

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

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In re:	:	Chapter 11
URBAN BRANDS, INC., <i>et al.</i>	:	Case No. 10-13005 (KJC)
	:	(Jointly Administered)
Debtors.	:	Hearing Date: October 27, 2010 at 4:00 p.m. ET
	:	Objection Deadline: October 21, 2010 at 4:00 p.m. ET
	:	Related Docket Nos.: 34, 143, 184

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**OBJECTION OF CHICAGO BUILDING, L.L.C., BY ITS MANAGEMENT AGENT, MID-AMERICA ASSET MANAGEMENT, INC., THE LANDLORD FOR THE CHICAGO BUILDING, AND C. MICHELLE PANOVICH OF MID-AMERICA ASSET MANAGEMENT, INC., AS COURT APPOINTED RECEIVER FOR LINCOLN MALL, TO THE STALKING HORSE BIDDER'S ADEQUATE ASSURANCE OF FUTURE PERFORMANCE**

Chicago Building, L.L.C., an Illinois limited liability company, by and through its management agent, Mid-America Asset Management, Inc., an Illinois corporation, the landlord for the property commonly known as The Chicago Building, located at 7 West Madison Street, Chicago, Illinois (identified in these proceedings as store number 435) ("Landlord") and C. Michelle Panovich of Mid-America Asset Management, Inc., as court appointed Receiver for the property commonly known as Lincoln Mall located at 208 Lincoln Mall Drive in Matteson, Illinois, (identified in these proceedings as store number 137) ("Receiver"), hereby objects to the *Stalking Horse Bidder's Adequate Assurance of Future Performance*, and in support thereof states as follows:

**I. PRELIMINARY STATEMENT**

The Debtors proposed sale of assets to the New Ashley Stewart, LLC as the Stalking Horse Bidder ("New Ashley") includes the potential assumption and assignment of Real Property Leases to New Ashley. If successful, any purchaser should only be allowed to proceed if Landlord and Receiver are provided the requisite adequate assurance of future performance under the respective leases. To

date, New Ashley has not provided the requested additional information to allow Landlord and Receiver to determine if there is adequate assurance of future performance under the respective leases.

## II. BACKGROUND FACTS

1. Urban Brands, Inc., and its affiliated co-debtors (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. The Receiver is responsible for and in control of the Debtors’ commercial retail space at a location commonly known as Lincoln Mall located at 208 Lincoln Mall Drive, Space 249, in Matteson, Illinois pursuant to that certain lease dated on or about July 22, 1996, as subsequently amended. The Debtors lease commercial retail space from Landlord at a location commonly known as The Chicago Building located at 7 West Madison Street in Chicago, Illinois, 60602 pursuant to that certain lease and guaranty of lease dated on or about December 29, 2006. Collectively, the commercial spaces referenced above shall be referred to as Premises and the leases shall hereinafter be referred to as the “Leases.”

3. The Leases are “lease[s] 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 their *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 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)* (“Motion”)<sup>1</sup>, seeking to approve New Ashley Stewart, LLC’s proposed Asset Purchase Agreement, setting procedures for disseminating the adequate assurance information, and various other related relief.

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* (the “Procedures Order”), providing among other things, the deadline to object to the sale procedures and the Adequate Assurance Information of New Ashley is October 21, 2010.

6. Pursuant to the Procedures Order, and in connection with the proposed sale and potential assumption and assignment of leases, on October 12, 2010, New Ashley filed its *Adequate Assurance Information as Required by Bidding Procedures Order* (Docket Number 184) (“Adequate Assurance Information”).

### **III. OBJECTION**

7. Landlord and Receiver object to the inadequate and incomplete Adequate Assurance Information provided by New Ashley.

8. The only financial information provided in the Adequate Assurance Information package is that: (i) the Debtors, not New Ashley, will have a letter of credit facility in place and will

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<sup>1</sup> All capitalized terms not specifically defined herein shall have the meaning ascribed to them in the Motion.

then add an asset-based lending facility after the sale closing; (ii) that GB Merchant Partners, LLC (“GBMP”), New Ashley’s parent company, will fund New Ashley’s balance sheet on an incremental basis (with no specifics as to the timing or increments), with \$10,000,000.00 dollars; (iii) that GBMP is “prepared to fund 100%” of the capital requirements of the business on an ongoing basis; (iv) that the 1903 Equity Fund, L.P. (“1903 Fund”) is guaranteeing New Ashley’s purchase payment to the Debtors. Despite request, Landlord and Receiver have been unable to obtain additional information from New Ashley.

9. This information is severely lacking in several regards. There is no information regarding the specifics of the letter of credit and the asset-based lending facility and there are no specifics as to how and when the \$10,000,000.00 will be funded. Since GBMP has not offered to guarantee the obligations of New Ashley, its vague statement that it is prepared to fund 100% of the capital requirements of the business is meaningless. The statement that the 1903 Fund is guaranteeing the obligations of New Ashley to the Debtors, is completely irrelevant to Landlord’s and Receiver’s assurance of New Ashley’s performance on a going forward basis.

10. The only item of any possible substance that Landlord and Receiver can extract from the Adequate Assurance Information, is that New Ashley will be funded (at some unknown incremental time), with \$10,000,000.00. Considering that New Ashley pledges to “keep, renegotiate, and assume the vast majority of the Debtors’ current real estate leases,” this sum equates to approximately \$100,000.00 per store. This is not enough capital to guarantee the future performance of New Ashley.

11. On October 15, 2010, in accordance with the Procedures Order and the Adequate Assurance Information, Landlord and Receiver demanded additional information, including, but not limited to, the following:

- (a) A financial statement, profit and loss statement or any other financial documents available for New Ashley;

- (b) A financial statement, profit and loss statement or any other financial documents available for GBMP and 1903 Fund;
- (c) Financial information pertaining to the proposed funding agreement between GBMP, the 1903 Fund, and New Ashley;
- (d) Financial information pertaining to the funding of the particular operations at The Chicago Building and Lincoln Mall locations specifically;
- (e) Financial information pertaining to GBMP and the proposed asset-based lending facility which is intended to be put in place after any closing;
- (f) Cash flow projections for New Ashley, New Ashley's most recent business plan, all cash flow projections and any financial projections for The Chicago Building and Lincoln Mall locations; and
- (g) Proposals for letter of credit, security deposit, a guaranty by the GBMP and/or the 1903 Fund, or other methods of additional security.

12. Despite the Adequate Assurance Information package statement that more information would be provided upon request, to date Landlord and Receiver have not received any additional documentation or financial information.<sup>2</sup>

#### IV. ARGUMENT

##### A. **Landlord is entitled to heightened adequate assurance under Section 365(b)(3).**

13. 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 lease 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) includes the following:

- a) 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);
- b) that any percentage rent due under the lease will not decline substantially. *See* 11 U.S.C. § 365(b)(3)(B);
- c) 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

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<sup>2</sup> Counsel for Landlord and Receiver, received a voicemail message from Scott Strasser, a partner of GBMP and returned that call. However, as of this date Mr. Strasser has not called or provided any documentation or information.

exclusivity provision, and will not breach 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

- d) 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).

14. 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. 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. Matter of Haute Cuisine, Inc., 58 B.R. at 394.

15. For the reasons set forth above, Landlord and Receiver object to any attempt to approve a purchaser of the Leases at the proposed Sale Hearing. Until sufficient information of adequate assurance of future performance is provided to Landlord and Receiver, they reserve all rights under Section 365 to object to the proposed assignee and the sufficiency of the adequate assurance information provided.

16. In order to satisfy the adequate assurance of future performance burden as discussed above, and assuming that the Debtors do sell these stores as a going concern to continue to be operated as an Ashley Stewart (in the case of this Landlord and Receiver), the Debtors and the proposed assignee must provide Landlord and Receiver the following minimum information:

- (i) the specific name of the proposed bidder and the proposed tenant that will act as the assignee;
- (ii) audited financial statements and annual reports for the past three (3) years, including all supplements or amendments thereto;
- (iii) 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 proformas prepared in contemplation of purchasing the Leases;

- (iv) a guarantee from the GBMP, the parent company, analogous to the current parent company guaranty in place under the Leases or in the event that there is no guarantee in place that GBMP enter into a guarantee of the Leases; and
- (v) all of the specific information as requested on Landlord's and Receiver's October 15, 2010 request as described in paragraph 12 above.

17. Without the above information and a guarantee of the performance of New Ashley, Landlord and Receiver cannot meaningfully assess the bona fides of any proposed assignee. Landlord and Receiver reserve the right to request further information that it deems necessary to make an informed decision as to the ability of a potential assignee to satisfy the requirements of Section 365.

**V. OBJECTION TO ASSUMPTION AND ASSIGNMENT TO BUYER DESIGNEE**

18. Section 2.5 of New Ashley's Asset Purchase Agreement provides that the Buyer can select a "Buyer Designee" for each particular lease to be assumed and assigned to.

19. Under the definition of Buyer Designee, the Asset Purchase Agreement states that it can be any Affiliate of the Buyer, or in the case of a Real Property Lease, such Buyer Designee can be a non-Affiliate of the Buyer.

20. This provision allows the Buyer to direct the Debtors to assume and assign any Real Property Lease to any entity or person whatsoever during the 120 day period for exercise of designation rights, effectively circumventing the bidding, auction, sale, cure objection, and sale objection procedures set forth by this Court and the restrictions of the Bankruptcy Code.

21. Landlord and Receiver hereby object to the assumption and assignment of the Leases to any designee at New Ashley's option.

22. Landlord and Receiver also reserve the right to object to the assumption and assignment of Leases to any entity other than New Ashley and to raise such objections at the hearing to approve the sale.

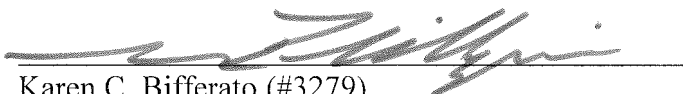
23. Should New Ashley be successful in its bid to purchase the assets of the Debtors and it does not then intend to operate the Debtors' business as a going concern or should intend to change the current use of the Premises, Landlord and Receiver object to any assumption and assignment of the Leases to the extent the Debtors fail to provide information that would satisfy its burden of proof under section 365 (b) (3) (C) and (D.).

24. For the reasons set forth above, Landlord and Receiver have a right to adequate assurances of future performance of any potential designee/assignee.

WHEREFORE, Chicago Building, L.L.C., by and through its management agent, Mid-America Asset Management, Inc., the landlord for the property commonly known as The Chicago Building, and C. Michelle Panovich of Mid-America Asset Management, Inc., as court appointed Receiver for the property commonly known as Lincoln Mall, respectfully object to New Ashley's Adequate Assurance of Future Performance Information, demand that the requisite information be provided, and object to the assumption and assignment of the leases until adequate assurance of information of any proposed assignee has been provided, and for such other and further relief as may be just and required under all of the circumstances.

Dated: October 21, 2010

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