

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:) Case No. 17-42267-659
) Chapter 11
Payless Holdings LLC, *et al.*,)
) Jointly Administered
Debtors.)
) **Proposed Hearing Date:** June 21, 2017
) **Proposed Hearing Time:** 10:00 a.m.
) (Central Time)
) **Proposed Objection Deadline:** June 21,
) 2017 at 10:00 a.m. (Central Time)
) **Hearing Location:** Courtroom 7 North

DEBTORS' MOTION FOR ENTRY OF AN
ORDER (I) AUTHORIZING THIRD LIST
STORE CLOSINGS AND (II) GRANTING RELATED RELIEF

The above-captioned debtors and debtors in possession (collectively, the "Debtors"), respectfully state as follows in support of this motion (this "Motion"):

Preliminary Statement

1. On April 4, 2017 (the "Petition Date"), the Debtors filed their *Debtor's Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Assume the Consulting Agreement, (II) Approving Procedures for Store Closing Sales, and (III) Granting Related Relief* [Docket No. 15] (the "Initial Store Closing Motion"), including the declaration of Scott Carpenter, President of Great American Retail Solutions, a division of Great American Group LLC, attached as **Exhibit C** thereto, seeking to close an initial 389 stores (the "Initial Store Closings"). In the Initial Store Closing Motion, the Debtors discussed the importance of the Initial Store Closings to the success of their reorganization and maximizing the value of their estates.

2. Since the Petition Date, the Debtors have been working diligently to negotiate rent concessions with the assistance of RCS Real Estate Advisors and Keen Summit Capital Partners LLC. While many of those negotiations have been successful and significant savings have been realized, other negotiations have not been as successful. Accordingly, on May 24, 2017, the Debtors filed their *Debtors' Motion for Entry of an Order (I) Authorizing Second List Store Closings and (II) Granting Related Relief* [Docket No. 883], seeking authority to close an additional 408 stores. On June 7, 2017, the Debtors filed their *Notice of Revised List of Second Store Closings* [Docket No. 997] reducing the list of second round store closures from 408 to 216.

3. To successfully reorganize, however, the Debtors seek to further rationalize their store fleet. To that end, the Debtors are filing this Motion to be granted the authority to close up to an additional 81 stores (the "Third List Stores"). The Debtors are hopeful that continued negotiations between the date hereof and the hearing on this Motion will result in consensual modifications and rent concessions with respect to the Third List Stores, but are filing this Motion to close the Third List Stores in case such negotiations do not succeed. For the avoidance of doubt, the Debtors reserve the right to remove any of the Third List Stores from the attached exhibit prior to the date of the hearing. Further rationalization of the Debtors' store footprint may continue beyond these Third List Stores as needed based on other ongoing negotiations.

Relief Requested

4. By this Motion, and pursuant to sections 105, 363, 365, and 554 of title 11 of the United States Code (the "Bankruptcy Code"), and Rules 2002, 6003, and 6004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the Debtors seek entry of an order (the

“Proposed Order”)¹ (a) authorizing the Debtors to conduct the Third List Store Closings pursuant to the Sale Guidelines and (b) granting related relief. In further support of this Motion, the Debtors respectfully state as follows:

Jurisdiction and Venue

5. The United States Bankruptcy Court for the Eastern District of Missouri (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and Rule 81.901(B)(1) of the Local Rules of the United States District Court for the Eastern District of Missouri. The Debtors confirm their consent, pursuant to Bankruptcy Rule 7008, to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

6. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

Background

7. The Debtors and their non-Debtor affiliates (together, the “Company”) comprise the largest specialty family footwear retailer in the Western Hemisphere, offering a wide range of shoes and accessory items at affordable prices. The Company has more than 4,000 stores in more than 30 countries. The Debtors are headquartered in Topeka, Kansas, but their operations are extensive and span across Asia, the Middle East, Latin America, Europe, and the United States.

8. On the Petition Date, each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their business and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy

¹ A copy of the Proposed Order will be provided to the Notice Parties (as defined below) and made available on the Debtors’ case information website at <https://cases.primeclerk.com/payless>.

Code. These chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered pursuant to Bankruptcy Rule 1015(b) [Docket No. 62]. No request for the appointment of a trustee or examiner has been made in these chapter 11 cases. On April 14, 2017, the Office of the United States Trustee for the Eastern District of Missouri (the “U.S. Trustee”) formed the official committee of unsecured creditors (the “Creditors’ Committee”) pursuant to section 1102 of the Bankruptcy Code [Docket No. 241].

I. The Third List Store Closings.

9. Recognizing the need to remodel their brick and mortar business to align with worsening retail-industry conditions, the Debtors’ management team and advisors, including Alvarez & Marsal North America LLC, Guggenheim Securities, LLC, and RCS Real Estate Advisors, undertook an extensive analysis of the Debtors’ existing store footprint to determine whether the Debtors should close any stores in connection with their broader financial and operational restructuring initiatives.

10. On the Petition Date, the Debtors filed the Initial Store Closing Motion. Shortly thereafter, the Debtors began the Initial Store Closings. On May 17, 2017, this Court entered a final order granting the relief requested in the Initial Store Closing Motion and approving the Sale Guidelines [Docket No. 786] (the “Final Order”). On May 19, 2017, the Debtors filed their *Notice of Rejection of Certain Unexpired Leases* [Docket No. 807] seeking to reject, as of May 31, 2017, approximately 150 unexpired leases of the Initial Store Closings that are expected to be completed at the end of May. The remaining Initial Store Closings are ongoing and are expected to conclude by the end of June.

11. On May 24, 2017, the Debtors filed their *Debtors’ Motion for Entry of an Order (I) Authorizing Second List Store Closings and (II) Granting Related Relief* [Docket No. 883], seeking to close an additional 408 stores (the “Second List Store Closings”). The Court

approved the Second List Store Closings on June 8, 2017. The Second List Store Closings are expected to conclude in approximately seven weeks. The Debtors' efforts to further rationalize their store footprint are ongoing as the Debtors and their advisors evaluate the Debtors' remaining unexpired leases.

12. In formulating the list of Third List Stores, the Debtors considered, among other factors, historical store profitability, recent sales trends, the geographic market in which the store is located, the potential to realize negotiated rent reductions with applicable landlords, and specific circumstances related to a store's performance. Specifically, the Third List Stores were identified based on the following criteria: (a) whether the Third List Store was unprofitable on an EBITDAR basis (EBITDA after adding back the associated rent and occupancy expense) and was not a candidate for rent concessions; (b) whether the Third List Store was cash flow negative and had little to no opportunity for rent concessions or, based upon the current discussion between the Debtors and respective landlord, the rent concessions offered were not sufficient; and (c) whether the Third List Store had high anticipated "transfer sales" (*i.e.*, sales that would flow through to the Debtors' other store locations) that exceeded its estimated cash flow.

13. The Debtors² seek to apply the Sale Guidelines included in the Initial Store Closing Motion and approved in the Final Order, to sell the (a) saleable inventory located in the Third List Stores following the Petition Date (the "Third List Merchandise"), and (b) associated furniture, fixtures, and equipment (the "Third List FF&E" and, together with the Merchandise, the "Third List Store Closure Assets"), in each case free and clear of liens, claims, or encumbrances, and to otherwise prepare the Third List Stores for turnover to the applicable

² The Debtors are seeking authority to conduct the Third List Store Closings themselves, rather than requesting that the Consultant (as defined in Initial Store Closing Motion) conduct the Third List Store Closings. Nevertheless, if the Motion is granted, the Debtors will comply with the Sale Guidelines.

landlords. The Debtors have determined that, in the exercise of their business judgment and in consultation with their advisors, the Sale Guidelines provide the best and most efficient means of selling the Third List Store Closure Assets to maximize the value to their estates. The Debtors estimate that the Third List Store Closing process will take approximately five to six weeks once they begin.

14. Certain states in which the Debtors operate stores have or may have licensing or other requirements governing the conduct of store closing, liquidation, or other inventory clearance sales, including, but not limited to, state, provincial, and local laws, statutes, rules, regulations, and ordinances (the “Liquidation Sale Laws”). Liquidation Sale Laws may establish licensing, permitting or bonding requirements, waiting periods, time limits, and bulk sale restrictions and augmentation limitations that would otherwise apply to the Third List Store Closings. The Debtors request Court authority to conduct the Third List Store Closings in accordance with the Sale Guidelines without complying with the Liquidation Sale Laws.

15. Similarly, the Debtors respectfully request a waiver of any contractual restrictions that could otherwise inhibit or prevent the Debtors from maximizing value for creditors through the Third List Store Closings. In certain instances, the contemplated Third List Store Closings may be inconsistent with certain provisions of leases, subleases, or other documents with respect to the premises in which the Debtors operate, including, without limitation, reciprocal easement agreements, agreements containing covenants, conditions, and restrictions (including, without limitation, “go dark” provisions and landlord recapture rights), or other similar documents or provisions. Such restrictions would also hamper the Debtors’ ability to maximize value in selling their inventory.

16. The Debtors also request that no entity, including, without limitation, utilities, landlords, creditors, and all persons acting for or on their behalf shall interfere with or otherwise impede the conduct of the Third List Store Closings, or institute any action against the Debtors in any court (other than in this Court) or before any administrative body that in any way directly or indirectly interferes with, obstructs, or otherwise impedes the conduct of the Third List Store Closings, the advertising and promotion (including through the posting of signs) of the Third List Store Closings.

Basis for Relief Requested

I. The Court Should Approve the Third List Store Closings under Bankruptcy Code Sections 105(a) and 363(b)

17. The Court may authorize the Debtors to consummate the Third List Store Closings pursuant to sections 105(a) and 363(b) of the Bankruptcy Code. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that “[t]he [debtor], 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). Further, section 105(a) of the Bankruptcy Code provides, in relevant part, that “[t]he court may 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).

18. Pursuant to section 363(b) of the Bankruptcy Code, for the purpose of conducting the Third List Store Closings, the Debtors need only show a legitimate business justification for the proposed action. *See, e.g., In re Channel One Commc’ns, Inc.*, 117 B.R. 493, 496 (Bankr. E.D. Mo. 1990) (“A debtor in possession may sell substantially all of its assets under 11 U.S.C. Section 363(b)(1) so long as the court can ‘expressly find from the evidence presented before [it] at the hearing a good business reason to grant such an application.’”) (quoting *In re Lionel Corp.*, 722 F.2d 1063, 1070 (2d Cir. 1983)); *see also Comm. of Equity Sec. Holders v. Lionel Corp.*

(*In re Lionel Corp.*), 722 F.2d 1063, 1070 (2d Cir. 1983); *Comm. of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986) (“Where the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor’s conduct.”). When a valid business justification exists, the law vests the debtor’s decision to use property out of the ordinary course of business with a strong presumption ““that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.”” *In re GSC, Inc.*, 453 B.R. 132, 174 (Bankr. S.D.N.Y. 2011) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)). Accordingly, parties challenging a debtor’s decision must make a showing of “bad faith, self-interest or gross negligence.” *In re Integrated Res. Inc.*, 147 B.R. 650, 656 (Bankr. S.D.N.Y. 1992) (citations omitted).

19. In addition, the Court may authorize the Third List Store Closings under section 105(a) of the Bankruptcy Code. Section 105(a) of the Bankruptcy Code codifies the Court’s inherent equitable powers to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” Under section 105(a) of the Bankruptcy Code, courts may authorize actions that are essential to the continued operation of a debtor’s business. See *In re Payless Cashways, Inc.*, 268 B.R. 543, 546 (Bankr. W.D. Mo. 2001) (discussing “doctrine of necessity” with respect to payment of critical vendors); *In re C.A.F. Bindery, Inc.*, 199 B.R. 828, 835 (Bankr. S.D.N.Y. 1996) (holding “doctrine of necessity” may be invoked where the debtor shows payment of prepetition claims is “critical to a debtor’s reorganization); see also *In re Fin. New Network Inc.*, 134 B.R. 732, 735–36 (Bankr. S.D.N.Y. 1991) (same).

20. The relief requested by this Motion represents a sound exercise of the Debtors' business judgment, is necessary to avoid immediate and irreparable harm to the Debtors' estates, and is justified under sections 105(a) and 363(b) of the Bankruptcy Code. The Debtors and their advisors engaged in a review of their remaining stores to (a) identify underperforming and unprofitable stores; (b) consider whether the store's performance could be improved by various initiatives, including through the negotiation of lease concessions with landlords; (c) determine which stores should be promptly closed to eliminate their ongoing negative effect on the Debtors' financial performance and to improve the Debtors' liquidity. This process resulted in the Debtors' identification of the Third List Stores, which fail to generate positive cash flow and are therefore a drain on liquidity. The Debtors will realize an immediate benefit through additional liquidity upon the closing of the stores and the sale of the related Third List Store Closure Assets. A swift and orderly commencement of the Third List Store Closures will allow the Debtors to timely reject the applicable Third List Store leases and, therefore, avoid the accrual of unnecessary administrative expenses for rent payments.

II. The Court Should Approve the Sale of the Third List Store Closure Assets Free and Clear of all Liens, Encumbrances, and Other Interests under Bankruptcy Code Section 363(f)

21. The Debtors request approval to sell the Third List Store Closure Assets on a final "as is" basis, free and clear of any and all liens, claims, and encumbrances in accordance with section 363(f) of the Bankruptcy Code. Under sections 363(b) and 363(f) of the Bankruptcy Code, a debtor in possession may sell property "free and clear of any interest in such property of an entity other than the estate" if any one of the following conditions is satisfied: (a) applicable nonbankruptcy law permits the sale of such property free and clear of such interest; (b) such entity consents; (c) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (d) such interest is in bona fide

dispute; or (e) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. 11 U.S.C. § 363(f); *Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988) (noting that since section 363(f) is written in the disjunctive, the court may approve a sale free and clear if any one subsection is met).

22. The Debtors anticipate that, to the extent there are liens on the Third List Store Closure Assets, all holders of such liens will consent to the sales because they provide the most effective, efficient, and time-sensitive approach to realizing proceeds for, among other things, the repayment of amounts due to such parties. Any and all liens on the Third List Store Closure Assets sold under the Third List Store Closings would attach to the remaining net proceeds of such sales with the same force, effect, and priority as such liens currently have on these assets, subject to the rights and defenses, if any, of the Debtors and of any party in interest with respect thereto.

23. Moreover, all identified lienholders will receive notice and will be given sufficient opportunity to object to the relief requested. Any such entity that does not object to the sale of the Third List Store Closure Assets should be deemed to have consented. *See In re GSC, Inc.*, 453 B.R. 132, 183 (Bankr. S.D.N.Y. 2011) (“Consent pursuant to section 363(f)(2) may be satisfied where an entity has not objected to a sale.”); *In re Enron Corp.*, No. 01-16034, 2003 WL 21755006, at *2 (Bankr. S.D.N.Y. July 28, 2003) (order deeming all parties who did not object to proposed sale to have consented under section 363(f)(2)); *see also Futuresource LLC v. Reuters Ltd.*, 312 F.3d 281, 285-86 (7th Cir. 2002) (“It is true that the Bankruptcy Code limits the conditions under which an interest can be extinguished by a bankruptcy sale, but one of those conditions is the consent of the interest holder, and lack of objection (provided of course there is notice) counts as consent. It could not be otherwise; transaction costs would be prohibitive if

everyone who might have an interest in the bankrupt's assets had to execute a formal consent before they could be sold." (internal citations omitted)); *Hargrave v. Twp. of Pemberton (In re Tabone, Inc.)*, 175 B.R. 855, 858 (Bankr. D.N.J. 1994) (finding failure to object to sale free and clear of liens, claims and encumbrances satisfies section 363(f)(2)); *Citicorp Homeowners Serv., Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (E.D. Pa. 1988) (same).

24. Accordingly, the Debtors submit that the sale of the Third List Store Closure Assets satisfies the statutory requirements of section 363(f) of the Bankruptcy Code and should therefore be free and clear of any liens, claims, encumbrances, and other interests.

III. The Court Should Waive Compliance With Laws Regarding Liquidation Sales

25. Critical to the success of the Third List Store Closings is the Debtors' ability to conduct the Third List Store Closings in accordance with the Sale Guidelines and without complying with Liquidation Sale Laws. Although the Debtors intend to comply with state and local health and safety laws and consumer protection laws in conducting the Third List Store Closings, many Liquidation Sale Laws require special and cumbersome licenses, waiting periods, time limits, and other procedures for store closing, liquidation, or similar sales.

26. To eliminate the time, delay, and expense associated with the administrative procedures necessary to comply with the Liquidation Sale Laws, the Debtors proposed and the Court approved the Sale Guidelines as a way to streamline the administrative burdens on their estates while still adequately protecting the broad and varied interests of both landlords and applicable governmental agencies charged with enforcing any Liquidation Sale Laws that may apply to the Third List Store Closings. As such, the Debtors believe the Sale Guidelines mitigate any concerns that their landlords or governmental agencies may raise with respect to the Third List Store Closings, and therefore, the below requested relief seeking the waiver of certain state and local laws and lease provisions is appropriate.

27. The Debtors submit that there is strong support for granting them the authority to not comply with the Liquidation Sale Laws. **First**, it is generally accepted that many state statutes and regulations provide that, if a liquidation or bankruptcy sale is court authorized, a company need not comply with the Liquidation Sale Laws. *See, e.g.*, Ark. Code Ann. § 4-74-103 (exempting from the provisions of the chapter sales pursuant to any court order); Fla. Stat. Ann. 559.25(2) (same); Ga. Code Ann. § 10-1-393(b)(24)(C)(iv) (same); 815 ILCS 350/3 (same); La. Rev. Stat. Ann. § 51:43(1) (same); N.Y. Gen. Bus. Law § 584(a) (same); Or. Rev. Stat. Ann. § 646A.100(2)(b) (“‘Going out of business sale’ does not include a sale conducted by a bankruptcy trustee.”); Tex. Bus. & Com. Code Ann. § 17.91(3) (exempting from subchapter sales conducted pursuant to court order). **Second**, pursuant to section 105(a) of the Bankruptcy Code, the Court has the authority to permit the Third List Store Closings to proceed notwithstanding contrary Liquidation Sale Laws as it is essential to the continued operation of the Debtors’ business. **Third**, this Court will be able to supervise the Third List Store Closings because the Debtors and their assets are subject to this Court’s exclusive jurisdiction. *See* 28 U.S.C. § 1334. As such, creditors and the public interest are adequately protected by notice of this Motion and the ongoing jurisdiction and supervision of this Court, and parties in interest will be able to raise any further issues at the final hearing.

28. Further, bankruptcy courts have consistently recognized that federal bankruptcy law preempts state and local laws that contravene the underlying policies of the Bankruptcy Code. *See Belculfine v. Aloe (In re Shenango Group, Inc.)*, 186 B.R. 623, 628 (Bankr. W.D. Pa. 1995) (“Trustees and debtors-in-possession have unique fiduciary and legal obligations pursuant to the bankruptcy code [A] state statute . . . cannot place burdens on [a debtor] where the result would contradict the priorities established by the federal bankruptcy code.”), *aff’d*, 112

F.3d 633 (3d Cir. 1997). Courts have found that preemption of state law is not appropriate if the laws deal with public health and safety. *See Baker & Drake, Inc., v. Public Serv. Comm'n of Nev. (In re Baker & Drake, Inc.)*, 35 F.3d 1348, 1353–54 (9th Cir. 1994) (holding that Bankruptcy Code did not preempt state law prohibiting taxicab leasing that was promulgated in part as public safety measure). Preemption is appropriate, however, where the only state laws involved concern economic regulation rather than the protection of public health and safety. *See In re Baker & Drake, Inc.*, 35 F.3d at 1353 (finding that “federal bankruptcy preemption is more likely . . . where a state statute is concerned with economic regulation rather than with protecting the public health and safety”).

29. Under the circumstances of these chapter 11 cases, enforcing the strict requirements of the Liquidation Sale Laws would undermine the fundamental purpose of section 363(b) of the Bankruptcy Code by placing constraints on the Debtors’ ability to maximize estate assets for the benefit of creditors. Accordingly, authorizing the Third List Store Closings without the delays and burdens associated with obtaining various state and local licenses, observing state and local waiting periods or time limits, and/or satisfying any additional requirements with respect to advertising and similar items is necessary and appropriate. The Debtors do not seek a general waiver of all state and local requirements, but only those that apply specifically to retail liquidation sales. Indeed, the requested waiver is narrowly tailored to facilitate the successful consummation of Third List Store Closings. Moreover, the Debtors will comply with applicable state and local public health and safety laws, and applicable tax, labor, employment, environmental, and consumer protection laws, including consumer laws regulating deceptive practices and false advertising.

30. Based on the foregoing, courts in district this and courts other jurisdiction have granted similar relief in other bankruptcy cases under similar circumstances. *See, e.g., In re Bakers Footwear Grp., Inc.*, No. 12-49658 (CER) (Bankr. E.D. Mo. Jan. 14, 2013) (“Compliance with . . . [Liquidation Sale Laws] . . . constitute an impermissible restraint on the Debtor’s ability to maximize the value of the Assets under section 363 of the Bankruptcy Code and are unnecessary based upon the protections provided by the Motion and the jurisdiction of this Court.”); *see also In re Gander Mountain Co.*, No. 17-30673 (MER) (Bankr. D. Minn. 2017) (authorizing store closing sales while presuming compliance with laws affecting store closing or liquidation sales); *In re BCBG Max Azria Glob. Holdings, LLC*, No. 17-10466 (Bankr. S.D.N.Y. Mar. 2, 2017) (same); *In re Aéropostale, Inc.*, No. 16-11275 (Bankr. S.D.N.Y. May 6, 2016) (same); *In re The Great Atl. & Pac. Tea Co., Inc.*, No. 15-23007 (RDD) (Bankr. S.D.N.Y. Aug. 13, 2015) (same).³

31. Thus, the Court should authorize the Debtors to conduct the Third List Store Closings in accordance with the Sale Guidelines and without complying with Liquidation Sale Laws.

IV. The Court Should Waive Compliance with Any Restriction in the Leases

32. Certain of the Debtors’ leases may contain provisions purporting to restrict or prohibit the Debtors from conducting a store closing, liquidation, or similar sale. Such provisions have been held to be unenforceable in chapter 11 cases as they constitute an impermissible restraint on a debtor’s ability to properly administer its reorganization case and maximize the value of its assets under section 363 of the Bankruptcy Code. *See In re Lisbon Shops, Inc.*, 24 B.R. 693, 695 (Bankr. E.D. Mo. 1982) (holding restrictive lease provision

³ Because of the voluminous nature of the orders cited herein, such orders have not been attached to this Motion. Copies of these orders are available upon request of the Debtors’ proposed counsel.

unenforceable in chapter 11 case where debtor sought to conduct a liquidation sale); *see also Ames Dep't Stores*, 136 B.R. at 359 (deciding that enforcement of such lease restrictions would “contravene overriding federal policy requiring debtor to maximize estate assets”); *In re R. H. Macy and Co., Inc.*, 170 B.R. 69, 73–74 (Bankr. S.D.N.Y. 1994) (holding that the lessor could not recover damages for breach of a covenant to remain open throughout the lease term because the debtor had a duty to maximize the value to the estate and the debtor fulfilled this obligation by holding a store closing sale and closing the store.); *In re Tobago Bay Trading Co.*, 112 B.R. 463, 467–68 (Bankr. N.D. Ga. 1990) (finding that a debtor’s efforts to reorganize would be significantly impaired to the detriment of creditors if lease provisions prohibiting a debtor from liquidating its inventory were enforced).

33. Store closing sales are a routine part of chapter 11 cases involving retail debtors. Such sales are consistently approved by courts, despite provisions in recorded documents or agreements purporting to forbid such sales. Indeed, courts in this jurisdiction and others have repeatedly deemed such restrictive contractual provisions unenforceable as impermissible restraints on a debtor’s ability to maximize the value of its assets under section 363 of the Bankruptcy Code. *See, e.g., In re Bakers Footwear Grp., Inc.*, No. 12-49658 (CER) (Bankr. E.D. Mo. Jan. 14, 2013) (authorizing store closing sales without requiring compliance with lease provisions affecting store closing or liquidation sales laws); *see also In re Gander Mountain Co.*, No. 17-30673 (MER) (Bankr. D. Minn. 2017) (authorizing store closing sales without requiring compliance with lease provisions affecting store closing or liquidation sales laws); *In re BCBG Max Azria Glob. Holdings, LLC*, No. 17-10466 (Bankr. S.D.N.Y. Mar. 2, 2017) (same); *In re*

Aéropostale, Inc., No. 16-11275 (Bankr. S.D.N.Y. May 6, 2016) (same); *In re The Great Atl. & Pac. Tea Co., Inc.*, No. 15-23007 (RDD) (Bankr. S.D.N.Y. Aug. 13, 2015) (same).⁴

34. Thus, to the extent that such provisions or restrictions exist in any of the leases of the stores subject to the Third List Store Closings, the Debtors request that the Court authorize the Debtors to conduct any Third List Store Closings without interference by any landlords or other persons affected, directly or indirectly, by the liquidation sales.

V. The Court Should Approve the Abandonment of Certain Property in Connection with Any Third List Store Closings

35. After notice and a hearing, a debtor “may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.” 11 U.S.C. §554(a); *see also Hanover Ins. Co. v. Tyco Indus., Inc.*, 500 F.2d 654, 657 (3d Cir. 1974) (stating that a trustee “may abandon his claim to any asset, including a cause of action, he deems less valuable than the cost of asserting that claim”).

36. The Debtors are seeking to sell all Third List FF&E that remain in the Third List Stores upon the completion of the Third List Store Closures. However, the Debtors may determine that the costs associated with holding or selling certain property or Third List FF&E exceeds the proceeds that will be realized upon its sale, or that such property is not sellable at all. In such event, the property is of inconsequential value and benefit to the estates and may be burdensome to retain.

37. Notwithstanding the foregoing, the Debtors will utilize all commercially reasonable efforts to remove or cause to be removed any confidential or personal identifying information (which means information which alone or in conjunction with other information

⁴ Because of the voluminous nature of the orders cited herein, such orders have not been attached to this Motion. Copies of these orders are available upon request of the Debtors’ proposed counsel.

identifies an individual, including, but not limited to, an individual's name, social security number, date of birth, government-issued identification number, account number, and credit or debit card number) in any of the Debtors' hardware, software, computers, or cash registers or similar equipment that are to be sold or abandoned.

38. To maximize the value of the Debtors' assets and to minimize the costs to the estates, the Debtors respectfully request authority to abandon any of their remaining Third List FF&E or other property located at any of the Stores without incurring liability to any person or entity. The Debtors further request that the landlord of each Store with any abandoned Third List FF&E or other property be authorized to dispose of such property without liability to any third parties.

Request for Waiver of Stay

39. The Debtors also seek a waiver of any stay of the effectiveness of the orders in relevant part, that "[e]xcept to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, grant relief regarding . . . a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate." Further, pursuant to Bankruptcy Rule 6004(h), "[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." As set forth above, the Debtors submit that ample cause exists to justify (i) the immediate entry of an order granting the relief sought herein, and (ii) a waiver of the fourteen-day stay imposed by Bankruptcy Rule 6004(h).

Notice

40. The Debtors will provide notice of this Motion to: (a) the U.S. Trustee; (b) counsel to the Creditors' Committee; (c) counsel to the Prepetition ABL Agents and the DIP ABL Agents; (d) counsel to the Prepetition First Lien Term Loan Agent and the DIP Term Loan

Agent; (e) counsel to the Prepetition First Lien Term Loan Steering Committee; (f) counsel to the Prepetition Second Lien Term Loan Agent; (g) the United States Attorney's Office for the Eastern District of Missouri; (h) the office of the attorneys general for the states in which the Debtors operate; (i) the Internal Revenue Service; (j) the United States Securities and Exchange Commission; (k) the landlords of the Third List Stores; and (l) any party that has requested notice pursuant to Bankruptcy Rule 2002 (collectively, the "Notice Parties"). The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

No Prior Request

41. No prior request for the relief sought in this motion has been made to this or any other court.

[Remainder of page intentionally left blank]

WHEREFORE, the Debtors respectfully request entry of the Proposed Order
(a) granting the relief requested herein and (b) granting such other relief as is just and proper.

Dated: June 13, 2017
St. Louis, Missouri

/s/ Steven N. Cousins

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EXHIBIT A

Third List Store Closings

Exhibit A - Store List

COUNT	STORE	STORE LOCATION ADDRESS 1	STORE LOCATION ADDRESS 2	STORE LOCATION CITY	STORE LOCATION STATE	LANDLORD NAME
1	5299	1 S WHITEHORSE PIKE		STRATFORD	NJ	LEE S LINDEN
2	1476	11211 SE 82ND AVE		HAPPY VALLEY	OR	EMC4 LLC
3	5331	1150 STAFFORD MARKET PLACE	SUITE 107	STAFFORD	VA	STAFFORD MARKETPLACE LLC
4	2111	1777 SW LOOP 410		SAN ANTONIO	TX	KANAWHA-APH-FKG CAPITAL PARTNERS
5	3283	207 S MAIN ST		MCALLEN	TX	GIANCHANDANI INVESTMENTS LC
6	4022	22611 76TH AVENUE WEST	SPACE 100	EDMONDS	WA	TRIPLE K FAMILY LIMITED PARTNERSHIP
7	4373	255 FULTON AVE		HEMPSTEAD	NY	GEORGE ZAHABIAN
8	2272	2814 S 108TH ST		WEST ALLIS	WI	LP WEST ALLIS LLC
9	4076	3049 SHERIDAN DR		BUFFALO	NY	NORTHTOWN PROPERTY OWNER LLC
10	4699	3601 S LA BREA AVENUE		LOS ANGELES	CA	BALDWIN HILL INVESTORS LTD
11	3801	3643 S DALE MABRY HWY		TAMPA	FL	CORINNE W WILLIAMS
12	926	40668 US HIGHWAY 19 N		TARPON SPRINGS	FL	LEE S. LINDEN TRUSTEE OF THE LEE S LINDEN FAMILY TRUST
13	4964	407 MAMARONECK AVENUE		MAMARONECK	NY	ACME REALTY LLP
14	136	4124 W DIVISION ST		SAINT CLOUD	MN	JACK L. DOCKENDORF
15	3792	42-01 BELL BLVD		FLUSHING	NY	PARKER GREENFIELD LLC
16	5071	428 UTICA AVENUE		BROOKLYN	NY	BAWABEH BROTHERS NO 2 LLC
17	4954	5024 5TH AVENUE		BROOKLYN	NY	EMKAY LLC
18	5185	6053 JONESBORO ROAD		MORROW	GA	VERL H. HANNAH & PATRICIA L HANNAH
19	5263	750 W HALLANDALE BEACH BLVD		HALLANDALE	FL	MARINER CAPITAL LLC
20	4140	835 W MAIN ST		LEWISVILLE	TX	SCHMITZ PROPERTIES INC.
21	3625	874 FLATBUSH AVE		BROOKLYN	NY	BLDG OCEANSIDE LLC
22	3662	8811 SW 107TH AVE		MIAMI	FL	SVF KENDALL MIAMI LLC
23	1530	8824 RAINIER AVE S		SEATTLE	WA	ONE LIBERTY PROPERTIES INC.
24	5693	ARBOR PARK	17700 HWY 281 N	SAN ANTONIO	TX	BRE RC ARBOR PARK TX LP
25	4278	BAYONNE CROSSING	305 BAYONNE CROSSING WAY	BAYONNE	NJ	KRG BAYONNE URBAN RENEWAL LLC - C/O KITEREALTY GROUP
26	1895	BEACON CENTER	6700 7 RICHMOND HIGHWAY	ALEXANDRIA	VA	BEACON CENTER LLC
27	3679	BRUCKNER COMMONS	1929 TURNBULL AVE	BRONX	NY	URBAN EDGE PROPERTIES
28	3250	CAMARILLO TOWN CENTER	309 W VENTURA BLVD	CAMARILLO	CA	SPHEAR INVESTMENTS LLC
29	1612	CANYON SPRINGS SC	2851 CANYON SPRINGS PARKWAY	RIVERSIDE	CA	WESTMINSTER PARTNERSHIP
30	5713	CAPE COD MALL	793 IYANNOUGH RD	HYANNIS	MA	MAYFLOWER CAPE COD LLC
31	411	CENTERTON SQUARE SHOPPING CENTER	22 CENTERTON RD	MOUNT LAUREL	NJ	CENTERTON SQUARE LLC; TRT - DDR JOINT VENTURE I OWNER LLC
32	4268	CENTRAL SQUARE	599 MASSACHUSETTS AVE	CAMBRIDGE	MA	3MJ ASSOCIATES LLC
33	5790	CLINTON SHOPETTE	6787 CLINTON STREET	GREENWOOD VILLAGE	CO	BELLIO 17TH STREET HOLDINGS LLLP
34	2402	COMPTON TOWNE CTR	186 E COMPTON BLVD	COMPTON	CA	COMPTON COMMERCIAL REDEVELOPMENT COMPANY
35	1508	COUNTRY CLUB PLAZA	4167 W 167TH ST	COUNTRY CLUB HILLS	IL	COUNTRY CLUB HILLS PLAZA LLC
36	3442	CROSSROADS AT SANTA MARIA	2162 S BRADLEY RD	SANTA MARIA	CA	SM 101 TWO LLC
37	3976	DANBURY FAIR	7 BACKUS AVE	DANBURY	CT	DANBURY MALL LLC
38	3059	DEERFIELD MALL SC	3868 W HILLSBORO BLVD	DEERFIELD BEACH	FL	WEINGARTEN REALTY INVESTORS
39	3088	DIXIE PLAZA	5352 DIXIE HWY	LOUISVILLE	KY	THOMAS VENTURES LLC
40	1506	DONLON PLAZA	4050 E MAIN STREET	VENTURA	CA	DOLLINGER VENTURA ASSOCIATES
41	3064	EASTGATE SQUARE	4394 EASTGATE SQUARE DR	CINCINNATI	OH	MARK WEISS ES LLC
42	3400	EDDYSTONE CROSSING SC	1558 CHESTER PIKE	EDDYSTONE	PA	EDDYSTONE ASSOCIATES LP
43	1057	ELK GROVE VILLAGE S/C	8547 ELK GROVE BLVD	ELK GROVE	CA	ELK GROVE VILLAGE LLC
44	2685	FASHION SQUARE	10773 SW BEAVERTON HILLSDALE HWY	BEAVERTON	OR	HSP HOLDINGS LLC
45	3414	FESTIVAL AT BEL AIR	5 BEL AIR SOUTH PKWY	BEL AIR	MD	CH REALTY VI/R BEL AIR FESTIVAL LLC
46	2532	FIESTA CENTER	933 E IRVING BLVD	IRVING	TX	SOL PLAZA I LTD.
47	6577	HAWTHORNE PLAZA SC	2058 FRUITVILLE PIKE	LANCASTER	PA	HAWTHORNE CENTRE ASSOCIATES L.P.
48	1379	KEMAH CENTER	153 FM 518 SUITE A	KEMAH	TX	KEMAH PAD 1 LP
49	4588	KENTLANDS SHOPPING CENTER	221 KENTLANDS BLVD	GAITHERSBURG	MD	KENTLANDS SQUARE LLC
50	1923	LA GRAN PLAZA DE FORT WORTH	4200 SOUTH FREEWAY	FORT WORTH	TX	TOWN CENTER MALL L.P.
51	3960	LAKEWOOD CROSSING	17020 TWIN LAKES AVENUE	MARYSVILLE	WA	PBS ASSOCIATES LLC
52	4004	MATTAPAN SQUARE	1624 BLUE HILL AVE	MATTAPAN	MA	NISSON FAMILY TRUST C/O M. DANA AND SONS
53	4372	MERRIMAC PLAZA	180 HAVERHILL ST	METHUEN	MA	MERRIMAC INCOME PARTNERS LIMITED PARTNERSHIP
54	3485	MONTGOMERY PLAZA	5011 MONTGOMERY BLVD NE	ALBUQUERQUE	NM	MONTGOMERY PLAZA PARTNERS LLC
55	1650	NEWPARK MALL	2215 NEWPARK MALL	NEWARK	CA	NEWPARK MALL LP

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COUNT	STORE	STORE LOCATION ADDRESS 1	STORE LOCATION ADDRESS 2	STORE LOCATION CITY	STORE LOCATION STATE	LANDLORD NAME
56	4363	NORDAHL MARKETPLACE	751 CENTER DRIVE	SAN MARCOS	CA	NORDAHL MARKETPLACE LLC
57	3901	NORTHGATE MALL	5800 NORTHGATE MALL	SAN RAFAEL	CA	NORTHGATE MALL ASSOCIATES
58	3031	PRINCE OF ORANGE MALL	2390 CHESTNUT ST NE	ORANGEBURG	SC	PRINCE OF ORANGE LLC
59	3537	RIVERDALE CROSSING SHOPPING CENTER	12940 RIVERDALE DR NW STE 800	COON RAPIDS	MN	RIVERDALE 2005 LLC
60	3245	RIVERDALE PLAZA	60 W 225TH STREET	BRONX	NY	KINGSBRIDGE ASSOCIATES LLC
61	1284	RIVERFRONT PLAZA	2657 N ELSTON	CHICAGO	IL	RLR ASSOCIATES LLC
62	1011	SANTA ANA DWNTWN PLAZA	407 E 1ST ST STE 2A	SANTA ANA	CA	ROIC SANTA ANA LLC
63	1848	SAUL KLEINFELD SC	1801 ZARAGOSA	EL PASO	TX	EP GMK LP
64	4093	SOUTH ATTLEBORO SQUARE	287 WASHINGTON ST	ATTLEBORO	MA	AMALGAMATED FINANCIAL GROUP VIII LP
65	1817	SOUTHGATE SHOPPING CENTER	447A BLOSSOM HILL ROAD	SAN JOSE	CA	MARDESICH COMPANY SOUTHGATE LLC
66	2770	SOUTHLAND PLAZA	585 SATURN BLVD	SAN DIEGO	CA	SPP CORP JACK W. DAVIS LLC ALBERT W. KRASNOFF LLC MCPHEE HOLDINGS LLC
67	1437	SOUTHLAND S/C	931 W STATE ROAD 84	FORT LAUDERDALE	FL	CASTO INVESTMENTS COMPANY LLLP
68	5250	STONECREST PLAZA	3460 MURPHY CANYON ROAD	SAN DIEGO	CA	AGC SD RETAIL 6 LLC
69	1688	STONY ISLAND PLAZA	1625 E 95TH ST	CHICAGO	IL	STONY ISLAND LLC
70	504	THE SHOPS AT BUENA PARK	7540 ORANGETHORPE AVENUE	BUENA PARK	CA	W & F INVESTMENTS LLC
71	4195	TOWNE PLAZA	700 BOSTON RD	BILLERICA	MA	VALLEY PROPERTIES INC.
72	2161	TRULY PLAZA SHOPPING CENTER	114 TRULY PLAZA	CLEVELAND	TX	TRULY PLAZA REALTY CORPORATION
73	4509	VICTORIA GARDENS	7901 KEW AVE	RANCHO CUCAMONGA	CA	RANCHO MALL LLC
74	2258	VICTORY VILLAGE CENTER	280 E LAKE MEADE DR	HENDERSON	NV	THORNDIKE PROPERTIES INC.
75	3194	VILLAGE SQUARE	1400 W 49TH ST	HIALEAH	FL	VILLAGE SHOPPING CENTER LAND TRUST C/O HIALEAH COLLECTION AGENCY
76	4425	WAHIAWA TOWN CENTER	935 CALIFORNIA AVE	WAHIAWA	HI	WAHIAWA VENTURES
77	4853	WAL-LEX SHOPPING CENTER	862 LEXINGTON STREET	WALTHAM	MA	WAL-LEX LLC
78	6694	WASHINGTON SQUARE SC	4849 WEST NORTH AVE	CHICAGO	IL	NORTH & CICERO DEVELOPMENT LLC
79	2671	WESTWOOD VISTA SC	6511 W LOOP 1604	SAN ANTONIO	TX	WESTWOOD VISTA SHOPPING CENTER LTD
80	3857	WILKINSON CROSSING	3210 WILKINSON BLVD	CHARLOTTE	NC	WILKINSON CROSSING LLC
81	3218	WOODLAND VILLAGE SHOPPING CENTER	2700 WOODLANDS VILLAGE BLVD	FLAGSTAFF	AZ	WOODLANDS VILLAGE SHOPPING CENTERS LLC