

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

In re

ORECK CORP., et al.,

Debtors,

Chapter 11

Case No. 13-04006

Judge Lundin

(Jointly Administered)

CREDITOR'S AMENDED OBJECTION TO DEBTOR'S NOTICE AND MOTION TO
ASSUME AND ASSIGN CERTAIN UNEXPIRED LEASE OF NONRESIDENTIAL REAL
PROPERTY

PLEASE TAKE NOTICE THAT:

Creditor Teton LLC by counsel John F. Bury hereby amends its Creditor's Objection (Docket No. 455) to Debtors Notice and Motion (Docket No. 93) to Assume and Assign Unexpired Non-Residential Real Property Lease.

BASIS OF OBJECTION

1. Oreck Homecare LLC is Tenant and Teton LLC, a Washington Limited Liability Company is Landlord under commercial lease of the premises located at Spokane, Washington.

2. The Debtor / Tenant has failed to pay monthly rent and common area expenses in the monthly amount of \$4,011.67 per month for the prepetition months of April and May, 2013; total \$8,096.15.

3. Debtor proposes to assume and assign the lease with \$0 cure amount and waiver of claim therefor.

4. Creditor landlord's lease, section 13.8.2 provides specific terms of adequate assurance under 11 USC § 365 (b), as attached hereto.

5. Creditor objects to the cure amount and DIP / assignee's failure to provide adequate assurance of future performance i.e. two month's rent deposit, etc., pursuant to lease terms.

GROUNDS

1. 11 USC § 365 (b)(1): If there has been a default in an . . . unexpired lease of the debtor, the trustee may not assume such . . . lease unless, at the time of assumption of such . . . lease, the trustee cures or provides adequate assurance that the trustee will promptly cure such default, and (c) provides adequate assurance of future performance under such . . . lease.

2. 11 USC § 365 (d)(3): The trustee shall timely perform all obligations of the debtor . . . arising from or after the order of relief under any unexpired lease

The debtors filed a Petition for relief under this case on May 6, 2013.

3. The Debtor is liable to pay the two prepetition nonresidential lease payments as a condition of assumption.

4. *In re Rachael Industries*, 109 BR 797, W.D. Tenn, 1990, dictates and enforces 11 USC § 365 (b); That test is set forth in § 365 (b)(1) as follows:

(1) the default must be cured or adequate assurance of prompt cure provided;

(2) any party, other than the debtor, to the contract or lease must be compensated, or given adequate assurance of prompt compensation, for any actual pecuniary loss resulting from the default; and

(3) adequate assurance of future performance under such contract or lease must be provided.

Each requirement must be complied with before assumption can be approved. *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1310 (5th Cir.1985); *In re Windmill Farms, Inc.*, 841 F.2d 1467, 1473 (9th Cir.1988); *In re Corporacion de Servicios Medicos Hosp.*, 805 F.2d 440, 447.

5. Part 3, “adequate assurances of future performance” is agreed in the lease to be:

For the purposes of Section 365(b)(1) the Bankruptcy Code, adequate assurance of future performance of this Lease by Tenant, Trustee or any proposed assignee of the Lease will require that Tenant, Trustee or the proposed assignee deposit two months of Rent and Additional Rent payments into an escrow fund (to be held by the court or an escrow agent approved by Landlord and the court) as security for such future performance. In addition, if the Lease is to be assigned adequate assurance of future performance by the proposed assignee shall require that: (i) the assignee have a tangible net worth not less than \$1,000,000 or that

such assignee's performance be unconditionally guaranteed by a person or entity that has a tangible net worth not less than the above amount; (ii) assignee assume in writing all the Tenant's obligations under the Lease.

Wherefore, Teton LLC, respectfully requests the Court:

1. Overrule Debtor's proposed cure payment of \$0; and
2. Deny Debtor's Motion for assignment and assumption of the subject nonresidential lease, and
3. Grant such future relief to Teton, LLC as is equitable.

Respectfully submitted this 11th day of July, 2013.

/s/ John F. Bury

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