

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
	:	Case No. Case No. 10-13005 (KJC)
	:	
URBAN BRANDS, INC., <i>et al</i> ,	:	(Jointly Administered)
	:	
	:	Hearing Date: October 27, 2010 at 11:00 a.m. (ET)
Debtors.	:	Objection Due: October 21, 2010 at 4:00 p.m. (ET)
	:	[Relates to Docket Nos. 34, 104, 114 & 229]

FINAL LIMITED OBJECTION OF RREEF, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, AND WATT MANAGEMENT COMPANY TO 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)

RREEF, The Prudential Insurance Company of America, and Watt Management Company (collectively, the “Landlords”) hereby file this final limited objection (the “Limited Objection”) to 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”),¹ and respectfully represent as follows:

I. BACKGROUND FACTS

1. Urban Brands, Inc., and it's 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

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

RREEF	
Gateway Centre (Store No. 410)	Chicago, IL
Prudential Insurance Company of America	
Florin Town Center (Store No. 445)	Sacramento, CA
Watt Management Company	
Crenshaw Plaza (Store No. 320)	Los Angeles, CA

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

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

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 Sale Motion, which proposes to enter into a stalking horse bid with New Ashley Stewart, LLC (the “Stalking Horse”).

5. On October 1, 2010, the Landlords filed an initial objection to the Sale Motion [Docket No. 114] (the “Initial Sale Objection”), which included objections to the bidding and auction procedures, as well as sale-related objections. In response to the Initial Sale Objection, and other objections, certain modifications were made to the bidding procedures and the parties agreed that all sale related objections would be preserved for the Sale Hearing.³ In conjunction with those modifications, the Landlords reserved their rights with respect to all sale related objections, as well as the right to seek to have the Sale Hearing serve as a status conference in the event that they received insufficient adequate assurance of future performance information, or a party other than the Stalking Horse was successful at the auction.

III. ARGUMENT

A. Objection to adequate assurance and reservation of rights.

6. Pursuant to the schedule approved by the Court, the Landlords must file their objection prior to the bid and auction. Therefore, the Landlords do not yet know who will prevail at the auction, or even who will participate. To date, the Landlords have received some information from the Stalking Horse only, but the limited adequate assurance information provided thus far does not satisfy either the general requirements of Section 365(b), or the heightened shopping center requirements of Section 365(b)(3)(A) – (D). Without adequate assurance information that satisfies the standards of Section 365, the Debtors cannot assume and assign the Leases at this time. Landlords are still working with the Debtors, the Committee and

³ The Landlords hereby incorporate the objections raised in the Initial Sale Objection as if set forth herein in full.

the Stalking Horse (and look forward to receiving such information from other potential bidders) with respect to adequate assurance of future performance, and to the extent an agreement is reached on this issue prior to a hearing, the Landlords will withdraw this portion of the Objection.⁴

7. In order to satisfy the adequate assurance of future performance burden discussed below, the Debtors and the Stalking Horse (and any other bidder) will need to provide, at a minimum, 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 Lease 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 Landlord may directly contact in connection with the adequate assurance of future performance.

8. At this time, the Landlords have received no financial information with respect to the Stalking Horse or any other bidders. Without at least this information, they cannot properly assess the ability of the Stalking Horse (or any other bidder) to perform under the Leases.

B. Section 365(b) burdens the Debtors with making an affirmative showing of adequate assurance of future performance.

9. 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

⁴ If the Landlords do not have sufficient information (or time) to make a determination as to a proposed assignee, or if the proposed assignee is unacceptable, the Landlords will need to seek a continuance of the sale hearing to conduct expedited discovery, arrange for expert testimony, and file supplemental objections based upon the information gleaned from whatever information is actually produced by the Debtors, the Stalking Horse, or any other successful bidder.

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).

10. 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); In re Bygaph, Inc., 56 B.R. 596 (Bankr. S.D.N.Y. 1986) (court granted motion to assume and assign based on assignee's capital contribution, personal financial resources, and expressed willingness to devote sufficient funding which gave new restaurant a strong likelihood of succeeding, coupled with assignee's experience as an owner/operator of a successful restaurant and his family's planned involvement in the day-to-day management). Without this type of information, the Landlords are denied their statutory right to conduct a meaningful analysis of any proposed assignee.

C. The Landlords are entitled to heightened adequate assurance under Section 365(b)(3).

11. In this case, the Leases are shopping center leases and, as such, the Bankruptcy Code requires more than the basic adequate assurance of future performance of the Leases under Section 365(b)(1)(C). In re Sun TV and Appliances, Inc., 234 B.R. 356, 359 (Bankr. D. Del. 1999). The heightened adequate assurance requirements that Debtors must satisfy under Section 365(b)(3) include the following:

- 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).

12. This 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.

13. The Stalking Horse is a newly formed entity with no financial or operating history. At this time, the Landlord has no substantive information with respect to the Stalking Horse's (or any other bidder's) financial wherewithal. In addition, some or all of the Leases are currently guaranteed by Urban Brands, Inc. Therefore, any potential assignee (and especially where such assignee is a newly formed entity) should similarly provide the Landlords with a guaranty of the assignee's obligations under the Leases. Alternatively, the Landlords would be willing to accept a letter of credit, or a cash security deposit, in place of a guaranty. Pursuant to Section 365(1), the Landlords may require such a credit enhancement as security for the performance of the assignee's obligations under the Leases in the event that it fails to perform on a going-forward basis. This is a reasonable condition of demonstrating adequate assurance of future performance where the Debtors seek approval of an assignee with no operating history.

14. The Landlords object to any attempt to approve the assumption and assignment of the Leases at the Sale Hearing until adequate assurance of future performance information is provided to Landlords.

D. Objection to cure procedures.

15. On October 19, 2010, the Landlords filed their limited 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 [Docket No. 229] (the "Cure Objection"), which Cure Objection is incorporated herein by this reference. In addition, the Debtors cannot accurately establish cure amounts for Leases that they may not assume and assign for over four (4) months, without providing for a means of amending such amounts at the time of an actual request to assume and assign a Lease. The Landlords reserve

the right to amend and/or supplement the amounts set forth in the Cure Objection at any time up to, and including, at the assumption and assignment of the Leases.

16. Moreover, the Debtors provide no mechanism for the resolution of cure claims in the event of a dispute. The Debtors should provide that all undisputed cure amounts will be paid immediately upon the assumption and assignment of the Leases. Debtors should escrow disputed amounts, and a procedure should be put in place to resolve these disputed cure amounts within thirty (30) days of the assumption and assignment of the Leases, with a status conference set to deal with any amounts that remain unresolved after such period.

17. Finally, any order approving the sale needs to specify that either the Debtors and/or assignee must satisfy all unbilled 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 Landlords' right to recover unbilled charges that have accrued, or are accruing, under the Leases. Any proposed assignee must take the assignment of a Lease subject to its terms, as well as pay all obligations owing under such Lease, including obligations that have accrued but may not yet have been billed under such Lease.

E. Any assumption and assignment must comply with the terms of the Leases.

18. Landlords re-assert and incorporate the objections raised in the Initial Sale Objection to the assumption and assignment of the Leases, including the re-asserting the requirement that any such assumption and assignment fully comply with all term of the Leases, as if fully set forth herein. .

F. 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.

19. Landlords re-assert and incorporate the objections raised in the Initial Sale Objection that no sale may be free and clears of the obligations to satisfy unbilled charges under the Leases, when due, as if fully set forth herein.

G. Objection to lease designation rights.

20. Landlords re-assert and incorporate the objections raised in the Initial Sale Objection with respect to the granting of designation rights, as if fully set forth herein. To the extent that the Stalking Horse, or any successful bidder, is permitted to operate the Debtors' stores during the Designation Period, such party must comply with all terms of the Leases during such Designation Period in all respects.

H. Objection to assumption and assignment procedures for Leases.

21. Landlords re-assert and incorporate the objections raised in the Initial Sale Objection with respect to assumption and assignment procedures, as if fully set forth herein.

I. Objection to rejection procedures for Leases.

22. Landlords re-assert and incorporate the objections raised in the Initial Sale Objection with respect to the proposed rejection procedures, as if fully set forth herein.

J. Objection to Store Closing Sales.

23. Landlord has been in discussions with Gordon Brothers Retail Group, Inc. to resolve the issues raised with respect to a potential store closing sale in the Initial Sale Objection. Those discussions are ongoing. Until such time that a final agreement is reached, or to the extent another party is successful and seeks authority to conduct store closing sales, Landlords re-assert and incorporate the objections raised in the Initial Sale Objection with respect to the proposed store closing sales as if fully set forth herein.

K. Objection to waiver of FRBP 6004 and 6006.

24. Landlords re-assert and incorporate the objections raised in the Initial Sale Objection with respect to the waiver of FRBP 6004 and 6006, as if fully set forth herein. .

L. Joinder in other landlord objections.

25. 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.

III. CONCLUSION

The Debtors provide no authority to disregard the terms of the Leases and the protections granted Landlords under the Bankruptcy Code. The Court should modify any final sale order to incorporate the objections raised herein, and grant such further relief as the Court deems proper.

Dated: October 21, 2010
Wilmington, Delaware

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