



So Ordered.

Signed this 15 day of November, 2018.

Diane Davis
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

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In re:	:
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	:
HERB PHILIPSON’S ARMY AND NAVY	:
STORES INC.,	:
	:
	:
Debtor. ¹	:
	:
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Chapter 11

Case No. 18-61376 (DD)

THIRD INTERIM ORDER PURSUANT TO SECTIONS 105, 361, 362, 363, 507 AND 552 OF THE BANKRUPTCY CODE, BANKRUPTCY RULES 2002, 4001, 6003, 6004 AND 9014 (I) AUTHORIZING THE DEBTOR TO USE CASH COLLATERAL; (II) GRANTING ADEQUATE PROTECTION; AND (III) SCHEDULING A FINAL HEARING

This Third Interim Order (the “Third Interim Order”) is made among Herb Philipson’s Army and Navy Stores Inc., the above captioned debtor and debtor in possession (the “Debtor”), Second Avenue Capital Partners LLC (“Second Avenue”), Gary L. Philipson (“G.L. Philipson”) and Aviva Philipson (together with Second Avenue and G.L. Philipson, the “Secured Parties”), by and through their undersigned counsel and in connection with the relief requested in the Debtor’s *Motion for Entry of an Interim and Final Order Pursuant to Sections 105, 361, 362, 363, 507 and 552 of the Bankruptcy Code, Bankruptcy Rules 2002, 4001, 6003, 6004 and 9014*

¹ The last four digits of the Debtor’s federal tax identification number are 4814.

(I) Authorizing the Debtor to Use Cash Collateral; (II) Granting Adequate Protection; and (III) Scheduling a Final Hearing [Docket No. 3] (the “Motion”):²

RECITALS

A. Commencement of Case. On October 8, 2018 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of New York (the “Bankruptcy Court”) thereby commencing this Chapter 11 Case.

B. Debtor in Possession. Since the Petition Date, the Debtor has been managing and operating its business and property as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, including the use of the Secured Parties’ cash collateral (the “Cash Collateral”) as authorized pursuant to (i) that certain *Stipulation and Order Pursuant to Sections 105, 361, 362, 363, 507 And 552 of the Bankruptcy Code, Bankruptcy Rules 2002, 4001, 6003, 6004 and 9014 (I) Authorizing the Debtor to Use Cash Collateral; (II) Granting Adequate Protection; and (III) Scheduling a Final Hearing*, entered by this Court on October 11, 2018 [Docket No. 41] (the “First Interim Order”) and (ii) that certain *Second Interim Order Pursuant to Sections 105, 361, 362, 363, 507 and 552 of the Bankruptcy Code, Bankruptcy Rules 2002, 4001, 6003, 6004 and 9014 (I) Authorizing the Debtor to Use Cash Collateral; (II) Granting Adequate Protection; and (III) Scheduling a Final Hearing*, entered by this Court on October 19, 2018 [Docket No. 68] (the “Second Interim Order”).

C. Committee Formation. On October 19, 2018, the United States Trustee appointed the Official Committee of Unsecured Creditor’s (the “Committee) in this Chapter 11 Case pursuant to section 1102 of the Bankruptcy Code [Docket No. 67].

D. Jurisdiction and Venue. This Court has jurisdiction over this Chapter 11 Case, the Motion, and the parties and property affected hereby pursuant to 28 U.S.C. §§ 157(a) and 1334(b).

² All capitalized terms used, but not otherwise defined herein, shall have the meaning ascribed to them in the Motion.

Consideration of the Motion constitutes a core proceeding pursuant to 28 U.S.C. §157(b)(2). The predicates for relief sought herein are section 105, 361, 362, 363, 507(b) and 552 of the Bankruptcy Code, Bankruptcy Rules 2002, 4001, 6003, 6004 and 9014. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

E. Conditional Consent; Sections 506(c) and 552(b). Subject to the terms and conditions of this Third Interim Order, the Secured Parties are willing to consent to the Debtor's continued use of their Cash Collateral solely for the purposes set forth in, and in accordance with the terms and conditions of, the Budget (as defined herein) and this Third Interim Order. In light of the Secured Parties' continued consent to permit the use of the prepetition collateral, including Cash Collateral, for payments made in accordance with the Budget and the terms of this Third Interim Order, the Secured Parties are entitled to a grant of the Adequate Protection (as defined herein) as provided for below.

F. Good Faith. The terms of the Cash Collateral arrangement described herein are fair and reasonable, reflect the Debtor's exercise of prudent business judgment consistent with its fiduciary duties, and are supported by reasonably equivalent value and fair consideration. The terms concerning the Debtor's use of Cash Collateral as provided in this Third Interim Order were negotiated in good faith and at arms' length between the Debtor and the Secured Parties, and the Adequate Protection and other protections granted pursuant to this Third Interim Order will have the protections provided in section 364(e) of the Bankruptcy Code and will not be affected by any subsequent reversal, modification, vacatur, amendment, reargument or reconsideration of either the first Interim Order, this Third Interim Order, or any other order.

NOW THEREFORE, IT IS HEREBY STIPULATED, AGREED AND ORDERED:

1. Authorization to Use Cash Collateral.

a) The Debtor is authorized to use Cash Collateral, subject to the terms hereof, and consistent with and solely for the purposes set forth in the Budget (attached hereto as Schedule 1) (the "Budget") through and including December 19, 2018 (the "Third Interim Period"), subject to earlier termination as set forth herein.

b) The Debtor's authorization to use the Cash Collateral shall continue through and including the earliest to occur of the following:

- (i) December 19, 2018;
- (ii) the Debtor fails to make any payment required under this Third Interim Order, including, but not limited to, the Adequate Protection;
- (iii) the Debtor fails to comply with the Reporting Requirements (as such term is defined herein);
- (iv) the date of the commencement of any action by the Debtor or the Committee against a Secured Party with respect to the validity, extent, priority and/or amount of their respective prepetition claims or the prepetition liens;
- (v) without the prior written consent of the Secured Parties, the appointment of a chapter 11 trustee or examiner with duties in addition to those set forth in sections 1106(a)(3) and (a)(4) of the Bankruptcy Code;
- (vi) without the prior written consent of the Secured Parties, the Debtor's Chapter 11 Case is converted to a case under chapter 7; and
- (vii) without the prior written consent of the Secured Parties, the obtaining after the Petition Date of credit or the incurring of indebtedness that is (a) secured by a security interest, mortgage or other lien on all or any portion of the prepetition collateral that is equal or senior to any security interest, mortgage or other lien of the Secured Parties' respective prepetition liens, including, without limitation, any Replacement Lien (as defined herein) granted hereunder, or (b) entitled to priority administrative status which is equal or senior to any claim of the Secured Parties, including, without limitation, the Superpriority Claims (as defined herein).

For purposes of this Third Interim Order, the occurrence and continuation of any one or more of the foregoing events is defined herein as an "Event of Default."

c) Upon the occurrence and during the continuation of an Event of Default, the Secured Parties may serve a "Termination Declaration". A Termination Declaration shall be given by facsimile (or other electronic means) to counsel to the Debtor, counsel to any statutory committee, and the U.S. Trustee (the date of delivery of any such Termination Declaration being defined as the "Termination Declaration Date"). Unless such Event of Default is cured within five days after the Termination Declaration Date (the "Remedies Notice Period"), a Secured Party may seek expedited relief seeking the termination, reduction or restriction of the ability of the Debtor to use any Cash Collateral; provided,

however, that the aforementioned cure period shall not apply to a failure by the Debtor to make any payment required under Paragraph 1(d)(iii) hereof, and upon the occurrence of any such Event of Default Second Avenue shall immediately be permitted to seek expedited relief seeking the termination, reduction or restriction of the ability of the Debtor to use any Cash Collateral. Nothing herein shall be construed as consent on the part of Second Avenue to the Debtor's continued use of Cash Collateral beyond the Remedies Notice Period, or shall affect the rights of Second Avenue to object to the Debtor's continued use of Cash Collateral following the occurrence of a Termination Event, all such rights being hereby expressly reserved and preserved.

d) Adequate Protection. Pursuant to sections 361 and 363(e) of the Bankruptcy Code, and as a condition for the Debtor's use of Cash Collateral, the Secured Parties are entitled to adequate protection for and to the extent of any diminution in their respective prepetition collateral (the "Adequate Protection"). The Secured Parties are hereby granted the following Adequate Protection:

- (i) Superpriority Claim. Allowed senior administrative expense claims (the "Superpriority Claims") with priority over any and all administrative expenses, adequate protection claims and all other claims against the Debtor, excluding for purposes hereof solely any unpaid statutory fees of the Office of the United States Trustee or Chapter 7 trustee fees, now existing or hereafter arising, of any kind whatsoever, as provided under section 507(b) of the Bankruptcy Code, including, without limitation, all administrative expenses of the kind specified in sections 503(b) and 507(b) of the Bankruptcy Code, and over any and all administrative expenses or other claims arising under the Bankruptcy Code in the amount of the diminution. The Superpriority Claims shall be payable from all property of the Debtor's estate; provided, however, that avoidance actions arising under Chapter 5 of the Bankruptcy Code, including any proceeds arising therefrom, shall be excluded from the reach of the Superpriority Claims.

Anything herein to the contrary notwithstanding, nothing herein shall be construed as the Secured Parties' consent to the allowance and payment of any Chapter 7 trustee fees, or any professional fees or expenses of any person, or shall affect the rights of the Secured Parties to object to the allowance and payment of such fees and expenses.

- (ii) Adequate Protection Liens. Effective as of the date of entry of this Third Interim Order, in each case without the necessity of the execution by the Debtor (or recordation or other filing) of security agreements, financing statements, or other instrument or document (the "Adequate Protection Liens"), a replacement, valid, binding and enforceable, fully perfected

lien on and security interest in all of the Debtor's assets to the same extent, priority and enforceability held by each Secured Party as of the Petition Date, except as to (a) avoidance actions arising under Chapter 5 of the Bankruptcy Code, including any proceeds arising therefrom, and (b) the Liverpool Lease (as defined herein).

(iii) Postpetition Payments. As additional Adequate Protection:

- a) On November 16, 2018, the Debtor shall pay Second Avenue \$55,000 (the "November 16th Payment), upon receipt of which Second Avenue shall be authorized to apply the same in partial satisfaction of its prepetition claims, provided that such November 16th Payment shall be in the form of a "cash-sweep" from the Debtor's bank accounts, consistent with the Cash Management Order (as defined herein) and the prepetition financing documents;
- b) On November 23, 2018, the Debtor shall pay Second Avenue \$55,000 (the "November 23rd Payment), upon receipt of which Second Avenue shall be authorized to apply the same in partial satisfaction of its prepetition claims, provided that such November 23rd Payment shall be in the form of a "cash-sweep" from the Debtor's bank accounts, consistent with the Cash Management Order (as defined herein) and the prepetition financing documents;
- c) On November 30, 2018, the Debtor shall pay Second Avenue \$55,000 (the "November 30th Payment), upon receipt of which Second Avenue shall be authorized to apply the same in partial satisfaction of its prepetition claims, provided that such November 30th Payment shall be in the form of a "cash-sweep" from the Debtor's bank accounts, consistent with the Cash Management Order (as defined herein) and the prepetition financing documents;
- d) On December 7, 2018, the Debtor shall pay Second Avenue \$55,000 (the "December 7th Payment), upon receipt of which Second Avenue shall be authorized to apply the same in partial satisfaction of its prepetition claims, provided that such December 7th Payment shall be in the form of a "cash-sweep" from the Debtor's bank accounts, consistent with the Cash Management Order (as defined herein) and the prepetition financing documents; and
- e) On December 14, 2018, the Debtor shall pay Second Avenue \$55,000 (the "December 14th Payment), upon receipt of which Second Avenue shall be authorized to apply the same in partial satisfaction of its prepetition claims, provided that such December 14th Payment shall be in the form of a "cash-sweep" from the Debtor's bank accounts, consistent with the Cash

Management Order (as defined herein) and the prepetition financing documents.

Notwithstanding any provision of this Third Interim Order or the prepetition financing documents to the contrary, the Secured Parties reserve, and this Third Interim Order is without prejudice to, its rights to, among other things, claim additional interest, fees and expenses (including, without limitation, professional fees and expenses) in an amount no greater than the amounts provided for in this Third Interim Order.

2. Cash Management. The Debtor shall maintain its existing cash management system consistent with the *Final Order Pursuant to Bankruptcy Code Sections 105(a), 345, 363, 503(b)(1) and 507(a)(2) Authorizing (I) Continued Maintenance of Existing Bank Accounts; (II) Continued Use of Existing Business Forms; (III) Continued Use of Existing Cash Management System; (IV) Continued Intercompany Transactions; and (V) Waiver of Certain Guidelines Relating to Bank Accounts* entered by the Court (the “Cash Management Order”). The Debtor shall undertake steps to ensure that all proceeds of the Secured Parties’ collateral are deposited in the Debtor’s bank accounts and maintained consistent with the Debtor’s existing cash management system and as otherwise required under the Secured Parties’ prepetition loan documents.

3. Preservation of Challenge Rights. Notwithstanding anything provided in this Third Interim Order to the contrary, any and all rights of the U.S. Trustee, or any other party-in-interest with requisite standing that has been sought and granted by this Court, that may have to bring an adversary proceeding, cause of action, objection, claim, defense, or other challenge to contest the extent, validity, priority or perfection of any and all liens of Secured Parties, to contest the amount of the Secured Parties’ claims, to seek the avoidance, recharacterization or subordination of the Secured Parties’ claims or interests, to seek the avoidance of any transfer to any Secured Party, or to otherwise contest the claims, rights and liens of the Secured Parties by any party in this Chapter 11 Case, are preserved, and nothing contained herein shall prejudice any party asserting such challenge.

4. Continuing Effect of Order. If an order dismissing this Chapter 11 Case under section 1112 of the Bankruptcy Code or otherwise is at any time entered, such order shall provide (in accordance with sections 105 and 349 of the Bankruptcy Code) that (x) the Superpriority Claims and the Adequate Protection Liens shall continue in full force and effect and shall maintain their priorities as provided in this Third Interim Order until all Adequate Protection obligations shall have been paid and satisfied in full (and that such Superpriority Claims and the Adequate Protection Liens shall, notwithstanding such dismissal, remain binding on all persons and property covered thereby); and (y) this Court shall retain jurisdiction, notwithstanding such dismissal, for the purposes of enforcing the claims, liens and security interests referred to in this Third Interim Order.

5. Modification of Automatic Stay. The automatic stay under section 362(a) of the Bankruptcy Code is hereby modified as necessary to effectuate all of the terms and provisions of this Third Interim Order, including, without limitation, to: (a) permit the Debtor to grant the Adequate Protection Liens and incur the Superpriority Claims; (b) permit the Debtor to perform such acts as may be needed to assure the perfection and priority of the liens granted herein; (c) permit the Debtor to incur all liabilities and obligations under the terms of this Third Interim Order; and (d) authorize the Debtor to pay, and the Secured Parties to retain and apply, any payments made in accordance with the terms of this Third Interim Order.

6. Reporting Requirements. On or before the close of business on each Friday during the Third Interim Period, starting on November 16, 2018, the Debtor shall furnish to the Secured Parties, the U.S. Trustee, and the Committee, such financial and other information as the Secured Parties shall reasonably request, including, but not limited to the following:

- a) A report showing the Debtor's cash receipts, inventory receipts and current balances, and disbursements (x) for the immediately preceding weekly period covered by the Budget, and (y) cumulatively from the Petition Date, as well as a report showing any and all variances (on a line item and cumulative basis from the Petition Date, whether a positive or negative variance);
- b) An inventory receipt report for the immediately preceding weekly period and cumulatively from the Petition Date;

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- c) A rolling updated 13-week cash flow forecast and Budget;
- d) An updated “Borrowing Base Certificate” prepared in accordance with the Debtor’s prepetition Loan and Security Agreement entered into with Second Avenue;
- e) Any financial information and pleadings filed with the Court shall be served upon the counsel to Secured Parties contemporaneous with the filing of such information or pleading with the Court;
- f) All other financial information and reports prepared by the Debtor and filed with the Court or submitted to the U.S. Trustee; and
- g) All other reports and financial information required to be provided to the Secured Parties by the prepetition financing documents or historically provided to the prepetition Secured Parties, at such times and in the form customarily provided, and any additional reports as may be reasonably requested by Secured Parties from time to time.

7. No Third-Party Rights. Except as explicitly provided for herein, this Third Interim Order does not create any rights for the benefit of any third party, creditor, equity holder or any direct, indirect, or incidental beneficiary.

8. Binding Effect of Third Interim Order. Immediately upon entry by the Court (notwithstanding any applicable law or rule to the contrary), the terms and provisions of this Third Interim Order shall become valid and binding upon the Debtor, the Secured Parties, all other creditors of the Debtor and all other parties in interest and their respective successors and assigns, including any trustee or other fiduciary hereafter appointed in this Chapter 11 Case, or upon dismissal or conversion of this Chapter 11 Case.

9. Effect of this Third Interim Order. This Third Interim Order shall take effect and be enforceable immediately upon execution; provided, however, that nothing contained in this Third Interim Order shall prejudice in any way the rights or abilities of any party to assert any objections to the use of Cash Collateral at a subsequent interim hearing or the Final Hearing. Any stay, modification, reversal or vacation of this Third Interim Order shall not affect the validity of any obligation of the Debtor to the Secured Parties incurred pursuant to this Third Interim Order. Notwithstanding any such stay, modification, reversal or vacation, all use of Cash Collateral and all obligations incurred by the Debtor

pursuant hereto prior to the effective date of such stay, modification, reversal or vacation, shall be governed in all respects by the original provisions hereof and the Secured Parties shall be entitled to all the rights, privileges and benefits, including, without limitation, the Adequate Protection granted herein. The provisions of this Third Interim Order, and any actions taken pursuant hereto, shall survive entry of any order which may be entered (a) confirming any plan of reorganization in the Chapter 11 Case, (b) converting the Chapter 11 Case to a chapter 7 case, or (c) dismissing the Chapter 11 Case, and the terms and provisions of this Third Interim Order, as well as the Adequate Protection granted pursuant to this Third Interim Order, shall continue in full force and effect notwithstanding the entry of such order, and such Adequate Protection shall maintain the priority as provided by this Third Interim Order.

10. No Waiver. Nothing contained in the Motion or this Third Interim Order shall constitute a waiver of the Secured Parties' rights (if any) to seek other or additional adequate protection, or other or additional relief from the Court as the circumstances may dictate, including, but not limited to, the right to seek additional adequate protection, relief from the automatic stay, dismissal or conversion of the Chapter 11 case, or the appointment of one or more trustees or examiners (including a trustee or examiner with duties in addition to those set forth in sections 1106(a)(3) and (a)(4) of the Bankruptcy Code).

11. Provisions Relating to Debtor's Leasehold with Hiawatha Plaza Associates. Notwithstanding anything to the contrary provided for in the Motion or this Third Interim Order, no Secured Party may use or occupy the premises leased by the Debtor from Hiawatha Plaza Associates, LLC (the "Hiawatha Plaza Lessor") pursuant to that certain Lease Amendment by and between Hiawatha Plaza Lessor, as landlord, and the Debtor, as tenant, dated as of May 15, 2018 (the "Liverpool Lease") and located at 7421 Oswego Road, Liverpool, New York 13090 in the exercise of its rights and remedies absent: (1) an agreement in writing between the applicable Secured Party and Hiawatha Plaza Lessor, (2) pre-existing rights of the applicable Secured Party and Hiawatha Plaza Lessor under applicable non-bankruptcy law, or (3) further Order of the Court following notice to Hiawatha Plaza Lessor and a hearing pursuant to the Local Rules of this Court.

12. Final Hearing; Objections.

a) Within three (3) business days of entry of this Third Interim Order, the Debtor shall mail copies of a notice of entry of this Third Interim Order and the Final Hearing (defined below), together with a copy of this Third Interim Order, by first class mail, postage prepaid, facsimile, electronic mail or overnight mail upon the Initial Notice Parties. In addition, all parties who have requested electronic notice of filings in these cases through the Court's ECF system will automatically receive notice of this Third Interim Order no later than the day after its entry on the docket. The notice of the entry of this Third Interim Order and the Final Hearing shall state that objections to the Motion and entry of the Final Order shall be filed with the United States Bankruptcy Court for the Northern District of New York, together with proof of service thereon, and served on the counsel for the Debtor and the Initial Notice Parties with a copy to the Court's chambers so as to be actually received no later than 4:00 p.m. (New York Time) on a date that is not later than seven (7) days prior to the Final Hearing (the "Objection Deadline").

b) The Bankruptcy Court shall hold a final hearing (the "Final Hearing") to consider entry of a Final Order granting the relief requested in the Motion on December 19, 2018 at 11:30 a.m. (New York Time).

13. Debtor's Authorization. The Debtor is authorized and empowered to take all actions necessary to implement the relief granted in this Order.

14. Retention of Jurisdiction. This Court hereby retains jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation and/or enforcement of this Third Interim Order.

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ENTRY OF THE FOREGOING THIRD INTERIM
ORDER IS HEREBY CONSENTED TO:

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