

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:

COLTS RUN, L.L.C.,
an Illinois Limited Liability Company,

Debtor/Debtor-in-Possession.)

)
) Case No. 10-18071
) Chapter 11
) Judge Hollis
)

NOTICE OF MOTION

TO: ATTACHED SERVICE LIST:

PLEASE TAKE NOTICE that on the 28th day of June, 2011 at 10:30 a.m. or as soon thereafter as counsel can be heard, I shall appear before the Honorable Pamela S. Hollis, Bankruptcy Judge, in the room usually occupied by her as courtroom 644 in the United States Bankruptcy Court in the Everett McKinley Dirksen Federal Building, 219 South Dearborn Street, Chicago, Illinois, or before any other Judge who may be sitting in her place and stead and shall present the Amended Motion for Authority to Use Cash Collateral To Pay Allowed Administrative Claims, a copy of which is attached hereto and herewith served upon you, and shall pray for the entry of an Order in compliance therewith.

AT WHICH TIME and place you may appear if you so see fit.

/s/David K. Welch
Crane, Heyman, Simon, Welch & Clar
135 S. LaSalle St., Suite 3705
Chicago, Illinois 60603
(312) 641-6777

CERTIFICATE OF SERVICE

STATE OF ILLINOIS)
COUNTY OF COOK)

The undersigned, being first duly sworn on oath deposes and states that he caused a copy of the foregoing Notice and attached Amended Motion for Authority to Use Cash Collateral To Pay Allowed Administrative Claims to be served on all the parties listed on the attached service list via first class mail, properly addressed, postage pre-paid, on the 19th day of May, 2011.

/s/David K. Welch

SERVICE LIST

United States Trustee
Dirksen Federal Building
219 South Dearborn Street
Suite 873
Chicago, IL 60604

Ronald Barliant, Esq.
Sarah J. Risken, Esq.
Goldberg Kohn Ltd.
55 East Monroe St., Suite 3300
Chicago, IL 60603

Charles F. Merz
Charles F. Merz & Associates P.L.L.C.
11414 Main Street, Suite 102
Louisville, Kentucky 40243

Bankruptcy Administration
IKON Financial Services
1738 Bass Road
P.O. Box 13708
Macon, GA 31208-3708

Steve Jakubowski
The Coleman Law Firm
77 W. Wacker Drive, Suite 4800
Chicago, IL 60601

Fayette County Attorney
Attn: Dianne McKenna
110 West Vine Street
2nd Floor
Lexington, KY 40507

ABCO Carpet Cleaning
PO Box 23834
Lexington, KY 40523

Apartment Finder
PO Box 402168
Atlanta, GA 30384-2168

Apartments.com
2563 Collection Center Dr.
Chicago, IL 60693

Assurance Agency, Ltd.
PO Box 66056
Chicago, IL 60666-0056

Assurant Health
PO Box 790076
Saint Louis, MO 63179-0076

Cort Furniture Rental
4904 Century Plaza Rd.
Indianapolis, IN 46254

Ellis Painting
527 Pinoak Drive
Nicholasville, KY 40356

For Rent Magazine
75 Remittance Dr., #1705
Chicago, IL 60675-1705

Hassan Reda
3170 Mapleleaf Dr., #1411
Lexington, KY 40509

HD Supply Facilities
PO Box 509058
San Diego, CA 92150-9058

Illustratus
10983 Granada Lane
Leawood, KS 66211

Lowes Commercial Services
PO Box 530954
Atlanta, GA 30353-0954

Office Depot, Inc.
PO Box 88040
Chicago, IL 60680-1040

Okolona Pest Control, Inc.
PO Box 19201
Louisville, KY 40259-0201

PNC Bank
One North Franklin Street
21st Floor
Chicago, IL 60606
Attn: Jason Rockwell

Rent.Com/Payment Center
Department 1987
Los Angeles, CA 90084-1987

Rite Rug Company, Inc.
c/o Fifth Third Bank
PO Box 634478
Cincinnati, OH 45263-4478

Sherwin Williams Store 1223
1183 D. Brock McVey Dr.
Lexington, KY 40509-4118

Sherwin Williams Store 1261
2909 Richmond Rd. #90
Lexington, KY 40509-1715

Wilmar Industries, Inc.
PO Box 404284
Atlanta, GA 30384-4284

Windstream
PO Box 9001908
Louisville, KY 40290-1908

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:

COLTS RUN, L.L.C.,
an Illinois Limited Liability Company,

Debtor/Debtor-in-Possession.)

) Case No. 10-18071
) Chapter 11
) Judge Hollis

**AMENDED MOTION FOR AUTHORITY TO USE
CASH COLLATERAL TO PAY ALLOWED ADMINISTRATIVE CLAIMS**

COLTS RUN, L.L.C., an Illinois limited liability company, Debtor/Debtor-in-Possession herein, by and through its Attorneys, makes its Amended Motion pursuant to Section 363 of the Bankruptcy Code , Rule 4001(b) of the Federal Rules of Bankruptcy Procedure and Rule 4001-2 of the Local Rules of this Court for Authority to Use Cash Collateral To Pay Allowed Administrative Claims,¹ and in support thereof; states as follows:

Introduction

1. On April 23, 2010, the Debtor filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code ("Petition Date"). This Chapter 11 case has been designated as a "single asset real estate case" as defined in Section 101(51)(B) of the Bankruptcy Code.

2. The Debtor is operating its business and managing its financial affairs as Debtor in Possession. No trustee, examiner or committee of unsecured creditors has been appointed to serve in this reorganization case.

3. By this Amended Motion, the Debtor requests that this Court authorize it to use certain cash and cash equivalents that serve as collateral for claims asserted against

¹On May 12, 2011, this Court authorized the Debtor to file this Amended Motion and set a briefing schedule with respect thereto. This Court directed that the Debtor file this Amended Motion by May 19, 2011, that the Bank respond to the Amended Motion by June 2, 2011, that the Debtor reply to the Bank's Response by June 13, 2011, and, that the Amended Motion is set for further hearing on June 28, 2011, at 10:30 a.m.

the Debtor and its property by PNC Bank ("Bank") to pay certain allowed administrative claims. This Amended Motion takes into account certain rulings made by this Court as of December 9, 2010, with respect to the value of the Property.²

4. This Court has jurisdiction over this matter pursuant to 28 U.S.C. Sections 157 and 1334.

5. This matter constitutes a "core" proceeding within the meaning of 28 U.S.C. Section 157(b)(2)(A), (M) and (O).

6. The statutory predicates for the relief requested in this Amended Motion are Section 363 of the Bankruptcy Code, Rule 4001(b) of the Federal Rules of Bankruptcy Procedure and Rule 4001-2 of the Local Rules of this Court.

Relevant Factual Background

7. The Debtor is the owner of the "Colts Run Apartments" ("Property") in Lexington, Kentucky. The Property, acquired by the Debtor in 2001 for \$19,000,000.00, is comprised of 252 residential rental apartment units located in 21 buildings spread over 13.77 acres. In addition, the Property has a clubhouse and 8 garage buildings. The Debtor has expended in excess of \$2,700,000.00 for capital improvements to the Property in addition to regular maintenance.

8. Occupancy at the Property as of the Petition Date was approximately 89% and has increased to approximately 95% currently.

9. The Bank³ is the Debtor's primary secured creditor that is asserting senior liens on the Property as well as against the rents generated at the Property.

²The "Property" is defined in paragraph 7 of this Amended Motion.

³The Bank is the successor by merger to National City Bank and by virtue of such merger is, on information and belief, the holder of the note and mortgage on the Property which were originally entered into between the Debtor and National City Bank.

10. On or about August 23, 2010, the Bank filed a claim in this Chapter 11 case in an amount not less than \$23,171,999.70. On the face of the claim, the Bank asserts that the value of the secured claim (and thus the value of the Property in the opinion of the Bank) is not less than \$17,000,000.00. Therefore, the Bank believes that it is an undersecured creditor.

11. The Debtor asserts that the value of the Property as of the Petition Date is \$25,000,000.00. Importantly, due to, among other things, increased occupancy at the Property, the value of the Property has not declined during the course of this Chapter 11 case.

12. The Debtor has filed a formal objection to the allowance of the claim filed by the Bank in this Chapter 11 case ("Claim Objection").

13. Since the filing of this Chapter 11 case and pursuant to several Interim Cash Collateral Orders, the Debtor has made monthly contract interest payments calculated against the entire amount of the Bank's indebtedness to the Bank for the period May 24, 2010, through the present in the aggregate approximate amount of \$515,000.00. The Bank's secured interests in and to the Property are adequately protected within the meaning of Sections 361, 362 and 363 of the Bankruptcy Code.

14. The Bank has opposed the Debtor on virtually every significant issue in this Chapter 11 case and has taken action to impede a successful reorganization by the Debtor.⁴ The Bank has filed multiple objections to the Debtor's use of cash collateral, opposed the payment of fees to the management company retained by the Debtor, objected to necessary capital expenditures for the Property, filed a Motion to Appoint a Chapter 11 Trustee (which has been withdrawn), sought to vacate an Interim Cash Collateral Order that it had consented to days earlier, objected to the Debtor's Plan of

⁴Mt. Zion Limited Partnership filed a related Chapter 11 case on April 23, 2010, which pends before this Court under case number 10-18075 ("Mt. Zion Case"). The Bank has conducted itself in the same manner in the Mt. Zion Case.

Reorganization ("Plan") within days of it having been filed by the Debtor, acquired several small claims of certain unsecured creditors for the sole purpose of preventing confirmation of the Plan and objected to the payment of allowed interim compensation to the Debtor's professionals.

15. On August 3, 2010, the Debtor filed the Plan and, on August 6, 2010, filed its supporting Disclosure Statement. The Plan provides for the payment of 100% of all creditors' claims plus interest. As to the Bank, the Plan provides that the Bank's claim is fully secured and will be paid in the same manner as required by the underlying loan documents with a balloon payment of all remaining amounts due to the Bank on the fifth anniversary of confirmation of the Plan.

**Value of Property As Established
By This Court**

16. On December 9, 2010, this Court conducted a valuation hearing relating to the Property. Thereafter, on March 8, 2011, this Court announced that it had determined that the value of the Property as of December 9, 2010, was \$23,940,914.29.

17. On April 12, 2011, this Court denied the relief requested in the Bank's Motion to Reconsider Valuation Ruling. On April 12, 2011, this Court entered an Order determining the value of the Property to be \$23,940,914.29 as of December 9, 2010. A copy of this Order is attached to this Amended Motion as **Exhibit A**.

18. In reaching its valuation for the Property, this Court selected a capitalization rate ("Cap Rate") of 7%. At the time of the Valuation Hearing, the average national Cap Rate for properties such as the Property was 7.12%. Thereafter, the average national Cap Rate reported in January 2011 dropped to 6.51% and then to 6.29% as reported in April 2011.⁵

⁵The lower the Cap Rate, the higher the value of the Property.

19. Clearly, since the valuation of the Property by this Court as of December 9, 2010, the value of the Property has significantly increased.

20. Notably, this Court's valuation only relates to the Property itself and does not account for the value of the Debtor's other assets. These other assets include cash as of April 30, 2011, in the amount of \$418,823.00, accounts receivable, vehicles, office equipment and furniture and maintenance equipment and tools with an aggregate value as of the Petition Date (as set forth in the Debtor's bankruptcy schedules) of \$234,028.01. Therefore, the combined value of all of the Debtor's assets, inclusive of the values for the Property, cash and other personal property is in excess of \$24,593,765.00. This amount continues to increase.

Interim Fee Allowances

21. The Debtor filed Motions pursuant to Section 331 of the Bankruptcy Code seeking the allowance of interim compensation to Debtor's Counsel and Debtor's Accountants.

22. The Bank filed written objections to the interim compensation requested by Debtor's Counsel and Debtor's Accountants ("Fee Objections"). In the Fee Objections the Bank did not contest any of the amounts sought by Debtor's Counsel and Debtor's Accountants but did object to the payment of such interim compensation. One of the objections to the payment of such interim compensation is that the Debtor has made no request under Section 363 of the Bankruptcy Code to pay the interim compensation from the Bank's cash collateral. This Motion disposes of that particular objection by the Bank.

23. On November 23, 2010, this Court entered Orders allowing interim compensation to Debtor's Counsel in the amount of \$93,782.55 (less the pre-petition retainer of \$50,000.00) and to Debtor's Accountants in the amount of \$17,792.95 (less the post-petition retainer of \$10,000.00) ("Fee Allowances"). This Court further directed that

the retainers previously paid to Debtor's Counsel and Debtor's Accountants be applied to the Fee Allowances.

24. As a result of this Court's valuation of the Property, the Bank has filed a Motion to Authorize Allowance of Post-Petition Interest, Attorneys Fees, Costs and Charges Under §506(b) ("506-b Motion"). In the 506-b Motion, based upon the existing (and growing) equity in the Property, the Bank seeks to impose its default interest, fees, expenses and other costs upon the Debtor.

Use of Cash Collateral

25. The issues with respect to the payment of allowed fees and expenses to professionals is one of adequate protection.⁶ Are the secured interests of the Bank in and to the Property and rents generated therefrom adequately protected? The answer is an unqualified and resounding "Yes." Since the Bank's secured interests are adequately protected, the Debtor is entitled to pay allowed professional fee claims. *In Re Addison Properties Ltd. Ptnrshp.*, 185 B.R. 766, 769 (Bankr.N.D.Ill. 1995).

26. In the present case, the Bank is receiving the following adequate protection of its secured interests including its secured interests in rents generated at the Property:

- A) The Property has equity that is increasing;
- B) The Property and the Bank's interests therein are properly insured;
- C) All post-petition real estate taxes have been paid earlier than required thereby resulting in a discount;
- D) The Property is being properly maintained and leased with occupancy significantly increasing since the filing of this Chapter 11 case;

⁶Earlier in this Chapter 11 case, the Bank objected to the payment of management fees for the Property from its cash collateral. This Court overruled the Bank's objection to the payment of such management fees from the Bank's cash collateral. The result should be the same with respect to the payment of professional fee claims from cash collateral.

- E) Monthly contractual interest payments calculated against the entire amount of the Bank's indebtedness have been made to the Bank for each month of this Chapter 11 case in the approximate aggregate amount of \$515,000.00 even though applicable case law does not require that such post-petition payments be made;
- F) The Debtor has already filed a Plan of Reorganization ("Plan") which provides for the payment of all allowed claims (including the claims of the Bank) in full plus interest; and
- G) The Debtor's net cash on deposit in its accounts has increased from approximately \$4,100.00 as of the filing of this Chapter 11 case to \$418,823.00 as of April 30, 2011.

27. What more can the Debtor do? What more can the Bank reasonably expect? Since the filing of this Chapter 11 case, occupancy at the Property has increased, cash flow has improved, net cash has increased and the value of the Property has increased.

28. The Bank has virtually objected to everything in this Chapter 11 case and, in so doing, is responsible for fees and expenses being higher than may have otherwise occurred. It is unfair to cause fees and expenses to escalate and then object to the payment of such fees and expenses when the Bank's secured interests are adequately protected. Sanctioning such actions would, in addition to being contrary to the Bankruptcy Code and applicable law, effectively eliminate any chance of reorganization by a debtor having a secured creditor with liens on its assets.

29. The Bank's objection to the payment of the allowed interim fees and

expenses is nothing more than a part of its larger litigation strategy aimed at blocking confirmation of a Plan that pays creditors in full with interest.⁷ The Bank's position is unreasonable and unsupported by the Bankruptcy Code and applicable case law.

Conclusion

30. Under the circumstances of this Chapter 11 case and since the secured interests of the Bank are adequately protected and the Property has equity, the payment of allowed interim fees and expenses to Debtor's Counsel and Debtor's Accountants should be authorized.

WHEREFORE, COLTS RUN, L.L.C., an Illinois limited liability company, as Debtor/Debtor-in-Possession herein, prays for the entry of an Order authorizing the payment of the Fee Allowances (less retainers) from the cash collateral of the Bank and granting such other relief as may be just and appropriate.

COLTS RUN, L.L.C., an Illinois limited
liability company, Debtor/Debtor-in-Possession

By: /s/David K. Welch
One of its Attorneys

DEBTOR'S COUNSEL:

David K. Welch, Esq.
(Atty. No. 06183621)
Arthur G. Simon, Esq.
(Atty. No. 03124481)
Jeffrey C. Dan, Esq.
(Atty. No. 06242750)
Crane, Heyman, Simon, Welch & Clar
135 South LaSalle Street, Suite 3705
Chicago, IL 60603
TEL: (312) 641-6777

W:\GRACE\Colts\Cash Collateral.MOT.#2.Amended.5-19-11.wpd

⁷The fees and expenses of Debtor's Counsel and Debtor's Accountants are allowed on an interim basis only and, as with all such interim allowances, are reviewable on a final basis under Section 330 of the Bankruptcy Code at the conclusion of this Chapter 11 case.