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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 MOTION FOR ORDER
AUTHORIZING AND APPROVING (1)
THE SALE OF THE ASSETS OF ESTYLE,
INC. FREE AND CLEAR OF LIENS AND
(2) THE ASSUMPTION AND
ASSIGNMENT OF UNEXPIRED
NONRESIDENTIAL REAL PROPERTY
LEASES AND EXECUTORY CONTRACTS
IN CONNECTION THEREWITH**

18 Date: July 8, 2008
19 Time: 2:00 p.m.
20 Dept: U.S. Bankruptcy Court
Courtroom 1575
255 East Temple Street
21 Los Angeles, CA 90012

22 Short Hills Associates, LLC and Taubman Cherry Creek Shopping Center LLC
23 (collectively the "Taubman Landlords"), lessors of debtor eStyle, Inc., doing business as babystyle
24 ("Debtor"), at two shopping center locations, submit their objection to Debtor's Motion For Order
25 Authorizing and Approving (1) The Sale of The Assets of eStyle, Inc. Free and Clear of Liens and
26 (2) The Assumption and Assignment of Unexpired Nonresidential Real Property Leases and
27 Executory Contracts In Connection Therewith ("Sale Approval Motion") (Docket No. 196).
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OBJECTION TO DEBTOR'S MOTION FOR ORDER AUTHORIZING AND APPROVING (1) THE SALE OF
THE ASSETS OF ESTYLE, INC., ETC.

1 **FACTUAL AND PROCEDURAL BACKGROUND**

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

7 2. Objecting Landlords are lessors of two of the retail locations that are the subject of
8 Debtor's Sale Procedures Motion: Cherry Creek Shopping Center, Denver, Colorado, and The
9 Mall at Short Hills, Short Hills, New Jersey. (See accompanying Declaration of Barbara J.
10 Hansen ["Hansen Declaration"] at ¶¶ 5-7 and Exhibits 1-3.) It cannot be seriously disputed that
11 each of the debtors' leases for these locations are for premises in a "shopping center" as that term
12 was defined in In re Joshua Slocum Ltd., 922 F.2d 1081, 1087-1089 (3rd Cir. 1990). (Hansen
13 Declaration at ¶¶ 3-4.)

14 3. On June 18, 2008, Debtor filed its Sale Approval Motion, seeking approval for the
15 sale, on an expedited schedule, of substantially all of Debtor's assets, and the assignment and
16 assumption of twelve retail leases (including Cherry Creek and Short Hills), to TRG Acquisition
17 Subsidiary, Inc. ("Proposed Purchaser"), subject to overbids at an auction scheduled for July 8,
18 2008, immediately followed by a sale approval hearing that same day.

19 4. It is well-established that the debtor bears the ultimate burden of presentation and
20 persuasion that a lease of nonresidential real property is one subject to assumption and assignment
21 and that all requirements for assumption have been met. In re Rachels Industries, Inc., 109 B.R.
22 797, 802 (Bankr. W.D. Tenn. 1990); In re Memphis-Fridays Associates, 88 B.R. 830, 840-841
23 (Bankr. W.D. Tenn. 1988); see also Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303,
24 1309-1310 (5th Cir. 1985); In re Airlift International Inc., 761 F.2d 1503, 1508 (11th Cir. 1985).

1 construction of leasehold improvements with respect to Cherry Creek. (See Schedule 1 to
2 Debtor's Cure Schedule; Hansen Declaration at ¶ 11 and Exhibit 6 thereto.) Section 10.02(c) of
3 the Cherry Creek Lease (Exhibit 3 to Hansen Declaration) provides that the "Tenant shall keep the
4 leased premises and all other parts of the regional retail development free from any and all liens
5 arising out of any work performed, materials furnished or obligations incurred by or for Tenant
6 ..."

7 9. As a condition to any assumption and assignment of the Cherry Creek Lease,
8 Debtor should be required to promptly cure the defaults arising from the assertion of mechanics'
9 liens arising from its construction of leasehold improvements by either (1) payment in satisfaction
10 of lien claims and their resulting release, or (2) the recordation of one or more mechanics' lien
11 release bonds, discharging the real property, and the landlord's interest, from the claim of lien.

12 10. If there is a default under a lease sought to be assumed and assigned, Bankruptcy
13 Code section 365(b)(1) comes into play. Debtor's leases with the Taubman Landlords contain
14 provisions for the recovery of attorneys' fees in the event of defaults under the lease. (See, e.g.,
15 Section 19.03 of the Cherry Creek Lease.) Bankruptcy courts have held that attorneys' fees
16 incurred in the enforcement of obligations, covenants and conditions of a lease are recoverable as
17 part of a landlord's "pecuniary loss" under Bankruptcy Code section 365(b)(1)(B) due upon
18 assumption and assignment of a lease if the underlying lease provides for them. In re
19 Entertainment, Inc., 223 B.R. 141, 152 (Bankr. N.D. Ill. 1998). "Although attorneys fees are not
20 independently recoverable under the Bankruptcy Code, section 365(b)(1)(B) allows for such
21 recovery if based upon the existence of a separate agreement between the parties." In re Child
22 World, Inc., 161 B.R. 349, 353 (Bankr. S.D.N.Y. 1993); In re Crown Books Corporation, 269 B.R.
23 12, 18 (Bankr. D. Del. 2001) (landlord's attorneys' fees incurred in proving post-petition rent had
24 not been paid recoverable as component of cure under Section 365(b)(1); see also Travelers
25 Casualty & Surety Co. v. Pacific Gas & Electric Co., 127 S.Ct. 1199, 1203-1206 (2007) (contract
26 providing for attorneys' fee recovery enforceable in bankruptcy unless Bankruptcy Code
27 specifically provides otherwise).

1 11. To date, the Taubman Landlords have incurred, and continue to incur, attorneys'
2 fees in excess of \$10,000 in enforcement of their rights under the Cherry Creek and Short Hills
3 Leases and are entitled to payment thereof as compensation for its pecuniary loss Bankruptcy
4 Code section 365(b)(1)(B).

5 **DEBTOR MUST DEMONSTRATE ADEQUATE ASSURANCE OF FUTURE**
6 **PERFORMANCE IN ORDER TO ASSUME AND ASSIGN ITS LEASES**

7 12. Adequate assurance of future performance is clearly an element of the assumption
8 process which must be met in addition to the curing of any default. 11 U.S.C. § 365(b)(1)(C).
9 Where a lease of nonresidential real property is to be assigned, adequate assurance of future
10 performance by the assignee must be provided, "whether or not there has been a default in such
11 contract or lease." 11 U.S.C. § 365(f)(2)(B).

12 13. While adequate assurance of future performance is not defined in the Bankruptcy
13 Code, several courts have looked to the legislative history for guidance and have concluded that
14 "the term was intended to be given a practical, pragmatic construction in light of the facts of each
15 case." In re Natco Industries, Inc., 54 B.R. 436, 440-441 (Bankr. S.D.N.Y. 1985). The emphasis
16 is on protection of the lessor, and the intention "is to afford landlord with a measure of protection
17 from having to be saddled with a debtor that may continue to default and return to bankruptcy."
18 Id., at 441. Adequate assurance requires a foundation that is nonspeculative and sufficiently
19 substantive so as to assure that a landlord will receive the bargained-for performance. In re World
20 Skating Center, Inc., supra, 100 B.R. at 148-149. By implication, Bankruptcy Code section 365
21 operates to remove doubts entertained by a lessor concerning the status of his lease with the
22 bankruptcy estate. See In re Standard Furniture Co., 3 B.R. 527, 530 (Bankr. S.D. Cal. 1980).

23 14. The initial burden of presentation as to adequate assurance falls upon the debtor.
24 Sea Harvest Corp. v. Riviera Land Co., 868 F.2d 1077, 1079 (9th Cir. 1989). The Sea Harvest
25 court rejected the debtor's bald statement that it "recognizes the ongoing obligation to maintain
26 such Leases and pay all obligations with regard thereto," stating that Sea Harvest's empty
27 declaration does not provide the compensation and assurances required by section 365(b)(1)." Sea
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1 Harvest, supra, 868 F.2d at 1080; see also In re Washington Capital Aviation & Leasing, 156 B.R.
2 167, 173 (Bankr. E.D. Va. 1993) (while an absolute guarantee is not required, more than
3 speculative plans are needed). Indeed, courts have required a specific factual showing through
4 competent evidence to determine whether adequate assurance of future performance has been
5 provided. See, e.g., Matter of Haute Cuisine, Inc., 58 B.R. 390, 393-394 (Bankr. M.D. Fla. 1986);
6 In the Matter of CM Systems, Inc., 64 B.R. 363, 364-365 (Bankr. M.D. Fla. 1986).

7 15. It has been held that the best form of adequate assurance of future performance is
8 advance rent or a deposit. In re Hub of Military Circle, Inc., supra, 19 B.R. at 461. However, it
9 may also include "sufficient financial backing, escrow deposits or other forms of security or
10 guaranty," In re Gold Standard at Penn, Inc., 75 B.R. 669, 674 (Bankr. E.D. Pa. 1987), sound
11 financial statements and a substantial net worth, In re Taylor Manufacturing, Inc., 6 B.R. 370, 372
12 (Bankr. N.D. Ga. 1980), projected sales proceeds sufficient for and earmarked for payment of rent,
13 Buchakian v. Musikahn Corp., 69 B.R. 55, 56 (E.D.N.Y. 1986), and a substantial cash reserve, a
14 favorable market outlook and the history of prompt payment, Seacoast Products, Inc. v. Spring
15 Valley Farms, Inc., 34 B.R. 379, 381 (M.D.N.C. 1983).

16 16. As the bankruptcy court noted in In re Washington Capital Aviation & Leasing,
17 156 B.R. 167, 175 fn.3 (Bankr. E.D. Va. 1993):

Adequate assurance of future performance by the assignee is
important because 11 U.S.C. § 365(k) "relieves the ... estate from
any liability for any breach of such ... lease occurring after such
assignment." A party subject to a contractually created obligation
ordinarily cannot divest itself of liability by substituting another in
its place without the consent of the party owed the duty. See
Douglas G. Baird and Thomas H. Jackson, *Bankruptcy* 285 (2d ed.
1990) (citing Restatement (Second) of Contracts § 318(3) (1981)
("delegation of performance ... does not discharge any duty or
liability of the delegating obligor")). While the assignee may be
entitled to perform for the original obligor, the original obligor
remains ultimately liable until discharged by performance or
otherwise. Section 365(k) changes this common law rule and
relieves the estate from all liability under the lease following
assignment.

26 See also In re Rickel Home Centers, Inc., 209 F.3d 291, 299 (3rd Cir. 2000) (Adequate
27 assurance is "necessary to protect the rights of the non-debtor party to the contract or lease,
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1 because assignment relieves the trustee and the estate from liability arising from a post-assignment
2 breach.")

3 17. It is well-established that "[t]he Bankruptcy Code imposes heightened restrictions
4 on the assumption and assignment of leases of shopping centers." In re Joshua Slocum, Ltd.,
5 supra, 922 F.2d at 1086. Bankruptcy Code section 365(b)(3), added as part of the so-called 1984
6 "Shopping Center Amendments" to the Bankruptcy Code, provides that adequate assurance of
7 future performance of a lease of real property in a shopping center also includes adequate
8 assurance:

- 9 (A) of the source of rent and other consideration due under such
10 lease, and *in the case of an assignment, that the financial*
11 *condition and operating performance of the proposed*
12 *assignee and its guarantors, if any, shall be similar to the*
13 *financial condition and operating performance of the debtor*
14 *and its guarantors, if any, as of the time the debtor became*
15 *the lessee under the lease;*
- 16 (B) that any percentage rent due under such lease will not
17 decline substantially;
- 18 (C) *that assumption or assignment of such lease is subject to all*
19 *the provisions thereof, including (but not limited to)*
20 *provisions such as a radius, location, use, or exclusivity*
21 *provision, and will not breach any such provision contained*
22 *in any other lease, financing agreement, or master agreement*
23 *relating to such shopping center; and*
- 24 (D) that assumption or assignment of such lease will not disrupt
25 any tenant mix or balance in such shopping center.

26 (Emphasis added.)

27 **Debtor Has Failed To Demonstrate Adequate Assurance of Future Performance By**

28 **Proposed Purchaser:**

18. Here, while Debtor asserts that the Proposed Purchaser is "financially capable of
fulfilling all of its obligations under the Assumed Contracts" (Sale Approval Motion at 26: 18-21),
the Taubman Landlords assert that the operating history and financial condition of the Proposed
Purchaser, as well as its proposed guarantor, as set forth in the Confidential Bidder Financial

1 Information, does not satisfy the standards of Section 365(b)(3) of the Bankruptcy Code. Among
2 other things, while Bankruptcy Code section 365(b)(3)(A) makes clear that adequate assurance, in
3 the case of an assignment of a shopping center lease, requires that the financial condition and
4 operating performance of the proposed assignee be similar to that of the debtor "as of the time the
5 debtor became the lessee under the lease," the evidence will show that Proposed Purchaser and its
6 tendered guarantor do not meet that standard.

7 19. Bankruptcy Code section 365(l) provides that if an unexpired lease of the debtor is
8 to be assigned, "the lessor of the property may require a deposit or other security for the
9 performance of the debtor's obligations under the lease substantially the same as would have been
10 required by the landlord upon the initial leasing to a similar tenant." The Taubman Landlords will
11 demonstrate that further credit enhancements are necessary to satisfy the standard provided by
12 Bankruptcy Code section 365(l). Indeed, the Taubman Landlords note that while Hancock Park
13 Capital II, L.P., Proposed Purchaser's ultimate parent, is providing a guaranty of Proposed
14 Purchaser's performance and obligations under the Asset Purchase Agreement, it is not offering
15 guaranty of assumed lease obligations.

16 20. Consistent with this Court's Order Authorizing and Approving Sale Procedures To
17 Be Employed In Connection With Debtor's Sale of Assets Subject To Overbid Opportunity and
18 Granting Related Relief (Docket No. 221), the Taubman Landlords request that the Court use the
19 July 8, 2008 hearing as a status conference to address either (1) the handling of the Proposed
20 Purchaser's Confidential Bidder Financial Information or (2) adequate assurance of future
21 performance with respect to any successful overbidder, and set a further briefing schedule and
22 evidentiary hearing on the issue of adequate assurance of future performance.

23 **Debtor Has Failed To Provide For Payment of Accrued Percentage Rent and Future**
24 **Expense Adjustments:**

25 21. Bankruptcy Code section 365(b)(3)(C) provides that the assumption and
26 assignment of a shopping center lease "is subject to all the provisions thereof..." As with most
27 modern shopping center leases, the Taubman Landlords' leases provide for the monthly payment
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1 of tenant's pro-rata share of certain expenses (common area maintenance expenses, insurance,
2 taxes, marketing and promotional expenses) based on budgeted amounts, subject to later
3 reconciliation based on actual expenses incurred. (See, e.g., Sections 6.2 of Short Hills Lease.)
4 Debtor's leases with the Taubman Landlords also provide for semi-annual payments of percentage
5 rent. (See Section 2.02(b) of both the Cherry Creek and Short Hills Leases.)

6 22. Here, Section 1.3 of the proposed Asset Purchase Agreement apparently seeks to
7 bifurcate the tenant's future percentage rent and expense reimbursement obligations, by limiting
8 Buyer's assumption of the "Assumed Leases" to obligations "as of the Closing."

9 23. Since year-end expense adjustments for 2008 will not be billed until sometime in
10 2009, and the next semi-annual payment of percentage rent is not due until August 2008, there is
11 no pending default with respect to such obligations. Nevertheless, by purporting to exclude
12 Buyer's liability for such obligations in the Asset Purchase Agreement, the Taubman Landlords
13 are not receiving adequate assurance that those obligations will be paid when billed in the future.
14 In order to satisfy the adequate assurance requirements of Bankruptcy Code section 365(b)(1)(C),
15 and ensure that the assumption of each of the leases "is subject to all the provisions thereof..." (11
16 U.S.C. § 365(b)(3)(C)), either Debtor must make arrangement for such payment by establishment
17 of a segregated, reserve account for that purpose or the proposed assignee must have responsibility
18 for such as yet unbilled obligations (and, conversely, receive the benefit of any credits) even
19 though future billings may include percentage rent and expenses that accrue prior to the Closing
20 Date under the Asset Purchase Agreement.

21 **Debtor Has Failed To Provide For Future Performance of Indemnification**

22 **Obligations:**

23 24. In addition to the monetary obligations that either Debtors or any proposed
24 assignee must satisfy under Section 365 of the Bankruptcy Code, Debtor's leases with Cherry
25 Creek and Short Hills provide that Debtor must indemnify and hold the landlord harmless with
26 regard to events or incidents that may have occurred prior to any assignment, but which are not
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1 made known to the landlord, Debtor or any assignee until after the assignment. (See, e.g.,
2 Section 11.03 of Cherry Creek Lease.)

3 25. Accordingly, in order to cure possible pre-assignment non-monetary defaults and
4 provide adequate assurance of future performance with respect to the indemnification obligations
5 under its leases with the Taubman Landlords, either (a) the assignee must be required to assume
6 all responsibility for any and all such claims, notwithstanding Section 1.3(a) of the Asset Purchase
7 Agreement, or (b) Debtor must be required to demonstrate or obtain adequate insurance (by
8 purchase of "tail" coverage or otherwise) in order to satisfy potential indemnification obligations
9 based on events or occurrences prior to the effective date of an assignment. Such claims for
10 indemnity could include claims for personal injury occurring at the leased premises where a
11 landlord is joined as a party to a lawsuit or for damage and destruction of property by Debtor or
12 their agents or employees.

13 **AN ADVANCE WAIVER OF THE STAY UNDER BANKRUPTCY**
14 **RULES 6004(g) AND 6006 IS INAPPROPRIATE**

15 26. Debtor also seeks an advance waiver of the ten (10)-day stay of Rules 6004(g) and
16 6006(d) of the Federal Rules of Bankruptcy Procedure following entry of any order approving the
17 relief requested by Debtor's Sale Approval Motion. (Sale Approval Motion at 29: 13-30: 3.) Such
18 an advance blanket waiver is unjustified and inappropriate.

19 27. Rule 6006(d) provides that:

20 "[a]n order authorizing the trustee to assign an executory contract or
21 unexpired lease under § 365(f) is stayed until the expiration of 10
22 days after the entry of the order, unless the court orders otherwise."

23 The Committee Note to Rule 6006(d) provides:

24 "[s]ubdivision (d) is added to provide sufficient time for a party to
25 request a stay pending appeal of an order authorizing the assignment
26 of an executory contract or unexpired lease under § 365(f) of the
27 Code before the assignment is consummated. . . . The court may, in
28 its discretion, order that Rule 6006(d) is not applicable so that the
executory contract or unexpired lease may be assigned immediately
in accordance with the order entered by the court. Alternatively, the
court may order that the stay under Rule 6006(d) is for a fixed
period less than 10 days."

1 28. The Rule 6006(d) stay provides a short period of time that "is often needed and
2 essential to an objecting party intending to appeal because if the assignment is closed in the
3 absence of a stay, then any appeal by the objecting party may well be moot." Collier on
4 Bankruptcy ¶ 6006.04, at 6006-17 (15th ed. Rev. 2004); see also In re Quanalyze Oil & Gas Corp.,
5 250 B.R. 83, 92 (Bankr. W.D. Tex. 2000)(in reviewing a similar provision in Rule 6004(g)
6 observing that "[a] party seeking to obtain appellate review of just such a sale should not find its
7 efforts frustrated by a 'quick closing' that renders an appeal moot.") Collier further observes that:

8 "[I]f an objection has been filed and is being overruled, the court
9 should eliminate or reduce the 10 day stay period *only upon a*
10 *showing that there is a compelling business need to close the*
11 *assignment within the 10 day period and that the interests of the*
12 *objecting party are sufficiently protected.* If the objecting party
13 informs the court that it intends to appeal and seek a stay, then the
14 stay period should not be reduced to less than an amount of time
15 sufficient to allow the objecting party to seek a stay, unless the court
16 determines that the need to proceed sooner is overwhelming and the
17 chances of the objecting party obtaining a stay are exceedingly
18 slim." (Id. at 6006-17 [emphasis added].)

14 29. Given the relief sought by Debtor's Sale Approval Motion and the fact that the
15 assumption and assignment of shopping center leases is being sought on an expedited basis, there
16 is a legitimate possibility that an appeal of any ruling on one or more issues may be warranted
17 under the circumstances. Here, (1) the Federal Rules of Bankruptcy Procedure presumptively
18 favor the 10-day stay, (2) Rules 6004 and 6006 were adopted expressly to allow objecting parties
19 time to appeal, and (3) the asserted fact that "it is imperative that the Proposed Sale be [completed]
20 on an expedited basis" (Sale Procedures Motion at 23: 8-10) is not sufficient grounds to abrogate
21 landlord's due process protections and the right to appeal without the appeal effectively being
22 rendered moot. "Shopping center landlords, even more than non-debtor parties to executory
23 contracts and executory leases, receive 'extraordinary protection' under the Code." In re Rickel
24 Home Centers, Inc., supra, 209 F.3d at 298. Preclusion of the stay provided by Rules 6004 and
25 6006 to allow a landlord a meaningful opportunity to appeal undermines the protections afforded
26 landlords by Section 365.

