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8 UNITED STATES BANKRUPTCY COURT
9 EASTERN DISTRICT OF CALIFORNIA
10 SACRAMENTO DIVISION

11 In re:
12 A GREENER GLOBE,
13 Debtor.

CASE NO.: 16-21900-C-11
Chapter 11

DCN: FWP-6

Date: October 25, 2016
Time: 10:30 a.m.
Courtroom: 35
501 I Street, 6th Floor
Sacramento, CA

17 **CHAPTER 11 TRUSTEE’S MOTION AUTHORIZING (1) TRUSTEE’S USE OF CASH**
18 **COLLATERAL AND (2) ADEQUATE PROTECTION PAYMENTS**

19 Russell K. Burbank, the duly appointed Chapter 11 Trustee (the “Trustee”) in the above-
20 referenced case, hereby moves the Court for entry of an order (the “Motion”): (1) authorizing the
21 Trustee to use cash collateral to pay for necessary costs related to operation of the Debtor’s real
22 property as well as expenses related to an expected sale of that property for the seven-month
23 period of October 1, 2016 through April 30, 2017; and (2) authorizing the Trustee to make
24 adequate protection payment to Western Highland Mortgage Fund I, LLC (“Western”) on its
25 senior deeds of trust as well as pay post-petition real property taxes owed to Placer County Tax
26 Collector.

27 This Motion is based on the memorandum of points and authorities below, the Declaration
28 of Russel K. Burbank in support of this Motion (“Burbank Decl.”), the pleadings and papers on

1 file in this case, and such other evidence and argument as may be submitted before or during the
2 hearing on this Motion.

3 STATUS OF CASE AND NEED FOR USE OF CASH COLLATERAL

4 The Debtor owns approximately 25.3 acres of real property located at 901 and 903
5 Galleria Blvd., Roseville, California (the "Subject Property"), that included a closed landfill
6 ("Landfill"), formerly known as the Fingers Landfill, or the Berry Street Mall Landfill. In 2002,
7 the California Regional Water Quality Control Board, Central Valley Region ("Regional Water
8 Board") brought a judicial enforcement action against the Debtor that resulted in a stipulation
9 declaring that the Debtor was responsible for complying with California Waste Discharge
10 Requirements and Cleanup and Abatement Orders.

11 On March 31, 2014, the Debtor split the Subject Property into two parcels: (a) APN 015-
12 100-062, consisting of 20.0 acres (the "Landfill Parcel") which encompasses the Landfill; and
13 (b) APN 015-100-063, consisting of 5.31 acres (the "Nursery Parcel"). The Debtor leases the
14 Nursery Parcel to Green Acres Nursery & Supply, LLC ("Green Acres") at a current lease rate of
15 \$23,500 per month ("Green Acres Rent"), which is the Debtor's only source of income. The
16 Landfill Parcel is unoccupied and securely fenced.

17 The Trustee believes he may have a potential purchase for the Subject Property on an "as-
18 is" basis free and clear of liens that will benefit secured and general unsecured creditors of the
19 estate. The Trustee requires use of cash collateral to pay for continued operations of the Debtor
20 and the Subject Property as well as a potential sale of the Subject Property.

21 In this cash collateral motion, the Trustee proposes to use the Green Acres Rent to pay
22 (i) monthly amounts owed to Western on its senior deeds of trust, (ii) a retainer to special counsel
23 of up to \$25,000 (in the amount of \$7,000 per month until the total deposited or paid to special
24 counsel is \$25,000) to assist the Trustee with the sale transaction of the Subject Property,
25 (iii) upcoming real property taxes on the Subject Property, and (iv) ongoing operational and
26 Court-required expenses of operating in a Chapter 11 case, including quarterly US Trustee fees
27 and a portion of the projected professional costs of this Chapter 11 case (after fee application
28 approvals).

RELIEF REQUESTED

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2 1. By this Motion, the Trustee requests the Court to enter an order:

3 a. Authorizing the use of cash collateral from the Green Acres Rent to pay
4 ongoing operating expenses of the Debtor’s bankruptcy estate as well as interim fees of the
5 Trustee’s special counsel through April 30, 2017, pursuant to the budget attached as Exhibit 1
6 (the “Budget”) to the Exhibit Document filed herewith and incorporated herein by this reference;

7 b. Approving the use of cash collateral through April 30, 2017, without
8 requiring adequate protection for the holders of any interests in the Green Acres Rent junior to
9 Western, because Western’s senior interests are being serviced pursuant to the Budget and the
10 Trustee proposes to pay post-petition real property taxes as those taxes come due in December
11 2016 and April 2017; and

12 c. Granting such other and further relief as the Court may deem proper.

13 **JURISDICTION**

14 2. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and
15 1334, section 363 of Title 11 of the United States Code (“Bankruptcy Code”), and Federal Rule
16 of Bankruptcy Procedure 4001. Venue is proper pursuant to 28 U.S.C. § 1409. This is a core
17 proceeding pursuant to 28 U.S.C. § 157(b)(2)(M).

18 **CASE BACKGROUND**

19 3. The Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy
20 Code on March 28, 2016 (the “Bankruptcy Case”). On June 14, 2016, the Court entered its order
21 approving the Trustee’s appointment as the Chapter 11 Trustee for the Debtor’s Bankruptcy Case
22 pursuant to the request of the United States Trustee filed on June 13, 2016.

23 4. The Debtor is a California corporation qualified to do business as a non-profit
24 public benefit corporation. It was incorporated on December 7, 1993. The corporation was
25 formed to operate recycling centers, provide educational materials and information on
26 conservation and recycling and to provide employment for physically and mentally challenged
27 individuals. Burbank Decl. ¶ 4.

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OVERVIEW OF USE OF CASH COLLATERAL

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2 5. The Debtor's primary business is leasing the Nursery Parcel to Green Acres. The
3 Trustee believes that it is in the best interests of the Debtor's estate and creditors to preserve and
4 continue Debtor's business operations while the Trustee performs his other duties as trustee,
5 including, *inter alia*, a sale of the Subject Property. The Trustee requires the use of cash
6 collateral in order to continue the Debtor's ownership and leasing operations. The Green Acres
7 Rent is the estate's only regular and consistent material source of operating income. Burbank
8 Decl. ¶¶ 7-8.

9 6. The Debtor scheduled numerous secured creditors with in interest in the Subject
10 Property and the Green Acre Rent. *See* Schedule D (Dkt. No. 1) at pp. 1-4. Specifically, based
11 on the Debtor's schedules and a preliminary title report, the Trustee believes the following
12 entities assert the following secured interests with respect to the Subject Property:¹

- 13 a. Western asserts first and second deeds of trust against the Subject Property;
- 14 b. Sherwood Sterling and James R. Walsh assert a third deed of trust against the
15 Subject Property;
- 16 c. Richard Steffan asserts a fourth deed of trust against the Subject Property;
- 17 d. Daniel Sheehan asserts a fifth deed of trust against the Landfill Parcel;²
- 18 e. Jacklyn C. Sheehan asserts a sixth deed of trust against the Landfill Parcel;
- 19 f. Regional Water Board asserts two judgment liens in seventh and eight
20 positions against the Subject Property; and
- 21 g. Placer County Tax Collector holding a statutory lien against the Subject
22 Property for outstanding real property taxes.

23 ¹ The Trustee is investigating various facts and circumstances surrounding the granting of all
24 the liens on the Subject Property, and reserves all rights with respect to such liens, including but
25 not limited to any potential actions to avoid the liens and/or claims, or to disallow such claims
pursuant to 11 U.S.C. § 502(h).

26 ² While the Debtor's Schedule D shows Jacklyn Sheehan's deed of trust having priority over
27 Daniel Sheehan's deed of trust, based on the instrument numbers of the Jacklyn Sheehan and
28 Daniel Sheehan deeds of trust, the Trustee believes that the Daniel Sheehan deed of trust was
recorded ahead of the Jacklyn Sheehan deed of trust. In addition, since the Daniel Sheehan and
Jacklyn Sheehan deeds of trust are filed only against the Landfill Parcel, the Trustee does not
believe either Daniel Sheehan or Jacklyn Sheehan hold a valid security interest in the Green
Acres Rent. Burbank Decl. ¶ 10.

1 Burbank Decl. ¶ 9. The entities listed in (a) through (f) above are collectively referred to
2 hereafter as the “Lienholders.”

3 7. Previously, the Trustee has obtained the consent of the Lienholders to pay from the
4 Green Acres Rent:

- 5 a. \$7,607.78 per month to Western on its two deeds of trust;
- 6 b. an initial payment of \$7,438.91 plus monthly installments of \$627.63 for
7 insurance;
- 8 c. \$4,664.40 to lease fencing post-petition to secure the Landfill Parcel; and
- 9 d. up to \$1,000 per month for miscellaneous and contingency expenses (not
10 including professional fees or costs).

11 Burbank Decl. ¶ 11.

12 8. The proposed Budget continues to pay monthly amounts owed to Western on its
13 deeds of trust as well as operational costs for insurance, fencing, real property taxes, U.S. Trustee
14 fees, professional fees and miscellaneous monthly expenses of up to \$1,000. *Id.* ¶ 12.

15 9. The Trustee believes he may have a potential purchase for the Subject Property on
16 an “as-is” basis free and clear of liens that will benefit secured and general unsecured creditors of
17 the estate. *Id.* ¶ 13.

18 10. Concurrently with the Motion, the Trustee is filing a motion to approve the
19 employment of Diepenbrock Elkin Gleason LLP (“Diepenbrock Elkin”) as special counsel to
20 assist the Trustee with the anticipated sale of the Subject Property (“Motion to Employ”). *Id.*
21 ¶ 14.

22 11. As set forth in more detail in the Motion to Employ, because Diepenbrock Elkin
23 does not typically handle bankruptcy matters, it required a post-petition retainer, which was
24 negotiated to be \$25,000.00 (the “Retainer Amount”), to be funded from the Green Acres Rent
25 over time at \$7,000 per month. In consideration, Diepenbrock Elkin agreed to a 10% reduction in
26 its hourly rates. In the Motion to Employ, the Trustee has requested that Diepenbrock Elkin be
27 authorized to bill the estate monthly for its services and expenses and, after approval from the
28 Trustee of a bill, to withdraw the amount of the bill from the Retainer Amount on an interim

1 basis. These interim fees and expenses, as well as any additional fees and expenses, will be
2 subject to approval by the Court in a final fee application, with any disallowed fees and expenses
3 subject to disgorgement. In this Motion, the Trustee seeks authority to pay the Retainer Amount
4 from the Green Acres Rent. *Id.* ¶ 15.

5 12. In addition to paying Diepenbrock Elkin, the Trustee budgets \$8,000 for
6 miscellaneous sale costs, if needed, at up to \$2,000 per month for October 2016 through January
7 2017. *Id.* ¶ 16.

8 DISCUSSION

9 Bankruptcy Code section 363(c)(2) provides that a debtor in possession may not use, sell,
10 or lease cash collateral unless “(A) each entity that has an interest in such cash collateral
11 consents; or (B) the court, after notice and a hearing, authorizes such use, sale, or lease in
12 accordance with the provisions of this section.” 11 U.S.C. §363(c)(2).

13 Here, the Trustee expects that the Lienholders will continue to consent to the use of cash
14 collateral in accordance with the proposed Budget. However, in the event that there is no
15 consent, approval is still warranted for the following reasons:

16 a. The proposed use of cash collateral is necessary to preserve the going concern
17 value of the Subject Property. Use of cash collateral is necessary to manage and operate the
18 Debtor’s business as well as provide for a potential sale of the Subject Property which will benefit
19 the Debtor’s estate. Without cash to operate, the Trustee would not be able to pay for insurance,
20 leased fencing and other expenses necessary to operate and maintain the Debtor’s assets and
21 would lose these necessary items. The costs and expenses associated with operating the Debtor’s
22 business, as well as allowing a potential sale of the Subject Property, are necessary to preserve the
23 value of the Debtor’s property and satisfy the obligations of the estate. Thus, the Trustee paying
24 the expenses set forth in the proposed Budget is necessary for the successful operation of the
25 estate.

26 b. The proposed payments to Western as well as payment of post-petition real estate
27 taxes in December 2016 and April 2017 will provide adequate protection to all Lienholders by
28 protecting junior Lienholders from further erosion of their interests.

1 c. The various line items on the proposed Budget, such as for property insurance,
2 also will provide adequate protection of the Lienholders in their collateral.

3 WHEREFORE, for the foregoing reasons, the Trustee requests the Court enter an order
4 granting the relief requested herein.

5 Dated: September 27, 2016

FELDERSTEIN FITZGERALD
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7 By: /s/ Thomas A. Willoughby
8 THOMAS A. WILLOUGHBY
9 Attorneys for Russell K. Burbank,
Chapter 11 Trustee

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