

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

In re:

Oreck Corp., *et al.*,

Debtors.

Chapter 11

Case No. 13-04006 (KML)

(Jointly Administered)

**OBJECTION OF DDR CORP., DDRTC FAYETTE PAVILION I AND II, LLC, AND
BRE DDR RIVERDALE VILLAGE INNER RING, LLC TO DEBTORS' MOTION
TO APPROVE (I) THE SALE TRANSACTION TO ORECK ACQUISITION
HOLDINGS, LLC AND (II) THE ASSUMPTION AND ASSIGNMENT OF
CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

DDR Corp., DDRTC Fayette Pavilion I and II, LLC, and BRE DDR Riverdale Village Inner Ring, LLC (the "Landlords"), by and through their counsel, Kelley Drye & Warren LLP, object to the *Motion By Debtors Pursuant to 11 U.S.C. §§ 363(b), (f), (k), and (m), and 365 and Fed. R. Bankr. P. 2002, 6004, and 6006, To (I) Approve (A) The Sale Transaction Pursuant To The Asset Purchase Agreement With Oreck Acquisition Holdings, LLC, Free And Clear Of Claims, Liens, Encumbrances, And Other Interests; (B) The Assumption And Assignment of Certain Executory Contracts And Unexpired Leases; And (II) (A) Establish Sale and Bidding Procedures; And (B) Schedule A Sale Approval Hearing*¹ (the "Motion") filed by the above-captioned debtors (the "Debtors"). In support of this objection, the Landlords respectfully state as follows:

BACKGROUND

1. On May 6, 2013, the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") with this Court.

¹ Docket Entry No. 93.

2. To date, the Debtors have continued to manage their businesses as debtors and debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

3. The Debtors lease retail space from the Landlords pursuant to written leases (the “Leases”) at Fayette Pavilion in Fayette, Georgia and Riverdale Village in Coon Rapids, Minnesota (the “Leased Premises”). The Leased Premises are located in shopping centers as that term is used in section 365(b)(3) of the Bankruptcy Code. *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081 (3d Cir. 1990).

4. On May 16, 2013, the Debtors filed the Motion, which sought, among other things, to sell substantially all of the Debtors’ assets and assume and assign the Leases to Oreck Acquisition Holdings, LLC (the “Stalking Horse Bidder”) or the bidder with the highest and best bid at an auction. On June 20, 2013, the Court entered a supplemental order² approving the sale procedures and establishing the proposed cure amounts for the Leases as \$0.00 (the “Debtor-Proposed Cure Amounts”).

CURE OBJECTION

5. The Landlords dispute the Debtor-Proposed Cure Amounts. The correct amounts outstanding under the Leases are as follows (the “Landlord-Proposed Cure Amounts”):

Store No.	Mall Name	Location	Landlord	Landlord-Proposed Cure Amounts
57	Fayette Pavilion	Fayetteville, GA	DDRTC Fayette Pavilion I and II, LLC	\$14,223.82
181	Riverdale Village	Coon Rapids, MN	BRE DDR Riverdale Village Inner Ring, LLC	\$21,184.60

The Landlord-Proposed Cure Amounts include estimates of attorney’s fees incurred to date.

6. Prior to assumption and assignment, the Debtors are required to cure all outstanding defaults under the Leases pursuant to section 365(b)(1) of the Bankruptcy Code.

Pursuant to the Leases, the Debtors are obligated to pay regular installments of fixed monthly rent, as well as a pro rata share of common area maintenance costs, real estate taxes, and insurance. Moreover, prior to assumption and assignment, the Debtors must also compensate the Landlords for any actual pecuniary losses under the Leases. *See* 11 U.S.C. §365(b)(1)(B). As part of their pecuniary losses, the Landlords are entitled to attorneys' fees in connection with the Debtors' defaults under the Leases. *See LJC Corp. v. Boyle*, 768 F.2d 1489, 1494-96 (D.C. Cir. 1985); *In re Bullock*, 17 B.R. 438, 439 (B.A.P. 9th Cir. 1982); *In re BAB Enterprises, Inc.*, 100 B.R. 982, 984 (Bankr. W.D. Tenn. 1989); *In re Westview 74th St. Drug Corp.*, 59 B.R. 747, 757 (Bankr. S.D.N.Y. 1986); *In re Ribs of Greenwich Vill., Inc.*, 57 B.R. 319, 322 (Bankr. S.D.N.Y. 1986).

7. To the extent that rent, attorney's fees, interest, or other charges continue to accrue, and/or the Landlords suffer other pecuniary losses with respect to the Leases, the Landlords hereby reserve their rights to amend the Landlord-Proposed Cure Amounts to reflect such additional amounts or to account for year-end adjustments, including, without limitation, adjustments for 2011, 2012, and 2013 (the "Adjustment Amounts"), which have not yet been billed or have not yet become due under the terms of the Leases. As such, the Debtors or their assignee(s) must be responsible to satisfy the Adjustment Amounts, if any, when due in accordance with the terms of the Leases, regardless of when such Adjustment Amounts are or were incurred.

8. The Landlords request that the Debtors or their assignee(s) continue to comply with all contractual obligations, including the obligation to indemnify and hold the Landlords harmless. This indemnification obligation should include any events which occurred

² Docket Entry No. 361.

before the assumption and assignment but were not known to either the Landlords or the Debtors as of the date of the assumption and assignment. The indemnification obligation includes, but is not limited to, any (i) claims for personal injury that occurred at the Leased Premises, (ii) damage or destruction to the Leased Premises or property caused by the Debtors or their agents, and (iii) environmental damage or clean-up.

ADEQUATE ASSURANCE OBJECTION

9. In connection with the assumption and assignment of leases, shopping center landlords are afforded special statutory protections under the Bankruptcy Code in the form of adequate assurance of future performance. *In re Joshua Slocum*, 922 F.2d 1086; *In re Trak Auto Corp.*, 277 B.R. 655 (Bankr. E.D. Va. 2002). Section 365(b)(1) of the Bankruptcy Code provides:

If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of the assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default...;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

10. In connection with a shopping center lease, adequate assurance of future performance includes adequate assurance

(A) of the source of rent... due under such lease, and in the case of an assignment, that the financial condition and operating

performance of the proposed assignee... shall be similar to the financial condition and operating performance of the debtor...;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as radius, location, use, or exclusivity, ... and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

11 U.S.C. § 365(b)(3).

11. The Debtors bear the burden of proving adequate assurance of future performance in connection with the assumption and assignment of the Leases. *In re F.W. Restaurant Assoc., Inc.*, 190 B.R. 143 (Bankr. D. Conn. 1995); *In re Rachels Indus. Inc.*, 109 B.R. 797, 802 (Bankr. W.D. Tenn. 1990); *In re Lafayette Radio Electronics Corp.*, 12 B.R. 302, 312 (Bankr. E.D.N.Y. 1981).

12. The Landlords have received some information from the Stalking Horse Bidder that they are still reviewing to determine whether or not it is adequate. The Landlords have not yet received any information evidencing any other bidder's adequate assurance of future performance. Therefore, the Landlords are unable at this point to assess whether or not their rights are being satisfied and reserve their rights to object to any adequate assurance information provided by either the Debtors, the Stalking Horse Bidder, or any other bidder.

13. In addition, whether or not the Debtors or their assignee(s) will satisfy the Adjustment Amounts is a question of adequate assurance. If the Debtors cannot provide adequate assurance that they or their assignee(s) will satisfy the Adjustments Amounts when they come due, then the Debtors have not provided the adequate assurance of future performance to which the Landlords are entitled under section 365(b)(1) of the Bankruptcy Code.

DEMAND FOR SECURITY

14. Section 365(l) of the Bankruptcy provides, in the pertinent part:

If an unexpired lease under which the debtor is lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

11 U.S.C. § 365(l).

15. In the ordinary course of their business, the Landlords requires security deposits or guaranties when leasing (or assessing an assignment of a lease) to certain companies based on their financial information and history. In connection with the proposed assumption and assignment of the Leases, the Landlords hereby make a demand for such security in one of those forms as required by section 365(l) of the Bankruptcy Code.

RESERVATION OF RIGHTS

16. The Landlords reserve their rights to amend and/or supplement this objection, including, without limitation, adding any obligations that accrue, arise, or are related to the pre-assumption and assignment period that subsequently become known to the Landlords.

17. The Landlords also reserve their rights to object to the assumption and assignment of the Leases on any basis, including, without limitation, that the Debtors have failed to provide adequate assurance of future performance by the Debtors or their proposed assignee(s).

WHEREFORE, the Landlords request that the Court enter an order (i) requiring the Debtors or their assignee(s) to pay the Landlord-Proposed Cure Amounts; (ii) reserving the Landlords' right to assert additional cure amounts, including attorney's fees, due under the Leases at the time of assumption and assignment; (iii) requiring the Debtors or their assignee(s) to continue to comply with the obligations under the Leases to pay the Adjustment Amounts and any indemnification obligations in the regular course of business; and (iv) granting such other and further relief as the Court deems just and proper.

Dated: July 2, 2013

Respectfully submitted,

Frost Brown Todd LLC

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via ECF Noticing to all parties receiving ECF Notice in these chapter 11 cases and to the parties listed below via first class, U.S. mail, postage prepaid on this 2nd day of July, 2013:

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