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12 **UNITED STATES BANKRUPTCY COURT**
 13 **EASTERN DISTRICT OF CALIFORNIA**
 14 **SACRAMENTO DIVISION**

16 In re
 17 ECS REFINING, INC.,
 18 Debtor.

Case No. 18-22453-D-11
 Chapter 11
 DC NO. KLG-1

**OBJECTION TO FIFTH EMERGENCY
 MOTION FOR AN INTERIM ORDER (1)
 AUTHORIZING THE USE OF CASH
 COLLATERAL PURSUANT TO 11 U.S.C. §
 363; (2) SCHEDULING A FINAL
 HEARING; AND (3) GRANTING
 RELATED RELIEF; AND LANDLORD’S
 DEMAND FOR IMMEDIATE ADEQUATE
 PROTECTION OF ITS INTERESTS**

25 **TO THE HONORABLE ROBERT S. BARDWIL,**
 26 **UNITED STATES BANKRUPTCY JUDGE:**

27 Prologis, L.P. (“Prologis” or the “Landlord”), a creditor and lessor in the above-captioned
 28 bankruptcy case, hereby files its Objection to Fifth Emergency Motion for an Interim Order (1)

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1 Authorizing the Use of Cash Collateral Pursuant to 11 U.S.C. § 363; (2) Scheduling a Final Hearing;
2 and (3) Granting Related Relief; and Landlord's Demand for Immediate Adequate Protection of Its
3 Interests (the "Objection"). In support of its Objection, Prologis respectfully states as follows:

4 1. On July 15, 2016, ECS Refining, Inc. ("ECS" or the "Debtor"), as lessee, and
5 Prologis, as lessor, entered into a certain Lease Agreement (as amended, the "Lease"). Pursuant to
6 the terms of the Lease, the Debtor leased from Prologis approximately 9,519 square feet of
7 warehouse space, commonly known as 1240 Bell Ranch Drive, Santa Fe Springs, California 90670
8 (the "Leased Premises"). A true and correct copy of the Lease is attached to the Declaration of the
9 Landlord's property manager, Ann Nelson ("Nelson Decl.") as Exhibit "A" and is incorporated herein
10 for all purposes.

11 2. On April 24, 2018 (the "Petition Date"), ECS filed its Voluntary Petition under
12 chapter 11 of the Bankruptcy Code commencing the above-captioned bankruptcy case (the "Case").

13 3. On May 2, 2018, this Court appointed W. Donald Gieseke as chapter 11 trustee for the
14 Debtor's estate (the "Chapter 11 Trustee"). Since his appointment, the Chapter 11 Trustee has
15 continued in possession of the Debtor's assets and has continued to operate the Debtor's business.

16 4. As of the filing of this Objection, the Chapter 11 Trustee has been operating the
17 Debtor's business for nearly sixty (60) days. The Chapter 11 Trustee's activities involve the
18 collection and generation of materials, including electronics and electronic waste, which are
19 hazardous materials¹. Such materials are collected and stored at the Leased Premises, along with
20 about nine (9) other collection facilities operated by the Chapter 11 Trustee, prior to shipment to
21 processing centers.

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23 _____
24 ¹ Pursuant to 28 U.S.C. § 959, "... a trustee, receiver, or manager appointed in any cause pending in
25 any court of the United States, including a debtor in possession, shall manage and operate the
26 property in his possession as such trustee, receiver or manager according to the requirements of the
27 valid laws of the State in which such property is situated, in the same manner that the owner or
28 possessor thereof would be bound to do as if in possession thereof."

The Chapter 11 Trustee is bound by applicable laws and regulations of both the United States and the State of California to lawfully remove and dispose hazardous materials stored on the Leased Premises. These requirements are likewise included within the terms of the Lease.

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1 5. The Chapter 11 Trustee's business is heavily regulated, with the Chapter 11 Trustee
2 maintaining various certifications (and, presumably, many applicable licenses) to conduct such
3 business. According to its website², the Debtor's certifications include the following:

4 a. e-Stewards Certified: e-Steward Certification is rapidly emerging as the
5 leading global program designed to enable individuals and organizations who dispose of their
6 old electronic equipment, to easily identify recyclers that adhere to the highest standard of
7 environmental responsibility and worker protection.

8 b. R2 Certified: The R2 Standard sets forth requirements relating to
9 environmental health, safety, and security aspects of electronics recycling. R2 also requires e-
10 recyclers to assure that more toxic material streams are managed safely and responsibly by
11 downstream vendors-all the way to final disposition. It also prohibits e-recyclers and their
12 downstream vendors from exporting these more toxic materials to countries that have enacted
13 laws making their import illegal.

14 c. ISO 14001:2004 – Environmental Management: Environmental Management
15 refers to environmental policy, sustainability, resource and asset management, legal
16 compliance, carbon footprint and impact reduction, pollution prevention, corporate social
17 responsibility, cultural awareness and change management. The ISO 14001:2004 standard
18 helps us to protect the environment, check pollution, and improve our overall environmental
19 performance. This standard specifies the framework for ECS to understand our impact on the
20 environment, and set forth plans to minimize that impact.

21 d. OHSAS: 18001:2007 – Occupational Health & Safety: The OHSAS standard
22 provides guidelines used for the implementation of effective health and safety procedures in
23 the workplace. Utilizing these guidelines, ECS has been able to minimize health and safety
24 risks within our workplace, and maximizes safety for the workers and visitors to our facilities.

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28 ² See www.ecsrefining.com, click About, then click Certifications. See also click Industries, then
click Environmental.

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1 6. As stated on the Debtor’s website: (i) “[The Debtor] has been a hazardous waste
2 treatment service provider for over 30 years;” (ii) “[the Debtor] maintain[s] a “Standardized Permit”
3 issued by the California Department of Toxic Substance Control (DTSC);” (iii) “[the Debtor]
4 provides environmentally secure management of specific hazardous wastes including the following,
5 Solder dross, Solder paste and wipes, Photographic wastewater, Precious metal bearing wastes and
6 scrap materials, Silver oxide batteries”; (iv) “[the Debtor] is registered as a Hazardous Waste
7 Transporter and able to provide secure, cost-effective, and convenience one-stop service to our
8 customers”; and (v) “[the Debtor] also offers proprietary silver (metal) recovery columns for on-site
9 collection of silver (and other metal constituents) at the generator’s facility”. *See* www.ecsrefining,
10 click Industries, then click Environmental, then click Hazardous Waste.

11 7. On June 27, 2018, the Chapter 11 Trustee filed his Fifth Emergency Motion For An
12 Interim Order (1) Authorizing the Use of Cash Collateral Pursuant to 11 U.S.C. § 363; (2) Scheduling
13 a Final Hearing; and (3) Granting Related Relief (the “Cash Collateral Motion”). Through the Cash
14 Collateral Motion, the Chapter 11 Trustee seeks authority to use cash collateral through July 11,
15 2018, in order to either continue operations to permit a sale of the Debtor's business as a going
16 concern or to wind down the business and close the various locations where the Chapter 11 Trustee
17 conducts business, including the Leased Premises.

18 8. The Cash Collateral Motion states that the Chapter 11 Trustee seeks “formal authority
19 to pay necessary expenses to avoid immediate and irreparable harm”. Cash Collateral Motion, ¶19.
20 Further, the Chapter 11 Trustee states that he “must expend such funds to pay employees, taxes,
21 insurance, and out of pocket administrative expenses necessary to maintain the going concern value
22 of the Debtor’s business.” *Id.*

23 9. The Chapter 11 Trustee, however, has not been paying, and does not appear to
24 contemplate paying, the administrative expenses arising under the Lease³. Neither of the two
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26 ³ It is significant that in the last cash collateral order, Docket No. 225, the budget attached to the cash
27 collateral order entered by the Court provided for \$30,000 as a partial rent payment to the landlord at
28 the Santa Clara location. This is clearly an admission by the Chapter 11 Trustee that a necessary cost
for operating in Chapter 11 is paying the rents at the facilities used by the Chapter 11 Trustee in his
operations.

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1 alternate budgets attached to the Cash Collateral Motion provide for: (i) payment of rent due to the
2 Landlord since the Petition Date, which amount is approximately \$30,000 (consisting of May 2018,
3 June 2018, and July 2018 in base rent, taxes, insurance, and common area maintenance charges) and
4 (ii) the costs necessary for the Chapter 11 Trustee to remove and dispose of the hazardous waste and
5 other materials stored on the Leased Premises.

6 10. The property manager for Prologis took photographs of the Leased Premises in the
7 past week, evidencing the mountains of hazardous waste and other electronic equipment stored on the
8 Leased Premises. True and correct copies of such photographs are at Nelson Decl., Exhibit "B" and
9 are incorporated herein for all purposes.

10 11. By this Objection, the Landlord objects to the Cash Collateral Motion to the extent
11 that the budgets do not provide for the Chapter 11 Trustee to make such payments as set forth in
12 paragraph 9 above⁴. Further, in order to adequately protect Landlord's interest in the Leased
13 Premises, any order approving the continued use of cash collateral should (i) provide that the Chapter
14 11 Trustee shall immediately cease and desist from accepting more materials on the Leased Premises
15 and remove and properly dispose of all materials stored on the Leased Premises and (ii) provide for
16 the use of cash collateral to accomplish the foregoing. Alternatively, the Landlord's interest could be
17 adequately protected by providing a carve out from the secured creditors' collateral for all obligations
18 to the Landlord arising under the Lease, including the unpaid rent owed and accruing under the Lease
19 during the term of the Chapter 11 Trustee's occupation of same and the cost to remove and properly
20 dispose of all materials stored on the Leased Premises⁵.

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22 ⁴ Section 365(d)(3) of the Bankruptcy Code provides that "[t]he trustee shall timely perform all
23 obligations of the Debtor ... arising from and after the order for relief under any expired lease of
24 nonresidential real property, until such lease is assumed or rejected[.] See 11 § 365(d)(3). Section
25 365(d)(3) was enacted to prevent a landlord from being reduced to an involuntary postpetition
26 creditor of a debtor's estate. See *Calet Hirsch & Ferrell, Inc. v. Microvideo Learning Sys. (In re
27 Microvideo Learning Sys.)*, 254 B.R. 90, 92 (S.D.N.Y. 1999). Indeed, to avoid such a result, section
28 365(d)(3)'s clear and express intent is to require a debtor to timely fulfill all postpetition lease
obligations until a lease is assumed or rejected. See *CenterPoint Properties v. Montgomery Ward
Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205, 209 (3d Cir. 2001).

⁵ Note that the Chapter 11 Trustee and his professionals have obtained a carve-out for their
administrative claims – which are of the same priority status as the administrative claims of the
Landlord – and yet the Landlord's Leased Premises continue to be used by the Chapter 11 Trustee in

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12. The Court should recall that, in the Fourth Cash Collateral Motion, the Chapter 11 Trustee warned that it is at risk of being administratively insolvent. Further, the Chapter 11 Trustee also informed the Court that, if he had to shut down the Debtor's business, he would be faced with the cost of environmental remediation, which was estimated at \$1 million. See Exhibits to Emergency Motion for an Interim Order (1) Authorizing the Use of Cash Collateral Pursuant to 11 U.S.C. § 363; (2) Authorizing Post-Petition Financing; (3) Scheduling a Final Hearing; and (4) Granting Related Relief, filed by the Chapter 11 Trustee on June 15, 2018 [Docket No. 209] (in both the "Soft Landing Liquidation Analysis" and the "Hard Landing Liquidation Analysis" the Chapter 11 Trustee has made provision for a \$1 million Environmental Clean Up).

13. Absent the adequate protection requested above, the Landlord respectfully requests that this Court enter an order denying the relief sought by the Chapter 11 Trustee in the Cash Collateral Motion.

RELIEF REQUESTED

14. Prologis asks the Court to enter an order compelling the Chapter 11 Trustee to pay the unpaid rent for May 2018, June 2018, and July 2018 under the Lease, and to timely pay the monthly rent thereafter until the Chapter 11 Trustee (i) rejects the Lease and surrenders the Leased Premises to Prologis in accordance with the terms and conditions of the Lease, or (ii) alternatively, obtains the entry of an order providing for the assumption and assignment of the Lease in accordance with Section 365 of the Bankruptcy Code.

15. Further, Prologis asks the Court to enter an order (i) compelling the Chapter 11 Trustee to immediately cease and desist from accepting more materials on the Leased Premises and immediately remove and properly dispose of all materials stored on the Leased Premises in compliance with applicable law and (ii) providing for the use of cash collateral to accomplish the foregoing.

the operation of his business without providing for his funding of the rental obligations under the Lease and the costs of removal and disposal of all materials on the Leased Premises.

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WHEREFORE, Prologis asks the Court to deny the Cash Collateral Motion or condition any use of cash collateral on the relief requested above, and for such other and further relief to which it may be entitled.

Respectfully submitted,

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Dated: June 28, 2018

By: /s/ Michael B. Lubic
Michael B. Lubic

Attorneys for Prologis, L.P.