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Hearing Date: August 2, 2013 at 10:00 a.m.

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CW NORTH RIDGE PLAZA LLC

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In Re:

SOUND SHORE MEDICAL CENTER OF
WESTCHESTER, *et al.*

Chapter 11
Case No. 13-BK-22840 (RDD)
(Jointly Administered)

Debtors.

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**LIMITED OBJECTION OF CW NORTH RIDGE PLAZA LLC TO DEBTORS'
MOTION TO APPROVE PRIVATE SALE OF SUBSTANTIALLY ALL OF THE
DEBTORS' REAL PROPERTY AND DESIGNATED
PERSONAL PROPERTY ACQUIRED ASSETS**

The limited objection of CW NORTH RIDGE PLAZA LLC to Debtors' Motion to approve a private sale of the Debtors' real estate and designated personal property assets (the "Motion") is as follows:

1. By Lease dated August 27, 1996, as amended February 27, 2012 and August 20, 2012, CW NORTH RIDGE PLAZA LLC is the landlord (the "Landlord") and NRHMC SERVICES CORP., a debtor herein (also "Debtor" or "Tenant"), is the tenant for the premises referred to as Store Nos. 205, located in the North Ridge

Shopping Center at 77 Quaker Ridge Road, in New Rochelle, New York 10804; CW North Ridge Plaza LLC is the landlord's successor-in-interest (the "Lease").

2. The above-captioned debtors each filed a petition for relief under the Bankruptcy Code on May 29, 2013 (collectively, the "Debtors").

3. In the Motion, dated May 29, 2013, as supplemented, the Debtors have moved, *inter alia*, for approval of certain procedures relating to a private sale of the Debtors' real estate and designated personal property assets "free and clear of all liens, claims and encumbrances, security interests and other interests, including successor liability claims except as expressly assumed by Buyer." The proposed sale procedures include procedures relating to assumption and assignment of real property leases, including, potentially, the subject Lease, as part of the larger transaction.

4. However, the potential assumption and assignment of the Lease, and the transaction involving the sale of the Debtors' assets, as proposed by the Debtors and proposed purchaser, must conform with the applicable statutes and case law intending to safeguard Landlords' rights.

I. The Sale Terms Must Include the Protections Afforded to Landlords in the Bankruptcy Code and Case Law

5. Under the proposed Sale procedures, the Landlord is essentially being required to accept the sale terms agreed to by the Debtors and proposed purchaser. However, those terms must satisfy the statutory and other Bankruptcy requirements designed to protect landlords, which the Landlord here will not waive.

A. The Cum Onere Principle

6. A well settled Bankruptcy principle provides, "If an executory contract is assumed, it is said to be assumed cum onere, with all of its benefits and burdens." In re Leslie Fay Companies, Inc., 166 B.R. 802, 808 (Bkrtcy.S.D.N.Y.,1994); In re Kopel, 232 B.R. 57, 63 (Bkrtcy.E.D.N.Y.,1999)(“It is axiomatic that an executory contract generally must be assumed cum onere.”) “The law is clear that a debtor who assumes a lease or other executory contract assumes the contract cum onere, without any diminution in its obligations or impairment of the rights of the lessor in the present or the future.” In re Texaco Inc., 254 B.R. 536, 550 (Bkrtcy.S.D.N.Y.,2000).

7. Once assumed by the debtor, with regard to a subsequent assignment, the *cum onere* principle applies as follows: “The trustee can only assign what he assumes, and the assignee cannot impose terms, implicitly or explicitly, that render performance less onerous to the assignee or more onerous to the non-debtor party to the contract.” In re Best Payphones, Inc., 2007 WL 1388103, 12 (Bkrtcy.S.D.N.Y., 2007).

8. Here, the available draft of the Restated Asset Purchase Agreement (“RAPA”) at Paragraph 2.3 (a) does not conform with the *cum onere* principle because, and to the extent that, upon the proposed assignment of the Lease the assignee/purchaser is not assuming the obligations of the Lease from its inception, but from the “Closing Date”. Specifically, paragraph 2.3(a) provides,

On the terms and subject to the conditions of this Agreement, Buyer agrees that at Closing it will assume, and agree to full and faithfully pay, perform and discharge, as the case may be, when due, only the obligations and Liabilities under (i) the Assigned Contracts, but only to the extent of contractual obligations and Liabilities which are to

be initially performed or which accrue from an after the Closing date and relate solely to dates of service from and after the Closing Date, (ii) the Debt of the Sellers listed on Schedule 2.3(ii) and subject to the satisfaction of the conditions in Section 10.1, (iii) Liabilities incurred on or after the Closing Date by Buyer, (iv) certain liabilities accruing to eligible former employees of Sellers as set forth in Section 2.3 (b), and (v) the Cure Amounts as required by Section 2.5 hereto up to a maximum among of three million dollars (\$3,000,000)(collectively, the liabilities described in this 2.3, the "Assumed Liabilities"); and [emphasis supplied]

9. However this does not take into account that in a real property lease, by way of example (and not limitation), there are ongoing executory obligations for insurance, indemnity, environmental responsibility, compliance with law, and a myriad of other executory obligations. These obligations must be assumed by the assignee as of the origin of a lease, and not solely as of the assignment or an "effective" date.

10. Further, Paragraph 2.4 of the RAPA, the "Excluded Liabilities" subsections violate the *cum onere* principle, by specifically excluding liabilities not specifically assumed, stating in part,

Notwithstanding any provision of this Agreement or any other document or instrument to the contrary, Buyer shall have the obligation to assume only the Assumed Liabilities, and Buyer shall not have any obligation with respect to any other Liabilities of the Sellers, regardless of whether such obligation arises before, on or after the Closing Date (all of such other Liabilities, collectively, the "Excluded Liabilities"). It shall not affect the status of a Liability as an Excluded Liability to the extent Buyer affirmatively elects in its sole and absolute discretion to assume responsibility for a given Excluded Liability. [emphasis supplied]

11. A least as respects the Lease here, the RAPA must be revised to conform with this well settled Bankruptcy principle, whereby the assignee/purchaser expressly assumes the Lease as if that entity were the original tenant named in the Lease.

12. Simply stated, the Lease must be assumed by the assignee, not just assigned to the assignee. Otherwise, the Landlord objects to approval of the Sale procedures and assumption and assignment of the Lease.

B. Section 365 Protections

13. Further, Bankruptcy Code Section 365 provides in part:

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

(b)(1) 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 other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

(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.

...

(f)(1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) 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.

(1) Adequate Assurance of Future Performance by Assignee

14. In the case of an assumption and assignment, the potential of the proposed assignee to provide adequate assurance of future performance is subject to scrutiny. In re Alipat, Inc., Bkrtcy.E.D.Mo.1984, 36 B.R. 274. (Application to assign an unexpired commercial lease would be granted, where adequate assurance of future performance by assignee was established by fact that financial resources were available to meet the rental payments, business to be operated by assignee was substantially the same as that presently being conducted, assignee had exhibited ability to operate the business successfully and to comply with other terms of the lease.)

15. The Landlord presently does not hold any security upon the Lease. Meanwhile, the Lease with the debtor was subject to a guaranty. There is no indication that the Buyer will be assuming the guaranty.

16. Therefore, in order to secure adequate assurance of future performance of the Lease by the proposed assignee, the Landlord seeks a security deposit in the amount of two months rental value on assignment. There are examples of additional security constituting adequate assurance in the case law. *See, e.g., In re Westview 74th Street Drug Corp.*, 59 B.R. 747 (Bankr. S.D. N.Y. 1986) (a security deposit may constitute adequate assurance); *In re Curriavan's Chapel of the Sunset*, 51 B.R. 217 (N.D.Cal.1985)(Bankruptcy Court's imposition of the condition upon debtor's assumption of lease, under which there was no default, that debtor pay \$10,000 security deposit did not violate any specific statutory provision, and thus, imposition of condition was within Court's equitable powers.)

17. With the loss of the guaranty as a safety net, the significance of the Landlord holding a security deposit is more relevant. Therefore, this security deposit requirement should be a condition of the assumption and assignment of the subject Lease, as an element of adequate assurance of future performance.

(2) Cure or Adequate Assurance of Prompt Cure, and Compensation for Pecuniary Loss

18. By statute, the Debtors are required to cure all defaults as a condition to assumption (and assignment). The Debtors' stated maximum threshold or "maximum amount" indicated in the RAPA (see Section 2.5) seeks to limit total "Cure Amounts"

and fails to assure that there will be prompt and full cure and compensation for defaults and for pecuniary losses (including attorneys fees incurred by the Landlord).

Without a whole cure, the Landlord objects to assumption and assignment of the Lease.

19. Finally, the Landlord now demands immediate payment of all post-petition rent and additional rent for the stub period and for July 2013, which is to date outstanding, and continued payment of such rent and additional rent as it comes due.

20. The Landlord reserves the right to assert other and further objections.

WHEREFORE, for the foregoing reasons, CW NORTH RIDGE PLAZA LLC requests the following relief and/or for changes to be made to the Sale Procedure terms and documents as follows:

1. As respects the subject Lease, the RAPA must require the proposed assignee/purchaser to assume the Lease and the obligations thereunder from the Lease's inception, as if that entity were the original tenant named in the Lease, not just from the "Closing Date;"
2. As a showing of adequate assurance of performance, assumption and assignment of the subject Lease should be conditioned upon:
 - o Payment of a security deposit being promptly provided to the Landlord in an amount equal to two months of rent and additional at the current monthly rate; and
 - o Cure of all defaults and compensation for all pecuniary losses incurred by the Landlord, including outstanding pre-petition rent, additional rent and attorneys fees and expenses incurred;
3. Immediate payment of all post-petition rent and additional rent for the stub period and for July 2013, which is to date outstanding, and

continued payment of such rent and additional rent as it comes due;

and requests such other relief as the Court deems just and appropriate under the circumstances.

Dated: Great Neck, New York
July 16, 2013

Yours, etc.,

/s / LARA P. EMOUNA
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