

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

In re	) Chapter 11
	)
ORECK CORPORATION., <i>et al.</i> ,	) Case No. 13-4006
	) Judge Lundin
Debtors.	) (Jointly Administered)

**LIMITED OBJECTION OF PFP COLUMBUS II, LLC 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**

PFP Columbus II, LLC (“PFP Columbus”), by its undersigned attorneys, FROST BROWN TODD LLC, hereby submits this Limited 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 Acquisitions 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”) (Docket No. 93). In support of this Limited Objection, PFP Columbus respectfully states:

**BACKGROUND**

1. On May 6, 2013 (the “Petition Date”), the above-captioned debtors (the “Debtors”) filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Middle District of Tennessee (this “Court”).

2. Upon information and belief, the Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. PFP Columbus is the owner of, or the managing agent for the owner of, the shopping center commonly known as Polaris Fashion Place, located in Columbus, Ohio, in which the Debtors lease retail space (the “Leased Premises”) from PFP Columbus pursuant to a certain written lease dated April 3, 2006 (the “Lease”).<sup>1</sup>

4. The Leased Premises are located in a “shopping center” as that term is used in section 365(b)(3) of the Bankruptcy Code. *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081, 1086-87 (3d Cir. 1990).

5. On May 16, 2013, the Debtors filed the Sale Motion. Pursuant to the Sale Motion, the Debtors seek, among other things, the approval of the sale of substantially all of the Debtors’ assets and authority to assume and assign certain of the Debtors’ non-residential real property leases.

6. On June 20, 2013, this Court entered an order (the “Sale Procedures Order”) (Docket No. 361) approving, among other things, the Debtors’ proposed procedures with respect to the potential sale of certain of the Debtors’ assets (the “Sale Procedures”) and the Debtors’ proposed procedures in connection with the potential assumption and assignment of certain of the Debtors’ leases (the “Assumption and Assignment Procedures”). The Sale Procedures Order provides, among other things, that non-debtor counterparties to leases are to file objections to the Debtors’ proposed cure amounts by no later than July 2, 2013 at 5:00 p.m. (CT). The Sale Procedures Order further provides, among other things, that objections to entry

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<sup>1</sup> The Lease and related documentation are voluminous, and therefore, have not been attached to this Limited Objection. However, PFP Columbus will provide copies of such Lease and related documentation, upon request.

of any order approving the proposed sale of the Debtors' assets to the Successful Bidder (the "Sale Order"), including to the proposed assumption and assignment of any unexpired lease of non-residential real property, must be filed with this Court on or before July 15, 2013 at noon (CT), "if Qualified Bids are received by the Bid Deadline from any parties other than the Purchaser and the Auction goes forward." See Sale Procedures Order at ¶ 15.

7. On July 1, 2013, PFP Columbus timely and properly filed its *Objection of PFP Columbus II, LLC to Debtors' Proposed Cure Amounts in Connection with Potential Assumption and Assignment of Non-Residential Real Property Lease* (the "Cure Objection") (Docket No. 426). PFP Columbus hereby incorporates the Cure Objection by this reference as if it were set forth in full as part of this Limited Objection.

8. On July 8, 2013, pursuant to the Sale Procedures Order, an auction was held in connection with the proposed sale of the Debtors' assets. On July 9, 2013, the Debtors filed a *Notice of Completion of Auction* (the "Initial Auction Notice") (Docket No. 508) providing, among other things, 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"). The Initial Auction Notice also references a list of non-residential real property leases (including the Lease), which the Debtors seek to assume and assign to the Successful Bidder.

9. On July 12, 2013, the Debtors filed a *Supplemental Notice Regarding Completion of Auction and Clarification of Matters Going Forward at Sale Hearing Scheduled for July 16, 2013 at 9:00 a.m. (CT)* (the "Supplemental Auction Notice") (Docket No. 546). The Supplemental Auction Notice provides, among other things, that (1) the list of non-residential real property leases referenced in the Initial Auction Notice as proposed to be assumed and

assigned to the Successful Bidder is incorrect; (2) the Successful Bidder has not yet decided which non-residential real property leases it will seek to have assumed and assigned and has sixty (60) days under the asset purchase agreement for the winning bid (the “Royal APA”) to decide whether to seek the assumption and assignment or rejection of any non-residential real property leases, including designating that the Debtors seek to assign any such non-residential real property leases to third parties; (3) no objections to cure amounts will be going forward at the hearing to approve the proposed sale, scheduled for July 16, 2013 at 9:00 a.m. (CT) (the “Sale Hearing”); (4) at the Sale Hearing, the Debtors will not be seeking the assumption and assignment to the Successful Bidder of any non-residential real property leases for the Debtors’ retail stores (the “Store Leases”) and landlords need not file objections to the Successful Bidder as a proposed assignee of the Store Leases; and (5) the Debtors will incorporate into the proposed Sale Order certain procedures with respect to any proposed assumption and assignment of the Store Leases in the future following the Sale Hearing, including procedures for assignments with the consent of the landlord (if applicable), and providing landlords with adequate assurance information for a proposed assignee and the opportunity to object prior to a hearing on the proposed assignment.

10. As of the filing of this Limited Objection, PFP Columbus has not been provided with copies of the Royal APA or the proposed Sale Order. Although the Supplemental Auction Notice provides that the Debtors will not move forward with the proposed assumption and assignment of any Store Leases at the Sale Hearing and that landlords do not need to file objections to the Successful Bidder as a proposed assignee of the Store Leases, given the objection deadline of noon (CT) on July 15, 2013, as well as the presence of a number of issues

that remain of concern to PFP Columbus,<sup>2</sup> PFP Columbus submits this Limited Objection at this time, out of an abundance of caution.

### **LIMITED OBJECTION**

#### **A. Objection to Proposed Assumption and Assignment of the Lease**

11. Any proposed assumption and assignment of the Lease must strictly comply with the requirements of section 365 of the Bankruptcy Code, and specifically, all of the requirements of section 365(b) and (f) of the Bankruptcy Code. The Debtors bear the ultimate burden of persuasion as to issues under section 365 of the Bankruptcy Code. *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); *Beckett v. Coatesville Housing Associates*, No. Civ.A 00-5337, 2001 WL 767601, at \*4 (E.D. Pa. July 5, 2001).

12. As an initial matter, any assumption and assignment of the Lease must be conditioned on the Debtors first paying all amounts due and owing under the Lease through *the effective date of assumption and assignment of the Lease*, in accordance with section 365 of the Bankruptcy Code. As set forth in the Cure Objection, which is incorporated herein by reference, the Debtors are currently in default of the terms of the Lease by failing, among other things, to make certain pre and post-petition rental payments and other related charges when due. The Debtors must cure all existing defaults and compensate PFP Columbus for any actual pecuniary loss as a result of those defaults in order to assume the Lease under section 365(b) of the Bankruptcy Code. *See* 11 U.S.C. § 365(b)(1)(A) and (B).

13. In addition, as provided in the Cure Objection, any order approving any proposed

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<sup>2</sup> Particularly, certain of the relief requested with respect to, among other things, the granting of certain designation rights to the Successful Bidder and the establishment of future procedures with respect to the proposed assumption and assignment of Store Leases to third party designees was not requested as part of the Sale Motion, and PFP Columbus does not have sufficient information with respect to the proposed terms thereof at this time.

assumption and assignment of the Lease must provide, among other things, that (1) the Debtors will remain responsible for all accrued, but unbilled charges under the Lease, including unpaid year-end adjustments and reconciliations, whether accruing prior to or after any effective date of assumption and assignment of the Lease, when such charges become due in accordance with the terms of the Lease,<sup>3</sup> and (2) such assumption and assignment is pursuant to the express terms of the Lease, including, without limitation, that any assignee continues to be responsible for all indemnification obligations, regardless of when they arose.

14. Further, the Debtors cannot assume and assign the Lease unless there is adequate assurance of future performance under the Lease. *See* 11 U.S.C. § 365(b)(1)(C); *see also* 11 U.S.C. § 365(f)(2). And, since the Leased Premises are located in a shopping center, the Debtors and any proposed assignee must satisfy the heightened standards for adequate assurance of future performance in a shopping center. *See* 11 U.S.C. § 365(b)(3). *See also Joshua Slocum*, 922 F.2d at 1086; *see also L.R.S.C. Co. v. Rickel Home Centers, Inc. (In re Rickel Home Centers, Inc.)*, 209 F.3d 291, 299 (3d. Cir. 2000).

15. Adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance: (A) of the source of rent and other consideration due under the Lease, and that the financial condition and operating performance of the proposed assignee and any guarantor shall be similar to the financial condition and operating performance of the Debtors and any guarantor of the Debtors at the time the Debtors entered into the Lease with PFP Columbus; (B) that any percentage rent due under the Lease will not decline

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<sup>3</sup> This result is mandated by the requirement that the Debtors cure all arrears and that the Debtors provide adequate assurance of future performance under the terms of the Lease. *See* 11 U.S.C. § 365(b)(1) and 365(f)(2). Section 365(b)(3) of the Bankruptcy Code specifically provides that, for purposes of section 365(f) of the Bankruptcy Code, adequate assurance of future performance with regard to a lease of real property in a shopping center includes adequate assurance “of the source of rent and other consideration due under the lease.” 11 U.S.C. § 365(b)(3)(A).

substantially; (C) that assumption and assignment of the Lease is subject to all provisions of the Lease, including but not limited to radius, location, use or exclusivity provisions, and will not breach any such provision contained in another lease; and (D) that assumption or assignment of the Lease will not disrupt any tenant mix in the Leased Premises. *See* 11 U.S.C. § 365(b)(3).

16. Further, it should be noted that pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) amendments, section 365(f)(1) of the Bankruptcy Code was amended “to make sure that all of the provisions of Section 365(b) of the code are adhered to and that 365(f) of the code does not override Section 365(b).” 151 Cong. Rec. S2461 (daily ed. March 10, 2005) (statement of Sen. Hatch). BAPCPA clarified section 365 of the Bankruptcy Code to reflect the Congressional intent that debtors may not use section 365(f)(1) of the Bankruptcy Code to avoid lease provisions. The language of section 365(f) of the Bankruptcy Code, and any ability to assume and assign the Lease, is subject to the protections provided to PFP Columbus under section 365(b)(1) and (3) of the Bankruptcy Code. It does not modify section 365(b) of the Bankruptcy Code. *See, e.g., Trak Auto Corp. v. West Town Ctr. LLC (In re Trak Auto Corp.)*, 367 F.3d 237, 243-44 (4th Cir. 2004) (bankruptcy courts could not use the general anti-assignment provision of section 365(f)(1) of the Bankruptcy Code to trump the specific protections granted to landlords in section 365(b)(3)(C) of the Bankruptcy Code). Accordingly, any proposed assumption and assignment of the Lease must remain subject to all provisions of the Lease (including, without limitation, any provisions concerning use, radius, exclusivity, tenant mix and balance), and PFP Columbus specifically objects to any proposed assumption and assignment of the Lease to the extent that such proposed assumption and assignment of the Lease does not strictly comply with all provisions of the Lease.

17. The Debtors bear the burden of demonstrating any proposed assignee’s ability to

provide adequate assurance of future performance. *In re Lafayette Radio Electronics Corp.*, 12 B.R. 302, 312 (Bankr. E.D.N.Y. 1991). *See also In re Federated Dept. Stores, Inc.*, 135 B.R. 941, 944 (Bankr. S.D. Ohio 1991); *In re TSW Stores of Nanuet, Inc.*, 34 B.R. 299, 308 (Bankr. S.D.N.Y. 1983). In addition, in connection with the heightened adequate assurance requirement for shopping center leases, courts require a specific factual showing through competent evidence to determine whether the Debtors have provided adequate assurance of future performance. *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).

18. However, as of the filing of this Limited Objection, the Debtors have not provided PFP Columbus with evidence to demonstrate adequate assurance of future performance under the Lease in accordance with section 365 of the Bankruptcy Code, and specifically, the heightened adequate assurance requirements for shopping center leases under section 365(b)(3) of the Bankruptcy Code. Indeed, it is uncertain at this time whether the Debtors will ultimately seek to assume and assign the Lease to the Successful Bidder (or to any other party). The identity of any proposed assignee is also uncertain at this time. To the extent the Debtors seek to assume and assign the Lease to the Successful Bidder (or any other party), PFP Columbus demands strict proof of any proposed assignee's ability to provide adequate assurance of future performance.

19. Accordingly, based upon the foregoing reasons, among others, any proposed assumption and assignment of the Lease should be denied by this Court at this time.<sup>4</sup>

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<sup>4</sup> The objections set forth herein also apply with respect to the Back-Up-Bidder. PFP Columbus has 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, this Court should schedule a separate objection deadline and hearing to address any issues concerning any proposed assumption and



**B. Objection to Lease Designation Rights and Potential Future Assumption and Assignment Procedures**

20. The Supplemental Auction Notice provides, among other things, that “[u]nder the Royal APA, [the Successful Bidder] has at least sixty (60) days from the date the sale closes to decide and direct the Debtors whether to seek the assumption and assignment or rejection of unexpired leases of non-residential real property (the “Leases”) and any executory contracts that are not unexpired non-residential real property leases (the “Executory Contracts”), including designating that the Debtors seek to assign Leases to third parties.” *See* Supplemental Auction Notice at ¶ 2. The Supplemental Auction Notice further provides, among other things, that “[t]he Debtors and [the Successful Bidder] plan to incorporate into the sale order procedures for any proposed assumption and assignment of the Stores Leases in the future following the Sale Hearing, including procedures for assignments with the consent of the landlord (if applicable), and providing landlords with adequate assurance information for a proposed assignee and the opportunity to object prior to a hearing on the proposed assignment.” *See* Supplemental Auction Notice at ¶ 4.

21. As previously discussed, as of the filing of this Limited Objection, PFP Columbus has not been provided with copies of the Royal APA or the proposed Sale Order. Further, PFP Columbus has not been advised of the terms of the proposed procedures for the future proposed assumption and assignment of non-residential real property leases, which the Debtors intend to incorporate into the proposed Sale Order. PFP Columbus has also not been provided with the terms of any proposed lease designation rights, or any operating agreement and/or any transition services agreement between the Debtors and the Successful Bidder.

22. PFP Columbus should be provided with a reasonable opportunity to review the

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assignment of the Lease by the Debtors to the Back-Up Bidder.

proposed Sale Order and the Royal APA, including with respect to any proposed provisions relating to lease designation rights and any proposed procedures with respect to the future potential assumption and assignment of the Lease, as well as any operating agreements, transition services agreements and/or any other agreements relating to lease designation rights, and to object, if necessary.<sup>5</sup>

23. In addition, to the extent that this Court approves procedures in any Sale Order relating to the future potential assumption and assignment of the Lease, this Court should require, at a minimum, that the Debtors provide PFP Columbus with no less than ten (10) days from the filing of any designation notice to object to any proposed assumption and assignment of the Lease, on any and all grounds (including, without limitation, to adequate assurance of future performance and to any proposed cure amounts).

24. Finally, to the extent that this Court allows any requested lease designation rights, any Sale Order should clarify, among other things, that any lease designation period shall not extend past any applicable deadline established under section 365(d)(4) of the Bankruptcy Code and that the Debtors must strictly comply with the provisions of section 365(d)(4) of the Bankruptcy Code.

### **RESERVATION OF RIGHTS**

25. PFP Columbus reserves the right to supplement and/or amend this Limited Objection from time to time and at any time. Further, PFP Columbus reserves any and all rights with respect to the relief requested in the Sale Motion, or such other relief as may be requested at the Sale Hearing or otherwise, and to: (i) raise any additional objections at the Sale Hearing or any further hearing; (ii) object to any proposed assumption and assignment of the Lease

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<sup>5</sup> It should be noted that PFP Columbus does not have any contractual relationship with the Successful Bidder or any other proposed assignee at this time.

(including, without limitation, to the Successful Bidder, the Back-Up Bidder and/or any other party), on any and all grounds under section 365 of the Bankruptcy Code or as otherwise may be available to PFP Columbus; (iii) object to the form of any proposed Sale Order; (iv) object to any lease designation rights and/or any procedures with respect to the future proposed assumption and assignment of the Lease; and (v) otherwise object to any relief requested in the Sale Motion or such relief that may subsequently be sought by the Debtors to be granted pursuant to any proposed Sale Order or otherwise, as such requested relief relates to the Lease and/or the interests of PFP Columbus.

### **JOINDER**

26. PFP Columbus joins in the objections that have been or may be filed by any other landlords, including but not limited to those objections filed by (i) Brixmor Property Group, Inc. and Novi Town Center Investors, LLC (Docket No. 535), and (ii) The Macerich Company, Passco Companies LLC, UCR Asset Services, and Deutsche Asset & Wealth Management (Docket No. 544), to the extent they are not inconsistent with this Limited Objection.

WHEREFORE, PFP Columbus respectfully requests that this Court sustain this Limited Objection, deny any assumption and assignment of the Lease at the Sale Hearing, and grant PFP Columbus such other and further relief as this Court deems just and appropriate under the circumstances.

Dated: July 14, 2013

Respectfully submitted,

**FROST BROWN TODD LLC**

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