

KELLEY DRYE & WARREN LLP

Robert L. LeHane, Esq.
Jennifer D. Raviele, Esq.
3 World Trade Center
175 Greenwich Street
New York, NY 10007
Tel: (212) 808-7800
Fax: (212) 808-7897
Email: rlehane@kelleydrye.com
jraiviele@kelleydrye.com

KELLEY DRYE & WARREN LLP

Sean T. Wilson (TX Bar No. 24077962)
515 Post Oak Blvd.
Houston, TX 77027
Telephone: (212) 808-7612
E-mail: swilson@kelleydrye.com

Counsel to BRE RC Las Palmas MP TX LP

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:

FRESH ACQUISITIONS, LLC, *et al.*,¹

Debtors.

Chapter 11

Case No. 21-30721-SGJ

(Jointly Administered)

**LIMITED OBJECTION OF BRE RC LAS PALMAS MP TX LP TO NOTICE OF
EXECUTORY CONTRACTS AND UNEXPIRED LEASES SUBJECT TO
POSSIBLE ASSUMPTION AND ASSIGNMENT AND PROPOSED CURE AMOUNTS**

BRE RC Las Palmas MP TX LP (the “Landlord”) submits this limited objection (the “Objection”) to the potential assumption and assignment of its Lease (as defined below) by the above-captioned debtors (the “Debtors”) and the Debtors’ proposed cure amount for the Lease. In support of this Objection, the Landlord respectfully states as follows:

¹ The Debtors in these chapter 11 cases and the last four digits of each Debtor’s taxpayer identification number are as follows: Alamo Fresh Payroll, LLC (1590); Fresh Acquisitions, LLC (2795); Alamo Ovation, LLC (9002); Buffets LLC (2294); Hometown Buffet, Inc. (3002); Tahoe Joe’s Inc. (7129); OCB Restaurant Company, LLC (7607); OCB Purchasing, Co. (7610); Ryan’s Restaurant Group, LLC (7895); Fire Mountain Restaurants, LLC (8003); Food Management Partners, Inc. (7374); FMP SA Management Group, LLC (3031); FMP-Fresh Payroll, LLC (8962); FMP-Ovation Payroll, LLC (1728); and Alamo Buffets Payroll, LLC (0998). The Debtors’ principal offices are located at 2338 N. Loop 1604 W., Suite 350, San Antonio TX, 78248, United States.

PRELIMINARY STATEMENT

1. The Landlord does not object to the assumption and assignment of the Lease by the Debtors *per se*, but files this limited Objection to address two key issues: (i) the cure amount must include all amounts due and owing under the Lease and must address all non-monetary defaults that must be cured; and (ii) the Debtors must provide the Landlord with adequate assurance of future performance with respect to the proposed assignee of the Lease.

2. First, in connection with the potential assumption and assignment of the Lease, the Debtors must be required to pay the cure amount set forth in the column “Total Cure Amount” on Exhibit A, attached hereto, plus any additional pecuniary losses suffered by the Landlord, including reasonable attorneys’ fees. The Debtors must also cure or provide adequate assurance that they or their assignee will cure all non-monetary defaults under the Lease, including by fulfilling their obligation to repair, replace, or rebuild the Leased Premises as a result of certain damage that occurred during 2020.

3. Second, to satisfy the Debtors’ burden under sections 363 and 365 of the Bankruptcy Code, the Debtors must furnish the Landlord with sufficient adequate assurance information to determine if any proposed assignee is creditworthy and could be a viable operator of the business, specifically in the context of heightened requirements afforded to counterparties to shopping center leases under section 365(b)(3) of the Bankruptcy Code.

4. Third, as part of adequate assurance of future performance, the Debtors or the proposed assignee must satisfy any Adjustment Amounts (as defined below) which have not yet been billed or have not yet become due under the terms of the Lease. The Debtors or the proposed assignee must also (i) be required to comply with all contractual obligations to indemnify and hold the Landlord harmless with regard to events which occurred before

assumption and assignment, but which were not known to the Landlord as of the date of the assumption and assignment, and (ii) continue to timely pay all rent, additional rent, and percentage rent due under the Lease until the Lease is assumed, assumed and assigned, or rejected pursuant to section 365(d)(3) of the Bankruptcy Code.

5. The Landlord hopes to resolve some, if not all, of the issues raised herein with the Debtors consensually, but reserves the right to argue these issues at the hearing.

BACKGROUND

6. The Landlord is the owner, managing agent, or affiliate of the owner of a shopping center where the Debtors lease retail space pursuant to a written lease (the “Lease”) for the location listed on the attached Exhibit A (the “Leased Premises”). The Leased Premises are located in a shopping center as that term is used in section 365(b)(3) of the Bankruptcy Code. *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081 (3d Cir. 1990).

7. On April 20, 2021 (the “Petition Date”), the Debtors filed with this Court voluntary petitions for relief pursuant to chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”).

8. The Debtors remain in possession of their properties and continue to manage their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

9. On May 18, 2021, the Debtors filed the *Motion for (I) an Order (A) Approving Bidding Procedures and Certain Bid Procedures, (B) Scheduling Bid Deadline, Auction Date, and Sale Hearing and Approving Form and Manner of Notice Thereof, and (C) Approving Cure Procedures and the Form and Manner of Notice Thereof; and (II) an Order Approving the Sale of Substantially All of the Debtors’ Assets Free and Clear of Liens, Claims*

and Interests (the “Sale Motion”).² The Sale Motion sought to establish, among other things, bidding procedures (the “Bidding Procedures”) for the sale of the Debtors’ assets, including the Lease, procedures (the “Assignment Procedures”) for the assumption and assignment of the Lease to the Stalking Horse Bidder, or, alternatively, another party with the highest and best bid at an auction, procedures for the cure of defaults under the Lease (the “Cure Procedures”), and a timeline for the bidding and sale process.

10. On May 27, 2021, the Court entered an order granting certain relief requested in the Sale Motion, specifically approving the Bidding Procedures, Assignment Procedures, and Cure Procedures, with certain modifications.³

11. On June 25, 2021, the Debtors filed the *Notice of Executory Contracts and Unexpired Leases Subject to Possible Assumption and Assignment and Proposed Cure Amounts* (the “Cure Notice”).⁴

12. The Cure Notice lists the proposed cure amounts for numerous unexpired leases of non-residential real property, including the Lease. The cure amount listed in the Cure Notice is included on Exhibit A, attached hereto, in the column entitled “Debtors’ Cure Amount.”

² Docket No. 165.

³ Docket No. 203.

⁴ Docket No. 268. Capitalized terms used, but not defined, herein shall have the meanings ascribed to them in the Cure Notice.

OBJECTION

I. DEBTORS MUST PROVIDE EVIDENCE OF ADEQUATE ASSURANCE OF FUTURE PERFORMANCE UNDER THE LEASE

(A) *Adequate Assurance of Future Performance for the Shopping Center Lease*

13. In connection with the assumption and assignment of leases, shopping center landlords are afforded special statutory protections under the Bankruptcy Code in the form of adequate assurance of future performance. *In re Joshua Slocum*, 922 F.2d at 1086; *In re Trak Auto Corp.*, 277 B.R. 655 (Bankr. E.D. Va. 2002). Section 365(f)(2) provides:

The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2).

14. Section 365(b)(1) of the Bankruptcy Code provides:

If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default...;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

15. In connection with the assumption and assignment of a shopping center lease, adequate assurance of future performance includes adequate assurance:

(A) of the source of rent... due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee... shall be similar to the financial condition and operating performance of the debtor... as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption... of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement related to such shopping center; and

(D) that assumption... of such lease will not disrupt any tenant mix or balance in such shopping center.

11 U.S.C. § 365(b)(3).

16. The Debtors bear the burden of proving adequate assurance of future performance in connection with the potential assumption and assignment of the Lease. *In re F.W. Restaurant Assoc., Inc.*, 190 B.R. 143 (Bankr. D. Conn. 1995); *In re Rachels Indus. Inc.*, 109 B.R. 797, 802 (Bankr. W.D. Tenn. 1990); *In re Lafayette Radio Electronics Corp.*, 12 B.R. 302, 312 (Bankr. E.D.N.Y. 1981).

17. To determine whether the requirements of adequate assurance of future performance will be satisfied, at a minimum, the Landlord and its attorneys must receive the following information from the exact proposed assignee of the Lease (collectively, the "Adequate Assurance Information"):

a. The exact name of the entity that will be designated as the assignee of the Lease and any guarantor;

- b. Audited (or un-audited, if audited is not available) financial statements and any supplemental schedules for the calendar or fiscal years ended 2019, 2020, and 2021 for the proposed assignee and any guarantors;
- c. Any and all documents regarding the proposed assignee's and any guarantor's experience operating restaurants;
- d. The number of restaurants the proposed assignee and any guarantor operates and all trade names used;
- e. The proposed assignee and any guarantor's 2021 and 2022 business plans including sales and cash flow projections;
- f. A statement setting forth the proposed assignee's intended use of the premises; and
- g. Any financial projections, calculations, and/or financial *pro-formas* prepared in contemplation of purchasing the Lease.

The Landlord may also need similar information for the Debtors in the year when the Debtors entered into the Lease to appropriately evaluate the ability of the proposed assignee to provide adequate assurance of future performance.

18. Unless and until the Landlord receives all of this information, the Debtors have not satisfied their burden pursuant to 11 U.S.C. § 365(b)(3).

(B) *The Leases Must Be Assumed and Assigned Cum Onere*

19. Section 365(b)(3)(C) of the Bankruptcy Code provides that the assumption of a shopping center lease “is subject to all the provisions thereof...”. 11 U.S.C. § 365(b)(3)(C). Bankruptcy courts have described the assumption of an unexpired lease as “an all-or-nothing proposition – either the whole contract [or lease] is assumed or the entire contract [or lease] is rejected.” *See, e.g., In re CellNet Data Systems, Inc.*, 327 F.3d 242, 249 (3d Cir. 2003).

20. As the court noted in *In re Washington Capital Aviation & Leasing*, 156 B.R. at 167, 175 n. 3 (Bankr. E.D. Va. 1993):

Adequate assurance of future performance by the assignee is important because 11 U.S.C. § 365(k) “relieves the ... estate from any liability for any breach of such ... lease occurring after such assignment.” A party subject to a contractually created obligation ordinarily cannot divest itself of liability by substituting another in its place without the consent of the party owed the duty. *See* Douglas G. Baird and Thomas H. Jackson, *Bankruptcy* 285 (2d ed. 1990) (citing Restatement (Second) of Contracts § 318(3) (1981) (“delegation of performance ... does not discharge any duty or liability of the delegating obligor”)). While the assignee may be entitled to perform for the original obligor, the original obligor remains ultimately liable until discharged by performance or otherwise. Section 365(k) changes this common law rule and relieves the estate from all liability under the lease following assignment.

See also In re Rickel Home Centers, Inc., 209 F.3d 291, 299 (3d Cir. 2000) (adequate assurance is “necessary to protect the rights of the non-debtor party to the contract or lease, because assignment relieves the trustee and the estate from liability arising from a post-assignment breach”). The Debtors are not entitled to the benefits and protections of section 365(k) if they do not assume and assign a lease *cum onere* – with all benefits and burdens. *See, e.g., American Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76 (3d Cir. 1999).

21. Furthermore, the Debtors or the proposed assignee must be required to comply with all contractual obligations to indemnify and hold the Landlord harmless for events which occurred before assumption and assignment, but which were not known to the Landlord as of the date of the assumption and assignment. This includes, but is not limited to, (i) claims for personal injury that occurred at the Leased Premises, (ii) damage and destruction to the Leased Premises or property by the Debtors or their agents, and (iii) environmental damage or clean-up. To cure possible pre-assignment, non-monetary defaults and provide adequate assurance of future performance with respect to the indemnification obligations under the Lease, either (a) the Debtors or the proposed assignee must be required to satisfy any and all such claims, notwithstanding anything to the contrary contained in a plan or any court order, or (b) the

Debtors must be required to demonstrate or obtain adequate insurance (by purchase of "tail" coverage or otherwise) in order to satisfy potential indemnification obligations based on events or occurrences that occurred prior to the effective date of an assignment. Such claims for indemnity could include claims for personal injury occurring at the Leased Premises where the Landlord is joined as a party to a lawsuit or for damage and destruction of property by the Debtors or their agents or employees.

22. Finally, the Landlord asserts that, if the Debtors seek to assume and assign the Lease, the proposed assignee should be required to execute short-form assumption and assignment agreements with the Landlord in connection with the proposed assignment of the Lease so that the Landlord will be in privity with its new tenant.

II. THE PROPOSED CURE AMOUNT IS INCORRECT

23. The Landlord disputes the cure amount proposed by the Debtors in the Cure Notice. The correct cure amount for the Lease is set forth on Exhibit A, attached hereto, in the "Total Cure Amount" column, which includes an estimate of attorneys' fees incurred to date. The Landlord reserves the right to amend the cure amount to include additional amounts that continue to accrue, including non-monetary unfulfilled repair obligations, and any other obligations that arise and/or become known to the Landlord prior to assumption and assignment of the Lease.

24. Pursuant to the Lease, the Debtors are obligated to pay regular installments of fixed monthly rent, percentage rent, and/or gross rent, as well as a share of common area maintenance costs, real estate taxes, and assessments. In addition, prior to assumption and assignment of the Lease, the Debtors are required by section 365(b)(1) of the Bankruptcy Code to cure all outstanding defaults under the Lease and compensate the Landlord for any actual pecuniary loss, including the payment of related attorneys' fees. See 11 U.S.C.

§365(b)(1)(B). Attorneys' fees due under the Lease are compensable. See *LJC Corp. v. Boyle*, 768 F.2d 1489, 1494-96 (D.C. Cir. 1985); *In re Bullock*, 17 B.R. 438, 439 (B.A.P. 9th Cir. 1982); *In re Crown Books Corp.*, 269 B.R. 12, 14-15 (Bankr. D. Del. 2001); *In re BAB Enterprises, Inc.*, 100 B.R. 982, 984 (Bankr. W.D. Tenn. 1989); *In re Westview 74th St. Drug Corp.*, 59 B.R. 747, 757 (Bankr. S.D.N.Y. 1986); *In re Ribs of Greenwich Vill., Inc.*, 57 B.R. 319, 322 (Bankr. S.D.N.Y. 1986). Accordingly, as part of its pecuniary losses, the Landlord is entitled to attorneys' fees in connection with the Debtors' obligation to cure all monetary defaults under the Lease.

III. DEBTORS OR PROPOSED ASSIGNEE MUST CURE OR PROVIDE ADEQUATE ASSURANCE THAT THEY WILL CURE ALL NON-MONETARY DEFAULTS UNDER THE LEASE

25. The obligation of the Debtors to cure all defaults under the Lease pursuant to section 365(b)(1) of the Bankruptcy Code extends to non-monetary defaults as well. The Debtors or their proposed assignee must cure all such non-monetary defaults, or provide adequate assurance that such defaults will be cured within a reasonable amount of time.

26. Upon information and belief, the Leased Premises were damaged during March 2020 due to a water condition exacerbated by the closing of Debtors' restaurants because of the COVID-19 pandemic. Although the Landlord has not been able to access the Leased Premises since the damage occurred, the Debtors have advised that the damage is substantial enough that it may require the Leased Premises to be rebuilt.

27. Pursuant to paragraph 27 of the Lease, the Debtors are obligated to repair, replace, or rebuild all buildings and improvements if they are damaged. Paragraph 27(a) provides, in pertinent part:

If the buildings and improvements on the Leased Premises are destroyed or damaged in whole or in part by fire or other cause within the extended coverage of Tenant's Insurance carried by

Tenant in accordance with this Lease so as to render the Leased Premises unfit for Tenant's purposes hereunder, as determined by Tenant, then Tenant shall cause the same to be repaired, replaced or rebuilt, at its own cost and expense, within a period of time which, under all prevailing circumstances, is reasonable....

Lease at ¶ 27(a).

28. The Landlord asserts that the Debtors or their proposed assignee must be required to either cure this default by repairing, replacing, or rebuilding the Leased Premises, or provide adequate assurance that they will repair, replace, or rebuild the Leased Premises within a commercially reasonable amount of time and in accordance with all applicable provisions of the Lease.

IV. DEBTORS OR PROPOSED ASSIGNEE MUST BE RESPONSIBLE FOR (A) PAYMENT OF ADJUSTMENT AMOUNTS WHEN THEY COME DUE IN THE ORDINARY COURSE OF BUSINESS, AND (B) SATISFACTION OF INDEMNIFICATION OBLIGATIONS

29. To the extent that rent, attorneys' fees, interest, and/or other charges continue to accrue, and/or the Landlord suffers other pecuniary losses with respect to the Lease, the Landlord hereby reserves the right to amend the Total Cure Amount to reflect such additional amounts or to account for year-end adjustments, including, without limitation, adjustments for 2019, 2020, and 2021, which have not yet been billed or have not yet become due under the terms of the Lease (the "Adjustment Amounts"). The Debtors or the proposed assignee must be responsible to satisfy the Adjustment Amounts, if any, when due in accordance with the terms of the Lease, regardless of when such Adjustment Amounts were incurred.

30. In addition, any assignee of the Lease must be required to comply with all contractual obligations to indemnify and hold the Landlord harmless with regard to events which may have occurred before assumption and assignment but which were not known to the Landlord as of the date of the assumption and assignment, including, but not limited to, claims for personal

injury that occurred at the Leased Premises, damage and destruction to the Leased Premises or property by the Debtors or their agents, and environmental damage or clean-up.

V. DEMAND FOR SECURITY

31. Section 365(l) of the Bankruptcy Code provides, in the pertinent part:

If an unexpired lease under which the debtor is lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

11 U.S.C. § 365(l).

32. In the ordinary course of its business, the Landlord requires security deposits, letters of credit, or guaranties when leasing (or assessing an assignment of a lease) to certain companies based on their financial information and history. In connection with the proposed assumption and assignment of the Lease, the Landlord hereby demands such security in one of those forms as required by section 365(l) of the Bankruptcy Code. Until the exact financials of the proposed assignee are known to the Landlord, the Landlord reserves its right to specify the exact form and amount of such security; however, the Landlord would typically require a parent or personal guaranty in connection with leasing to a new tenant.

VI. THE DEBTORS MUST BE RESPONSIBLE FOR TIMELY PAYMENT OF ALL POST-PETITION RENT AND ADDITIONAL RENT DUE UNDER THE LEASE UNTIL IT IS ASSUMED, ASSUMED AND ASSIGNED, OR REJECTED

33. Section 365(d)(3) of the Bankruptcy Code provides, in pertinent part:

The [debtor] shall timely perform all the obligations of the debtor...arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of [the Bankruptcy Code].

11 U.S.C. § 365(d)(3).

34. The Landlord requests that the assumption and assignment of the Lease be conditioned upon the Debtors' timely performance of all obligations arising under the Lease before the Lease is assumed, assumed and assigned, or rejected pursuant to section 365(d)(3) of the Bankruptcy Code, including, without limitation, the full payment of rent and additional rent on the first day of each month.

RESERVATION OF RIGHTS

35. The Landlord reserves the right to amend and/or supplement this Objection on any basis, including, without limitation, by adding or supplementing objections to the Debtors' proposed cure amount and by adding or supplementing objections to the adequate assurance of future performance provided by the Debtors or any proposed assignee(s).

CONCLUSION

WHEREFORE, the Landlord requests that the Court enter an order: (i) conditioning the assumption and assignment of the Lease on (a) the Debtors or the proposed assignee providing adequate assurance of future performance in accordance with section 365(b) of the Bankruptcy Code, (b) the Debtors or the proposed assignee promptly paying the cure amount set forth in the column titled "Total Cure Amount" on Exhibit A, attached hereto, plus any additional pecuniary losses suffered by the Landlord, including reasonable attorneys' fees, and (c) the Debtors or the proposed assignee curing all non-monetary defaults under the Lease, including the Debtors' obligation to repair, replace, or rebuild the Leased Premises, or providing adequate assurance that such defaults will be cured; (ii) requiring the Debtor or the proposed assignee to continue to comply with all obligations under the Lease, including payment of the Adjustment Amounts and satisfaction of any indemnification and other lease obligations in the regular course of business; (iii) requiring the proposed assignee to enter into a short-form assumption and assignment agreement with the Landlord; (iv) requiring the proposed assignee to

provide security to the Landlord pursuant to section 365(l) of the Bankruptcy Code; and
(v) granting such other and further relief as the Court deems just and proper.

Dated: July 9, 2021

KELLEY DRYE & WARREN LLP

By: /s/ Sean T. Wilson
Sean T. Wilson (TX Bar No. 24077962)
515 Post Oak Blvd.
Houston, TX 77027
Tel.: (212) 808-7612
Email: swilson@kelleydrye.com

-and-

By: /s/ Robert L. LeHane
Robert L. LeHane
Jennifer D. Raviele
3 World Trade Center
175 Greenwich Street
New York, New York 10007
Tel.: (212) 808-7800
Fax: (212) 808-7897
Email: rlehane@kelleydrye.com
jraviele@kelleydrye.com

Counsel to BRE RC Las Palmas MP TX LP

EXHIBIT A

BRE RC Las Palmas MP TX LP				
Mall Name	Location	Landlord	Debtors' Cure Amount	Total Cure Amount
Las Palmas	El Paso, TX	BRE RC Las Palmas MP TX LP	\$191,095.53	\$276,935.22

CERTIFICATE OF SERVICE

I, Connie Choe, hereby certify that on July 9, 2021, in addition to the notice and service provided through the Court's CM/ECF system, I served true and correct copies of the foregoing document upon the parties listed in the attached schedule in the manner indicated.

/s/ Connie Choe

SCHEDULE 1 - SERVICE LIST**Parties Served Via E-Mail**

<p><i>Counsel for the Debtor</i></p> <p>Gray Reed Attn: Jason S. Brookner, Aaron M. Kaufman Amber M. Carson Emails: jbrookner@grayreed.com akaufman@grayreed.com acarson@grayreed.com</p>	<p><i>Counsel to the Official Committee of Unsecured Creditors</i></p> <p>Dickinson Wright PLLC Carolyn J. Johnsen William L. Novotny Email: cjohnsen@dickinsonwright.com wnovotny@dickinsonwright.com</p>
<p><i>Counsel to Arizona Bank & Trust</i></p> <p>Attn.: Patrick A. Clisham Email: pac@eblawyers.com</p>	<p><i>Counsel to VitaNova Brands, LLC</i></p> <p>Attn: J. Michael Sutherland Email: msutherland@ccsb.com</p>
<p><i>United States Trustee</i></p> <p>Attn: Meredyth A. Kippes, Email: meredyth.a.kippes@usdoj.gov</p>	