IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

	)	**Chapter 11**
	)	
In re	)	**Case No. 03-13063 (CGC)**
	)	
CHI-CHI'S, INC., ***et al.***	)	**(Jointly Administered)**
	)	
	)	**Hearing Date: October 9, 2003 @ 2:00 p.m.**
Debtor	)	**Related to Docket No. 11**

LIMITED OBJECTION OF KRAVCO COMPANY TO DEBTORS' MOTION FOR INTERIM AND FINAL ORDERS: (1) AUTHORIZING SECURED POSTPETITION FINANCING ON A SUPERPRIORITY BASIS PURSUANT TO 11 U.S.C. §§ 105, 364(c) AND 364(d) OF THE BANKRUPTCY CODE; (2) AUTHORIZING USE OF CASH COLLATERAL PURSUANT TO 11 U.S.C. § 363; AND (3) SCHEDULING A FINAL HEARING PURSUANT TO BANKRUPTCY RULE 4001(c)

TO THE HONORABLE CHARLES G. CASE, II,
UNITED STATES BANKRUPTCY COURT JUDGE:

Kravco Company ("Kravco"), by its undersigned attorneys, makes this Limited Objection to Debtors' Motion for Interim and Final Orders: (1) Authorizing Secured Postpetition Financing on a Superpriority Basis Pursuant to 11 U.S.C. §§ 105, 364(c) and 364(d) of the Bankruptcy Code; (2) Authorizing Use of Cash Collateral Pursuant to 11 U.S.C. § 363; and (3) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001(c) (the "Motion") and in support thereof avers:

1. Kravco is the owner or agent for the owner of two (2) shopping centers[1] in which Debtors operate "Chi-Chi's" restaurants pursuant to written leases (the "Leases"), that are impacted by the relief requested in the Motion.

2. Both of the Chi-Chi's leases are leases of premises located in shopping centers, as that term is used in 11 U.S.C. § 365(b)(3). *See, In Re: Joshua Slocum, Ltd.*, 922 F.2d 1081 (3d Cir. 1990).

3. It is unclear from a reading of the Motion, the Proposed Order and the Senior Secured Super-Priority Debtor-In-Possession Loan and Security Agreement (the "Agreement") whether or not Debtors seek, *inter alia*, the right to grant a lien and/or security interest in and to the Kravco Leases. The Motion indicates that the lender's lien will include the "real and personal property of the Borrowers." (See, ¶ 29 "Liens and Priority"). Paragraph (b), at page 3, of the Proposed Order references, as part of the Collateral, "all interests under leases, licenses or occupancy agreements covering personal or real property". In addition, paragraph 12 of the order, entitled "**Lien to Secure Postpetition Obligations**." proposes that any provision of a lease that requires the consent of the landlord to pledge the leasehold interest shall have no force and effect with regard to the lenders' lien. However, the definition of the "Borrower Collateral" set forth in Section 1.1 of the Agreement states, at subparagraph (l):

> all of its Real Property Collateral, and, with respect to all leased locations of each Borrower, only to the extent of all value obtained and realized from disposition (*sic*) any of such Borrower's real property leases, including proceeds received by such Borrower from the assumption and assignment of any such real property leases.

1 The restaurant locations are at the Lehigh Valley Mall, Whitehall, PA and the Oxford Valley Mall, Langhorne, PA. Kravco is also the agent for MAK, Inc. which operates the utility service at the Lehigh Valley Mall.

4. While Kravco does not object to the granting of a lien on and/or security interest in the proceeds of the sale of the Leases, Kravco does object to any attempt to lien, grant a security interest in, mortgage or otherwise hypothecate the Leases, contrary to the provisions thereof. Assuming that the Agreement is, indeed, the final understanding between Debtors and their DIP lenders, and the above quoted language does mean that the lenders are only seeking a lien on the proceeds of the sale of the Leases, Kravco does not object to that provision; however, the Proposed Order must be modified to reflect the language of the Agreement.

5. It should also be noted that in addition to the strict prohibition in most leases against the granting of liens in, or hypothecation of, the leasehold interests, the subject Kravco properties are encumbered by mortgages which, it is believed, specifically prohibit the landlord from allowing any encumbrances to be granted upon the various tenant leases, which leases are themselves subject to the prior mortgage lien of the landlord's lender.

6. While it has become common for lenders to request liens on real property leases, most cash collateral and post-petition financing orders provide that only the proceeds of the leaseholds will be encumbered, not the leaseholds themselves. *See, e.g.*, the Final Order in *Fannie Mae Holdings, Inc.*, Case No. 02-11719 pending in this District, attached hereto as Exhibit "A", Final DIP Order in *The Walking Company*, case #SV-03-15880-GM, currently pending in the Central District of California, , attached hereto as Exhibit "B" and Interim and Final Orders (see paragraph 15) in *Samuels Jewelers, Inc.*, Case No. 03-12399 (MFW), currently pending in this District, attached hereto as Exhibits "C" and "D". Where similar issues were raised in the *SFMB* and *Wherehouse* matters currently pending in this District, the negotiated Orders did not extend the liens to leases of non-residential real property, but only to the proceeds thereof. Similarly, in the *Fleming* matter currently pending before this Court, the final order

provided that to the extent that a lease prohibited the granting of a lien on a leasehold, no such lien was to be taken by the lender, the lender being satisfied with the proceeds of the disposition of any leasehold.

7. The Proposed Order and Agreement also afford the lenders a multitude of remedies in the event of a default under the loan. Those remedies are triggered without notice to the landlords and include such items as granting the lender a 120 day License to use the leased premises without charge and the right to occupy the premises for the purpose of disposing of the Collateral, notwithstanding any provisions of the Leases and without further order of this Court. These provisions should be modified to provide for notice to the landlords and the use of the premises only as agreed to by the landlords or as provided by further order of this Court. Acceptable language may be found at paragraph 19 of the *Samuels* Orders.

WHEREFORE, Kravco prays that in the event that Debtors' Motion is granted, that said motion provide that any lien pertaining to Kravco's Leases shall be in and to only the proceeds of such leaseholds, and not the leaseholds themselves; and,

WHEREFORE, Kravco prays that in the event that Debtors' Motion is granted, that said order be modified with regard to the lenders' rights in the event of a default, as referenced in paragraph 7, above; and,

WHEREFORE, Kravco prays for such other and further relief as may be just and appropriate under all of the circumstances.

October 8, 2003

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