

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:

THE WET SEAL, LLC, *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 17-10229 (CSS)  
Jointly Administered

Re: D.I. 10, 17, 50, 51

Hearing Date: February 22, 2017 at 10:00 a.m. (ET)  
Obj. Deadline: February 20, 2017  
(extended by consent)

**OMNIBUS OBJECTION OF CERTAIN LANDLORDS TO DEBTORS' MOTIONS FOR  
(A) ENTRY OF FINAL ORDER (I) AUTHORIZING THE DEBTORS TO ASSUME  
THE CONSULTING AGREEMENT, (II) AUTHORIZING AND APPROVING THE  
CONDUCT OF STORE CLOSING SALES, WITH SUCH SALES TO BE FREE AND  
CLEAR OF ALL LIENS, CLAIMS, AND ENCUMBRANCES, AND (III) GRANTING  
RELATED RELIEF; AND (B) ENTRY OF FINAL ORDER (I) AUTHORIZING  
POSTPETITION USE OF CASH COLLATERAL, (II) GRANTING ADEQUATE  
PROTECTION, AND (III) MODIFYING THE AUTOMATIC STAY**

GGP, Inc., Rouse Properties Inc., and Turnberry Associates (collectively, the "Landlords"), by and through their counsel, Kelley Drye & Warren LLP, hereby object (the "Objection") to the *Debtors' Motion for Entry of Final Order (I) Authorizing the Debtors to Assume the Consulting Agreement, (II) Authorizing and Approving the Conduct of Store Closing Sales, with Such Sales to be Free and Clear of All Liens, Claims, and Encumbrances, and (III) Granting Related Relief* (D.I. 10) (the "GOB Motion") and *Debtors' Motion for Entry of Final Order (I) Authorizing Postpetition Use of Cash Collateral, (II) Granting Adequate Protection, and (III) Modifying the Automatic Stay* (D.I. 17) (the "Cash Collateral Motion").<sup>2</sup> In support of the Objection, the Landlords respectfully state as follows:

<sup>1</sup> The above-captioned debtors in these proceedings are: The Wet Seal, LLC; The Wet Seal Gift Card, LLC; Mador Financing, LLC.

<sup>2</sup> Capitalized terms used but not defined in this Objection shall have the meanings ascribed to them in the GOB Motion and the Cash Collateral Motion.

**PRELIMINARY STATEMENT**

1. On February 2, 2017, approximately one week after the Debtors announced that they were permanently closing all of their stores and had commenced store closing sales (the “GOB Sales”), the Debtors commenced these bankruptcy proceedings. The Debtors careful and deliberate timing when filing these bankruptcy cases forced their landlords to provide millions of dollars of non-consensual unsecured financing that the Debtors appear unwilling and unable to repay.

2. In exchange for allowing the Debtors to use their cash collateral to liquidate their inventory and other collateral, the Debtors and their primary secured lenders (the “Secured Lenders”) have proposed a budget that fails to provide millions of dollars necessary to pay the administrative expenses associated with liquidating their collateral through Chapter 11. Most notably for the Landlords, the proposed cash collateral budget fails to provide funds for the payment of “Stub Rent” owed to the Landlords for the use of their property from February 2 to February 28 – the likely duration of the GOB Sales.<sup>3</sup>

3. While the Landlords are not conceptually opposed to Court-authorized and monitored GOB Sales during a bankruptcy proceeding, or the proposed use of the Secured Lenders’ cash collateral to carry out the GOB Sales, the Landlords are opposed to the allowance of GOB Sales and approved use of cash collateral where there is no plan, no funds available, and no Court authorization to pay the Landlords’ Stub Rent claims for the Debtors’ and Secured Lenders’ postpetition use of the Landlords’ leased premises to liquidate the Secured Lenders’ collateral. In light of the Debtors’ apparent administrative insolvency, it is particularly problematic

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<sup>3</sup> The GOB Sales will be carried out at least through the end of February. *See* Decl. of Judd P. Tirnauer (D.I. 19) at ¶ 74. To the extent the Debtors vacate and reject a lease prior to February 28, the Stub Rent would consist of the per diem rent and any other Lease obligations due for the period from February 2 through and including the effective date of rejection of such lease.

that the Secured Lenders are seeking waivers of sections 506(c) and 552(b) of the Bankruptcy Code, the very provisions specifically enacted by Congress to prevent the exploitation of the Debtors and their unsecured creditors that the Secured Lenders are seeking in this case – namely, forcing unsecured creditors to pay for the liquidation of the Secured Lenders’ collateral.

4. The Landlords have been accommodating to the Debtors and their expedited liquidation process, including supporting the Debtors’ requests regarding conducting the GOB Sales at the first day hearing. Since the first day hearing, the Landlords have continued to work cooperatively with the Debtors and their liquidation consultants to consensually resolve their objections to the GOB Sales, and, to that end, the Landlords have agreed in principle to the terms of side letters with the Debtors’ consultants to govern the conduct of the GOB Sales in the event they continue.

5. The only remaining objection that the Landlords have to the GOB Motion and Cash Collateral Motion is the Debtors’ refusal and inability to pay the Landlords for the use of their premises while liquidating the Secured Lenders’ collateral in the GOB Sales. If the Debtors and the Secured Lenders want to liquidate their collateral in Chapter 11, with the attendant benefit of GOB Sales authorized by a Federal Bankruptcy Court, they must pay to play, including immediately paying the Landlords’ Stub Rent for the stores where they are conducting GOB Sales.

### **BACKGROUND**

6. The Landlords are the owners or managing agents for the owners of numerous shopping centers located throughout the United States. The Debtors lease retail space from the Landlords pursuant to leases (the “Leases”) for the stores identified in the chart attached hereto as Exhibit 1 (the “Leased Premises”). All or substantially all the Leased Premises are located in shopping centers as that term is used in section 365(b)(3) of the Bankruptcy Code. *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081 (3d Cir. 1990).

7. On January 23, 2017, the Debtors commenced the GOB Sales at essentially all of their remaining store locations pursuant to a certain consulting agreement.<sup>4</sup>

8. On February 2, 2017 (the “Petition Date”), the Debtors filed voluntary petitions for relief pursuant to chapter 11 of the Bankruptcy Code with this Court, and numerous “first day” motions, including the GOB Motion and the Cash Collateral Motion. Attached to the Cash Collateral Motion as Exhibit 2 is the Debtors’ proposed Cash Collateral budget (the “Budget”). On February 3, 2017, the Court entered interim orders on the GOB Motion (D.I. 50) (the “Interim GOB Order”) and the Cash Collateral Motion (D.I. 51)(the “Interim Cash Collateral Order”).

9. The Debtors did not pay February rent when due, and have not paid the Stub Rent due under the Leases for the Debtors’ continued use and occupancy of the Leased Premises from February 2 – February 28, 2017. The Budget and first day pleadings say little or nothing about the payment of millions of dollars of Stub Rent, and what funds, if any, will be available for distribution to general unsecured creditors.

10. In the coming days, the Landlords plan to file a motion seeking immediate payment of the Landlords’ Stub Rent claims as adequate protection for the Debtors’ postpetition use of the Landlords’ property outside the ordinary course of business to liquidate the Secured Lenders’ collateral through the GOB Sales.

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<sup>4</sup> See GOB Motion at ¶ 6.

**OBJECTION**

11. Under the Cash Collateral Motion, the Debtors are required to abide by the restrictions of the Budget,<sup>5</sup> thus payment of the Stub Rent to the Landlords would place the Debtors in default of their obligations under the Interim Cash Collateral Order. Therefore, the Interim Cash Collateral Order indirectly forbids the Debtors from complying with sections 363(e) and 361 of the Bankruptcy Code which requires the Court to grant adequate protection upon request of the Landlords through cash payment of the Stub Rent.

12. The Landlords object to the GOB Motion, Cash Collateral Motion, and entry of any orders thereon or approval of any budget that (i) includes waivers of sections 506(c) and 552 of the Bankruptcy Code, and (ii) fails to provide funds to pay and direction to the Debtors to immediately pay the Stub Rent for the GOB Sales. Absent modification of the Budget and revision of the proposed final cash collateral order and GOB Sale order, the Cash Collateral Motion and GOB Motion should be denied.

**A. The Court Should Not Allow 506(c) or 552(b) Waivers, and Should Require the Secured Lenders to Pay For the Liquidation of Their Collateral**

13. The Court should not approve any waiver of the estates' rights under sections 506(c) and 552(b) of the Bankruptcy Code. Section 506(c) of the Bankruptcy Code allows a debtor to charge the costs of preserving or disposing of a secured lender's collateral to the collateral itself. 11 U.S.C. § 506(c). This provision ensures that the cost of liquidating a secured lender's collateral is not paid from unsecured recoveries. *See, e.g., Precision Steel Shearing v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 325 (3d Cir. 1995) (stating, "section 506(c) is designed to prevent a windfall to the secured creditor"); *Kivitz v. CIT Group/Sales Fin., Inc.*, 272 B.R. 332, 334 (D. Md.

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<sup>5</sup> *See Interim Cash Collateral Order* at ¶ 13(z).

2000) (stating, “the reason for [section 506(c)] is that unsecured creditors should not be required to bear the cost of protecting property that is not theirs”). Similarly, the “equities of the case” exception in section 552(b) of the Bankruptcy Code allows a debtor, committee or other party-in-interest to exclude post-petition proceeds from pre-petition collateral on equitable grounds, including to avoid having unencumbered assets fund the cost of a secured lender’s foreclosure. 11 U.S.C. § 552(b).

14. The Budget neither provides sufficient funds for the Stub Rent, nor allows the immediate payment of the Stub Rent for the GOB Sales, and there are no assurances in the Cash Collateral Motion, the Budget or the Interim Cash Collateral Order (D.I. 51) that the Debtors’ estates will have enough money to pay all administrative claims and conduct an orderly wind down of these cases.

15. Absent sufficient funding in a consensual budget that ensures (i) the immediate payment of the Stub Rent for the GOB Sales to the Landlords, (ii) administrative solvency and (iii) a controlled exit from these chapter 11 cases, the Debtors should not be allowed to waive their statutory ability to surcharge the Secured Lenders’ collateral and/or recover costs, including Stub Rent, as adequate protection or under the equities of the case. *See, e.g., In re Mortgage Lenders Network USA, Inc.*, Hearing Transcript (D.I. 346) at 20-21, Case No. 07-10146 (PJW) (Bankr. D. Del. Mar. 20, 2007) (recognizing that 506(c) waivers require creditor consent); *see also In re Townsends, Inc.*, Hearing Transcript (D.I. 338) at 23-25, Case No. 10-14092 (CSS) (Bankr. D. Del. Jan. 21, 2011) (refusing to approve financing for a sale process that would leave the estate administratively insolvent); *In re NEC Holdings Corp.*, Hearing Transcript (D.I. 224) at 100, Case No. 10-11890 (PJW) (Bankr. D. Del. July 13, 2010) (requiring that secured creditors pay the “freight” of the bankruptcy by ensuring an administratively solvent estate).

16. The Landlords believe that, at a minimum, the Court should follow the example set by Judge Walrath in the *Sports Authority* bankruptcy, where, faced with evidence of

administrative insolvency, including tens of millions of dollars of unpaid and unbudgeted stub rent claims, the Court refused to grant the 506(c) waiver sought by the lenders. *See In re Sports Authority Holdings, Inc.*, Hearing Transcript (D.I. 1463) at 194-195, Case No. 16-10527 (MFW) (Bankr. D. Del. April 26, 2016). As Judge Walrath explained:

There is no commitment to pay the stub rent. There's a commitment to escrow \$8 million, a fraction of the stub rent for the GOB leases. But there's no commitment to allow that payment to be made. And I assume that the lenders are going to retain a security interest in that cash escrow agreement. Even if they don't, that's clearly insufficient. The debtor is correct under *Montgomery Ward*, you don't have to pay the stub rent on the first day of the case. But in a case where the landlords and other administrative claims are clearly not budgeted or being paid while the ... secured lenders' collateral is being liquidated and their secured claim is being paid, I have a serious problem with that. I think the fix is no 506(c) waiver for anybody.

**B. The Court Should Not Allow Continued GOB Sales  
Without Payment of the Stub Rent**

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17. Respectfully, if the Debtors' Secured Lenders are unwilling to budget for and immediately pay the Landlords' Stub Rent claims, the Landlords believe that the Court should take the additional step of denying the GOB Motion and ordering the immediate termination of all of the GOB Sales.

18. Just as the Court would not allow the Debtors to continue operations without assurance that they would be able to pay their employees, the Court similarly should not authorize the continued use of the Landlords' leased premises outside of the ordinary course of business for the liquidation of the Secured Lenders' collateral through the GOB Sales. As this Court discussed in the *Townsend* case, the Debtors should not be allowed to discriminate between classes of administrative creditors, and pick and choose which administrative claims they are willing or able to pay, and which will fall victim to administrative insolvency.

**JOINDER IN OBJECTIONS OF OTHER LANDLORDS**

19. To the extent not inconsistent with this Objection, the Landlords join in the objections of other landlords and contract counterparties to the GOB Motion and Cash Collateral Motion.

**CONCLUSION**

WHEREFORE, the Landlords respectfully request that the Court enter separate orders (i) terminating the Debtors' GOB Sales unless the Debtors immediately pay the Landlords the Stub Rent for the GOB Sales as adequate protection required by section 363(e) and 361 of the Bankruptcy Code for the Debtors' postpetition use of the Landlords' property, (ii) denying the Cash Collateral Motion or modifying the proposed final order and Budget as set forth herein; and (iii) granting such other and further relief as this Court deems just and proper.

Dated: February 20, 2017  
New York, New York

KELLEY DRYE & WARREN LLP

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Counsel for GGP, Inc., Rouse Properties, Inc., and  
Turnberry Associates



**EXHIBIT 1****GGP, Inc.**

<b>Mall Name</b>	<b>Location</b>
Fashion Show	Las Vegas, NV
Visalia Mall	Visalia, CA
Bayside Marketplace	Miami, FL
Parks At Arlington	Arlington, TX
Alderwood	Lynwood, WA
Pembroke	Pembroke Pines, FL
Governors Square	Tallahassee, FL
Northstar Mall	San Antonio, TX
Willowbrook Mall	Wayne, NJ
First Colony	Sugarland, TX
Fox River	Appleton, WI
Spokane Valley	Spokane, WA
Woodlands	Woodlands, TX
Water Tower Place	Chicago, IL
Mayfair	Wauwatosa, WI
Northridge Fashion Center	Northridge, CA
Coronado Center	Albuquerque, NM
Stonebriar Mall	Frisco, TX
Baybrook	Friendswood, TX
Lakeside Mall	Sterling, MI
Carolina Place	Pineville, NC
Columbiana Centre	Columbia, SC
Columbia Mall	Columbia, Missouri
Clackamas Town Center	Portland, OR
Galleria at Tyler	Riverside, CA
Altamonte Mall	Altamonte Springs, FL
North Point	Alpharetta, GA
Northbrook Court	Northbrook, IL
Peachtree	Columbus, GA
Perimeter	Atlanta, GA
Quail Springs	Okalahoma City, OK
Rivertown Crossings	Grandville, MI
Sooner Fashion Mall	Norman, OK
Tucson Mall	Tucson, AZ
Woodbridge Center	Woodbridge, NJ
Cumberland Mall	Atlanta, GA
Northtown	Spokane, WA
Park City Center	Lancaster, PA

Westroads	Omaha, NE
Mall St. Matthews	Louisville, KY
Crossroads-MI	Portage, MI
The Oaks	Gainesville, FL
Lynnhaven	Virginia Beach, VA
Bellis Fair	Bellingham, WA
Boise Towne Square	Bose, ID
Valley Plaza Mall	Bakersfield, CA
Oglethorpe	Savannah, GA
Grand Teton Mall	Idaho Falls, ID
Buckland Hills	Manchester, CT
Providence Place	Providence, RI
Willowbrook Mall	Houston, TX

### **Rouse Properties, Inc.**

<b>Mall Name</b>	<b>Location</b>
Mall at Mt. Shasta	Redding, CA

### **Turnberry Associates**

<b>Mall Name</b>	<b>Location</b>
Destin Commons	Destin, FL

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FOR THE DISTRICT OF DELAWARE**

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**CERTIFICATE OF SERVICE**

I, Gilbert R. Saydah Jr., hereby certify that on February 20, 2017, in addition to the notice and service provided through the Court’s CM/ECF system, I served true and correct copies of the foregoing document upon the parties listed below in the manner indicated.

/s/ Gilbert R. Saydah Jr.  
Gilbert R. Saydah Jr., Esq.

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