

IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
DISTRICT OF KANSAS

In Re: )  
)  
CIP INVESTMENT PROPERTIES, LLC ) Case No. 18-22039  
) Chapter 11  
Debtor, )

**FARM BUREAU LIFE INSURANCE COMPANY'S MOTION TO  
PROHIBIT USE OF  
CASH COLLATERAL, AND FOR RECOUPMENT AND/OR SETOFF**

Farm Bureau Life Insurance Company (“Farm Bureau”), by and through counsel, hereby moves the Court to enter its Order prohibiting the use of Farm Bureau’s cash collateral, and to confirm Farm Bureau’s recoupment and/or setoff rights, and in support thereof respectfully states as follows:

**PARTIES**

1. On September 28, 2018, debtor CIP Investment Properties, LLC (“**Debtor**”) filed a Voluntary Petition under Chapter 11 of the United States Bankruptcy Code (the “**2018 Bankruptcy**”).

2. Farm Bureau is a secured credit in this proceeding and is the holder of a Promissory Note, Mortgage, Assignments of Rents, Guaranty, and an Assignment and Assumption Agreement (collectively, the “**Loan Documents**”), as more particularly described below.

**JURISDICTION AND VENUE**

3. The Court has jurisdiction under 28 U.S.C. §157(a) and § 1334.
4. This is a core proceeding under 28 U.S.C. § 157(b)(2)(M).
5. Venue is proper under 28 U.S.C. § 1408 and § 1409.

#### **FARM BUREAU'S SECURED CLAIM**

6. Debtor's primary asset is a suburban office building located at 8200 and 8300 East Thorn Drive, Wichita, Kansas (the "**Thorn Building**").

7. Farm Bureau is the holder of a Promissory Note (the "**Note**") dated October 31, 2002 which is secured by the Thorn Building as described and as identified in the Mortgage, Security Agreement, Financing Statement and Fixture Filing with Absolute Assignment of Rents and Leases (the "**Mortgage**") of same date, executed and delivered to Farm Bureau by Debtor. True and correct copies of the Note and Mortgage are attached to this Motion and incorporated by this reference as Exhibits 1 and 2.

8. In connection with the Note and Mortgage, on October 31, 2002 Debtor executed an Absolute Assignment of Leases, Rents, and Income (the "**First Assignment of Rents**"). A true and correct copy of the First Assignment of Rents is attached to this Motion and incorporated by this reference as Exhibit 3.

9. On April 6, 2005 the Note and Mortgage were amended by way of an Allonge and Amendment to Secured Installment Note and Mortgage and Ratification of Guaranty Agreement (the "**First Allonge and**

**Amendment**”). A true and correct copy of the First Allonge and Amendment is attached to this Motion and incorporated by this reference as Exhibit 4.

10. On December 22, 2006 the Note and Mortgage were again amended by way of a Second Allonge and Amendment to Secured Installment Note and Mortgage and Ratification of Guaranty Agreement (the “**Second Allonge and Amendment**”). A true and correct copy of the Second Allonge and Amendment is attached to this Motion and incorporated by this reference as Exhibit 5.

11. On February 17, 2011, Farm Bureau executed an Assignment of Mortgage and Assignment of Leases (the “**Assignment of Mortgage**”) in favor of 5400 Holdings, LLC (“**5400 Holdings**”). A true and correct copy of the Assignment of Mortgage is attached to this Motion and incorporated by this reference as Exhibit 6.

12. On September 30, 2013 the Note and Mortgage were again amended by way of a Third Allonge and Amendment to Secured Installment Note and Mortgage and Ratification of Guaranty Agreement (the “**Third Allonge and Amendment**”). A true and correct copy of the Third Allonge and Amendment is attached to this Motion and incorporated by this reference as Exhibit 7.

13. On December 1, 2013 and December 2, 2013, 5400 Holdings executed an Allonge (the “**5400 Allonge**”) and an Assignment and Assumption Agreement (the “**5400 Assignment and Assumption**”).

**Agreement**”), both in favor of Farm Bureau. True and correct copies of the 5400 Allonge and the 5400 Assignment and Assumption Agreement are attached to this Motion and incorporated by this reference as Exhibits 8 and 9, respectively.

14. On December 2, 2013, 5400 Holding executed an Assignment of Mortgage and Assignment of Leases (the “**5400 Assignment of Mortgage**”) in favor of Farm Bureau. A true and correct copy of the 5400 Assignment of Mortgage is attached to this Motion and incorporated by this reference as Exhibit 10.

15. As of October 1, 2018, the following amounts are due under the Note, as amended:

a. Principal:	\$13,968,698.69
b. Interest:	\$53,382.70
c. Legal Fees 6/1/2013 – current	<u>\$87,979.96</u>
	<b>\$14,110,061.35 Total</b>

16. Interest continues to accrue under the Note at the rate of \$1,746.09 per day from October 1, 2018.

17. Under the terms of the Note and its First through Third Amendments, Farm Bureau is entitled to its attorney’s fees, costs, and other expenses including those incurred in this proceeding.

**DEBTOR’S 2012 CHAPTER 11 CASE**

18. Debtor filed its First Chapter 11, Case No. 12-21952 on July 17, 2012 (the “**2012 Bankruptcy**”).

19. On July 26, 2013, this Court entered its Findings of Fact, Conclusions of Law, and Order Confirming Debtor’s Modified Plan of Reorganization (As Amended) (the “**Confirmation Order**”). *In re CIP Investment Properties, LLC* 12-21952 [Doc 190]. A true and correct copy of the Confirmation Order is attached hereto and marked Exhibit 11.

20. The Confirmation Order incorporated the Debtor’s Notice of Plan Modification (the “**Plan Modification**”). *Id.*, [Doc. 175].

21. Pursuant to the Confirmation Order, the rents from Debtor’s operation of the Thorn Building have been deposited into a lockbox account controlled by Farm Bureau since September 30, 2013. On or about the fifth business day of each month, Farm Bureau makes certain disbursements out of the lockbox account to pay monthly principal, interest, and escrow for future real estate taxes and insurance<sup>1</sup>. Farm Bureau then transfers the remaining lockbox account balance to CIP for operation of the Thorn Building.

22. As of October 1, 2018, the lockbox account balance was approximately \$218,814.55.

23. As of Debtor’s September 28, 2018 2018 Bankruptcy Case filing date, no amounts were due by Debtor to Farm Bureau.

24. The final payment due by Debtor to Farm Bureau is the October 1, 2018 final balloon payment on account of maturity of the Loan in the amount of \$14,110,061.35

**PROHIBITION OF DEBTOR'S USE OF CASH COLLATERAL**

25. Farm Bureau incorporates and restates Paragraphs 1 – 24.

26. Under the Loan Documents, and the amendments thereto, Farm Bureau has an absolute assignment of *inter alia*, all of the leases, rents, income, revenues, issues, royalties, and profits of the real property that secures the debt to Farm Bureau. See First Assignment of Rents, Exhibit 3. Consequently, the rents are not property of the bankruptcy estate and do not constitute cash collateral within the meaning of 11 U.S.C. § 363(a).

27. The rents are cash collateral, Debtor has not obtained Farm Bureau's consent to the use thereof and no order authorizing the use of cash collateral has been entered by the Court as required by 11 U.S.C. § 363(c)(2).

28. To the extent the rents are cash collateral, Debtor has failed to provide Farm Bureau with adequate protection of its interest in the property which secures the debts.

29. If Debtor is using the rents without Farm Bureau's consent or authorization of the Court, Farm Bureau will suffer irreparable harm unless the Court enters an order prohibiting Debtor's use of the rents without adequate protection.

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<sup>1</sup> Prior to July, 2018, Farm Bureau also disbursed a monthly payment to Sedgwick County in the amount of \$59,383.34 for pre-2012 real estate taxes owed. The final payment to Sedgwick County for pre-

30. To the extent that Debtor has engaged in the unauthorized use of cash collateral since the filing of the Second Chapter 11 Petition, Farm Bureau is entitled to an administrative claim in the amount of such unauthorized use.

WHEREFORE, Farm Bureau prays that this Court enter its Order prohibiting the Debtor from using its cash collateral, for an Order compelling the Debtor to pay adequate protection as a condition of using its cash collateral; for allowance of an administrative expense claim equal to the amount of cash collateral used by Debtor without its consent or authorization of the Court since the filing of the Second Chapter 11 Petition; for its attorney's fees and costs incurred herein; and for such further relief as the Court deems just and proper.

**RECOUPMENT AND/OR SETOFF**

31. Farm Bureau incorporates and restates Paragraphs 1 – 30.

32. Pursuant to the Confirmation Order and Plan Modification, a Lockbox Agreement (the “**Lockbox Agreement**”) was executed by Debtor in favor of 5400 Holdings. *See* Confirmation Order, Exhibit 11.

33. As a result of the Lockbox Agreement, Farm Bureau has in its possession \$275,075.85 (the “**Lockbox Funds**”), which were collected prior to the filing of Debtor's Second Chapter 11 Petition, and which is comprised of \$273,077.63 in tax escrow and \$1,998.22 in insurance escrow. Under 11 U.S.C. § 553 and the Loan Documents, Farm Bureau holds a first, prior, and

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2012 taxes was disbursed in June, 2018.

perfected security interest in these funds through its rights of recoupment, or alternatively offset senior to all other creditors.

WHEREFORE, Farm Bureau prays this Court grant it relief from the automatic stay to recoup or alternatively to offset the \$275,075.85 against any amounts owed to Farm Bureau, and for such further relief as this Court deems just and proper.

Dated: October 3, 2018

LATHROP GAGE LLP

By: /s/ Brian M. Holland

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Attorneys for Creditor Farm Bureau  
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### **CERTIFICATE OF SERVICE**

I hereby certify that on October 3, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notice of electronic filing to all counsel of record.

/s/ Brian M. Holland  
*An Attorney for Farm Bureau  
Life Insurance Company*