UNITED STATES BANKRUPTCY COURT
DISTRICT OF PUERTO RICO

In Re:	Case No. 13-04867 (ESL)
BUILDERS GROUP & DEVELOPMENT CORP.,	Chapter 11
Debtor(s).	

OPPOSITION TO DEBTOR'S MOTION UNDER 11 U.S.C. §506(c) TO SURCHARGE COLLATERAL (DOCKET NO. 131)

TO THE HONORABLE ENRIQUE S. LAMOUTTE,
CHIEF UNITED STATES BANKRUPTCY JUDGE:

COMES NOW CPG/GS PR NPL, LLC ("CPG/GS" or "Secured Creditor"), secured and judgment creditor herein, by and through its undersigned counsel, and respectfully submits its opposition (the "Opposition") to Builders Group & Development, Corp.'s (the "Debtor") "Motion under 11 U.S.C. §506(c) to Surcharge Collateral" (Dkt. No. 131, or the "Surcharge Motion"):

1. Following the court's denial of authorization to use CPG/GS' cash collateral on October 23, 2013 (Dkt. 108, or "Opinion and Order"), Debtor now requests a surcharge upon the same cash, i.e., rents (the "Rents" or "Cash Collateral") generated by the Cupey Professional Mall (the "Shopping Center" or "Mall"). The Surcharge Motion lists various monthly items, which are typical of budgets normally included in a cash collateral stipulation at the commencement of a Chapter 11 case of a shopping center similar to the Mall. In this case, the Debtor opted not to seek the secured creditor's consent to use cash collateral; instead, Debtor simply used it, defying not only CPG/GS' warnings, but section 363 of Bankruptcy Code (the "Code") as well. Debtor now faces the adverse consequences of its strategic election. The period for alteration or amendment of the Opinion and Order expired on November 6, 2013, more than a week before the Surcharge Motion, and the proposed use of the same cash, and the arguments

therefore, were readily available to the Debtor, and Debtor was well aware of them, prior to the Opinion and Order.

2. Debtor advances an additional theory to access the cash, not previously developed, that is, that 11 U.S.C. §506(c) allows a monthly charge of $46,458.79 against the Cash Collateral for costs and expenses which are allegedly (1) necessary; (2) reasonable; and (3) incurred for the direct benefit of the secured creditor, citing *In re National Real Estate Ltd. Partnership II*, 104 B.R. 968, 972 (Bankr. E.D. Wisc. 1989). CPG/GS agrees that the Debtor has the burden to show the expenditures are reasonable and necessary, but the Debtor also has the burden to show that each expense was incurred primarily to protect or preserve CPG/GS' collateral (in particular, CPG/GS' Cash Collateral); and to show a direct and quantifiable benefit to the Cash Collateral therein. *General Electric Credit Corp. v. Peltz, (In re Flagstaff Foodervice Corp.*, 762 F. 2d 10 (2d Cir. 1985); *In re Cascade Hydraulics Utilities Svcs. Inc*,, 815 F. 2d 546,548 (9th Cir. 1987); *In re K&K Lakeland Inc.*, 128 F. 3d 203, 208 (4th Cir. 1997).

3. Debtor alleges that "[Debtor's] President Jorge Rios ("Ríos") has invested funds from other business enterprises controlled by him and made personal advances/capital contributions to cover the expenses of the Mall, which actions have primarily benefited [CPG/GS] as it holds the first lien and primary security over the real estate and business". Dkt. No. 131 at 3. The assertion by Debtor is incorrect for the following reasons:

(a) The Monthly Operating Reports (MOR) on file show that Debtor allegedly received only $14,866.45 from Rios as a purported "loan" during the first 18 days of the chapter 11 administration (Dkt. No. 48 at 3)--- a loan clearly outside the ordinary course of business, and for which no notice or authorization was obtained or attempted either through sections 363 or 363 of

the Bankruptcy Code. The total disbursements reported through October 31, 2013 are $139,777.21 (Dkt. 138 at 2), that is, almost ten times greater than Mr. Rios' supposed cash transfer, for which reason alone it cannot be inferred or shown that Mr. Rios' funds benefited CPG/GS' collateral at all.

(b) Debtor cannot show how even a single dollar from Rios is connected to any of the expenses cited by the Surcharge Motion as directed to preserve and protect any of CPG/GS' collateral (much less the Cash Collateral).

(c) The fact that CPG/GS holds a first lien over the Shopping Center and the Rents is not in and on itself indicative that CPG/GS is receiving any "primary benefit" for purposes of section 506(c). See, e.g., *In re Flagstaff Foodervice Corp, supra.*

(d) The substantial majority of cases hold that, to support a section 506(c) surcharge, the expenditures must provide a direct benefit to the secured creditor. *In re C.S. Assocs.*, 29 F.3d 903, 906 (3d Cir.1994); *In re Towne Inc*., 2013 WL 4566061 (3d Cir. Aug. 29, 2013) at 4. An incidental benefit to the collateral is not sufficient for section 506(c)[1].

4. The expenses listed in the Surcharge Motion, had they been directed to the real property, with the exception of salaries for management and maintenance and repairs ($2,400+2,000=$4,400), could have plausibly been considered both necessary and reasonable had the corresponding services and materials actually been performed.

[1] "The key element for recovery under section 506(c) is whether the services conferred a direct benefit on the Bank. The secured creditor cannot be required to bear expenses which benefit the estate under the theory that the expenses were incurred to preserve the assets of the estate as a whole. Section 506(c) does not convert ordinary administrative

In re Evanston Beauty Supply Inc., 136 B.R. 171, 177 (Bankr. N.D. Ill. 1992) (Citations omitted).

5. According to the facts of this case, as presented in previous contested proceedings, it is questionable whether the services or materials listed in the Surcharge Motion have even been provided. Notwithstanding this, even assuming *arguendo* that they had been provided, CPG/GS does not agree that they have been incurred for the direct benefit of the secured creditor, much less the primary benefit of the secured creditor. Rather, they advantage primarily (indeed, only) a delay in CPG/GS' realization upon its collateral. Moreover, even if we were to consider that CPG/GS had somehow acquiesced to Debtor's chapter 11 administration in a manner similar to that in *In re Flagstaff Foodservice Corp*.,[2] here, as in *Flagstaff*, "there is no suggestion…that the reorganization was undertaken exclusively or even primarily at the secured creditor's behest or for the secured creditor's benefit." 4 Collier, Bankrtkupcy, ¶506.05[6][a] (16th ed. 2013) at 506-121.

6. Even more seriously, none of the expenses benefitted the secured creditor's post-petition interest in the Rents. As emphasized previously at various junctures in this case, the Debtor has not provided adequate protection to CPG/GS for its two separate interests; namely, its mortgage on the real property and its "**security interest in the post-petition rents. Thus, Builders Group may not use CPG's cash collateral (the post-petition rents)**." Dkt. 108 at 41-42 (Emphasis Added).

7. As distinguished from the real property, the Rents can only be adequately protected by a full cash deposit or full equivalent----dollar for dollar. While there is a recent (but untimely) proposal to provide a limited cash deposit, the amount offered was clearly insufficient. See, Dkt. 142, and CPG/GS' response thereto.

[2] *General Electric Credit Corp. v. Levin & Weintraub*, 739 F. 2d 73 (2d Cir. 1984); *General Electric Credit Corp. v. Peltz*, 762 F. 2d 10 2d Cir. 1985).

8. Without specific identification of the source of the dollars to the specific disbursement proposed, it is obvious that Debtor intends to use the Cash Collateral, which use has already been prohibited by the Court. In fact, Debtor has not been able to match dollars from sources other than CPG/GS' Cash Collateral to each specific disbursement proposed in the Surcharge Motion.

9. Moreover, CPG/GS' collateral cannot be surcharged where, as here, the case and proceeding thus far was, and is, filed and conducted against CPG/GS' will. This case contrasts markedly with *U.S. v. Boatmen's First National Bank*, 5 F. 3d 1157, 1160 (8th Cir. 1993) where the secured creditor "agreed to the post-petition preservation of the debtor's business with an eye toward a better return on the collateral."

10. The Surcharge Motion at 4 argues that "Section 506(c) does not distinguish between expense that the estate paid, and expenses that the estate incurred but have gone unpaid". See, Dkt. 131. The citation to *In re Ben Franklin Retail Stores Inc*., 210 B.R. 315,317 (Bank. N.D. Ill. 1997) is not controlling, or even precedential, for the Court in that case denied application of section 506(c) because it would have favored distribution to an administrative creditor in excess of the dividend payable to all administrative creditors of the same class.

11. More pertinent to the issue, while not discussed in the Surcharge Motion, is Judge Deasy's analysis in *In re Felt Mfg. Co*., 402 B.R. 502 (Bankr. D.N.H. 2009), where Judge Deasy contends that the conclusion in *In re K &L Lakeland, Inc*. 128 F. 3d 203 (4th Cir. 1997) requiring a paid expense to support a section 506(c) application is wrong. Yet, as explained in *K&L Lakeland* at 207, common law required an expenditure of money as one requirement before surcharge could be imposed, and the legislative history of the Bankruptcy Code incorporated that

principle. While Judge Deasy sits in our Circuit (and indeed sometimes in this court) his decision in *Felt Mfg. Co*. should not override what a U.S. Court of Appeals has clearly held.[3]

12. The Surcharge Motion seeks a surcharge on a monthly basis, both past and future. No precedent is cited for future expenses' inclusion in a section 506(c) surcharge, and none should be permitted.

13. Moreover the expenses to date have not been charged nor incurred against what would otherwise be available to the priority and general creditors, because: (a) Mr. Rios' cash transfer to the Debtor has not been approved as a liability of the estate; (b) CPG/GS' liens fully encumber the assets of the estate (excepting potential avoidance action proceeds by a future trustee). For these reasons also, the Surcharge Motion should be denied.

14. In the alternative, CPG/GS suggests that any consideration of surcharge is premature. Most if not virtually all of the reported cases on section 506(c) arise at or after the time the collateral is disposed of by the estate representative, when the estate representative (or movant claiming authority on his behalf) seeks to surcharge the proceeds with the expenses of preservation and disposition. See. e.g., *In re IBI Security Service, Inc* , 133 F. 3d 205 (7th Cir. 1998) (attempt to surcharge litigation proceeds already collected); *In re Evanston Beauty Supply Inc, supra* (attempt to surcharge sales proceeds already collected)*; In re Felt Manufacturing Inc., supra.* (post-confirmation trustee sought surcharge of expenses incurred in the first weeks of pre-confirmation Chapter 11 administration).

15. Finally, while we agree that avoiding a windfall to secured creditors is a legitimate policy supporting section 506(c), and indeed appears to be primary reason for said section, here however, there is no windfall.

[3] Moreover, the Surcharge Motion quotes Judge Deasy's recitation in pertinent part, of "Section 506 (c) …[applies] where the trustee (or debtor-in-possession) *expends funds* to preserve or dispose of property securing the debt." Surcharge Motion at 5 (emphasis added).

16. No benefit, *a fortiori* no windfall to CPG/GS may be inferred where, as here, the value of CPG/GS collateral has diminished substantially during the chapter 11 administration.

WHEREFORE, for the above-stated reasons, CPG/GS respectfully requests that the Surcharge Motion (Dkt. 131) be denied.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 6h day of December, 2013.

I HEREBY CERTIFY THAT on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participants in this case.

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