

SONNENSCHN NATH & ROSENTHAL LLP  
Jo Christine Reed, Esq.  
1221 Avenue of the Americas  
New York, New York 10020  
Telephone: (212) 768-6700  
Facsimile: (212) 768-6800

-and-

Patrick C. Maxcy, Esq.  
Stefanie L. Wowchuk, Esq.  
Sonnenschein Nath & Rosenthal LLP  
233 S. Wacker Drive  
Suite 7800  
Chicago, IL 60606  
Telephone: (312) 876-8000  
Facsimile: (312) 876-7934

*Counsel for 939 North Avenue Collection, LLC*

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

In re

AGT CRUNCH ACQUISITION LLC *et al.*,

Debtors.<sup>1</sup>

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Chapter 11  
Case No. 09-12889 (REG)  
Jointly Administered

**LIMITED OBJECTION OF 939 NORTH AVENUE COLLECTION, LLC  
TO DEBTORS' MOTION FOR ENTRY OF AN ORDER APPROVING THE  
ACQUISITION OF THE NORTH & SHEFFIELD CLUB AND EXTENDING  
THE DEADLINE TO ASSUME OR REJECT THE RELATED LEASE**

939 North Avenue Collection, LLC ("NAC") hereby files this limited objection to the  
Debtors' Motion for Entry of an Order Approving the Acquisition of the North & Sheffield Club

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<sup>1</sup> The Debtors in these cases are: AGT Crunch Acquisition LLC, Sports & Fitness Ventures LLC, AGT Crunch Services LLC, Crunch CFI LLC, AGT Crunch Atlanta LLC, Crunch CFI Georgia, LLC, Crunch CFI Atlanta, LLC, AGT Crunch Chicago LLC, Crunch CFI GW, LLC, AGT Crunch Los Angeles LLC, AGT Union Street LLC, AGT Crunch Miami LLC, AGT Crunch New York LLC, Fort Greene Sports Club, LLC, Hauppauge Sports Club, LLC, Crunch CFI New York LLC, Park Slope Sports Club, LLC, 113 4<sup>th</sup> Sports Club, LLC, AGT Crunch San Francisco LLC, Crunch CGI San Francisco, LLC, AGT Crunch Washington DC LLC and The Silver Springs Sports Club, L.L.C.

and Extending the Deadline to Assume or Reject the Related Lease (the “Motion”). In support of its limited objection, NAC states as follows:

### **Background**

1. NAC and the Debtors are parties to a real property lease dated as of January 5, 2001, as amended (the “NAC Lease”), for property located at 939 West North Avenue, Chicago, IL 60642 (the “Premises”). As security for the NAC Lease, the Debtors provided for the benefit of NAC an unconditional, standby-by, irrevocable non-documentary letter of credit (the “Letter of Credit”). JPMorgan Chase Bank, N.A. is the issuer under the Letter of Credit and NAC is the beneficiary of the Letter of Credit.

2. On May 6, 2009, the Debtors filed a motion (the “Initial Rejection Motion”) seeking authorization to reject certain leases, including the NAC Lease. NAC filed a limited objection to the Initial Rejection Motion on the grounds, *inter alia*, that the Initial Rejection Motion sought an open-ended assumption/rejection period.

3. On August 7, 2009, the Debtors filed a motion (the “First Extension Motion”) seeking the entry of an amended proposed order granting the Debtors authority to extend the time within which the Debtors must assume or reject certain leases, including the NAC Lease. On August 13, 2009, the Court entered an order granting the First Extension Motion and extending the deadline to assume or reject leases through and including October 31, 2009.

4. On October 29, 2009, the Debtors filed the Motion seeking, in part, the Court’s approval of the sale of the Debtors’, *inter alia*, membership interests, fixtures and equipment located at the Premises, the rejection of the NAC Lease and the further extension of the deadline to assume or reject the NAC Lease.

### **Basis for Objection**

5. NAC does not object to the Debtors' request for entry of an order approving the acquisition of the Debtors' fitness center located at the Premises. Nor does NAC object to the rejection of the NAC Lease effective as of the Closing Date<sup>2</sup>, provided the effective date of rejection does not occur more than 210 days after the order for relief in this case as set forth in § 365(d)(4)(B)(i) of the Bankruptcy Code. NAC does not consent to any extension beyond 210 days from the order for relief. NAC, however, objects to the Motion to the extent that the Debtor seeks to improperly enjoin or condition NAC's contractual rights under the Letter of Credit .

6. In Section 15 of the Motion, the Debtors improperly attempt to impose certain pre-conditions on NAC's ability to draw on the Letter of Credit. Specifically, the Debtors propose that *before* applying "any security deposits, escrow funds, letter of credit proceeds, or related amounts" (collectively, "Security") NAC must provide to the Debtors' counsel and to counsel to the Official Committee of Unsecured Creditors, within ten calendar days from the Closing Date "a statement specifically identifying and itemizing all (i) prepetition arrearages or delinquencies, (ii) postpetition arrearages or delinquencies, (iii) claims that the Landlord believes are allowable under section 502(b)(6) of the Bankruptcy Code, and (iv) mitigation of damages pursuant to the new lease entered into by [NAC] and [the acquirer of the Debtors' fitness center located at the Premises]." [Motion at §15].

7. The Debtors' request amounts to an injunction against NAC's contractual right to draw on the Letter of Credit or any other Security. Remarkably, the Debtors provide no authority for this request, which asks this Court to disregard the longstanding "independence principle" governing letters of credit. The "independence principle" provides that a letter of

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<sup>2</sup> The "Closing Date" is defined in the Motion as the third business day following the entry of the Court's order approving the acquisition of the Debtor's fitness center located at the Premises, or on such other date as the parties agree.

credit is “totally independent of the underlying transaction” to which it relates. In re Northeast Biofuels, LP, 2009 WL 2873073, at \*3 (Bankr. N.D.N.Y. Mar. 21, 2009). “[C]ourts should rarely interfere with executory letter-of-credit transactions,” except in the limited circumstances where fraud exists. Id.

8. The independence principle holds that a letter of credit transaction consists of three independent contracts:

- “(1) the underlying contract, usually between a [party] who applies to a bank for the letter of credit, and a [party] who becomes the beneficiary under the credit;
- (2) a contract between the issuing bank and its customer to issue a letter of credit; and
- (3) the letter of credit itself which is a contract between the issuing bank and the beneficiary.”

Carol Ruth, Inc. v. Provident Life and Accident Ins. Co., No. 90 Civ 2400 (SWB) (LB), 1995 WL 130530, at \*3 (S.D.N.Y. Mar. 24, 1995). The Motion seeks to affect the contract between NAC, as beneficiary, and the issuing bank, JP Morgan Chase Bank, N.A., to which the Debtors are not a party. The Debtors simply have provided no basis for such an extraordinary request.

9. NAC further notes that the relief requested by the Debtors is inconsistent with prior orders of lease rejection entered in this case. For example, the Order Rejecting Grand & Wabash Lease, which also followed the sale of the Debtors’ interest in membership and equipment for that location, provided as follows:

“ORDERED, that the landlord under the Grand & Wabash Lease shall immediately return to the Debtors any security deposits, escrow funds, letter of credit proceeds, or related amounts (“Security”) after application to any prepetition arrearages or delinquencies under the Grand & Wabash Lease and any rejection damages, to the extent permitted by the Bankruptcy Code and applicable law (“Permitted Draws”); and it is further

ORDERED that landlord under the Grand & Wabash Lease shall provide to counsel to the Debtors a statement identifying any amount remaining after application of the Permitted Draws to the Security ...”

[Order Rejecting Grand & Wabash Lease at p. 2., Docket No. 544].

10. NAC does not object to an order substantially identical to the Order Rejecting Grand & Wabash Lease. Following application of the Letter of Credit proceeds and any other applicable security, NAC will provide Debtors with a statement of amounts applied and any amounts remaining after such draws, if any. However, NAC objects to the Debtors’ improper request to enjoin NAC’s contractual right to draw on the Letter of Credit.

**Reservation of Rights Regarding Postpetition Rent**

11. NAC has had preliminary conversations with the Debtors regarding proper amount of postpetition rent which remains unpaid and still owing to NAC under §363(d)(3) of the Bankruptcy Code. Nothing in this limited objection should be construed as a waiver of any of NAC’s rights, and NAC specifically reserves the right to compel payment of unpaid postpetition obligations pursuant to §365(d)(3) of the Bankruptcy Code or otherwise seek payment of an administrative expense related to Debtors’ unpaid postpetition obligations.

**Conclusion**

12. For the reasons stated herein, the Motion should be denied to the extent that it seeks to improperly enjoin or set pre-conditions on NAC’s exercise of its contractual rights under the Letter of Credit and other security.

Dated: November 12, 2009

Respectfully submitted,

SONNENSCHN NATH & ROSENTHAL LLP

By:     /s/ Jo Christine Reed    

Jo Christine Reed, Esq.  
1221 Avenue of the Americas  
New York, New York 10020  
Telephone: (212) 768-6700  
Facsimile: (212) 768-6800

- and-

Patrick C. Maxcy, Esq.  
Stefanie L. Wowchuk, Esq.  
Sonnenschein Nath & Rosenthal LLP  
Suite 7800  
233 S. Wacker Drive  
Chicago, IL 60606  
Telephone: (312) 876-8000  
Facsimile: (312) 876-7934

Counsel to 939 North Avenue Collection, LLC

SONNENSCHN NATH & ROSENTHAL LLP  
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1221 Avenue of the Americas  
New York, New York 10020  
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	:	Jointly Administered
Debtors. <sup>1</sup>	:	

**CERTIFICATE OF SERVICE**

I, Jo Christine Reed, certify that on November 12, 2009, a copy of the **Limited Objection of 939 North Avenue Collection, LLC to Debtors' Motion for Entry of an Order Approving the Acquisition of the North & Sheffield Club and Extending the Deadline to Assume or Reject the Related Lease** was served via electronic mail and/or CM/ECF to those individuals authorized to receive pleadings via the Court's CM/ECF system.

I hereby further certify that on the 12<sup>th</sup> day of November 2009, a copy of the **Limited Objection of 939 North Avenue Collection, LLC to Debtors' Motion for Entry of an Order Approving the Acquisition of the North & Sheffield Club and Extending the Deadline to Assume or Reject the Related Lease** was served by overnight courier to the following parties:

See attached Service List.

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**SERVICE LIST**

Honorable Robert E. Gerber  
United States Bankruptcy Court  
One Bowling Green  
New York, NY 10004

Susan Golden  
Nazar Khodorovsky  
Office of the United States Trustee  
33 Whitehall Street, Suit 2100  
New York, NY 10004

Shmuel Vasser  
Davin J. Hall  
Dechert LLP  
1095 Avenue of the Americas  
New York, NY 10036