

1 NICHOLAS B. WARANOFF (Bar No. 60155)
IVAN M. GOLD (Bar No. 121486)
2 MARLENE M. MOFFITT (Bar No. 223658)
ALLEN MATKINS LECK GAMBLE
3 MALLORY & NATSIS LLP
Three Embarcadero Center, 12th Floor
4 San Francisco, CA 94111-4074
Phone: (415) 837-1515
5 Fax: (415) 837-1516

6 Attorneys for Landlords West Farms Mall, LLC and
Willow Bend Shopping Center Limited Partnership
7

8 UNITED STATES BANKRUPTCY COURT

9 CENTRAL DISTRICT OF CALIFORNIA

10 LOS ANGELES DIVISION

11 In re

12 ESTYLE, INC., a Delaware corporation d/b/a
13 babystyle and Cadeau and Cadeau Designs,

14 Debtor.

Case No. LA 08-13518-SB

Chapter 11

**OBJECTION TO DEBTOR'S EMERGENCY
MOTION FOR INTERIM AND FINAL
ORDERS AUTHORIZING DEBTOR (A) TO
CONDUCT STORE CLOSING SALES, (B)
TO DISCONTINUE OPERATIONS AT
CERTAIN STORES, AND (C) GRANTING
ANCILLARY AND OTHER RELIEF**

15 Date: March 21, 2008
16 Time: 10:00 a.m.
17 Dept: U.S. Bankruptcy Court
18 Courtroom 1575
19 255 East Temple Street
20 Los Angeles, CA 90012

21 West Farms Mall, LLC and Willow Bend Shopping Center Limited Partnership
22 (collectively "Objecting Landlords"), lessors of debtor eStyle, Inc., doing business as babystyle, at
23 two shopping center locations, submit their objection to Debtor's Emergency Motion for Interim
24 and Final Orders Authorizing Debtor (a) to Conduct Store Closing Sales, (b) to Discontinue
25 Operations at Certain Stores, and (c) Granting Ancillary and Other Relief (the "Store Closing
26 Motion").
27
28

1 Debtor eStyle, Inc., doing business as babystyle and Cadeau Maternity ("Debtor") operates
2 twenty-three (23) retail stores in shopping centers and urban locations in nine states. On March
3 19, 2008, Debtor filed its voluntary Chapter 11 petition herein. No trustee has been appointed and
4 Debtor continues to operate its business as a debtor-in-possession under Bankruptcy Code sections
5 1107(a) and 1108.

6 Objecting Landlords are lessors of two of the retail locations that are the subject of
7 Debtor's Store Closing Motion: Westfarms Mall, Farmington, Connecticut, and The Shops at
8 Willow Bend, Plano, Texas. It cannot be seriously disputed that each of the debtors' leases for
9 these locations are for premises in a "shopping center" as that term was defined in In re Joshua
10 Slocum Ltd., 922 F.2d 1081, 1087-1089 (3rd Cir. 1990).

11 Debtor's Store Closing Motion seeks authority to close six unprofitable store locations and
12 to conduct store closing sales at those stores, including the two leased from the Objecting
13 Landlords. Objecting Landlords do not challenge the Debtor's business decision to cease
14 operations at unprofitable stores and to seek to conduct inventory liquidation or store closing sales,
15 but take issue with certain of the specifics, or lack of specifics, by which Debtor seeks to
16 accomplish that objective.

17 While proposing to conduct "store closing sales" through liquidation sales of inventory,
18 trade fixtures and equipment at various locations, the "Protocol For Store
19 Closing/Liquidation/Going Out of Business Sales proposed by Debtor's Store Closing Motion
20 ("Proposed Guidelines"), Exhibit 1 thereto, is inadequate and incomplete, leaving too much
21 discretion with the Debtor, in contravention of the bargained for rights of the landlords and their
22 shopping center tenants. While the Debtor's leases with the Objecting Landlords expressly
23 prohibit "auction, liquidation, going out of business or bankruptcy sales" and contain restrictions
24 on store signage, the Proposed Guidelines fail to strike an appropriate balance between the
25 Debtor's duty to maximize return to creditors of the estate and the shopping center lease
26 provisions prohibiting such sales. In particular, the Proposed Guidelines are not as comprehensive
27 or complete as those previously approved by this Court and other bankruptcy judges in this
28

1 District in national retail bankruptcy cases such as In re Illuminations.com, Inc., Case No. LA 04-
2 10427-SB, In re Lux Corporation d/b/a Mr. Rags, Case No. SA 03-10697 JR, and In re Store of
3 Knowledge, Inc., Case No. LA 01-19181-EC. (Copies of the liquidation sales guidelines from
4 these cases are attached hereto as Exhibits "1" through "3" respectively.)

5
6 **THE COURT SHOULD LIMIT OR MODIFY THE**
LIQUIDATION SALES GUIDELINES PROPOSED BY DEBTOR

7 Bankruptcy courts have long recognized the need to balance a debtor's need to maximize
8 return to creditors of the estate by conducting going-out-business sales and the interests of a
9 shopping center landlord and its non-bankrupt retail tenants.

10 The Debtor's leases at West Farms Mall and The Shops at Willow Bend both provide, at
11 Section 7.02, that "[n]o auction, liquidation, going out of business, fire or bankruptcy sales may be
12 conducted or advertised by sign or otherwise in the leased premises." Debtor's Store Closing
13 Motion asserts that such provisions have been "deemed unenforceable" in other Chapter 11 cases
14 as "impermissible restraints on a debtor's ability to maximize the value of its assets under
15 Bankruptcy Code section 363." (Store Closing Motion at 8: 27-9: 1.)¹

16 But bankruptcy courts have recognized the competing interests between a shopping center
17 landlord and a retail debtor-tenant for inventory liquidation or going-out-of-business sales. In In
18 re Ames Department Stores, Inc., 136 B.R. 357, 359 (Bankr. S.D.N.Y. 1992), cited by Debtor, the
19 Bankruptcy Court stated: "That is not to say the Code abrogates all lease provisions and statutes
20 conditioning GOB sales. Section 363(e) reserves for bankruptcy courts the discretion to condition
21 the time, place and manner of GOB sales, thereby providing adequate safeguards to protect
22 shopping center landlords and their other tenants, while allowing the [Debtor] to fulfill its
23 fiduciary obligations."

24 Inventory liquidation sales, so-called GOB sales, held on the premises needlessly damage
25 the interests of both the landlords and each remaining tenant at the respective shopping center.
26 Such a liquidation sale negatively impacts landlords in several respects. First, in order to maintain

27 _____
28 ¹ While Debtor apparently asserts that Section 363 requires it to maximize recoveries for
creditors, there is no such language in the section.

1 the proper image and promote the financial health of both the tenants and the center as a whole,
2 leases generally prohibit extensive signage. The property looks less desirable if a retailer is
3 permitted to display signage that is inconsistent with the appearance and ambiance of the center
4 and other retail stores. Second, GOB sales are detrimental not only to the image of a shopping
5 center and the commensurate rental rate, but also to the tenants who are adjacent to and/or
6 compete with the liquidating tenant. Typically, at any shopping center, there will be at least one
7 other tenant that sells some, if not all, of the same merchandise that is sold by the liquidating
8 debtor. Since these non-debtor tenants and the debtor are each subject to the same lease
9 restrictions, authorization of a liquidation sale allows a debtor to unfairly improve its position at
10 the expense of other complying tenants. Finally, since landlords benefit from increased
11 percentage rent from each tenant, declining sales of the remaining tenants may have a significant
12 effect on the landlord and the shopping centers themselves.²

13 As set forth below, the Proposed Guidelines should be modified in a number of respects to
14 strike an appropriate balance between the interests of the Debtor, on one hand, and the Objecting
15 Landlords and their tenants, on the other hand.

16 **1. Signage:**

17 The Proposed Guidelines contain no restrictions on the number and size of interior sale
18 signage and seek to provide for the use of exterior banners, even with respect to upscale shopping
19 center locations.

20 Debtor's Leases with Objecting Landlords (at Section 6.01) generally restrict changes in
21 the overall appearance of the store without the landlord's consent. Section IV of Exhibit B of
22 these leases provide express signage criteria, expressly providing that "Cloth, paper, plastic or
23 cardboard signs" that are "hung around, on or behind storefront glass or within storefront space"
24 are prohibited.

25
26

27 _____
28 ² This impact, unfortunately, cannot be measured until a debtor's inventory liquidation sales are
underway, and the competing retailer's sales can then be examined and analyzed.

1 The Proposed Guidelines purport to permit unrestricted exterior banners (Proposed
2 Guidelines at ¶5), in contravention of the terms of the leases and contrary to the image and
3 appearance of the shopping centers. Consistent with other cases involving upscale shopping
4 centers, exterior banners should be prohibited (absent landlord consent).

5 There are no customary restrictions on interior store signage (e.g., number of signs per
6 square foot or an overall limitation), as provided in other retail bankruptcy cases, effectively
7 granting Debtor a "blank check" by allowing a virtually unlimited number of signs of any size,
8 creating a "cluttered" visual image. Similarly, the Proposed Guidelines fail to contain customary
9 prohibitions on neon or "day-glo" signage. (See Exhibit 1-3 hereto.)

10 Debtor's proposed use of the term "going out of business sale" in connection with the
11 proposed sales (Proposed Guidelines at ¶6) is misleading to consumers. Debtor is not "going out
12 of business" but instead seeks to reorganize around its remaining seventeen stores (see Omnibus
13 Declaration of Robert S. Kelleher In Support of Debtor's "First Day" Motions at ¶12). Objecting
14 Landlords submit that the use of such terms as "store closing sale," "liquidation sale" or "inventory
15 clearance sale" is more accurate and less problematic.

16 Without appropriate restrictions adopted in other cases in this District, Debtor could
17 employ a signage package that is aesthetically objectionable and inconsistent with the image and
18 appearance of the Objecting Landlords' shopping centers. Objecting Landlords urge the Court to
19 adopt reasonable limitations on the size and number of signs consistent with those of other cases
20 involving bankrupt retailers in regional shopping centers, such as Illuminations, Mr. Rags and
21 Store of Knowledge. The guidelines suggested by the Objecting Landlords are not overly
22 restrictive or unreasonable, having been successfully employed by Chapter 11 debtors and
23 liquidators in these and other cases.

24 2. Advertising:

25 The distribution of handbills and leaflets, as proposed by Paragraph 8 of the Proposed
26 Guidelines, should be limited to the terms of the shopping center leases. What is "customary" and
27 as to whom is too uncertain a standard to be enforced. Similarly, "sign walkers," who are
28

1 increasingly employed in connection with store closing and liquidation sales, are not expressly
2 addressed in the Proposed Guidelines. The use of "sign walkers" should be expressly prohibited
3 within Objecting Landlords' shopping centers, keeping with the upscale image of these properties.

4 **3. Time Limitation on Store Closing Sales:**

5 While Debtor's Store Closing Motion and supporting Kelleher Declaration make multiple
6 references to the fact that the Debtor "expects that the Store Closing Sales will be completed prior
7 to the end of April, 2008" (see, e.g., Store Closing Motion at 6: 23-24), neither the Proposed
8 Guidelines nor the proposed Interim Order (Exhibit 2 to Store Closing Motion) make any
9 reference to an outside date by which such sales would be concluded. The relief granted by this
10 Court should not extend indefinitely. Any order approving the proposed Store Closing Sales
11 should provide a fixed date by which such sales are to be completed (e.g., April 30, May 15, etc.),
12 absent the written consent of the affected landlord or further Order from this Court, following
13 notice and an opportunity to be heard.

14 **4. Alterations:**

15 Paragraph 9 of the Proposed Guidelines provides that Debtor shall make any alterations to
16 interior or exterior store lighting at the six locations being closed. Any alterations, not just those
17 relating to lighting, should be subject to the provisions of the applicable lease, as required by
18 Bankruptcy Code Section 365(d)(3).

19 **5. Expedited Relief:**

20 Neither the Proposed Guidelines nor Debtor's Store Closing Motion contains any proposed
21 procedure for the resolution of disputes concerning liquidation sales. A landlord asserting that a
22 material departure from court-approved guidelines has occurred should be able to provide three (3)
23 calendar days' facsimile notice to the Debtors and its counsel, with an expedited hearing available
24 from this Court if the dispute cannot be resolved. Objecting Landlords submit that the availability
25 of expedited relief, coupled with a notice and "meet and confer" requirement, has proved useful in
26 other retail bankruptcies in resolving or minimizing the scope of disputes arising under the
27 implementation of store closing sale guidelines.

1 6. Adequate Protection:

2 If Debtor is to receive the protection of what is essentially an injunction against the
3 potential claims of any state or local governmental authority for the conduct of the store closing
4 sales under the Proposed Guidelines (see Proposed Interim Order, Exhibit 2 to Store Closing
5 Motion, at ¶3), so should the affected landlords whose properties are being utilized for the
6 liquidation of estate property. A right of indemnification against a debtor operating under Chapter
7 11 protection is of speculative value. Extending the scope of the requested injunction to
8 landlords, who are precluded from enforcing the terms of their leases and potentially subjected to
9 claims from governmental authorities (based on prohibitions and restrictions landlords could
10 otherwise enforce), is an appropriate form of adequate protection under Bankruptcy Code section
11 363(e) upon which Debtor's use of the leased properties should be conditioned.

12 **JOINDER**

13 To the extent not inconsistent with the foregoing, the Objecting Landlords join in any other
14 objections to Debtors' Store Closing Motion asserted by other affected shopping center landlords.

15 **CONCLUSION**

16 For the foregoing reasons, the Objecting Landlords assert that if inventory liquidation sales
17 are to be permitted at the six store locations requested by Debtor, Debtors' Proposed Guidelines
18 should be modified to protect the legitimate interests of the landlords and their tenants.

19 Dated: March 20, 2008

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP

21 By: /s/ Marlene Moffitt

MARLENE M. MOFFITT
Attorneys for Landlords West Farms Mall,
LLC and Willow Bend Shopping Center
Limited Partnership