

**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

Hearing Date: January 13, 2011 at 10:00 am

Related Docket No. 104, 219

**AMENDED OBJECTION OF HARTZ MOUNTAIN METROPOLITAN TO  
DEBTORS' PROPOSED CURE AMOUNT [D.I. #104]**

Hartz Mountain Metropolitan (hereinafter "Hartz" or "Landlord") brings this amended<sup>1</sup> objection ("Amended Objection") to the Cure Amount set forth in Exhibit 1 (Schedule of Executory Contract Cure Amounts) 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 the Sale of Substantially All of the Debtors' Assets and the Proposed Cure Amounts With Respect Thereto" (hereinafter, the "Debtors' Cure Notice") (Docket No. 104), and in support hereof asserts as follows:

1. Hartz is the owner of the property located at 100 Metro Way, Secaucus, New Jersey 07094 (the "Subject Property"). By lease dated August 1, 1995, Hartz, as Landlord, leased certain warehouse and office space at the Subject Property to Ashley Retail Stores, Inc. ("Ashley"), as tenant (the "Demised Premises"). Said Lease subsequently was amended by Lease Modification Agreement dated September 12, 1995, Second Lease Modification Agreement dated May 15, 1997, Third Lease Modification Agreement dated March 10, 1999, Fourth Lease Modification Agreement dated October 26, 2000, and Fifth Lease Modification Agreement dated June 29, 2005 (collectively referred to herein as the "Lease"). By means of an

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<sup>1</sup> This Amended Objection is being filed to reflect that certain charges from the original objection have since been paid and other additional charges have accrued and remain unpaid.

Assignment and Assumption Agreement dated May 10, 1996, Ashley assigned its entire interest in the Lease, together with its entire leasehold estate thereunder, to ASNJ 10, Inc. (“ASNJ” or “Tenant”). The Permitted Uses of the Demised Premises, as defined in the Lease, are “warehousing and distribution of non-hazardous materials and offices.” ASNJ has continued to operate in the Demised Premises after filing for bankruptcy under Chapter 11 of the Bankruptcy Code.

2. Exhibit 1 to the Debtors’ Cure Notice sets forth the Debtors’ proposed cure amount for the Lease (the “Proposed Cure Amount”). See Exhibit 1, Schedule 1.1(d), Page 2 of 5, Store No. 6420, “Corporate Office.” The Proposed Cure Amount is incorrect in that it fails to include many of the charges currently due and owing pursuant to the Lease. The Proposed Cure Amount of \$95,985.68 is far below the amounts due and owing as reflected in Hartz’ books and records, which indicate that there is presently due and owing from ASNJ an amount no less than **two hundred forty-eight thousand, three hundred forty-one dollars and ninety-seven cents (\$248,341.97)** in Rent (as that term is defined in the Lease). A Statement of Unpaid Charges including back-up documentation for each such charge is attached hereto as Exhibit A.

3. Pursuant to the Third Lease Modification Agreement, dated March 10, 1999, ASNJ took over the entire building and thus is obligated to pay, *inter alia*, 100% of the building’s Operating Expenses and Real Estate Taxes in addition to Fixed Rent and other Additional Charges (as defined in the Lease, and collectively referred to in the Lease as “Rent”). Landlord reserves the right to recover any and all such Rent as part of the Cure Amount and requests that any order entered by the Court approving an assignment and assumption of the Lease specify that all such charges shall be paid either by the assignee or the Debtor(s) as and

when due under the Lease, even if they were incurred in the period of time that predated such assignment and assumption.

4. The Lease further obligates ASNJ to pay interest to Landlord in the event of default in the payment of Rent or any other damages payable under the Lease. Landlord submits that it is entitled to recover all such interest charges as an element of the Debtors' cure obligations. See In re Skylark Travel, Inc., 120 B.R. 352, 355 (Bankr. S.D.N.Y. 1990); In re Cukierman, 265 F.3d 846, 853 (9<sup>th</sup> Cir. 2001).

5. The Lease also requires ASNJ to indemnify Landlord in certain specified circumstances, such as, by way of example but without limitation, against any accident, injury or damage whatever (unless caused solely by Landlord's or Landlord's employees' or agents' negligence) occurring in the Demised Premises. Any order entered by the Court with respect to the Debtors' cure obligations should specify that the Debtors and any assignee of the Lease shall assume and remain responsible for all such indemnification obligations pursuant to the Lease, or require the Debtors to provide adequate assurance, by insurance or otherwise, that they are able to satisfy all such indemnification obligations for any claims that predate the assignment and assumption of the Lease.

6. Finally, the Lease provides for Landlord to recover its reasonable attorneys' fees and expenses in connection with enforcing or endeavoring to enforce any of its rights against the Tenant or any of the Tenant's obligations under the Lease. To the extent that Landlord incurs any such attorneys' fees and expenses, it reserves the right to seek to recover such charges from the Debtors, and any order with respect to cure obligations should specifically reference and preserve that right. See In re Crown Books Corp., 269 B.R. 12, 15-16 (Bankr. D.Del. 2001);

Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co., 549 U.S. 443, 127 S.Ct. 1199, 1203-1204, 167 L.Ed.2d 178 (2007).

7. Section 365 of Title 11 of the Bankruptcy Code provides that the trustee or debtor may assume or reject any executory contract or unexpired lease of the debtor. 11 U.S.C. §365(a).

8. Prior to the Court's approval of the assumption of a lease, the Court must require the Debtor and/or its assignee to pay the correct pre-petition and post-petition amounts due. See 11 U.S.C. §365(b)(1)(A) and (B).

9. It is true that generally the Bankruptcy Code authorizes a debtor, with the Court's approval, to assume or assign executory contracts or unexpired leases. However, if the debtor has defaulted under the lease, it may not be assumed until all defaults are cured, the debtor compensates the non-debtor party for any actual pecuniary loss resulting from the default and provides the non-debtor party adequate assurance of future performance under such executory contract or lease. See 11 U.S.C. §365(b).

10. Because (a) the Debtors' Proposed Cure Amount is not correct in that it does not include all sums presently due and owing under the Lease, which sums presently total \$248,341.97, and (b) there are a multitude of charges and expenses that may become due and owing under the Lease, including, without limitation, Operating Expenses, Real Estate Taxes, indemnification obligations, interest, attorneys' fees and expenses, and other such charges, but such charges cannot yet be quantified and have not yet been billed, Landlord has submitted this Amended Objection to the Debtors' Proposed Cure Amount in order to fully preserve all of its rights to have such amounts included within the eventual Cure Amount under the Lease and to

unilaterally amend the Cure Amount in order that all such charges and expenses arising pursuant to or in accordance with obligations set forth in the Lease be included therein.

WHEREFORE, Hartz Mountain Metropolitan respectfully requests that the Proposed Cure Amount under its Lease with ASNJ 10, Inc. be revised in accordance with the foregoing, any order regarding cure amounts contain the above-discussed provisions; that any order granting assumption and/or assignment of the Lease be conditioned upon payment in full of the amounts asserted herein and cure of all other outstanding obligations, and for such other and further relief as deemed just and proper.

Dated: January 6, 2011  
Wilmington, DE

**McCARTER & ENGLISH, LLP**

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