

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
www.flmb.uscourts.gov

In re:

RETAIL DESIGNS, LLC,
CENTER DESIGNS, LLC,
COVINGTON PLACE
ASSOCIATES, LLC,

Debtors.

Chapter 11

Case No. 9:17-bk-02044-FMD

Case No. 9:17-bk-02045-FMD

Case No. 9:17-bk-02859-FMD

*Jointly Administered Under
Case No. 9:17-bk-02044-FMD*

**EMERGENCY MOTION FOR AN ORDER AUTHORIZING RETAIL
DESIGNS, LLC TO USE SYMETRA LIFE INSURANCE COMPANY'S
CASH COLLATERAL AND TO PROVIDE ADEQUATE PROTECTION**

Retail Designs, LLC ("***Retail***"), Center Designs, LLC ("***Center***") and Covington Place Associates, LLC ("***Covington***"), the above captioned debtors and debtors-in-possession (collectively, "***Debtors***"), by and through its undersigned counsel, hereby files its *Emergency Motion for an Order Authorizing Retail Designs, LLC to Use Symetra Life Insurance Company's Cash Collateral and to Provide Adequate Protection* ("***Motion***"), and in support thereof, respectfully states as follows:

PRELIMINARY STATEMENT

1. For the Court's ease of reference the following are the Typical Terms (as defined in the Local Rules) of this Motion, which are more fully described in Motion:

a. **Identification of Each Secured Creditor**: The only secured creditor that has a security interest in the cash collateral at issue in this Motion is Symetra by virtue of a Real Estate Promissory Note in the original principal amount of \$3,850,000.00 in favor of Symetra and that certain Trust Deed, Assignment of Rents, Fixture Filing and Security Agreement securing payment of the note. Retail currently owes Symetra approximately \$1,172,330.38.

b. **Adequate Protection**: Symetra will be adequately protected in the form of replacement liens and monthly adequate protection payments in the same amount that Symetra was receiving prior to the Bankruptcy Case.

c. **Cash Collateral on the Petition Date**: Retail did not possess any cash collateral on the Petition Date. However, since the Petition Date, Retail has accumulated \$131,694.50 in the segregated cash collateral account that it has established for Symetra.

d. **Amount Needed for Immediate Use**: Retail seeks the immediate use of cash collateral in the amount of \$10,000.

e. **Budget**: A budget setting forth the proposed use of the cash collateral (and the cash flow for the particular property that is subject to the liens of Symetra) is annexed hereto as Exhibit A.

f. **Reasonable Reporting Requirements**: The reporting requirements will be set forth in the proposed Order granting this Motion.

g. **Proposed Consequences of Default**: The consequences of default will be set forth in the proposed Order granting this Motion.

JURISDICTION

2. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of this proceeding and this Motion is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory predicates for the relief requested herein include, without limitation, Sections 105(a) and 363 of Title 11 of the United States Code (“***Bankruptcy Code***”) and Rule 4001(d)(1)(D) of the Federal Rules of Bankruptcy Procedure (“***Bankruptcy Rules***”).

BACKGROUND

1. On March 13, 2017 – in the case of Retail and Center – and on April 3, 2017 – in the case of Covington – (collectively “***Petition Date***”), the Debtors each filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtors are authorized to continue to operate their businesses and manage their properties as debtors in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

2. The Debtors are limited liability companies that own commercial shopping centers

in West Virginia and, in the case of Covington, Georgia.

3. More specifically, Retail – a Florida limited liability company – owns the following commercial shopping centers:

- a. Fayette Landing Shopping Center, located at 9003 Fayette Landing, in the City of Oak Hill, West Virginia (“*Fayette Landing Shopping Center*”), and;
- b. Merchants Walk Shopping Center, located at the intersection of U.S. Route 19 and West Webster Road, Summerville, Nicholas County, West Virginia.

4. Similarly, Center – a Georgia Limited Liability Company, headquartered in the State of Florida – owns the following commercial shopping centers:

- a. Marion Square Shopping Center, fronting Country Club Road at U.S. Route 19, Fairmont, West Virginia;
- b. Rainelle Plaza, located on the north side of U.S. Route 60, Rainelle, Greenbrier County, West Virginia;
- c. The Plantation Shopping Center, fronting on Stone Mountain Lane and U.S. Route 250/19, Elkins, West Virginia, and;
- d. Valley Pointe Shopping Center, located at the intersection of U.S. Route 219/250 and WV Route 25/4, Elkins, Randolph County, West Virginia.

5. Finally, Covington – a Georgia Limited Liability Company, headquartered in the State of Florida – owns the following commercial shopping center:

- a. Covington Place Shopping Center, 4060 Covington Highway, Atlanta (Decatur), GA.

FAYETTE LANDINGS SHOPPING CENTER

6. As stated above, Retail is the 100% owner of the Fayette Landings Shopping Center. This shopping center consists of two (2) separate parcels of land. The first parcel, which is not impacted by the relief requested herein, is encumbered by among other things a deed of trust and general security agreement held in favor of Carter Bank and Trust.

7. More importantly for purposes of this Motion, the second parcel is located at 9000 Fayette Landings Shopping Center, Oak Hill, West Virginia and is leased by Retail to Kmart Corporation pursuant to a lease dated January 28, 1992 (“*Second Parcel*”).

THE PRE-PETITION LOAN AGREEMENT WITH SYMETRA

8. On July 27, 2005, the Debtor executed a Real Estate Promissory Note in the original principal amount of \$3,850,000.00 in favor of Symetra (“*Note*”). The Note is secured by that certain Trust Deed, Assignment of Rents, Fixture Filing and Security Agreement (collectively the “*Security Agreements*”), pursuant to which the Debtor granted Symetra a first priority security interest in the Second Parcel.

9. The Debtor has received, and will continue to receive, monthly rental payments under the Kmart Lease in the amount of approximately \$43,073.50, which monthly rental payments constitute, in part, the cash collateral of Symetra.

10. As of March 30, 2017, the Retail owes Symetra approximately \$1,172,330.38.

11. Prior to the Petition Date, Retail was paying Symetra, in accordance with the Note, monthly payments – consisting of principal and interest – in the amount of approximately \$31,458.00.

12. At the time of Retail’s Petition Date, Retail was not in default with its payments to Symetra.

RELIEF REQUESTED

13. By this Motion, Retail seeks the entry of an Order authorizing it to use cash collateral pursuant to Section 363 of the Bankruptcy Code, Rule 4001(b)(2) of the Bankruptcy Rules, and Local Rule 2081-1; setting the time for a final hearing and objection deadline for this Motion; and granting such other and further relief as is just and proper.

14. As set forth in the budget annexed hereto as Exhibit A (“**Budget**”), Retail requires the use of cash collateral to fund all necessary operating expenses relating not only to the maintenance of the Second Parcel, but also to the administration of the Retail’s other accruing post-petition expenses.

15. Retail will suffer immediate and irreparable harm if it is not authorized to use cash collateral to fund the expenses set forth in the Budget. Absent such authorization, Retail will not be able to maintain and protect its business.

16. The Debtor’s use of property of the estate is governed by Section 363 of the Bankruptcy Code, which provides 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, any may use property of the estate in the ordinary course of business without notice or a hearing.

11 U.S.C. § 363(c)(1).

17. A debtor in possession has all of the rights and powers of a trustee with respect to property of the estate, including the right to use property of the estate in compliance with Section 363 of the Bankruptcy Code. *See* 11 U.S.C. § 1107(a).

18. When a Chapter 11 debtor-in-possession is authorized to operate its business, it may use property of the estate in the ordinary course of business, but it is prohibited from using cash collateral absent consent of the secured creditor or court authorization. *In re Kahn*, 86 B.R. 506 (Bankr. W.D. Mich. 1988); *In re Westport-Sandpiper Associates Ltd. P’Ship*, 116 B.R. 355 (Bankr. D. Conn. 1990)(debtor may not use cash collateral unless entity that has interest in it consents or debtor proves that interest of the entity is adequately protected).

19. “Cash collateral” is defined by the Bankruptcy Code as, “cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property...” 11 U.S.C. § 363(a). Any cash collateral generated by the Debtor may constitute the cash collateral of the alleged secured creditors.

20. The Debtor proposes to use the Cash Collateral in accordance with the terms of the Budget. The Debtor also requests that it be authorized: (i) to exceed any line item on the budget by an amount up to ten (10) percent of each such line item; or (ii) to exceed any line item by more than ten (10) percent so long as the total of all amounts in excess of all line items for the Budget do not exceed ten (10) percent in the aggregate of the aggregate of the total budget.

ADEQUATE PROTECTION TO SYMETRA

21. The Bankruptcy Code does not define “adequate protection” but does provide a non-exclusive list of the means by which a debtor may provide adequate protection, including “other relief” resulting in the “indubitable equivalent” of the secured creditors’ interest in such property. See 11 U.S.C. § 361.

22. Adequate protection is to be determined on a case-by-case factual analysis. *See 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). For example, in *O’Connor*, the court held that “[i]n order to encourage the Debtors’ efforts in the formative period prior to the proposal of a reorganization, the court must be flexible in applying the adequate protection standard.” *In re O’Connor*, 808 F.2d at 1396 (citations omitted). *See also In re Quality Interiors, Inc.*, 127 B.R. 391 (Bankr. N.D. Ohio 1991) (holding that the granting or a replacement lien provided adequate protection).

23. Adequate protection is meant to ensure that the secured creditors receive the value for which it originally bargained pre-bankruptcy. *Swedeland Development Group, Inc.*, 16 F.3d 552, 564 (3rd Cir. 1994) (citing *In re O'Connor*, 808 F.2d 393, 1396-97 (10th Cir. 1987)). Courts have noted that the essence of adequate protection is the assurance of the maintenance and continued responsibility of the lien value during the interim period between the filing and the confirmation of a plan. *In re Arrienes*, 25 B.R. 79, 81 (Bankr. D. Or. 1982). The purpose of adequate protection requirement is to protect secured creditors from diminution of value during the use period. See *In re Kain*, 86 B.R.506, 513 (Bankr. W.D. Mich. 1988); *In re Becker Indus. Corp.*, 58 B.R. 725, 736 (Bankr. S.D.N.Y. 1986); *In re Ledgmere Land Corp.*, 116 B.R. 338, 343 (Bankr. D. Mass. 1990).

24. As adequate protection for the interests of Symetra in the cash collateral, Retail shall provide replacement liens (the “**Adequate Protection Liens**”) upon all categories and property of Retail, now existing and hereafter acquired, upon which Symetra held prepetition security interests or liens and all proceeds, rents, or other income thereof (collectively, the “**Adequate Protection Collateral**”), effective upon the Petition Date and without the necessity of the execution or filing by Retail or Symetra of mortgages, security agreements, pledge agreements, financing statements, or otherwise. The Adequate Protection Liens shall not prime, however, any pre-existing liens, if any, with priority over Symetra’s prepetition liens. The Adequate Protection Liens will secure any diminution in value of Symetra’s collateral, whether by use, sale, lease, depreciation, depletion, disposition, or otherwise.

25. In addition to the Adequate Protection Liens, Retail shall make adequate protection payments to Symetra in the full amount that Retail was paying prior to the Petition Date.

26. Retail submits that the above treatment provides adequate protection to Compass for the Debtor's use of cash collateral, and that the Court should therefore grant the relief requested herein.

A. The Use of Cash Collateral will Preserve Retail's Going Concern Value Which Will Inure to the Benefit of Symetra and Other Creditors.

27. The continued operation of Retail's business will preserve its going concern value, enable the Retail to capitalize on that value through a reorganization strategy, and ultimately facilitate Retail's ability to confirm a Chapter 11 plan. If Retail is not allowed to use cash collateral, it will be unable to operate and potentially cause harm to the property.

28. It is well established that a bankruptcy court, where possible, should resolve issues in favor of preserving the business of the debtor has a going concern:

A debtor, attempting to reorganize a business under Chapter 11, clearly has a compelling need to use cash collateral in its effort to rebuild. Without 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 George Ruggiere Chrysler-Plymouth, Inc., 727 F.2d 1017, 1019 (11th Cir. 1984).

29. Accordingly, courts typically authorize the use of cash collateral to enhance or preserve a debtor's going concern value. For example, in *In re Stein*, 19 B.R. 458 (Bankr. E.D. Pa. 1982), the Court allowed a debtor to use cash collateral where the secured party was undersecured, finding that the use of cash collateral was necessary to the debtors' continued operations and the creditor's secured position can only be enhanced by the continued operation of the debtor's business. *Id.* at 460; *see also Federal Nat. Mort. v. Dacon Bolingbrook Assoc.*, 153 B.R. 204, 204 (N.D. Ill. 1993) (security interest protected to extent debtor reinvested rents in operation and maintenance of the property); *In re Constable Plaza Assoc.*, 125 B.R. 98, 105 (Bankr. S.D.N.Y.

1991) (debtor's reinvestment of rents to maintain and operate office building will serve to preserve or enhance the value of the building which, in turn, will protect the collateral covered by [the] mortgage); *In re Dynaco Corp.*, 162 B.R. 389, 395-96 (Bankr. D. N.H. 1983)(finding that the alternative to the debtor's use of cash collateral, termination of its business, would doom reorganization and any chance to maximize value for all creditors); *In re Karl A. Neise, Inc.*, 156 B.R. 600, 602 (Bankr. S.D. Fla. 1981)(marginally secured creditor adequately protected by lien on postpetition property acquired by debtor, debtors can use cash collateral in the normal operation of their business).

30. If Retail cannot use cash collateral, it will be forced to cease operations. By contrast, granting the relief requested will allow Retail to maintain operations and preserve the going concern value of its business which will inure to the benefit of any secured creditors and all other creditors.

NOTICE AND REQUEST FOR IMMEDIATE RELIEF

31. Pursuant to Bankruptcy Rule 4001(b)(2), a final hearing on this Motion may not be commenced before 14 days after service of that Motion. Fed. R. Bankr. P. 4001. This Court may, however, conduct a preliminary hearing on such motion and authorize the use of cash collateral, if necessary, to the extent necessary to avoid immediate and irreparable harm to the debtor's estate.

Id.

32. Retail brings this Motion on an emergency basis given the immediate and irreparable harm that it will potentially suffer if it is denied the relief requested herein. This relief is necessary for Retail to sustain its ongoing business operations and to achieve its future business objectives. Use of cash collateral will permit Retail to, among other things, preserve the value of

its bankruptcy estate, continue operations and/or liquidation of its business in an orderly fashion, meet ongoing obligations to third-parties, and satisfy other working capital and operational needs.

33. Absent immediate relief as requested herein, Retail would likely have to cease business operations to the material detriment of creditors and other parties-in-interest. Retail needs to ensure the availability of such working capital now. Retail anticipates using cash collateral to fund its day-to-day operations.

34. Retail therefore requests that the Court hold a preliminary hearing on this Motion as soon as the Court's schedule permits, and that it hold a final hearing on this Motion after the required fourteen-day period prescribed by Bankruptcy Rule 4001(b) has passed.

35. Furthermore, to successfully implement the foregoing, Retail requests a waiver of the notice requirements of Bankruptcy Rule 6004(a) and the 14-day stay under Bankruptcy Rule 6004(h). The exigent nature of the relief sought herein justifies immediate relief, which is necessary for Retail to be able to continue to operate its businesses and preserve value in its estate.

WHEREFORE, Retail respectfully requests that this Court (i) grant the Motion on an interim basis; (ii) approve the interim use of cash collateral as more fully described in the Budget; (iii) set the Motion for a final hearing; (iv) approve the use of cash collateral on a final basis, following such final hearing; and (v) grant such other relief as is just and proper.

Dated: June 9, 2017

Respectfully submitted,

By **DAL LAGO LAW**

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Debtors-in-Possession*

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing was electronically served through the Court's CM/ECF Noticing system this 9th day of June, 2017 to the following: **United States Trustee – FTM** at USTPRegion21.TP.ECF@USDOJ.GOV; **Benjamin E. Lambers, Esq.** on behalf of U.S. Trustee United States Trustee – FTM at Ben.E.Lambers@usdoj.gov; **Jonathan L. Hauser, Esq.**, on behalf of Creditor, Carter Bank & Trust at jonathan.hauser@troutmansanders.com; **Luis E Rivera, II, Esq.**, on behalf of Creditor, Carter Bank & Trust at luis.rivera@henlaw.com; **Bradley M. Saxton, Esq.**, on behalf of Creditor, Symetra Bank Mortgages at bsaxton@whww.com and the **10 Largest Unsecured Creditors**, as noted on the attached mailing matrix, by First Class U.S. Mail.

/s/ Michael R. Dal Lago
MICHAEL R. DAL LAGO
Florida Bar No. 0102185

*Counsel for Debtors and Debtors-in-
Possession*

In re Retail Designs, LLC, Case No. 9:17-bk-02044-FMD

List of Creditors Who Have the 10 Largest Unsecured Claims, Are Not Insiders and Are Not Represented by Counsel

City of Oak Hill
Business and Occupation Tax
P.O. Box 1245
Oak Hill, WV 25901

City of Summersville
Business & Occupation Tax
P.O. Box 525
Summersville, WV 26651

MonPower
P.O. Box 3615
Akron, OH 44309-3615

Nicholas County Landfill
P.O. Box 59
Calvin, WV 26660-0059

Nicholas Sanitation
17 Elk Lane
Summersville, WV 26651-9631

Oak Hill Garbage Disposal
1479 Stanaford Road
Beckley, WV 25801-8633

SLS Land & Energy Dev
PO Box 150
Glenville, WV 26351-0150

Williamson & Shriver Archit.
717 Bigley Avenue
Charleston, WV 25302-3356

Zurich North America
P.O. Box 4664
Carol Stream, IL 60197-4664

EXHIBIT A

BUDGET

TO BE FILED BEFORE HEARING