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8 UNITED STATES BANKRUPTCY COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10 LOS ANGELES DIVISION

11 In re:

12 B&B LIQUIDATING, LLC,

13  
14 Debtor and Debtor in Possession.

Case No. 2:18-bk-11744- NB

Chapter 11

**OPPOSITION OF SECURED  
LENDER SIENA LENDING GROUP,  
LLC TO CREDITOR SIMON  
PROPERTY GROUP, INC.'S  
MOTION TO COMPEL  
IMMEDIATE PAYMENT OF  
ADMINISTRATIVE RENT**

**DECLARATIONS OF MICHAEL  
ZIELINSKI AND LEO D. PLOTKIN  
IN SUPPORT THEREOF**

Date: November 6, 2018

Time: 2:00 p.m.

Ctrm: 1545

1 **I. INTRODUCTION**

2 Through its Motion to Compel Immediate Payment of Administrative Rent, Simon  
3 Property Group, Inc. (“Simon”) seeks to require Siena Lending Group, LLC (“Siena”) to pay  
4 almost \$80,000 of purported administrative rent on six commercial properties from which Debtor  
5 formerly operated. The motion should be denied for the following reasons:

- 6 • Simon failed to offer any evidence whatsoever to support its claim, which  
7 apparently is based primarily on “sales overage”—rent over and above the base  
8 rent that Siena already paid and which constitutes a percentage of the proceeds of  
9 the liquidation sales. Simon offered no evidence, much less sustained its burden to  
10 prove, that it is entitled to such overage, the amount of such overage, or any other  
11 component of its claim. For this reason alone, the motion must be denied.
- 12 • Simon also did not argue, much less establish, a basis for Siena’s responsibility  
13 for administrative rent in excess of that which Siena already paid. While  
14 Bankruptcy Code Section 506(c) (which Simon does not even cite) authorizes  
15 surcharge of a secured lender’s collateral for the reasonable and necessary costs of  
16 preserving and disposing of such collateral, Simon offered no evidence or even  
17 argument that the sales overage and other charges it seeks from Siena met Section  
18 506(c)’s standards. Simon’s failure to meet its burden of proof on the issue  
19 constitutes an independent ground compelling denial of the motion.

20 **II. BACKGROUND**

21 As Debtor’s post-petition lender, Siena agreed to fund the expenses of the liquidation  
22 sales during the course of this bankruptcy case pursuant to the terms of the financing stipulation  
23 and the budget incorporated therein. As the liquidation sales were concluding, Siena sought and  
24 obtained relief from stay to foreclose upon its remaining collateral.

25 As part of the resolution of such motion, the parties agreed on a procedure to resolve the  
26 administrative rent claims by Debtor’s landlords. Specifically, the parties agreed, and the Court  
27 ordered, that Siena pay the portions of the landlords’ claims that Siena did not dispute within  
28 seven days of entry of the order granting relief, and that the landlords had the right to initiate a

1 contested motion in lieu of an adversary proceeding to obtain a determination of Siena’s  
2 obligation to pay disputed portions of such claims. [Docket 220 at p. 3, ¶ 16.3.] Simon’s motion  
3 is one of two such motions filed by Debtor’s landlords. (Siena reached a settlement of the claim  
4 of a third landlord prior to the filing of a motion on such claim.)

5 Siena reviewed Simon’s claim and paid the portion thereof that it did not dispute.  
6 [Declaration of Michael Zielinski (“Zielinski Dec.”), ¶¶ 3-4.] Simon thereafter invoked the  
7 dispute resolution procedures of the order granting relief from stay and filed its motion to obtain  
8 the Court’s determination of the validity of its administrative claim for additional rent.

9 **III. SIMON FAILED TO ESTABLISH THAT ANY ADDITIONAL**  
10 **ADMINISTRATIVE RENT IS DUE**

11 Although Simon claims it is entitled to an additional \$80,000 of rent as an administrative  
12 expense under 11 U.S.C. §§ 365(d)(3)<sup>1</sup> and 503(b)<sup>2</sup>, it failed to submit a shred of evidence  
13 supporting the existence of such claim or the manner in which the charges incorporated within  
14 the claim were calculated. Simon has not provided the Court with the leases that presumably  
15 contain provisions regarding the amount of rent Debtor was obligated to pay, or any business  
16 records establishing the amount of rent claimed due, or any information concerning its  
17 calculation of the sales overage component of its claim. Instead, Simon offers only a one page  
18 chart (obviously prepared only for purposes of the motion and not any sort of recognized  
19 business record) that purports to set forth its claim. Simon failed to submit a declaration or any  
20 other evidence authenticating the spreadsheet or otherwise establishing its claim.

21 Simon unquestionably has the burden to prove up its administrative expense claim under  
22 Section 503(b), which requires notice and a hearing before the Court can authorize payment of  
23 the expense. As stated in *In Re Cook Inlet Energy LLC*, 583 B.R. 494 (9th Cir. B.A.P. 2018),  
24 where the court was distinguishing the burden borne by an administrative claimant under Section  
25 503(b) from that of a general unsecured creditor filing a proof of claim:

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26  
27 <sup>1</sup> Section 365(d)(3) generally requires the trustee (or debtor-in-possession) to perform Debtor’s obligations under  
28 an unexpired lease of nonresidential real property until such lease is assumed or rejected..

<sup>2</sup> Section 503(b) authorizes the Court, after notice and a hearing, to award administrative expenses for, among other things, the “actual, necessary costs and expenses of preserving the estate . . . .”

1 [A]n administrative claimant must present its claim at a noticed hearing  
2 and, like any other moving party, bear the burden of persuasion by a  
3 preponderance of the evidence to meet the strict standards set, keeping in  
4 mind the policy behind the allowance of such claims.

5 *In Re Cook Inlet Energy LLC*, 583 B.R. at 501.

6 Accordingly, Simon was required to adduce competent evidence not only establishing the  
7 nature and amount of its claim, but also that the components of the claim constituted actual and  
8 necessary costs of preserving the estate under Section 503(b). Simon proffered no evidence on  
9 these issues at all.

10 Simon must bear the burden of proof on its claim under Section 365(d)(3) as well. Given  
11 that the parties agreed that the disputed portion of the administrative rent claims would be  
12 determined by motion, Simon bears the burden of persuasion “like any other moving party”. *In*  
13 *re Cook Inlet Energy*, 583 B.R. at 501. As stated by the Ninth Circuit Bankruptcy Appellate  
14 Court in that case, because administrative priority claims under Section 503(b)(1)(A) “must be  
15 presented to the court by motion, they are not deemed allowed as priority claims.” *Id.*

16 By parity of reasoning, as moving party Simon has the burden to prove its administrative  
17 rent claim under Section 365(d)(3), which also is being presented by way of a motion to the  
18 Court requiring notice and a hearing. Indeed, one of the cases Simon cited expressly held that  
19 even though a claim under similarly-worded former Section 365(d)(10) (applicable to personal  
20 property) was not subject to Section 503(b)(1)(A)’s requirement that the underlying expense  
21 constitute an actual and necessary cost of preserving the estate, the claimant nonetheless must  
22 seek the expense under Section 503(b)’s procedures. *In re Midway Airlines Corp.*, 406 F.3d 229,  
23 236 (4th Cir. 2005) (“we conclude that a lessor must still assert its administrative expense claim  
24 under § 503(b); it simply does not assert the claim under the specific provision of §  
25 503(b)(1)(A)” [emphasis in original]).

26 In light of Simon’s failure to meet its burden of proof, or indeed to adduce any evidence  
27 whatsoever supporting the nature and amount of its claim under Sections 503(b) and 365(d)(3),  
28 the motion should be denied.

1 **IV. SIMON ALSO FAILED TO ESTABLISH THAT SIENA, A SECURED LENDER,**  
2 **IS RESPONSIBLE FOR PAYMENT OF THE ADDITIONAL ADMINISTRATIVE**  
3 **CLAIM**

4 Simon offers limited statutory and case law authority (none of which is from the Ninth  
5 Circuit) to support its motion. Without exception, the citations Simon does provide concern the  
6 *debtor's* obligation to pay administrative expenses. Simon provides no authority or argument  
7 whatsoever that Siena, a secured creditor, can be compelled to pay such a claim.

8 Simon may belatedly argue that such amounts can be recovered from Siena under 11  
9 U.S.C. § 506(c), which provides:

10 (c) The trustee may recover from property securing an allowed secured  
11 claim the reasonable, necessary costs and expenses of preserving, or  
12 disposing of, such property to the extent of any benefit to the holder of  
13 such claim, including the payment of all ad valorem property taxes with  
14 respect to the property.

15 Preliminarily, it should be noted that Siena agreed, as a condition of the order granting  
16 relief from stay, not to argue that the lack of any collateral remaining to surcharge constituted a  
17 defense to the landlords' motions.<sup>3</sup> However, Simon nonetheless had the burden to demonstrate  
18 that the disputed portions of its claim met Section 506(c)'s requirements. In order to be entitled  
19 to such surcharge, Simon must demonstrate that the amounts it seeks constitute *reasonable* and  
20 *necessary* costs of preserving or disposing of the collateral. Siena may not be charged with such  
21 expense unless it either consented to or caused Debtor's incurring the expense or was directly  
22 benefitted by the expense. *In Re Compton Impressions, Ltd.*, 217 F.3d 1256, 1260 (9th Cir.  
23 2000).

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26 <sup>3</sup> Accordingly, the order granting relief from stay provides in relevant part:

27 Siena shall not raise as a defense to such motion that the landlords' remedy is  
28 limited to surcharging Siena's collateral, and shall pay any amounts that the Court  
determines Siena is required to pay the landlords within seven days of the entry of  
a final order on such contested motion or as otherwise may be agreed by the parties  
in writing. [Docket 220 at p. 3, ¶ 16.3.]

1 Siena certainly did not consent to pay the sales overage, which constitutes the majority of  
2 the claim set forth on the single page chart attached as Exhibit A to Simon's motion. Simon  
3 apparently takes the position (although the motion itself is silent on the overage issue) that even  
4 though Debtor was conducting store closing sales as part of its liquidation, Simon nonetheless  
5 was entitled to charge additional rent based upon the level of those liquidation sales. Although  
6 Simon did not offer into evidence the leases containing the overage provisions, it can be fairly  
7 assumed that such leases contemplated a sharing of Debtor's good fortune if its sales increased  
8 over a certain level, and not that Simon should be awarded bonus rent if Debtor were to cease  
9 business operations and was forced to liquidate its inventory.

10 In any event, Siena agreed only to pay the base rent for the stores from which the  
11 liquidation sales were conducted in accordance with Debtor's budget. Notably, the occupancy  
12 expenses in that budget were premised upon base rent only, and not a windfall in the form of a  
13 percentage of the proceeds of the liquidation. The concept of additional rent in the form of sales  
14 overage was never raised or discussed during negotiations over the financing stipulation and  
15 associated budget. [Declaration of Leo D. Plotkin, ¶¶ 2-3.] Siena clearly did not consent to the  
16 overage portion of the claim. As for the balance of the claim, Simon provided insufficient  
17 information to establish such expenses or that Siena consented to them.

18 Moreover, Siena was not directly benefitted by Simon's attempt to capitalize upon the  
19 store closing sales and obtain additional rent generated by such sales, and Simon has not  
20 established that Siena benefitted from any other charges. Simon therefore failed to establish a  
21 basis for surcharge under Section 506(c). As stated in *In Re Debbie Reynolds Hotel & Casino,*  
22 *Inc.*, 255 F.3d 1061 (9th Cir. 2001):

23 [T]he party seeking the surcharge must prove that its expenses were  
24 reasonable, necessary and provided a quantifiable benefit to the secured  
25 creditor. [Citation omitted.] This is not an easy standard to meet. It is the  
26 party seeking the surcharge that has the burden of showing a "concrete"  
27 and "quantifiable" benefit. The § 506 recovery is limited to the amount of  
28

1 the benefit actually proven. [Citation omitted.] . . . [A] party seeking a  
2 surcharge faces an onerous burden of proof . . . .

3 *In Re Debbie Reynolds Hotel & Casino, Inc.*, 255 F.3d at 1068.

4 Simon failed even to raise the Section 506(c) surcharge issue, much less attempt to meet  
5 its burden to prove that the additional expenses it seeks to extract from Siena met Section  
6 506(c)'s requirements. For this additional reason, the motion should be denied.

7 **V. CONCLUSION**

8 Simon has failed completely to demonstrate its entitlement to, and the nature and amount  
9 of, any additional administrative rent purportedly due or to articulate any rational basis to require  
10 Siena to pay any further expenses of Debtor's operations. Simon's motion should be denied in its  
11 entirety.

12 DATED: October 23, 2018

LEO D. PLOTKIN  
LEVY, SMALL & LALLAS  
A Partnership Including Professional Corporations

14  
15 By:   
16 Leo D. Plotkin  
17 Attorneys for Secured Lender  
18 Siena Lending Group, LLC  
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**DECLARATION OF MICHAEL ZIELINSKI**

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I, Michael Zielinski, declare:

1. I am employed by Siena Lending Group, LLC (“Siena”) as its Senior Vice President, Account Management. I have personal, first-hand knowledge of each and every fact set forth in this declaration and, if called upon to testify thereto as a witness, I could and would do so competently.

2. I was primarily responsible for managing the financing relationship between Siena and B&B Liquidating, LLC (“Debtor”) throughout the instant Chapter 11 proceeding. My duties included closely monitoring Debtor’s expenditure of funds to ensure that only expenses authorized under the agreed-upon budget were being paid by Debtor. These expenses included occupancy expenses for the various retail stores from which Debtor conducted its liquidation sales.

3. As the liquidation sales were winding down, Debtor’s landlords requested payment of various rental charges through the date that the underlying leases were deemed rejected. I was responsible for reviewing, on Siena’s behalf, such claims to determine whether they were properly payable under the terms of the financing stipulation. I requested evidentiary backup for the claims, which in many cases was not forthcoming. After carefully reviewing such claims, where there was sufficient evidentiary backup for the claim and I determined that such claim was appropriately payable as an administrative expense for which Siena was responsible under the financing stipulation, I arranged for the claim to be paid.

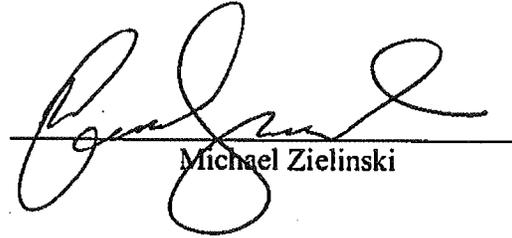
4. I reviewed the claim of Simon Property Group, LLC (“Simon”) consistent with the practice described above. Following entry of the order granting relief from stay, I arranged for Siena’s payment of the amount that Siena did not dispute, in the sum of \$16,986.41. Siena disputes the balance of Simon’s claim, the majority of which constitutes “sales overage”, which I understand constitutes a percentage of the proceeds of the liquidation sales conducted at Simon’s locations over and above the base rent that Siena paid. Siena never agreed, and would never have agreed, to pay sales overage, and Debtor’s budget attached to the financing stipulation did not include payment of any such overage. Further, I never received from Simon sufficient

1 evidentiary backup for its claim, and the instant motion to compel payment of such claim is  
2 unsupported by any such evidence. I believe that Siena has paid Simon all that it is required to  
3 pay under the terms of the financing stipulation.

4 Executed this 23<sup>rd</sup> day of October, 2018 at Stamford, Connecticut.

5 I declare under penalty of perjury under the laws of the United States of America that the  
6 foregoing is true and correct.

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Michael Zielinski

**DECLARATION OF LEO D. PLOTKIN**

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I, Leo D. Plotkin, declare:

1. I am an attorney at law duly licensed to practice before this Court and all courts of the State of California and, through my professional corporation, am a partner of Levy, Small & Lallas, A Partnership Including Professional Corporations, attorneys for Secured Lender Siena Lending Group, LLC (“Siena”) in this action. I have personal, first-hand knowledge of each and every fact set forth in this declaration and, if called upon to testify thereto as a witness, I could and would do so competently.

2. I have been primarily responsible for Siena’s representation throughout the course of this bankruptcy case. Among other things, I negotiated the terms and conditions of the post-petition financing provided by Siena to Debtor, including the negotiation of the financing stipulation. At no time before issuance of the financing orders did any landlord claim the right to receive a percentage of the liquidation sales conducted in their stores in addition to the base rent, which some landlords refer to as sales overage. During the negotiation of Debtor’s budget, the occupancy expenses were estimated based solely upon the base rent specified in the leases, and did not include any provision for sales overage.

3. I understand that the concept of including a sales overage provision in Debtor’s leases was intended to permit the landlords to share in Debtor’s success if, during the course of its normal business operations, its sales increased over a designated level. Given the nature of a going out of business sale, where the entire inventory is being liquidated, thereby artificially increasing the level of gross sales, I would never have agreed to a provision of the financing stipulation or budget that would require Siena to pay a sales overage to the landlords, and would have strongly advised Siena not to agree to such a provision. I am confident that Siena in fact would not have made the post-petition loan had it been required to effectively pay an additional

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1 liquidation fee to the landlords based on a percentage of sales over and above what it was already  
2 paying to the liquidation consultants.

3 I declare under penalty of perjury under the laws of the United States of America that the  
4 foregoing is true and correct.

5 Executed this 23rd day of October, 2018 at Los Angeles, California.

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Leo D. Plotkin

## PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:  
815 Moraga Drive, Los Angeles, California 90049

A true and correct copy of the foregoing document entitled (*specify*): **OPPOSITION OF SECURED LENDER SIENA LENDING GROUP, LLC TO CREDITOR SIMON PROPERTY GROUP, INC.'S MOTION TO COMPEL IMMEDIATE PAYMENT OF ADMINISTRATIVE RENT; DECLARATIONS OF MICHAEL ZIELINSKI AND LEO D. PLOTKIN IN SUPPORT THEREOF** will be served or was served in the manner stated below:

**1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):** Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On **10/23/2018**. I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Brian L Davidoff on behalf of Debtor B&B Liquidating, LLC - bdavidoff@greenbergglusker.com,  
calendar@greenbergglusker.com; jking@greenbergglusker.com

Service information continued on attached page

**2. SERVED BY UNITED STATES MAIL:**

On **10/23/2018**, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Rommel Mapa, Donlin, Recano & Company, Inc., 6201 15th Avenue, Brooklyn, NY 11219  
TN Dept. of Revenue, c/o TN Atty. General's Office, BK Division, PO Box 20207, Nashville, TN 37202-0207

**3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (date) \_\_\_\_\_, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

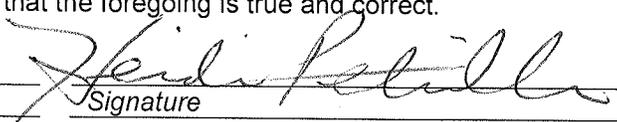
10/23/2018

Heidi Petrilli

Date

Printed Name

Signature



**1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF):**

Charla L Brown on behalf of Creditor Texas Comptroller of Public Accounts  
charla.brown@cpa.texas.gov

Shirley Cho on behalf of Creditor Committee Official Committee Of Unsecured Creditors  
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John P Dillman on behalf of Creditor Harris County  
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Jonathon J. Herzog on behalf of Creditor Simon Property Group, Inc.  
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Brian D Huben on behalf of Creditors Starwood Retail Partners LLC and The Forbes Company  
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Lillian Jordan on behalf of Interested Party Courtesy NEF  
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Martin W Taylor on behalf of Creditor Israel Discount Bank of New York  
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Ronald M Tucker, Esq on behalf of Creditor Simon Property Group, Inc.  
rtucker@simon.com, cmartin@simon.com; psummers@simon.com; Bankruptcy@simon.com

United States Trustee (LA) [ustpregion16.la.ecf@usdoj.gov](mailto:ustpregion16.la.ecf@usdoj.gov)

Elizabeth Weller on behalf of Creditor Dallas County  
Elizabeth Weller on behalf of Creditor c/o Elizabeth Weller City of Frisco  
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