

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:  
  
HRI HOLDING CORP., et al.,  
  
Debtors.

Chapter 11  
  
Case No. 19-12415  
(Jointly Administered)  
  
**Hearing Date: December 5, 2019 at 2:00 p.m.**  
  
**Ref. Docket Nos.: 14, 48**

**LIMITED OBJECTION OF LEVIN MANAGEMENT CORPORATION,  
AS AGENT FOR HARMON MEADOW OWNER, LLC  
TO DEBTORS' MOTION: (A) APPROVING BIDDING PROCEDURES IN  
CONNECTION WITH A TRANSACTION BY PUBLIC AUCTION; (B) SCHEDULING A  
HEARING TO CONSIDER THE TRANSACTION; (C) APPROVING THE FORM AND  
MANNER OF THE NOTICE THEREOF; (D) APPROVING THE CONTRACT  
PROCEDURES; AND (E) GRANTING OTHER RELATED RELIEF**

Levin Management Corporation, agent for the Harmon Meadow Owner, LLC (the "Landlord"), by and through its counsel, Stark & Stark, P.C. hereby files the following limited objections (the "Objections") to the above-captioned debtors' (the "Debtors") Motion: (A) Approving Bidding Procedures in Connection with a Transaction by Public Auction; (B) Scheduling a Hearing to Consider the Transaction; (C) Approving the Form and Manner of Notice Thereof; (D) Approving Contract Procedures; and (E) Granting Related Relief [Docket No. 14, 48] (the "Motion").

**BACKGROUND**

1. On November 14, 2019 (the "Petition Date"), Debtor filed voluntary petitions under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") with this Court.
2. Upon information and belief, Debtors are operating their businesses as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.
3. Landlord and Debtors are parties to unexpired, nonresidential real property lease dated



October 13, 1982, between Debtors and Landlord's predecessor in interest for property known as 700 Plaza Drive, Secaucus, NJ at the Plaza at Harmon Meadow, also designated as Store # 233 by the Debtors (the "Lease"), which is owed \$111,256.18, plus any unbilled amounts.

4. The Lease is a lease "of real property in a shopping center" within the meaning of section 365(b)(3) of the Bankruptcy Code. *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081, 1086-87 (3d Cir. 1990).

5. Both pre-petition and post-petition rents for Landlord's Lease have not been paid.

### **LIMITED OBJECTIONS**

#### **A. General Objections - Compliance with Bankruptcy Code**

6. Landlord objects to any proposed assumption and assignment of its Lease(s), unless the Debtors and/or a proposed assignee comply with all the requirements of the Bankruptcy Code, including Sections 365 (b) thru (f).

7. Included in these obligations is the payment of rent. *See In re Valley Media, Inc.*, 290 B.R. 73 (Bankr. D. Del. 2003) ("§365(d)(3) is to protect landlords by requiring debtors to timely perform their obligations arising under the lease. With regard to rent, courts generally agree that § 365(d)(3) requires debtors to pay rent obligations in-full and without proration as they come due in the pre-rejection period.").

8. Currently, Landlord is owed \$111,256.18, plus any unbilled amounts, for rent, plus any additional rent, charges, attorneys' fees, costs, interest and damages. Unless compliance is made as noted, including without limitation all pre-petition and post-petition arrears, any proposed assumption and assignment must be denied.

**B. Auction Objections**

9. Landlord requests that it be disseminated Bidders' Adequate Assurance Information concerning its Premises of qualified Bids by December 16, 2019, at least two (2) days prior to the Auction. The deadline for Bids to be submitted is December 16, 2019. The Auction is scheduled for December 18, 2019. An Adequate Assurance Objection Deadline is not provided.

10. Landlord and other counter-parties must be provided with Adequate Assurance Information by at least two (2) days prior to the Auction. Landlord needs this time to review the same and prepare objections, if appropriate. Accordingly, Landlord requests a reasonable time-frame to provide Landlord with Adequate Assurance Information, ahead of the Auction and Adequate Assurance Objection deadline.

11. Further, Landlord joins in objections by other landlords' objection and their requests.

12. Debtors should be required to file notice of the auction results with any agreements with the successful bidder and backup bidder, at a minimum, a day before the sale hearing and Landlord should be able to submit objections the day of the hearing..

13. Landlord also reserves their rights to submit a Qualified Bid.

14. Further, Landlord should be permitted to bid on their own Premises without the need for a deposit, as there are substantial arrears. These arrears should be allowed as a credit bid.

15. Landlord should be permitted to have a designated representative, including its counsel, attend the Auction, whether Landlord is Qualified Bidders.

**C. Adequate Assurance**

16. Landlord demands that for a designation of a lease for assignment, Debtors must demonstrate adequate assurance of future performance. 11 U.S.C. § 365(b)(1)(C); see also 11 U.S.C. § 365(f)(2).

17. Debtors bear the burden of persuasion under Section 365. See In re Lafayette Radio Electronics Corp., 12 B.R. 302, 312 (Bankr. E.D.N.Y. 1991); 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 (5th Cir. 1985) (Holding a specific factual showing through competent evidence to determine adequate assurance of future performance). See e.g., Matter of Haute Cuisine, Inc., 58 B.R. 390 (Bankr. 5 M.D. Fla. 1986) (even though experts presented cash flow projections, the court found that insufficient documentary evidence had been presented).

18. Section 365(b)(3) heightens the adequate assurance requirements for shopping center leases. See In re Sun TV and Appliances, Inc., 234 B.R. 356, 359 (Bankr. D. Del. 1999). To assume and assign shopping center leases, Debtors must satisfy the heightened requirements set forth in 11 U.S.C. § 365(b)(3)(A) - (D). See In re Joshua Slocum, 922 F.2d 1081, 1086 (2d Cir. 1990); see also L.R.S.C. Co. v. Rickel Home Centers, Inc. (In re Rickel Home Centers, Inc.), 209 F.3d 291, 299 (3d Cir. 2000). The heightened adequate assurance includes:

- the source of rent and that the financial condition and operating performance of the proposed assignee and its guarantors, if any, must be similar to the financial condition and operating performance of the debtor and its guarantor(s), if any, as of the time the debtor became the lessee. See 11 U.S.C. § 365(b)(3)(A);
- any percentage rent due under the lease will not decline substantially. See 11 U.S.C. § 365(b)(3)(B);
- assumption and assignment of the lease is subject to all provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision in any other lease, financing agreement, or master agreement relating to such shopping center. See 11 U.S.C. § 365(b)(3)(C); and

- assumption and assignment of the lease will not disrupt the tenant mix or balance in the shopping center. See 11 U.S.C. § 365(b)(3)(D).

19. In order to satisfy this burden, Landlord should receive, at a minimum:

- specific name of proposed bidder, proposed tenant that will act as the assignee, and the proposed name under which the assignee intends to operate the store;
- intended use for the space;
- audited financial statements and annual reports for the past three (3) years, including all supplements or amendments thereto;
- cash flow projections, most recent business plan, all cash flow projection for the Lease subject to the assignment request, and any financial projections, calculations and/or proformas prepared in contemplation of purchasing the Lease;
- all documents and other evidence of the potential assignee's retail experience and experience operating in-line stores in a shopping center;
- a contact information for the proposed assignee that Landlord may directly contact in connection with the adequate assurance of future performance; and
- a credit enhancement, such as: (i) a guaranty of future performance from a financially capable parent entity; (ii) a letter of credit; or (iii) a cash security deposit.

**D. CURE**

20. Landlord requests to reserve its rights to include additional rent, attorneys' fees, costs, damages and in their asserted cure amounts year-end adjustments, including, without limitation, adjustments for 2019, which have not yet been billed or have not yet become due under Lease as the Debtors are responsible to satisfy the same.

21. In addition, in the event of a cure dispute, the Debtors should be required to pay all

undisputed portions on the effective day of the assumption and assignment and the disputed portion should be escrowed pending further order of the court or agreement with Landlord.

**E. No Change in Use of Other Provisions in the Lease / Free and Clear Provisions**

22. Landlord demands the "Use" remain the same.

Through the BAPCPA "[s]ection 365(f)(1) is amended to make sure that all of the provisions of Section 365(b) are adhered to and that 365(f) of the code does not override Section 365(b).

Floor Statement of Senator Orrin Hatch, 151 Cong. Rec. S. 2459, 2461-62 (daily ed. March 10, 2005).

23. The changes embodied in the BAPCPA specifically preserve a landlord's right to enforce use and other lease provisions. Senator Hatch's remarks in the Congressional Record note:

A shopping center operator. . . must be given broad leeway to determine the mix of retail tenants it leases to. Congress decided that use or similar restrictions in a retail lease, which the retailer cannot evade under nonbankruptcy law, should not be evaded in bankruptcy. It is my understanding that some bankruptcy judges have not followed this mandate. Under another provisions of the Code, Section 365(f), a number of bankruptcy judges have misconstrued the Code and allowed the assignment of a lease even though terms of the lease are not being followed. 151 Cong. Rec. S. 2459, 2461-62 (daily ed. March 10, 2005).

24. The Bankruptcy Code requires strict enforcement of use and other lease provisions.

25. Further, the Sale cannot be free and clear of obligations to pay all charges due under the Lease, including accrued but unbilled year-end adjustments and reconciliations.

**JOINDER IN OBJECTIONS RAISED BY OTHER  
LANDLORDS AND RESERVATION OF RIGHTS**

26. To the extent consistent with the objections expressed herein, Landlord also joins in the objections of other shopping center lessors to the Motion. Further, Landlord reserves all rights to make further and or future objections when a proposed assignee and or "winning bid" is identified.

**WHEREFORE**, for the foregoing reasons, Levin Management Corporation, agent for the Harmon Meadow Owner, LLC respectfully request entry of an order denying the Motion and granting such other relief as is just and proper.

Dated: December 2, 2019

Respectfully submitted,

**STARK & STARK**  
**A Professional Corporation**

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**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:

HRI HOLDING CORP., et al.,

Debtors.

Chapter 11

Case No. 19-12415  
(Jointly Administered)

**Hearing Date: December 5, 2019**

**CERTIFICATION OF SERVICE OF LIMITED OBJECTION OF LEVIN  
MANAGEMENT CORPORATION, AS AGENT FOR HARMON MEADOW PLAZA,  
INC. TO DEBTORS' MOTION (A) APPROVING BIDDING PROCEDURES IN  
CONNECTION WITH A TRANSACTION BY PUBLIC AUCTION; (B) SCHEDULING A  
HEARING TO CONSIDER THE TRANSACTION; (C) APPROVING THE FORM AND  
MANNER OF THE NOTICE THEREOF; (D) APPROVING THE CONTRACT  
PROCEDURES; AND (E) GRANTING OTHER RELATED RELIEF;**

John Weaver, Esquire hereby certifies that on the 2<sup>nd</sup> day of December, 2019, a true and correct copy of the Limited Objection of Levin Management Corporation, as Agent for Harmon Meadow Plaza, Inc. to Debtors' Motion (A) Approving Bidding Procedures in Connection with a Transaction by Public Auction; (B) Scheduling a Hearing to Consider the Transaction; (C) Approving the Contract Procedures; and (E) Granting Other Related Relief, was served upon the addressees listed on the attached service list in the manner indicated.

Dated: December 2, 2019

Respectfully submitted,

**JOHN R. WEAVER, JR., P.A.**

By: /s/ John R. Weaver, Jr.

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