

Declaration of Michael A. Abate in Support of First Day Motions (the “Abate Declaration”), and respectfully state as follows:

JURISDICTION

1. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

BACKGROUND

A. Introduction

2. On September 21, 2010 (the “Petition Date”), each of the Debtors filed a voluntary petition for relief (collectively, the “Chapter 11 Cases”) under chapter 11 of the Bankruptcy Code.

3. The Debtors continue to operate their business and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner or official committee of unsecured creditors has been appointed in these Chapter 11 Cases.

B. Overview of the Debtors’ Business

4. The Debtors are a leading specialty retailer of fashion-forward and inspirational apparel for plus sized urban women under the brand name of Ashley Stewart. Urban Brands, Inc., a Delaware corporation, is the direct or indirect parent company of all of the Debtors. Until 2009, the Debtors also operated stores under the brand name of Marianne.

5. The Ashley Stewart concept was founded in 1991 and has grown to become a nationally-recognized brand. According to an October 2009 industry survey by the NPD Group, a nationally recognized firm specializing in apparel research, plus sized African American

women ranked Ashley Stewart third of all retailers, behind only Wal-Mart and Lane Bryant, as their favorite place to shop.

6. Ashley Stewart operates broadly in the women's apparel market, which the NPD Group estimates is approximately \$107 billion. Within women's fashion, Ashley Stewart focuses on the plus sized market, which is estimated to be over \$18 billion and growing. Within this subset of the market, Ashley Stewart focuses on the underserved urban market, particularly the African American and Hispanic consumer, two of the fastest growing segments of the U.S. population. Ashley Stewart is one of the few concepts focusing directly on these particular niche markets.

7. As of the Petition Date, the Debtors operate approximately 210 stores in 26 states with approximately 2,100 employees, the majority of which are minority women. The store base is reinforced by a strong online presence through AshleyStewart.com, providing both a marketing tool as well as an additional outlet for Ashley Stewart customers.

8. Despite the strength of their brand names and success at individual store locations, the Debtors began suffering from cash flow/liquidity problems in 2007, especially in their Marianne division. The Debtors' financial difficulties continued in 2008 with the slow down in the overall economy. As part of a strategic initiative to strengthen their balance sheet and improve their liquidity by focusing exclusively on the Ashley Stewart brand, in February 2008, the Debtors began divesting themselves of all of their Marianne stores. The proceeds from the Marianne divestitures, coupled with the reduction of the working capital investment needed to support the Marianne brand name, provided improvement in operating results and cash flow during fiscal year 2009 (ending January 30, 2010). Unfortunately, although the Debtors significantly reduced their net losses from approximately \$44.3 million in 2008 to \$28.6 million

in 2009, the business continued to operate at a loss. Additionally, from fiscal year 2008 to fiscal year 2009, the Debtors net sales decreased from \$179.6 million to \$174.6 million.

C. The Debtors' Capital and Debt Structure

9. The Debtors are borrowers under a Loan and Security Agreement dated as of September 3, 2004 (the "Prepetition Financing Agreement"), with Bank of America, N.A. (successor by merger to LaSalle Retail Finance, a Division of LaSalle Business Credit, LLC, as agent for LaSalle Bank Midwest National Association f/k/a Standard Federal Bank National Association) (the "Lender"). The Prepetition Financing Agreement was an asset-based facility with a maturity date of September 10, 2010. The availability for borrowings and letter of credit obligations under the Prepetition Financing Agreement was capped at \$6.5 million and is further limited to an amount supported by a borrowing base consisting of certain cash, certain accounts receivable and eligible inventory. As of the Petition Date, the Debtors owe only approximately \$2,251,651 plus interest on the facility with an additional \$2,366,324 in outstanding letters of credit (all of which are fully collateralized by the Debtors' cash).

10. In April 2004, the Debtors entered into a Note Purchase Agreement with a group of institutional investors led by Trimaran Fund II, L.L.C. ("Trimaran"), the Debtors' largest equity holder, and certain officers, employees and consultants of the Debtors. From August 2007 to November 2009, the Debtors entered into five additional note purchase agreements to raise additional capital. In total, the Debtors sold \$58,500,000 in senior unsecured notes (the "Notes"). As of the Petition Date, the Debtors owe approximately \$81.3 million on account outstanding principle and interest on the Notes.

D. Objectives of Chapter 11 Filing

11. In April 2010, the Debtors engaged Oppenheimer & Co. Inc. ("Oppenheimer") to assist the Debtors in searching for additional equity and/or mezzanine financing. Following exhaustive efforts to locate additional capital, the Debtors determined that there was insufficient interest in the market for this additional financing and, as a result, the Debtors' best alternative to preserve the Debtors' business as a going concern and maximize the value of their assets was to pursue a sale of all or substantially all the Debtors' assets.

12. Accordingly, in August 2010, Oppenheimer expanded its marketing efforts to solicit interest from prospective purchasers of the Debtors and their assets as a going-concern. As a result of this process, New Ashley Stewart, LLC ("New Ashley" or the "Stalking Horse Bidder") emerged as the party submitting the highest and best bid for the Debtors' assets. Accordingly, the Debtors, with the approval of their board of directors, engaged in active negotiations with New Ashley regarding a potential going concern transaction and, on September 8, 2010, the Debtors and New Ashley executed a non-binding letter of intent. Following the execution of the letter of intent, the Debtors and their advisors actively negotiated with New Ashley regarding the definitive terms and conditions of an asset purchase agreement. The Debtors expect that on or shortly after the Petition Date, they will execute an asset purchase agreement with New Ashley (the "New Ashley Purchase Agreement"), which the Debtors will seek Court approval of pursuant to section 363 of the Bankruptcy Code following a Court sanctioned auction process.

13. The Debtors believe that a going-concern sale of the Debtors' business presents the best opportunity to maximize recoveries for creditors and preserve thousands of jobs for the Debtors' employees. Accordingly, the Debtors expect to file a sale procedures motion on the

first day of these chapter 11 cases and continue their efforts to solicit bids from other potentially interested parties.

RELIEF REQUESTED

14. By this Motion, the Debtors seek authority, pursuant to sections 105(a) and 363 of the Bankruptcy Code, to pay prepetition shipping, storage and associated fees and expenses to third party shippers, haulers, common carriers, transporters, logistics providers and warehousemen (collectively, the “Common Carriers”) that the Debtors determine, in the exercise of their business judgment, are necessary or appropriate to obtain the release of goods and supplies (“Goods”) in the possession of such parties and to satisfy the liens, if any, in respect of amounts owed to such parties.

15. As of the Petition Date, the approximate value, at cost, of Goods ordered and either awaiting transit or in transit to the Debtors’ stores and distribution center is \$1.4 million. In contrast, the Debtors estimate that the total amount owing to all Common Carriers and the maximum amount required to obtain or deliver the Goods is approximately \$820,000.

16. The Debtors’ business operations and the success of the Chapter 11 Cases depend on the delivery of Goods in a timely manner. Thus, the Debtors believe that the relief requested is necessary to avoid immediate and irreparable harm.

BASIS FOR RELIEF

17. Section 9-310 of the Uniform Commercial Code grants to creditors holding possessory liens, such as common carriers and warehousemen, a priority in payment over consensual lien creditors. Thus, under the Bankruptcy Code, to the extent of the value of Goods in their possession, the Common Carriers are entitled to receive payment in full for these charges under virtually any scenario in connection with these Chapter 11 Cases. Consequently, payment of such charges and fees gives the Common Carriers no more than that to which they are already

entitled. On the other hand, absent payment of the amounts owed, the Common Carriers may retain goods having a value to the Debtors that equals or exceeds that amount.

18. If the Debtors do not pay the prepetition charges, the Common Carriers may refuse to ship Goods to the Debtors, severely disrupting the Debtors' business. Without the performance of services by the Common Carriers, the Debtors face the risk of a serious interruption in the flow of products to their stores.

19. The Debtors propose that any payments made pursuant to the Motion be subject to the following conditions:

- a. The Debtors, in their sole discretion, shall determine which parties, if any, are entitled to payment under this Motion; and
- b. Prior to making a payment to a party under this Motion, the Debtors may, in their absolute discretion, settle all or some of the prepetition claims of such party for less than their face amount without further notice or hearing.

20. The Debtors also request that all banks and other financial institutions on which checks to the Common Carriers are drawn be authorized and directed to receive, process, honor and pay any and all such checks, whether presented before or after the Petition Date, upon each such bank receiving notice of such authorization. In addition, the Debtors request authority to issue postpetition checks as necessary to replace any prepetition checks issued that may be dishonored.

21. In the ordinary course of their business, the Debtors employ the services of the Common Carriers to ship, transport, store and deliver goods to and from their distribution center and stores. For the majority of the merchandise shipments received by the Debtors, the merchandise vendor arranges Goods to be shipped to the Debtors, prepays related freight charges and includes those charges in the invoice presented to the Debtors for subsequent payment along with the cost of Goods shipped. In the remaining circumstances, however, the Debtors arrange

for the shipment of Goods and pay the related freight charges directly to the Common Carriers. Specifically, the Debtors employ two logistics providers, GIF Services Inc. and APL Logistics, for purposes of importing Goods from overseas to the continental United States. In addition to handling the transportation of Goods, these logistics providers are tasked with consolidating Goods when they arrive in the United States, classifying and declaring Goods pursuant to applicable United States law and providing related services. The Debtors also employ other logistics providers specifically for transporting and delivering Goods to the Debtors' store location in the Virgin Islands. Additionally, the Debtors primarily use Federal Express for transporting Goods from the Debtors' distribution center to the Debtors' stores. Lastly, the Debtors use the following logistics providers for warehousing and supplying Goods to stores and customers: Priority Fulfillment Services, which fulfills E-commerce orders from the Debtors' customers, and Diversified Distribution System, which fulfills supply orders to the stores.

22. Some of the Common Carriers have outstanding invoices for Goods delivered to the Debtors prior to the Petition Date or outstanding invoices related to the storage of such Goods prior to the Petition Date (collectively, the "Charges"). The Debtors believe that if they fail to pay these Charges, the Common Carriers may discontinue or delay services and withhold or prevent shipment and sale of essential Goods. The Debtors seek authority to pay outstanding prepetition Charges in an amount not to exceed \$820,000 in the aggregate.

23. The Debtors seek to pay the prepetition Charges for several reasons. First, if the prepetition Charges are not paid, the Common Carriers may refuse to perform additional services for the Debtors. In such event, the Debtors will incur additional expenses (such as premium shipping costs) to replace the Common Carriers.

24. Second, if shipments to and from the distribution center and the stores are not made promptly and regularly, the Debtors may risk having inadequate in-store inventory, which would frustrate the expectations of their customers and cause a loss of customer confidence. Such an outcome could be potentially devastating to the going-concern value of the Debtors.

25. Finally, any delays in payment of the Charges with respect to Goods that are in the possession of the Common Carriers as of the Petition Date will likely result in the assertion, under applicable state law, of possessory liens upon the Debtors' property in the possession of such parties. Thus, the Debtors will have no alternative but to pay the Charges in order to effect the release of any liens securing payment of such charges.

APPLICABLE AUTHORITY

E. Ample Authority Exists to Support Payment of the Charges

26. Courts generally acknowledge that it is appropriate to authorize the payment (or other special treatment) of prepetition obligations in appropriate circumstances. See, e.g., In re Wickes Holdings, LLC, Case No. 08-10212 (KJC) (Bankr. D. Del. Feb. 5, 2008); In re Tweeter Home Entm't Group, Inc., Case No. 07-10787 (PJW) (Bankr. D. Del. June 13, 2007); In re Pope & Talbot, Inc., Case No. 07-11738 (CSS) (Bankr. D. Del. Nov. 21, 2007); In re Hancock Fabrics, Inc., Case No. 07-10353 (BLS) (Bankr. D. Del. Mar. 22, 2007); In re Dura Auto. Sys., Inc., Case No. 06-11202 (KJC) (Bankr. D. Del. Nov. 20, 2006); In re J.L. French Auto. Castings, Inc., Case No. 06-10119 (MFW) (Bankr. D. Del. Mar. 6, 2006). In authorizing payments of certain prepetition obligations, courts rely on several legal theories rooted in sections 1107(a), 1108, 363(b) and 105(a) of the Bankruptcy Code.

27. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, debtors-in-possession are fiduciaries "holding the bankruptcy estate[s] and operating the business[es] for the benefit of [their] creditors and (if the value justifies) equity owners." In re CoServ, L.L.C., 273

B.R. 487, 497 (Bankr. N.D. Tex. 2002). Implicit in the fiduciary duties of any debtor-in-possession is the obligation to “protect and preserve the estate, including an operating business’s going-concern value.” Id. Some courts have noted there are instances in which a debtor can fulfill this fiduciary duty “only . . . by the preplan satisfaction of a prepetition claim.” Id. The CoServ court specifically noted the pre-plan satisfaction of prepetition claims would be a valid exercise of the debtor’s fiduciary duty when the payment “is the only means to effect a substantial enhancement of the estate.” Id.

28. Consistent with the debtor’s fiduciary duties, courts have also authorized payment of prepetition obligations under section 363(b)² of the Bankruptcy Code where a sound business purpose exists for doing so. See, e.g., In re Ionosphere Clubs, Inc., 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (finding that a sound business justification existed to justify payment of prepetition wages); see also Armstrong World Indus., Inc. v. James A. Phillips, Inc., (In re James A. Phillips, Inc.), 29 B.R. 391, 397 (S.D.N.Y. 1983) (relying on section 363 to allow contractor to pay prepetition claims of suppliers who were potential lien claimants because the payments were necessary for general contractors to release funds owed to debtors).

29. In addition, the Court may authorize payment of prepetition claims in appropriate circumstances based on section 105(a) of the Bankruptcy Code. Section 105(a), which codifies the inherent equitable powers of the bankruptcy court, empowers the court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Under section 105(a), courts may permit pre-plan payments of prepetition obligations when essential to the continued operation of the debtor’s business. Specifically, the

² Section 363(b) provides that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate ” 11 U.S.C. § 363(b)(1).

Court may use its power under section 105(a) to authorize payment of prepetition obligations pursuant to the “necessity of payment” rule (also referred to as the “doctrine of necessity”).

30. The “doctrine of necessity” or the “necessity of payment” rule originated in railway cases and was first articulated by the United States Supreme Court in Miltenberger v. Logansport, C.&S.W.R. Co., 106 U.S. 286 (1882). The doctrine was expanded to non-railroad debtors in the mid-century. See Dudley v. Mealey, 147 F.2d 268, 271 (2d Cir. 1945) (holding, in hotel reorganization case, that the court was not “helpless” to apply the rule to supply creditors of non-railroad debtors where alternative was cessation of operations). The United States Court of Appeals for the Third Circuit recognized the “necessity of payment” doctrine in In re Lehigh & New England Ry. Co., 657 F.2d 570, 581 (3d Cir. 1981). The Third Circuit held that a court could authorize the payment of prepetition claims if such payment was essential to the continued operation of the debtor. Id. (stating courts may authorize payment of prepetition claims when there “is the possibility that the creditor will employ an immediate economic sanction, failing such payment”); see also In re Penn Central Transp. Co., 467 F.2d 100, 102 n.1 (3d Cir. 1972) (holding necessity of payment doctrine permits “immediate payment of claims of creditors where those creditors will not supply services or material essential to the conduct of the business until their pre-reorganization claims have been paid”); In re Just for Feet, Inc., 242 B.R. 821, 824-845 (Bankr. D. Del. 1999) (noting that, in the Third Circuit, debtors may pay prepetition claims that are essential to continued operation of business); In re Columbia Gas Sys., Inc., 171 B.R. 189, 191-92 (Bankr. D. Del. 1994) (same).

31. Indeed, it is not uncommon for this Court and other courts to authorize payments to prepetition creditors, and in particular shippers, warehousemen and other lien claimants. See, e.g., In re Nortel Networks Inc., Case No. 09-10138 (KG) (Bankr. D. Del. Jan. 15, 2009)

(authorizing payment of common carrier charges in an amount no to exceed \$3.5 million and warehouse fees in an amount not to exceed \$5 million); In re Motor Coach Industries International, Inc., Case No. 08-12136 (BLS) (Bankr. D. Del. Oct. 7, 2008) (authorizing payment of up to \$1.2 million in common carrier charges on a final basis); In re J.L. French Automotive Castings, Inc., Case No. 06-10119 (MFW) (Bankr. D. Del. Mar. 6, 2006) (authorizing payment of prepetition shipping and warehousing charges in an amount not to exceed \$400,000 and lien claimant claims in an amount not to exceed \$6,000,000); In re Pliant Corp., Case No. 06-10001 (MFW) (Bankr. D. Del. Jan. 4, 2006); In re Dana Corp., Case No. 06-10354 (BRL) (Bankr. S.D.N.Y. Mar. 3, 2006) (authorizing payment of prepetition lienholder claims); In re Tower Automotive, Inc., Case No. 05-10578 (ALG) (Bankr. S.D.N.Y. Feb. 2, 2005) (same) (authorizing payment of prepetition shipping and lienholder claims); In re Delphi Corp., et al, Case No. 05-44481 (RDD) (Bankr. S.D.N.Y. Oct. 8, 2005) (same).

F. Failure to Authorize the Debtors to Pay the Charges Within 21 Days of the Petition Date Will Cause Immediate and Irreparable Harm

32. Pursuant to Rule 6003 of the Bankruptcy Rules, the Court may grant relief regarding a motion to pay all or part of a prepetition claim within 21 days after the Petition Date if the relief is necessary to avoid immediate and irreparable harm.

33. The Debtors' failure to pay the Charges plainly would result in immediate and irreparable harm. The refusal of any one of the Common Carriers to continue servicing the Debtors could halt the Debtors' operations, prevent the Debtors from maintaining adequate inventory at their stores and thus cripple the Debtors' business.

34. Accordingly, the Debtors submit they have satisfied the requirements of Bankruptcy Rule 6003 to support immediate payment of prepetition obligations related to the Charges.

G. Cause Exists to Authorize and Direct the Debtors' Financial Institutions to Honor Checks and Electronic Fund Transfers

35. The Debtors represent that they have sufficient availability of funds to pay the amounts described herein in the ordinary course of business by virtue of cash reserves, expected cash flows from ongoing business operations and anticipated access to postpetition financing. Also, under the Debtors' existing cash management system, the Debtors represent that checks or wire transfer requests can be readily identified as relating to an authorized payment made to satisfy the Charges. Accordingly, the Debtors believe that checks or wire transfer requests other than those relating to authorized payments will not be honored inadvertently. The Debtors therefore request that all applicable financial institutions be authorized and directed, when asked by the Debtors, to receive, process, honor and pay any and all checks or wire transfers related to the payment of any of the Charges.

NOTICE

36. No trustee, examiner or creditors' committee has been appointed in these chapter 11 cases. The Debtors have provided notice of this Motion by facsimile and/or overnight mail to: (a) the Office of the United States Trustee for the District of Delaware; (b) each of the Debtors' creditors holding the twenty (20) largest unsecured claims on a consolidated basis; (c) counsel to the Debtors' proposed postpetition secured lender; (d) counsel to Trimaran; (e) the Internal Revenue Service; and (f) the United States Department of Justice. As this Motion is seeking first-day relief, notice of this Motion and any order entered hereon will be served on all parties required by Local Rule 9013-1(m). Due to the urgency of the circumstances surrounding this Motion and the nature of the relief requested herein, the Debtors respectfully submit that no further notice of this Motion is required.

NO PRIOR REQUEST

37. No previous application for the relief requested herein has been made by the Debtors to this or any other court.

WHEREFORE the Debtors respectfully request that the Court enter an order, substantially in the form attached hereto as Exhibit A, granting the relief requested herein, and such other and further relief as the Court may deem just and proper.

Dated: September 21, 2010
Wilmington, Delaware

Respectfully submitted,



Mark D. Collins (No. 2981)
Michael J. Merchant (No. 3854)
Paul N. Heath (No. 3704)
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
Telephone: (302) 651-7700
Facsimile: (302) 651-7701

*Proposed Attorneys for the Debtors and
Debtors-in-Possession*