

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

In re: : **Chapter 11**
: :
ORECK CORPORATION, et al. : **Case No. 13-4006**
: **(Jointly Administered)**
: :
Debtors. : **Judge Lundin**

OBJECTION OF BRIXMOR PROPERTY GROUP, INC. AND NOVI TOWN CENTER INVESTORS, LLC TO DEBTORS' MOTION 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

BRIXMOR PROPERTY GROUP, INC. ("Brixmor") and NOVI TOWN CENTER INVESTORS, LLC ("Novi", and together with Brixmor, "Objecting Landlords"), by and through their undersigned attorneys, submit this Objection (the "Objection") to Debtors' Motion 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 (the "Motion"), and in support thereof state as follows:

1. Objecting Landlords are the owners or agents for the owners of certain shopping centers in which Debtors operate retail stores pursuant to written leases (the “Leases” and each a “Lease”) which are affected by the relief sought by the Motion.

2. All of Objecting Landlords’ premises are 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). The premises affected by the Motion are:

SHOPPING CENTER	CITY/STATE	STORE #	LANDLORD
Hampton Village	Rochester Hills, MI	44	Brixmor
Northern Hills	Manchester, CT	196	Brixmor
Southport	Apple Valley MN	170	Brixmor
Novi Town Center	Novi, MI	43	Novi

Background

3. Debtors filed their Voluntary Petitions under Chapter 11 of the Bankruptcy Code on July 6, 2013 (the “Petition Date”). Since the Petition Date, Debtors have operated their business and managed their properties as debtor-in-possession. By the Motion, Debtors seek *inter alia*, approval of the sale of all or substantially all of their assets and the assignment of some or all of their non-residential real property leases to the successful bidder (the “Assignee” or “Purchaser”) obtained pursuant to bidding procedures (the "Bidding Procedures") approved by the Court on June 20, 2013, (Docket # 361).

4. On June 20, 2013, Debtors filed their initial list of leases and contracts and that may be assumed and assigned together with the cure amounts due with regard thereto (the “Cure Notice”). (See Docket #370)

5. Pursuant to the Bidding Procedures, an Auction was conducted on July 8, 2013. On July 9, 2013, Debtors filed a Notice of Completion of Auction naming Royal

Appliance Manufacturing Company as the successful bidder (“Royal” and/or the “Successful Bidder”). The original Stalking Horse bidder (Oreck Acquisition Holdings LLC) was named as the "Back-up Bidder".

6. As of July 12, 2013 the executed Asset Purchase Agreement between Debtors and Royal had not been filed of record or provided to Objection Landlords.

Best Interests of Debtors' Estates – Highest and Best Bid

7. The Amended APA (Docket #369) filed by Debtors with regard to the Stalking Horse bidder contained a purchase price floor of Thirteen Million (\$13,000,000.00) Dollars but also contained the assumption of certain liabilities as well as the likelihood of the continued operation of many, if not most, of Debtors' retail stores. Since no APA with Royal has been produced it is impossible to determine the value of that bid and, accordingly, whether the designation of Royal as the Successful Bidder is, indeed, in the best interests of Debtors' estates. Accordingly, strict proof is demanded at the sale hearing to show that the Royal bid is the highest and best offer for the assets being sold and is in the best interests of the Debtors' estates.

General Objections to Sale of Leases

8. Objecting Landlords object to any proposed sale and assumption and assignment of their Leases to any Assignee unless the Debtors and/or the Assignee comply with all of the requirements of Sections 365(b) and (f) of the Bankruptcy Code. Absent the ability, or willingness, of the Debtors and Royal or the Back-Up Bidder to satisfy said requirements any proposed assumption and assignment must be denied.

9. Pursuant to Section 365(f)(2)(B) of the Bankruptcy Code Debtors may only assign the Leases if “adequate assurance of future performance by the assignee of such . . .

lease is provided,. . . .” As set forth in Section 365(b)(3), adequate assurance of future performance in the shopping center context includes, *inter alia*, adequate assurance:

“(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

* * *

(C) that assumption and assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as radius, location, use or exclusivity provision, and will not breach any such provision contained in any other lease, . . . relating to the shopping center;....”

10. The burden of proof on adequate assurance issues is with the Debtors. *See In re Lafayette Radio Electronics Corp.* 12 B.R. 302, 312 (Bankr. E.D.N.Y. 1991).

11. Pursuant to the BAPCPA amendments to the Bankruptcy Code, which took effect for cases filed on and after October 17, 2005, such as the instant matter, the “anti-assignment provisions” of Section 365(f)(1) may no longer be used to override the specific protections afforded to landlords by Section 365(b).

Use and Tenant Mix and Balance

12. Assuming that Royal and/or the Back-Up Bidder intends to continue to operate the Leases strictly in accordance with the use clauses set forth therein, Objecting Landlords have no objection to the proposed assumption and assignment based upon use or tenant mix and balance. Objecting Landlords reserve all rights to object to any change in the use of the premises as well as the effect that change may have on Tenant Mix and Balance at their shopping centers.

Adequate Assurance and Financial Condition of Proposed Assignee

13. Objecting Landlords have received certain financial information as alleged proof of adequate assurance of future performance of Royal. However, none of that information relates directly to Royal, but, rather, to what appears to be Royal's parent. No information whatsoever has been provided regarding Royals ability to operate a chain of retail stores as an adjunct to its manufacturing business. Further, since the Back-Up Bidder is a "Newco" its previously submitted projections are based on assumptions which have not been shared with Objecting Landlords. Objecting Landlords demand strict proof of the Assignee's ability to provide adequate assurance of future performance.

Security Deposit for Assignee

14. Pursuant to § 365(l) of the Bankruptcy Code, Objecting Landlords demand that the Assignee post a letter of credit or, in Objecting Landlords' sole discretion, a security deposit, equal to three (3) months rent and additional rental charges under each assumed and assigned Lease.

Cure Amounts

15. Objecting Landlords filed their "Cure Objection" on July 1, 2013 (see Docket #415) and incorporate all of the averments of that Cure Objection in this Objection as fully as though same were set forth hereat.

Additional Obligations

16. In addition to the monetary obligations that Debtors must satisfy under Section 365 of the Bankruptcy Code, Objecting Landlords' Leases also provide that Debtors must indemnify and hold Objecting Landlords harmless with regard to existing claims as well as with regard to events which may have occurred pre-assumption but which have not been made

known to Objecting Landlords or Debtors until some time post-assignment. Accordingly, either the Assignee must assume this obligation or Debtors must be required to evidence, or obtain adequate insurance in order to guaranty, (by way of purchase of a “tail” or otherwise) that their indemnity responsibilities will be met. Claims for indemnity may include, but are not limited to, claims for personal injuries which occur at the leaseholds, where an Objecting Landlord is joined as a party defendant, damage and destruction to the property by Debtors or their agents, claims for environmental damage or environmental clean up, *etc.*

Liabilities for Year-End Adjustments

17. As set forth in the Cure Objection, the lessee under each of Objecting Landlords’ Leases is responsible for year-end adjustments to items such as CAM, insurance, taxes and other items that are paid during the course of the year on an estimated basis. Since Section 365(b) only requires that debtors cure defaults under their leases, and since there can be no default for failure to pay an amount that has not as yet been billed, unpaid year-end adjustments, and those adjustments that may currently be accruing, are not a part of the cure obligation of the Debtors. The obligation to pay the year-end adjustments is, however, certainly a part of the obligation to provide adequate assurance of future performance.

18. Objecting Landlords, therefore, request that language be inserted into any Sale Order to provide that the Assignee shall be responsible for all unpaid year-end 2012 and 2013 adjustments, whether accruing prior to or after the effective date of assignment of the Lease, when such charges become due in accordance with the terms of the Leases. Absent such a provision, Debtor must be required to maintain a separate escrow account for Objecting Landlords only which shall be comprised of an amount equal to 200% of the average yearly

adjustments for each Lease over the prior three (3) years, in order to assure that funds will be available to pay year-end adjustments when they come due.

Assumption and Amendment Agreement

19. Objecting Landlords request that, as a condition to any order approving assumption and assignment of Objecting Landlords' Leases, the Assignee be required to enter into a short form Assumption and Amendment Agreement whereby the Assignee shall become directly obligated to Objecting Landlords and the provisions of Objecting Landlords' Leases regarding notice addresses will be modified. (See form attached as Exhibit "A").

Designation of Leases and Transition Agreement

20. As state above, as of the time of filing of this Objection, Objecting Landlords have not been provided with a copy of the final executed APA or a proposed Sale Order. Upon information and belief, Objecting Landlords assume that the Assignee will be seeking and/or granted "designation rights" for the Leases, and the leases of other similarly situated landlords, which will, at a minimum, give the Assignee some period of time to determine which, if any, leases the Assignee desires the Debtors to assume and assign to it as well as the right to operate the stores located at the leasehold premises.

21. Objecting Landlords have no contractual relationship with the Assignee and there is no privity of contract under Objecting Landlords' Leases with the Assignee. Nevertheless, Debtors may propose to give the Assignee authority to operate the stores in the leasehold premises, to reap the benefit of any and all profits from the designated store locations and to be responsible for all expenses related thereto. Further, no operating agreement, or transition services agreement, between Debtors and the Assignee has been produced. There is absolutely no authority to allow Debtors to bring in a third party operator to run Debtors'

leasehold premises under Objecting Landlords' Leases. The Assignee is no different than any other unrelated party whom Debtors might seek to bring in to operate stores and be responsible for the costs and expenses related thereto. The only difference in this case is that the Assignee is purchasing certain of Debtors' other assets. That, alone, does not give Debtors the right to turn over the locations to a non-related third party without the landlord's consent.

22. In the event that this Court does permit the Assignee to operate Objecting Landlords' locations under the Leases, then Objecting Landlords request that the Court further order, and the Assignee acknowledge, that it shall be obligated to make all rental payments directly to Objecting Landlordse in accordance with the terms of the Leases, that it shall acknowledge that it is responsible for all of the obligations of the Tenant under the Leases and shall be obligated to Objecting Landlords with regard thereto and, except as provided herein, the Assignee shall acquire no interest whatsoever in any of the Leases without a further order of this Court approving assumption and assignment of the leases to the Assignee.

Sale Order

23. Objecting Landlords reserve the right to object to the terms of any Sale Order once a final Sale Order is proposed by Debtors and the Assignee.

Reservation of Rights

24. Objecting Landlords reserve the right to make such other and further objections as may be appropriate.

Joinder in Other Landlord Objections

25. Objecting Landlords hereby join in the objections filed by Debtors' other landlords to the extent that such objections are not inconsistent with the provisions hereof.

WHEREFORE, Objecting Landlords pray for relief consistent with the foregoing objections; and for such other and further relief as may be just and proper under all of the circumstances

July 12, 2013

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed by ECF noticing to all parties receiving ECF notice and via First Class U.S. Mail, postage prepaid, to the following parties:

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This 12th day of July, 2013.

/s/ David L. Pollack
David L. Pollack