

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

<i>In re</i>	:	Chapter 11
	:	
URBAN BRANDS, INC.,	:	Case Number 10-13005-KJC
<i>et. al.</i> ,	:	
	:	Jointly Administered
	:	Hearing Date: October 27, 2010 at 11:00 a.m.
Debtors	:	Objection Deadline: October 21, 2010 at 4:00 p.m.
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UNITED STATES TRUSTEE’S LIMITED OBJECTION TO THE DEBTORS’ MOTION FOR AN ORDER APPROVING SALE OF SUBSTANTIALLY ALL OF THE DEBTORS’ ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS; AND TO PROPOSED ASSUMPTION OF CERTAIN EXECUTORY CONTRACTS (D.E. , 34, 143 “Motion”)

In support of her Limited Objection (“Limited Objection”) to the Debtors’ Motion For an Order Approving the Sale of Substantially All of the Debtors’ Assets Free and Clear of All Liens, Claims, Encumbrances and Interests; and to Proposed Assumption of Certain Executory Contracts (D.E. , 34, 143 “Motion”)¹ Roberta A. DeAngelis, United States Trustee for Region 3 (“UST”), by and through her undersigned counsel, states as follows:

1. This Court has jurisdiction to hear the above-referenced Objection.
2. Pursuant to 28 U.S.C. § 586, the UST is charged with the administrative oversight of cases commenced pursuant to chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). This duty is part of the UST’s overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that UST has “public interest standing” under 11 U.S.C. § 307, which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990)

^{1/} Capitalized terms shall have the same meaning given to them in the Motion, unless otherwise noted.

(describing the UST as a “watchdog”).

3. Pursuant to 11 U.S.C. § 307, the UST has standing to be heard with regard to the above-referenced Objection.

4. This case was filed on September 21, 2010. The following day, the Debtors’ filed the Motion. Less than two weeks later, on October 4, 2010, the Court entered its order approving the proposed bidding and auction procedures (D.E. 143, “Bid Procedures Order”). The proposed Asset Purchase Agreement (“APA”) with Stalking Horse Bidder New Ashley Stewart, LLC was attached to the Motion.

5. Section 2.1(c) of the APA provides that all of the Debtors’ inventory is included in the sale. Section 4.1 of the APA provides that the sale is to close on the second business day after fulfillment of the conditions in Section 8.1 of the APA. The essential condition is approval by this Court. It is anticipated that the sale will close promptly upon Court approval, since the DIP Order expires on October 29, 2010.

7. The Motion seeks approval to extend the time period to assume or reject unexpired leases to a date 120 days after the anticipated Closing Date of October 29, 2010, approximately February 28, 2011.

8. According to Paragraph 8 of the First Day Affidavit of Michael A. Abate, the Debtors’ Vice President/Treasurer (D.E. 17, “First Day Affidavit”), the Debtors operated on the filing date approximately 210 locations in 26 States.

9. In the Motion, the Debtors’ seek approval of Store Closing Sales procedures. However, the Motion does not identify, among other things, the stores at which sales are proposed to be conducted or the times during which the sales will take place. Paragraph 36 of the Proposed

Sale Order (Exhibit E to the Motion) provides in pertinent part: “All proceeds and all inventory sold from the Non-Continuing Stores shall be the sole property of the Purchaser and constitute part of the Purchased Assets for all purposes, including under the Purchase Agreement, and shall be sold free and clear of any Interest which any person may assert against such Inventory or Proceeds.”

10. On September 29, 2010, the Debtors filed a Notice of Executory Contracts and Unexpired Leases Which May be Assumed and Assigned (D.E. 100). On September 30, 2010, the Debtors filed a *Corrected* Notice of Executory Contracts and Unexpired Leases Which May be Assumed and Assigned (D.E. 104, “Executory Contract Notice”). In the Executory Contract Notice, the Debtors include contracts with various professionals and seek to pay their pre-petition claims as cure amounts. Deloitte Consulting LLP is listed as a “Consultant” with a cure amount of \$22,500. Gardere Wynne Sewell LLP (“GWS”) is listed as “Legal services” with a cure amount of \$357,531.55.² Hughes, Hubbard & Reed LLP (“HHR”) is listed as “Legal services” with a cure amount of \$189,312.48. Facility Group, a trade vendor, is listed as “store operating supplies light bulbs” with a cure amount of \$62,880.

11. The United States Trustee requested the Debtor’s to provide each of these alleged executory contracts for review. The Debtors produced engagement agreements between the Debtors and each of the professionals (GWS, HHR and Deloitte, hereinafter collectively referred to as the “Professionals”). The engagement agreements are routine professional services retention contracts. The Debtors did not produce a contract with Facility Group. The Debtors, through counsel, advised

² GWS is listed as one of the Debtors’ Top 20 Creditors in the list appended to the petition (D.E. 1) in the amount of \$329,873. On October 13, 2010, a Declaration of Disinterestedness by Ronald M. Gaswirth on behalf of GWS was filed at D.E. 199 (“Gaswirth Declaration”). Paragraph 7 of the Gaswirth Declaration states that GWS holds a pre-petition claim of \$403,063. As of October 15, 2010, the Debtors have not filed their Schedules.

the U. S. Trustee that there is no contract with Facility Group.

12. The United States Trustee opposes the Debtors' request to approve Store Closing Procedures as premature. Additionally, since the sale will close before any determination has been made as to which stores may close, and since all inventory passes with the sale, no property of the estate will be involved in any Store Closing Sale. As a result, the Court has no jurisdiction to approve the as yet unknown Store Closing Sales. Denial of this request will not prejudice the purchaser from proceeding to conduct Store Closing Sales in compliance with applicable non-bankruptcy law.

13. The United States Trustee also opposes the Debtors' proposed assumption of executory contracts with Professionals on the grounds that such contracts may not be assumed. The U.S. Trustee also opposes the payment of the pre-petition claims of Facility Group as there is no executory contract to assume.

GROUND/BASIS FOR RELIEF

Approval of Store Closing Guidelines is premature

14. The Motion does not seek approval to conduct Store Closing Sales at specified locations at specified times. The Motion seeks to obtain advance approval for the purchaser to conduct Store Closing Sales at unidentified locations at unidentified times. Moreover, these store closing sales will not include estate property. As a result, parties in interest cannot adequately determine at this time whether or not to oppose such a request since, ultimately, the request may or may not affect their interests. The UST submits that the request would be more appropriate, if at all, when the parties are in a position to identify those locations at which they may seek to approval of Store Closing Sales.

The Court Lacks Jurisdiction to Approve Store Closing Sales

15. In *Boroff v. Continental Bank*, 766 F.2d 797 (1985) (*In re Boroff*), the Third Circuit found no subject matter jurisdiction over a debtor's tort claim that was not property of the estate, stating: "We hold therefore, that the debtor's tort claims were not property of the estate, and that the district court did not have jurisdiction to adjudicate them as being 'related to' the debtor's bankruptcy proceeding."

16. In *Torkelson v. Maggio*, 72 F.3d 1171 (*In re The Guild and Gallery Plus, Inc.*), the court held that it had no subject matter jurisdiction in a suit brought by a creditor against a bankruptcy trustee where the underlying claims did not involve property of the estate. The court held that where the estate has no interest, financial or otherwise, in the outcome of the dispute that the matter was not a core proceeding. Applying the test set forth in *In re Pacor, Inc.*, 743, F.2d 984 (3d Cir. 1984), the court stated: "If the action does not involve property of the estate, then not only is it a noncore proceeding, it is an unrelated matter completely beyond the bankruptcy court's subject-matter jurisdiction." 72 F.3d at 1181 (citations omitted).

17. Here, the Debtors are seeking to sell all their assets to the purchaser in a sale that will close on or about October 29, 2010. All title to the assets will pass at the close of sale. No relevant assets will remain property of the estate. The Motion seeks approval of Store Closing Guidelines to sell property that is not property of the estate at unknown times at unknown locations. The timing will permit the purchaser to conduct Store Closing Sales throughout the Christmas shopping season, even though the sale closes on October 29, 2010, and the purchaser will not be selling property of the estate. The estate will gain no benefit from these sales. Denying this part of the Motion will not prejudice the purchaser, who retains lease designation rights through the agreed upon Designation

Date. The only effect upon denial is that the purchaser will be required to comply with applicable non-bankruptcy law in conducting any Store Closing Sales. Given that the estate will have no interest in the assets sold after the sale closes, it would be inappropriate for this court to approve these procedures and detrimental to the public interest. It is not the purpose of the Bankruptcy Code to insulate non-debtors from compliance with local consumer protection laws regulating going out of business sales.

Professional Engagements May Not be Assumed

18. The Debtor admits there is no contract with Facility Group, the light bulb supplier. Executory contracts are contracts in which some performance remains due on both sides other than payment. Where the debtor's only duties under the contract are to pay money, the contract is not executory. See, e.g. this Court's opinion in *In re Waste Systems International, Inc.*, 280 B.R.824 (Bankr. Del. 2002.), a contract is not executory if the only remaining obligation is the payment of money by the debtor. A proposal to assume what appears to be nothing more than ongoing purchases from a vendor is not a relationship subject to assumption and assignment, but is a way to improperly circumvent the distributive provisions of the Bankruptcy Code.

19. A debtor may not employ Section 365 as a method to circumvent the requirement that a professional be retained pursuant to Section 327. This Court recently held, in *In re Essential Therapeutics*, 295 B.R. 203 (Bankr. Del. 2003) that Section 1107(b) does not permit the retention of professionals not otherwise qualified to serve: "[S]ections 327(a) and 101(14)(D) preclude the retention by the Debtors, notwithstanding section 1107(b)." 295 B.R. at 207.

20. Here, the Debtor seeks to assume the Professional engagements as executory contracts. In doing so, the Debtors seek to retain professionals without compliance with Section 327

of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 2014. The Debtors' conduct is an improper attempt to circumvent the provisions that relate to the retention of professionals by a debtor-in-possession. Section 365 cannot be used to circumvent the requirements of the Code to retain professionals. See *In re Keren Limited Partnership*, 189 F. 3d 86 (Cir. 2 1999) ("It is plain from the Code that compensation for professional services will only be an administrative expense when approved by the court. An executory contract cannot be assumed without court approval...and Section 327(a) contemplates that professionals may only be employed subject to court approval" 189 F.3d at 88).; *In re Office Products of America*, 136 B.R. 675 (Bankr. W.D. Tex. 1992) ("...professional persons seeking compensation under §330 must first meet the requirements prescribed by §327, governing the hiring of professional persons." 136 B.R. at 680); *In re Financial News Network*, 134 B.R. 732 (Bankr. S.D.N.Y. 1991) ("Clearly, the Code's drafters intended that payment of the debtor's professionals would be governed solely by §327 and its related compensation provisions...Given the express language of the Code and the case law, Congress could not have intended for retained professionals to look to §365 as a vehicle for payment of prepetition fees." 134 B.R. at 734-735).

21. It is a principle of statutory construction that general provisions in a statute may not be employed to obviate more specific statutory sections. See, for example, *United States v. Fiorillo*, 186 F.3d 1136 (9th Cir. 1999). This is clearly the case with respect to the retention of professionals under the Bankruptcy Code as described at length above.

22. Here, the attempt to cloak Professional engagement agreements as executory contracts to be assumed and cured would act to sanction payment of substantial pre-petition unsecured claims to the prejudice of all other unsecured claimants, as well as circumvent the provisions of Section

327.³

23. The UST leaves the moving party to its burden and the UST reserves and any all rights, remedies and obligations to, *inter alia*, complement, supplement, augment, alter and/or modify this Objection and to conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent upon further factual discovery.

WHEREFORE the UST requests that this Court issue an order denying the Motion as written and/or granting such other relief as this Court deems appropriate, fair and just.

Respectfully submitted,

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^{3/} Were professional retention applications submitted under Section 327 for any of the Professionals, the existence of their pre-petition claims against the estate would preclude their retention pursuant to *United States Trustee v. Price Waterhouse* 19 F.3d 138 (Cir. 3 1994). The proposed assumption would allow not only employment of the Professionals but also permit payment of their claims, precisely the opposite of the result dictated by the Bankruptcy Code. The inappropriate payments proposed here exceed \$500,000 that could otherwise be made available for distribution to unsecured creditors.