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Obj. Deadline: July 20, 2017 at 4:00 p.m. ET¹
Hearing Date: July 25, 2017 at 9:00 a.m. ET

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and The Forbes Company,*

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X		
In re	:	Chapter 11
	:	
BCBG MAX AZRIA GLOBAL HOLDINGS, LLC, et al., ²	:	Case No. 17-10466 (SCC)
	:	
	:	(Jointly Administered)
Debtors.	:	
-----X		

**OBJECTION AND RESERVATION OF RIGHTS OF
FEDERAL REALTY INVESTMENT TRUST AND THE FORBES
COMPANY TO SCHEDULE OF LEASES TO BE ASSUMED AND
ASSIGNED PURSUANT TO THE AMENDED JOINT PLAN OF
REORGANIZATION OF BCBG MAX AZRIA GLOBAL HOLDINGS, LLC
AND ITS DEBTOR AFFILIATES PURSUANT TO CHAPTER 11**

¹ Extended by agreement with counsel for the Debtors.

² The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, include: BCBG Max Azria Global Holdings, LLC (6857); BCBG Max Azria Group, LLC (5942); BCBG Max Azria Intermediate Holdings, LLC (3673); Max Rave, LLC (9200); and MLA Multibrand Holdings, LLC (3854). The location of the Debtors’ service address is: 2761 Fruitland Avenue, Vernon, California 90058.

**OF THE BANKRUPTCY CODE AND DEBTORS' PROPOSED
CURE AMOUNTS SCHEDULED IN THE PLAN SUPPLEMENT**

**TO THE HONORABLE SHELLEY C. CHAPMAN,
UNITED STATES BANKRUPTCY JUDGE:**

Federal Realty Investment Trust ("Federal") and The Forbes Company ("Forbes") and together with Federal, the "Landlords", by and through their undersigned counsel, hereby file this objection and reservation of rights (the "Objection") to the Schedule of Leases to be Assumed and Assigned Pursuant to the Amended Joint Plan of Reorganization of BCBG Max Azria Global Holdings, LLC and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code and Debtors' Proposed Cure Amounts Scheduled in the Plan Supplement, and respectfully represent as follows:

I. BACKGROUND FACTS

1. BCBG Max Azria Global Holdings, LLC, and its affiliated co-debtors (collectively, the "Debtors"), filed their voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code on February 28, 2017. The Debtors continue to operate their business and manage their properties as debtors-in-possession pursuant to 11 U.S.C. §§ 1107(a) and 1108.³

2. The Debtors lease retail space (the "Premises") from Landlords pursuant to unexpired leases of nonresidential real property (individually, a "Lease," and collectively, the "Leases") at the shopping centers (the "Centers") more fully set forth below.

3. The Leases are leases "of real property in a shopping center" as that term is used in Section 365(b)(3). *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081, 1086-87 (3d Cir. 1990).

4. The Debtors filed the *Amended Joint Plan of Reorganization of BCBG Max Azria Global Holdings, LLC and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 461] (the "Plan")⁴ on June 23, 2017 and, filed the *Plan Supplement* [Docket No.

³ All statutory references to "Section" are to 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code"), unless otherwise specified in the Motion.

⁴ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Plan.

523] on July 12, 2017, which included the schedule of leases to be assumed and assigned pursuant to the Plan. Article V.E. of the Plan provides that “the Debtors shall provide for notices of proposed assumption (or assumption and assignment) and proposed cure amounts to be sent to applicable third parties and for procedures for objecting thereto and resolution of disputes by the Bankruptcy Court.”

5. According to the *Certificate of Mailing of Claims Agent of Notice of (A) Executory Contracts and Unexpired Leases to be Assumed or Assumed and Assigned) by the Debtors Pursuant to the Plan, (B) Cure Amounts, If Any, and (C) Related Procedures in Connection Therewith* [Docket No. 531] (the “Cure Notice”), the Debtor served the Cure Notice by first class mail. However, the Cure Notice fails to provide for any procedures for objecting to any assumption or cure amount and provides no specific objection deadline. Instead, the Cure Notice merely provides that objections “must be filed, served, and actually received by the Debtors by the date on which objections to confirmation are due [which date is July 17, 2017] (or such other date as may be provided in the Plan [*i.e.*, three days prior to the confirmation hearing in accordance with Article V. E. of the Plan] or applicable assumption notice).”

II. CURE OBJECTION

A. The Debtors’ Proposed Cure Amounts Do Not Provide For Payment Of All Obligations Due Under The Leases.

6. The Landlords’ cure, as compared to the Debtors’ cure is summarized below, and those charges comprising the Landlords’ cure are more fully detailed in Exhibits A and B, which are attached hereto and incorporated into this Objection by this reference:

Landlord	Store No.	Debtors' Cure	Landlord Cure ⁵	Ex.
Somerset Collection Limited Partnership [Forbes]	617	\$ 75,832	\$ 95,157.49	A
Forbes Taubman Orlando, L.L.C [Forbes]	667	\$ 51,904	\$ 65,214.01	B
PES Partners, LLC ⁶ [Federal]	715	\$ 22,792	@ ⁷	--

7. In addition to the current outstanding rent and other monthly charges due under the Leases, in determining what must be paid as cure pursuant to Section 365(b), the charges referenced below must also be taken into consideration and paid by the Debtors or assignee, either as cure or when properly billed under the Leases.

i. Year-end adjustments and reconciliations

8. In addition to rent and related monthly charges, attorneys' fees, costs, and interest, some charges for which the Debtors bear responsibility under the Leases have not yet been reconciled and/or adjusted from pre-petition (or even post-petition) periods. By way of example, the Debtors occupy retail space at the Centers pursuant to triple-net leases, where they typically pay rent and related lease charges in advance for each month. The Debtors pay fixed minimum rent, along with a pro-rata share of expenses such as real property taxes, insurance, common area maintenance ("CAM") fees, annual percentage rent, and the like. Certain charges, such as CAM and property taxes are estimated prospectively, billed to and paid by the tenant during the year,

⁵ Landlords' Cure does not include charges arising after filing this Objection, or charges not directly billed to Landlords as of the filing of this Objection. Landlords' Cure also does not include charges that are billed directly to Debtors, including in some cases, real estate taxes. To the extent Landlords are later billed for any amount due to Debtors failure to pay, or to the extent that there are other charges that come due under the Leases after the date of this Objection, Landlords retain and reserve the right to payment of these amounts when billed in the ordinary course under the Leases (and to amend this Objection to the extent necessary for any amounts that come due under the Leases through the date of any cure payment).

⁶ As more fully set forth below, the Federal Lease expired by its own terms on June 30, 2017.

⁷ The symbol "@" indicates that the Landlord's cure is equal to or less than the Debtors' cure amount, inclusive of attorney's fees asserted in the amount of \$3,000.

and then reconciled after year-end. The reconciliation compares the amounts estimated and paid against actual charges incurred at the respective Center. To the extent the estimated payments exceed actual charges; the result is a credit to the tenant. To the extent the estimated payments do not cover actual charges incurred under the Leases; the result is an additional amount (or debit) for which the tenant is liable. In some instances, year-end reconciliations and adjustments for previous years for the Premises may not yet be complete (i.e. - year-end reconciliations and adjustments that accrued through 2016 may not have been billed for some locations). In other instances, certain charges may be paid in arrears, and cannot be calculated (in some cases) until a year or more after year-end. Since these accrued, but unbilled, charges are not yet due under the Leases, they do not create a current default that gives rise to a requirement to cure by the Debtors at this time.

9. Nevertheless, Debtors remain responsible for all accrued or accruing charges under the Leases, and must pay such charges when they come due under the Leases. The Debtors (or their assignee) assume the Leases subject to their terms, and must assume all obligations owing under the Leases, including obligations that have accrued but may not yet have been billed under each Lease. Any final assumption or confirmation order should clearly state that the Debtors (or their assignee) will assume these lease obligations and pay them when due, regardless of whether they relate to the period prior to, or after, the assumption. In addition, any provision in an assumption or confirmation order that purports to release the Debtors (or their assignee) of further liability based upon a payment of cure amounts, must specify that such release does not apply to obligations to pay accrued or accruing, but unbilled, charges that come due under the Leases.

10. Finally, the Leases require the Debtors to indemnify and hold the Landlords harmless with respect to any existing claims which may not become known until after the assumption and assignment of the Leases, examples of which may include such claims as personal injuries at the Premises and damage to the Premises or Centers by the Debtors or their agents. Any assumption of the Leases must be subject to the terms of the Leases, including the continuation of all indemnification obligations, regardless of when they arose.⁸ In the alternative, the Debtors must provide (by insurance or otherwise) that they can satisfy the indemnification obligations under the Leases for any claims that relate to the period prior to assumption of the Leases. Nothing in any assumption or confirmation order should preclude the Landlords from pursuing the Debtors, their insurance, or any other party that may be liable under the Leases, and the Landlords request that any order specifically preserve their right to pursue such rights irrespective of any resolution of cure amounts herein.

ii. Attorneys' fees, costs, and interest

11. The Leases contain provisions for recovery of attorneys' fees, costs, and interest in the event the Landlords are required to take legal action to protect their interests. The Debtors are obligated to cure all defaults under the Leases, and compensate the Landlords for their actual pecuniary losses as a result of defaults under the Leases. *See* 11 U.S.C. § 365(b)(1)(A) and (B). The principle is well-recognized. *In re LCO Enterprises*, 12 F.3d 938, 941 (9th Cir. 1993); *Elkton Associates v. Shelco Inc. (Matter of Shelco)*, 107 B.R. 483, 487 (Bankr. D. Del. 1989) (debtors allowed to assume lease provided it cured *all pre-petition defaults*).

12. The Debtors (or their assignee) take the Leases *cum onere* – subject to existing burdens. The Debtors cannot assume the favorable portions, and reject the unfavorable

⁸ Any ability to assume the Leases is subject to the protections provided by Section 365(b) and (f). Therefore, any assumption must be in accordance with all provisions of the Leases.

provisions, of their Leases. *In re Washington Capital Aviation & Leasing*, 156 B.R. 167, 172 (Banks. E.D. Va. 1993). If forced to continue in the performance of the Leases, the Landlords are entitled to the full benefit of the bargain under their Leases with the Debtors. *See Matter of Superior Toy and Mfg. Co., Inc.*, 78 F.3d 1169 (7th Cir. 1996). The “full benefit of the bargain” principle has been held to require payment of interest. “The cure of a default under an unexpired lease pursuant to 11 U.S.C. § 365 is more akin to a condition precedent to the assumption of a contract obligation than it is to a claim in bankruptcy. One of the purposes of Section 365 is to permit the debtors to continue in a beneficial contract; provided, however, that the other party to the contract is made whole at the time of the debtor’s assumption of the contract.” *In re Entertainment, Inc.*, 223 B.R. 141, 151 (Bankr. N.D. Ill. 1998) (citation omitted; bankruptcy court allowed interest at 18%). Interest on pre-petition lease charges continues to run from the filing of the Debtors’ petition and must be paid as a condition of the assumption of the Leases. *See In re Skylark Travel, Inc.*, 120 B.R. 352055 (Bankr. S.D.N.Y. 1990). Interest calculations are therefore not cut short by the automatic stay, and payment of such interest is required to fully compensate Landlords for the Debtors’ default under the Leases, and thus to properly assume the Leases. Finally, post-petition interest is allowable where such interest is provided for under the terms of the Leases. *Cukierman v. Uecker (In re Cukierman)*, 265 F.3d 846, 853 (9th Cir. 2001).

13. Attorneys’ fees and costs incurred in enforcement of the covenants, obligations, and conditions of a lease are also proper components of a cure claim, and the Debtors (or successor) must satisfy these lease charges as part of the assumption or assumption and assignment of the Leases. *Entertainment, Inc.*, 223 B.R. at 152 (citation omitted). There is no logical distinction for purposes of Section 365 between attorneys’ fees incurred in connection with pre-petition defaults and fees incurred with post-petition defaults. *Id.* at 154. The fact that

a landlord uses bankruptcy procedures to enforce a lease should not preclude recovery of attorneys' fees and costs for such enforcement activity (particularly where the Bankruptcy Court is the exclusive forum where the landlord can obtain any relief, being foreclosed from state court relief by the automatic stay). *Id.*, see also, *In re Crown Books Corporation*, 269 B.R. 12 (Bankr. D. Del. 2001) (Landlords' fees and costs are recoverable as a component of cure under 11 U.S.C. § 365(b)(1)); *Urban Retail Properties v. Loews Cineplex Entertainment Corporation, et al.*, 2002 WL 5355479 (S.D.N.Y. Apr. 9, 2002) (where lease "provides for recovery of attorneys' fees and interest, their receipt deserves the same priority under Section 365(d)(3) as any of the debtors' other obligations that arise postpetition"); *Three Sisters Partners, L.L.C. v. Harden (In re Shangra-La, Incorporated)*, 167 F.3d 843, 850 (4th Cir. 1999). The Supreme Court has upheld the enforceability of such attorneys' fees clauses, ruling that pre-petition attorneys' fee clauses were enforceable with respect to issues peculiar to bankruptcy law. *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric*, 127 S. Ct. 1199, 1206 (2007).

iii. *The cure amounts serve only as estimates*

14. Landlords can only provide the information presently available regarding amounts owing by the Debtors, while reserving the right to amend the Objection as necessary to include any additional or unknown charges that arise, including but not limited to subsequent rent defaults, attorney fees, costs, interest, and year-end adjustments and reconciliations. There is no basis to impose upon the Landlords the equivalent of an administrative bar date, limiting their recourse to recover charges to which they are entitled under the Leases.

iv. *Immediate payment of undisputed cure amounts*

15. Section 365(b)(1)(A) requires that the Debtors promptly cure outstanding balances due under the Leases upon assumption. To the extent there is a dispute over the total

cure obligation for any Lease, all undisputed cure amounts should be paid immediately. Debtors should escrow disputed amounts, and the Court should set a status conference within thirty (30) days of the assumption or assumption and assignment of the Leases to deal with any disputes that remain unresolved after such period.

III. OBJECTION TO ASSUMPTION AND ASSIGNMENT

a. Prior Expiration of the Federal Lease Prevents the Debtors' Ability to Assume and Assign the Federal Lease Under the Plan

16. The Federal Lease expired by its own terms on June 30, 2017 (*See* Federal Lease, Sections 1.8 & 3.1, Commencement Date Agreement, Section 3). According to Section 20.6 of the Federal Lease, as a result of the automatic termination of the lease on June 30, 2017, Debtors became, and continue to be, a tenant at will subject to removal at any time. Copies of the relevant pages of the Federal Lease are attached hereto as **Exhibit C**.

17. As a result of the termination of the Lease, despite that the parties are discussing an extension agreement, no agreement has been signed and, therefore, the Debtors may only assume and assign their limited occupancy rights under the Federal Lease as a tenant at will, and any proposed or actual assumption and assignment of the Lease will not, and cannot, expand or extend either Debtors' rights under the Lease or the term thereof.

b. The Debtors must demonstrate adequate assurance of future performance to assume and assign the Leases to Buyer.

18. In order to satisfy the adequate assurance requirements of Section 365(b)(1), much less the heightened requirements of Section 365(b)(3), the Debtors must provide Landlords with adequate assurance of future performance information (the "**Adequate Assurance Information**"). Landlords must receive, at a minimum, the following information, and a reasonable timeframe to review such information, if Debtors are to satisfy this burden:

- (i) the specific name of the proposed bidder, the proposed tenant that will act as the assignee, and the proposed name under which the assignee intends to operate the store;
- (ii) the potential assignee's intended use for the space;
- (iii) audited financial statements and annual reports for the proposed assignee for the past three (3) years, including all supplements or amendments thereto;
- (iv) cash flow projections for the proposed assignee, the proposed assignee's most recent business plan, all cash flow projections for the Leases subject to the assignment request, and any financial projections, calculations and/or pro-formas prepared in contemplation of purchasing the Leases;
- (v) all documents and other evidence of the potential assignee's retail experience and experience operating stores in a shopping center; and
- (vi) a contact person for the proposed assignee that Landlords may directly contact in connection with the adequate assurance of future performance.

19. Any party bidding on the assets of the Debtors, including any of the Leases, must provide basic information on their ability to perform under the Lease(s), the intended use for the Premises, the name of the proposed tenant, a contact person, and their experience operating in a retail shopping center environment. The above is a non-exclusive list of the minimum information that should be included in any bid package that Landlords will need to assess a potential assignee's viability. Landlords reserve the right to request further information they deem necessary to make an informed decision as to the ability of a potential assignee to satisfy the requirements of Section 365

20. The Debtors may not assume and assign the Leases unless they demonstrate adequate assurance of future performance. 11 U.S.C. § 365(b)(1)(C); *see also* 11 U.S.C. § 365(f)(2). The provision of adequate assurance of future performance is an affirmative duty of the Debtors, and the Debtors bear the ultimate burden of persuasion as to issues under Section 365. *See In re Rachels Industries, Inc.*, 109 B.R. 797, 802 (Bankr. W.D. Tenn. 1990); *see also Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309 (5th Cir. 1985). The obligation to comply with Section 365(b) and Section 365(f) is unaffected by the assumption and assignment process taking place through a sale under Section 363. Courts require a specific factual showing through competent evidence to determine whether adequate assurance of future

performance has been provided. *See e.g., Matter of Haute Cuisine, Inc.*, 58 B.R. 390 (Bankr. M.D. Fla. 1986) (even though experts presented cash flow projections, the court found that insufficient documentary evidence had been presented).

21. Courts require a specific factual showing through competent evidence to determine whether a debtor demonstrates adequate assurance of future performance. *See e.g., Matter of Haute Cuisine, Inc.*, 58 B.R. 390 (Bankr. M.D. Fla. 1986) (even though experts presented cash flow projections, the court found that insufficient documentary evidence had been presented). To determine whether a party provides adequate assurance of future performance under Section 365(b), courts have looked to sufficient economic backing, economic conditions, certificates, credit reports, escrow deposits or other similar forms of security or guarantee. *In re Belize Airways*, 5 B.R. 152 (Bankr. S.D. Fla. 1980); *In re Lafayette Radio Electronics Corp.*, 9 B.R. 993 (Bankr. E.D.N.Y. 1981). Courts also look to the operating experience of the proposed assignee. *In re Bygaph, Inc.*, 56 B.R. 596 (Bankr. S.D.N.Y. 1986).

22. Section 365 requires that the Debtors provide adequate assurance of future performance information to carry their burden under Section 365, and without receipt of such information, the Landlords cannot assess the *bona fides* of any proposed assignee.⁹ Without specific financial and operational information, the Landlords are denied their statutory right to conduct a meaningful analysis of any proposed assignee. Landlords have yet to receive information sufficient to satisfy Section 365, especially as set forth below, because the Leases are shopping center leases.

⁹ If the Landlords do not have sufficient information (or time) to make a determination as to a proposed assignee, or if the proposed assignee is unacceptable, the Landlords must object to the proposed sale and prepare for an evidentiary hearing. In preparation of such evidentiary hearing, Landlords must conduct expedited discovery, arrange for expert testimony, and file supplemental objections based upon the information gleaned from whatever information the Debtors, or any successful bidder, actually produces.

c. The Debtors must provide heightened Adequate Assurance Information required by Section 365(b)(3) for shopping center leases.

23. In this case, the Leases are shopping center leases and, as such, the Bankruptcy Code requires more than the basic adequate assurance of future performance of the Leases under Section 365(b)(1)(C). *In re Sun TV and Appliances, Inc.*, 234 B.R. 356, 359 (Bankr. D. Del. 1999). In order to assume and assign shopping center leases, the Debtors must satisfy the heightened requirements set forth in 11 U.S.C. § 365(b)(3)(A) - (D). *See Joshua Slocum*, 922 F.2d at 1086; *see also L.R.S.C. Co. v. Rickel Home Centers, Inc. (In re Rickel Home Centers, Inc.)*, 209 F.3d 291, 299 (3d Cir. 2000). The heightened adequate assurance requirements that Debtors must satisfy under Section 365(b)(3) include the following:

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

24. This heightened adequate assurance of future performance determination must be satisfied in connection with an assumption and assignment under Section 365(f)(2)(B). *Sun TV and Appliances, Inc.*, 234 B.R. at 370. In connection with the heightened adequate assurance requirement for shopping center leases, courts also require a specific factual showing through competent evidence to determine whether the Debtors have provided adequate assurance of future performance. *Matter of Haute Cuisine, Inc.*, 58 B.R. at 394.

25. The information supplied to date does not provide sufficient information on the identity or financial capabilities of the ultimate assignee for the Leases. For instance, Landlords

do not know whether the Buyer intends to assign all Leases to a single entity, or whether it will designate leases to multiple entities. Landlords intend to continue working with the Buyers to resolve any adequate assurance questions prior to the hearing.

d. Any assumption and assignment must comply with the terms of the Leases.

26. Through the BAPCPA¹⁰ amendments, “Section 365(f)(1) is amended to make sure that all of the provisions of Section 365(b) are adhered to and that 365(f) of the code does not override Section 365(b).” Floor Statement of Senator Orrin Hatch, 151 Cong. Rec. S. 2459, 2461-62 (daily ed. March 10, 2005). The BAPCPA amendments clarified Section 365 to reflect the Congressional intent that the language of Section 365(f), and any ability to assume and assign the Leases, is subject to the protections of Section 365(b)(1) and (3). It does not modify Section 365(b). *Trak Auto Corp. v. West Town Ctr. LLC (In re Trak Auto Corp.)*, 367 F.3d 237, 243-44 (4th Cir. 2004) (bankruptcy courts could not use the general anti-assignment provision of Section 365(f)(1) to trump the specific protections granted to landlords in Section 365(b)(3)(C)). Therefore, any assignment must remain subject to all provisions of the Leases, including but not limited to those provisions concerning use, radius, exclusivity, and tenant mix and balance.

27. The revisions to Section 365 make it clear that the Debtors cannot use Section 365(f) to render lease provisions unenforceable. While certain provisions may indirectly limit the assignment of the Leases, Section 365(b) specifically protects these provisions. Provisions governing use, radius and the permitted conduct upon the Premises, therefore, are not anti-assignment provisions and Section 365(f) does not render them unenforceable. These provisions negotiated by the parties legitimately preserve the Landlords’ control over their shopping centers. Section 365(b)(3) no longer permits even insubstantial breaches of provisions such as

¹⁰ On October 17, 2005, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the “BAPCPA”) went into effect, clarifying, *inter alia*, the protections that Landlords are entitled to under 11 U.S.C. § 365.

use, radius, location or exclusivity. These critical lease terms are enforceable under Section 365(b), and this Court should deny any attempted assignment that fails to strictly comply with such provisions, and strike any language in an order that prospectively renders such lease provisions unenforceable.

28. In particular, Landlords understand that the Buyer intends to continue to operate as BCBG. However, Landlords reserve the right to object to any change in use.

e. An undercapitalized assignee should provide the Landlords additional security.

29. If a proposed assignee does not possess sufficient operating experience or capitalization to satisfy the Landlords' requirements, the assignee should provide some type of credit enhancement as part of its adequate assurance of future performance demonstration, such as: (i) a guaranty of future performance from a financially capable parent entity; (ii) a letter of credit; or (iii) a cash security deposit. The Landlords 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 assurance of future performance where the Debtors are seeking approval of an ultimate assignee with no operating history.

f. The assumption and assignment must not be free and clear of obligations to pay all charges due under the Leases, including unbilled year-end adjustments and reconciliations.

30. As set forth in the Landlords' objection to the Plan, Landlords object to any confirmation order or assumption and assignment that is free and clear of the obligations to satisfy unbilled taxes, reconciliations, percentage rent, or other year-end adjustments or unbilled charges that may have accrued under the Leases prior to the assignment of the Leases, but which have not yet been billed. The Debtors continue to be responsible for all such unbilled charges as they come due under the Leases, and the Debtors, or any assignee, must continue to satisfy all charges due under the Leases, including charges which have not yet been billed, reconciled and/or adjusted from pre-petition (or even post-petition) periods. Any assumption and assignment of the Leases cannot cut off the Landlords' right to recover unbilled charges that

have accrued, or are accruing, under the Leases. If the sale is not subject to these reconciliation and adjustment claims, it is unlikely that these legitimate lease charges will ever be paid to the Landlords.

31. Finally, the Leases provide that the Debtors must indemnify and hold the Landlords harmless with respect to any existing claims which may not become known until after the assumption and assignment of the Leases, examples of which may include such claims as personal injuries at the Premises and damage to the Premises or Centers by the Debtors or their agents. Any order approving the assumption and assignment of the Leases must provide that the assumption and assignment is pursuant to the terms of the Leases, including that any assignee continues to be responsible for all such indemnification obligations, regardless of when they arose. In the alternative, the Debtors must provide (by insurance or otherwise) that it can satisfy the indemnification obligations under the Leases for any such claims that relate to the period prior to any assumption and assignment of the Leases.

g. Assumption and Amendment Agreement

32. Landlords request that, as a condition to any order approving assumption and assignment of the Leases, the assignee shall be required to enter into a short form Assumption and Amendment Agreement whereby the assignee shall become directly obligated to the respective Landlord and the provisions of the Leases regarding notice addresses will be modified. *See, e.g.*, a form Assumption and Amendment Agreement attached hereto as **Exhibit D**.

IV. JOINDER IN OBJECTIONS BY OTHER LANDLORDS

33. To the extent not inconsistent herewith, the Landlords hereby join in the objections raised by other landlords.

V. CONCLUSION

In order to protect the interests of the Landlords, the cure amounts should be allowed (subject to adjustment by the Landlords) in the amounts set forth herein, any order

approving the sale through confirmation of the Plan should protect the Landlords as set forth above, and the Court should grant such other relief that the Court finds just and proper.

Dated: July 20, 2017
Wilmington, Delaware

Respectfully submitted,

/s/ Leslie C. Heilman

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