

IN THE UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

In re:

HRI HOLDING CORP., *et al.*,

Debtors.

Chapter 11

Case No.: 19-12415 (MFW)

Jointly Administered

Re: Docket Nos. 14, 15, 89 and 164

Hearing Date: December 20, 2019 at 2:00 p.m.

**OBJECTION OF (I) BRIDGEWATER REALTY CORP. AND FAIRFIELD LAND I, LLC TO PROPOSED CURE AMOUNT, ADEQUATE ASSURANCE OF FUTURE PERFORMANCE, AND PROPOSED SALE OF LEASE DESIGNATION RIGHTS, AND (II) BAYONNE RESTAURANT, LLC TO SALE OF A LIQUOR LICENSE**

Bridgewater Realty Corp. (“Bridgewater Realty”), and Fairfield Land I, LLC (“Fairfield Land”, and collectively with Bridgewater Realty, the “Landlords”), hereby object to the above-referenced Debtors (i) proposed cure amounts, (ii) proposed adequate assurance of future performance in the event the Landlords leases are assumed and assigned, and (iii) the proposed sale of lease designation rights, and Bayonne Restaurant, LLC (“Bayonne Restaurant”) hereby objects to the Debtors’ proposed sale of a liquor license for a Houlihan’s restaurant located in Bayonne, New Jersey, and respectfully state as follows:

**FACTUAL BACKGROUND**

1. Fairfield Land leases real property to one of the Debtors located at 645 Route 46, Fairfield, New Jersey, upon which the Debtors operate a Houlihan’s restaurant.
2. Bridgewater Realty leases real property to one of the Debtors located 1288 Route 22, Bridgewater, New Jersey, upon which the Debtors operate a Houlihan’s restaurant.
3. *The Debtors’ Notice of Assumption and Cure Costs with Respect to Executory Contracts and Unexpired Leases Potentially to be Assumed and Assigned in*



*Connection with Sale of Debtors' Assets* (the "Cure Notice") [Docket No. 89], states that cure cost for the Bridgewater Realty lease is \$59,107.33;<sup>1</sup> and for the Fairfield Land lease is \$35,126.66. The Debtors' estimated cure amount for the Fairfield Land lease is incorrect for the reasons set forth below. Bridgewater Realty does not object to the cure amount set forth in the Cure Notice.

4. For the Fairfield Land lease, the amount of pre-petition arrearages owed to Fairfield Land is:

Pre-petition unpaid real estate taxes	\$33,359.56
October 2019 rent	\$35,126.66
November rent through the petition date	\$17,563.33
TOTAL	\$86,048.55

5. In addition, while the Landlords have been paid the post-petition December 2019 rent, the Debtors have not paid the Landlords the November stub rent for the period of the petition date through and including November 30, 2019. The Debtors must be directed to immediately pay the post-petition stub rent for November.

#### **OBJECTION TO CURE AMOUNTS**

6. Fairfield Land hereby objects to the cure costs listed by the Debtors in the Cure Notice. The amount set forth in the Cure Notice are incorrect. The correct amount due to Fairfield Land is \$86,048.55 as set forth above. Accordingly, Fairfield Land respectfully requests the entry of an order pursuant to Section 365(b)(1) of the Bankruptcy Code that conditions the Debtors assumption and assignment of the its lease on the prompt payment of the

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<sup>1</sup> In the Cure Notice, the Debtors erroneously identify the property owner for the Bridgewater lease as Bridgewater Realty, LLC. This property owner's correct name is Bridgewater Realty Corp.

correct cure amount set forth above, meaning within fifteen (15) days of entry of an order approving any assumption and assignment of Fairfield Land's lease.

**ADEQUATE ASSURANCE OBJECTION**

7. Sections 365(b)(1)(c) and 365(f)(2)(b) of the Bankruptcy Code both provide that a debtor may not assume and assign a lease of non-residential real property unless the debtor demonstrates adequate assurance of future performance. The provision of adequate assurance of future performance is an affirmative duty of a debtor, and the debtor bears the ultimate burden of persuasion as to the issues under Section 365 of the Bankruptcy Code. *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 (5<sup>th</sup> Cir. 1985); *In re: F.W. Restaurant Assoc., Inc.*, 190 B.R. 143, 147 (Bankr. D. Conn. 1995).

8. A debtor's obligation to comply with Sections 365(b) and (f) is unaffected by maneuvering the assumption and assignment process through a sale under Section 363 of the Bankruptcy Code. Courts require a specific factual showing of competent evidence to determine whether adequate assurance of future performance has 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 to demonstrate adequate assurance of future performance).

9. While the Debtors' sale motion provides no information on the stalking horse bidder's ability to demonstrate adequate assurance of future performance beyond simply stating that the stalking horse bidder has significant financial resources, the Landlords have now received for Landry's adequate assurance information and have no objection to this information. Nonetheless, because Landry's bid is subject to higher and better offers, or Landry's could opt to put the Landlords' leases into the group of those leases it will seek to acquire and then sell the lease designation rights, any order of the Court must preserve the Landlords' right to object to an alternative bidders proposed adequate assurance of future performance. Thus, the Landlords

request that any court order approving the sale must include the following provision: “The rights of all landlords to object to any subsequent motion or application by the Debtors or the purchaser of the Debtors’ lease designation rights to assume and assign a non-residential real property lease on the grounds of lack of adequate assurance of future performance, the amount of cure costs or for any other reason are hereby preserved.”

10. In addition, the proposed sale of the Landlords’ leases to either the stalking horse bidder (Landry’s) or any other subsequent bidder (or purchaser of lease designation rights) cannot be free and clear of the obligations under the leases to satisfy unbilled taxes, reconciliations, percentage rent, common area maintenance and other year-end adjustments or unbilled charges that may have accrued under the leases prior to the assignment of the leases, or accruing, but which have not yet been billed to the Debtors. The assumption and assignment of the Landlords’ leases cannot cut off the Landlord’s right to recover unbilled charges that have accrued, or accruing, under the leases. Thus, any order approving the assumption and assignment of Leases (including lease designation rights) 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 a financial commitment (by posting of funds such as a bond or otherwise) that can be used to satisfy these obligations under the leases for any such claims that relate to the period prior to the assumption and assignment of the Landlords’ leases to either the stalking horse bidder or any subsequent bidder.

11. Further, any order approving of the assumption and assignment of the Landlords’ leases must provide that the assignee will become subject to the express terms of the leases and responsible for all obligations of the tenant thereunder.

12. Last, Section 365(l) of the Bankruptcy Code provides that:

If an unexpired lease under which the debtor is the lessee is assigned pursuant to this Section, the lessor of the property may require a deposit or the security

for the performance of the debtor's obligations under the lease substantially the same it would have been required by the landlord upon the initial leasing to a similar tenant.

Thus, the Landlords reserve the right to request such a financial undertaking if an alternative bidder or any subsequent assignee of the Landlords' leases cannot properly demonstrate adequate assurance of future performance.

**OBJECTION TO PROPOSED SALE OF LEASE DESIGNATION RIGHTS**

13. As part of the sale motion, the Debtors seek to sell lease designation rights to the stalking horse bidder (or the back-up bidder). *See*, Asset Purchase Agreement ("APA") at Section 7.5 [Docket 15-1]. While the Landlords do not object to the sale of designation rights, the Debtors' proposal requires modification. No proposed order was submitted with the sale motion. Thus, it is unclear as to who will be liable for all obligations (both financial and otherwise) under the Landlords' leases after the closing date of the sale transaction and/or the sale of the lease designation rights. The proposed order must make clear that the Debtors remain ultimately liable for all charges that accrue under the leases through the actual effective date of rejection or the assumption and assignment of the Landlords' leases. The proposed Management Agreement (a copy of which is not attached to the APA) and proposed sale order must also expressly state that the stalking horse bidder (or any alternative bidder) either pay the Landlords directly or promptly reimburse the Debtors on a monthly basis for payment to the Landlords of all post-sale financial obligations due under the leases.

14. In addition, the relief sought by the Debtors potentially impacts the Landlords rights under their leases and, accordingly, any order approving the sale of lease designation rights must make clear that all rights of the Landlords, including the right to object to assumption and assignment of the leases, cure amounts, adequate assurance of future performance, etc., are preserved until such time as there is an actual request to assume and assign one or both of the Landlords' leases via the sale of lease designation rights. Thus, nothing in the

order approving the sale of lease designation rights should be allowed to modify the leases in any way.

15. Finally, the lease designation rights procedures must provide adequate notice to the Landlords of any potential assumption and assignment of their leases. The Debtors or the purchaser of the lease designation rights should be required to provide e-mail notice to the Landlords and their counsel within 24 hours of receipt of an assumption notice by a buyer. The proposed designation rights should also provide the Landlords should receive at least four (4) calendar days' notice between receipt of adequate assurance information from a proposed assignee and any hearing to approve of the assumption and assignment of a lease.

16. Further, as noted above, the Debtors have failed to pay the Landlords post-petition stub rent for November 2019. There is no reason that the Landlords' administrative claims for post-petition November stub rent, including base rent, real estate taxes and other charges, should not be paid prior to the sale of assets or the lease designation rights so that the Landlords' post-petition administrative lease obligations have been paid on a current basis based on current available billing information. Accordingly, the Landlords respectfully request that the Court deny the Debtors' request to sell the lease designation rights unless the modifications set forth in this Objection are incorporated into any proposed order for approval of the sale.

17. The Landlords join in the objections of other landlords in connection with the proposed sale of the lease designation rights to the extent not inconsistent with the objections set forth herein.

**THE LIQUOR LICENSE FOR THE BAYONNE RESTAURANT CANNOT BE SOLD**

18. Pursuant to Section 363 of the Bankruptcy Code, the Debtors cannot sell an asset they do not own. Accordingly, the Debtors cannot sell the liquor license related to the Bayonne restaurant because no Debtor has title to that liquor license.

19. By way of factual background, A.C.E. Restaurant Group, Inc. and a number of affiliated entities and/or subsidiaries (collectively, "ACE") owned and operated 17

Houlihan's restaurants in New Jersey and New York as a franchisee of the Debtors. Pursuant to an Asset Purchase Agreement by and between Houlihan's Restaurants, Inc. and certain related entities (all Debtors in these bankruptcy cases) and ACE dated as of March 27, 2018, ACE sold to the Debtors the 17 franchised Houlihan's restaurants, assigned the real estate leases, and sold the Debtors inventory and equipment, and certain of the liquor licenses. This transaction closed in May of 2018.

20. As part of the sales transaction, certain liquor licenses related to these Houlihan's restaurants were promptly transferred to the Debtors, and certain liquor licenses remained owned by ACE or its related entities due to the specific requirements of New Jersey state law concerning the transfer of liquor licenses. Pursuant to a Settlement and Release Agreement dated May 10, 2019, entered into in connection with the Asset Purchase Agreement, the Debtor entities covenanted and agreed that they shall exercise commercially reasonable best efforts to complete the transfer of the liquor licenses for restaurants located in Paramus, Hasbrouck Heights, Weehawken and Bayonne, New Jersey on or before June 30, 2019. *Id.* at ¶4. The liquor licenses for the Paramus and Hasbrouck Heights restaurants were transferred to the Debtors, but the Weehawken and Bayonne liquor licenses have never been transferred, and are still owned by non-debtors Bayonne Restaurant and Weehawken Restaurant, LLC.<sup>2</sup>

21. Relevant to the Debtors' current proposed sale of substantially all of their assets to Landry's, the stalking horse bidder, the Debtors seek to sell the Houlihan's restaurant located in Bayonne, New Jersey, along with the related liquor license. The liquor license for the Weehawken restaurant is expressly listed as an excluded asset in schedule 2.2(r) to the Landry's Asset Purchase Agreement [Docket No. 15-1].

22. Pursuant to documents executed in connection with the May 2018 sale transaction between ACE and the Debtors at the closing, Bayonne Restaurant owns and holds

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<sup>2</sup> In schedule 3.8 to the Landry's Asset Purchase Agreement, the Debtors acknowledge that they do not hold title to the Bayonne and Weehawken liquor licenses and stated: "transfer pending to HOP" Bayonne, LLC and separately HOP Weehawken, LLC, both of which are Debtors.

title to the Bayonne liquor license. At the closing, Bayonne Restaurant entered into two agreements with HOP Bayonne, LLC (a Debtor in these bankruptcy cases) entitled an Interim Beverage Management Agreement and a separate Interim Lease Agreement, both dated May 10, 2018. These agreements, in addition to the Settlement and Release Agreement, detail the Debtors' financial obligations to Bayonne Restaurant before the liquor license can be transferred. The Debtors were in default of these agreements prior to the Petition Date because they were not current on their financial obligations and they failed to effectuate the transfer of the Bayonne liquor license on or before June 30, 2019 as required by the Settlement and Release Agreement.

23. Bayonne Restaurant would not object to the sale of the liquor license, subject to compliance with New Jersey state law and local Alcoholic Beverage Commission approval, conditioned upon the Debtors' immediate payment of all pre- and post-petition monies due to Bayonne Restaurant under the Interim Beverage Management Agreement, the Interim Lease Agreement and Settlement and Release Agreement. The amounts due to Bayonne Restaurant pursuant to these agreements is \$5,220.00 through December 1, 2019, plus an additional \$870.00 will be due for the month of December 2019, and possibly more if the sale and transfer of the Bayonne liquor license does not occur in December due to compliance with New Jersey state law and local Alcoholic Beverage Commission approval.

24. Accordingly, unless and until the Debtors commit in writing and any order of the Court approving of the sale of the Bayonne liquor license requires and directs the Debtors to pay at the closing Bayonne Restaurant all of the above sums due, the Debtors cannot sell and transfer the Bayonne liquor license to Landry's (or an alternative bidder) because the Debtors do not own the liquor license for the Bayonne Restaurant.

**RESERVATION OF RIGHTS TO OBJECT TO THE SALE ORDER**

25. The Debtors have not filed nor have the Landlords or Bayonne Restaurant seen a proposed form of sale order or management agreement with respect to the stalking horse



bidder. As a result, the Landlords and Bayonne Restaurant reserve their right to object to the form of sale order and/or management agreement after they have been filed with the Court.

**RESERVATION OF RIGHTS AS TO BACKUP OR ANY SUBSEQUENT BIDDER**

26. To the extent that the stalking horse bidder does not close on the proposed sale transaction, and the Debtors either designate a back-up bidder or, alternatively, the stalking horse bidder acquires lease designation rights and subsequently attempts to assume and assign the Landlords' leases to a third-party, the Landlords have no current ability to assess whether a back-up bidder or any future proposed assignee can provide adequate assurance of future performance as required by Section 365 of the Bankruptcy Code. Thus, the Landlords reserve the right to object to any such back-up or subsequent assignee attempt to assume and assign their leases to an alternative bidder.

**WHEREFORE**, (a) Bridgewater Realty and Fairfield Land respectfully request that the Court (i) direct the Debtors to revise the amount of the cure costs due to Fairfield Land; and (ii) revise any proposed order to incorporate Landlords' objections to the proposed sale of lease designation rights and adequate assurance of future performance; (b) Bayonne Restaurant objects to the sale of the liquor license for the Bayonne restaurant unless the conditions set forth above have been satisfied; and (c) grant the Landlords and Bayonne Restaurant such other and further relief as is just and proper.

Dated: December 13, 2019

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