

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

In re: Urban Brands, Inc., <i>et al.</i> , Debtors.

Chapter 11

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

Objection Deadline: October 19, 2010 at 4:00 p.m. (EDT)
Related Docket No.: 104

**OBJECTION OF DEVELOPERS DIVERSIFIED REALTY CORPORATION
TO DEBTORS' 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**

Developers Diversified Realty Corporation (the "Landlord"), by and through its counsel, Kelley Drye & Warren LLP, objects to the Debtors' 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 Sale of Substantially All of the Debtors' Assets and the Proposed Cure Amounts with Respect Thereto for certain of the Landlord's Leases (defined below). In support of this objection, the Landlord respectfully states as follows:

BACKGROUND

1. On September 21, 2010 (the "Petition Date"), the Debtors each filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") with this Court.
2. Since the Petition Date, the Debtors have continued to manage their businesses as debtors and debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.
3. The Landlord is the owner or managing agent for the owner of numerous shopping centers located throughout the United States. The Debtors lease retail space from the

Landlord pursuant to written leases (the “Leases”) at the locations (the “Leased Premises”) identified in the chart attached hereto as **Exhibit A**. The Leased Premises are located in shopping centers as that term is used in section 365(b)(3) of the Bankruptcy Code. *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081 (3d Cir. 1990).

4. On September 30, 2010, the Debtors filed 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 Sale of Substantially All of the Debtors’ Assets and the Proposed Cure Amounts with Respect Thereto (Docket No. 104) (the “Notice”). In the Notice, the Debtors listed certain cure amounts for each of the Leases (the “Debtors’ Proposed Cure Amounts”), which amounts are included for reference on **Exhibit A**.

CURE OBJECTION

5. The Landlord disputes the Debtors’ Proposed Cure Amounts. The correct amounts outstanding under the Leases are set forth on **Exhibit A** in the column entitled “Landlord’s Proposed Cure Amounts” (the “Landlord’s Proposed Cure Amounts”). Each of the Landlord’s Proposed Cure Amounts include an estimate of attorneys’ fees incurred to date.

6. Prior to assumption and assignment, the Debtors are required to cure all outstanding defaults under the Leases pursuant to section 365(b)(1) of the Bankruptcy Code. Pursuant to the Leases, the Debtors are obligated to pay regular installments of fixed monthly rent, as well as a pro rata share of common area maintenance costs, real estate taxes, and insurance. Moreover, prior to assumption and assignment, the Debtors must also compensate the Landlord for any actual pecuniary loss under the leases. *See* 11 U.S.C. §365(b)(1)(B). As part of its pecuniary loss, the Landlord is entitled to attorneys’ fees in connection with the Debtors’ defaults under the Leases. *See LJC Corp. v. Boyle*, 768 F.2d 1489, 1494-96 (D.C. Cir. 1985); *In*

re Bullock, 17 B.R. 438, 439 (B.A.P. 9th Cir. 1982); *In re BAB Enterprises, Inc.*, 100 B.R. 982, 984 (Bankr. W.D. Tenn. 1989); *In re Westview 74th St. Drug Corp.*, 59 B.R. 747, 757 (Bankr. S.D.N.Y. 1986); *In re Ribs of Greenwich Vill., Inc.*, 57 B.R. 319, 322 (Bankr. S.D.N.Y. 1986).

7. To the extent that rent, attorneys' fees, interest, or other charges continue to accrue, and/or the Landlord suffers other pecuniary losses with respect to the Leases, the Landlord hereby reserves its right to amend the Landlord's Proposed Cure Amounts to reflect such additional amounts or to account for year-end adjustments, including without limitation, adjustments for 2009, 2010, and 2011 (the "Adjustment Amounts"), which have not yet been billed or have not yet become due under the terms of the Leases. As such, the Debtors must be responsible to satisfy the Adjustment Amounts, if any, when due in accordance with the terms of the Leases, regardless of when such Adjustment Amounts are incurred.

8. The Landlord requests that the Debtors or their successor(s) continue to comply with all contractual obligations, including the obligation to indemnify and hold the Landlord harmless. This indemnification obligation should include any events which occurred before the assumption and assignment but were not known to either the Landlord or the Debtors as of the date of the assumption and assignment. The indemnification obligation includes, but is not limited to any (i) claims for personal injury that occurred at the Leased Premises, (ii) damage or destruction to the Leased Premises or property cause by the Debtors or their agents, and (iii) environmental damage or clean-up.

ADEQUATE ASSURANCE OBJECTION

9. In connection with the assumption and assignment of leases, shopping center landlords are afforded special statutory protections under the Bankruptcy Code in the form of adequate assurance of future performance of any proposed assignee. *In re Joshua Slocum*,

922 F.2d 1086; *In re Trak Auto Corp.*, 277 B.R. 655 (Bankr. E.D. Va. 2002). Section 365(f)(2) of the Bankruptcy Code provides:

The trustee may assign an executory contract or unexpired lease of the debtor only if— (A) the trustee assumed such contract or lease in accordance with the provisions of this section; and (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2).

10. In connection with a shopping center lease, adequate assurance of future performance includes adequate assurance

(A) of the source of rent... due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee... shall be similar to the financial condition and operating performance of the debtor...;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as radius, location, use, or exclusivity, ... and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

11 U.S.C. § 365(b)(3).

11. The Debtors bear the burden of proving adequate assurance of future performance in connection with the assignment of the Leases. *In re F.W. Restaurant Assoc., Inc.*, 190 B.R. 143 (Bankr. D. Conn. 1995); *In re Rachels Indus. Inc.*, 109 B.R. 797, 802 (Bankr. W.D. Tenn. 1990); *In re Lafayette Radio Electronics Corp.*, 12 B.R. 302, 312 (Bankr. E.D.N.Y. 1981).

12. While the stalking horse bidder has provided some financial information to the Landlord, it is still unknown whether the stalking horse bidder will be the successful

bidder for the Debtors' assets. Therefore, the Landlord asserts that the Debtors have not yet met their burden to prove adequate assurance of future performance under the Leases.

13. In addition, the Landlord reserves the right to require a deposit or other security to ensure the assignee's performance under the Leases as would have been required upon initial leasing to a similar tenant. *See* 11 U.S.C. § 365(l).¹

RESERVATION OF RIGHTS

14. The Landlord reserves its right to amend and/or supplement this cure objection, including, without limitation, adding any obligations that accrue, arise, or are related to the pre-assumption and assignment period that subsequently become known to the Landlord.

¹ Section 365(l) of the Bankruptcy Code provides, in pertinent part:

If an unexpired lease under which the debtor is lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

WHEREFORE, the Landlord requests that the Court enter an order (i) requiring the Debtors to pay the Landlord's Proposed Cure Amounts set forth on **Exhibit A**; (ii) reserving the Landlord's right to assert additional cure amounts, including attorneys' fees, due under the Leases at the time of assumption; (iii) requiring the Debtors to continue to comply with the obligations under the Leases to pay the Adjustment Amounts and any indemnification obligations in the regular course of business; and (iv) granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
October 19, 2010

KELLEY DRYE & WARREN LLP

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EXHIBIT A

Developers Diversified Realty Corporation

Store Nos.	Mall Name	Location	Landlord	Debtors' Proposed Cure Amounts	Landlord's Proposed Cure Amounts
341	Pavilion Parkway	Fayetteville, GA	DDRTC Fayette III and IV LLC	\$16,735.46	\$27,851.47