

**THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

URBAN BRANDS, INC., *et al.*,

Debtors.

Chapter 11

Case No. 10-13005 (KJC)
(Jointly Administered)

Objections Due: October 22, 2010 at 4:00 p.m.
Hearing Date: November 16, 2010 at 3:00 p.m.

**MOTION OF GEORGE BUTLER, JR. FOR RELIEF FROM STAY UNDER
BANKRUPTCY CODE SECTION 362**

George Butler, Jr. ("Mr. Butler" or the "Movant"), by and through his undersigned attorneys, hereby files the Motion of George Butler, Jr. for Relief From Stay Under Bankruptcy Code Section 362 (the "Motion"). In support of the Motion, the Movant respectfully states as follows:

BACKGROUND

A. The Bankruptcy Cases

1. On September 21, 2010 (the "Petition Date"), each of the above-captioned debtors and debtors-in-possession (each a "Debtor" and collectively, the "Debtors") filed a petition for relief under chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Court").

2. The Debtors continue to operate their businesses and manage their financial affairs as debtors-in-possession pursuant to Bankruptcy Code sections 1107(a) and 1108.

3. On September 22, 2010, the Debtors filed the Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a), 363, and 365, and Bankruptcy Rules 2002, 6004, and 6006 for (i) Entry of an

Order (a) Establishing Bidding and Auction Procedures Related to the Sale of Substantially all of the Debtors' Assets; (b) Approving Related Bid Protections; (c) Scheduling an Auction and Sale Hearing; (d) Establishing Certain Notice Procedures for Determining Cure Amounts for Executory Contracts and Leases to be Assigned; and (e) Granting Related Relief; and (ii) Entry of an Order (a) Approving the Sale of Substantially All of the Debtors' Assets Free and Clear of All Liens, Claims, Encumbrances and Interests; (b) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases; (c) Establishing Assumption and Rejection Procedures for Certain Executory Contracts and Unexpired Leases; (d) Approving Guidelines for Conducting Store Closing Sales; (e) Approving Agency Agreement; and (f) Extending the Deadline to Assume or Reject Unexpired Leases of Nonresidential Real Property Pursuant to 11 U.S.C. § 365(d)(4) [D.I. 34] (the "Bid Procedures Motion").

4. On October 1, 2010, the Office of the United States Trustee for the District of Delaware selected the Official Committee of Unsecured Creditors (the "Committee").

5. On October 4, 2010, the Court entered its Order (a) Establishing Bidding and Auction Procedures Related to the Sale of Substantially All of the Debtors' Assets; (b) Approving Related Bid Protections; (c) Scheduling an Auction and Sale Hearing; (d) Establishing Certain Notice Procedures for Determining Cure Amounts for Executory Contracts and Leases to be Assigned; and (e) Granting Certain Related Relief [D.I. 143] (the "Bid Procedures Order"). The Bid Procedures Order provides for an auction of substantially all the Debtors' assets to be conducted on October 25, 2010 and a hearing to approve the sale of such assets on October 27, 2010.

6. To date, no trustee or examiner has been appointed in these cases.

B. The Civil Action

7. On November 1, 2007, the Movant filed a civil action complaint (the "Complaint") in the Court of Common Pleas, Montgomery County in the Commonwealth of Pennsylvania as a result of a September 7, 2006 automobile accident which caused serious, permanent, and disabling injuries to Movant (the "Civil Action"). The Civil Action is styled *Butler v. Urban Brands, Inc. a/k/a/ Urban Brands, Ltd.*, No. 07-27118. A copy of the Complaint is attached as Exhibit A.

8. Included as defendants to the Civil Action was Debtor, Urban Brands, Inc. ("Urban Brands") and Virginia G. Silvey ("Silvey"), an employee of Urban Brands working in such capacity at the time of the accident.

9. In the Complaint, Mr. Butler alleges, among other things, that while negligently and carelessly operating her vehicle, Ms. Silvey struck Mr. Butler's vehicle from behind at a high rate of speed. The force of the accident drove Mr. Butler's truck into the concrete median and caused such damage to the truck that Mr. Butler and his passenger needed to be extricated from the vehicle.

10. Mr. Butler suffered serious spinal and nerve injuries. Despite numerous surgeries and treatment, Mr. Butler still suffers from disabling pain to the point where he is permanently disabled. Moreover, in addition to his physical injuries, Mr. Butler is suffering from serious depression (he has openly contemplated suicide) and the lack of his ability to work has caused serious financial duress during the pendency of the Civil Action. A copy of Mr. Butler's pre-trial statement in the Civil Action setting forth a more detailed account of his injuries and present condition is attached as Exhibit B.

11. As it stands, the Civil Action is scheduled for trial on December 7, 2010; however, the automatic stay has halted the proceeding and will likely delay the trial absent leave of the Court. Mr. Butler has been waiting for the adjudication of the Civil Action for almost three years; if the Civil Action is unable to go forward on December 7, he will likely wait months or years before he can obtain another trial date. Mr. Butler simply cannot wait for another trial date; his physical, emotional, and financial conditions warrant modifying the automatic stay and allowing the Civil Action to go forward on December 7.

12. Upon information and belief, and based on discussions between counsel to the parties to the Civil Action the Debtors' insurers are funding defense costs of the Civil Action. As more fully set forth below, the Movant seeks to modify the automatic stay in order to allow the Movant to liquidate his claims against the Debtors (either through settlement or prevailing at trial). At this time, Movant does not seek any direct recovery from the Debtor/defendants; instead, Movant seeks recovery from any and all applicable insurance coverage. Further, Movant understands that upon liquidation of his claim against the estates, he will hold an unsecured claim for the amount of any unsatisfied portion any applicable self insured retention.

JURISDICTION

13. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue of these cases and this Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicate for the relief sought by the Motion is Bankruptcy Code section 362(d).

RELIEF REQUESTED

14. Movant requests that the Court lift the automatic stay for the limited purpose for

allowing the completion of discovery, settlement, and/or adjudication of the Civil Action.

Movant does not seek direct recovery against the Debtors at this time, but rather to proceed with the Civil Action, liquidate his claim(s), and recover from the Debtors' applicable insurance.

BASIS FOR RELIEF

15. Movant seeks relief from the automatic stay so that he may enter into a settlement with Debtors' insurer, or alternatively, to pursue the Civil Action to judgment. Section 362(a) of the Bankruptcy Code defines the scope of the automatic stay, in pertinent part:

“[A] petition filed under ... this title ... operates as a stay ... of –

- (1) The commencement or continuation ... of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . .
- (3) Any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.

Bankruptcy Code section 362(d) provides, in pertinent part, as follows:

- (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay . . .
 - (1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

11 U.S.C. § 362(d)(1).

16. In order to trigger the automatic stay, there must be an act against either the debtor or against property of the debtor or of the estate. The automatic stay does not stay actions taken against non-debtor third parties. As the Third Circuit has recognized:

Although the scope of the automatic stay is broad, the clear language of section 362(a) stays actions only against a “debtor” . . . As a consequence

“it is universally acknowledged that an automatic stay of proceedings accorded by § 362 may not be invoked by entities such as sureties, guarantors, co-obligors, or others with a similar legal or factual nexus to the . . . debtor.

McCartney v. Integra Nat’l Bank North, 106 F.3d 506, 509 (3d Cir. 1997).

17. The bankruptcy court “shall” lift the automatic stay for “cause.” 11 U.S.C. § 326(d)(1). If a creditor seeking relief from the automatic stay makes a *prima facie* case of “cause” for lifting the stay, the burden going forward shifts to the debtor pursuant to Bankruptcy Code section 362(g). *See, e.g., In re 234-6 West 22nd St. Corp.*, 214 B.R. 751, 756 (Bankr. S.D.N.Y. 1997).

18. The Bankruptcy Code does not define “cause.” Instead, whether “cause” exists to lift the automatic should be determined on a case-by-case basis. *See Izzarelli v. Rexene Prod. Co. (In re Rexene Prod. Co.)*, 141 B.R. 574, 576 (Bankr. D. Del. 1992); *see also In re Texas State Optical, Inc.*, 188 B.R. 552, 556 (Bankr. E.D. Tex. 1995) (finding that “cause” for modification of the automatic stay is “an intentionally broad and flexible concept that permits . . . [a] [b]ankruptcy [c]ourt, as a court of equity, to respond to inherently fact-sensitive situations.”) Courts determine what constitutes “cause” based on the totality of the circumstances in each particular case. *Baldino v. Wilson (In re Wilson)*, 116 F.3d 87, 90 (3d Cir. 1997).

19. As is often cited in the Court, *Rexene* provides the “balancing test” to determine whether cause exists to lift the automatic stay. 141 B.R. at 576. Under *Rexene*, the balancing test looks at three factors to decide whether to lift the automatic stay, including:

- (a) whether prejudice will be caused to the estate or the debtor;
- (b) whether hardship to the movant from continuing the stay outweighs any hardship to the debtor; and

- (c) whether the movant has a reasonable probability of prevailing on the merits of the suit.

Id.

20. Movant seeks relief from the automatic stay to the extent of available insurance coverage. Further, Movant seeks relief from the automatic stay to allow them to proceed with the Civil Action which has been suspended as a result of the commencement of these bankruptcy cases.

21. Allowing Movant to proceed with the Civil Action, or settle with Debtors' insurer(s), will not prejudice the Debtors. Upon information and belief, Debtors' insurer(s) will continue to provide defense counsel if Movant is allowed to proceed with the Civil Action. Further, should Movant settle with Debtors' insurer(s), Movant will limit his claims against the Debtors to the extent of available insurance proceeds plus an unsecured claim for any amounts owed by the Debtors under any self insured retention.

22. The hardship to the Movant were the Court to deny relief requested would be considerable. First, Movant has waited for his day in court for almost three years, the inability to move forward in December would cause further delay to adjudication of the Civil Action which would cause Movant further physical, emotional, and financial hardships. As set forth above and in the attached Exhibit B, Movant has suffered considerably since the accident, modifying the automatic stay to allow the Civil Action to move forward in December will allow the adjudication of the Civil Action and bring closure to the Movant's three year wait for his day in court. Further, should he prevail in the Civil Action, he would receive much needed financial relief allowing him to hire much needed nurses that would help alleviate the physical and emotional burden of his current situation.

23. The hardship to the Debtors is minimal. Upon information and belief, Debtors are covered by commercial automobile liability insurance. As mentioned above, counsel to the Debtors in the Civil Action believes that Debtors' insurers are paying Debtors' defense costs arising from Movant's claims. Finally, as Movant's injuries are a result of Debtors' negligence, Movant has a high probability of prevailing on the merits in the Civil Action.

NOTICE AND NO PRIOR REQUEST

24. Notice of the Motion has been given to the Office of the United States Trustee for the District of Delaware, counsel for the Debtors, counsel to the Lenders, counsel to Gordon Brothers, and those parties that have filed requests for notices in this case pursuant to Bankruptcy Rule 2002. The Movant submits that no further notice need be given.

25. No request for the relief requested herein has been made in this or any other court.

[Intentionally Left Blank]

WHEREFORE, Movant requests the entry of an order substantially in the form attached as Exhibit C, granting (i) relief from the automatic stay to allow for the continuation and resolution of the Civil Action to allow Movant to complete discovery, seek damages against Debtors, and to apply the proceeds of insurance to the extent such proceeds as available to any judgment and attorneys' fees and costs that may arise as a consequence of the litigation of Movant's claims, and (ii) such other relief as is deemed just and proper.

Dated: October 7, 2010
Wilmington, Delaware

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