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Lloyds TSB Bank plc, now known as Lloyds Bank plc

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re

Domum Locis LLC,

Debtor.

Case No. 2:14-bk-23301-RK

(A) LTSB'S OPPOSITION TO DEBTOR'S "MOTION FOR THE ENTRY OF AN ORDER: (I) AUTHORIZING DEBTOR TO UTILIZE CASH COLLATERAL PURSUANT TO 11 U.S.C. § 363; AND (II) GRANTING ADEQUATE PROTECTION TO PRE-PETITION SECURED PARTIES PURSUANT TO 11 U.S.C. §§ 361 AND 363"; AND (B) LTSB'S OPPOSITION TO DEBTOR'S "MOTION TO APPROVE RESIDENTIAL LEASE AGREEMENTS"

Hearing Date: August 5, 2014
Hearing Time: 2:30 p.m
Place: Courtroom 1675
255 E. Temple St.
Los Angeles, CA 90012

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Lloyds TSB Bank plc, now known as Lloyds Bank plc ("LTSB" or "Lender"), secured lender to Michael Kilroy ("Kilroy"), the sole member of the Debtor, hereby submits this Opposition (the "Opposition") to (1) the Debtors' *Notice of Motion and Motion for the Entry of an Order: (I) Authorizing Debtor to Utilize Cash Collateral Pursuant to 11 U.S.C. § 363; and (II) Granting Adequate Protection to Pre-Petition Secured Parties Pursuant to 11 U.S.C. §§ 361 and 363* [Docket No. 3] (the "Cash Collateral Motion") and (2) the Debtor's *Notice of Motion and Motion to Approve Residential Lease Agreements* [Docket No. 2] (the "Lease Motion"),[1] as follows:

I. INTRODUCTION

Pending before this Court are: (1) Debtor's Cash Collateral Motion, (2) Debtor's Lease Motion, and (3) LTSB's Motion for (A) Relief from the Automatic Stay Under 11 U.S.C. § 362 (Real Property) and (B) Relief from Turnover Under 11 U.S.C. § 543 by Prepetition Receiver or Other Custodian [Docket No. 11] (the "Stay Relief Motion"). Matters (1) and (2) have been set for hearing on Tuesday, August 5, 2014, at 2:30 p.m., and a motion to shorten the notice period on matter (3) [Docket No. 12] is currently pending. In support of this Opposition, LTSB relies upon these papers, the Stay Relief Motion, the Memorandum of Points and Authorities and Declarations attached thereto, and the Record in this Chapter 11 case.

The Debtor's Cash Collateral Motion and Lease Motion must be denied. Both Motions are entirely premised on the Debtor's erroneous assertion that the North Flores Property, the Strand Property, and the Vista Chino Property are assets of the Debtor's estate under Section 541 of the Bankruptcy Code. In reality, the Debtor has no legal or equitable interests in the North Flores, the Strand, or the Vista Chino properties (collectively the "Kilroy Properties") because the Debtor's sole member, Kilroy, unlawfully transferred them to the Debtor in direct violation of state court receivership orders, as described in greater detail in the Stay Relief Motion and below.

[1] Unless otherwise indicated, capitalized terms used herein shall have the same meaning as used in LTSB's Stay Relief Motion [Doc. No. 11].

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In late 2006 and early 2007, Kilroy borrowed more than $23 million from LTSB to invest in California real estate. Initially, more than $9 million of those borrowings was secured by the Kilroy Properties. LTSB's Memorandum of Points and Authorities in Support of the Stay Relief Motion for (A) Relief from the Automatic Stay Under 11 U.S.C. § 362 (Real Property) and (B) Relief from the Turnover Under 11 U.S.C. § 543 by Prepetition Receiver or Other Custodian [Docket No. 011-1] ("Stay Relief Memorandum") at 4-5. In addition to numerous other defaults, Kilroy made no interest payments on his interest-only loans with LTSB after January 2009 and failed to repay the principal when due. Id. at 5-6. Kilroy's actions forced LTSB to seek judicial recourse in Los Angeles County and Riverside County Superior Courts.[2] Id. at 7. Both Superior Courts entered orders ("the Receivership Orders") appointing Robert C. Warren III ("the Receiver") to serve as receiver for the Kilroy properties and requiring Kilroy to turn the Kilroy Properties over to the Receiver.[3] Id. Moreover, the Receivership Orders prohibited Kilroy from committing certain actions in respect of the Kilroy Properties. For example, the Los Angeles County Receivership Order expressly prohibited Kilroy from "committing or permitting any waste on the property or any act on the property in violation of law," "diverting or using the rents" from the subject properties, and "selling, transferring, disposing, encumbering or concealing the property without a prior court order," among other things. Id. at 9.

Kilroy violated the Receivership Orders and Loan and Security Agreements by: (i) residing in a unit at the North Flores Property rent-free from December 2011 to present; (ii) forming the Debtor, a shell company in which Kilroy is the sole member, on June 13, 2012,

[2] Throughout its Motions, the Debtor characterizes the loans Kilroy took from LTSB, LTSB's purported actions in respect of those loans, the state court litigation in Los Angeles and Riverside Counties between LTSB and Kilroy/Domum Locis LLC, and the "[n]ecessity of [the] Debtor's Chapter 11 Case." Likewise, the Debtor also makes certain generalizations regarding class action lawsuits involving LTSB from which Kilroy opted out. LTSB disagrees with Debtor's characterizations and generalizations, many of which are irrelevant to this proceeding.

[3] Debtor's Cash Collateral Motion attempts to mislead this Court by repeatedly referring to the Receiver as "*Lloyds'* Receiver" (emphasis added). It is axiomatic that "[a] receiver . . . is an officer of the court, installed to deal with property which is the subject of litigation in order to preserve it for disposition in accord with the final judgment." Shannon v. Super. Ct. (1992) 217 Cal. App. 3d 986, 992; see also 6 Witkin, Cal. Procedure (5th ed. 2008) Provisional Remedies, § 419 ("A receiver is a court officer or representative appointed to take over the control and management of property that is the subject of litigation before the court, to preserve the property, and ultimately to dispose of it according to the final judgment."). To carry out this purpose, a receiver has the power "to take and keep possession of the property, to receive rents, collect debts, compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the Court may authorize." Cal. Code Civ. Proc. § 568.

and transferring the North Flores and Strand properties to it on June 15, 2012; and (iii) recording, without LTSB's consent, a Second Deed of Trust against The Strand Property on November 27, 2013, to secure a $700,000 loan from Jack Cameron. Id. at 8. Kilroy took each of those actions without obtaining permission from the Court in the Los Angeles or the Riverside Actions for his transfers to the Debtor, nor did he obtain (or even seek) LTSB's consent to them. Id. at 9.

In light of the foregoing, on June 4, 2014, LTSB requested that the Receiver order Kilroy to vacate the North Flores Property, and immediately deed the North Flores and Strand properties back to himself. Id. Kilroy baldly objected, indicating that he would not comply with such requests. Id. Accordingly, on June 11, 2014, the Receiver was forced to file a Motion for Appointment of Counsel and Instructions, which was set for hearing on July 14, 2014. Id. One business day before the hearing, the Debtor filed for bankruptcy protection in an effort to divest the Superior Court of Los Angeles County of its jurisdiction to remedy Kilroy's misdeeds.[4] Indeed, at the July 14 hearing on the Receiver's Motion, the Court issued an order expressly finding that Kilroy "***transferred title to Domum Locis, LLC in violation of this court order appointing a receiver and in violation of his trust deed and mortgage provisions and is continuing to occupy also in violation of this court's order.***" Id. (quotations omitted). The Court further instructed that, "***if the bankruptcy court lift its stay re the LLC bankruptcy, in keeping with this Court's findings, and permits this court's receiver to remain in possession, the receiver is then to consider an OSC re contempt or other options, including an immediate motion to vacate the transfer of title to the LLC . . . .***"[5] Id. (quotations omitted).

There can be no dispute that Kilroy has engaged in bad faith manipulation of his property holdings that are currently subject to the Receivership Orders. Moreover, Kilroy has previously demonstrated serious mismanagement of the Kilroy Properties. Most plainly, Kilroy consistently

[4] Cal. Civ. Proc. Code § 1209(a)(5) ("Disobedience of any lawful judgment, order or process of the court" constitutes an act of contempt); In re Morello, 121 Cal.App. 480, 485 (1932) (interference with receiver's possession is punishable as contempt).

[5] As noted in the Stay Relief Motion, Kilroy also violated the Riverside Receivership Order by transferring the Vista Chino property to Debtor on June 15, 2012, without the court's approval or LTSB's consent. Stay Relief Memorandum at 9-10. However, before LTSB brought Kilroy's misconduct to the attention of the Riverside County Superior Court, the Debtor filed for bankruptcy protection. Id.

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breached the loan agreements with LTSB that are secured by the Kilroy Properties, id. at 5-6, and also accrued significant delinquencies on property taxes—$355,000, including penalties—by the time the Receiver was appointed to manage the Kilroy Properties. Id. at 6. In fact, Kilroy's delinquency forced LTSB to advance funds to allow the Receiver to establish five-year tax plans with Los Angeles and Riverside Counties to avoid impending tax sales of two of the Kilroy Properties. Id. at 7-8.

As a result, despite the Debtor's claim that the Kilroy Properties are *its* sole assets, LTSB has clearly proven in the Stay Relief Motion (and to the satisfaction of the Los Angeles Superior Court) that **Kilroy is the true owner** of the Kilroy Properties and conversely, that the Kilroy Properties **are not property of the Debtor's estate**. See, e.g., id. at 8-9. As a result, the Debtor should not be permitted to (1) use the cash collateral generated by the Kilroy Properties nor (2) enter into leases or otherwise use the Kilroy Properties for its own benefit.

II. ARGUMENT

A. The Debtor's Request to Use "Cash Collateral" Should be Denied.

1. *The Kilroy Properties and Their Income are Not Estate Property*.

It is clear from the facts set forth herein and in the Stay Relief Motion, which facts are incorporated herein, that the Kilroy Properties are not rightfully property of the Debtor's estate, and as a result, the Debtor should be denied the authority to seek to use the cash collateral generated by the Kilroy Properties.

Section 541(a)(1) states clearly:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, **all legal or equitable interests of the debtor in property** as of the commencement of the case.

11 U.S.C. § 541(a)(1) (emphasis added).

Section 541 provides a "framework for providing the scope of the debtor's estate and what property will be included in the estate, it does not provide any rules for determining whether the

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debtor has an interest in property in the first place." 16 Collier on Bankruptcy ¶541.03 (16th ed. 2013). Such determinations regarding the interest in property is to be determined by **state law** absent a showing of a federal interest. See Butner v. U.S., 440 U.S. 48, 54-55 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law.") (emphasis added).

As set forth above and described in the Stay Relief Motion, the Los Angeles Superior Court has already made its finding clear that Kilroy is the true owner of the Strand Property and the North Flores Property, and that Kilroy's transfer of those properties to Domum Locis was in violation of the court's Receivership Order and Kilroy's Loan and Security Documents. All parties, including the Debtor, Kilroy, LTSB, and the Los Angeles Superior Court know that Kilroy and the Debtor are using this shell entity and its bankruptcy proceeding in a transparent attempt to defraud LTSB. The Debtor and Kilroy also know that the Receivership Orders and the Loan and Security documents prevented the transfer of any of the Kilroy properties to the Debtor.

To permit the Debtor to use the cash generated by the Kilroy Properties would encourage the fraudulent and obstructionist behavior of Kilroy, to the great detriment of LTSB.

2. *The Lender is Not Adequately Protected.*

In a motion requesting the use of cash collateral, "[t]he Debtor has the burden of proof on the issue of adequate protection." Wilmington Trust Co. v. AMR Corp. (In re AMR Corp.), 490 B.R. 470, 477 (Bankr. S.D.N.Y. 2013); see also In re Energy Partners Ltd., 409 B.R. 211, 235-236 (Bankr. S.D. Tex. 2009) ("The parties requesting court approval to use cash collateral have the burden to prove there is adequate protection for the entities that have an interest in the cash collateral.") (citations omitted). In this case, the Debtor failed to meet its burden, and LTSB will not be adequately protected by the Debtor's proposal.

First, the Debtor argues that it must have use of cash collateral in order to maintain and operate its property.[6] Cash Collateral Motion at 10. Because the property in question is not actually estate property, the Debtor has no need to access funds for that purported purpose. In

[6] LTSB is still reviewing the Debtor's proposed budget, and reserves all rights to challenge the budget and the income and expenses described therein. Additionally, LTSB disputes the payment of any funds to Jack Cameron on account of his alleged second lien on the Strand Property.

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fact, the Receiver that has been in place since December 2011 has been and continues to be capable of maintaining and operating the Kilroy Properties, Stay Relief Memorandum at 14, and LTSB certainly desires for the Receiver to continue to do so.

Second, even if the Debtor were the rightful owner of the Kilroy Properties—which it is not—the Court should deny its motion because: (1) its (*i.e.*, Kilroy's[7]) promise to make any payments to manage the property rings entirely hollow given Kilroy's past behavior; (2) the Debtor's budget is insufficient to cover the Kilroy Properties' management costs; and (3) Kilroy's offer to "make quarterly interest payments in the amount of $40,492" does nothing to protect against the diminution in value of LTSB's collateral.[8]

"The Bankruptcy Code requires a debtor to provide a secured lender with adequate protection against a diminution in value of the secured lender's collateral …." Official Comm. of Unsecured Creditors v. UMP Bank, NIA. (In re Capital), 501 B.R. 549, 589 (Bankr. S.D.N.Y 2013). As the Debtor notes, whether a payment constitutes adequate protection is a factual inquiry. Cash Collateral Motion at 13; In re Helena Christian Sch., Inc., 2013 Bankr. LEXIS 3851, at *15 (Bankr. D. Mont. Sept. 16, 2013). "Adequate protection under the Bankruptcy Reform Act … is protection against unreasonable risk …." In re Elliott Leases Cars, Inc., 20 B.R. 893, 896 (Bankr. D.R.I. 1982).

Here, by allowing Kilroy to utilize cash collateral, the Court would be subjecting LTSB to considerable risk of the diminution in value of its collateral. Indeed, Kilroy's past actions demonstrate his complete disregard for monies owed to LTSB and Los Angeles and Riverside Counties related to the Kilroy Properties: he ceased making loan payments in early 2009, and he allowed significant unpaid property taxes to accrue between 2009 and 2010 and present. Thus,

[7] Because Kilroy is the sole member of the Debtor, this Court should view him and the Debtor as the same entity. See Stay Relief Memorandum at 2.

[8] The Debtor asserts in the Cash Collateral Motion that LTSB is adequately protected by a ten to twenty percent (10-20%) equity cushion because the "current appraised value" of the Kilroy Properties is $14,470,000. Cash Collateral Motion at 14. But that phony assertion is premised on "current appraised values" that the Debtor acknowledges were actually obtained in the fall of 2009—almost five full years ago! Id. at 8-9. Even if there were an equity cushion here, "[a]n equity cushion does not always respond to or answer fully the whole range of risks to the value of the creditor's encumbrances." Principal Mut. Life Ins. Co. v. Atrium Dev. Co. (In re Atrium Dev. Co.), 159 B.R. 464, 471 (Bankr. E.D. Va. 1993).

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Kilroy's self-serving claims regarding the Debtor's plans to now make payments to satisfy LTSB's need for adequate collateral should be ignored.

Additionally, the Debtor's proposed budget is fanciful. Where, as here, a proposed budget fails to present reasonable calculations, the Court should find that LTSB's cash collateral is not adequately protected. See, e.g., In re Real Am., Inc., 2012 Bankr. LEXIS 2730, at *4 (Bankr. N.D. Ohio June 14, 2012) ("For these reasons, and as otherwise stated by the court at the hearings … the court finds that Debtor has failed to show a reasonable probability that its revenues will be sufficient such that the Bank's interest in its cash collateral can be adequately protected based on the high degree of unreliability with respect to 25% of the revenues in the amended budget presented."); Lei Lei Wang Ekvall & Evan D. Smily, Bankruptcy for Business 97 (2007) ("[T]he cash collateral budget[] has to be supported by competent evidence that it is reasonable, i.e., supportable by historical performance or sound explanations if the projections deviate substantially from historical data.").

While the Debtor makes grand gestures about the payments it is now able to collect from Kilroy and pay to LTSB (despite Kilroy having chosen, for years, to be in default of his payment obligations to LTSB and the tax authorities in Riverside and Los Angeles Counties), the Debtor's own budget attached to the Cash Collateral Motion reflects that, without the additional proposed lease payments for which permission is sought in the Lease Motion (and to which LTSB responds below), the Debtor does not have sufficient funds to make these adequate protection payments to LTSB. In fact, the Debtor is a mere cipher, with no real operations at all. It was created by Kilroy as a shell company on June 13, 2012, for the sole purpose of receiving the Kilroy Properties that were wrongfully transferred away from the control of the court-appointed Receiver and in violation of the Receivership Orders and Kilroy's Loan and Security Documents. Without the assumed lease payments, the Debtor's own calculations show that it would have net operating income of only approximately $12,312 per month, which would not provide sufficient funds to make quarterly payments of $40,492 to LTSB.

Even assuming *arguendo* that the Debtor is entitled to the additional lease revenue from the assumed leases, which it is not, the Debtor's budget is still insufficient. Indeed, the Debtor's

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calculation fails to consider the costs and expenses of operating this case in bankruptcy, including attorney fees and U.S. Trustee fees, and the substantial tax payments that are **required to avoid tax foreclosure**. While the Debtor's budget includes some tax payments, it wholly ignores the more than $110,000 owed to Riverside and Los Angeles Counties in April 2015 and similar amounts due annually thereafter in each of the 5 years of the Receiver-brokered tax plans (necessitated by Kilroy failing to make property tax payments when due while he was in control of the Kilroy Properties). Declaration of Robert C. Warren, III in Support of Support of Stay Relief Motion [Docket No. 011-4] at ¶ 22; see also id. at ¶ 22 (as the Receiver declares, under current operations, there is insufficient funding in the Kilroy Properties to pay outstanding taxes). Without this payment, Riverside and Los Angeles Counties will foreclose on the Kilroy Properties, significantly harming LTSB's collateral. Id.

Finally, Kilroy's offer to "make quarterly interest payments in the amount of $40,492" does nothing to protect the diminution in value of LTSB's collateral. Adequate protection payments are designed to protect the secured creditor from the diminution in value of its collateral at the debtor's hands. The Debtor has not offered any support to show that this spurious promise of an interest payment (which it cannot afford in any event) is sufficient to protect LTSB from a diminution in value.

Because of the foregoing, the Debtor has failed to show that LTSB will be adequately protected if the Debtor is allowed to use of Cash Collateral. Moreover, the Debtor has submitted no evidence indicating that LTSB would be better protected if the Debtor is permitted to use cash collateral rather than allowing the Receiver to continue to manage the Kilroy Properties, as has been the *status quo* pursuant to the Receivership Orders for over two years. To the contrary, all of the evidence is that the Receiver—and not the Debtor/Kilroy—is the competent, professional property manager in this case

B. The Debtor's Lease Motion Should Be Denied.

The Court should not permit the Debtor to enter into the Lease Agreements with Kilroy because the Kilroy Properties are not property of the estate and the Debtor has failed to meet its

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burden by demonstrating how such an insider transaction is entirely fair, not in bad faith, and will avoid the potential for abuse.

The Debtor's Lease Motion asserts that it should be permitted to enter into various lease agreements with Kilroy—an insider and its sole managing member. But the Lease Motion is premised on the mistaken assumption that the North Flores Property and the Vista Chino Property are actually assets of the Debtor's estate. As demonstrated above and in the Stay Relief Motion, the Kilroy Properties are not property of the Debtor's estate. And more than just being an insider, Kilroy is the schemer who created the Debtor in order to unlawfully transfer the Kilroy Properties to the Debtor. This Court should not permit the Debtor to avail itself of provisions of the Bankruptcy Code designed to address a Debtor's use of estate property, and in so doing, utilize for its own benefit the non-estate assets that are the Kilroy Properties.

Even if the court were to analyze the merits of the Debtor's case beyond its lack of ownership of the Kilroy Properties, the Debtor fails to properly address the standard this Court should use when determining whether it should permit a non-ordinary course, insider transaction affecting estate property. The Debtor relies on the business judgment rule but does not adequately state the heightened scrutiny the Court should apply to this insider transaction. In re Blixseth, 2010 Bankr. LEXIS 585 (Bankr. D. Mont. Feb. 23, 2010) (when engaging in a transaction with an insider, applying a heightened scrutiny is necessary—"the business judgment rule simply does not apply."); In re Biderman Indus. U.S.A., 203 B.R. 547, 551 (Bankr. S.D.N.Y. 1997) (insider transactions are not per se prohibited, "but [they] are necessarily subjected to heightened scrutiny because they are rife with the possibility of abuse."). "In applying heightened scrutiny, courts are concerned with the integrity and entire fairness of the transaction at issue, typically examining whether the process and price of a proposed transaction not only

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appear fair but are fair and whether fiduciary duties were properly taken into consideration." In re Innkeepers USA Trust, 442 B.R. 227, 231 (Bankr. S.D.N.Y. 2010).

Here, the Debtor failed to indicate how it intends to cure the fact that these proposed Lease Agreement transactions are rife with the possibility of abuse. Kilroy claims to now be willing to pay a seemingly reasonable monthly rent plus provide money to cover future property tax payments. However, as previously indicated, Kilroy has to date shown nothing but bad faith and bad business judgment with respect to the Kilroy Properties. As more fully described in LTSB's Stay Relief Motion, Kilroy never made principal payments to LTSB, defaulted on interest payments in 2009, defaulted on tax payments resulting in significant penalties, lived in the properties, rent-free, in violation of the Loan and Security Documents and Receivership Orders, and transferred the Kilroy Properties to the Debtor in direct violation of the Loan and Security Documents and Receivership Orders. LTSB seriously questions Kilroy's veracity and credibility in stating that he will now make rent and tax payments as part of the Lease Agreements. LTSB's Stay Relief Motion demonstrates the various ways in which the Debtor and Kilroy have acted in bad faith and there is no credible reason to believe that pattern is likely to change.

Additionally, the proposed leases are not fair and do not take into account fiduciary duties. See Id. There are no protections to allow for the enforcement of the lease terms because the agreements contemplate that Kilroy, the would-be tenant will be his own landlord as the sole member of Debtor, the would-be landlord. By way of example, Section 3 of the leases attached to the Lease Motion as Exhibits B and C require Kilroy to make payments to the Debtor, or otherwise "as directed in writing by the [Debtor]." This language allows the Debtor to redirect funds to a different source, including Kilroy or any of his other shell companies. While this may contravene the Debtor's obligation to its creditors, it would not be the first time Kilroy has

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violated a court's order and the law. In the view of LTSB, it is inherently improbable that the Debtor (directed by Kilroy) would ever enforce the Lease Agreements' terms, pursue Kilroy for breaches of the Lease Agreements, or attempt to evict him for violating any provisions of the Lease Agreements. Moreover, as a tenant in properties that are the subject of foreclosure proceedings, Kilroy may have additional protections under landlord/tenant law[9]—an unacceptable and patently unfair result, and one that was specifically and expressly excluded from the loan transactions in the first instance. See Exhibits A, E, I to Motion for Stay Relief at 2 (Loan Agreements between Kilroy and LTSB wherein Kilroy agrees that "[t]he premises are residential premises and will not be occupied by the Borrower or his family"); see also Cash Collateral Motion at 3 (Kilroy admits to signing Regulation Z letters, which are intended to ensure that the borrower understands that the properties are for investment purposes as opposed to residential living).

Rather than relying on the applicable heightened scrutiny standard, the Debtor has cobbled together its own hybrid standard of "good business justification" and "best interest of creditors." Lease Motion at 6. Both the Riverside and Los Angeles County Superior Courts have already removed the Kilroy Properties from Kilroy's custody and control—how can it be in the best interest of creditors to allow this insider transaction that would reverse that decision, allow Kilroy to lease these premises, and effectively act as his own landlord?

Kilroy's continuing willingness to breach contractual obligations and violate court orders is in fact demonstrated by the Lease Motion in which Kilroy asks this Court to approve his violation and breach of the Loan and Security Documents, which prohibit Kilroy from residing in any of the Kilroy Properties—all just to allow Kilroy to reside in the properties. Not only is this

[9] See Protecting Tenants at Foreclosure Act of 2009, 12 USC 5201 note [Public Law 111-22 ; 123 Stat. 1660].

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not a "good business justification," the court is not permitted to grant such relief. In re Pin Oaks Apartments, 7 B.R. 364, 372 (Bankr. S.D. Tex. 1980) ("Sections 365 and 363(b) of the Code do not give the trustee the power to assume the ICM Lease and then change its provisions. The trustee is bound by the terms of the Lease."). Indeed, "[t]he 'permissive' language of Section 363(b) grants [the Debtor] no authority to ignore existing contractual rights …." Id. at 367. The Loan and Security Documents of both the North Flores and Vista Chino property explicitly define the properties as investment properties and state that neither Kilroy nor his family members will reside in the properties. See Exhibits A and E to Motion for Stay Relief at 2 (Loan Agreements between Kilroy and LTSB wherein Kilroy agrees that "[t]he premises are residential premises and will not be occupied by the Borrower or his family"). The Bankruptcy Code, and in particular Section 363(b), does not allow the Court to authorize Kilroy's breaches.

Finally, the Debtor's reliance on Section 105(a) of the Bankruptcy Code is an indication that it cannot meet the precedential requirements and standards necessary to allow the use of estate property outside the ordinary course. The Supreme Court has recently cautioned against the use of Section 105(a) when the relief requested is in direct contravention of specific statutory provisions. Law v. Siegel, 134 S. Ct. 1188, 1194 (2014). While Section 363 does not set forth a specific test for the allowance of a non-ordinary course transaction with an insider, precedential authority does. As previously mentioned, not only do the Debtor and Kilroy fail to satisfy their own cited hybrid standard, they fail to satisfy the more heightened scrutiny the court should apply to such an insider transaction. The Debtor and Kilroy cannot and should not be able to cure these failures and shortcomings as identified in solid precedent, merely by falling back on Section 105(a) of the Bankruptcy Code. Such an application of Section 105(a) would effectively dilute the weight of precedential authority.

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III. CONCLUSION

For the foregoing reasons, LTSB respectfully requests that the Court (i) deny the Cash Collateral Motion, (ii) deny the Lease Motion, and (iii) grant LTSB any other and further relief deemed necessary.

Dated: July 22, 2014

Squire Patton Boggs (US) LLP

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Emily Wallerstein
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