

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

In re	:	Chapter 11
	:	
	:	Case No. Case No. 10-13005 (KJC)
	:	
URBAN BRANDS, INC., et al,	:	(Jointly Administered)
	:	
	:	Hearing Date: October 27, 2010 at 11:00 a.m. (ET)
Debtors.	:	Objection Due: October 19, 2010 at 4:00 p.m. (ET)
	:	Related to Docket No. 104

LIMITED OBJECTION OF RREEF MANAGEMENT COMPANY, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, AND WATT MANAGEMENT COMPANY TO THE CORRECTED NOTICE OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES WHICH MAY BE ASSUMED AND ASSIGNED, PURSUANT TO SECTION 365 OF THE BANKRUPTCY CODE, IN CONNECTION WITH THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS AND THE PROPOSED CURE AMOUNTS WITH RESPECT THERETO

RREEF Management Company, The Prudential Insurance Company of America, and Watt Management Company (collectively, the “Landlords”) hereby file this objection (the “Objection”) to the Corrected Notice of Executory Contracts and Unexpired Leases Which May Be Assumed and Assigned, Pursuant to Section 365 of the Bankruptcy Code, in Connection with the Sale of Substantially All of the Debtors' Assets and the Proposed Cure Amounts With Respect Thereto (the “Cure Schedule”),¹ and respectfully represent as follows:

I. BACKGROUND FACTS

1. Urban Brands, Inc., and its affiliated co-debtor entities (collectively, the “Debtors”) filed their voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code on September 21, 2010. The Debtors have continued to operate their business and manage their properties as debtors-in-possession pursuant to 11 U.S.C. §§ 1107(a) and 1108.²

¹ Terms not otherwise defined herein shall have the meanings ascribed to them in the Cure Schedule, the Sale Motion (as defined below), and accompanying documents.

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

2. The Debtors lease retail space (the “Premises”) from the Landlords where they operate their business as a tenant pursuant to unexpired leases of nonresidential real property (the “Leases”) at the following shopping center locations (the “Centers”):

RREEF Management Company	
Gateway Centre	Chicago, IL
Prudential Insurance Company of America	
Florin Town Center	Sacramento, CA
Watt Management Company	
Crenshaw Plaza	Los Angeles, CA

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 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 Certain 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 Additional Executory Contracts And Unexpired Leases; (D) Approving Guidelines For Conducting Store Closings 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)*

(the “Sale Motion”). The Court entered an order approving bidding procedures related to the Sale Motion on October 4, 2010.

5. On September 30, 2010, the Debtors filed the Cure Schedule. The amounts set forth in the Cure Schedule do not reflect all outstanding balances due and owing to Landlords under the Leases, and the proposed cure amounts do not account for accrued but unbilled charges which may come due in the future. Therefore, the cure amounts set forth by the Debtors must be modified to reflect the additional charges owing, as well as recognize the liability for accruing charges, due under the Leases as set forth herein.

II. THE DEBTORS’ PROPOSED CURE AMOUNTS DO NOT PROVIDE FOR PAYMENT OF ALL OBLIGATIONS DUE UNDER THE LEASES.

6. The Landlords’ cure, as compared to the Debtors’ cure is summarized below, and more fully set forth in Exhibits A through C, which are attached hereto and incorporated into this Objection by this reference:

Landlord	Center	Store No.	Debtors’ Cure	Landlords’ Cure³
RREEF	Gateway Centre	410	\$7,223.00	\$25,274.11
Prudential	Florin Town Center	445	\$13,988.04	\$117,731.83
Watt	Crenshaw	320	\$9,430.41	\$20,199.44

7. In addition to the current outstanding rent and other monthly charges due under the Leases, in determining what the Debtors must pay as cure pursuant to Section 365(b), the charges referenced below must also be taken into consideration and paid by the Debtors or the eventual assignee, either as part of the cure or as part of the obligations arising under the Leases when such charges are billed under the Leases.

³ The Landlords' cure does not include charges arising since this Objection, and the Landlords reserve the right to payment (and to amend this Objection to the extent necessary) for any additional amounts that come due under the Leases through the payment date of any cure by the Debtors or an assignee.

i. Year-end adjustments and reconciliations

8. In addition to rent and related monthly charges, attorneys' fees, costs, and interest, some charges for which the Debtors bear responsibility under the Leases have not yet been reconciled and/or adjusted from pre-petition (or even post-petition) periods. By way of example, the Debtors occupy retail space at the Centers pursuant to triple-net leases, where they typically pay rent and related lease charges in advance for each month. The Debtors pay fixed minimum rent, along with a pro-rata share of expenses such as real property taxes, insurance, common area maintenance ("CAM") fees, annual percentage rent, and the like. Certain charges, such as CAM and property taxes are estimated prospectively, billed to and paid by the tenant during the year, and then reconciled after year-end. The reconciliation compares the amounts estimated and paid against actual charges incurred at the respective Center. To the extent the estimated payments exceed actual charges, the result is a credit to the tenant. To the extent the estimated payments do not cover actual charges incurred under the Leases, the result is an additional amount (or debit) for which the tenant is liable. In some instances in this case, year-end reconciliations and adjustments for previous years for the various Premises may not yet be complete (i.e. - year-end reconciliations and adjustments which accrued throughout 2009 may yet to be billed at certain locations, and year-end reconciliations and adjustments which accrue throughout 2010 will not be billed until sometime in 2011). In other instances, certain charges may be paid in arrears, and cannot be calculated (in some cases) until a year or more after year-end. Since these accrued, but unbilled, charges are not yet due under the Leases, they do not create a current default that gives rise to a requirement to cure by the Debtors and/or an assignee.

9. Nevertheless, the Debtors (or an assignee) continue to be responsible for all such accrued and accruing charges under the Leases, as and when they are billed under the Leases. Therefore, to the extent the Debtors assume and assign any of the Leases, the Debtors or assignee must provide for the payment of these unbilled amounts for such Leases, as and when they come

due under the Leases, regardless of whether the underlying charges relate to periods that pre-date any such assumption and assignment of the Leases.⁴

10. Finally, the Leases provide that the Debtors must indemnify and hold the Landlords harmless with respect to any existing claims which may not become known until after the assumption and assignment of the Leases, examples of which may include such claims as personal injuries at the Premises and damage to the Premises or Centers caused by the Debtors or their agents. Any order approving the assumption and assignment of the Leases must provide that the assumption and assignment is pursuant to the terms of the Leases, including that any assignee continues to be responsible for all such indemnification obligations, regardless of when they arose.⁵ In the alternative, the Debtors must provide (by insurance or otherwise) that they can satisfy the indemnification obligations under the Leases for any such claims that relate to the period prior to any assumption and assignment of the Leases.

ii. Attorneys' fees, costs, and interest

11. In addition, the Leases contain provisions for the recovery of attorneys' fees, costs, and interest in the event the Landlords are required to take legal action to protect their interests. The Debtors are obligated to cure all defaults under the Leases, and compensate the Landlords for their actual pecuniary losses as a result of defaults under the Leases. *See* 11

⁴ The Sale Motion seeks authority for the sale the leases free and clear of liens, claims and encumbrances. The Landlord objects to any sale free and clear of the Debtors' obligations to satisfy unbilled reconciliations and adjustments that 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 assignee must continue to 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 assumption and assignment of the Leases cannot cut off the Landlord's right to recover unbilled charges that have accrued, or are accruing, under the Leases. Therefore, the Sale Motion, any sale order, and any assignment must specify that these charges will survive the assumption and assignment of any of the Leases. It should be clear that any assignee will inherit the responsibility for all unbilled charges that may come due under the Leases.

⁵ The 2005 changes to the Bankruptcy Code 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). Therefore, any assignment must remain subject to all provisions of the Leases.

U.S.C. § 365(b)(1)(A) and (B). The principle is well-recognized. In re LCO Enterprises, 12 F.3d 938, 941 (9th Cir. 1993); Elkton Associates v. Shelco Inc. (Matter of Shelco), 107 B.R. 483, 487 (Bankr. D. Del. 1989) (debtors allowed to assume lease provided it cured *all pre-petition defaults*).

12. In assuming and assigning the Leases, the Debtors take the Leases *cum onere*, that is, subject to existing burdens. The Debtors cannot, on the one hand, assume the favorable portions of the Leases and, on the other hand, reject the unfavorable provisions of the same Leases. In re Washington Capital Aviation & Leasing, 156 B.R. 167,172 (Bankr. E.D. Va. 1993). If forced to continue in the performance of the Leases, the Landlords are entitled to the full benefit of the bargain under their Leases with the Debtors. *See* Matter of Superior Toy and Mfg. Co., Inc., 78 F.3d 1169 (7th Cir. 1996). The “full benefit of the bargain” principle has been held to require payment of interest. “The cure of a default under an unexpired lease pursuant to 11 U.S.C. § 365 is more akin to a condition precedent to the assumption of a contract obligation than it is to a claim in bankruptcy. One of the purposes of Section 365 is to permit the debtors to continue in a beneficial contract; provided, however, that the other party to the contract is made whole at the time of the debtor’s assumption of the contract.” In re Entertainment, Inc., 223 B.R. 141, 151 (Bankr. N.D. Ill. 1998) (citation omitted; bankruptcy court allowed interest at 18%). Interest on pre-petition lease charges continues to run from the filing of the Debtors’ petition and must be paid as a condition to the assumption and assignment of the Leases. *See* In re Skylark Travel, Inc., 120 B.R. 352055 (Bankr. S.D. N.Y. 1990). Interest calculations are therefore not cut short by the automatic stay, and payment of such interest is required to fully compensate Landlords for the Debtors’ default under the Leases, and thus to properly assume and assign the Leases. Finally, post-petition interest is allowable where such interest is provided for under the terms of the Leases. Cukierman v. Uecker (In re Cukierman), 265 F.3d 846, 853 (9th Cir. 2001).

13. Attorneys’ fees and costs are also proper components of a cure claim, and the Debtors or assignee must satisfy these lease charges as part of the assumption and assignment of the Leases. Attorneys’ fees and costs incurred in enforcement of the covenants, obligations, and

conditions of a lease must be paid as a condition of the assumption and assignment of the Leases. Entertainment, Inc., 223 B.R. at 152 (citation omitted). There is no logical distinction for purposes of Section 365 between attorneys' fees incurred in connection with pre-petition defaults and fees incurred with post-petition defaults. Id. 154. The fact that a landlord uses bankruptcy procedures to enforce a lease should not preclude recovery of attorneys' fees and costs for such enforcement activity, particularly where the Bankruptcy Court is the exclusive forum where the landlord can obtain any relief, being foreclosed from state court relief by the automatic stay. Id., *see also*, In re Crown Books Corporation, 269 B.R. 12 (Bankr. D. Del. 2001) (Landlords' fees and costs are recoverable as a component of cure under 11 U.S.C. § 365(b)(1)); Urban Retail Properties v. Loews Cineplex Entertainment Corporation, et al., 2002 WL 5355479 (S.D.N.Y. Apr. 9, 2002) (where lease "provides for recovery of attorneys' fees and interest, their receipt deserves the same priority under Section 365(d)(3) as any of the debtors' other obligations that arise postpetition"); Three Sisters Partners, L.L.C. v. Harden (In re Shangra-La, Incorporated), 167 F.3d 843, 850 (4th Cir. 1999). The Supreme Court has recently upheld the enforceability of such attorneys' fees clauses, ruling that pre-petition attorneys' fee clauses were enforceable with respect to issues peculiar to bankruptcy law. Travelers Casualty & Surety Co. Of America v. Pacific Gas & Electric, 127 S. Ct. 1199, 1206 (2007).

14. At this time, Landlords can only estimate the total attorneys' fees that will be incurred in connection with each Lease because these amounts will continue to accrue at least through any hearing on a motion to assume and assign any of the Leases. Landlords will provide the Debtors with the most current information on attorneys' fees at the time of such hearing or an eventual assumption and assignment of any of the Leases.

iii. The cure amounts serve only as estimates

15. The cure amounts set forth herein represent only the current amounts due and owing under the Leases. As a practical matter at this juncture, the best the Landlords can do is provide the most accurate information presently available regarding the cure amounts payable by the Debtors, but the Landlords reserve the right to unilaterally amend the cure amounts as

necessary to include any additional or presently unknown sum of money for any reason, including but not limited to subsequent rent defaults, attorney fees, costs, interest, and year-end adjustments and reconciliations. There is no basis to impose upon the Landlords the equivalent of an administrative bar date without the ability to recover lease charges to which they are entitled under the Leases.

16. This is especially true in this instance where the Debtors propose that any assignee may have a designation period to decide whether to seek assumption of any individual lease. As a result, the Sale Order should also include procedures for such assignee to notify Landlords of any attempt to take an assumption and assignment of a lease. At the very least, the Landlords should have ten (10) days to object to the assumption of any lease to deal with additional cure amounts that may have arisen since filing this Objection.

III. JOINDER IN OBJECTIONS BY OTHER LANDLORDS

17. To the extent not inconsistent herewith, the Landlords hereby join in the objections raised by other landlords.

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WHEREFORE, in order to protect the interests of the Landlords, the cure amounts should be established (subject to adjustment by the Landlords) as set forth herein, and the Court should grant such other relief that the Court finds just and proper.

Dated: October 19, 2010
Wilmington, Delaware

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