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Fear Retail Stores, Inc., Debtor and Debtor
7 in Possession

8 **UNITED STATES BANKRUPTCY COURT**

9 **Southern District of California**

10 In re

11 **NO FEAR RETAIL STORES, INC.,**
12 a California corporation,

13
14 Debtor.

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20 Employer ID #20-5238208
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Case No. 11-02896-MM11

DATE: March 1, 2011
TIME: 9:00 a.m.
JUDGE: Hon. Margaret M. Mann
PLACE: Chamber 1—Room 218
U.S. Bankruptcy Court
325 West "F" Street
San Diego, CA 92101

Chapter 11

**DEBTOR'S EMERGENCY FIRST DAY
MOTION FOR ORDER APPROVING
DEBTOR'S REJECTION OF
UNEXPIRED LEASES OF
NONRESIDENTIAL REAL
PROPERTY**

[Omnibus Declaration of Mark Simo in
Support "First Day" Motions Filed
Concurrently Herewith]

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I.

SUMMARY

No Fear Retail Stores, Inc. (the "Debtor"), requests an order of the Court approving the Debtor's rejection of 12 unexpired leases (the "Leases") of nonresidential real property under which the Debtor is the lessee. The 12 affected properties (the "Properties") are described by location name and address in **Exhibit "1"** hereto. The landlords under the Leases are listed alphabetically in Section V below. The Debtor, as lessee, entered into the Leases with the lessors also identified in Section V below and in Exhibit "1" hereto. IF YOU ARE A LANDLORD OF THE DEBTOR REVIEW SECTION V. BELOW TO DETERMINE WHETHER YOUR LEASE IS COVERED BY THIS MOTION.

This Motion is based on the grounds that, in the Debtor's reasonable business judgment, the continued liabilities associated with the Leases will impede the Debtor's opportunity to maximize the value of the estate and are burdensome to the estate. The Debtor has already closed all 12 stores operated at the Properties covered by the Leases.

Pursuant to this Motion, the Debtor requests that the Court approve the rejection of the Leases effective as of the earlier of February 24, 2011, or the date by which the Debtor returns possession of a particular property covered by a Lease back to the landlord in broom swept condition (recognizing that the date of rejection will not be deemed to be prior to the date possession of a property has been relinquished to the landlord in broom swept condition).

Rejection of the Leases will avoid the continuing imposition of administrative claims for rent or adequate protection against the estate for properties where the reasonable business decision is that marketing the Debtor's leasehold interest is not cost effective and would not benefit the estate. The Leases either relate to Properties which are no longer profitable for the Debtor, or have terms that are burdensome to the Debtor. Under the circumstances, as evaluated by the Debtor, the Leases have no residual value for the Debtor or the estate. Accordingly, approval of

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1 rejection of the Leases is in the best interest of the Debtor, creditors, all other interested
2 parties, and the estate.

3 This Motion is based on 11 U.S.C. § 365(a), the authorities set forth herein,
4 the Omnibus Declaration of Mark Simo submitted in support of "First Day" Motions, and
5 any additional argument or evidence that the Court may consider.

6 II.

7 **CHAPTER 11 FILING**

8 The Debtor commenced the above-captioned reorganization case by filing a
9 voluntary chapter 11 petition on February 24, 2011 (the "Petition Date"). The Debtor
10 remains in possession of its assets and continues to operate its business as the debtor in
11 possession pursuant to 11 U.S.C. §§ 1101(1), 1107(a), and 1108.

12 III.

13 **DEBTOR'S BUSINESS**

14 The Debtor is a retailer of action, sports, and casual youth lifestyle
15 apparel and accessories, targeting young adults and teens. The Debtor sells a
16 broad range of apparel and accessories, primarily under the "No Fear" and "So
17 Cal" brands including t-shirts, jackets, jeans, shorts, eyewear, bags, and watches.
18 No Fear's products primarily target young adults and teens seeking an action
19 sports inspired lifestyle. As of the Petition Date, the Debtor operated 41 retail
20 stores in 7 states, primarily in the southwestern United States.

21 The Debtor's operations have not been profitable during the last year. The
22 Debtor believes that the best means of maximizing the value of the estate will be through
23 the closure of the Debtor's less desirable stores. Prior to the Petition Date, the Debtor
24 closed 12 of its retail stores covered by the Leases. In order to achieve the goal of
25 maximizing the value of the estate, it is imperative that there not be delay with respect to
26 rejection of the Leases relating to such stores. The stores have already closed, and are
27 no longer generating any revenue for the estate.

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IV.

THE LEASES

In connection with the operation of its business, the Debtor, as lessee, entered into the 12 Leases that are the subject of this Motion. The store number, store name, store address, landlord name, landlord address, and monthly rent amount with respect to the Leases that the Debtor seeks to reject pursuant to this Motion are set forth in Exhibit "1" hereto. The landlords under the Leases are listed alphabetically in Section V below. The Debtor will provide copies of the Leases upon request of any interested party in this matter. Because the Leases are voluminous, production of the Leases other than upon request would be unnecessarily burdensome and expensive.

All of the Leases cover premises where the Debtor has already closed stores. Therefore, no revenue is being generated from the Leases. Moreover, the Debtor has determined that the Leases all contain terms that are burdensome and that the burdens under the Leases outweigh any benefit that might be derived by the estate from the Leases.

V.

LANDLORDS UNDER THE LEASES

The Landlords under the Leases and the address of the Leases are listed (alphabetically by Landlord) below:

Landlord	Description/ Store Location
Metroring AMS Owner LLC	MetroCenter; 9617 North Metro Parkway West; Phoenix, Arizona 85051
Vestar TM-OPCO, L.L.C.	Tempe Marketplace; 2000 East Rio Salado Parkway; Tempe, Arizona 85281
The Irvine Company LLC	Irvine Spectrum Center; 71 Fortune Drive; Irvine, California 92618

1		Northridge Fashion Center; 9301 Tampa Avenue; Northridge, California 91324
2	GGP Northridge Fashion Center, LP	
3		Stoneridge Shopping Center; One Stoneridge Mall; Pleasanton, California 94588
4	Stoneridge Properties LLC	
5		Inland Center; 500 Inland Center Drive; San Bernardino, California 92408
6	WM Inland Investors IV, LLC	
7		Westfield Oakridge Shopping Center; 925 Blossom Hill Road; San Jose, California 95123-1294
8	Oakridge Mall LP	
9		Westfield Santa Anita Shopping Center; 400 South Baldwin Avenue; Arcadia, California 91007
10	Santa Anita Shoppingtown LP	
11		Simi Valley Town Center; 1555 Simi Town Center Way; Simi Valley, California 93065
12	Simi Valley Mall, LLC	
13		The Oaks; 350 Hillcrest Drive; Thousand Oaks, California 91360
14	Macerich Oaks LLC	
15		Westfield West Covina Shopping Center; 112 Plaza Drive; West Covina, California 91790
16	Plaza West Covina LP	
17		Lakeland Square; 3800 US Highway 98 North; Lakeland, Florida 33809
18	GGP-Lakeland, Inc.	

VI.

COURTS APPROVE THE REJECTION OF LEASES BASED ON THE EXERCISE OF THE DEBTOR'S REASONABLE BUSINESS JUDGMENT

The primary goal of chapter 11 is rehabilitation of the debtor. NLRB v. Bildisco & Bildisco, 465 U.S. 513, 104 S. Ct. 1188, 1197, 79 L. E. 2d 482 (1984); see also

1 Eastern Airlines, Inc. v. International Assoc. of Machinists & Aerospace Workers, A.F.L.-
 2 C.I.O., et al. (In re Ionosphere Clubs, Inc.), 108 B.R. 901, 937 (Bankr. S.D.N.Y. 1989)
 3 ("The paramount policy and goal of chapter 11, to which all other bankruptcy policies are
 4 subordinated, is the rehabilitation of the debtor"). In furtherance of this goal, there is a
 5 long-standing principle of bankruptcy law that a debtor should not be compelled to
 6 perform under a pre-bankruptcy contract that is burdensome to the estate. NLRB v.
 7 Bildisco & Bildisco, 465 U.S. at 528, 104 S. Ct. at 1198 ("[T]he authority to reject an
 8 executory contract is vital to the basic purpose of a chapter 11 reorganization, because
 9 rejection can release a debtor's estate from burdensome obligations that can impede a
 10 successful reorganization").

11 Bankruptcy Code section 365(a) provides that, subject to court approval, a
 12 debtor in possession "may assume or reject any executory contract or unexpired lease of
 13 the debtor." 11 U.S.C. §§ 365(a) and 1107(a). Section 365(a) does not provide a
 14 standard for determining when rejection of an unexpired lease is appropriate. See
 15 Monarch Tool & Mfg. Co. v. Monarch Product Sales Corp. (In re Monarch Tool and Mfg.
 16 Co.), 114 B.R. 134, 137 (Bankr. S.D. Ohio 1990). However, courts traditionally have
 17 applied a "business judgment" standard in determining whether to authorize rejection of
 18 executory contracts and unexpired leases. See N.L.R.B. v. Bildisco & Bildisco, 465 U.S.
 19 513, 523, 104 S. Ct. 1188, 1194-95, 79 L. Ed. 2d 42 (1984); Group of Investors v.
 20 Chicago, Milwaukee, St. Paul & Pacific Railroad Company, 318 U.S. 523, 63 S. Ct. 727,
 21 87 L. Ed. 959 (1943); In re Orion Pictures Corp., 4 F.3d 1095, 1099 (2nd Cir. 1993);
 22 Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303, 1309 (5th Cir. 1985), *cert.*
 23 *denied*, 475 U.S. 1057 (1986). Accordingly, if the debtor in possession has reasonably
 24 exercised its business judgment in determining to reject an executory contract, the
 25 decision should be approved by the court. See Lubrizol Enterprises Inc. v. Richmond
 26 Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.), 756 F.2d 1043, 1046-47 (4th
 27 Cir. 1985); Carrie v. Mobil Oil Corp (In re Tilco, Inc.), 558 F.2d 1369, 1372 (10th Cir.

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1 1977); Robertson v. Pierce (In re Houg), 23 B.R. 798, 800 (Bankr. 9th Cir. 1982);
 2 3 Collier on Bankruptcy ¶ 365.03[2] at 365-22 (15th ed. rev. 1998).

3 "As a general rule, a bankruptcy court presented with an application to
 4 disaffirm the obligations of an executory contract need determine only whether it is
 5 indeed executory and whether disaffirmance would be advantageous to the debtor." In re
 6 Federated Department Stores, Inc., 131 B.R. 808, 811 (Bankr. S.D. Ohio 1991). Further,
 7 "[t]he burden or hardship which rejection would impose on other parties to such a
 8 contract is not a factor to be weighed by the bankruptcy court in ruling upon the debtor's
 9 application." Id. As applied to a debtor's decision to reject an executory contract, it has
 10 been held that the business judgment test "requires that the decision be accepted by
 11 courts unless it is shown that the [debtor's] decision was one taken in bad faith or in
 12 gross abuse of the bankrupt's retained business discretion." Lubrizol, 756 F.2d at 1047.

13 VII.

14 THE DEBTOR'S REJECTION OF THE LEASES SHOULD BE APPROVED

15 As stated above, the Debtor has already closed the stores that are the
 16 subject of the Leases. In determining that the Leases should be rejected, the Debtor
 17 exercised reasonable business judgment and considered, among other things: (1) the
 18 continued liabilities associated with the Leases and the significant negative impact of
 19 such liabilities on the Debtor's estate; (2) the lack of profitability of the operations
 20 previously conducted at the leasehold locations; and (3) various financial factors dictating
 21 that the Debtor's interests in the Leases are not worth marketing to proposed assignees
 22 and cannot feasibly be sold to the landlords, including: (a) above market rental rates or
 23 rental rates within a range of market rents that cause it not to be feasible for the Debtor to
 24 assign its interests in the leases when considering the time necessary to market, (b) the
 25 cost of carrying the lease while marketed, (c) the remaining term of the lease (including
 26 options), (d) the security risk/expenses associated with a closed location, (e) the
 27 likelihood of a lease premium being paid in a cash lump sum payment or over time, and
 28

1 (f) legal fees and transaction costs association with assumption and assignment of the
2 lease.

3 The Debtor has evaluated the Leases. The Debtor has determined that the
4 Leases all have terms that are burdensome to the Debtor and the estate. Further, the
5 Debtor has determined that burdens under the Leases outweigh any benefit that might be
6 derived for the estate pursuant to the Leases. In summary, the Debtor, in the reasonable
7 exercise of its business judgment, has determined that the Leases are burdensome and
8 have no residual value for the Debtor or the estate.

9 VIII.

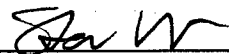
10 CONCLUSION

11 Based on the foregoing, and in order to avoid the imposition of unnecessary
12 administrative expense on the estate, the Debtor respectfully requests that the Court
13 approve the rejection of the Leases identified in Exhibit "1" hereto, effective as of the
14 earlier of February 24, 2011, or the date by which the Debtor returns possession of the
15 subject property to the landlord (recognizing that the rejection will not be deemed
16 effective until possession of the subject property has been relinquished to the landlord in
17 broom swept condition).

18 Dated: February 24, 2011

Respectfully submitted,

19 **SulmeyerKupetz**
A Professional Corporation

20
21 By: 
22 Steven F. Werth
23 (Proposed) Bankruptcy Counsel for No Fear
24 Retail Stores, Inc., Debtor and Debtor in
25 Possession
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EXHIBIT "1"

Location	Mall name and address	Status	Landlord	Landlord Notice Address	Monthly rent
Phoenix, Arizona	MetroCenter, 9617 North Metro Parkway West, Phoenix, Arizona 85051	closed 1/25	Metrorising AMS Owner LLC	DVM CO.; c/o M.S. Management Associates Inc.; National City Center; 115 West Washington; Indianapolis, Indiana 46204	\$6,918.75
Tempe, Arizona	Tempe Marketplace; 2000 East Rio Salado Parkway; Tempe, Arizona 85281	closed 1/27	Vestar TM-OPCO, L.L.C.	Vestar TM-OPCO, L.L.C.; c/o Vestar Development Co.; 2425 East Camelback Road, Suite 750; Phoenix, Arizona 85016; Attention: President	\$7,724.49
Irvine, California	Irvine Spectrum Center; 71 Fortune Drive; Irvine, California 92618	closed 2/1	The Irvine Company LLC	Attn: General Counsel, Retail Properties; The Irvine Company LLC; 100 Innovation; Irvine, California 92617	\$12,252.42
Northridge, California	Northridge Fashion Center; 9301 Tampa Avenue; Northridge, California 91324	closed	GGP Northridge Fashion Center, LP	Northridge Fashion Center; c/o GGP Northridge Fashion Center, LP; 110 N. Wacker Dr.; Chicago, IL 60606; Attn: Law/Lease Administration Department	\$2,000.00

Pleasanton, California	Stoneridge Shopping Center; One Stoneridge Mall; Pleasanton, California 94588	closed 1/30	Stoneridge Properties LLC	Stoneridge Properties LLC; c/o M.S. Management Associates Inc.; 225 West Washington Street; Indianapolis, Indiana 46204-3438	\$8,042.66
San Bernardino, California	Inland Center; 500 Inland Center Drive; San Bernardino, California 92408	closed 2/2	WM Inland Investors IV, LLC	WM Inland Investors IV, LLC; 500 Inland Center Drive; San Bernardino, California 92408; Attention: Center Manager	\$10,659.72
San Jose, California	Westfield Oakridge Shopping Center; 925 Blossom Hill Road; San Jose, California 95123-1294	closed 1/31	Oakridge Mall LP	Oakridge Mall LP; 11601 Wilshire Boulevard, 12th Floor; Los Angeles, California 90025; Attention: Legal Department	\$8,332.33
Arcadia, California	Westfield Santa Anita Shopping Center; 400 South Baldwin Avenue; Arcadia, California 91007	closed 2/8	Santa Anita Shoppingtown LP	Santa Anita Shoppingtown LP; 11601 Wilshire Boulevard, 11th Floor; Los Angeles, California 90025; Attention: Legal Department	\$9,079.17

Simi Valley, California	Simi Valley Town Center; 1555 Simi Town Center Way; Simi Valley, California 93065	closed 1/29 (lease expiration 3/9/11, kick-out)	Simi Valley Mall, LLC	Forest City Commercial Group, Inc.; Terminal Tower; 50 Public Square, Suite 1100; Cleveland, Ohio 44113-2267	\$10,293.26
Thousand Oaks, California	The Oaks; 350 Hillcrest Drive; Thousand Oaks, California 91360	closed 1/25	Macerich Oaks LLC	Macerich Oaks LLC; Management Office; 350 West Hillcrest Drive; Thousand Oaks, California 91360; Attention: Center Manager	\$6,037.00
West Covina, California	Westfield West Covina Shopping Center; 112 Plaza Drive; West Covina, California 91790	closed 2/7	Plaza West Covina LP	Plaza West Covina LP; 11601 Wilshire Boulevard, 12th Floor; Los Angeles, California 90025; Attention: Legal Department	\$10,640.32
Lakeland, Florida	Lakeland Square; 3800 US Highway 98 North; Lakeland, Florida 33809	closed 1/29	GGP-Lakeland, Inc.	Lakeland Square; c/o GGP-Lakeland, Inc.; 110 N. Wacker Dr.; Chicago, IL 60606; Attn: Law/Lease Administration Department	\$1,044.00