

United States Bankruptcy Court  
District of Delaware

824 N. Market Street  
Wilmington, DE 19801



CHIEF JUDGE BRENDAN LINEHAN SHANNON

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June 25, 2015

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Re: In re: RadioShack Corporation, et al.  
Case No. 15-10197 (BLS)

Dear Counsel:

This letter follows upon an evidentiary hearing held on June 18, 2015 regarding the Debtors' request to assume and assign the lease (the "Lease") to Store No. 9723 (the "Property") to Sportive, Inc. ("Sportive"). The Landlord to the Property objects to assumption and assignment, and in fact is the back-up bidder for the Lease following an auction held on June 11, 2015. For the reasons that follow, the Court will sustain the Landlord's objection and deny the assumption and assignment to Sportive.

At the hearing, the Court admitted without objection numerous exhibits and heard live testimony from Mr. Omar Limon, the principal of Sportive, and Ms. Idania Salgueiro, property manager for the Landlord. The Court notes that both Mr. Limon and Ms. Salgueiro testified competently and credibly.

The record reflects that Store No. 9723 is located in a building referred to as 420 Lincoln Road ("420 Lincoln"). That building is located on the eastern edge of the Lincoln Avenue Road Mall, a pedestrian-only shopping district in Miami. 420 Lincoln Road is bordered by Lincoln Road to the north, Washington Avenue to the east, 16<sup>th</sup> Street to the south, and Drexel Avenue to the west.

To win approval of the assumption and assignment to Sportive, the Debtors and Sportive must provide “adequate assurance of future performance” under the Lease. 11 U.S.C. § 365(b)(1)(c). Case law teaches that the concept of “adequate assurance” is a flexible one, mainly requiring evidence satisfactory to the Court that the proposed assignee possesses the financial wherewithal to perform all of the obligations under the agreement at issue.<sup>1</sup>

In the present case, the Lease requires monthly payments of \$14,083.33, plus Common Area Maintenance charges and 7% sales tax. Testimony adduced at trial indicates that, all in, the Lease would require monthly payments of not less than \$18,000 for an annual obligation of approximately \$216,000. There are twelve years remaining on the Lease.

In support of its request for assignment, Sportive offers a security deposit equal to one month’s rent, plus a personal guarantee from Mr. Limon for one year’s rent. Mr. Limon also testified that alternatively, Sportive would offer three months’ prepaid rent and a six-month personal guarantee. In further support, Sportive introduced into evidence certain unaudited financial statements relating to Mr. Limon’s various businesses, and an unaudited single-page statement regarding Mr. Limon’s assets and personal net worth.

The Landlord strongly objects to assumption and assignment to Sportive. Ms. Salgueiro testified that, in a non-bankruptcy setting, the Landlord would not seriously consider or rely upon the type of financial evidence offered by Sportive. At minimum, Ms. Salgueiro testified that the Landlord would require Mr. Limon and Sportive to post a deposit equal to six months’ rent and a personal guaranty (or letter of credit) covering the full twelve-year term of the Lease. Mr. Limon has declined this request.

Ms. Salgueiro testified that, when RadioShack signed the Lease in 2007, it was a 90-year old-publicly traded company with annual revenues in the billions, and that RadioShack (at that time) is simply not comparable to Sportive as a potential tenant. The record further reflects that 420 Washington contains numerous retail tenants that are large national, or international, companies including Zara, Footlocker, Sunglass Hut, Starbucks, and Haagen Dazs.

The Landlord identifies a number of significant concerns regarding whether Sportive can provide adequate assurance of its ability to perform under the Lease. Specifically, the Landlord notes that the corporate entity that would be the actual tenant, Sportive, Inc., is a non-public limited liability company whose current business is limited to operating two retail stores. The other entities that are part of “Sportive Group” would not be tenants under the Lease or otherwise be responsible for ongoing obligations under the Lease.

The Landlord challenges the weight that should be accorded to the unaudited financial statements and statement of net worth offered into evidence, as well as the projections for expected performance of a Sportive store at 420 Lincoln. The Landlord also stresses that

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<sup>1</sup> The parties devoted significant time and attention to whether 420 Lincoln is a “shopping center” within the meaning of Bankruptcy Code § 365(b)(3). If it is indeed a mall or shopping center, the restrictions on assignment relating to competing exclusivity provisions and tenant mix expectations come into play to significantly limit the otherwise broad latitude afforded a debtor under § 365(b)(1). It would be a close call whether 420 Lincoln is in fact a mall or shopping center, after applying the fourteen factors articulated in the Third Circuit’s seminal decision in *In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1086 (3d Cir. 1990). However, adequate assurance of financial performance is a bedrock requirement under § 365(b)(1) as well as 365(b)(3); since the Court concludes that Sportive and RadioShack have not provided the requisite adequate assurance, the Court need not reach the Landlord’s arguments under 365(b)(3) regarding tenant mix and the potential dynamic between Sportive and current 420 Lincoln tenant Foot Locker.

The Honorable Brendan Linehan Shannon  
United States Bankruptcy Court  
for the District of Delaware  
June 25, 2015  
Page 3

while Mr. Limon testified he was prepared to use his own personal funds and resources to support the new store if it became necessary, he is in fact under no legal obligation to do so.

Mr. Limon testified at length and credibly at trial. It is clear to the Court that he is an able and experienced businessman, with many years of success in a demanding retail sector. Nevertheless, while giving due weight and consideration to Sportive's testimony and evidence, the Court concludes that Sportive has not carried its burden to prove adequate assurance of its future performance of all obligations under the Lease. In the face of a robust objection by the Landlord, the Court concludes that based on the facts and circumstances of this case, unaudited financials and projections are insufficient to satisfy the statutory requirement to provide adequate assurance of future performance under the Lease. The parties are requested to submit a form of order consistent with this ruling.

Very truly yours,



Brendan Linehan Shannon  
Chief United States Bankruptcy Judge

BLS/jmw



Lease, pursuant to the terms set forth in that certain Lease Termination Agreement (the "Lease Termination Agreement"), a copy of which is attached hereto as **Exhibit A**; and the Court having entered an order approving the bidding procedures and granting certain related relief [Docket No. 1947] (the "Bidding Procedures Order") at the hearing held on April 28, 2015 (the "Bid Procedures Hearing"); and an auction having been conducted on May 14, 2015 in accordance with the Bidding Procedures Order; and the Landlord having submitted the highest and best offer for the Lease under the Lease Termination Agreement; and the Court having conducted a hearing on the Lease Sale Motion on May 27, 2015, continued to June 18, 2015 (the "Lease Sale Hearing") at which time all interested parties were offered an opportunity to be heard with respect to the Lease Sale Motion; and the Court having reviewed and considered the Lease Sale Motion, the Lease Termination Agreement, the Bidding Procedures Order, and all objections filed in accordance with the Bidding Procedures Order; and the appearance of all interested parties and all responses and objections to the Lease Sale Motion having been duly noted in the record of the Lease Sale Hearing; and upon the record of the Lease Sale Hearing, having heard statements of counsel and the evidence presented in support of the relief requested in the Lease Sale Motion at the Lease Sale Hearing; and upon all of the proceedings before the Court, all objections and responses to the relief requested in the Lease Sale Motion having been heard and overruled, continued or resolved on the terms set forth in this Order; and it appearing that due notice of the Lease Sale Motion, the Lease Termination Agreement, the Bid Procedures Hearing, the Bidding Procedures Order and the Auction having been provided; and it appearing that the relief requested in the Lease Sale Motion is in the best interests of the Debtors, their estates and their creditors; and it appearing that the Court has jurisdiction over this matter; and it further

appearing that the legal and factual bases set forth in the Lease Sale Motion and at the Lease Sale Hearing establish just cause for the relief granted herein; and after due deliberation thereon,

**IT IS HEREBY ORDERED THAT:**

1. With respect to the Lease for Store Number 9723 that is subject to the Lease Termination Agreement, the Lease Sale Motion is granted as set forth herein.

2. The Lease Termination Agreement, all of the terms and conditions thereof, and consummation of all of the transactions (the “Transactions”) contemplated therein, including the termination of the Lease and the surrender of the Premises, are authorized and approved in all respects pursuant to section 363(b) of the Bankruptcy Code. The Debtors are authorized to enter into and consummate the Lease Termination Agreement upon the conclusion of the store closing sale being conducted by the Debtors at the Premises, and nothing herein shall obligate the Debtors to enter into or consummate the Lease Termination Agreement, or to surrender the Premises, prior to the conclusion of such sale.

3. Notwithstanding anything in the Lease Termination Agreement to the contrary, the Purchase Price for the Lease shall be \$370,000.00 and the Landlord’s waiver of all alleged cure claim amounts against the Debtors and their estates.

4. Notwithstanding anything in the Lease Termination Agreement to the contrary, the Termination Date shall be the earlier of the date Tenant (as such term is used in the Lease Termination Agreement) vacates the Premises or June 30, 2015.

5. The failure specifically to include any particular provisions of the Lease Termination Agreement shall not diminish or impair the efficacy of such provision, it being the intent of the Court that the Lease Termination Agreement is approved in its entirety.

6. With respect to the Lease Termination Agreement, any objections to the Lease Sale Motion or the relief requested therein that have not been withdrawn, waived or settled, and all reservations of rights included therein, are hereby overruled on the merits and denied with prejudice. With respect to the Lease Termination Agreement, all persons and entities given notice of the Lease Sale Motion that failed to timely object thereto are deemed to consent to the relief sought therein.

7. As of the Termination Date (as defined in the Lease Termination Agreement), except as to the obligations of the Debtors and the Landlord expressly set forth in the Lease Termination Agreement, the Debtors and the Landlord are deemed to mutually release each other and their respective successors and assigns of and from any and all claims, damages, obligations, liabilities, actions and causes of action of every kind and nature whatsoever that may arise under or in connection with the Lease before, on or after the Termination Date, including, without limitation, any claims under section 502(b)(6) of the Bankruptcy Code.

8. The Lease Termination Agreement has been negotiated and executed, and the Transactions contemplated thereby are and have been undertaken, by the Debtors, the Landlord and their respective representatives at arm's length, without collusion and in "good faith," as that term is defined in section 363(m) of the Bankruptcy Code. Accordingly, the reversal or modification on appeal of the authorization provided herein to consummate the Sale shall not affect the validity of the Transactions, unless such authorization and consummation of the Sale are duly and properly stayed pending such appeal. The Landlord is a good faith purchaser within the meaning of section 363(m) of the Bankruptcy Code and, as such, is entitled to the full protections of section 363(m) of the Bankruptcy Code.

9. The requirements set forth in Bankruptcy Rules 6003(b), 6004 and 6006 and Local Bankruptcy Rules 6004-1 and 9013-1, to the extent applicable, have been satisfied or otherwise deemed waived.

10. The Court shall retain exclusive jurisdiction to, among other things, interpret, implement, and enforce the terms and provisions of this Order and the Lease Termination Agreement.

11. As provided by Bankruptcy Rules 7062 and 9014, the terms and conditions of this Order shall be effective immediately upon entry and shall not be subject to the stay provisions contained in Bankruptcy Rules 6004(h) and 6006(d) or any similar rule that would delay the effectiveness of this Order. Time is of the essence in closing the Sale and the Debtors and the Landlord intend to close the Sale as soon as possible following the conclusion of the store closing sale being conducted by the Debtors at the Premises.

Dated: June 25, 2015  
Wilmington, Delaware

  
THE HONORABLE BRENDAN L. SHANNON  
UNITED STATES BANKRUPTCY JUDGE

**EXHIBIT A**

## LEASE TERMINATION AGREEMENT

THIS LEASE TERMINATION AGREEMENT (this "Agreement") is made as of 5/12, 2015, by and between 420 Lincoln Road Associates, LP, a Florida limited partnership ("Landlord"), and Radio Shack Corp. a Delaware Corporation, as debtor and debtor-in-possession ("Tenant").

WHEREAS, Landlord and Tenant entered into a certain lease dated June 13, 2007 (as the same may have been amended from time to time, and together with any and all other agreements affecting the subject premises, the "Lease"), covering certain premises commonly known as 1624 Washington Ave. Miami Beach FL 33139 (the "Premises"); and

WHEREAS, Tenant, along with its affiliated debtors and debtors in possession, has filed a voluntary petition for relief pursuant to chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (as amended, the "Bankruptcy Code"), in the United States Bankruptcy Court for the District of Delaware (together with any other court having proper jurisdiction, the "Bankruptcy Court"); and

WHEREAS, subject to the conditions set forth herein, the parties desire to terminate the Lease effective on the earlier of the date the Tenant vacates premises and May 31, 2015 (the "Termination Date").

NOW, THEREFORE, in consideration of the premises and the mutual agreements contained herein, Landlord and Tenant hereby agree as follows:

11. Payment of Purchase Price. Landlord shall on the Termination Date deliver the purchase price for the Lease in the amount of \$ 99,227.17, which amount includes \$ 74,227.17 constituting a credit bid for cure claim amounts, in immediately available funds wired to the account specified by Tenant plus the amount of any security deposit applicable to the Lease that has not been applied in accordance with the terms of the Lease.

12. Termination and Surrender.

A. As of the Termination Date, Tenant hereby surrenders the Premises to Landlord and does hereby give, grant and surrender unto Landlord all of Tenant's right, title and interest in and to the Premises, including, without limitation, all of Tenant's right, title and interest in, to and under the Lease, and Landlord hereby accepts such surrender. Except as otherwise expressly provided herein, each of the parties hereto acknowledges performance of all obligations of the other party under the Lease or otherwise in connection with the Premises through and including the Termination Date. The Lease is hereby agreed to be null and void and of no further force and effect as of the Termination Date. In addition, any and all rights and obligations of the parties that may have arisen in connection with the Premises shall be deemed to have expired and terminated as of the Termination Date.

B. As of the Termination Date, except as to the obligations of Tenant and Landlord expressly set forth in this Agreement, Tenant and Landlord hereby mutually release each other and their respective successors and assigns of and from any and all claims, damages,

obligations, liabilities, actions and causes of action of every kind and nature whatsoever that may arise under or in connection with the Lease before, on or after the Termination Date, including, without limitation, any claims under section 502(b)(6) of the Bankruptcy Code.

C. To the extent Landlord has filed or files any proof of claims with respect to the Lease or the Premises, Landlord consents to the expungement of such claims, with prejudice.

13. Further Assurances. At any time and from time to time after the date hereof, without further consideration, (a) at the request of Landlord, Tenant shall execute and deliver such other instruments of sale, transfer, conveyance and termination or consents and take such other action as Landlord may reasonably request as necessary or desirable in order to more effectively transfer, convey and surrender to Landlord all of Tenant's rights to the Premises and under the Lease, and (b) at the request of Tenant, Landlord shall execute and deliver such other instruments of assumption and confirmation and take such other action as Tenant may reasonably request as necessary or desirable in order to more effectively evidence Landlord's acceptance of Tenant's surrender of the Lease.

14. "As Is, Where Is" Transaction. Landlord hereby acknowledges and agrees that Tenant makes no representations or warranties whatsoever, express or implied, with respect to any matter relating to the Premises or the Lease. Accordingly, Landlord accepts the Premises "AS IS" and "WHERE IS."

15. Miscellaneous.

A. This Agreement is binding upon and shall inure to the benefit of Tenant's successors and assigns, including, without limitation, a trustee, if any, subsequently appointed under chapter 7 or chapter 11 of the Bankruptcy Code, and is binding upon and shall inure to the benefit of Landlord's successors and assigns.

B. Each of Tenant and Landlord warrants and represents that it has the power and authority to enter into this Agreement.

C. This Agreement and any additional agreements delivered in connection herewith together contain the entire agreement between the parties hereto, and except as otherwise specifically set forth herein, supersede all prior agreements and undertakings between the parties hereto relating to the subject matter hereof.

D. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument, and presentation of any copy of this Agreement, whether original or facsimile (including in portable document format (pdf)), signed by Tenant and Landlord shall constitute sufficient proof of this Agreement.

E. This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware without regard to principles of conflicts of law, and any disputes shall be resolved by the Bankruptcy Court, which shall have exclusive jurisdiction at all times during which Tenant's bankruptcy case is pending.

F. Any and all sales, transfer and recording taxes, stamp taxes or similar taxes or fees, if any, relating to the termination of the Lease shall be the sole responsibility of Landlord and shall be paid, if applicable, to the proper governing body on the Termination Date.

G. This Agreement may not be amended orally but rather may be amended only by an agreement in writing signed by the party against whom enforcement of any waiver, change, modification or discharge is sought.

*[Signatures are on the following page.]*

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the date first written above.

TENANT:

RadioShack Corporation  
[Name of Tenant]

By: Steve Moroneso *SM*

Name: Steve Moroneso

Title: Vice President, Real Estate & Leasing

LANDLORD:

[Name of Landlord]

By: Idania Salgueiro

Name: Idania Salgueiro

Title: Property Manager