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Debtors-in-Possession

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEW JERSEY  
CASE NO. 13-

Chapter 11  
(Joint Administration Pending)

In re:

RIH ACQUISITIONS NJ, LLC, *et al.*,<sup>1</sup>

Debtors-in-Possession.

**NOTICE OF MOTION FOR AN ORDER  
DIRECTING THE CREDIT CARD  
PROCESSOR TO HONOR THE  
PROCESSING AGREEMENT WITH  
RIH ACQUISITIONS NJ, LLC PENDING  
ASSUMPTION OR REJECTION  
PURSUANT TO 11 U.S.C. §§ 365 AND  
105(a)**

**HEARING DATE AND TIME:**  
\_\_\_\_\_, 2013, at \_\_:\_\_ a.m.

**ORAL ARGUMENT REQUESTED**

TO: All Parties-in-Interest

<sup>1</sup> The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal identification number are: RIH Acquisitions NJ, LLC d/b/a The Atlantic Club Casino Hotel (1695) and RIH Propco NJ, LLC (5454).



PLEASE TAKE NOTICE that pursuant to an Order Regarding Application for Expedited Consideration of First Day Matters served herewith, on the \_\_\_\_\_ day of November, 2013, at \_\_\_\_\_ .m., or as soon thereafter as counsel may be heard, the undersigned, proposed counsel for RIH Acquisitions NJ, LLC d/b/a The Atlantic Club Casino Hotel (“**RIH Acquisitions**”) and RIH Propco NJ, LLC, the within debtors and debtors-in-possession (the “**Debtors**”), shall move before the assigned United States Bankruptcy Judge, at the United States Bankruptcy Court, Mitchell H. Cohen U.S. Courthouse, 400 Cooper Street, 4<sup>th</sup> Floor, Camden, New Jersey 08101, for entry of an Order directing the credit card processor to honor the processing agreement with RIH Acquisitions (the “**Motion**”).

PLEASE TAKE FURTHER NOTICE that in support of the Motion, the undersigned shall rely on the “First Day” Affidavit of Eric Matejevich and the accompanying Application, which collectively set forth the relevant factual and legal bases upon which the relief requested in the Motion should be granted. A proposed Order granting the relief requested in the Motion also is submitted herewith.

PLEASE TAKE FURTHER NOTICE that objections, if any, to the relief requested in the Motion shall be presented in accordance with the Order Regarding Application for Expedited Consideration of First Day Matters.

PLEASE TAKE FURTHER NOTICE that unless objections are timely presented, the Motion shall be deemed uncontested in accordance with D.N.J. LBR 9013-1(a), and the requested relief may be granted without a hearing.

PLEASE TAKE FURTHER NOTICE that the undersigned requests oral argument on the return date of the Motion.

COLE, SCHOTZ, MEISEL,  
FORMAN & LEONARD, P.A.  
Proposed attorneys for RIH Acquisitions NJ, LLC, *et al.*,  
Debtors-in-Possession

By: /s/ Michael D. Sirota  
Michael D. Sirota  
Warren A. Usatine  
Ryan T. Jareck  
Nicholas B. Vislocky

DATED: November 6, 2013

**COLE, SCHOTZ, MEISEL,  
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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEW JERSEY  
CASE NO. 13-

Chapter 11  
(Joint Administration Pending)

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In re:

RIH ACQUISITIONS NJ, LLC, *et al.*,<sup>1</sup>

Debtors-in-Possession.

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**APPLICATION IN SUPPORT OF  
DEBTORS' MOTION FOR AN ORDER  
DIRECTING THE CREDIT CARD  
PROCESSOR TO HONOR THE  
PROCESSING AGREEMENT WITH  
RIH ACQUISITIONS NJ, LLC PENDING  
ASSUMPTION OR REJECTION  
PURSUANT TO 11 U.S.C. §§ 365 AND  
105(a)**

**HEARING DATE AND TIME:**

\_\_\_\_\_, 2013, at \_\_: \_\_ .m.

**ORAL ARGUMENT REQUESTED**

TO: Honorable Judge of the  
United States Bankruptcy Court

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<sup>1</sup> The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal identification number are: RIH Acquisitions NJ, LLC d/b/a The Atlantic Club Casino Hotel (1695) and RIH Propco NJ, LLC (5454).

The Application of RIH Acquisitions NJ, LLC d/b/a The Atlantic Club Casino Hotel (“**RIH Acquisitions**”) and RIH Propco NJ, LLC, the within debtors and debtors-in-possession (the “**Debtors**”), by and through their proposed counsel, Cole, Schotz, Meisel, Forman & Leonard, P.A., respectfully represents:

### **I. INTRODUCTION AND JURISDICTION**

1. This Application is submitted in support of the Debtors’ motion for an Order directing the credit card processor to honor the processing agreement with RIH Acquisitions pending RIH Acquisitions’ assumption or rejection thereof pursuant to 11 U.S.C. §§ 365 and 105(a) (the “**Motion**”).

2. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 1334 and 157(b). This is a “core” proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

3. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409(a).

### **II. BACKGROUND**

4. On November 6, 2013 (the “**Filing Date**”), the Debtors filed voluntary petitions for relief pursuant to Chapter 11 of the Bankruptcy Code. Since the Filing Date, the Debtors have remained in possession of their assets – and RIH Acquisitions continues management of its business – as debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

5. A detailed description of RIH Acquisitions’ business and the facts precipitating the filing of the Debtors’ Chapter 11 proceedings are set forth in the Affidavit of Eric Matejevich in support of the Debtors’ various “First Day Motions” (the “**Matejevich Affidavit**”). Those facts are incorporated herein by reference.

6. As set forth in the Matejevich Affidavit, RIH Acquisitions is in the hotel and gaming business and owns and operates The Atlantic Club Casino Hotel (formerly The Atlantic City Hilton and ACH) located at Boston Ave. & The Boardwalk in Atlantic City, New Jersey

(the “**Atlantic Club Casino**”). The Atlantic Club Casino has 801 hotel rooms, over 75,000 square feet of casino gaming space including state of the art low denomination slots and table games, as well as seven restaurants. The Atlantic Club Casino also offers over 37,000 square feet of versatile event space and can accommodate gatherings of up to 1,600 people.

7. In the ordinary course of business, RIH Acquisitions accepts credit card payments from customers for all goods and services they purchase at the Atlantic Club Casino. On a monthly basis, RIH Acquisitions receives between \$450,000 and \$1,000,000 in the aggregate from credit card purchases, depending on the month. RIH Acquisitions maintains a contract with Merchant’s Choice Payment Solutions (“**Merchant’s Choice**”) pursuant to which RIH Acquisitions’ MasterCard, Visa, American Express, Discover Card and Diners Club credit card transactions, including both charges and credits, are processed (the “**Merchant’s Choice Processing Agreement**”).<sup>2</sup>

8. Pursuant to the Merchant’s Choice Processing Agreement, credit card payments are deposited, after they have been processed by the relevant credit card company, and service charges have been deducted, into a depository account at the end of each day. That depository account is swept daily into the Concentration Account as more fully described in the Debtors’ motion for an Order: (a) authorizing RIH Acquisitions to continue using its existing cash management system; (b) authorizing the Debtors, as applicable, to continue using their bank accounts and business forms; and (c) waiving compliance with investment guidelines under 11 U.S.C. § 345(b).

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<sup>2</sup> A copy of the Merchant’s Choice Processing Agreement will be supplied upon request of the Debtors’ proposed counsel.

### **III. RELIEF REQUESTED AND BASIS THEREFOR**

9. Section 365 of the Bankruptcy Code entitles a debtor-in-possession to assume or reject executory contracts. 11 U.S.C. § 365. Section 365(a) specifically provides:

Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee [or debtor-in-possession], subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

11 U.S.C. § 365(a).

10. An executory agreement “remain[s] in effect until [the debtor] ma[kes] its decision to assume or reject the contract.” In re Whitcomb & Keller Mortgage Company, Inc., 715 F.2d 375, 378 (7th Cir. 1983). Pursuant to Section 365(d) of the Bankruptcy Code, a debtor-in-possession may assume or reject an executory contract at any time before confirmation of a plan, unless the court specifies an earlier period of time within which the contract must be assumed or rejected. 11 U.S.C. §365(d)(2). Furthermore, Section 105(a) of the Bankruptcy Code authorizes the Court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a). Section 105(a) can be used to compel a contracting party to continue performance pending a debtor's decision to assume or reject an executory contract. See Whitcomb, 715 F.2d at 378 n.4.

11. Credit card processing agreements are executory contracts that a debtor-in-possession is entitled to assume or reject. See, e.g., In re Thomas B. Hamilton Co. Inc., 969 F.2d 1013, 1022 (11th Cir. 1992); In re UAL Corp., 293 B.R. 183, 186 (Bankr. N.D. Ill. 2003), aff'd 368 F.3d 720 (7th Cir. 2004). As executory contracts, credit card processing agreements survive a debtor's bankruptcy filing and cannot be terminated unilaterally absent unusual circumstances, such as fraud by the debtor or unusually high ‘chargebacks’ for which the debtor itself is liable. See Hamilton, 969 F.2d at 1021; In re Nat'l Hydro-Vac Indus. Servs., L.L.C., 262 B.R. 781, 786-

787 (Bankr. E.D. Ark. 2001) (rejecting the argument that a credit card processing agreement is a personal services contract that cannot be assumed, and recognizing the debtor had never defaulted or committed fraud with respect to its processing agreement); In re Best Prods. Co. Inc., 210 B.R. 714, 718 (Bankr. E.D. Va. 1997).

12. In Hamilton, the United States Court of Appeals for the Eleventh Circuit made it clear that credit card processing agreements are executory contracts that may be assumed pursuant to Section 365 of the Bankruptcy Code. In that case, a credit card processor sought relief from the automatic stay to terminate its processing agreement with a Chapter 11 debtor. Hamilton, 969 F.2d at 1017. The credit card processor argued stay relief and termination of the processing agreement were warranted because the processing agreement was a “financial accommodation” the debtor could not assume under Section 365(c)(2) of the Bankruptcy Code.<sup>3</sup> Id. at 1018.

13. Rejecting the credit card processor’s contention, the Eleventh Circuit held the processing agreement did not fall within the scope of Section 365(c)(2) of the Bankruptcy Code. Id. at 1021. Rather, the court recognized the agreement basically was one “for an exchange of . . . sales drafts, for money, with an obligation by [the debtor] to repay [the credit card processor] the amount of any sales draft that is invalid [for certain enumerated reasons].” Id. at 1020. The court held, therefore, the agreement was executory and subject to assumption or rejection by the debtor pursuant to Section 365(a). Id. at 1022.

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<sup>3</sup> Section 365(c)(2) provides:

The trustee may not assume or assign an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—such contract is to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor[.]



14. The Eleventh Circuit also recognized the importance of credit card processing to a debtor's ability to emerge from Chapter 11:

Sound policy considerations support [our] conclusion. The Agreement at issue here is typical of credit card merchant agreements between all kinds of merchants and merchant banks. If these agreements may not be assumed by the trustee following a bankruptcy filing, rehabilitation will be virtually impossible for any merchant who relies heavily on credit card sales.

Id. at 1020. Consequently, the court concluded that “such agreements . . . may not be automatically terminated due to a bankruptcy filing.” Id. at 1022; see also Nat'l Hydro-Vac, 262 B.R. at 788 (finding a credit card processor violated the automatic stay by terminating a debtor's processing agreement).

15. A Chapter 11 debtor's ability to assume credit card processing agreements also was confirmed by the United States Bankruptcy Court for the Northern District of Illinois in UAL Corp., 293 B.R. at 189. In UAL Corp., as in Hamilton, a credit card processor argued its processing agreement with the debtor was a financial accommodation that could not be assumed under Section 365(a) of the Bankruptcy Code. UAL Corp., 293 B.R. at 186-87. The bankruptcy court, relying primarily on Hamilton, rejected the processor's argument and held credit card processing agreements are assumable by a debtor under Section 365(a) of the Bankruptcy Code. Id. at 188-89. Like the Eleventh Circuit in Hamilton, the bankruptcy court in UAL Corp. also recognized that such agreements typically are critical to a debtor's ability to avail itself fully of Chapter 11. Id. at 189 (“requiring termination of the . . . credit card processing agreement at the outset of the case would significantly impair the prospects” of debtors).

16. Here, as in Hamilton and UAL Corp., the Merchant's Choice Processing Agreement is an executory contract that is integral to RIH Acquisitions' ability to operate its business without interruption and emerge successfully from Chapter 11. See also Adamar of

New Jersey, Inc., Case No. 09-20711 (JHW), Docket No. 50 (where this Court granted the debtors' motion for an order directing credit card processors to honor the credit card processing agreements pending assumption or rejection). Furthermore, RIH Acquisitions is not in default under the Merchant's Choice Processing Agreement and has not, traditionally, experienced an excessive number of chargebacks. Therefore, the Merchant's Choice Processing Agreement should remain in full force and effect, and Merchant's Choice should be required to perform thereunder until the Merchant's Choice Processing Agreement is assumed or rejected by RIH Acquisitions pursuant to Section 365 of the Bankruptcy Code.

WHEREFORE, the Debtors respectfully request that the Court enter an Order granting the Motion and such other relief as the Court deems just and appropriate under the circumstances.

Respectfully submitted,

COLE, SCHOTZ, MEISEL,  
FORMAN & LEONARD, P.A.  
Proposed attorneys for RIH Acquisitions NJ, LLC, *et al.*,  
Debtors-in-Possession

By: /s/ Michael D. Sirota  
Michael D. Sirota  
Warren A. Usatine  
Ryan T. Jareck  
Nicholas B. Vislocky

DATED: November 6, 2013

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY	
Caption in Compliance with D.N.J. LBR 9004-2(c) COLE, SCHOTZ, MEISEL, FORMAN & LEONARD, P.A. A Professional Corporation Court Plaza North 25 Main Street P.O. Box 800 Hackensack, NJ 07602-0800 Michael D. Sirota, Esq. Warren A. Usatine, Esq. Ryan T. Jareck, Esq. Nicholas B. Vislocky, Esq. (201) 489-3000 (201) 489-1536 Facsimile Proposed attorneys for RIH Acquisitions NJ, LLC, <i>et al.</i> , Debtors-in-Possession	
In re:	Case No. 13-
RIH ACQUISITIONS NJ, LLC, <i>et al.</i> , <sup>1</sup>	Judge:
Debtors-in-Possession.	Chapter 11 (Joint Administration Pending)
	<b>Hearing Date and Time:</b> _____, 2013, at __:__.m.

**ORDER DIRECTING THE CREDIT CARD PROCESSOR TO HONOR THE  
PROCESSING AGREEMENT WITH RIH ACQUISITIONS NJ, LLC PENDING  
ASSUMPTION OR REJECTION PURSUANT TO 11 U.S.C. §§ 365 AND 105(a)**

The relief set forth on the following pages, numbered two (2) and three (3), is hereby  
**ORDERED.**

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<sup>1</sup> The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal identification number are: RIH Acquisitions NJ, LLC d/b/a The Atlantic Club Casino Hotel (1695) and RIH Propco NJ, LLC (5454).

(Page 2)

Debtors: RIH ACQUISITIONS NJ, LLC, *et al.*  
Case No: 13-  
Caption of Order: ORDER DIRECTING THE CREDIT CARD PROCESSOR TO HONOR  
THE PROCESSING AGREEMENT WITH RIH ACQUISITIONS NJ,  
LLC PENDING ASSUMPTION OR REJECTION PURSUANT TO 11  
U.S.C. §§ 365 AND 105(a)

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THIS MATTER having been opened to the Court by RIH Acquisitions NJ, LLC d/b/a The Atlantic Club Casino Hotel (“**RIH Acquisitions**”) and RIH Propco NJ, LLC, the within debtors and debtors-in-possession (the “**Debtors**”), by and through their proposed counsel, Cole, Schotz, Meisel, Forman & Leonard, P.A., upon motion for an Order directing the credit card processor to honor the processing agreement with RIH Acquisitions pending RIH Acquisitions’ assumption or rejection thereof pursuant to 11 U.S.C. §§ 365 and 105(a) (the “**Motion**”);<sup>2</sup> and good and sufficient notice of the hearing on the Motion having been provided, as evidenced by the Affidavit of Service filed with the Court; and the Court having considered the moving papers, the opposition thereto, if any, and the arguments of counsel, if any; and good cause appearing for the entry of this Order;

IT IS ORDERED as follows:

1. Absent any further Order of this Court, Merchant’s Choice Payment Solutions (“**Merchant’s Choice**”) is directed to continue performing credit card processing services under the Merchant’s Choice Processing Agreement related to Visa U.S.A., Inc., Mastercard International Incorporated, American Express Company, Discover Card Services, Inc., Diners Club and any other credit cards covered under the Merchant’s Choice Processing Agreement.

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<sup>2</sup> All capitalized terms used but not otherwise defined herein shall have the meaning ascribed to them in the Application submitted in support of the Motion.

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Debtors: RIH ACQUISITIONS NJ, LLC, *et al.*  
Case No: 13-  
Caption of Order: ORDER DIRECTING THE CREDIT CARD PROCESSOR TO HONOR  
THE PROCESSING AGREEMENT WITH RIH ACQUISITIONS NJ,  
LLC PENDING ASSUMPTION OR REJECTION PURSUANT TO 11  
U.S.C. §§ 365 AND 105(a)

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2. Nothing in this Order or the Motion shall be deemed to constitute the post-petition assumption or adoption of any credit card processing agreements pursuant to Section 365 of the Bankruptcy Code.

3. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation and enforcement of this Order.

4. A true copy of this Order shall be served on all credit card processors and other parties-in-interest by regular mail within two (2) days hereof.