

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ROME DIVISION

IN RE:

HUTCHESON MEDICAL CENTER, INC.

Debtor.

CHAPTER 11

CASE NO. 14-42863-pwb

**NOTICE OF HEARING**

**PLEASE TAKE NOTICE** that NHP-Parkway Physicians Center, LLC ("NHP") has filed a Motion for Payment of Administrative Expense (the "Motion") seeking the entry of an order directing Debtor, Hutcheson Medical Center, Inc. ("Debtor"), to immediately pay to NHP unpaid postpetition rent that has accrued since the Petition Date under Debtor's nonresidential real property leases with NHP.

**PLEASE TAKE FURTHER NOTICE** that the Court will hold a hearing on the Motion in Courtroom 1401, United States Courthouse, 75 Spring Street, S.W., Atlanta, Georgia, at 2:00 p.m. on March 24, 2015.

Your rights may be affected by the court's ruling on these pleadings. You should read these pleadings carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.) If you do not want the court to grant the relief sought in these pleadings or if you want the court to consider your views, then you and/or your attorney must attend the hearing. You may also file a written response to the pleading with the Clerk at the address stated below, but you are not required to do so. If you file a written response, you must attach a certificate stating when, how and on whom (including addresses) you served the response. Mail or deliver your response so that it is received by the Clerk at least two business days before the hearing. The address of the Clerk's Office is, U. S. Bankruptcy Court, Suite 1340, 75 Spring Street, Atlanta, Georgia 30303. You must also mail a copy of your response to the undersigned at the address stated below.

This 4<sup>th</sup> day of March, 2015.

/s/ David E. Gordon  
David E. Gordon  
Georgia Bar No. 111877  
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*Attorneys for NHP-Parkway Physicians  
Center, LLC*

**FILED**

**MAR 04 2015**

**MC GROUP**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ROME DIVISION**

IN RE:

HUTCHESON MEDICAL CENTER, INC.

Debtor.

CHAPTER 11

CASE NO. 14-42863-pwb

**MOTION FOR PAYMENT OF ADMINISTRATIVE EXPENSE**

COMES NOW NHP-Parkway Physicians Center, LLC (“NHP”), pursuant to 11 U.S.C. §§ 365(d)(3) and 503 and Rule 9013 of the Federal Rules of Bankruptcy Procedure, and moves the Court for the entry of an order directing Debtor, Hutcheson Medical Center, Inc. (“Debtor”), to immediately pay to NHP unpaid postpetition rent in the amount of \$92,929.12 that has accrued since the Petition Date (as defined below) under Debtor’s nonresidential real property leases with NHP. In support of this Motion NHP respectfully shows the Court as follows:

**JURISDICTION**

1.

The Court has jurisdiction with respect to this Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157 (b)(2).

**BACKGROUND**

2.

NHP leases certain office space to the Debtor in the Parkway Physicians Center, a medical office building owned by NHP and located at 4700 Battlefield Parkway, Ringgold, Georgia.

3.

Specifically, NHP leases to Debtor a medical office suite (Space 140) and two imaging

centers (Spaces 310 and 320) pursuant to three separate leases: (1) that certain Lease Agreement by and between NHP, as landlord, and Debtor, as tenant, relating to Space 140 of the Parkway Physicians Center (the “140 Lease”); (2) that certain Lease Agreement by and between NHP, as landlord, and Debtor, as tenant, relating to Space 310 of the Parkway Physicians Center (the “310 Lease”); and (3) that certain Lease Agreement by and between NHP, as landlord, and Debtor, as tenant, relating to Space 320 of the Parkway Physicians Center (the “320 Lease”) (collectively, the “Leases”).

4.

On November 20, 2014 (the “Petition Date”), Debtor filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.* (the “Bankruptcy Code”).

5.

Debtor was in default under all three Leases prior to the Petition Date. NHP filed a Proof of Claim asserting a prepetition, unsecured claim in the amount of \$283,406.16 for unpaid prepetition rent. (ECF Claim No. 100; BMC Claim No. 110). True and correct copies of the Leases are attached to NHP’s Proof of Claim, which is hereby incorporated herein by reference.

6.

From and after the Petition Date, Debtor has continued to use and occupy the office suite and two imaging centers leased from NHP under the Leases. Debtor has failed, however, to pay the postpetition rent due and owing under the Leases.

7.

As of the filing of this Motion, the amount of postpetition rent due and owing under the Leases is \$92,929.12. Debtor has not moved to assume or reject any of the Leases.

8.

NHP sent Debtor a letter dated February 10, 2015, a true and correct copy of which is attached hereto as “**Exhibit 1**”, in order “to address Debtor’s failure to pay postpetition rent for space that Debtor leases from NHP in an effort to rectify the same without resort to motion practice.” NHP’s February 10 letter explained that Debtor was failing to pay postpetition rent while continuing to use and occupy the leased premises, set forth the amount of postpetition rent then owed under the Leases, and requested that Debtor make arrangements for the timely payment of postpetition rent. The Official Committee of Unsecured Creditors appointed in this case (the “Committee”) was copied on the letter. Neither Debtor nor the Committee responded to the letter, and Debtor’s counsel failed to return multiple phone calls from NHP’s counsel. NHP therefore files this Motion.

**RELIEF REQUESTED**

9.

By this Motion, NHP respectfully requests that the Court enter an order pursuant to Section 365(d)(3) of the Bankruptcy Code directing Debtor to immediately pay to NHP the postpetition rent due under the Leases in the amount of \$92,929.12. Alternatively, NHP seeks entry of an order pursuant to Section 503(b)(1)(A) allowing NHP’s claim for unpaid postpetition rent as a “super priority” administrative expense.<sup>1</sup>

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<sup>1</sup> This Motion is filed without prejudice to NHP’s right to seek to compel the payment of further amounts from Debtor or to assert additional administrative expense claims against Debtor. Debtor has not moved to assume or reject any of the Leases. If Debtor does not timely pay postpetition rent going forward, the amount of unpaid postpetition rent due and owing under the Leases, and therefore the amount of NHP’s administrative priority claim, will continue to increase.

## **BASIS FOR RELIEF**

### **I NHP is Entitled to Immediate Payment of Postpetition Rent.**

10.

Bankruptcy Code Section 365(d)(3) provides that “[t]he Trustee shall timely perform all the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease of nonresidential real property, until such leases is assumed or rejected . . . .”

11.

The effect of Section 365(d)(3) is to mandate “immediate payment of post-petition lease obligations,” regardless of the estate’s solvency, and to exempt them from the usual tests applied to assertions of administrative priority. In re Pudgie’s Dev. of NY, Inc., 239 B.R. 688, 694-95 (S.D.N.Y. 1999). Because the estate’s solvency is irrelevant to Section 365(d)(3), rent payments are also immune from disgorgement, giving them a “de facto priority over other administrative expenses.” In re Telesphere Communications, Inc., 148 B.R. 525, 530-31 (Bankr. N.D. Ill. 1992); accord In re Rare Coin Galleries of Am., Inc., 72 B.R. 415, 416-17 (D. Mass. 1987); In re Brennick, 178 B. R. 305, 307-08 (Bankr. D. Mass. 1995).

12.

The purpose of Section 365(d)(3) is to alleviate the unique disadvantage at which landlords previously found themselves under the Bankruptcy Code:

A second and related problem is that during the time the debtor has vacated space but has not yet decided whether to assume or reject the lease, the trustee has stopped making payments due under the lease. These payments include rent due the landlord and common area charges which are paid by all the tenants according to the amount of space they lease. In this situation, the landlord is forced to provide current services - the use of its property, utilities, security, and other services - without current payment. No other creditor is put in this position.

H.R. Conf. Rep. No. 98-882 (1984), reprinted in 1984 U.S.C.C.A.N. 576, 599 (statement of Sen. Hatch).

13.

Debtor has succeeded in imposing on NHP the very burdens that Bankruptcy Code Section 365(d)(3) were meant to prevent. Specifically, Debtor has continued to use the leased premises after the Petition Date without making current payment and deliberately imposing the costs of reorganization on NHP. Moreover, NHP has had to incur the costs of bringing this Motion, costs that Section 365(d)(3) was also meant to alleviate.

14.

Therefore, NHP is entitled to, and respectfully requests, an Order requiring Debtor to immediately pay the postpetition rent and to pay NHP's attorneys' fees in bringing this Motion to the extent that such recovery is permitted by law.<sup>2</sup>

**II Alternatively, NHP's Claim for Postpetition Rent Should be Allowed as a Superpriority Administrative Expense Under Section 503(b)(1)(a) of the Bankruptcy Code.**

15.

The Bankruptcy Code allows claims for administrative expenses for the "actual, necessary costs and expenses of preserving the estate . . ." 11 U.S.C. § 503(b)(1)(A). Claims for unpaid rent under Section 365(d)(3) are entitled to priority treatment as an administrative expense. In Re Cukierman, 265 F.3d 846, 850 (9th Cir. 2001).

16.

Claims for unpaid rent arising under Section 365(d)(3) are entitled to a "superpriority" over other allowed administrative expenses under Section 503. In re C.Q., LLC, 343 B.R. 915, 918 (Bankr. W.D. Wis. 2005). Claims for unpaid rent under Section 365(d)(3) must be paid when due, or in any event prior to allowed administrative expenses. Id.

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<sup>2</sup> All three of the Leases provide that NHP may recover its reasonable attorneys' fees incurred in enforcing Debtor's obligations under the Leases.

17.

NHP's claim for postpetition rent is an allowable administrative expense, and the amount of NHP's allowable administrative expense should be calculated pursuant to the express terms of the Leases. See Cukierman, 265 F.3d at 850.

18.

To the extent NHP's claim for postpetition rent is not paid immediately to NHP, NHP is entitled to payment of its administrative expense claim prior to the payment of other allowed administrative expense claims. C.Q., 343 B.R. at 918.

19.

Therefore, if the Court does not enter an order requiring Debtor to pay NHP's claim immediately, NHP respectfully requests that the Court enter an order allowing the full amount of NHP's claim for postpetition rent as an administrative expense under Section 503(b)(1)(A) and directing that such claim be paid prior to all other allowed administrative expense claims in this Chapter 11 case.

WHEREFORE, NHP respectfully requests that the Court:

- (a) enter an order directing Debtor to immediately pay to NHP unpaid postpetition rent in the amount of \$92,929.12;
- (b) alternatively, enter an order allowing the full amount of NHP's claim for postpetition rent as an administrative expense under Section 503(b)(1)(A) of the Bankruptcy Code and directing payment of such claim prior to payment of all other allowed administrative expenses in this Chapter 11 Case; and

- (c) grant such other or further relief in favor of NHP as may be just and proper including, without limitation, ordering that Debtor pay NHP's attorneys' fees incurred in filing and prosecuting this Motion.

Respectfully submitted this 4<sup>th</sup> day of March, 2015.

/s/ David E. Gordon  
David E. Gordon  
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*Attorneys for NHP-Parkway Physicians Center,  
LLC*



**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing *Motion for Payment of Administrative Expense* was served on the parties listed on Exhibit A hereto via the modes of service indicated thereon.

This 4<sup>th</sup> day of March, 2015.

/s/ David E. Gordon

David E. Gordon

Georgia Bar No. 111877

**Exhibit A**

**(Service List)**

Label Matrix for local noticing  
113E-4  
Case 14-42863-pwb  
Northern District of Georgia  
Rome  
Wed Mar 4 09:05:13 EST 2015

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End of Label Matrix	
Mailable recipients	34
Bypassed recipients	0
Total	34

**Exhibit 1**

(February 10, 2015 Letter)

# McKenna Long & Aldridge<sup>LLP</sup>

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DAVID GORDON  
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EMAIL ADDRESS  
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February 10, 2015

## VIA E-MAIL

J. Robert Williamson ([rwilliamson@swlawfirm.com](mailto:rwilliamson@swlawfirm.com))  
Ashley Reynolds Ray ([aray@swlawfirm.com](mailto:aray@swlawfirm.com))  
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**Re: In re Hutcheson Medical Center Inc.; Chapter 11 Case No. 14-42863-PWB;  
Failure to Pay Postpetition Rent**

Dear Rob, Ashley & Hayden:

This law firm represents NHP-Parkway Physicians Center, LLC ("NHP"), a creditor and party in interest in the above-referenced Chapter 11 case of Hutcheson Medical Center, Inc. ("Debtor"). I write to address the Debtor's failure to pay postpetition rent for space that Debtor leases from NHP in an effort to rectify the same without resort to motion practice.

NHP leases certain office space to the Debtor in the Parkway Physicians Center, a medical office building owned by NHP and located at 4700 Battlefield Parkway, Ringgold, Georgia. Specifically, NHP leases to Debtor a medical office suite (Space 140) and two imaging centers (Spaces 310 and 320) pursuant to three separate leases. As of November 20, 2014 (the "Petition Date"), Debtor owed NHP \$283,406.16 in unpaid rent under the three leases, that amount being comprised of \$173,537.01 under the 140 Lease, \$41,220.91 under the 310 Lease, and \$68,648.24 under the 320 Lease. NHP has filed a Proof of Claim in Debtor's bankruptcy case asserting a general unsecured claim in this amount. (See Claims Register; Claim No. 100). The Proof of Claim contains a breakdown of amounts owed under the three leases as well as copies of the leases themselves.

J. Robert Williamson  
February 10, 2015  
Page 2

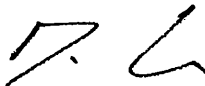
Under each Lease, rent is due on the first of the month. While Debtor has continued to use and occupy the leased spaces, Debtor has failed to pay the rent due for each lease on December 1, 2014, January 1, 2015, and February 1, 2015. The total amount currently due and owing for the postpetition period is \$62,343.76. This amount will increase over time if Debtor fails to pay the postpetition rent due and owing under the Leases.

As you are aware, while a tenant debtor-in-possession has 120 days to decide whether to assume or reject an unexpired lease of commercial real property, such right is subject to the requirement that the debtor timely pay rent accruing after the Petition Date. The Debtor's failure to pay such rent gives rise to an administrative expense claim, one that, in this case, grows daily as Debtor continues to enjoy use and occupancy of the leased premises without paying rent. NHP therefore demands that Debtor immediately make satisfactory arrangements for payment of all past due, postpetition rent.

If NHP does not receive a satisfactory response to this letter on or before **Monday February 16, 2015**, NHP will seek appropriate relief from the bankruptcy court. This relief may include, without limitation, filing a motion for relief from the automatic stay to terminate the leases, filing an administrative expense claim, filing a motion to compel Debtor to pay postpetition rent, and/or filing a motion to compel Debtor to immediately assume or reject the leases. NHP reserves all rights and remedies.

Please contact me to discuss the foregoing.

Very truly yours,



David Gordon

DG

cc: Official Committee of Unsecured Creditors  
c/o David B. Kurzweil ([kurzweild@gtlaw.com](mailto:kurzweild@gtlaw.com))  
c/o John D. Elrod ([elrodj@gtlaw.com](mailto:elrodj@gtlaw.com))