

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

In re:

URBAN BRANDS, INC., *et al.*,

Debtors.

Chapter 11

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

**Objections Due: December 10, 2010**  
**Hearing Date: December 17, 2010 at 10:00 a.m.**

**MOTION OF GWENDOLYN SCOTT-ADAMS FOR RELIEF FROM STAY UNDER  
BANKRUPTCY CODE SECTION 362 (d), BANKRUPTCY RULE 4001 AND LOCAL  
BANKRUPTCY RULE 4001-1**

Gwendolyn Scott-Adams (“Ms. Scott-Adams”), by and through her undersigned attorneys, files this Motion for Relief From Stay Under Bankruptcy Code Section 362(d), Bankruptcy Rule 4001 and Local Bankruptcy Rule 4001-1 (the “Motion”).

**BACKGROUND**

**A. The Bankruptcy Cases**

1. On September 21, 2010 (the “Petition Date”), the above-captioned debtors and debtors-in-possession (each a “Debtor” and collectively, the “Debtors”) filed a petition for relief under chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Delaware (the “Court”).

2. The Debtors continue to operate their businesses and manage their financial affairs as debtors-in-possession pursuant to Bankruptcy Code §§ 1107(a) and 1108.

**B. The FLSA and Civil Rights Lawsuit**

3. On January 31, 2007, Ms. Scott-Adams filed a civil action complaint in the United States District Court for the Southern District of New York (the “New York District Court”), Case No. 07-Civ. 746 (DCF) (the “FLSA and Civil Rights Litigation”) and on October 15, 2009, filed an amended complaint. Jeanfreau Declaration, Ex. A.

4. In the amended complaint, Ms. Scott-Adams alleges, among other things, that defendant (i) failed to pay plaintiff premium overtime wages in violation of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 et seq., the New York Labor Law, Article 6, § 190 et seq. and Article 19, §650 et seq. and NYCRR §14202.2 , (ii) intentionally discriminated against plaintiff in violation of the Civil Rights Act of 1866, 42 U.S.C. §1981 by firing plaintiff because of her race and national origin and (ii) discriminated against plaintiff on the basis of her disability in violation of the New York State Human Rights Law, N.Y. Executive Law §§ 296 (a) and (e) and the New York City Human Rights Law, NYC Admin. Code §§8-107(1) and (7) by refusing to grant plaintiff’s request for reasonable accommodation for her physical disabilities and firing her because of her requests for reasonable accommodation. Jeanfreau Decl. Ex. A at ¶1.

5. As of the Petition Date, the parties had completed discovery in the FLSA and Civil Rights Litigation and the New York District Court had set a summary judgment briefing schedule requiring completion of briefing on dispositive motions by November 30, 2010. See Jeanfreau Decl., Ex. B.

**JURISDICTION**

6. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue of these cases and

this Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicate for the relief sought by the Motion is Bankruptcy Code section 362(d).

### **RELIEF REQUESTED**

7. Ms. Scott-Adams requests that the Court lift the automatic stay for the limited purpose for allowing the FLSA and Civil Rights Litigation to proceed to judgment. She does not seek recovery against the Debtors, but rather seeks to liquidate her claim so that it may be administered in the Debtors' bankruptcy cases.

### **BASIS FOR RELIEF**

8. Section 362(a) of the Bankruptcy Code defines the scope of the automatic stay. It provides, in pertinent part:

“[A] petition filed under ... this title ... operates as a stay ... of –

- (1) The commencement or continuation ... of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . .
- (3) Any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.

Bankruptcy Code section 362(d) provides, in pertinent part, as follows:

- (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay . . .
  - (1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

11 U.S.C. § 362(d)(1).

9. The bankruptcy court “shall” lift the automatic stay for “cause.” 11 U.S.C. § 362(d)(1). If a creditor seeking relief from the automatic stay makes a *prima facie* case of

“cause” for lifting the stay, the burden shifts to the debtor pursuant to Bankruptcy Code section 362(g). *See, e.g., In re 234-6 West 22<sup>nd</sup> St. Corp.*, 214 B.R. 751, 756 (Bankr. S.D.N.Y. 1997) (noting that debtor bears not only burden of going forward with evidence but also burden of ultimate persuasion).

10. The Bankruptcy Code does not define “cause.” Instead, whether “cause” exists to lift the automatic should be determined on a case-by-case basis. *See Izzarelli v. Rexene Prod. Co. (In re Rexene Prod. Co.)*, 141 B.R. 574, 576 (Bankr. D. Del. 1992); *see also Sonnax Indus. v. Tri Component Prod. Corp. (In re Sonnax Indus.)*, 907 F.2d 1280, 1286 (2nd Cir. 1990) (“the facts of each request will be determine whether relief is appropriate under the circumstances.”) Courts determine what constitutes “cause” based on the totality of the circumstances in each particular case. *Baldino v. Wilson (In re Wilson)*, 116 F.3d 87, 90 (3d Cir. 1997).

11. Under the *Rexene* balancing test, frequently cited in this district, courts examine three factors to decide whether to lift the automatic stay, including:

- (a) whether prejudice will be caused to the estate or the debtor;
- (b) whether hardship to the movant from continuing the stay outweighs any hardship to the debtor; and
- (c) whether the movant has a reasonable probability of prevailing on the merits of the suit.

*Id.*

12. Allowing Ms. Scott-Adams to proceed with the FLSA and Civil Rights Litigation will not prejudice the Debtors, given Ms. Scott-Adams’ commitment to refrain from collecting on any judgment other than through the current chapter 11 cases. *See Exhibit A, Affidavit of Gwendolyn Scott-Adams*, at ¶1. Moreover, if the issues raised by Ms. Scott-Adams in the FLSA and Civil Rights Litigation are not resolved by the New York District Court, they will need to be

resolved either by this Court or by the Delaware District Court.<sup>1</sup> Thus, if this Court does not modify the stay, either it or the Delaware District Court will have to expend judicial resources determining issues which will be more easily and quickly determined by the New York District Court, which is already well acquainted with the relevant facts and legal issues. *See In re Larkham*, 31 B.R. 273, 277 (Bankr. D. Vt. 1983) (modifying stay to permit continued prosecution of employment discrimination claim in state court).

13. If the Court denies the Motion and requires Ms. Scott-Adams to prosecute her claims in the bankruptcy cases (or in the Delaware District Court), she will suffer delay because the claims resolution process in these cases may not commence for many months - the proposed bar date will not occur until late January 2011, and the claims reconciliation process may not be complete for quite some time after the bar date. In contrast, the New York District Court is prepared to entertain potentially dispositive motions within the next few months or weeks. *See Jeanfreau Decl. Ex. B* (setting forth proposed briefing schedule). In similar circumstances, courts have frequently modified the automatic stay to allow prepetition litigations to continue where discovery has already taken place or is well underway. *See Packerland Packing Co. v. Giffith Brokerage Co. (In re Kemble)*, 776 F.2d 802, 807 (9th Cir. 1985) (affirming decision to modify stay where trial was pending); *In re Fischer*, 202 B.R. 341, 345 (Bankr. E.D.N.Y. 1996) (granting stay relief to allow civil RICO claims to proceed where discovery was near completion); *In re Rexene Prod. Co.*, 141 B.R. at 578 (Bankr. D. Del. 1992) (granting relief from stay where document discovery had been completed and only a few depositions remained).

14. In each of the cases cited above, the court recognized that the interests of judicial

---

<sup>1</sup> Ms. Scott-Adams has demanded a jury trial in the FLSA and Civil Rights Litigation, which cannot be conducted by the bankruptcy court absent the consent of all parties. 11 U.S.C. § 157(e). The presence of a jury demand has been held to constitute grounds for withdrawal of the reference. *In re Orion Pictures Corp.* 4. F.3d 1095, 1101-1102 (2d Cir. 1993). Judicial efficiency will be enhanced by modifying the automatic stay to permit the FLSA and Civil Rights Litigation to proceed in the New York District Court, rather than the Delaware District Court.

efficiency would not be served by requiring existing litigations to be restarted in the bankruptcy courts, possibly requiring repetitive discovery and motion practice and certainly resulting in delay for the plaintiff. This case is no different. Requiring Ms. Scott-Adams to begin her case again in this court, when discovery in the New York District Court is already complete and the New York District Court is prepared to entertain dispositive motions, would delay the resolution of her claims, would result in additional costs for her and for the estate and would not be an efficient use of judicial resources.

15. In addition, refusal to modify the stay will deny Ms. Scott-Adams the ability to litigate her claim in her chosen forum. Unlike the Debtor, which is a national corporation able to appear in any court in the country with equal facility, Ms. Scott-Adams is a resident of New York who cannot easily travel out of state for hearings. *See Exhibit A* at 8 (describing medical issues and financial considerations that could make out of state travel difficult for Ms. Scott-Adams). Accordingly, the hardship to Ms. Scott-Adams which will result if the stay is maintained far outweighs the hardship, if any, to the Debtors if the stay is lifted.

16. Courts have held that the required showing for the third *Rexene* factor - probability of success on the merits - is “very slight.” *Rexene*, 141 B.R. at 578. The movant meets that burden so long as it has stated a reasonable claim in the underlying litigation. *Id.* at 578 (“only strong defenses to state court proceedings can prevent a bankruptcy court from granting relief from the stay where ... the decision making process should be relegated to bodies other than this court” quoting *Fonseca v. Philadelphia Housing Authority (In re Fonseca)*, 110 B.R. 191, 196 (Bankr. E.D. Pa.)). Ms. Scott-Adams has easily met this standard.

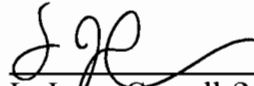
17. Finally, policy concerns mandate modification of the automatic stay to allow the FLSA and Civil Rights Litigation to continue. In enacting the Bankruptcy Code, Congress noted

that while the stay had broad application “it will often be more appropriate to permit proceedings to continue in their place of origin, where no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from many duties that may be handled elsewhere.” *Matter of Holtkamp*, 669 F.2d. 505, 508 (7th Cir. 1982) (citing S. Rep. No. 989, 95th Congr. 2nd. Sess. 50 (*reprinted in* 1978 U.S. Code Congr. & Ad. News 5787, 5836).

WHEREFORE, Ms. Scott-Adams requests the entry of an order substantially in the form attached as Exhibit B, granting (i) relief from the automatic stay to allow for the continuation and resolution of the FLSA and Civil Rights Litigation and (ii) such other relief as is deemed just and proper.

Dated: November 30, 2010  
Wilmington, Delaware

**FOX ROTHSCHILD LLP**



L. Jason Cornell (No. 3821)  
919 N. Market St., Suite 1300  
P.O. Box 2323  
Wilmington, DE 19899  
Telephone: (302) 654-7444

- and -

COVINGTON & BURLING LLP  
Charles H. Jeanfreau (*pro hac vice  
admission pending*)  
The New York Times Building  
620 Eighth Avenue  
New York, NY 10018-1405  
(212) 841-1000  
cjeanfreau@cov.com

*Attorneys for the Movant*