

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

In re

**ORECK CORPORATION,**

**Debtors.**

**Chapter 11  
Case No. 13-04006  
Judge Lundin**

**Related to Motion 93  
Hearing Date: July 16, 2013  
Hearing Time: 9:00 a.m. (CT)  
Objection. Due: July 15, 2013**

**LIMITED OBJECTION OF THE MACERICH COMPANY, PASSCO COMPANIES, LLC, UCR ASSET SERVICES, AND DEUTSCHE ASSET & WEALTH MANAGEMENT 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**

The Macerich Company, Passco Companies LLC, UCR Asset Services, and Deutsche Asset & Wealth Management (the “Landlords”) hereby object (the “Objection”) 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 (the “Sale Motion”),<sup>1</sup> and respectfully represent as follows:

**I. BACKGROUND FACTS**

1. Oreck Corporation and its affiliated co-debtor entities (the “Debtors”) filed their voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code on or about

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<sup>1</sup> Terms not otherwise defined herein shall have the meanings ascribed to them in the Sale Motion, and other accompanying documents.

May 6, 2013. The Debtors continue to operate their business and manage their properties as debtors-in-possession pursuant to 11 U.S.C. §§ 1107(a) and 1108.<sup>2</sup>

2. The Debtors lease retail space (the “Premises”) from the Landlords where they operate as a tenant pursuant to leases of nonresidential real property (the “Leases”) at the shopping center locations (the “Centers”) set forth in attached Schedule A that are the subject of this Sale Motion.

3. The Leases are each a “lease of real property in a shopping center” as that term is used in Section 365(b)(3). *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081, 1086-1087 (3d Cir. 1990).

4. On May 16, 2013, the Debtors filed the Sale Motion. Thereafter, on June 20, 2013, the Court entered an order approving bidding and sale procedures (the “Bidding Procedures Order”). Pursuant to the Bidding Procedures Order, on July 8, 2013, the Debtors and their professionals held an auction for the sale of Debtors’ assets. On July 9, 2013, the Debtors filed the Notice of Completion of Auction, stating that Royal Appliance Manufacturing Company was declared the winning bidder (the “Successful Bidder”), and that Oreck Acquisition Holdings LLC was declared the back-up bidder (the “Back-Up Bidder”).

5. To date, the Landlords have not seen the asset purchase agreement (the “APA”) for the winning bid, a proposed sale order, nor any further information on the Successful Bidder. Landlords have been advised that the Debtors will not move forward with the assumption and assignment of Leases at the Sale Hearing, but numerous items remain of concern to Landlords.

6. The Landlords object to any assumption and assignment of the Leases to any party at the Sale Hearing, and reserve the right to raise any applicable objection with respect to matters that may impact the Leases at the Sale Hearing.

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<sup>2</sup> Unless otherwise specified, all statutory references to “Section” are to 11 U.S.C. §§ 101 et seq. (the “Bankruptcy Code”).

## **II. ARGUMENT**

### **A. The Debtors have not provided adequate assurance of future performance information.**

7. The Debtors may not assume and assign the Leases unless there is adequate assurance of future performance under the Leases. 11 U.S.C. § 365(b)(1)(C); *see also* 11 U.S.C. § 365(f)(2). The provision of adequate assurance of future performance is an affirmative duty of the Debtors, and the Debtors bear the ultimate burden of persuasion as to issues under Section 365. *See In re Rachels Industries, Inc.*, 109 B.R. 797, 802 (Bankr. W.D. Tenn. 1990); *see also Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985). This includes issue of adequate assurance. *See In re Lafayette Radio Electronics Corp.*, 12 B.R. 302, 312 (Bankr. E.D.N.Y. 1981). Because no such information has been submitted on behalf of the Successful Bidder, as set forth more fully below, the Court should deny the request to assume and assign the Leases.

8. To satisfy the adequate assurance of future performance burden, the Debtors and the Successful Bidder must, at a minimum, provide the following information:

- (i) the specific name of the proposed bidder, the proposed tenant that will act as the assignee, and the proposed name under which the assignee intends to operate the store;
- (ii) the potential assignee's intended use for the space;
- (iii) audited financial statements and annual reports for the past three (3) years, including all supplements or amendments thereto;
- (iv) cash flow projections for the proposed assignee, the proposed assignee's most recent business plan, all cash flow projection for the Leases subject to the assignment request, and any financial projections, calculations and/or pro-formas prepared in contemplation of purchasing the Leases;
- (v) all documents and other evidence of the potential assignee's retail experience and experience operating in-line stores in a shopping center; and
- (vi) a contact person for the proposed assignee that Landlords may directly contact in connection with the adequate assurance of future performance.

9. Neither the Debtors nor the Successful Bidder have provided the adequate assurance of future performance information required by Section 365(b)(1), much less the heightened standards that Congress established for the assumption and assignment of shopping center leases contained in Section 365(b)(3)(A) – (D). Assuming the Debtors do not seek to

assume and assign any Leases at the Sale Hearing, this is not an issue. However, to the extent there is any attempt to assume and assign Leases, the Landlords object to the assumption and assignment of the Leases to the Successful Bidder, or any other party, at the Sale Hearing.

**B. The Debtors must provide heightened adequate assurance under Section 365(b)(3).**

10. The Leases are shopping center leases, and Section 365(b)(3) requires the Debtors to satisfy heightened adequate assurance of future performance to assume and assign leases, in addition to the basic requirements of Section 365(b)(1)(C). In re Sun TV and Appliances, Inc., 234 B.R. 356, 359 (Bankr. D. Del. 1999). These heightened requirements include:

- the source of rent and that the financial condition and operating performance of the proposed assignee and its guarantors, if any, must be similar to the financial condition and operating performance of the debtor and its guarantor(s), if any, as of the time the debtor became the lessee. *See* 11 U.S.C. § 365(b)(3)(A);
- that any percentage rent due under the lease will not decline substantially. *See* 11 U.S.C. § 365(b)(3)(B);
- that assumption and assignment of the lease is subject to all provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach of any such provision in any other lease, financing agreement, or master agreement relating to such shopping center. *See* 11 U.S.C. § 365(b)(3)(C); and
- that assumption and assignment of the lease will not disrupt the tenant mix or balance in the shopping center. *See* 11 U.S.C. § 365(b)(3)(D).

11. Courts require a specific factual showing through competent evidence to determine whether an adequate assurance of future performance has been provided. *See e.g.*, Matter of Haute Cuisine, Inc., 58 B.R. 390 (Bankr. M.D. Fla. 1986) (even though experts presented cash flow projections, the court found that insufficient documentary evidence had been presented); *see also* In re Bygraph, Inc., 56 B.R. 596 (Bankr. S.D.N.Y. 1986). Adequate assurance of future performance determination must be satisfied in connection with an assumption and assignment under Section 365(f)(2)(B). Sun TV and Appliances, Inc., 234 B.R. at 370. The Debtors has provided no evidence to satisfy this heightened standard.

*i. Financial Condition and Operational History*

12. In determining whether a moving party provides adequate assurance of future performance under Section 365(b), courts look to sufficient economic backing, economic conditions, certificates, credit reports, escrow deposits or other similar forms of security or

guarantee. In re Belize Airways, 5 B.R. 152 (Bankr. S.D. Fla. 1980); In re Lafayette Radio Electronics Corp., 9 B.R. 993 (Bankr. E.D.N.Y. 1981). Courts also look to the operating experience of the proposed assignee. In re Bygaph, Inc., 56 B.R. 596 (Bankr. S.D.N.Y. 1986). The Landlords have received no such information with respect to the Successful Bidder. The only evidence of financial condition that the Debtors have provided is the 2012 Annual Report Successful Bidder's parent company. This report is irrelevant to the ability of the Successful Bidder to provide adequate assurance of future performance. Finally, the Debtors provide no evidence to demonstrate its own financial condition when the Leases were executed. As such, there is no "benchmark" against which the Successful Bidder's financial condition can be measured, even if it were provided to Landlords.

ii. Percentage Rent

13. The Debtors provide no information or evidence on this issue.

iii. Use Provisions

14. Sections 365(b)(3) and (f)(2) "evidence Congress' belief that use and tenant mix in shopping center lease are material." In re Sun TV and Appliances, Inc., 234 B.R. at 370. The Court went on to find that use provisions "are at the heart of the interdependence of shopping center leases, as recognized by Congress in requiring an assignee to demonstrate an ability to adhere to them. They are crucial to the tenant mix, which is designed to attract the right number and mix of customers to the mall." In re Sun TV and Appliances, Inc., 234 B.R. at 370-371. The Court ultimately concluded that "section 365(b)(3) does not permit [use provisions] to be stricken, even where (as the Debtor asserts) they prevent the Debtor from selling the [l]ease." In re Sun TV and Appliances, Inc., 234 B.R. at 371.

15. The 2005, Congress left no doubt that Sun TV (and other similar cases) were correct. Through the BAPCPA<sup>3</sup> amendments, "Section 365(f)(1) is amended to make sure that all

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<sup>3</sup> On October 17, 2005, the Bankruptcy Abuse Prevention And Consumer Protection Act of 2005 (the "BAPCPA") went into effect, clarifying, *inter alia*, the protections that Landlords are entitled to under 11 U.S.C. § 365.

of the provisions of Section 365(b) are adhered to and that 365(f) of the code does not override Section 365(b).” Floor Statement of Senator Orrin Hatch, 151 Cong. Rec. S. 2459, 2461-62 (daily ed. March 10, 2005). In explaining the change to Section 365(f)(1), Senator Hatch stated:

The bill helps clarify that an owner should be able to retain control over the mix of retail uses in a shopping center. When an owner enters into a use clause with a retail tenant forbidding assignments of the lease for a use different than that specified in the lease, that clause should be honored. Congress has so intended already, but bankruptcy judges have sometimes ignored the law.

151 Cong. Rec. S. 2459, 2461 (daily ed. March 10, 2005).

16. The changes embodied in the BAPCPA specifically preserve a landlords’ right to enforce use and other lease provisions. Again, Senator Hatch’s remarks in the Congressional Record clarify the intent behind Section 365(b) and 365(f):

A shopping center operator. . . must be given broad leeway to determine the mix of retail tenants it leases to. Congress decided that use or similar restrictions in a retail lease, which the retailer cannot evade under nonbankruptcy law, should not be evaded in bankruptcy. It is my understanding that some bankruptcy judges have not followed this mandate. Under another provisions of the Code, Section 365(f), a number of bankruptcy judges have misconstrued the Code and allowed the assignment of a lease even though terms of the lease are not being followed.

151 Cong. Rec. S. 2459, 2461-62 (daily ed. March 10, 2005).

17. The intent to strictly enforce the use and other provisions in the Leases is echoed by comments from the House of Representatives:

Section 404(b) amends § 365(f)(1) to assure that § 365(f) does not override any part of § 365(b). Thus, § 404(b) makes a trustee’s [debtor-in-possession’s] authority to assign an executory contract or unexpired lease subject not only to § 365(c), but also to § 365(b), which is given full effect. Therefore, for example, assumption or assignment of a lease of real property in a shopping center must be subject to the provisions of the lease, such as use clauses. (Emphasis added)

H.R. Rep. No. 109-31, pt. 1, at 87, reprinted in 2005 U.S. Code Cong. & Admin. News 153.

18. The BAPCPA clarified Section 365 to reflect the Congressional intent that Section 365(f)(1) not be used by debtors to avoid lease provisions. The language of Section 365(f), and any such ability to assume and assign the Leases, is subject to the protections provided by Section 365(b)(1) and (3). Section 365(f) does not modify Section 365(b).

Therefore, any assignment must remain subject to all provisions of the Leases, including those provisions concerning use, radius, exclusivity, tenant mix and balance, etc.

19. The Debtors provide no information on what the Successful Bidder's intent is with respect to the Leases. Any assignee must comply with the Leases, as well as any exclusives in favor of other tenants in the Centers in the operation of the Premises. If the Successful Bidder intends to engage in any business that deviates from the permitted use or restrictions imposed by exclusive provisions of other leases in the Centers, the Court must deny the assumption and assignment of the Leases.

iv. Tenant Mix or Balance

20. The revisions to Section 365 make it clear that the Debtors cannot use Section 365(f) to render lease provisions unenforceable. While such provisions may indirectly limit the assignment of the Leases, Section 365(b) specifically protects these provisions. Provisions governing use, radius and permitted conduct upon the Premises are not anti-assignment provisions, and are not rendered unenforceable by Section 365(f). These are negotiated provisions that legitimately preserve the Landlords' control over shopping center environments. Section 365(b)(3) no longer permits even insubstantial breaches of provisions such as use, radius, location or exclusivity. These critical lease terms are enforceable under Section 365(b), and this Court should deny any attempted assignment that fails to comply with such lease provisions. The Landlords object to any use of the Premises that disrupts tenant mix or balance.

**C. Any sale must not be free and clear of obligations to pay all charges due under the Leases, including unbilled year-end adjustments and reconciliations.**

21. The Sale Motion seeks authority for the sale the leases free and clear of liens, claims and encumbrances. The Landlords object to any sale free and clear of the Debtors' obligations to satisfy unbilled taxes, reconciliations, percentage rent, or other year-end adjustments or unbilled charges that may have accrued under the Leases prior to the assignment of the Leases, but which have not yet been billed. The Debtors continue to be responsible for all such unbilled charges as they come due under the Leases, and the Debtors or any proposed

assignee must continue to satisfy all charges due under the Leases, including charges which have not yet been billed, reconciled and/or adjusted from pre-petition (or even post-petition) periods. Any assumption and assignment of the Leases cannot cut off the Landlords' right to recover unbilled charges that have accrued, or are accruing, under the Leases, and any sale order must specify that these charges will survive the assumption and assignment of any of the Leases, and shall be payable by the assignee or Debtors.

**D. Cure Objection.**

22. On July 1, 2013, the Landlords filed the Limited Objection of the Macerich Company, Passco Companies, LLC, UCR Asset Services, and Deutsche Asset & Wealth Management to the Notice of (I) Debtors' Intent to Assume and Assign Certain Executory Contracts, Unexpired Leases of Nonresidential Real Property and (II) Cure Amounts Related Thereto [Docket No. 422] (the "Cure Objection"). The Landlords hereby incorporate the Cure Objection by this reference as if it were set forth in full as part of this Objection.

23. In addition, as set forth above, any sale order must specify that either the Debtors or Successful Bidder will satisfy all charges due under the Leases, including charges which have not yet been reconciled and/or adjusted from pre-petition (or even post-petition) periods. Any sale cannot cut off the Landlords' right to recover unbilled charges that have accrued, or are accruing, under the Leases. The Debtors must cure all existing defaults and compensate Landlords for any actual pecuniary loss as a result of those defaults in order to assume the Leases under Section 365(b). *See* 11 U.S.C. § 365(b)(1)(A) and (B). This principle is well-recognized. *See Elkton Associates v. Shelco Inc. (Matter of Shelco)*, 107 B.R. 483, 487 (Bankr. D. Del. 1989). An assignee should take the benefits or burdens of these unbilled charges, and if it does not, the Debtors must escrow funds for any charges that remain the Debtor's responsibility.

**E. The Successful Bidder should provide a letter of credit, security deposit, or guaranty to secure its performance under the Leases.**

24. The Successful Bidder (or any other assignee) is likely a newly formed entity with no financial or operating history of its own. Additionally, it is not clear that it will receive any



initial capitalization from its parent entity. Pursuant to Section 365(l), the Landlords may require a security deposit or letter of credit as security for the performance of the assignee's obligations under the Leases in the event that an assignee fails to perform on a going-forward basis. While the Successful Bidder may be formed by entities with industry experience and/or adequate capitalization, the Successful Bidder itself does not possess such experience or capitalization or financial history. If such an entity were executing a new lease with Landlords, Landlords would require such security, and it is appropriate for the Landlords to require: (i) a guaranty from a financially capable parent entity; (ii) a letter of credit; or (iii) a cash security deposit.

**F. Objection to designation of Leases for further assumption and assignment.**

25. To the extent the Successful Bidder will not move forward with the assumption and assignment of the Leases, it will likely seek to operate the Leases under a designation rights agreement with the Debtors. The Landlords have not seen such agreement, or any transition services agreement, and the Landlords have no contractual relationship with the Successful Bidder or any other proposed assignee at this time. Should the Debtors and Successful Bidder request such designation procedures with respect to the Leases, the Landlords should have a reasonable opportunity review such agreements and to object, if necessary. At a minimum, this Court should require that any procedures require the Debtors provide Landlords not less than ten (10) days from the filing of any designation notice to object to the assumption and assignment of the Leases, adequate assurance, and to any existing or newly proposed cure amount.

26. Any designation period cannot extend beyond the deadline to assume or reject leases dictated by Section 365(d)(4). Therefore, any designation period must expire no later September 3, 2013, absent an order extending the time to assume or reject leases. To the extent the Court permits the Successful Bidder to operate the Debtors' stores during any designation period, it must comply with Section 365 and all terms of the Leases. Nothing in any sale order should act as an extension of the time to assume or reject leases under Section 365(d)(4) absent written consent by the Landlords.

27. Finally, any party operating the stores during the designation period is responsible for all obligations during the time that it controls the Leases. If bills for taxes or other obligations come due under the Leases during the designation period, the party operating the Debtors' stores must satisfy these amounts as required under the Leases.

**G. Assignment Agreement.**

28. If any assumption and assignment to the Successful Bidder is eventually approved, Landlords request that the Court require the Successful Bidder to enter into a short form assignment agreement (the "Agreement"), in a form acceptable to Landlords, that will cause the Successful Bidder to become directly obligated to Landlords under the Leases. The Agreement shall include the modification of notice addresses for the parties. The Agreement is critical to Landlords for the maintenance of their lease files, and under the laws of various states, it is critical to establish privity of contract between a landlord and the assignee.

**H. To the extent a back-up bidder become the purchaser, a further hearing is required.**

29. In the event the Back-Up Bidder emerges as the successful bidder or assignee, there will need to be additional time for Landlords to make a determination as to ability of the Back-Up Bidder to provide adequate assurance of future performance, and object, if necessary.

30. The Landlord re-asserts the objections set forth herein with respect to the Back-Up-Bidder. That notwithstanding, the Landlords have not had the opportunity to address specific adequate assurance or other objections with respect to the Back-Up Bidder, and to the extent the Back-Up Bidder becomes the primary bidder at the Sale Hearing, or in the future, the Court should schedule a separate objection deadline and hearing to address any issues concerning the assumption and assignment of the Leases by the back-up bidder.

**III. RESERVATION OF RIGHTS TO RAISE FURTHER OBJECTIONS.**

31. In light of the objections raised above, the Landlords reserve all rights with respect to the relief requested in the Sale Motion, including but not limited to: (i) raise additional objections at this, or any further, hearing; (ii) to object to the assumption and assignment of the Leases for any reason, including but not limited to, objections based upon the adequacy of

adequate assurance of future performance information, when provided; (iii) require any proposed assumption and assignment to comply with all lease terms; (iv) to object to any form of sale order; (v) to object to any designation rights procedures; (vi) to object to any issue that impacts the treatment of the Landlords or Leases; and (vii) to object to the assumption and assignment of Leases to the Back-Up Bidder.

#### **IV. JOINDER IN OBJECTIONS RAISED BY OTHER LANDLORDS.**

32. To the extent consistent with the objections expressed herein, Landlords also join in the objections of other shopping center lessors to the Debtors' proposed relief.

#### **V. CONCLUSION**

Landlords request that the Court modify any order as set forth herein and deny any attempt to assume and assign the Leases at the Sale Hearing, and grant such further relief as the Court deems proper.

Dated: July 12, 2013

Respectfully submitted,

Frost Brown Todd LLC

/s/ Robin Bicket White

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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 electronic mail and first class, U.S. mail, postage prepaid on this 12<sup>th</sup> day of July, 2013:

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**Schedule A**

**REAL PROPERTY LEASES**

<b>THE MACERICH COMPANY</b>		
Camelback Colonnade	Phoenix, AZ	Store No. 18
<b>PASSCO COMPANIES LLC</b>		
Lincoln Plaza	Tacoma, WA	Store No. 16
<b>UCR ASSET SERVICES</b>		
The Shoppes at Arbor Lakes	Maple Grove, MN	Store No. 2
<b>DEUTSCHE ASSET AND WEALTH MANAGEMENT</b>		
Providence Square	Marietta, GA	Store No. 20

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