

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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In re : Chapter 11

:

VER TECHNOLOGIES : Case No. 18-10834 (KG)

HOLDCO LLC, *et al.*, :

: Jointly Administered

Debtors.¹ :

: Obj. Deadline: July 20, 2018 at 4:00 pm (ET)²

: Hearing Date: July 26, 2018 at 10:00 am (ET)

: Related to Docket Nos. 551, 572, & 575

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**LIMITED OBJECTION OF RUSSELL ROAD PARTNERS AND
NM MAJESTIC HOLDINGS, LLC TO CURE AMOUNTS IN CONNECTION
WITH THE ASSUMPTION OF CERTAIN EXECUTORY CONTRACTS AND
UNEXPIRED LEASES UNDER THE SECOND AMENDED JOINT CHAPTER 11 PLAN
OF REORGANIZATION OF VER TECHNOLOGIES HOLDCO LLC AND ITS
DEBTOR AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE**

Russell Road Partners (“Russell Road”) and NM Majestic Holdings, LLC (“NM Majestic” and together with Russell Road, the “Landlord”) hereby file this limited objection (the “Objection”), by and through their undersigned counsel, to the cure amounts in connection with the assumption of certain executory contracts and unexpired leases listed in the plan supplement [Docket No. 551] (the “Plan Supplement”) to the *Second Amended Joint Chapter 11 Plan of*

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, include: VER Technologies HoldCo LLC (7239); VER Technologies MidCo LLC (7482); VER Technologies LLC (7501); Full Throttle Films, LLC (0487); FAAST Leasing California, LLC (7857); Revolution Display, LLC (6711); VER Finco, LLC (5625); CPV Europe Investments LLC (2533); and Maxwell Bay Holdings LLC (3433). The location of the Debtors’ service address is: 757 West California Avenue, Building 4, Glendale, California 91203.

² The Debtors extended the deadline for the Landlord to file this objection from July 19, 2018 at 4:00 pm (ET) to July 20, 2018 at 4:00 pm (ET).



Reorganization of VER Technologies Holdco LLC and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code [Docket No. 572] (the “Plan”),³ and respectfully state as follows:

I. BACKGROUND FACTS

1. VER Technologies Holdco LLC and its debtor affiliates in the above-captioned chapter 11 cases (the “Debtors”) filed their voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code on April 5, 2018 (the “Petition Date”). The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to 11 U.S.C. §§ 1107(a) and 1108.⁴

2. Debtor VER Technologies LLC leases warehouse space located at 5845 Wynn Road, Las Vegas, Nevada and 4155 Russell Road, Las Vegas, Nevada (the “Premises”) from the Landlord pursuant to that certain Standard Industrial Real Estate Lease dated March 13, 2015 (as amended, the “Lease”). Landlord holds a security deposit in the amount of \$125,100.54 (the “Security Deposit”) under the Lease and the Landlord timely filed a proof of claim for its prepetition claim and preserving its right to set off the Security Deposit against amounts due and owing by VER Technologies LLC under the Lease.⁵

3. On July 9, 2018 the Debtors filed the Plan Supplement. Exhibit C-1 of the Plan Supplement lists the unexpired leases the Debtors propose to assume and their respective cure amounts. The Debtors propose to assume the Lease, subject to documenting an amendment to the Lease (which the parties are working to do), but listed the Lease three separate times with

³ Capitalized terms not otherwise defined here shall have the meanings ascribed to them in the Plan and Plan Supplement.

⁴ Unless otherwise specified, all statutory references to “Section” are to 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”).

⁵ Counsel to the Debtors has agreed to confirm on the record at the confirmation hearing that the language in Article IX.G at page 44 of the Plan limiting recoupment rights is not intended to, and does not, impair, affect, or limit the ability of Landlord to set off or apply the Security Deposit against its prepetition and rejection damages claims in the event the Lease is rejected.

three separate cure amounts for the single Lease. The cure amount under the Lease was listed twice in the amount of \$0.00 and once in the amount of \$20,436.93. None of the cure amounts for the Lease set forth in Exhibit C-1 of the Plan Supplement accurately reflect the total balances owing under the Lease, and do not provide for the payment of certain accruing charges under the Lease.

II. THE DEBTORS' PROPOSED CURE AMOUNTS DO NOT PROVIDE FOR PAYMENT OF ALL OBLIGATIONS DUE UNDER THE LEASE

4. The Landlord's base cure (exclusive of other charges, such as attorney's fees and year-end adjustments, etc., as more fully set forth in detail herein) through the date hereof, as compared to the Debtors' cure is summarized below, and those charges comprising the Landlord's cure are more fully detailed in Exhibit A, which is attached hereto and incorporated into this Objection by reference:

Landlord	Address	Debtors' Contract ID	Debtors' Cure	Landlord's Cure
Russell Road	5845 Wynn Road and 4155 W. Russell Road, Las Vegas, NV	100268	\$0.00	\$79,405.60
Russell Road	5845 Wynn Road and 4155 W. Russell Road, Las Vegas, NV	100272	\$0.00	\$79,405.60
NM Majestic	5845 Wynn Road and 4155 W. Russell Road, Las Vegas, NV	100269	\$20,436.93	\$79,405.60

5. The Landlord's calculation of the Cure set forth in the foregoing chart does not include rent or charges arising after the filing this Objection, or charges not directly billed to the Landlord as of the filing of this Objection. The Landlord's calculation of the Cure also does not include charges that are billed directly to Debtors, including in some cases, real estate taxes. To the extent the Landlord is later billed for any amount due to Debtors' failure to pay, or to the extent that rent or other charges come due under the Lease after the date of this Objection that are not paid in the ordinary course by the Debtors, Landlord retains and reserves the right to

payment of these amounts either as part of the Cure or when billed in the ordinary course under the Lease (and to amend this Objection to the extent necessary for any amounts that come due under the Lease through the date of any cure payment).

6. For clarity, and notwithstanding how the Debtors listed the cure amounts in Exhibit C-1 to the Plan Supplement, there is only one Lease with the Landlord, and the Landlord claims entitlement to one payment of a cure in the amount of \$79,405.60.

7. In addition to the current outstanding rent and other monthly charges due under the Lease, in determining what must be paid as cure pursuant to Section 365(b), the charges referenced below must also be taken into consideration and paid by the Debtors either as cure or when properly billed under the Lease.

A. Year-end adjustments and reconciliations

8. In addition to rent and related monthly charges, attorneys' fees, costs, and interest, some charges for which the Debtors bear responsibility under the Lease have not yet been reconciled and/or adjusted from pre-petition (or even post-petition) periods. By way of example, the Debtors typically pay rent and related lease charges in advance for each month. The Debtors pay fixed minimum rent, along with a pro-rata share of expenses such as real property taxes, insurance, common area maintenance ("CAM") fees, and the like. Certain charges, such as CAM and property taxes are estimated prospectively, billed to and paid by the tenant during the year, and then reconciled after year-end. The reconciliation compares the amounts estimated and paid against actual charges incurred at the Premises. To the extent the estimated payments exceed actual charges, the result is a credit to the tenant. To the extent the estimated payments do not cover actual charges incurred under the Lease, the result is an additional amount (or debit) for which the tenant is liable. In some instances, year-end reconciliations and adjustments for

previous years for the Premises may not yet be complete (i.e. - year-end reconciliations and adjustments that accrued through 2017 may not have been billed, and such charges for 2018 will not be billed until 2019). In other instances, certain charges may be paid in arrears, and cannot be calculated (in some cases) until a year or more after year-end. Since these accrued, but unbilled, charges are not yet due under the Lease, they do not create a current default that gives rise to a requirement to cure by the Debtors at this time.

9. Nevertheless, Debtors remain responsible for all accrued or accruing charges under the Lease, and must pay such charges when they come due under the Lease. The Debtors assume the Lease subject to its terms, and must assume all obligations owing under the Lease, including obligations that have accrued but may not yet have been billed under the Lease. Any final assumption or confirmation order should clearly state that the Debtors will assume these Lease obligations and pay them when due, regardless of whether they relate to the period prior to, or after, the assumption. In addition, any provision in an assumption or confirmation order that purports to release the Debtors of further liability based upon a payment of cure amounts, must specify that such release does not apply to obligations to pay accrued or accruing, but unbilled, charges that come due under the Lease.

10. Finally, the Lease requires the Debtors to indemnify and hold the Landlord harmless with respect to any existing claims which may not become known until after the assumption and assignment of the Lease, examples of which may include such claims as personal injuries at the Premises and damage to the Premises by the Debtors or their agents. Any assumption of the Lease must be subject to the terms of the Lease, including the continuation of all indemnification obligations, regardless of when they arose.⁶ In the alternative, the Debtors

⁶ Any ability to assume the Lease is subject to the protections provided by Section 365(b) and (f). Therefore, any assumption be in accordance with all provisions of the Lease.

must provide (by insurance or otherwise) that they can satisfy the indemnification obligations under the Lease for any claims that relate to the period prior to assumption of the Lease. Nothing in any assumption or confirmation order should preclude the Landlord from pursuing the Debtors, their insurance, or any other party that may be liable under the Lease, and the Landlord requests that any order specifically preserve its right to pursue such rights irrespective of any resolution of cure amounts herein.

B. Attorneys' fees, costs, and interest

11. The Lease contains provisions for recovery of attorneys' fees, costs, and interest in the event the Landlord is required to take legal action to protect its interests. The Debtors are obligated to cure all defaults under the Lease, and compensate the Landlord for its actual pecuniary losses as a result of defaults under the Lease. *See* 11 U.S.C. § 365(b)(1)(A) and (B). This principle is well-recognized. *In re LCO Enterprises*, 12 F.3d 938, 941 (9th Cir. 1993); *Elkton Assocs v. Shelco Inc. (Matter of Shelco)*, 107 B.R. 483, 487 (Bankr. D. Del. 1989) (debtors allowed to assume lease provided it cured all pre-petition defaults).

12. The Debtors take the Lease *cum onere* – subject to existing burdens. The Debtors cannot assume the favorable portions, and reject the unfavorable provisions, of their leases. *In re Washington Capital Aviation & Leasing*, 156 B.R. 167, 172 (Bankr. E.D. Va. 1993). If forced to continue in the performance of the Lease, the Landlord is entitled to the full benefit of the bargain under its Lease with the Debtors. *See Matter of Superior Toy and Mfg. Co., Inc.*, 78 F.3d 1169 (7th Cir. 1996). The “full benefit of the bargain” principle has been held to require payment of interest. “The cure of a default under an unexpired lease pursuant to 11 U.S.C. § 365 is more akin to a condition precedent to the assumption of a contract obligation than it is to a claim in bankruptcy. One of the purposes of Section 365 is to permit the debtors to continue in a

beneficial contract; provided, however, that the other party to the contract is made whole at the time of the debtor's assumption of the contract." *In re Entertainment, Inc.*, 223 B.R. 141, 151 (Bankr. N.D. Ill. 1998) (citation omitted; bankruptcy court allowed interest at 18%). Interest on pre-petition lease charges continues to run from the filing of the Debtors' petitions and must be paid as a condition of the assumption of the Lease. *See In re Skylark Travel, Inc.*, 120 B.R. 352 (Bankr. S.D.N.Y. 1990). Interest calculations are therefore not cut short by the automatic stay, and payment of such interest is required to fully compensate Landlord for the Debtors' default under the Lease, and thus to properly assume the Lease. Finally, post-petition interest is allowable where such interest is provided for under the terms of the Lease. *Cukierman v. Uecker (In re Cukierman)*, 265 F.3d 846, 853 (9th Cir. 2001).

13. Attorneys' fees and costs incurred in enforcement of the covenants, obligations, and conditions of a lease are also proper components of a cure claim, and the Debtors must satisfy these lease charges as part of the assumption or assumption and assignment of the Lease. *Entertainment*, 223 B.R. at 152 (citation omitted). There is no logical distinction for purposes of Section 365 between attorneys' fees incurred in connection with pre-petition defaults and fees incurred with post-petition defaults. *Id.* at 154. The fact that a landlord uses bankruptcy procedures to enforce a lease should not preclude recovery of attorneys' fees and costs for such enforcement activity (particularly where the Bankruptcy Court is the exclusive forum where the landlord can obtain any relief, being foreclosed from state court relief by the automatic stay). *Id.* *See also, In re Crown Books Corporation*, 269 B.R. 12 (Bankr. D. Del. 2001) (Landlords' fees and costs are recoverable as a component of cure under 11 U.S.C. § 365(b)(1)); *Urban Retail Props v. Loews Cineplex Entertainment Corp.*, 2002 WL 5355479 (S.D.N.Y. Apr. 9, 2002); *Three Sisters Partners, L.L.C. v. Harden (In re Shangra-La, Incorporated)*, 167 F.3d 843, 850

(4th Cir. 1999). The Supreme Court has upheld the enforceability of such attorneys' fees clauses, ruling that pre-petition attorneys' fee clauses were enforceable with respect to issues peculiar to bankruptcy law. *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric*, 127 S. Ct. 1199, 1206 (2007).

14. Accordingly, the Landlord further requests that it be reimbursed for all of its actual pecuniary losses including, but not limited to, attorney's fees and costs expended with regard to Debtors' bankruptcy proceedings and negotiation of amendments to the Lease. The Landlord estimates its attorneys' fees and costs through the confirmation hearing to be \$25,000.00. The Landlord will provide a reconciliation of the actual fees and costs incurred at the time of the assumption of the Lease.

C. The Cure Amounts Serve Only as Estimates

15. The Landlord can only provide the information presently available regarding amounts owing by the Debtors, while reserving the right to amend this Objection as necessary to include any additional or unknown charges that arise, including but not limited to subsequent rent payment defaults, attorney fees, costs, interest, and year-end adjustments and reconciliations. There is no basis to impose upon the Landlord the equivalent of an administrative bar date, limiting its recourse to recover charges to which they are entitled under the Lease.

16. In addition, additional rent will become due on the first day of the month. Any rent that becomes due but is not paid should be added to the cure amount claimed herein.

III. IMMEDIATE PAYMENT OF UNDISPUTED CURE AMOUNTS

17. Section 365(b)(1)(A) requires that the Debtors promptly cure outstanding balances due under the Lease upon assumption. To the extent there is a dispute over the total

cure obligation for the Lease, all undisputed cure amounts should be paid immediately. The Debtors should escrow disputed amounts, and the Court should set a status conference within thirty (30) days of the assumption of the Lease to deal with any disputes that remain unresolved after such period.

IV. JOINDER IN OBJECTIONS BY OTHER LANDLORDS

18. To the extent not inconsistent herewith, the Landlord hereby joins in the objections raised by other landlords.

V. CONCLUSION

In order to protect the interests of the Landlord, the cure amounts should be allowed (subject to adjustment by the Landlord) in the amount set forth herein, and the Court should grant such other relief that the Court finds just and proper.

Dated: July 20, 2018
Wilmington, Delaware

Respectfully submitted,

/s/ Chantelle D. McClamb

Matthew G. Summers (No. 5533)

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Majestic Holdings, LLC*

EXHIBIT A

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 AR Tenant Inquiry - Open Amounts
 All Rollup Company No.
 All Property Manager
 Wednesday, December 31, 2003 to Tuesday, July 31, 2018

Name - Remark	Lease No.	Doc Date	Doc No.	Do Ty	Check Date	Check No.	Pay Item	Bill Code	Gross Amt	Payment Amount	Open Amt
<u>JLAPLACA - Jean LaPlaca</u>											
<u>2506 - Russell Road Buildings</u>											
<u>250601 - Russell Road Bldg 1</u>											
<u>724359 - Video Equipment Rentals LLC</u>											
Capital Cost Reserves-Asphalt	00019035	4/1/2018	449834	RD			009	RESA	129.73		129.73
Capital Cost Reserves-Paint	00019035	4/1/2018	449834	RD			007	RESP	333.60		333.60
Capital Cost Reserves-Roof	00019035	4/1/2018	449834	RD			008	RESR	1,297.33		1,297.33
Common Area Maintenance	00019035	4/1/2018	449834	RD			001	CAMT	1,884.00		1,884.00
Insurance - Property	00019035	4/1/2018	449834	RD			003	INSR	372.00		372.00
Management Fees	00019035	4/1/2018	449834	RD			004	MGMT	1,367.00		1,367.00
Real Estate Tax Impound	00019035	4/1/2018	449834	RD			002	RSTI	2,537.00		795.45
Utilities	00019035	4/1/2018	449834	RD			005	UTIL	788.00		788.00
Legal Fees - Bankruptcy	00019035	5/15/2018	456052	RN			001	LEGF	2,479.50		2,479.50
Common Area Maint./Fire 01/01	00019035	5/21/2018	456693	RH			001	CAMR	12,107.81		12,107.81
Current Year Real Estate Tax	00019035	5/21/2018	456693	RH			004	RSTR	620.64		620.64
Insurance - All 01/01/17-12/3	00019035	5/21/2018	456693	RH			002	INRR	-18.32		-18.32
Management Fee	00019035	5/21/2018	456693	RH			003	MGMR	971.00		971.00
Utilities 01/01/17-12/31/17	00019035	5/21/2018	456693	RH			005	UTLR	-1,239.64		-1,239.64
Total Customer Number 724359 - Video Eq									23,629.65		21,888.10
Total Building 250601 - Russell Road Bldg									23,629.65		21,888.10
<u>250602 - Russell Road Bldg 2</u>											
<u>724359 - Video Equipment Rentals LLC</u>											
Capital Cost Reserves-Asphalt	00019035	4/1/2018	449833	RD			008	RESA	294.87		294.87
Capital Cost Reserves-Paint	00019035	4/1/2018	449833	RD			006	RESP	758.24		758.24
Capital Cost Reserves-Roof	00019035	4/1/2018	449833	RD			007	RESR	2,948.71		2,948.71

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 AR Tenant Inquiry - Open Amounts
 All Rollup Company No.
 All Property Manager
 Wednesday, December 31, 2003 to Tuesday, July 31, 2018

Name - Remark	Lease No.	Doc Date	Doc No.	Do Ty	Check Date	Check No.	Pay Item	Bill Code	Gross Amt	Payment Amount	Open Amt
Common Area Maintenance	00019035	4/1/2018	449833	RD			001	CAMT	3,947.00		3,947.00
Insurance - Property	00019035	4/1/2018	449833	RD			003	INSR	848.00		848.00
Management Fees	00019035	4/1/2018	449833	RD			005	MGMT	3,098.00		3,098.00
Utilities	00019035	4/1/2018	449833	RD			004	UTIL	1,595.00		1,595.00
Common Area Maint./Fire 01/01	00019035	5/21/2018	456607	RH			001	CAMR	15,316.83		15,316.83
Current Year Real Estate Tax	00019035	5/21/2018	456607	RH			004	RSTR	85.84		85.84
Insurance - All 01/01/17-12/3	00019035	5/21/2018	456607	RH			002	INRR	-56.93		-56.93
Management Fee	00019035	5/21/2018	456607	RH			003	MGMR	328.29		328.29
Utilities 01/01/17-12/31/17	00019035	5/21/2018	456607	RH			005	UTLR	1,821.15		1,821.15
Bankruptcy - Legal Fees	00019035	6/19/2018	459467	RN			001	LEGF	1,532.50		1,532.50
Total Customer Number 724359 - Video Eq									32,517.50		32,517.50
Total Building 250602 - Russell Road Bldg									32,517.50		32,517.50
Total Company Rollup 2506 - Russell Road									56,147.15		54,405.60
Total 25-BU CC25 - Property Manager JLA									56,147.15		54,405.60
REPORT TOTAL:									56,147.15		54,405.60

CERTIFICATE OF SERVICE

I, Chantelle D. McClamb, do hereby certify that, on this 20th day of July 2018, I caused a true and correct copy of the *Limited Objection of Russell Road Partners and NM Majestic Holdings, LLC to Cure Amounts in Connection with the Assumption of Certain Executory Contracts and Unexpired Leases Under the Second Amended Joint Chapter 11 Plan of Reorganization of VER Technologies Holdco LLC and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* to be served on the addressees listed on the attached service list in the manner indicated.

Dated: July 20, 2018
Wilmington, Delaware

/s/ Chantelle D. McClamb
Chantelle D. McClamb (No. 5978)
BALLARD SPAHR LLP

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