Judge Walrath ruled:

But in a case where the landlords and other administrative claims are clearly not budgeted or being paid while the . . . secured lenders' collateral is being liquidated and their secured claim is being paid, I have a serious problem with that. And I think the fix is no 506(c) waiver for anybody. And to the extent that administrative claims are not paid at the end of this case, there will be a claim against the lenders for those costs under 506(c) to the extent they were necessary for the preservation or realization of their collateral.

*See* Hearing Transcript at 195:6-16 (relevant pages attached hereto as Exhibit B).

19. The DIP Lender will substantially benefit from the Debtors' continued use and occupancy of the Leased Premises, including the maintenance of the collateral supporting the

obligations it plans to credit bid in the sale of the Debtors' assets. Therefore, the DIP Lender should be required to fund the expenses of those benefits rather than escape any responsibility for post-petition occupancy costs through waivers of the estate's rights under sections 506(c) and 552(b) of the Bankruptcy Code. *See Southwest Sec., FSB v. Segner (In re Domistyle, Inc.)*, 811 F.3d 691, 696 (5th Cir. 2015) ("a secured creditor should not reap the benefit of actions taken to preserve the secured creditor's collateral without shouldering the cost") (citation omitted); *see also In re Isaac Cohen Clothing Corp.*, 39 B.R. 199, 201 (Bankr. S.D.N.Y. 1984) (granting surcharge because lender "clearly benefited from the property being stored on the [landlord's] premises").

**B. The Landlords Are Entitled to Adequate Protection Under Sections 363(e) and 361 of the Bankruptcy Code**

20. Section 363(e) of the Bankruptcy Code guarantees adequate protection to any party with an interest in property used by a debtor during the debtor's bankruptcy proceedings who makes a request for adequate protection:

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.

11 U.S.C. § 363(e).

21. Section 363(e) is straightforward and non-discretionary. If a creditor with an "interest" in property used by the Debtors makes a request for adequate protection, then the court "shall" prohibit or condition the use of such property on the provision of adequate protection.

11 U.S.C. § 363(e); *see In re Worldcom, Inc.*, 304 B.R. 611, 618 (Bankr. S.D.N.Y. 2004); *see also In re Metromedia Fiber Network, Inc.*, 290 B.R. 487, 491 (Bankr. S.D.N.Y. 2003) ("[s]ection 363(e) is not permissive or discretionary...").



22. The U.S. Supreme Court has held that the term “interest” “is the most general term that can be employed to denote a right, claim, title, or legal share in something.” *Russello v. U.S.*, 464 U.S. 16, 21 (1983).

23. Section 363(e) is not limited to secured creditors. A landlord undeniably holds an interest in the property that it owns and leases to a debtor, as well as an interest in the lease itself, the rents due under that lease, and the proceeds of the lease. *See In re P.J. Clarke’s Rest. Corp.*, 265 B.R. 392, 404 (Bankr. S.D.N.Y. 2001) (citing several cases holding that a landlord has the right to adequate protection of its right to timely payment of post-petition rent); *see also In re Ernst Home Center, Inc.*, 209 B.R. 955, 966 (Bankr. W.D. Wash. 1997) (holding that real property lessors may request adequate protection under § 363(e) and noting 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 section 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) (holding landlord’s right to be kept current on post-petition obligations is entitled to adequate protection); *In re Ames Department Stores, Inc.*, 136 B.R. 357, 359 (Bankr. S.D.N.Y. 1992) (“[s]ection 363(e) of the Bankruptcy Code reserves for bankruptcy courts the discretion to condition the time, place and manner of [store closing] sales, thereby providing adequate safeguards to protect shopping center landlords and their other tenants, while allowing the Trustee to fulfill its fiduciary obligations”). A landlord’s interests in its lease and the premises it leases to a debtor are further evidenced by the allowance of landlords’ stub rent claims in other cases pursuant to section 503(b) of the Bankruptcy Code. *See, e.g., In re Goody’s Family Clothing Inc.*, 401 B.R. 656, 665 (D. Del. 2009) (affirming the allowance of stub rent claims under section 503(b)(1) of the Bankruptcy Code). Because they

have an interest in property being used by the Debtors and are making this request, the Landlords are entitled to receive adequate protection.

24. The plain language of section 361 of the Bankruptcy Code states that adequate protection may take one of three forms: a debtor may (i) tender an upfront cash payment or periodic cash payments, (ii) grant replacement liens, or (iii) grant other related relief (other than an administrative claim under section 503(b)(1) of the Bankruptcy Code) amounting to the indubitable equivalent of the protected party's interest in the property. Section 361(3) is also clear that adequate protection *may not* take the form of a deferred administrative claim. Under section 361 of the Bankruptcy Code, only a contemporaneous transfer of value satisfies the requirements of adequate protection.

25. The Landlords recognize that the Debtors or the DIP Lender may not be willing to make immediate payment of stub rent. Although the Landlords are willing to work with the DIP Lender to agree to an acceptable timeline that provides for payment of the stub rent in the short term, the Debtors should be required to hold funds in escrow as adequate protection for the payment of stub rent, so the Landlords are not forced to bear the risk that they may never be paid if the proceeds of the sale of the Debtors' assets do not allow for payment in full of the stub rent or these cases are or become administratively insolvent.

#### **JOINDER IN OBJECTIONS OF OTHER LANDLORDS**

26. To the extent not inconsistent with this Limited Objection, the Landlords join in the objections to the DIP Motion asserted by other landlords and contract counterparties.

#### **RESERVATION OF RIGHTS**

27. The Landlords reserve their rights to amend and/or supplement this Limited Objection and to raise any additional objections to the DIP Motion at the final hearing.

**CONCLUSION**

**WHEREFORE**, the Landlords respectfully request that the Court (i) deny the DIP Motion unless the Final DIP Order and the Budget are modified as requested herein; and (ii) grant such other and further relief as this Court deems just and proper.

Dated: March 31, 2025

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