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11 **UNITED STATES BANKRUPTCY COURT**
12 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
13 **LOS ANGELES DIVISION**

14 In re) Case No. 2:08-bk-13518-SB
15)
16 ESTYLE, INC.,) Chapter 11
17 a Delaware corporation, dba babystyle, Cadeau)
18 and Cadeau Designs,) **OBJECTION TO MOTION FOR**
19) **ORDER AUTHORIZING AND**
20 Debtor.) **APPROVING: (1) THE SALE OF THE**
21) **ASSETS OF ESTYLE, INC. FREE AND**
22) **CLEAR OF LIENS, AND (2) THE**
23) **ASSUMPTION AND ASSIGNMENT OF**
24) **UNEXPIRED NONRESIDENTIAL**
25) **REAL PROPERTY LEASES AND**
26) **EXECUTORY CONTRACTS IN**
27) **CONNECTION THEREWITH**
28)
Date: July 8, 2008
Time: 2:00 p.m.
Place: Courtroom 1575
255 East Temple Street
Los Angeles, CA 90012

23 The Macerich Company (the "Landlord") hereby files this Motion For Order
24 Authorizing And Approving: (1) The Sale Of The Assets Of eStyle, Inc. Free And Clear Of
25 Liens, And (2) The Assumption And Assignment Of Unexpired Nonresidential Real Property
26 Leases And Executory Contracts In Connection Therewith (the "Objection"), and respectfully
27 represents as follows:

28 ///

1 **I. BACKGROUND FACTS**

2 1. eStyle, Inc. (the “Debtor”) filed its voluntary petition for relief under Chapter 11
3 of Title 11 of the United States Code on March 19, 2008. The Debtor has continued to operate
4 its business and manage its properties as debtor-in-possession pursuant to 11 U.S.C. §§ 1107(a)
5 and 1108.¹

6 2. The Debtor leases retail space from the Landlord where it continues to operate
7 retail stores as a tenant pursuant to unexpired leases of nonresidential real property (the
8 “Leases”) at the following locations (the “Premises”):

9

The Macerich Company	
Kierland Commons	Scottsdale, AZ
Scottsdale Fashion Square	Scottsdale, AZ

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13 3. Each of the leases is a “lease of real property in a shopping center” as that term is
14 used in Section 365(b)(3). See In re Joshua Slocum, Ltd., 922 F.2d 1081, 1086-1087 (3rd Cir.
15 1990).

16 4. On or about June 18, 2008, the Debtor filed the Sale Motion.² The Debtor has
17 identified TRS Acquisition Subsidiary, Inc. (“TRS”) as the stalking horse bidder with respect to
18 the upcoming auction. The Auction is scheduled for July 8, 2008, with the initial hearing to
19 approve TRS also scheduled for July 8, 2008. However, in the event there is another successful
20 bidder at the auction, or in the event that the Landlord objects to the assumption and assignment
21 of the Leases to TRS based upon confidential financial information, the July 8, 2008 hearing will
22 serve as a status conference to set additional dates to resolve such objections.

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27 ¹ Unless otherwise specified, all statutory references to “Section” are to 11 U.S.C. §§ 101 et seq. (the “Bankruptcy Code”).

28 ² All terms not otherwise defined herein shall have the meanings ascribed to them in the Sale Motion or Purchase Agreement or the Procedures Order (as defined below).

1 **III. ARGUMENT**

2 **A. The Court should deny the assumption and assignment of any Lease until the**
3 **Landlord is provided with adequate assurance of future performance information**
4 **as required by Section 365(b)(1) and Section 365(b)(3).**

5 5. Section 365 controls the assumption and assignment of non-residential real
6 property leases and requires, *inter alia*, that the Debtor provides adequate assurance that the
7 proposed assignee can perform under such leases. 11 U.S.C. §§ 365(b)(1)(C) & (f)(2). The
8 Debtor bears the ultimate burden of persuasion as to all issues under Section 365. *See In re*
9 *Rachels Industries, Inc.*, 109 B.R. 797, 802 (Bankr. W.D. Tenn. 1990); *see also Richmond*
10 *Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985). This includes issues of
11 adequate assurance under Section 365(b). *See In re Lafayette Radio Electronics Corp.*, 12 B.R.
12 302, 312 (Bankr. E.D.N.Y. 1981).

13 6. Adequate assurance of future performance is determined by the existing factual
14 conditions, and the Court may look to many factors in determining what is necessary to provide
15 adequate assurance of future performance under Section 365(b), including, sufficient economic
16 backing, economic conditions, certificates, credit reports, escrow deposits or other similar forms
17 of security or guarantee. *See In re Lafayette Radio Electronics Corp.*, 9 B.R. 993, 998 (Bankr.
18 E.D.N.Y. 1981); *see also In re Belize Airways*, 5 B.R. 152 (Bankr. S.D. Fla. 1980). Courts also
19 look to the operating experience of the proposed assignee. *See In re Bygaph, Inc.*, 56 B.R. 596,
20 605 (Bankr. S.D.N.Y. 1986).

21 7. The Sale Motion infers that there are no defaults under the Leases, and that as a
22 result, the Debtor does not need to comply with Section 365(b). *See* Sale Motion at page 25.
23 Therefore, the Sale Motion does not address the Debtor's or assignee's obligation to provide
24 adequate assurance of future performance as required by Sections 365(b)(1) & (b)(3). The
25 Debtor's position is factually incorrect, and it ignores Section 365(f)(2)(B). As set forth in
26 Section 365(f)(2)(B), the Debtor must demonstrate adequate assurance of future performance in
27 connection with the assumption and assignment of the Leases, regardless of a default under the
28 Leases.

1 8. Moreover, in this case, the Leases are shopping center leases and, as such, the
2 Bankruptcy Code requires more than the basic adequate assurance of future performance of the
3 Leases under Section 365(b)(1)(C). In re Sun TV and Appliances, Inc., 234 B.R. 356, 359
4 (Bankr. D. Del. 1999). The heightened adequate assurance requirements that Debtors must
5 satisfy under Section 365(b)(3) include the following:

- 6 • the source of rent and that the financial condition and operating performance of
7 the proposed assignee and its guarantors, if any, must be similar to the financial
8 condition and operating performance of the debtor and its guarantor(s), if any, as
9 of the time the debtor became the lessee. *See* 11 U.S.C. § 365(b)(3)(A);
- 10 • that any percentage rent due under the lease will not decline substantially. *See* 11
11 U.S.C. § 365(b)(3)(B);
- 12 • that assumption and assignment of the lease is subject to all provisions thereof,
13 including (but not limited to) provisions such as a radius, location, use, or
14 exclusivity provision, and will not breach of any such provision in any other
15 lease, financing agreement, or master agreement relating to such shopping center.
16 *See* 11 U.S.C. § 365(b)(3)(C); and
- 17 • that assumption and assignment of the lease will not disrupt the tenant mix or
18 balance in the shopping center. *See* 11 U.S.C. § 365(b)(3)(D).

19 9. This adequate assurance of future performance determination must be satisfied in
20 connection with an assumption and assignment under Section 365(f)(2)(B). Sun TV and
21 Appliances, Inc., 234 B.R. at 370. And, in connection with the heightened adequate assurance
22 requirement for shopping center leases, courts do require a specific factual showing through
23 competent evidence to determine whether a debtor has provided adequate assurance of future
24 performance. Matter of Haute Cuisine, Inc., 58 B.R. 390, 394 (Bankr. M.D. Fla. 1986).

25 10. The Landlord has additional concerns where, as here, the identity of the
26 successful bidder at the auction is still unknown. If the successful bidder is, like TRS, a newly
27 formed entity with no financial or operating history, the Landlord will require some type of
28 credit enhancement, such as: (i) a guaranty of future performance; and/or (ii) a letter or credit or
a cash security deposit. The Landlord requires that an existing entity with acceptable financing
guaranty the performance of any newly-formed company. In addition, pursuant to Section
365(l), the Landlord may require a security deposit or letter of credit as security for the
performance of the assignee's obligations under the Leases in the event that the assignee fails to
perform on a going-forward basis. This is a reasonable condition of demonstrating adequate

1 assurance of future performance where the Debtor is seeking approval of an assignee with no
2 operating history.

3 11. Pursuant to the Order Authorizing And Approving Sale Procedures To Be
4 Employed In Connection With Debtor's Sale Of Assets Subject To Overbid Opportunity And
5 Granting Related Relief (the "Procedures Order"), any objection related to Confidential Bidder
6 Financial Information shall be limited to a summary of such objection. *See* Procedures Order at
7 ¶ 6. The Landlord objects to the adequate assurance of future performance provided by the
8 Debtors and TRS as insufficient under Section 365. Specifically, the Landlord objects that the
9 Confidential Bidder Financial Information concerning TRS and its proposed guarantor does not
10 satisfy the standards of Sections 365(b)(1) & (b)(3)(A) – (D). Therefore, pursuant to the
11 Procedures Order, the Landlord requests that the Court use the July 8, 2008 hearing as a status
12 conference to address the handling of the Confidential Bidder Financial Information, and that the
13 Court set a further briefing schedule and evidentiary hearing on the issue of adequate assurance
14 of future performance.

15 **B. Any assumption and assignment must recognize the obligation to pay all charges
16 due under the Leases, including unbilled year-end adjustments and reconciliations.**

17 12. The assignee must satisfy all charges due under the Leases, including charges
18 which have not yet been reconciled and/or adjusted from pre-petition (or even post-petition)
19 periods. It appears from the Purchase Agreement that TRS will only assume obligations from
20 and after the Closing Date, and in addition, that it is only assuming up to \$200,000.00 of
21 accounts payable. *See* Purchase Agreement at § 1.3. The Debtor continues to be responsible for
22 all unbilled charges as they come due under the Leases. These charges are described more fully
23 in the Objection To Schedule Of Proposed Cure Amounts Regarding (1) Unexpired Real
24 Property Leases And (2) Executory Contract, Which May Be Assumed And Assigned Pursuant
25 To The Debtor's Motion For Order Authorizing And Approving (1) The Sale Of Estyle, Inc's
26 Assets Free And Clear Of Liens; And (2) The Assumption And Assignment Of Executory
27 Contracts And Unexpired Nonresidential Real Property Leases (the "Cure Objection"), filed
28 separately to this Objection, and which is hereby incorporated herein as if it were set forth in full

1 herein. Any assumption and assignment of the Leases cannot cut off the Landlord's right to
2 recover unbilled charges that have accrued, or are accruing, under the Leases.

3 13. Therefore, the Sale Motion and any sale order must specify that these charges will
4 be paid, and it should be clear that any successful bidder will inherit the responsibility for all
5 unbilled charges that may come due under the Leases.

6 **C. Any assumption and assignment of the Leases must comply with the terms of the**
7 **Leases.**

8 14. On October 17, 2005, the BAPCPA went into effect. Through the BAPCPA
9 amendments, "Section 365(f)(1) is amended to make sure that all of the provisions of Section
10 365(b) are adhered to and that 365(f) of the code does not override Section 365(b)." Floor
11 Statement of Senator Orrin Hatch, 151 Cong. Rec. S. 2459, 2461-62 (daily ed. March 10, 2005).

12 In explaining the change to Section 365(f)(1), Senator Hatch stated:

13 The bill helps clarify that an owner should be able to retain control over the mix
14 of retail uses in a shopping center. When an owner enters into a use clause with a
15 retail tenant forbidding assignments of the lease for a use different than that
16 specified in the lease, that clause should be honored. Congress has so intended
17 already, but bankruptcy judges have sometimes ignored the law.

18 151 Cong. Rec. S. 2459, 2461 (daily ed. March 10, 2005).

19 15. The changes embodied in the BAPCPA specifically preserve a landlord's right to
20 enforce use and other lease provisions. Again, Senator Hatch's remarks in the Congressional
21 Record clarify the intent behind Section 365(b) and 365(f):

22 A shopping center operator. . . must be given broad leeway to determine the mix
23 of retail tenants it leases to. Congress decided that use or similar restrictions in a
24 retail lease, which the retailer cannot evade under nonbankruptcy law, should not
25 be evaded in bankruptcy. It is my understanding that some bankruptcy judges
26 have not followed this mandate. Under another provisions of the Code, Section
27 365(f), a number of bankruptcy judges have misconstrued the Code and allowed
28 the assignment of a lease even though terms of the lease are not being followed.

151 Cong. Rec. S. 2459, 2461-62 (daily ed. March 10, 2005).

16. As set forth above, bankruptcy courts must strictly enforce the use and other
provisions in the Leases. This intent is echoed by comments from the House of Representatives,
and the legislative history leaves no doubt that such provisions must be strictly enforced:

Section 404(b) amends § 365(f)(1) to assure that § 365(f) does not override any
part of § 365(b). Thus, § 404(b) makes a trustee's [debtor-in-possession's]

1 authority to assign an executory contract or unexpired lease subject not only to §
2 365(c), but also to § 365(b), which is given full effect. Therefore, for example,
3 assumption or assignment of a lease of real property in a shopping center must be
4 subject to the provisions of the lease, such as use clauses. (Emphasis added)

5 H.R. Rep. No. 109-31, pt. 1, at 87, reprinted in 2005 U.S. Code Cong. & Admin. News 153.

6 17. The BAPCPA clarified Section 365 to reflect the Congressional intent that
7 Section 365(f)(1) not be used by debtors to void lease provisions.

8 18. The language of Section 365(f), and any such ability to assume and assign the
9 Leases, is subject to the protections provided by Section 365(b)(1) and (3). Therefore, any
10 assignment must remain subject to all provisions of the Leases, including those provisions
11 concerning use, radius, exclusivity, tenant mix and balance, etc.

12 19. The revisions to Section 365 make it clear that Debtor cannot use Section 365(f)
13 to render lease provisions unenforceable. Use provisions indirectly limit the assignment of the
14 Leases, but such provisions are specifically protected by Section 365(b). Moreover, under the
15 revised Section 365(b) and recent case law, continuous operations provisions are not anti-
16 assignment provisions. See In re Service Merchandise Company, 297 B.R. 675 (Bankr. M.D.
17 Tenn. 2002).

18 20. Provisions governing use, radius and the permitted conduct upon the Premises are
19 not anti-assignment provisions. They are negotiated provisions that legitimately seek to preserve
20 the Landlord's control over shopping center environments. Section 365(b)(3) no longer permits
21 even insubstantial breaches of provisions such as use, radius, location or exclusivity. These
22 critical lease terms are enforceable under Section 365(b), and this Court should deny any request
23 to modify these lease terms as part of any assumption and assignment of the Leases.

24 **D. Landlord objects to any waiver of Rules 6004(g) and 6006(d).**

25 21. The Landlord objects to any waiver of requirements of Federal Rule of
26 Bankruptcy Procedure (“Rule”) 6004(g) and 6006(d), especially to the extent it adversely affects
27 the Landlord's appellate rights thereunder. Such a waiver is unnecessary and inequitable. These
28 subsections were added to the Rules specifically to protect the rights of the objecting parties, and
thus eliminate the “rush to the courthouse” to obtain stay orders by those parties adversely

1 affected by entry of orders under Sections 363 or 365. Landlord should not have their appellate
2 rights compromised by an unnecessary and advance waiver of these protections, particularly
3 since the Debtor has failed to establish any cause for such a waiver, and particularly where
4 Landlord has limited time to object to a proposed assignee prior to the hearing.

5 **E. Assumption and Amendment Agreement.**

6 22. Finally, Landlord requests that the Court require any successful bidder taking an
7 assumption and assignment of any Lease enter into a lease amendment and assignment
8 agreement (the “Agreement”), in a form acceptable to Landlord, that will cause a successful
9 assignee to become directly obligated to Landlord under the specific Lease. The Agreement
10 shall include the modification of notice addresses for the parties. The Agreement is critical to
11 Landlord for the maintenance of its lease files, and under the laws of various states, it is critical
12 to establish privity of contract between a landlord and the assignee.

13 **F. Joinder with other objecting landlords.**

14 23. To the extent consistent with the objections expressed herein, Landlord also joins
15 in the objections of other shopping center lessors to the Debtor’s proposed relief.

16 **G. Reservation of rights to raise further objections by all landlords.**

17 24. Westfield, LLC, The Macerich Company, and RREEF Management Company all
18 reserve their rights to object to any bidder other than TRS that is successful at the auction. No
19 landlord has received any information concerning any bidder other than TRS. Therefore, they
20 have not had time to review and or assess the identity of any such party or such party’s ability to
21 perform under any lease. In the event another bidder is successful at the July 8, 2008 auction,
22 the July 8, 2008 hearing can only proceed as a status conference to set a further sale hearing to
23 approve such successful bidder after the Debtors have provided the identity of such bidder and
24 adequate assurance of future performance information necessary to satisfy Section 365, as well
25 as provide landlord with an adequate opportunity to review such information and object, if
26 necessary.

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