UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Caption in Compliance with D.N.J. LBR 9004-1(b)

BALLARD SPAHR LLP
Leslie C. Heilman
Laurel D. Roglen
Margaret A. Vesper
919 N. Market Street, 11th Floor
Wilmington, DE 19801
Telephone: (302) 252-4465
Facsimile: (302) 252-4466
E-mail: heilmanl@ballardspahr.com
roglenl@ballardspahr.com
vesperm@ballardspahr.com

Counsel to UE 2100 Route 38 LLC

In Re: SAM ASH MUSIC CORPORATION, *et al.*,[1] Debtors.	Case No.: 24-14727 (SLM) Chapter 11 (Jointly Administered)

OBJECTION OF UE 2100 ROUTE 38 LLC TO (1) DEBTORS' MOTION FOR ENTRY OF ORDERS (I)(A) APPROVING BIDDING PROCEDURES AND BREAKUP FEE, (B) APPROVING STALKING HORSE PURCHASE AGREEMENT, (C) SCHEDULING AN AUCTION AND A SALE HEARING, (D) APPROVING THE FORM AND MANNER OF NOTICE THEREOF, AND (E) ESTABLISHING NOTICE AND PROCEDURES FOR THE ASSUMPTION AND ASSIGNMENT OF CONTRACTS AND LEASES AND (II)(A) AUTHORIZING THE DEBTOR TO ENTER INTO AN ASSET PURCHASE AGREEMENT, (B) APPROVING THE ASSET PURCHASE AGREEMENT, AND (C) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT OF THE ASSUMED CONTRACTS AND (2) NOTICE TO CONTRACT PARTIES TO POTENTIALLY ASSUMED EXECUTORY CONTRACTS AND UNEXPIRED LEASES

UE 2100 Route 38 LLC ("Landlord") by and through its undersigned counsel, hereby filed this objection (the "Objection") to the (1) *Debtors' Motion for Entry of Orders (I)(A) Approving Bidding Procedures and Breakup Fee, (B) Approving Stalking Horse Purchase*

1 The debtors in these chapter 11 cases, along with the last four digits of each debtor's federal tax identification number, are: Sam Ash Music Corporation (3915); Samson Technologies Corp. (4062); Sam Ash Megastores, LLC (9955); Sam Ash California Megastores, LLC (3598); Sam Ash Florida Megastores, LLC (7276); Sam Ash Illinois Megastores, LLC (8966); Sam Ash Nevada Megastores, LLC (6399); Sam Ash New York Megastores, LLC (7753); Sam Ash New Jersey Megastores, LLC (8788); Sam Ash CT, LLC (5932); Sam Ash Music Marketing, LLC (2024); and Sam Ash Quikship Corp. (7410). The location of debtor Sam Ash Music Corporation's principal place of business is 278 Duffy Avenue, P.O. Box 9047, Hicksville, NY 11802.

Agreement, (C) Scheduling an Auction and a Sale Hearing, (D) Approving the Form and Manner of Notice Thereof, and (E) Establishing Notice and Procedures for the Assumption and Assignment of Contracts and Leases and (II)(A) Authorizing the Debtor to Enter Into an Asset Purchase Agreement, (B) Approving the Asset Purchase Agreement, and (C) Authorizing the Assumption And Assignment Of The Assumed Contracts (the "Sale Motion") [Docket No. 47] and (2) *Notice to Contract Parties to Potentially Assumed Executor Contracts and Unexpired Leases* (the "Cure Notice") [Docket No. 152]. In support of this Objection, the Landlord respectfully states as follows:

I. BACKGROUND

1. On May 8, 2024 (the "Petition Date"), Sam Ash Music Corporation and their affiliated debtor entities (the "Debtors") filed their voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code. The Debtors' cases have been jointly consolidated for administrative purposes only.

2. 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.[2] No trustee or examiner has been appointed in the Chapter 11 Cases at this time.

3. The Debtors lease retail space (the "Premises") from Landlord pursuant to an unexpired lease of nonresidential real property (as may have been amended, the "Lease"), in the shopping center known as The Plaza at Cherry Hill, located in Cherry Hill, New Jersey (the "Center").

4. The Lease is a lease "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).

5. On May 10, 2023, the Debtors filed the Sale Motion, seeking, *inter alia,* (a) authorization to enter into a stalking horse agreement (the "Stalking Horse APA") with Tiger

[2] Unless otherwise specified, all statutory references to "Section" are to 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code").

Finance, LLC (the "Stalking Horse Bidder") for the sale of, among other things, (i) designation rights with respect to leasehold interests, fixed assets, fixtures, equipment and inventory in all of the Debtors' stores, distribution centers, and/or warehouses; (ii) the Debtors' intellectual property; and (iii) the Debtors' e-Commerce assets, subject to higher and better bids following an Auction;[3] and (ii) approval of various procedures, including certain bid and assumption and assignment procedures (the "Bidding Procedures") to govern the sale (the "Sale") of substantially all of the Debtors' Assets, pursuant to section 363 of the Bankruptcy Code. As more fully set forth in the Sale Motion, the Auction and Sale contemplates the potential assumption and assignment of certain of the Debtors' unexpired nonresidential real property leases, including the Lease.

6. On June 5, 2024, the Court entered the *Order (A) Approving Bidding Procedures and Breakup Fee, (B) Approving the Form Asset Purchase Agreement, (C) Scheduling an Auction and a Sale Hearing, (D) Approving the Form and Manner of Notice Thereof, and (E) Establishing Notice and Procedures for the Assumption and Assignment o Contracts and Leases* [Docket No. 204] (the "Bidding Procedures Order") which, among other things, approved the Bidding Procedures.

7. The Bidding Procedures Order scheduled a hearing to consider approval of the Sale, the timing of which is dependent on whether an Auction is held (the "Sale Hearing"), and approved the form of Cure Notice, which was filed and served by the Debtors on May 31, 2024 [Docket No. 152]. The Cure Notice identifies, *inter alia*, certain unexpired leases that may be assumed and assigned in connection with the Sale to a Successful Bidder, including the Lease, along with the amounts, according to the Debtors' books and records, which must be paid to cure any defaults existing under such unexpired leases as of the Petition Date.

8. The Stalking Horse APA contemplates the sale of the Assets to the Stalking Horse Bidder, or its affiliate or designee on a liquidation basis. The Stalking Horse APA also includes designation rights, pursuant to which the Stalking Horse Bidder, if selected as the

---

[3] Capitalized terms not otherwise defined herein, should have the meaning given to them in the Sale Motion.

Successful Bidder, will have 90 days to evaluate, negotiate and determine which leases it may assume post-Closing.

9. The Cure Amount set forth in the Cure Notice does not reflect all outstanding balances due and owing to Landlord under the Lease, and does not account for accruing but unbilled charges which may come due in the future. The Cure Amount set forth by the Debtors must be modified to reflect additional charges owing, as well as recognize the liability for accruing charges due under the Lease, as more fully set forth herein.

10. Further, as of the filing of this Objection, Landlord does not yet know who will be ultimately selected as the Successful Bidder, and has not yet been provided with any adequate assurance information concerning the Stalking Horse Bidder or any Successful Bidder. As such, Landlord cannot, at this time, make an informed decision regarding whether it may have objections to the assumption or assumption and assignment of its Lease to the Stalking Horse Bidder or any Successful Bidder. Accordingly, Landlord files this Objection in order to preserve all of its rights with respect to the Sale, including as to any assumption and assignment of its Lease to a Successful Bidder, and reserve its rights to raise further and other objections to the selection of the Successful Bidder (including the Stalking Horse Bidder), and such Successful Bidder's ability to provide adequate assurance of future performance under the Lease, including the Stalking Horse Bidder, on or before the Supplemental Adequate Assurance Objection Deadline scheduled for June 24, 2024 at 5:00 p.m. (prevailing Eastern Time), should the Lease be implicated and such other and further information be provided.

II. <u>LIMITED OBJECTION TO SALE</u>

11. While Landlord does not generally object to a sale of the Debtors' assets to maximize the value of the estate for the benefit of all creditors, including as to Landlord's Lease, Landlord does object to any proposed assumption and assignment of the Lease unless Debtors and/or a Successful Bidder, including the Stalking Horse Bidder, comply with all of the requirements of Sections 365 of the Bankruptcy Code. Absent the ability, or willingness, of the Debtors and any proposed assignee to satisfy said requirements, the Court should deny any

proposed assumption and assignment of the Lease. In addition, the amount set forth in the Cure Notice for the Lease does not accurately reflect the total amount owing under the Lease, and does not provide for the payment or performance of certain accruing but not yet due charges under the Lease when those accruing obligations become due.

A. The Debtors Must Provide Adequate Assurance of Future Performance Information For Any Proposed Assignee of the Lease, and the Lease Cannot Be Assumed and Assigned Without An Affirmative Showing Of Adequate Assurance of Future Performance.

12. As noted above, the Landlord has received no adequate assurance information for the Stalking Horse Bidder or any other bidder and, therefore, objects to any assumption and assignment of the Lease until it has received and has had sufficient time to review such bidder's adequate assurance information. Landlord must receive adequate assurance of future performance information far enough in advance of any substantive objection deadline to conduct a meaningful analysis of such information for any entity seeking the assignment of the Lease.[4]

13. The Debtors may not assume and assign the Lease 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 maneuvering the assumption and assignment process through a sale under Section 363. Courts require a specific factual showing through competent evidence to determine whether adequate assurance of future performance has

[4] If the Landlord does not have sufficient information (or time) to make a determination as to a proposed assignee, or if the proposed assignee is unacceptable, the Landlord will need to object to the proposed assignment and prepare for a contested evidentiary hearing. In preparation of such evidentiary hearing, the Landlord will need to conduct expedited discovery, arrange for expert testimony, and file supplemental objections based upon the information gleaned from whatever information is actually produced by the Debtors or proposed assignee. To the extent the Sale Motion contemplates the assumption and assignment of the Leases, it initiates a contested hearing subject to Rule 9014 of the Federal Rules of Bankruptcy Procedure ("FRBP"). See FRBP 6006(a). Any evidentiary hearing will include witness testimony, and under FRBP 9014, the Court should establish procedures to provide parties a reasonable time to schedule an evidentiary hearing where witnesses will testify. See FRBP 9014(e).

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).

B. Section 365(b)(3) Requires Heightened Adequate Assurance for Landlord.

14. Further, since the Lease is a shopping center lease, the Bankruptcy Code requires more than the basic adequate assurance of future performance of the Lease under Section 365(b)(1)(C) when an assumption or assumption and assignment of the Lease is contemplated. In re Sun TV and Appliances, Inc., 234 B.R. 356, 359 (Bankr. D. Del. 1999). Thus, in order to assume and assign a shopping center lease, 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).

15. The burden of proof on adequate assurance issues is with the Debtors. See In re Lafayette Radio Elecs. Corp., 12 B.R. 302, 312 (Bankr. E.D.N.Y. 1991).

16. As discussed above, the Landlord has not yet received any adequate assurance information for the Stalking Horse Bidder, which the Landlord understands will be provided only

if the Lease is included as a lease to be designated under the Stalking Horse APA, or from such other bidders as may eventually be deemed to be the Successful Bidder. Landlord reserves its right to raise any objections if and when it receives such information as to adequate assurance on or before the Supplemental Adequate Assurance Objection Deadline.

C. Any Assumption and Assignment Must Comply with the Terms of the Lease.

17. Through the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") amendments,[5] "Section 365(f)(1) was 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). In explaining the change to Section 365(f)(1), Senator Hatch stated:

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

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

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

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

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

[5] 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 Landlord is entitled to under 11 U.S.C. § 365.

19. BAPCPA clarified Section 365 to reflect the Congressional intent that a Debtor cannot use Section 365(f)(1) to void lease provisions, and to overrule those prior court decisions that did not strictly enforce lease terms. The predicate to the limited ability to assign a lease over a landlord's objection under Section 365(f) is that such assignment must be subject to the protections of Section 365(b)(1) and (3).

20. Section 365(f)(1) does not modify or override 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)). Thus, any assignment must remain subject to all provisions of the Lease, including those provisions concerning use, radius, exclusivity, tenant mix and balance.

21. At this time, Landlord does not know if the ultimate Successful Bidder intends to operate the Debtors' business without any change in use. As such, Landlord reserves the right to object to any attempted assignment to another party that fails to comply with such provisions, and any sale order should not provide for any prospective blanket ruling concerning the enforceability of any lease provision at this time

D. Additional Security.

22. While the Stalking Horse Bidder, or another bidder, may be backed by entities with industry experience and/or adequate capitalization, if the assignee entity itself does not possess such experience or capitalization, assignee should provide some type of credit enhancement, such as: (i) a guaranty of future performance from a financially capable parent entity; (ii) a letter or credit; or (iii) a cash security deposit. To the extent the proposed assignee is a newly formed entity with no financial or operating history, an existing entity with acceptable financing should guaranty the performance of any newly-formed company that seeks an assignment of the Leases. Pursuant to Section 365(l), the Landlord may require a security deposit or letter of credit as security for the performance of the assignee's obligations under the Lease 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 assignee with no operating history.

E. <u>Any sale must not be free and clear of obligations to pay all charges due under the Leases, including unbilled year-end adjustments and reconciliations.</u>

23. The Sale Motion seeks authority for the sale of the Lease free and clear of liens, claims and encumbrances. The Landlord objects to any sale 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, or are accruing, but which have not yet been billed. As discussed below, any assumption and assignment of the Leases cannot cut off the Landlord's right to recover unbilled charges that have accrued, or are accruing, under the Leases. In addition, 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 they 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.

F. <u>Any Assignment of Leased Real Property Must be Subject to all Applicable Restrictive Covenants</u>

24. The *cum onere* principle and requirements of section 365 (including section 365(b)(3)) of the Bankruptcy Code also mandate that restrictive covenants be respected in connection with any lease assignment. <u>See</u> 11 U.S.C. § 365(b)(3)(C) (requiring that "assumption or assignment of such lease is subject to all the provisions thereof"); <u>Bildisco</u>, 465 U.S. at 531; <u>In re MF Glob. Holdings Ltd.</u>, 466 B.R. 239, 241 (Bankr. S.D.N.Y. 2012). As is typical, shopping center leases are part of an integrated and complex commercial relationship between the shopping center owner and tenants that arise under both leases as well as reciprocal easement agreements (or similar agreements) and other restrictive covenants applicable to the properties. Accordingly,

assumption of any assignment of any leases in accordance with section 365 of the Bankruptcy Code and applicable law requires compliance with, and is subject to, any agreements containing restrictive covenants or other obligations related to the properties.

25. Accordingly, Landlord objects to the assumption and/or assignment of the Lease to the extent such transfer is not subject to all applicable reciprocal easement agreements, other similar agreements, and other restrictive covenants or obligations set forth therein.

III. CURE OBJECTION

26. The amount set forth in the Cure Notice does not reflect all outstanding balances due and owing to Landlord under the Lease, and the proposed cure amount does not account for accrued but unbilled charges which may come due in the future. The cure amount set forth by the Debtors must be modified to reflect the additional charges owing, as well as recognize the liability for accruing charges due under the Lease, as more fully set forth herein.

27. Set forth below is Landlord's monetary cure claim for amounts due, exclusive of any sums which become due after June 1, 2024 (which amounts must be paid when due under the Lease pursuant to 11 U.S.C. § 365(d)(3)), as more fully set forth on **Exhibit 1** attached hereto and incorporated into this Objection by reference. The cure amount is Landlord's cure claim amount is subject to additional qualifications and modifications (such as reimbursement amounts for additional attorney's fees through the date of any assumption or assumption and assignment of the Lease), as more fully set forth below.

CENTER	LOCATION	DEBTORS' CURE	LANDLORD'S CURE[6]
The Plaza at Cherry Hill	Cherry Hill, NJ	$37,093.62	$75,465.05

28. In addition to the current outstanding rent and other monthly charges due under the Lease, in determining what must be paid as cure pursuant to Section 365(b), the charges

[6] Landlord's Cure does not include charges arising after filing this Objection (including July 2024 rents and other charges), or charges not directly billed to Landlord as of the filing of this Objection. Landlord's Cure also does not include charges that are billed directly to Debtors, including in some cases, real estate taxes. To the extent Landlord is later billed for any amount due to Debtors' failure to pay, or to the extent that there are other charges that come due

referenced below must also be taken into consideration and paid, either as cure on the effective date of any assumption or assumption and assignment, or when properly billed under the Lease.

i. Attorneys' Fees, Costs and Interest

29. The Lease contains provisions for recovery of attorneys' fees, costs, and interest in the event Landlord is required to take legal action to protect its interests. The Debtors are obligated to cure all defaults under the Lease, and compensate Landlord for its actual pecuniary losses as a result of defaults under the Lease. 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).

30. The Debtors (or their assignee) takes the Lease *cum onere*—subject to existing burdens. The Debtors cannot assume the favorable portions, and reject the unfavorable provisions, of their leases. In re Wash. Capital Aviation & Leasing, 156 B.R. 167, 172 (Bankr. E.D. Va. 1993). If forced to continue in the performance of the Lease, Landlord is entitled to the full benefit of the bargain under the Lease 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 Entm't, 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' petitions and must be paid as a condition of the assumption of the Lease. See In re Skylark Travel, Inc., 120 B.R. 352, 355 (Bankr. S.D.N.Y.

under the Lease after the date of this Objection, Landlord retains and reserves the right to payment of these amounts when billed in the ordinary course under the Lease (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).

1990). Interest calculations are, therefore, not cut short by the automatic stay, and payment of such interest is required to fully compensate Landlord for the Debtors' defaults under the Lease, and thus to properly assume (or assume and assign) the Lease. Finally, post-petition interest is allowable where such interest is provided for under the terms of the Lease. Cukierman v. Uecker (In re Cukierman), 265 F.3d 846, 853 (9th Cir. 2001).

31. 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 Lease. Entm't, 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 Corp., 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 Props. v. Loews Cineplex Entm't Corp., 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).

32. Accordingly, Landlord further requests that it be reimbursed for all of its actual pecuniary losses including, but not limited to, attorney's fees and costs expended with regard to

Debtors' bankruptcy proceedings. To date, Landlord estimates its attorney's fees and costs to be not less than $15,000.

ii. Year-End Adjustments and Reconciliations and Indemnification

33. In addition to rent and related monthly charges, attorneys' fees, costs and interest, some charges for which the Debtors bear responsibility under the Lease 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 Center pursuant to a triple-net lease, 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, and then reconciled after year-end. The reconciliation compares the amounts estimated and paid against actual charges incurred at the 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 Lease, 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 2023 may not yet have been billed as of this Objection, and such charges that are accruing for 2024 will not be billed until 2025). 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 Section 365(b) only requires debtors to cure defaults under their leases, and since there can be no default for failure to pay an amount that has not as yet been billed, these accrued, but unbilled, charges are not yet due under the Lease, and they do not create a current default that gives rise to a requirement of cure by the Debtors at this time. The obligation to pay the year-end adjustments and reconciliations is, however, certainly a part of the obligation to provide adequate assurance of future performance. As a result, the Court should deny any attempt to assign the Lease "free and clear" of these obligations.

34. Debtors remain responsible for all accrued or accruing charges under the Lease, and must pay such charges when they come due under the Lease. The Debtors (or any successful bidder) assumes and assigns the Lease subject to its terms, and must assume and assign all obligations owing under the Lease, including obligations that have accrued but may not yet have been billed under the Lease. Any final assumption or sale order should clearly state that the Debtors (or any successful bidder) will assume these lease obligations and pay them when due, regardless of whether they relate to the period prior to, or after, the closing of the Sales. In addition, any provision in a sale order that purports to release the Debtors (or any successful bidder) 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 Lease.

35. Finally, the Lease requires the Debtors (or any successful bidder) to indemnify and hold the Landlord harmless with respect to any existing claims which may not become known until after the assumption and assignment of the Lease, examples of which may include such claims as personal injuries at the Premises and damage to the Premises or Center by the Debtors, the Successful Bidder or their agents. Any assumption or assumption and assignment of the Lease must be subject to the terms of the Lease, including the continuation of all indemnification obligations, regardless of when they arose.[7] In the alternative, the Debtors must provide (by insurance or otherwise) that they can satisfy the indemnification obligations under the Lease for any claims that relate to the period prior to assumption or assumption and assignment of the Lease. Nothing in any sale order should preclude the Landlord from pursuing the Debtors, their insurance, or any other party that may be liable under the Lease, and Landlord requests that any order specifically preserve their right to pursue such rights irrespective of any resolution of cure amounts herein.[8]

---

[7] Any ability to assume and assign the Lease is subject to the protections provided by Section 365(b) and (f). Therefore, any assumption (or assumption and assignment) must be in accordance with all provisions of the Lease.

[8] If Debtors are covered under an "occurrence basis" insurance policy, rather than a "claims made" policy, this objection may be satisfied by proof of such insurance by the Debtors for Landlord's location.

36. Landlord, therefore, requests that in the event an assumption or assumption and assignment of the Lease is approved by the Court, language must be inserted into the Sale Order to provide that the proposed assignee shall be responsible for all unpaid year-end adjustments, whether accruing prior to or after the effective date of assumption of the Lease, when such charges become due in accordance with the terms of the Lease, including with respect to indemnification and insurance obligations. In default thereof, a suitable escrow for the Lease equal to 150% of the average year-end adjustments for the prior three (3) years must be established to assure that any amounts due will be available to Landlord when the year-end adjustments are actually billed and due pursuant to the terms of the respective Lease.

iii. The Cure Amounts Serve Only As Estimates

37. Landlord 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 Landlord the equivalent of an administrative bar date, limiting its recourse to recover charges to which it is entitled under the Lease.

iv. The Debtors Must Pay Undisputed Cure Amounts Immediately

38. Section 365(b)(1)(A) requires that the Debtors promptly cure outstanding balances due under the Lease upon assumption or assumption and assignment. To the extent there is a dispute over the total cure obligation for the 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 Lease to deal with any disputes that remain unresolved after such period.

IV. ASSUMPTION AND AMENDMENT AGREEMENT

39. Landlord also requests that, as a condition to any order approving assumption and assignment of Landlord's Lease, the assignee shall be required to enter into a short form

Assumption and Amendment Agreement whereby the assignee shall become directly obligated to Landlord and the provisions of the Lease regarding notice addresses will be modified.

V. ANY DESIGNATION RIGHTS MUST COMPLY WITH THE LEASE TERMS AND THE BANKRUPTCY CODE

40. The Stalking Horse APA appears to contemplate a 90-day designation rights period to allow the Stalking Horse Bidder or such other assignee to operate the lease under designation rights in order to evaluate and determine what leases will be assumed as part of the Sale should it become the Successful Bidder. To the extent that the Stalking Horse Bidder, or any other proposed assignee, is permitted to operate the Debtors' stores during the Designation Period, it must comply with all terms of the Lease during such Designation Period in all respects, and provide the Landlord with adequate recourse if they are not. This includes that such party must be responsible for all obligations arising under the Lease during the time that it controls the Lease. If tax obligations, year-end reconciliations, or any other lease charges are billed or otherwise become due under the Lease during the Designation Period, the Stalking Horse Bidder, or other proposed assignee, must satisfy (or arrange to have the Debtors satisfy) these amounts in full as an administrative expense of the Debtors' estate under Section 365(d)(3).

41. In addition, the designation rights cannot grant any greater rights than possessed by the Debtors. The designation rights emanate only from the rights of the Debtors under the Bankruptcy Code. *See* In re Ames Dep't Stores, Inc., 287 B.R. 122 (Bankr. S.D.N.Y. 2002). Under no circumstances, should the Designation Period extend beyond the applicable deadline to assume or reject leases under Section 365(d)(4), absent consent of the Landlord.

42. Moreover, the Sale Motion and APA do not fully set forth a process to assume or reject the designated leases. Any sale order that permits designation must establish procedures for notification of Landlord of any decision to assume and assign, or reject, the Lease, as well as provide time for Landlord to file a response and for a hearing on such proposed action. At the very least, any notice of rejection, or assumption and assignment, should be served on the Landlord and its counsel. Thereafter, Landlord should have no less than ten (10) days to object to any

rejection, or assumption and assignment, of its Lease or to raise issues in connection with vacating the Premises, providing additional cure amounts that may arise, or asserting additional grounds to oppose the assumption and assignment of its Lease if new circumstances have arisen since the sale hearing.

43. Finally, there is no direct relationship between the Successful Bidder and landlords of undesignated leases. Therefore, it is unclear what remedy those landlords will have in the event of failure to perform by any Successful Bidder. Any final order approving the Sale must protect landlords during any proposed designation period. The Court should require that sufficient funds remain with the Debtors to cover all lease obligations for the undesignated leases during any such designation period in the event the Successful Bidder (or its assignee) fails to perform under the leases. There should also be a direct contractual relationship establishing the rights and obligations of the parties during any such designation period.

44. Accordingly, the process must ensure that all obligations under the Lease will be performed and for Landlord to have adequate recourse if they are not. Landlord reserves its rights to object to any designation rights or other agreement that is intended to control the process, or that will create any contractual obligations outside the Lease, during any proposed designation period, if any, once final sale documentation is filed.

VI. RESERVATION OF RIGHTS TO RAISE FURTHER OBJECTIONS

45. Landlord reserve all rights to (i) raise further or other objections as may be necessary, including but not limited to, the identity of the Successful Bidder once a Successful Bidder is selected in connection with any assumption and assignment of the Lease; and to the final form of order approving the sale or any assumption and assignment of the Lease and/or the final transaction documents once such documents are filed of record with the Court; (ii) to require payment of all Lease charges and compliance with all Lease terms; and, (iii) to require any assignment on a form acceptable to Landlord.

VII. <u>JOINDER IN OBJECTIONS RAISED BY OTHER LANDLORDS</u>

46. To the extent consistent with the objections expressed herein, Landlord also join in the objections of other shopping center lessors to the Debtors' proposed relief.

VIII. <u>CONCLUSION</u>

47. To protect the interests of Landlord, the Court should modify any proposed sale order to incorporate the objections raised above, require any Successful Bidder to provide adequate assurance information as set forth herein before a determination on adequate assurance is made, and grant such further relief as the Court deems proper.

Date: June 14, 2024

Respectfully Submitted,

<u>/s/ Leslie C. Heilman</u>
BALLARD SPAHR LLP
Leslie C. Heilman
Laurel D. Roglen
Margaret A. Vesper
919 N. Market Street, 11th Floor
Wilmington, DE 19801
Telephone: (302) 252-4465
Facsimile: (302) 252-4466
E-mail: heilmanl@ballardspahr.com
roglenl@ballardspahr.com
vesperm@ballardspahr.com

Counsel to UE 2100 Route 38 LLC

EXHIBIT A

Statement of Account
Urban Edge Properties
RCH2: Cherry Hill
Sam Ash
Master Occupant ID: RCH21212O
Statement Date: 06-14-2024

Invoice Date	Category	Category Description	Transaction Description	Amount	Current	1 Month	2 Months	3 Months	4 Months	Additional Description
4/1/2024	BRR	Base Rent - Retail	AUTOCHRG @T4/30/2024	21,634.96	0.00	0.00	21,634.96	0.00	0.00	
4/1/2024	CAM	CAM	AUTOCHRG @T4/30/2024	3,553.56	0.00	0.00	3,553.56	0.00	0.00	
4/1/2024	TTT	Real Estate Tax	AUTOCHRG @T4/30/2024	4,274.17	0.00	0.00	4,274.17	0.00	0.00	
4/1/2024	WAT	TT - Water & Sewer	AUTOCHRG @T4/30/2024	450.00	0.00	0.00	450.00	0.00	0.00	
4/25/2024	CAM	CAM	Recovery Reconciliation 12/23	426.44	0.00	0.00	426.44	0.00	0.00	
4/25/2024	PCM	CAM - Prior Yr	Recovery Reconciliation 12/23	0.01	0.00	0.00	0.01	0.00	0.00	
5/1/2024	BRR	Base Rent - Retail	AUTOCHRG @T5/31/2024	21,634.96	0.00	21,634.96	0.00	0.00	0.00	
5/1/2024	CAM	CAM	AUTOCHRG @T5/31/2024 @R	3,660.17	0.00	3,660.17	0.00	0.00	0.00	Rate Change: 3,553.56 to 3,660.17
5/1/2024	TTT	Real Estate Tax	AUTOCHRG @T5/31/2024	4,274.17	0.00	4,274.17	0.00	0.00	0.00	
5/1/2024	WAT	TT - Water & Sewer	AUTOCHRG @T5/31/2024	450.00	0.00	450.00	0.00	0.00	0.00	
6/1/2024	CAM	CAM	AUTOCHRG @T6/30/2024	106.61	106.61	0.00	0.00	0.00	0.00	
Sam Ash Total:				**60,465.05**	**106.61**	**30,019.30**	**30,339.14**	**0.00**	**0.00**	
	Plus:	Attorneys' Fees		15,000.00						
		TOTAL CURE:		**75,465.05**						

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Caption in Compliance with D.N.J. LBR 9004-1(b)

BALLARD SPAHR LLP
Leslie C. Heilman
Laurel D. Roglen
Margaret A. Vesper
919 N. Market Street, 11th Floor
Wilmington, DE 19801
Telephone: (302) 252-4465
Facsimile: (302) 252-4466
E-mail: heilmanl@ballardspahr.com
roglenl@ballardspahr.com
vesperm@ballardspahr.com

Counsel to UE 2100 Route 38 LLC

In Re:

SAM ASH MUSIC CORPORATION, *et al.*,[1]

Debtors.

Case No.: 24-14727 (SLM)

Chapter 11

(Jointly Administered)

CERTIFICATION OF SERVICE

1. I, Leslie C. Heilman:

☒ represent UE 2100 Route 38 LLC in this matter.

☐ am the secretary/paralegal for Click or tap here to enter text., who represents Click or tap here to enter text. in this matter.

☐ am the Click or tap here to enter text.in this case and am representing myself.

2. On June 14, 2024, I sent a copy of the following pleadings and/or documents to the parties listed in the chart below.

1 The debtors in these chapter 11 cases, along with the last four digits of each debtor's federal tax identification number, are: Sam Ash Music Corporation (3915); Samson Technologies Corp. (4062); Sam Ash Megastores, LLC (9955); Sam Ash California Megastores, LLC (3598); Sam Ash Florida Megastores, LLC (7276); Sam Ash Illinois Megastores, LLC (8966); Sam Ash Nevada Megastores, LLC (6399); Sam Ash New York Megastores, LLC (7753); Sam Ash New Jersey Megastores, LLC (8788); Sam Ash CT, LLC (5932); Sam Ash Music Marketing, LLC (2024); and Sam Ash Quikship Corp. (7410). The location of debtor Sam Ash Music Corporation's principal place of business is 278 Duffy Avenue, P.O. Box 9047, Hicksville, NY 11802.

- *Objection of UE 2100 Route 38 LLC to Debtors'(1) Motion for Entry of Orders (I)(A) Approving Bidding Procedures and Breakup Fee, (B) Approving Stalking Horse Purchase Agreement, (C) Scheduling an Auction and a Sale Hearing, (D) Approving the Form and Manner of Notice Thereof, and (E) Establishing Notice and Procedures for the Assumption and Assignment of Contracts and Leases and (II)(A) Authorizing the Debtor to Enter Into an Asset Purchase Agreement, (B) Approving the Asset Purchase Agreement, and (C) Authorizing the Assumption and Assignment of the Assumed Contracts*; *and (*2*) Notice to Contract Parties to Potentially Assumed Executor Contracts and Unexpired Leases of Certain Unexpired Leases*.

3. I certify under penalty of perjury that I caused the above documents to be sent using the mode of service indicated.

Date: June 14, 2024

/s/ Leslie C. Heilman
Signature

Name and Address of Party Served	Relationship of Party to the Case	Mode of Service
Michael D. Sirota, Esq. Ryan T. Jareck, Esq. Matteo Percontino, Esq. Cole Schotz PC 25 Main Street P.O. Box 800 Hackensack, NJ 07602	Proposed Counsel to Debtor and Debtor-in-Possession	☐ Hand-delivered ☒ Regular mail ☐ Certified mail/RR ☒ Other by e-mail (As authorized by the Court or by rule. Cite the rule if applicable.)
Anthony B. Stumbo, Esq. Paul D. Bekker, Esq. Riemer & Braunstein LLP Times Square Tower, Suite 2506 Seven Times Square New York, New York 10036	Counsel to the DIP Lender	☐ Hand-delivered ☒ Regular mail ☐ Certified mail/RR ☒ Other by e-mail (As authorized by the Court or by rule. Cite the rule if applicable.)
U.S. Department of Justice Office of the US Trustee One Newark Center Suite 2100 Newark, NJ 07102-5504	US Trustee	☐ Hand-delivered ☒ Regular mail ☐ Certified mail/RR ☒ Other by e-mail (As authorized by the Court or by rule. Cite the rule if applicable.)

Name and Address of Party Served	Relationship of Party to the Case	Mode of Service
Brett S. Moore, Esq. Rachel Parisi, Esq. Kelly D. Curtin, Esq. Porzio, Bromberg & Newman 100 Southgate Parkway P.O. Box 1997 Morristown, NJ 07962	Counsel for the Unsecured Creditors Committee	☐ Hand-delivered ☒ Regular mail ☐ Certified mail/RR ☒ Other by e-mail (As authorized by the Court or by rule. Cite the rule if applicable.)

rev.8/1/16