

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

NNN 400 CAPITOL CENTER 16, LLC, et al.,¹

Debtors.

Chapter 11

Case No. 16-12728 (KG)
(Joint Administration Pending)

Hearing Date: Dec. 22, 2016 @ 9:00 a.m. (ET)
Objection Deadline: Dec. 21, 2016 @ 4:00 p.m. (ET)

DEBTORS' EMERGENCY MOTION FOR AN ORDER: (A) AUTHORIZING DEBTORS USE OF CASH COLLATERAL ON AN INTERIM AND FINAL BASIS; (B) GRANTING ADEQUATE PROTECTION; (C) MODIFYING THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362; AND (D) SCHEDULING A FINAL HEARING PURSUANT TO BANKRUPTCY RULE 4001

The above-captioned debtors and debtors-in-possession (collectively, the "Debtors"), by and through undersigned counsel, hereby file *this Emergency Motion for an Order: (A) Authorizing Debtors Use of Cash Collateral on an Interim and Final Basis; (B) Granting Adequate Protection; (C) Modifying the Automatic Stay Pursuant to 11 U.S.C. § 362; and (D) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001* (the "Motion"), and in support thereof state as follows:

¹ The debtors in these cases are: NNN 400 Capitol Center 2, LLC, Case No. 16-12741 (KG); NNN 400 Capitol Center 3, LLC, Case No. 16-12750 (KG); NNN 400 Capitol Center 4, LLC, Case No. 16-12752 (KG); NNN 400 Capitol Center 5, LLC, Case No. 16-12753 (KG); NNN 400 Capitol Center 6, LLC, Case No. 16-12754 (KG); NNN 400 Capitol Center 9, LLC, Case No. 16-12755 (KG); NNN 400 Capitol Center 10, LLC, Case No. 16-12730 (KG); NNN 400 Capitol Center 11, LLC, Case No. 16-12731 (KG); NNN 400 Capitol Center 12, LLC, Case No. 16-12732 (KG); NNN 400 Capitol Center 13, LLC, Case No. 16-12733 (KG); NNN 400 Capitol Center 14, LLC, Case No. 16-12735 (KG); NNN 400 Capitol Center 15, LLC, Case No. 16-12736 (KG); NNN 400 Capitol Center 16, LLC, Case No. 16-12728 (KG); NNN 400 Capitol Center 17, LLC, Case No. 16-12737 (KG); NNN 400 Capitol Center 18, LLC, Case No. 16-12738 (KG); NNN 400 Capitol Center 19, LLC, Case No. 16-12739 (KG); NNN 400 Capitol Center 20, LLC, Case No. 16-12742 (KG); NNN 400 Capitol Center 21, LLC, Case No. 16-12743 (KG); NNN 400 Capitol Center 22, LLC, Case No. 16-12744 (KG); NNN 400 Capitol Center 24, LLC, Case No. 16-12746 (KG); NNN 400 Capitol Center 26, LLC, Case No. 16-12747 (KG); NNN 400 Capitol Center 27, LLC, Case No. 16-12748 (KG); NNN 400 Capitol Center 28, LLC, Case No. 16-12749 (KG); and NNN 400 Capitol Center 32, LLC, Case No. 16-12751 (KG).

BANKRUPTCY RULE 4001 CONCISE STATEMENT

1. By this Motion, the Debtors respectfully request the entry of an order authorizing the Debtors to, among other things: (i) use Cash Collateral (defined below) pursuant to section 363 of 11 U.S.C. §§ 101, et seq. (the “Bankruptcy Code”) in accordance with the interim budget (the “Interim Budget”) attached hereto as **Exhibit A** and a final budget to be submitted separately and considered at a final hearing on this Motion; (ii) provide adequate protection in the form of periodic payments, replacement liens and an administrative priority expense claim pursuant to § 507(b) of the Bankruptcy Code to the extent there is a diminution in value of the prepetition liens of the Secured Creditor (defined below); and (iii) schedule a hearing to consider the use of Cash Collateral on a final basis in accordance with Rule 4001 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

2. The material provisions of the proposed use of cash collateral of the Secured Creditor (the “Cash Collateral”) on an interim basis, which are embodied in the proposed form of order attached hereto as **Exhibit B** are as follows:

- (a) Debtors. NNN 400 Capitol Center 16, LLC, *et al.*
- (b) Secured Creditor. Wells Fargo Bank, N.A., as Trustee for the Registered Holders of COMM 2006-C8 Commercial Mortgage Pass-Through Certificates (the “Secured Creditor”).
- (c) Use of Cash Collateral. The purposes for the use of the Cash Collateral are to pay for the operating expenses of the Property and to pay for certain administrative expenses of these bankruptcy cases in accordance with a proposed budget, on an interim basis. The uses of Cash Collateral on an interim basis, pending a final hearing on this Motion, are set forth in the Interim Budget attached hereto as Exhibit A. *See* Interim Order at ¶ 2 and exhibit attached thereto. At this time, the Secured Creditor has not consented to the use of its Cash Collateral pursuant to the proposed Interim Budget.
- (d) Adequate Protection. The Secured Creditor shall be provided with the following adequate protection under the Interim Order: (i) monthly interest payments based on the outstanding principal balance of the

secured debt at the non-default interest rate (nothing herein shall constitute a waiver of the Secured Creditor's right to assert that a different interest rate applies, similarly, nothing herein shall constitute a waiver of Debtors' right to dispute Secured Creditors' assertion); (ii) a replacement lien on all the post-petition assets of the Debtors pursuant to § 361 of the Bankruptcy Code to the extent of diminution in the value of the Secured Creditor's interest in Cash Collateral; and (iii) an administrative priority expense claim pursuant to § 507(b) of the Bankruptcy Code, to the extent there is a diminution in the value of the Secured Creditor's interest in Cash Collateral. The replacement lien shall not attach to any causes of action of the Debtors arising under Chapter 5 of the Bankruptcy Code. *See* Interim Order at ¶ 3.

- (e) Waiver of Applicable Nonbankruptcy Law Relating to Perfection on Property of the Estate or on the Foreclosure or Other Enforcement of Liens. The Interim Order is deemed to be sufficient and conclusive evidence of the priority, perfection, and validity of the post-petition liens and security interests granted therein, effective as of the Petition Date, without any further act and without regard to any other federal, state, or local requirements or law requiring notice, filing, registration, recording or possession of the subject collateral, or other act to validate or perfect such security interest or lien. *See* Interim Order at ¶ 4.
- (f) Relief From Automatic Stay. The automatic stay provisions of Section 362 of the Bankruptcy Code are modified and vacated to the extent necessary to permit the Secured Creditor to perform any act authorized or permitted under the Interim Order, including, without limitation, to take any act to create, validate, evidence, attach or perfect any lien, security interest, right or claim in the Secured Creditor's collateral. *See* Interim Order at ¶ 5.

JURISDICTION

3. The United States Bankruptcy Court for the District of Delaware (the "Court") has jurisdiction over these cases and the Motion pursuant to 28 U.S.C. §§ 157 and 1334, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012.

4. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue lies properly in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. § 157.

5. Pursuant to Rule 9013-1(f) of the Local Rules for the United States Bankruptcy Court for the District of Delaware, the Debtors hereby expressly confirm their consent to the entry of a final order by this Court in connection with this Motion if it is later determined that this Court, absent consent of the parties, cannot enter final orders or judgments in connection therewith consistent with Article III of the United States Constitution.

6. The relief sought by this Motion is based upon sections 105, 361, 362, 363 and 552 of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) 4001 and 9014.

BACKGROUND

Chapter 11 Reorganization Case

7. On December 9, 2016 (the “Petition Date”), the Debtors each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”). The Debtors are continuing in possession of their property and the management of their businesses as debtors-in-possession, pursuant to sections 1107 and 1108 of the Bankruptcy Code.

8. On December 13, 2016, the Debtors file a motion seeking the joint administration of the Debtors’ bankruptcy cases for an order directing the consolidation and joint administration for procedural purposes only of the Debtors’ various chapter 11 cases [D.I. 8] (the “Joint Administration Motion”). The Joint Administration Motion remains pending as of the filing of this Motion.

9. No statutorily authorized creditors’ committee has been appointed in any of the Debtors’ cases by the United States Trustee.

The Debtors and Their Business Operations

10. In support of this Motion, the Debtors incorporate herein and rely on the *Declaration of Lori McGhee in Support of Debtors' Chapter 11 Cases and First Day Motions* (the "Declaration"), filed concurrently herewith, which provides a detailed summary of the Debtors and their business operations.²

11. Each of the Debtors is a limited liability company. Each Debtor is owned by an individual or entity that made an independent investment in the Property (as defined below) in connection with an Internal Revenue Code Section 1031 tax deferred exchange offering (a "1031 Exchange").³ The investors and the TICs (as defined below) are not affiliated with, nor are they partners of, one another. The TIC structure has been developed to facilitate investments in real estate in connection with 1031 Exchange transactions.

12. Each Debtor acquired an undivided tenant-in-common ("TIC") interest in the Regions Center, an approximately 547,000 square foot office building located in Little Rock, Arkansas (the "Property"). The Property is occupied by multiple tenants under various commercial office leases.

13. Each of the Debtors is party to a Tenants-in-Common Agreement (the "TIC Agreement") that, *inter alia*: (1) provides for the appointment of an asset manager; (2) establishes the parties' voting rights and transfer rights; and (3) outlines the allocation of income and expenses. Likewise, each of the Debtors is a party to a Property and Asset Management Agreement with FGG, Inc. d/b/a First Guardian Group (the "Asset Manager"), providing for the management, leasing, operating and maintaining of the Property (the "Management

² Capitalized terms not defined herein shall have those meanings prescribed in the Declaration.

³ A section 1031 exchange is a transaction authorized by Section 1031 of the Internal Revenue Code that permits deferral of gains from the sale of certain real property when the proceeds are re-invested in other real property in a manner that complies with Section 1031.

Agreement”). Under the terms of the Management Agreement, the day to day operations of the Property are performed by Moses Tucker Real Estate (the “Property Manager”).

14. The Property is encumbered by a Mortgage, Assignment of Leases and Rents, Security Agreement and Fixture Filing, dated August 18, 2006, and related documents and instruments (the “Mortgage”). The Mortgage secures the obligations of the TIC investors under a promissory note related to a loan (the “Loan”) dated August 18, 2006 in the original principal amount of \$32,000,000.00 (the “Promissory Note,” and together with the Mortgage and related documents, the “Loan Documents”). Whether as an original borrower under the Promissory Note or pursuant to subsequent assignment and assumption agreements, each of the Debtors is a borrower under the Promissory Note, and each of the Debtors is liable under the Loan Documents. In total, there are thirty-two (32) separate TIC investors that hold an ownership interest in the Property and are obligated under the Loan Documents. The percentage of ownership each TIC holds varies and ranges from 0.90% to 9.25%. As of the filing of this Motion, twenty-four (24) of the thirty-two (32) TICs have filed petitions for bankruptcy.⁴

15. The current lender under the Loan Documents is Wells Fargo Bank, N.A., as Trustee for the Registered Holders of COMM 2006-C8 Commercial Mortgage Pass-Through Certificates (the “Lender”). The maturity date of the loan under the Promissory Note was September 1, 2016 (the “Maturity Date”). The TIC investors were in the process of refinancing the Loan in advance of the Maturity Date. However, due to certain improper actions of the Lender, the Loan refinancing did not occur. Not only did this cause a default under the Loan Documents, it also led to the Property losing a significant new tenant, diminishing the value of the Property and much needed cash flow for its operations. The Lender has also refused to

⁴ Each of the non-filing TICs is a borrower under the Promissory Note and is liable under the Loan Documents.

release certain reserve funds needed to fund previously agreed upon tenant improvements. The Property Manager has been forced to utilize other operating funds to pay for the tenant improvements, severely diminishing cash reserves.

16. Moreover, on November 8, 2016, the Lender filed a *Verified Complaint for Foreclosure, Replevin, and Other Relief and Emergency Appointment of Receiver*, against the Debtors and other of the TICs (the “Complaint”) in the Circuit Court of Pulaski County, Arkansas (the “Arkansas Circuit Court”), commencing Case No. 60CV-16-6167 therein (the “Foreclosure and Receiver Action”). The basis of the Foreclosure and Receiver Action is the failure to refinance and the resulting default. The deadline for the defendants in the Foreclosure and Receiver Action (including the Debtors) to respond to the Complaint was scheduled for December 9, 2016. The Arkansas Circuit Court scheduled a hearing in the Foreclosure and Receiver Action for January 12, 2017, which has now been stayed as a result of the filing of these bankruptcy cases.

17. As a result of the actions of the Lender, with diminished cash reserves and facing the possibility of the appointment of a receiver and/or the foreclosure on the Property, the Debtors were forced to seek relief under chapter 11 of the Bankruptcy Code. Filing bankruptcy was necessary to avoid the inherent cost and expense of defending the Foreclosure and Receiver Action and the possible negative outcome of that litigation, while giving the Debtors an opportunity to attempt to resolve their issues with the Lender for the benefit of all parties-in-interest.

Prepetition Obligations

18. The Secured Creditor asserts secured pre-petition indebtedness against the Debtors and the other TIC owners in the amount of approximately \$30 million, comprised of

principal, interest, default interest, late fees and other miscellaneous fees, as well as a credit to the Debtors for the Debtors' funds withheld by the Secured Creditor, comprised of suspense funds, escrow funds and reserve funds. The Debtors dispute the Secured Creditor's assertions as to the amounts actually owed by the TIC owners under the Loan Documents. As of the filing of these bankruptcy cases, the principal amount asserted to be due to the Secured Creditor under the Loan Documents is approximately \$30 million. Each of the Debtors are obligors under the Loan Documents, in addition to the non-Debtor TICs.

19. The original and subsequent borrowers under the Promissory Note are the following TICs:

<u>Original Borrowers</u>	<u>Subsequent Borrowers</u>
NNN 400 Capitol Center, LLC	NNN 400 Capitol Center 10, LLC
NNN 400 Capitol Center 1, LLC	NNN 400 Capitol Center 17, LLC
NNN 400 Capitol Center 2, LLC	NNN 400 Capitol Center 18, LLC
NNN 400 Capitol Center 3, LLC	NNN 400 Capitol Center 19, LLC
NNN 400 Capitol Center 4, LLC	NNN 400 Capitol Center 20, LLC
NNN 400 Capitol Center 5, LLC	NNN 400 Capitol Center 21, LLC
NNN 400 Capitol Center 6, LLC	NNN 400 Capitol Center 22, LLC
NNN 400 Capitol Center 7, LLC	NNN 400 Capitol Center 24, LLC
NNN 400 Capitol Center 8, LLC	NNN 400 Capitol Center 25, LLC
NNN 400 Capitol Center 9, LLC	NNN 400 Capitol Center 26, LLC
NNN 400 Capitol Center 11, LLC	NNN 400 Capitol Center 27, LLC
NNN 400 Capitol Center 12, LLC	NNN 400 Capitol Center 28, LLC
NNN 400 Capitol Center 13, LLC	NNN 400 Capitol Center 30, LLC
NNN 400 Capitol Center 14, LLC	NNN 400 Capitol Center 32, LLC

NNN 400 Capitol Center 15, LLC	NNN 400 Capitol Center 35, LLC
NNN 400 Capitol Center 16, LLC	NNN 400 Capitol Center 36, LLC

Local Rule 4001-2 Highlighted Provisions

20. Pursuant to Local Rule 4001-2, the Debtors' hereby: (i) state whether the proposed form of order authorizing the use of Cash Collateral contains those types of provisions set forth in Local Rule 4001-2(a)(i)(A) through (F); (ii) identify the location of such provisions, if any, in the proposed form of order submitted herewith; and (iii) provide justification where necessary for the inclusion of such provision:

(a) There are no provisions in the proposed form of order of the type specified in Local Rule 4001-2(a)(i)(A) through (E); *see generally* the proposed Interim Order; and

(b) The Interim Budget and the proposed Interim Order do not provide for any budgeted amount for fees of any creditors' committee professionals as it is not anticipated that a creditors' committee will be formed in these cases because the Debtors anticipate that all creditors will be paid in full. See proposed Interim Budget at Page 1, Line 20.

RELIEF REQUESTED

21. By the Motion, the Debtors seek the entry of an order, *inter alia*, authorizing the Debtors to use the Cash Collateral on an interim basis in the amount and upon the limitations set forth in the Interim Budget. By this Motion, the Debtors also seek final authorization for the use of Cash Collateral pursuant to a Final Budget beyond the interim period to be submitted for consideration by the Court at a final hearing on this Motion. The Debtors require the immediate use of Cash Collateral in order to maintain operations at the Property and avoid irreparable harm. Specifically, the Debtors require the use of Cash Collateral for the payment of operating expenses, including management fees, utilities expenses, maintenance expenses, and other administrative expenses of these bankruptcy cases as more fully set forth in the Budget. The

Debtors' use of Cash Collateral to operate the business will protect the value of the Property as it will allow the Debtors to continue providing the use of the Property for its tenants without interruptions that will occur if utilities aren't provided and the building properly managed and maintained.

A. Legal Basis for Use of Cash Collateral

22. The Debtors' use of property of their estates is governed by section 363 of the Bankruptcy Code, which provides in pertinent part that:

If the business of the debtor is authorized to be operated under section . . . 1108 . . . of this title and unless the court orders otherwise, the [debtor] may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

11 U.S.C. § 363(c)(1).

23. Section 363(c)(2)(B) of the Bankruptcy Code permits a debtor to use cash collateral with the approval of this Court. Section 363(e) of the Bankruptcy Code requires a debtor to adequately protect the secured creditors' interest in property to be used by a debtor against any diminution in value of such interest resulting from the debtor's use of the property during the chapter 11 case.

24. What constitutes sufficient adequate protection is decided on a case-by-case basis. *See In re George Ruggiere Chrysler-Plymouth, Inc.*, 727 F.2d 1017, 1019 (11th Cir. 1984); *In re Swedeland Dev. Group, Inc.*, 16 F.3d 552, 564 (3d Cir. 1994); *MBank Dallas, N.A. v. O'Connor (In re O'Connor)*, 808 F.2d 1393, 1396 (10th Cir. 1987); *In re Martin*, 761 F.2d 472 (8th Cir. 1985); *In re Columbia Gas Sys., Inc.*, 1992 WL 79323, at *2 (Bankr. D. Del. Feb. 18, 1992); *In re Mosello*, 195 B.R. 277, 289 (Bankr. S.D.N.Y. 1996); *In re Realty Sw. Assocs.*, 140 B.R. 360 (Bankr. S.D.N.Y. 1992). By requiring adequate protection, the Bankruptcy Code seeks to shield

a secured creditor from diminution in the value of its interest in its collateral during the period of use by the debtor in possession. *See In re Glasstream Boats*, 110 B.R. 610, 613 (Bankr. M.D. Ga 1990); *In re George Ruggiere Chrysler-Plymouth*, 727 F.2d at 1019; *In re 495 Cent. Park Ave. Corp.*, 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992); *In re Beker Indus. Corp.*, 58 B.R. 725, 736 (Bankr. S.D.N.Y. 1986); *In re Hubbard Power & Light*, 202 B.R. 680 (Bankr. E.D.N.Y. 1996). Adequate protection can come in various forms, including payment of adequate protection fees, payment of interest, granting of replacement liens, an equity cushion and allowance of administrative claims.

B. Emergency Need for Use of Cash Collateral

25. A debtor's cash "is the life's blood of the business," and the bankruptcy court must ensure that cash "is available for use even if to a limited extent." *In re Mickler*, 9 B.R. 121, 123 (Bankr. M.D. Fla. 1981). Courts typically authorize a debtor to use cash collateral to continue its operations so long as the interest asserted by any affected secured creditor in such cash collateral is adequately protected. Thus, courts are required to balance the debtor's need to use cash collateral in its reorganization effort against the secured creditor's need for adequate protection. *Stein v. U.S. Farmers Home Admin. (In re Stein)*, 19 B.R. 458, 459 (Bankr. E.D. Pa. 1982). In ruling whether a secured creditor is adequately protected early in a case, courts "will generally permit the business operation to continue, at least to the point of plan formulation, if the debtors make a solid evidentiary showing to support their projections[.]" *In re Dynaco Corp.*, 162 B.R. 389, 395 (Bankr. D.N.H. 1993).

26. Consistent with these principles, courts repeatedly have recognized that use of cash collateral is appropriate where necessary to preserve a debtor's ability to reorganize and thus maximize the value of an estate for all interested parties. *See, e.g., In re Dynaco*, 162 B.R.

at 394 (granting a motion for the use of cash collateral and stating that “the purpose of Chapter 11 is to rehabilitate debtors and generally access to cash collateral is necessary in order to operate a business”); In re George Ruggiere Chrysler-Plymouth, Inc., 727 F.2d at 1020 (allowing debtor to use cash collateral over secured creditor’s objection, noting that “[w]ithout the availability of cash to meet daily operating expenses such as rent, payroll, utilities, etc., the congressional policy favoring rehabilitation over economic failure would be frustrated.”); In re O’Connor, 808 F.2d at 1399 (permitting debtor to use cash collateral after finding that there was only a low risk that secured creditor’s interest would diminish).

27. In this case, the Debtors have a vital need to use Cash Collateral in order to continue operations with respect to the Property and have no ability to operate the business without the use of Cash Collateral. Without immediate access to Cash Collateral, the Debtors will not be able to operate the Property or pay trade debt related to the operations of the Property, including, among other things, paying for the management of the Property, paying post-petition utility deposits, paying utilities for post-petition services, paying for necessary maintenance to maintain the proper operations of the Property for the benefit of the tenants, providing security and paying for any other unanticipated issues that may arise on an emergent basis.

28. The inability to do any of the foregoing would cause immediate and irreparable harm to the Debtors, their estates and creditors and would stand in diametrical opposition to the rehabilitative purpose of chapter 11. Properly maintaining the Property and providing its tenants normal and uninterrupted use of the Property maintains the value of the Property as well, which is critical to the Debtors’ efforts to re-finance the secured debt.

29. Accordingly, the Debtors seek continued authority to use the Cash Collateral as set forth in the Interim Budget and in the Interim Order to prevent immediate and irreparable

harm to the Debtors' estate pursuant to Bankruptcy Rule 4001(b)(2). The Debtors further seek authority to use Cash Collateral as will be set forth in a Final Budget to be submitted for the Court's consideration. The Debtors also request the scheduling of a final hearing to consider the Debtors' request for authorization to use Cash Collateral on a final basis.

C. Adequate Protection for the Secured Creditor

30. As noted above, a debtor's authority to use cash collateral is typically conditioned on providing "adequate protection" to secured creditors that assert an interest in such cash. "The concept of 'adequate protection' is not defined in the [Bankruptcy] Code except by the implications of the examples of adequate protection listed in [section 361 of the Bankruptcy Code]." In re Beker Indus. Corp., 58 B.R. at 736. Section 361 identifies various types of adequate protection, including cash payments, additional liens, replacement liens and such other relief that will result in the realization by the secured creditor of the "indubitable equivalent" of its interest in its collateral. 11 U.S.C. § 361.

31. The determination of adequate protection is a fact-specific inquiry that is to be made on a case-by-case basis. *See, e.g., In re O'Connor*, 808 F.2d at 1396-97 (the determination is a question of fact "which is to be decided flexibly on the proverbial 'case-by-case' basis") (citing Martin, 761 F.2d at 474); In re Mosello, 195 B.R. 277, 289 (Bankr. S.D.N.Y. 1996) (holding that the determination "is left to the vagaries of each case"); *see also In re Royal d'Iberville Corp.*, 10 B.R. 37, 39 (Bankr. S.D. Miss. 1981) ("Opinions as to what is adequate protection must be determined on a case-by-case basis and opinions will vary greatly from court-to-court because adequate protection is not defined in the Bankruptcy Code."). Furthermore, in determining adequate protection, "[t]he equities in each case must be weighed in striking a balance." In re Stein, 19 B.R. at 459.

32. The focus of the adequate protection requirement is to preserve the secured creditor's position at the time of the bankruptcy filing and protect the secured creditor from diminution in the value of its collateral during the reorganization process. See Mosello, 195 B.R. at 288; Beker, 58 B.R. at 736; see also In re WorldCom, Inc., 304 B.R. 611, 618-19 (Bankr. S.D.N.Y. 2004) ("The legislative history for section 361 of the Bankruptcy Code, which sets forth how adequate protection may be provided under section 363, makes clear that the purpose is to insure that the secured creditor receives the value for which the creditor bargained for prior to the debtor's bankruptcy.").

33. In this case, the adequate protection proposed by the Debtors will fully protect the Secured Creditor. The Debtors propose to provide the Secured Creditor with the following adequate protection to the extent of diminution in the value of the Secured Creditor's interest in Cash Collateral:

(a) The Secured Creditor will receive monthly payments in the amount of the non-default interest due on the principal amount due under the Loan Documents (nothing herein shall constitute a waiver of the Secured Creditor's right to assert that a different interest rate applies, similarly, nothing herein shall constitute a waiver of Debtors' right to dispute Secured Creditors' assertion; further, such payments remain subject to recharacterization);

(b) The Secured Creditor will receive a replacement lien on all the post-petition assets of the Debtors pursuant to § 361 of the Bankruptcy Code to the extent of diminution in the value of the Secured Creditor's interest in Cash Collateral; and (ii) an administrative priority expense claim pursuant to § 507(b) of the Bankruptcy Code, to the extent there is a diminution in the value of the

Secured Creditor's interest in Cash Collateral. The replacement lien shall not attach to any causes of action of the Debtors arising under Chapter 5 of the Bankruptcy Code; and

(c) The Secured Creditor will receive a superpriority expense claim as provided in section 507(b) of the Bankruptcy Code, of the Bankruptcy Code, to the extent there is a diminution in the value of the Secured Creditor's interest in Cash Collateral, provided however, that such superpriority administrative expense claim shall not be satisfied from recoveries or proceeds of any causes of action of the Debtors arising under Chapter 5 of the Bankruptcy Code.

34. Based on the foregoing, the Debtors submit that the proposed adequate protection will fully protect the Secured Creditor from any diminution in the value of its interest in the Cash Collateral and is fair, reasonable and sufficient to satisfy the requirements of the Bankruptcy Code. Periodic cash payments provide adequate protection. 11 U.S.C. § 361(1); *see also In re WP Steel Venture LLC*, No. 12-11661, 2012 WL 5288123 (Bankr. D. Del. Oct. 23, 2012) (approving use of cash collateral where the debtors provided adequate protection "in the form of periodic payments from the proceeds of Collateral at the times and in the amounts set forth in the Budget"); *see also In re Markim, Inc.*, 15 B.R. 56, 59 (Bankr. E.D. Pa. 1981) (overruling objections to use of cash collateral where the debtor provided adequate protection by "provid[ing] the secured creditors with monthly payments").

35. Replacement liens are also an acceptable form of adequate protection, 11 U.S.C. § 361(2); *see also Resolution Trust Corp. v. Swedeland Development Group, Inc. (In re Swedeland Development Group, Inc.)*, 16 F.3d 552, 564 (3d Cir. 1994); *VWI Properties, LLC v. Mt. Olive Hospitality, LLC (In re Mt. Olive Hospitality, LLC)*, No. 13-3395, 2014 WL 1309953,

at *3 (D.N.J. Mar. 31, 2014), as is the granting of a superpriority expense claim under Section 507(b) of the Bankruptcy Code. *See, e.g., In re Source Interlink Cos., Inc.*, No. 09-11424, 2009 WL 6667972, at *10 (Bankr. D. Del. Apr. 29, 2009).

36. Accordingly, the adequate protection proposed herein on an interim basis, which is what will be provided as adequate protection on a final basis, is fair and reasonable and sufficient to satisfy the requirements of sections 363(c)(2) and (e) of the Bankruptcy Code. Moreover, a recent appraisal of the Property indicates that its value is between \$40 million and \$44 million, providing a significant equity cushion, providing a further significant form of adequate protection. *See In re Roach Automotive*, 540 B.R. 146, 151 (W.D. Pa. 2007).

D. Request for Final Hearing Pursuant to Bankruptcy Rule 4001(b)(2)

37. Pursuant to Bankruptcy Rule 4001(b)(2), a minimum of fourteen (14) days' notice is required before a final hearing on this Motion may take place. This Motion was filed on December 19, 2016. The Debtors respectfully request that the Court schedule a hearing on such date that is more than fourteen (14) days past December 19, 2016 as required by Bankruptcy Rule 4001(b)(2).

E. The Automatic Stay Should Be Modified on a Limited Basis

38. The relief requested herein contemplates a modification of the automatic stay (to the extent applicable) to permit the Secured Creditor to perform such acts as may be required to assure the perfection and priority of such security interests and liens to be granted as adequate protection.

39. Stay modifications of this kind are ordinary and standard features for the use of cash collateral, and in the Debtors' business judgment, are reasonable and fair under the present circumstances.

NOTICE

40. Notice of this Motion has been provided to (a) the Office of the United States Trustee; (b) the Debtors' 20 largest unsecured creditors; (c) counsel to the Secured Creditor; and (d) those persons who have formally appeared and requested service in these proceedings pursuant to Bankruptcy Rule 2002. The Debtors submit that, in light of the nature of the relief requested, no other or further notice is necessary or required.

CONCLUSION

WHEREFORE, the Debtors requests that the Court enter an Interim Order authorizing the final use of Cash Collateral as requested in the Motion and grant such other and further relief as is just and appropriate under the circumstances.

Dated: December 19, 2016
Wilmington, DE

WHITEFORD TAYLOR & PRESTON LLC

By: /s/ Thomas J. Francella, Jr.
Thomas J. Francella, Jr., Esq. (DE ID #3835)
The Renaissance Centre, Suite 500
405 North King Street
Wilmington, DE 19801-3700
Telephone: (302) 357-3252
Facsimile: (302) 357-3272
tfrancella@wtplaw.com

Proposed Counsel to the Debtors