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Honorable Christopher M. Alston
Chapter 11
Hearing Date: July 8, 2016, 9:30 a.m.
Response Date: July 5, 2016

8 UNITED STATES BANKRUPTCY COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 In re:

Case No. 16-11767-CMA

12 NORTHWEST TERRITORIAL MINT, LLC,

**TRUSTEE'S RESPONSE TO RETT,
LP'S MOTION FOR RELIEF FROM
STAY AND APPLICATION FOR
ALLOWANCE AND PAYMENT OF ITS
ADMINISTRATIVE EXPENSE
AND/OR ADEQUATE PROTECTION**

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14 **I. RESPONSE**

15 Mark Calvert, the Chapter 11 Trustee (the "Trustee"), files this Response to RETT, LP's
16 Motion for Relief from Stay and Application for Allowance and Payment of its Administrative
17 Expense and/or Adequate Protection (the "Motion") (Dkt. No. 439). RETT, LP ("RETT" or
18 "Landlord") is the real property landlord for the facility that the Debtor leases in Tomball, Texas.
19 RETT is controlled by Tom Tucker, who attempted, with his business partner Larry Cook, to
20 purchase the assets of the Debtor's Graco business operated at the Tomball facility (the "Graco
21 Assets"). Mr. Tucker, upset at having not been the prevailing bidder for the Graco Assets, now seeks
22 relief from stay to terminate RETT's lease prematurely, and requests payment of a significant
23 administrative expense claim. RETT's request for relief is an overreaching attempt by Mr. Tucker to
24 interfere with the Trustee's performance of the purchase and sale agreement entered into with
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26 TRUSTEE'S RESPONSE TO LANDLORD'S RELIEF
FROM STAY AND APPLICATION FOR
ADMINISTRATIVE EXPENSE CLAIM AND/OR
ADEQUATE PROTECTION- 1

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1 successful bidder Ira Green, Inc. (“Ira Green”) for the sale of the Graco Assets.¹ The estate no
2 longer operates a business at the Tomball premises. However, the estate is contractually obligated to
3 maintain the lease through July 31, 2016, to allow Ira Green to remove the Graco-related assets. Mr.
4 Tucker is fully aware that the Trustee only intends to maintain the real property lease until the end of
5 this month. As discussed herein, the Trustee has paid the Landlord more than it is owed postpetition
6 and even prepaid rent for the month of July. The Landlord is not entitled to payment of an
7 administrative expense claim and it is more than adequately protected, especially in light of the fact
8 that the Landlord holds a \$36,000 security deposit.

9 II. BACKGROUND

10 1. On April 1, 2016, the Debtor commenced this case by filing a voluntary petition
11 under chapter 11 of the United States Bankruptcy Code. The Court appointed Mark Calvert (the
12 “Trustee”) as the chapter 11 trustee over the Debtor on April 11, 2016. Upon the Trustee’s
13 appointment, the Trustee exercised control over the business operations of the Debtor and initiated
14 an investigation of the financial affairs of the bankruptcy estate. One aspect of the Debtor’s business
15 is the minting of coins, awards, and medallions for third parties. In furtherance thereof, the Debtor
16 owned a business commonly referred to as Graco Awards Manufacturing (“Graco”).

17 2. Graco’s primary business facilities were located at 723 South Cherry Street, Tomball,
18 Texas 77375 (the “Premises”). The Trustee determined that it was in the best interests of the estate to
19 sell the Graco Assets to a third party in order to generate cash and preserve other aspects of the
20 Debtor’s business. The Trustee filed a motion for approval of a sale of the assets associated with the
21 Graco business on May 6, 2016 (the “Sale Motion”). The Sale Motion requested that the Court
22 approve the sale of the Graco Assets to Tom Tucker and Larry Cook, representing a to-be-formed
23 entity (“Tucker/Cook”). At the time the Sale Motion was filed, it was unclear whether there would
24

25 ¹ Mr. Tucker has separately requested that the Court grant the entity he formed with Mr. Cook more
26 than double the break-up fee that was agreed to with the Trustee. *See* Dkt. No. 479.

1 be sufficient interest from third parties that would warrant the Trustee conducting an auction for the
2 assets. After the Sale Motion was filed, Ira Green came forward with a competing offer for the
3 Graco Assets. Ira Green had previously expressed an interest in purchasing the assets before the
4 Trustee filed the Sale Motion but did not finalize its purchase offer. After the Sale Motion was filed,
5 Ira Green came forward with an offer to purchase the Graco Assets at a higher price than had been
6 offered by Tucker/Cook. On May 27, 2016, the Trustee conducted an auction of the Graco Assets
7 and selected Ira Green as the prevailing bidder. On June 2, 2016, the Court entered an order granting
8 the Sale Motion and approving the sale of the Graco Assets to Ira Green, who submitted the highest
9 and best offer for the Graco Assets. The terms and conditions of the sale to Ira Green are set forth in
10 an asset purchase agreement attached to the Court's order approving the sale (the "APA"). Dkt. No.
11 374.

12 3. The Graco Assets that were the subject of the Sale Motion were initially acquired by
13 the Debtor from Graco Awards Enterprises, LP ("Graco Awards") in 2011. Tom Tucker was the
14 general partner of Graco Awards. *See* Dkt. Nos. 202; 305. The Debtor operated the same business
15 that Mr. Tucker's Graco Awards entity operated in the Premises prior to the sale to the Debtor. The
16 Debtor does not own the Premises; rather, it is leased from the Landlord pursuant to the Commercial
17 Lease Agreement dated as of May 12, 2011 (the "Lease"). The Landlord has been controlled by Mr.
18 Tucker since 2011. Pursuant to the terms of the Lease, the Landlord holds a security deposit in the
19 amount of \$36,000 that was paid to the Landlord prior to the petition date. The Lease provides that
20 its term expires on the last calendar day of the sixtieth calendar month after the commencement of
21 the Lease, which was May 31, 2016. Thus, under the terms of the Lease, the Lease became a month-
22 to-month Lease on June 1, 2016.

23 4. When the Trustee negotiated a proposed asset purchase agreement with Tucker/Cook,
24 Mr. Tucker agreed, on behalf of the Landlord, to defer the payment of April and May rent owed
25 under the Lease. Tucker/Cook offered to assume all postpetition obligations under the Lease as part
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TRUSTEE'S RESPONSE TO LANDLORD'S RELIEF
FROM STAY AND APPLICATION FOR
ADMINISTRATIVE EXPENSE CLAIM AND/OR
ADEQUATE PROTECTION- 3

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1 of their stalking horse offer. Accordingly, the Trustee, as part of the auction process, credited the
2 Tucker/Cook offer with the value of the unsatisfied postpetition obligations under the Lease as a
3 component of the purchase price.

4 5. Tucker/Cook was not the successful purchaser. The Trustee timely caused April and
5 May rent to be paid to the Landlord after approval of the sale to Ira Green. Furthermore, the Trustee
6 has caused to be paid the full \$16,900² in rent owed for the month of June under the Lease. Attached
7 as Exhibit B to the Trustee's declaration filed in support of this response (the "Calvert Decl.") is a
8 breakdown of the postpetition rent payments the Trustee has made under the Lease on behalf of the
9 estate. It shows that the estate is current on its postpetition rent obligations. Additionally, the Trustee
10 prepaid the full amount of rent owing under the Lease for the month of July, in the amount of
11 \$16,900.

12 6. The Lease provides that the Debtor is liable for taxes associated with the Premises.
13 However, the Landlord has been overpaid by the Trustee on account of any postpetition tax
14 obligations. The estate erroneously paid \$13,177 for 2015 real estate taxes owed by the Landlord to
15 Tomball Independent School District after the petition date because the Trustee was led to believe
16 the payment was for postpetition taxes. A copy of the 2015 tax statement paid by the estate is
17 attached to the Calvert Decl. as Exhibit C. Attached to the Calvert Decl. as Exhibit D is a copy of the
18 check the Trustee signed to satisfy this obligation. The 2015 taxes were a prepetition obligation of
19 the Debtor and therefore constitute a prepetition claim. As a result of the payment of this prepetition
20 obligation, the Landlord has been paid more than what it is rightfully entitled to on account of
21 postpetition taxes.

22 7. The Landlord alleges that approximately \$10,240 in 2016 real property taxes is owed
23 by the estate. The Lease provides that the Tenant is responsible for operating expenses related to the
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25 _____
26 ² The amount of rent owed under the Lease increased from \$13,000 per month to \$16,900 per month
once the Lease's initial term expired on May 31, 2016.

1 Premises, including “[a]ll property taxes.” However, the Lease is silent on *when* such property taxes
2 must be paid by the Tenant. It was the practice of the Debtor to pay real property taxes by their due
3 date, January 31 of the year following the applicable tax period. The real property taxes for 2016 are
4 prepetition tax obligations, which are not delinquent and are not presently due under the Lease.

5 8. The Trustee has been informed by Mr. Tucker that the purchaser of the Graco Assets,
6 Ira Green, limited RETT’s access to the Premises. Upon learning of the issue, the Trustee called Ira
7 Green’s representative Michael McAllister, who informed the Trustee that the Landlord’s contractor
8 works with a competitive business and Ira Green was concerned about his ability to gain access to
9 assets and sensitive business information from which the competitor could gain a competitive
10 advantage. The Trustee promptly resolved the issue with Mr. McAllister and allowed Mr. Tucker
11 access to the Premises within a few days’ time.

12 9. The APA the Trustee entered into with Ira Green, which was approved by this Court,
13 requires the Trustee to provide Ira Green with reasonable access to the Premises until July 31, 2016
14 (the “Removal Period”), in order to allow Ira Green to remove all of the purchased assets. Ira Green
15 is required to leave the Premises in “broom clean” condition. Thus, the estate will no longer have a
16 need for the Lease as of July 31, 2016. The Trustee requested, in the Trustee’s Motion Pursuant to
17 11 U.S.C. § 365(d)(4) for an Extension of Time to Assume or Reject Unexpired Leases of
18 Nonresidential Real Property (Dkt. No. 449), that the Court enter an order rejecting the Lease
19 effective as of July 31, 2016.

20 10. The APA provides that Ira Green shall pay the estate \$30,000 upon demand, for
21 storage, access, and assistance, during the Removal Period. As explained in the Calvert Decl., this
22 provision was intended to compensate the estate for the cost of maintaining the Lease for the
23 duration of the Removal Period. The Trustee has made this demand on Ira Green, and Ira Green has
24 paid the \$30,000 to the estate. The provision was not intended to benefit the Landlord, and it does
25 not require that the Trustee pay the \$30,000 to the Landlord.

26 TRUSTEE’S RESPONSE TO LANDLORD’S RELIEF
FROM STAY AND APPLICATION FOR
ADMINISTRATIVE EXPENSE CLAIM AND/OR
ADEQUATE PROTECTION- 5

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A. The Trustee is Obligated to Provide Ira Green Access to the Premises Pursuant to this Court’s Order.

The Landlord argues that it is entitled to relief from stay pursuant to Section 362(d)(2) of the Bankruptcy Code because “the debtor lacks equity in the property, and the property is not necessary to an effective reorganization.” But, the remaining three plus weeks of the Lease *are* necessary to the Trustee’s reorganization efforts. The Trustee must maintain the Lease through the month of July in order for the Trustee to comply with the APA the Trustee entered into with Ira Green for the Graco Assets. This Court recognized that the sale of the Graco Assets was critical to the estate and therefore approved the terms of the APA with Ira Green, including the removal period clause. By seeking relief from stay, the Landlord is attempting to thwart the Trustee’s ability to comply the explicit provision in the APA. The Trustee needs continued access to the Premises so that Ira Green can remove the Graco Assets. Thus, the Court should deny the Landlord’s motion pursuant to 11 U.S.C. § 362(d)(2).

B. The Landlord has Been Paid in Excess of what it is Owed Postpetition under the Lease.

The Motion lists a number of Lease obligations it believes that the Trustee has not fulfilled and that form the basis for approval of an administrative claim in excess of \$30,000. As explained herein, the Landlord’s Motion should be denied because it has been paid more than what it is owed under the Lease on account of postpetition obligations. The Landlord also argues that “cause” exists for relief from stay pursuant to section 362(d)(1) of the Bankruptcy Code because the Landlord’s interest in the Property is not being “adequately protected.”³ Cause does not exist, because the Trustee has made all payments it is obligated to make pursuant to Section 365(d)(3) of the

³ The question of whether a landlord is entitled to seek adequate protection of its right to be kept current postpetition is not settled. *Compare In re Ernst Home Center, Inc.*, 209 B.R. 955 (W.D. Wash. 1997) (stating that real property lessors may request adequate protection, but denying request for adequate protection), *with In re Sweetwater*, 40 B.R. 733 (Bankr. D. Utah 1984) (“a lessor’s exclusive remedies are to be found in Section 365”). The Trustee submits that even if landlords may request adequate protection, the Landlord’s interests are sufficiently protected in this case.

1 Bankruptcy Code, and even prepaid rent for the month of July.

2 Mr. Tucker states in his declaration that the estate has failed to pay \$3,900 in rent for May of
3 2016—the amount of the increase in the original rental rate upon expiration of the original term of
4 the lease; and \$2,600 in late fees for the estate’s failure to make “full” lease payments. According to
5 Mr. Tucker, the Lease term expired on May 12, 2016. Mr. Tucker’s position is erroneous because
6 the Lease did not expire until May 31, 2016. *See* Lease, § 2 (“The Term of this Lease shall . . . end
7 on the last day of the sixtieth calendar month thereafter”). Furthermore, because the Landlord
8 voluntarily deferred payment of rent for the months of April and May, the estate has no obligation to
9 pay the late fees the Landlord asserts are owed.

10 The only other obligations the Landlord asserts that the estate is obligated to pay pursuant to
11 365(d)(3) are \$14,723.10 for insurance through July 2016, and \$10,203.67 in “real estate taxes.” The
12 Trustee has maintained insurance on the Premises.⁴ A copy of the certificate of liability insurance is
13 attached as Exhibit A to the Calvert Decl. Furthermore, the Landlord never contacted the Trustee to
14 discuss the estate’s insurance obligation,⁵ and does not describe in the Motion how the sum of
15 \$14,723.10 was derived.

16 Regarding the alleged real estate tax obligations, 2016 real estate taxes are a prepetition
17 obligation are not an amount currently due under the Lease, therefore, the Trustee is not required to
18 pay such taxes pursuant to 365(d)(3). *See In re Ernst Home Center, Inc.*, 209 B.R. 955 (Bankr. W.D.
19 Wa. 1997). In *Ernst*, the Court stated that 365(d)(3) only requires the timely performance of
20 obligations under a lease—its application does not result in the acceleration of tax payments due
21 under the Lease. *Id.* at 964. Here, the Lease does not require monthly payments of property taxes for
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23 ⁴ The Trustee has a certificate of insurance substantiating a policy covering the Premises in the
amount of \$1,000,000.

24 ⁵ Mr. Tucker states in his declaration that he contacted the Debtor on April 10, 2016, to request proof
25 of insurance. As of April 10, 2016, the Trustee had not been appointed. Mr. Tucker made no similar
request to Mark Calvert for proof of insurance.

26 TRUSTEE’S RESPONSE TO LANDLORD’S RELIEF
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1 the current year. The real property taxes for 2016 accrued prepetition⁶ and are not due until January
2 31, 2017. It was the practice of the Debtor to pay real property taxes due under the Lease in full, on
3 or about the due date. Section 365(d)(3) does not accelerate the Debtor's obligation to *pay* 2016 real
4 estate taxes—an obligation that has not yet arisen under the Lease. *Ernst*, 209 B.R. at 964 (“real
5 estate taxes which accrue prepetition but are not billed under a lease until postpetition, remain
6 prepetition obligations and are not ‘obligations’ that must be paid pursuant to Section 365(d)(3)’”).

7
8 **C. The Debtor's Alleged Breaches of Non-Monetary Lease Obligations are Red Herrings.**

9 The Landlord also argues that it has been unable to access the Premises. The issue of the
10 Landlord's access to the Premises is an issue that the Trustee resolved when it came to his attention.
11 The Lease provides, in section 10, that the Landlord shall have a right to enter the Premises “upon
12 reasonable advance notice” and must “observe Tenant's established security requirements and
13 protocol for entering the Premises.” Mr. Tucker does not state whether notice was provided before
14 his representative attempted to access the Premises. Any ongoing issues are largely issues between
15 Ira Green and the Landlord, and will be mooted when the Removal Period expires and the Lease is
16 rejected by the Trustee.

17 The Landlord also attempts to argue that the Trustee is violating the “use” provision of the
18 Lease. Mr. Tucker does not explain how, other than to suggest that permitting Ira Green to access the
19 Property is a violation of the Lease. The Debtor operated the same business in the Premises that Mr.
20 Tucker operated (under the name of Graco Awards) prior to selling it to the Debtor in 2011. The
21 “use” provision of the Lease specifically contemplates the Debtor's use of the Premises “similar . . .
22 to . . . the use and occupation enjoyed by Graco Awards prior to the Commencement Date.” *See*
23 Section 5 of the Lease (Dkt. No. 439-2). The suggestion that the removal of property from the Lease

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25 ⁶ *See In re Midland Indus. Service Corp.*, 35 F.3d 164 (5th Cir. 1994) (citing to Tex. Tax Code Ann.
26 § 32.07 and holding that a property owner's liability for ad valorem taxes for any given year arises
as of January 1 of that year regardless of when the tax is assessed).

1 violates its use provision is disingenuous. Section 15 of the Lease specifically contemplates the
2 removal of property prior to the Lease's expiration, and the removal of such property is necessary to
3 comply with the APA.

4 For all of these reasons, the Landlord's motion for immediate payment of any administrative
5 expense claim should be denied.

6 **D. The Landlord is Not Entitled to Adequate Protection.**

7 According to the Landlord, it is entitled to adequate protection, in the amount of \$44,000, for
8 potential harm that may be caused to the Premises during the Removal Period. Additionally, the
9 Landlord argues that "the Buyer and its representatives are causing continuous and ongoing damage
10 to the Property" and that "the Trustee and Buyer are restricting RETT's ability to access the
11 Property." The allegations of "continuous and ongoing damages" are supported by Mr. Tucker's
12 statement that "Jeff Muller, RETT's general contractor, has reported to me that property damage is
13 occurring..." Mr. Tucker's statement is inadmissible hearsay and does not include any description of
14 how or what damage has occurred. Thus, his estimate that "it may cost as much as \$44,000 to repair
15 damage" is completely arbitrary and lacks any foundation.

16 Based upon the above, the Landlord's request for adequate protection is unwarranted.
17 However, there are additional reasons this Court should deny the Landlord's request. First, the
18 Trustee has overpaid the Landlord when it wrote a check for 2015 real property taxes in the amount
19 of \$13,177. Second, the Landlord presently holds a prepetition security deposit in the amount of
20 \$36,000. Any amounts that this Court believes are validly owed under the Lease postpetition should
21 be offset by the \$13,177 payment previously made by the Trustee.⁷

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23 ⁷ In the Motion, the Landlord argues that the "removal fee" under the APA should be used by the
24 Trustee to pay the Landlord adequate protection. The APA provides that Ira Green shall pay the
25 estate \$30,000 upon demand, for storage, access, and assistance, during the Removal Period. This
26 provision was intended to compensate *the estate* for the cost of maintaining the Lease for the
duration of the Removal Period. Ira Green has already paid the \$30,000 to the estate. The provision
is not intended to benefit the Landlord, who is not a party to the APA. The Landlord has already
benefitted from the fact that the Trustee agreed to maintain the Lease through the month of July and

1 As set forth above, the Trustee has paid the amounts owing under the Lease and more.
2 Furthermore, the Landlord has provided no evidence (other than the self-serving hearsay testimony
3 of Mr. Tucker) that would substantiate his concerns that there is continuing and ongoing damage to
4 the Premises. The request for adequate protection should therefore be denied.

5 **E. The Court Should Deny the Landlord’s Request for Attorneys’ Fees.**

6 Mr. Tucker is disgruntled after having not prevailed in his attempt to acquire the Debtor’s
7 Graco Assets. As a result, he has caused the Landlord, who holds a \$36,000 security deposit, to file
8 the Motion despite the fact that that it has been overpaid. The Landlord has forced the Trustee to
9 expend administrative resources responding to its unmeritorious Motion. The Landlord overreaches
10 further by requesting an award of attorneys’ fees. The Trustee requests that the Court deny the
11 Landlord’s Motion and its requests for attorneys’ fees therein. No basis for the attorneys’ fees
12 request is articulated in the Motion. Presumably, the Landlord’s attorneys’ fees request is premised
13 on section 21 of the Lease, which states that “[t]he prevailing party in any lawsuit between the
14 parties shall be entitled to recover reasonable attorneys’ fees and court costs from the non-prevailing
15 party. The Trustee, as the “prevailing party” should be awarded his costs, including reasonable
16 attorneys fees incurred in this action, in accordance with section 21 of the Lease.

17 **IV. CONCLUSION**

18 Based on the foregoing, the Trustee respectfully requests that this Court deny the Motion and
19 grant the Trustee his reasonable attorneys’ fees and costs incurred in connection with responding to
20 this Motion.

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26 has therefore paid rent for the months of June and July to the Landlord.

TRUSTEE’S RESPONSE TO LANDLORD’S RELIEF
FROM STAY AND APPLICATION FOR
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DATED this 5th day of July, 2016.

K&L GATES LLP

By /s/ Michael J. Gearin
Michael J. Gearin, WSBA #20982
David C. Neu, WSBA #33143
Brian T. Peterson, WSBA #42088
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TRUSTEE'S RESPONSE TO LANDLORD'S RELIEF
FROM STAY AND APPLICATION FOR
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CERTIFICATE OF SERVICE

The undersigned declares as follows:

That she is a paralegal in the law firm of K&L Gates LLP, and on July 5, 2016, she caused the foregoing document to be filed electronically through the CM/ECF system which caused Registered Participants to be served by electronic means, as fully reflected on the Notice of Electronic Filing.

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

Executed on the 5th day of July at Seattle, Washington.

/s/ Denise A. Evans
Denise A. Evans