Dated: June 27, 2023
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

THE LAKE DISTRICT, LLC,

Debtor.

Case No. 23-21496-L
Chapter 11

TIG Romspen US Master Mortgage, LP,

Movant,

v.

The Lake District, LLC,

Respondent.

Emergency Motion for Use of Cash Collateral [ECF No. 3]
Motion for Relief from Stay [ECF No. 41]

MEMORANDUM OPINION

THESE CONTESTED MATTERS came before the Court for evidentiary hearing on May 18-19, 2023. The Debtor, The Lake District, LLC (the "Debtor" or "Lake District"), seeks authority to use cash collateral pursuant to 11 U.S.C. § 363. The Lender, TIG Romspen US Master

Mortgage, LP, an exempted Cayman Islands limited partnership ("Romspen") opposes the use of cash collateral and seeks termination of the automatic stay pursuant to 11 U.S.C. § 362(d)(1), (2), and (3). Lake District opposes Romspen's motion. Following the hearing, the Court invited the parties to prepare post-trial briefs and proposed findings of fact and conclusions of law. The parties obtained an official transcript of the hearing, Lake District submitted a post-trial brief, and Romspen submitted a post-trial brief and proposed findings and conclusions. The Court has carefully reviewed the pleadings, briefs, exhibits, and the testimony of witnesses, and makes the following findings of fact and conclusions of law.

JURISDICTION, AUTHORITY, AND VENUE

Jurisdiction over contested matters arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). The use of cash collateral by a trustee in bankruptcy and standards for obtaining relief from the automatic stay arise under the Bankruptcy Code and thus are core proceedings. *See* 11 U.S.C § 363(c)(2), 362(d)(2) and 28 U.S.C. § 157(b)(2)(G) and (M). The bankruptcy court has authority to enter final orders approving the debtor's use of cash collateral or granting a creditor relief from the automatic stay subject only to appellate review. *See* 28 U.S.C. § 157(b)(1). Venue of these contested matters is proper to the Western District of Tennessee because these matters arise in a bankruptcy case pending in this district. *See* 28 U.S.C. §1409(a).

BACKGROUND FACTS

Lake District commenced this Chapter 11 bankruptcy case on March 24, 2023, in order to prevent foreclosure by Romspen. This is a single asset real estate case as defined by the Bankruptcy Code. Lake District is the developer of a large parcel of real property located at Interstate 40 and Canada Road in Shelby County, Tennessee (the "Property"). Lake District continues to operate its business as debtor in possession. [Joint Pretrial Statement ("JPTS") ¶¶ A.1 and A.2].

Prior to the bankruptcy filing, on or about February 14, 2020, Rompsen made a loan to the Debtor in the original principal amount of up to Sixty Million Dollars ($60,000,000.00) but subsequently reduced to Forty-Three Million Five Hundred Thousand Dollars ($43,500,000.00), plus accrued and accruing interest, fees and other charges (the "Loan"), arising from a loan evidenced by (i) that certain Construction Loan Agreement dated February 14, 2020, between the Debtor and Romspen (as amended, modified and/or restated from time to time, the "Loan Agreement"); and (ii) that certain Promissory Note dated February 14, 2020, given by the Debtor in favor of Romspen in the original principal amount of the Loan (as amended, modified and/or restated from time to time, the "Note"). [JPTS ¶ A. 26]. The Loan is secured by, among other things, virtually all of the real and personal property assets owned by the Debtor (collectively, "Property") as set forth in, among other things: (i) that certain Open-End Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing dated as of February 14, 2020, given by the Debtor, as trustor, for the benefit of Romspen, as beneficiary, and recorded in the Office of the Register of Deeds of Shelby County, Tennessee at Instrument Number 20017001 (the "Deed of Trust"); and (ii) that certain Security Agreement dated February 14, 2020, given by the Debtor in favor of Romspen (as amended, modified and/or restated from time to time, the "Security Agreement") [Romspen's Exs. 4 and 7].

As of the petition date, the Property consisted of a number of distinct parcels described as: (i) thirteen stand-alone outparcels, seven of which are on the west side of the Property adjacent to Interstate 40 (the "7 Outparcels") and six of which are on the south side of the Property adjacent to Canada Road (the "6 Outparcels"); (ii) a shopping center parcel (the "Shopping Center Parcel"); (iii) a 7.32 acre parcel designated for retail use (the "7.32 Retail Parcel"); (iv) a parcel planned for multi-family age-restricted development (the "Multifamily Parcel"); (v) a parcel planned for single-family home development (the "SFR Parcel"); and (vi) two adjacent parcels planned for mixed-use development, one consisting of approximately 26.7 acres (the 26.7 Mixed Use Parcel") and one consisting of approximately 2.0 acres (the "2.0 Office Parcel") [Debtor's Ex. 1].

In addition to the other collateral described above, Lake District assigned to Romspen the right to receive distributions from the Industrial Development Board of the City of Lakeland, Tennessee, a public nonprofit corporation ("Lakeland IDB"). The distribution rights arise from a Development Agreement dated September 5, 2017 between Lakeland IDB and the Debtor (the "Lakeland Development Agreement"). Economic incentives derived from the Lakeland Development Agreement include Tax Incremental Funding ("TIF") reimbursements. [JPTS ¶ A.8; Debtor's Ex. 13 § 3]. The TIF reimbursements, which are capped at $39 million, entitle the Debtor to payment only after (i) the annual taxes assessed against the development district property exceed the sum of the base rate, plus a 2% administrative fee, plus payment to the county and city for a portion of those entities' debt service payments (any such excess is the "Increment"); and (ii) the annual tax payment is paid in full. [Debtor's Ex. 12 ¶¶ 17, 20].

The Loan Agreement called for the Debtor to make an equity infusion of $3 million after completion of the building shell of the project space designated for a grocery story. [JPTS ¶ A.11; Romspen's Ex. 2 § 2.5]. This requirement was included because the grocery store build was

expected to involve a related party. Although the building shell was completed, the Debtor did not fund the $3 million equity infusion. [JPTS ¶ A.19].

The Loan had an original maturity date of July 31, 2021, only 18 months after the Loan's inception, with the possibility of a six-month extension under certain conditions. The Debtor was not able to meet these conditions and did not pay the outstanding balance of the Loan at maturity. [JPTS ¶ A.21]. Romspen exercised its discretionary Maturity Grace Period under the loan documents, but the Debtor was not able to pay the Loan when the Maturity Grace Period expired. [JPTS ¶ A.22].

After the expiration of the Maturity Grace Period, Lake District, Romspen, and the guarantors of the Loan executed a Forbearance & Loan Modification Agreement (the "First Forbearance Agreement") whereby Romspen agreed to forebear from enforcing certain of its rights and remedies arising from the Debtor's failure to repay the loan until no later than January 31, 2022. [JPTS ¶ A.23; Romspen's Ex. 10 § 10]. Among other provisions, in this First Forbearance Agreement, the parties reduced the loan amount from $60 million to $43,489,627.00, and Romspen extended the deadline for the Debtor to obtain Lakeland IDB's consent to the assignment of the Debtor's rights under the Lakeland Development Agreement. [JPTS ¶ A.27; Romspen's Ex. 10 § 7(b)]. At the end of the First Forbearance Agreement, the Debtor had sold two parcels—one Outparcel that was occupied by Starbucks, and a parcel designated for townhouse construction. [JPTS ¶ A.28]. These sales resulted in a release of Romspen's lien on those parcels and a partial paydown of the Loan. [JPTS ¶ A.28].

At the end of the first forbearance period the Debtor was unable to repay the Loan and had not obtained Lakeland IDB's consent to the assignment of the Debtor's rights under the Lakeland Development Agreement. [JPTS ¶ A.30].

The parties entered into a Second Forbearance & Loan Modification Agreement dated April 8, 2022 but made effective as of January 31, 2022 (the "Second Forbearance Agreement"), which extended Romspen's forbearance to September 31, 2022[sic]. Under the Second Forbearance Agreement, the Debtor acknowledged (i) the Forbearance Defaults; (ii) the outstanding balance of the Loan as of March 21, 2022, as no less than $38,693,750.65 (after application of the sale proceeds); and (the enforceability, validity, and collectability of the Loan Documents. [JPTS ¶ A.32; Romspen's Ex. 11 § 2, 3]. Under the Second Forbearance Agreement, Romspen also extended the deadline for the Debtor to obtain Lakeland IDB's consent to the assignment of the Debtor's rights under the Lakeland Development Agreement to June 30, 2022. [JPTS ¶ A.33; Romspen's Ex. 11 § 7(b)]. Under the Second Forbearance Agreement, the parties agreed to modify the "Loan Amount" to $47,303,161.00. [JPTS ¶ A.34; Romspen's Ex. 11 § 10].

Under the Second Forbearance Agreement, the Debtor agreed, among other things, to: (i) make monthly interest payments; (ii) make a $2 million paydown of the Loan by no later than July 31, 2022, in connection with sale of Outparcels; and (iii) establish a restricted account and to deposit all collected rents into such account, with any collected rents not timely deposited to be held in trust for the benefit of Romspen as lender. [JPTS ¶ A. 36; Romspen's Ex. 11, § 7].

The Debtor was not able to repay the Loan at the expiration of the second forbearance period on September 31, 2022 [sic] [JPTS ¶ 40]. It did not make monthly interest payments. It was not able to sell any additional Outparcels or make the $2 million paydown. [JPTS ¶¶ A.37, 38]. The Debtor did not deposit collected rents into a restricted account. [JPTS ¶ A.39].

Romspen, through counsel, issued a letter to Lake District on December 22, 2022, demanding payment in full by no later than January 6, 2023. [JPTS ¶ A.41].

When Lake District failed to pay, Romspen began the notice process for a non-judicial foreclosure sale of the Property scheduled for March 24, 2023. [JPTS ¶ A.43]. Lake District was unable to repay the loan and filed its petition in bankruptcy the day of the scheduled foreclosure sale. [Bankruptcy Case, ECF No. 1].

Upon the filing of its petition, Lake District sought approval of its use of Romspen's cash collateral. [ECF No. 3]. The budget that supported the motion for use of cash collateral shows total income (from the Shopping Center Parcel) over five months of $608,386.61, and total expenses of $500,489.34, for projected net income of $107,897.27. The parties agreed to three interim orders permitting use of cash collateral. [ECF Nos. 30, 60, and 93 (notice of need for correction of the proposed third interim order)]. By the close of the hearing, Lake District revised its projections substantially, now showing total income for the same five-month period of $558,600.55, expenses of $504,667.83, for projected net income of only $53,932.72. Lake District's projections do not include any debt service payments. Romspen asserts that its loan accrues interest at the non-default rate of $387,875.08 per month and at the default rate at $662,728.37 per month. [Romspen's Ex. 1 ¶ 21; Romspen's Ex. 21; Tr. May 19, pp. 130-31].

Romspen filed its proof of claim on May 5, 2023, in the amount of $49,446,186.80. Lake District's Schedule D and the Claims Register show additional liens secured by the Property in the approximate amount of $1,500,000. Taken together, liens against the Property total $50,934,574.19. [Romspen's Post-trial Brief, Sch. 1, ECF No. 95].

Three of the 6 Outparcels are subject to a prepetition conditional Asset Purchase Agreement between Lake District and Chick-Fil-A (the "Chick-Fil-A APA"). The Chick-Fil-A APA remains subject to conditions including exceptions to certain use limitations and bankruptcy court approval. [Debtor's Ex. 14]. Subsequent to the hearing, the Debtor filed a motion to approve

the Chick-Fil-A APA. [ECF No. 97]. Although Lake District has marketed the Outparcels for three years, the Chick-Fil-A APA currently is the only written agreement for sale of any of the Outparcels. [Tr. May 19, p. 205].

Each of the parties engaged experts to offer their opinions of the as-is value of the Property. Romspen's expert, Ronald Neyhart, Executive Vice President of CBRE, Inc., divided the parcels into three groups based upon their designated use and the type of buyer that would be interested in them. In his opinion, the Outparcels could be sold in bulk to a single developer, the Shopping Center Parcel could be sold as-is to a single investor, and the remaining parcels, which he termed the "Remaining Development Area," could be sold as-is to a single project developer. [Romspen's Ex. 7]. Mr. Neyhart valued the groups of parcels as of February 28, 2023. Applying discounts for holding costs until sales close and for sales in bulk, Mr. Neyhart valued the Outparcels at $12,000,000, the Shopping Center Parcel at $17,000,000, and the Remaining Development Area at $6,600,000. Although the sum of these figures is $35,600,000, Mr. Neyhart specified that additional discounts should be applied if he were attempting to determine the as-is value of the Property as a whole (because of the difficulty in finding one buyer for the Property). Mr. Neyhart testified that he had not performed that calculation, but that the resulting value would certainly be less than $35,600,000.

John Praytor, Senior Managing Director of BBG, Inc., was the expert engaged by Lake District. He divided the Property into seven different groups based upon entitlements assigned to them and made appraisal reports for each of them. His opinions of the as-is market value of the various groups as of March 12, 2023 were as follows: (i) for the three of the 6 Outparcels not subject to the Chick-Fil-A APA, $2,050,000; (ii) for the 7 Outparcels, $10,840,000; (iii) the 7.32 Retail Parcel, $4,780,000; (iv) the Multifamily Parcel, $2,580,000; (v) the SFR Parcel, $2,040,000;

the 26.7 Mixed Use Parcel plus the 2 Acre Office Parcel, $15, 809,000; (vi) the Shopping Center Parcel, $24,700,000. [Debtor's Ex. 1]. The sum of these figures is $62,799,000 and does not include the three outparcels that are the subject of the Chick-Fil-A APA, with a purchase price of $3 million. Mr. Praytor agreed with Mr. Neyhart that the as-is value of the Property as a whole would be less than the sum of his various appraisal amounts.

The Court found Mr. Neyhart's explanations and conclusions more reasonable than those of Mr. Praytor. For ease of comparison, Mr. Neyhart valued the Outparcels, including the parcels subject to the Chick-fil-A APA, at $12 million, while Mr. Praytor valued them at $15,890,000. Mr. Neyhart valued the Shopping Center Parcel at $17,000,000 while Mr. Praytor valued it at $24,700,000. Mr. Neyhart valued the Remaining Development Area at $6,600,000, while Mr. Praytor valued it at $25,209,000. The smallest difference between these, $3,890,000, concerns the Outparcels. With respect to the Outparcels, Mr. Praytor relied exclusively upon the Chick-Fil-A APA to value the parcels subject to it even though he testified that he had not read the entire agreement and he was unaware of a Fourth Amendment to the agreement entered into on May 1, 2023. In addition, Mr. Praytor used a twelve-month marketing period for all of the Outparcels even though, at the direction of Mr. Yehuda Netanel, manager of Lake District, he did not perform a discounted sell-off analysis as to the Outparcels and he could not answer whether it was reasonable to assume that all Outparcels could be sold within twelve months. Mr. Praytor admitted that the resuting valuation would be less because the discount would be greater if he assumed that sales of all Outparcels did not close within twelve months. Lake District has attempted to market the Outparcels for at least three years but has closed only two sales. It was unreasonable for Mr. Praytor to use a twelve-month marketing period in his analysis of the value of the Outparcels.

With respect to the Shopping Center Parcel, the difference between the two valuations is $7,700,000. Mr. Praytor compared the subject Shopping Century Parcel with shopping center sales that were out of the subject's market and were part of larger, portfolio sales. With respect to the portfolio sales, Mr. Praytor verified with the portfolio managers that the value allocations relied upon by him were accurate, but he did not ask how the portfolio prices were derived. In reaching his conclusion about the present value of the cash flow from the Shopping Center Property, he used only a direct capitalization approach rather than verifying his results with a discounted cash flow analysis even though he admitted that a potential buyer would more likely use the discounted cash flow method. [Transcript, May 18, pp. 99, 182-83]. In discounting the revenue stream of the Shopping Center Parcel, he used a vacancy rate, *including* credit loss allowance, of only 3.0%, even though his report reflects a vacancy rate, *excluding* credit loss, of more than 5.0%. [Debtor's Ex. 10, pp. 27, 61-63]. Mr. Praytor's assumptions about the Shopping Center Parcel were not reasonable.

With respect to the Remaining Development Area, the difference between Mr. Neyhart's valuation of $6,600,000 and the sum of Mr. Praytor's valuations, $25,209,000, is enormous -- $18,609,000. In fact, the sum of Mr. Praytor's valuations is almost four times Mr. Neyhart's valuation. As with the Outparcels, Mr. Praytor assumed that all parcels will be sold to end users and closed within twelve months, even though he admitted that scenario was unlikely and that his valuation should be discounted if a longer marketing period were to be assumed. Mr. Neyhart assumed that the various parcels in the Remaining Development Area could be sold to a single developer within the next twelve months, a developer who would expect a discount for the bulk sale, or could be sold to individual purchasers over a five-year period, also requiring a discount due to holding expenses associated with the lengthy marketing period. [Romspen's Ex. 17; Tr.,

May 18, pp. 18-22, 29-30, 40-41, 46-47, 63-65]. Mr. Neyhart's assumptions more closely reflect the actual experience of Lake District, which has attempted to market the Property over a three-year period with limited success.

Mr. Praytor assumed that the each of the parcels would be developed based on the vision and details of Lake District. The result of this assumption was that Mr. Praytor made no estimations of holding or other costs associated with seeking redesignation of the use of any of the parcels. Mr. Praytor acknowledged that the developer redesignated the 2.0 Acre Office Parcel from office to multifamily use after his report was issued. [Tr., May 18, pp, 129-30; Debtor's Ex. 1, 9]. Mr. Praytor further testified that he had been informed that the City of Lakeland has suspended approval of additional multifamily development for an indefinite period of time. Nevertheless, no amendment was made to Mr. Praytor's appraisal concerning the 2.0 Acre Office Parcel, which the developer apparently intends to market for multi-family use even though it is unlikely that use would be approved.

Perhaps most unsettling was Mr. Praytor's assumption that the national economic condition present as of March 12, 2023, the valuation date of his report, would remain "stable," even though Mr. Praytor admitted that interest rates and inflation have increased since March 12, 2023, a date corresponding with the failure of Silicon Valley Bank and Signature Bank. Moreover, he testified that a property appraised today would have the same value, if not slightly less, than the same property appraised in 2021. [Tr., May 18, pp. 190-93]. Notwithstanding his testimony that property values have remained steady or fallen since 2021, Mr. Praytor previously gave a valuation opinion of the 26.7 Mixed Use Parcel, as-is, as of March 12, 2023 of $14,570,000, the same parcel he valued as of March 17, 2021 at $9,500,000. [Romspen's Ex. 31, p. 2; Debtor's Ex. 8, pp. 2, 39; Tr., May 18, pp. 191-93]. Mr. Neyhart, on the other hand, testified that market conditions for

multifamily property were more favorable in 2021 than they are now as the result of the increase in inflation and interest rates.

The Court could continue with more specific examples, but they would merely reinforce its impression that Mr. Neyhart's report more accurately reflects the market value of the Property as of the date of the petition.

Although no plan was filed prior to the hearing on the Motions for Relief from Stay and for Use of Cash Collateral, the Debtor filed a plan and disclosure statement on June 22, 2023, less than a week after post-trial briefs were filed concerning these motions. The Court has reviewed the proposed plan, which, interestingly enough, provides that "On or before the Effective Date, the Debtor will retain a real estate broker(s) to market and sell all or part of the Property in pieces based on the entitlements each parcel of land has obtained." *Plan of Reorganization of the Lake District, LLC* (the "Plan"), ECF No. 100, p. 12. Among other provisions, the Plan provides that any contract for sale will permit Romspen 15 days to credit bid on the parcel to be sold in an amount not less than the purchase price. The Plan provides that the maturity date of a restated Romspen note and deed of trust will be modified to state that the Loan will mature one year from the effective date of the Plan. These provisions of the proposed Plan protect Romspen from the possibility that Mr. Praytor's opinions concerning the Debtor's ability to market and sell the various parcels are too optimistic.

ANALYSIS

Romspen seeks relief from the automatic stay under three provisions of the Bankruptcy Code, sections 362(d)(1), 362(d)(2), and 362(d)(3). The Debtor seeks permission to use the cash collateral of Romspen pursuant to section 363(c)(2). The Court will consider each of their arguments in turn.

Romspen's Interest in the Property is Adequately Protected

Section 362(d)(1) permits a party in interest to obtain relief from the automatic stay "for cause, including the lack of adequate protection of an interest in property of such party in interest." Adequate protection of interests in property of the estate may also be required when the trustee or debtor in possession proposes to use such property of the estate other than in the ordinary course of business. 11. U.S.C. § 363(b)(1) and (e). Lake District seeks to use property of the estate in which Rompsen has an interest, including cash collateral. Lake District has the burden to show that Romspen's interests in property of the estate are adequately protected.

"Adequate protection" is described but not defined at section 361 of the Bankruptcy Code:

> When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by—
>
> (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;
>
> (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
>
> (3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

11 U.S.C. § 361. The debtor bears the burden of proving that the interests of an entity in the estate's interest in property are adequately protected by a preponderance of the evidence. 11 U.S.C. §§ 362(g); 363(e), (p)(1).

Each of the examples of adequate protection requires the court first to determine the value of the subject entity's interest in the estate's interest in property. Romspen claims a security interest

in the Property and claims to be an assignee of the rents received from the Property. The Debtor argues that the rents constitute cash collateral.

Section 506(a) concerns the determination of secured status. It provides:

> (a) (1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. §506(a). The value of Romspen's interest in property of the bankruptcy estate is to be determined in light of the purpose of the valuation and of the proposed disposition or use of the property. The value of property that a debtor proposes to retain "is the cost the debtor would incur to obtain a like asset for the same 'proposed use.'" *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 965, 117 S.Ct. 1879, 1886 (1997). This, the Court has said, "is the price a willing buyer in the debtor's trade, business, or situation would pay to obtain like property from a willing seller." *Id.,* 520 U.S. at 960, n. 2, 117 S.Ct. at 1184. Although *Rash* was a Chapter 13 case, it is appropriate to apply its analysis to the valuation of a secured claim in a Chapter 11 case. *See, e.g., In re Creekside Sr. Apts, LP,* 477 B.R. 40, 55 (6th Cir. BAP 2012). Once the value of the debtor's interests in property is determined, the court must determine whether the creditor's interest in that property is adequately protected.

Romspen has filed a proof of claim in the amount of $49,446,186.80 secured by the Property. In order to show that the interest of Romspen in the Property is adequately protected, Lake District must show that the Debtor's proposed use of the Property will enable Romspen to realize the indubitable equivalent of that amount. Conversely, Romspen will be entitled to relief

from the automatic stay if the Debtor cannot prove that its proposed use of the Property will insure that Romspen will receive the value that it bargained for prebankruptcy. *In re O'Connor,* 808 F.2d 1393, 1396 (10th Cir. 1987). In addition to the statutory examples of adequate protection, "adequate protection may also be accomplished through the existence of an equity cushion, or '"value in the property, above the amount owed to the secured creditors ... that will shield that interest from loss due to a decrease in the property's value during the time the automatic stay remains in effect."' *In re Shivshankar P'ship* LLC, 517 B.R. 812, 817 (Bankr. E.D. Tenn. 2014), quoting *In re Norton*, 347 B.R. 291, 298 (Bankr.E.D.Tenn.2006) (quoting *Sumitomo Trust & Banking Co. v. Holly's Inc. (In re Holly's Inc.)*, 140 B.R. 643, 697 n. 87 (Bankr.W.D.Mich.1992)) (brackets omitted). Lake District relies upon the existence of an equity cushion as proof of adequate protection of Romspen's interest in the Property. This squarely raises the question of the value of the Property that secures the Loan.

If the Neyhart appraisals are accepted, the value of the Property is no more than $35,600,000, and there is no equity cushion to protect Romspen's interest. If the Praytor appraisals are accepted, the value of the Property is an undetermined amount that is less than $62,799,000. Mr. Praytor did not make the calculation necessary to determine the as-is value of the Property as a whole because he was directed by Mr. Netanel not to perform a discounted sell-off analysis. Therefore, it is not possible to determine the size of the equity cushion enjoyed by Romspen, if any, based upon the proof provided by the Debtor. The Debtor offered no protection to Romspen other than the asserted equity cushion, but neither of the experts opined that the value of the Property is decreasing. "Despite its form, the entitlement to and measure of adequate protection is always determined by the extent of the anticipated or actual decrease in the value of the secured creditor's collateral during the bankruptcy case." *In re First South Savings Assoc*., 820 F.2d 700,

710 (5th Cir.1987). The Debtor has proposed a Plan that the Court finds, on a preliminary basis, has a reasonable possibility of being confirmed in a reasonable time. Since there has been no proof that the Property is declining in value and since, consisting primarily of real property, it is unlikely to decline in value during the twelve-month sale period proposed by the Debtor, the Court finds that Romspen's interest in the Property is adequately protected.

The Debtor has No Equity in the Property

Section 362(d)(2) directs the court to grant relief from the automatic stay with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

11 U.S.C. § 362(d)(2). The movant has the burden to show that the debtor has no equity in the property, and the debtor has the burden to show that the property is necessary for an effective reorganization. 11 U.S.C. § 362(g). While the adequate protection analysis under 362(d)(1) looks only to the difference between the value of the debtor's interest in property and the movant's interest in that interest, the analysis under section 362(d)(2)(A) looks to the difference between the value of the debtor's interest in property and the amount of all liens against that interest. "'Equity' is the value, above all secured claims against the property, that can be realized from the sale of the property for the benefit of the unsecured creditors." *Stephens Industries, Inc. v. McClung,* 789 F.2d 386, 392 (6th Cir. 1986). The Supreme Court's description of "replacement value" – "the price a willing buyer in the debtor's trade, business, or situation would pay to obtain like property from a willing seller" likewise contemplates at least an implied sale of the property to be valued.

The total of all liens against the Property is $50,934,574.19. According to Mr. Neyhart, the value of the Property is an amount no more than $35,600,000. According to Mr. Praytor, the value

of the Property is an unspecified amount less than $62,799,000. The Court does not credit Mr. Praytor's analysis because it did not attempt to determine the discounts that should be applied in order to determine the as-is, present value of the Property. Romspen has successfully shown that the Debtor has no equity in the Property. Romspen will be entitled to relief from the automatic stay unless the Debtor has shown that the Property is necessary to its effective reorganization.

The Property is Necessary to the Debtor's Reorganization

As previously stated, the Debtor filed its proposed Plan on June 22, 2023. To defeat a motion for relief under 362(d)(2) by showing that the "property is necessary to an effective reorganization", the debtor must demonstrate that there is a "'reasonable possibility of a successful reorganization within a reasonable time.'" *In re Windwood Heights, Inc.,* 385 B.R. 832, 837, (Bankr. N. D. W.Va. 2008), quoting, *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd*., 484 U.S. 365, 377, 108 S.Ct. 626, 633, 98 L.Ed 2d 740 (1988). The Court has not attempted to analyze all of the provisions of the Plan but is satisfied that it represents a good faith proposal for an orderly liquidation of the Property in a manner that could maximize the value of the various parcels for the benefit of Romspen and the other secured creditors. It is not possible to tell whether there will be a return for unsecured creditors, as is contemplated by Mr. Praytor's report, but the Court believes that the process proposed by the Debtor has a better chance of realizing any remaining value in the Property than a foreclosure sale would. The Court believes that it is in the best interest of the creditors, including Romspen, and the Debtor to permit the plan negotiation process to move forward. The Court would have felt very differently about a plan proposing, for example, a five-to-seven-year period for the Debtor to operate the Shopping Center and continue to market the various other parcels. Instead, the Debtor seems to have recognized the

need to provide for a fairly limited marketing period for the Property in recognition of its prior marketing efforts and of Romspen's prepetition forbearance.

The Debtor has Filed a Plan that has a Reasonable Possibility of Being Confirmed.

Romspen also seeks relief from the automatic stay under section 362(d)(3), which provides:

> (3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—
>
> (A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or
>
> (B) the debtor has commenced monthly payments that—
>
> (i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and
>
> (ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate.

11 U.S.C. § 362(d)(3). "Single asset real estate" is defined at section 101(51B):

> (51B) The term "single asset real estate" means real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto.

The parties concede that the Property falls within this definition for purposes of this bankruptcy case. The bankruptcy petition was filed March 24, 2023. Ninety days from that date was June 22, 2023. The Debtor filed its plan on that day. The Court is prepared to find, on a preliminary basis, that the plan has a reasonable possibility of being confirmed within a reasonable time. The Court

is not required to conduct a min-confirmation hearing in adjudicating a motion for relief from stay under 362(d)(3). All that is required is a showing of a reasonable possibility of confirmation. *Windwood Heights*, 385 B.R. 838. See also, *In re RIM Dev. LLC,* 448 B.R. 280, 288-289 (Bankr. Kan. 2010. The Court finds that the Debtor has met this standard and thus that relief from the automatic stay should not be granted at this time.

The Debtor Should be Permitted to Use Cash Collateral to Preserve the Value of the Property

Lake District is currently operating under the *Second Interim Order on Debtor's Emergency Motion for Entry of Interim and Final Orders Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. § 363,* entered May 10, 2023 [ECF No. 60][1]. Lake District seeks a final order permitting it to use the rents generated by the Shopping Center Parcel "for working capital and capital expenditures, and operating costs and expenses … during this Chapter 11 case." *Emergency Motion,* ECF No. 3, p. 6. The Debtor suggests that Romspen will be adequately protected for the use of the Property through the Debtor's (i) continued maintenance of the Debtor's property, including but not limited to, the payment of normal operating expenses, (b) payment of post-petition property taxes with respect to the collateral, (iii) maintenance of insurance on the collateral, and (iv) maintenance of the market value of the collateral. [ECF No. 3, p. 9]. Lake District argues that Romspen is protected with respect to its cash collateral through the use of rents to maintain the real property. Romspen argues that the parties intended an absolute assignment of rents rather than an assignment for security only.

Under Tennessee law an assignment of rents is presumed to be a pledge of rents as security." *In re Village Green I, GP,* 435 B.R. 525, 535 (Bankr. W.D. Tenn. 2010). The

[1] As noted previously, the parties have agreed to a *Third Interim Order* but have not successfully presented it to the Court for signature and entry.

presumption is rebuttable by proof that the assignment was intended to be an absolute assignment rather than a pledge of security. *Id.* The terms that parties use to describe an assignment of rents, whether "absolute" or "for security" are not controlling. The court must look to the substance of the agreement and the practices of the parties to determine the parties' intentions. *See, e.g., Senior Housing Alternatives, Inc.,* 444 B.R. 386, 392 (Bankr. E.D. Tenn. 2011); *Village Green I,* 435 B.R. at 536; *In re 5877 Poplar, L.P.,* 268 B.R. 140, 145 (Bankr. W.D. Tenn. 2001).

Romspen's position that the assignment of rents in this case was intended to be absolute is belied by the admission of Romspen's representative Wesley Roitman, who testified, "… we don't keep rents after the loan is paid off." [Tr. May 19, p. 146]. The language of the "Open-End Deed of Trust, Assignment of Leases and Rents, Security Agreement and Fixture Filing" likewise indicates that the assignment of rents was intended as additional security: the document "*secures* obligatory advances …" (p.1), is given "to *secure* a loan by the Lender . . . ." (p. 2)(emphasis added). Section 8 of the Deed of Trust states that it "shall … remain in full force and effect until payment and performance in full of the Secured Obligations." Section 5.2.8 of the Deed of Trust grants Romspen certain remedies regarding rents in the event of default. Subsection (g) states that Romspen can "apply the receipts from the Property to the payment and performance of the Secured Obligations in the order required by the Loan Agreement …." [Romspen's Ex. 4]. The language of the First and Second Forbearance & Loan Modification Agreements also treat the assignment of rents as an additional item of security when they describe the Deed of Trust as given "to secure payment and performance of the Borrower's obligations under the Note." [Romspen's Exs.10 and 11].

The Court concludes that the language of the Deed of Trust and the practices of the parties demonstrate that they have at all times treated the assignment of rents as additional collateral for

the Loan. As such, the rents constitute cash collateral under the Bankruptcy Code and may be used by the Debtor for the purposes proposed in the Emergency Motion and as limited by agreement of the parties in the Interim Order.

CONCLUSIONS

For the foregoing reasons, the Motion for Relief from the Automatic Stay should be DENIED without prejudice to renewal of the motion should the Debtor prove unable to obtain confirmation of its Plan within a reasonable time. The Emergency Motion for Use of Cash Collateral should be GRANTED but limited by the agreements of the parties in the Interim Orders. The Debtor will be permitted to use cash collateral for purposes reflected in its budget through August 31, 2023, unless further extended by agreement of the parties or order of this Court.

cc: Debtor
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Movant
Attorneys for Movant
U.S. Trustee
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