IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
RUPARI HOLDINGS, INC., *et al.*,	Case No. 17-10793 (KJC)
Debtors.	Jointly Administered
	Re: Docket No. 121

OBJECTION OF ROMA DINING, LLC AND ROMACORP., INC. TO (A) CURE AMOUNT, AND (B) ASSUMPTION AND ASSIGNMENT OF LICENSE AGREEMENT

Roma Dining, LLC and Romacorp., Inc. (together, "Roma"), by and through the undersigned counsel, hereby submit this objection (the "Objection") to the Notice to Counterparties to Executory Contracts and Unexpired Leases that May be Assumed and Assigned [Docket No. 121] (the "Cure Notice") filed by the above-captioned debtors (the "Debtors" or "Rupari") in the above captioned jointly administered bankruptcy proceedings (the "Bankruptcy Case"). In support of its Objection, Roma states as follows:

I. PRELIMINARY STATEMENT

1. From day one, this Bankruptcy Case has been centered on the sale of the Debtors' assets. Initially, the sale, pursuant to a Stalking Horse Asset Purchase Agreement (the "Stalking Horse APA") between the Debtors and CBQ, LLC ("CBQ"), required the Debtors to assume the License Agreement (as defined below) between Debtor Rupari Food Services, Inc. and Roma. Subsequently, after Roma objected to (a) the expedited litigation of the Adversary Proceeding (as defined below) and (b) the bidding procedures (the "Bidding Procedures") proposed by the Debtors for the sale of their assets, the Debtors and CBQ amended the Stalking Horse APA to remove the condition precedent requiring assumption of the License Agreement. At the hearing

on the Bidding Procedures, the Debtors and CBQ represented that the proposed sale was no longer conditioned on the assumption of the License Agreement. Four days later, Rupari filed a notice of voluntary dismissal, without prejudice, of the Adversary Proceeding. At a telephonic status conference, Roma made clear that it would strenuously object to any attempt to assume or assign the License Agreement. No assumption is possible because the License Agreement was terminated prior to the petition date of this Bankruptcy Case. By dismissing the Adversary Proceeding, Rupari confirmed that it would not seek to assume and assign the License Agreement in connection with the Stalking Horse Purchase Agreement, because Rupari no longer sought a declaratory judgment that the License Agreement remained valid despite the termination by Roma. Roma repeatedly informed Rupari that the pre-petition termination of the License Agreement prevented any attempt to assume and assign it. Despite the Debtors' representations and the impossibility of assuming the License Agreement, the Debtors included the License Agreement on the list of executory contracts that the Debtors may seek to assume and assign (the "Cure Schedule") attached to the Cure Notice.

2. The proposed cure amount is irrelevant because the License Agreement cannot be assumed. However, Roma notes that the Debtors have no rights for use of the Licensed Marks[1] after termination of the License Agreement, unless the Debtors comply with the License's applicable provisions. The License Agreement provides that, after expiration or termination, for a period of six (6) months from such date, Rupari may use the Licensed Marks to sell, on a non-

[1] The Licensed Marks are defined as names, characters, symbols, designs and likenesses, including but not limited to copyrights, service marks, trademarks and trade names listed on a schedule to the License Agreement.

exclusive basis, its inventory on hand and work in process, "provided Royalty Payments[2] and Minimum Guarantees are current." License Agreement §12(d). To bring the Royalty Payments current, as required in order for the Debtors to sell the Licensed Products after termination of the License Agreement, the amount asserted by the Debtors as a "cure" amount is vastly understated. In order to be current on its Royalty Payments, Rupari must pay in excess of $4 million.

3. For the reasons set forth herein, the Court should bar the Debtors from assuming the License Agreement and accord no weight to the proposed cure amount to determine Royalty Payments owed to enable Rupari's use of the Licensed Marks during the Sell-off Period.

II. BACKGROUND

A. The License Agreement and Roma's Termination Thereof

4. Roma operates directly, and/or through its affiliates' franchises, full service, casual dining restaurants specializing in barbecued ribs and steaks, with more than 150 locations, in more than 30 countries, on five continents. Tony Roma's name is one of the most globally recognizable names in the industry. Roma was founded in Miami, Florida in 1972 and quickly became known for its signature barbeque sauces and rib preparations.

5. The License Agreement is dated May 1, 2007 (as amended by the First Amendment, dated as of November 3, 2010; the Second Amendment, dated as of June 14, 2011; and the Third Amendment, dated as of October 29, 2013). Pursuant to the License Agreement, Roma granted a trademark license to Rupari to produce, sell and distribute certain products under the TONY ROMA'S trademark.

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[2] The License Agreement uses the term "Royalty Payments" to refer to payment of Royalties on a quarterly basis within thirty days following the end of each calendar quarter. The Royalties are determined pursuant to a schedule attached to the License Agreement.

6. The License Agreement provided, among other things, a grant to Rupari of an exclusive license to utilize certain of Roma's licensed TONY ROMA'S marks (the "Licensed Marks") in connection with the manufacture, sale and distribution of certain refrigerated or frozen pork, beef, and poultry products ("Licensed Products"). The License Agreement required, among other things, that the Licensed Products be produced and packaged according to particular specifications, which Roma had to approve in writing. The License Agreement required Rupari to comply with "all approval procedures which Licensor [Roma] determines are necessary, in its sole discretion." License Agreement ¶ 6. Rupari's territory to use the Licensed Marks was restricted to the United States, its territories and possessions, and U.S. military bases worldwide.

7. Under the amended version of the License Agreement effective as of 2010, Rupari had the ability to renew the contract through multiple approval terms until June 30, 2030, provided that Rupari fully complied with the License Agreement during the prior terms and achieved certain minimum sales. Roma also had the ability to terminate the License Agreement under certain circumstances.

8. The License Agreement required Rupari to prepare and issue to Roma verified reports showing: (i) total number or amount, by item, of Licensed Products sold, (ii) gross selling price, by item, of Licensed Products sold, (iii) itemized deductions, allowances, and returns applicable under the License Agreement, and (iv) the "Royalty Payment accrued during the quarter and payable to [Roma] by [Rupari]." *Id.* ¶ 3(d). The License Agreement required Rupari to pay Royalty Payments owing to Roma on a quarterly basis, within 30 days following the end of each calendar quarter. *Id.* ¶ 3(e). Past-due payments are subject to interest accruing at the rate of 1.5% per month. *Id.*

9. Prior to the commencement of the Bankruptcy Case and as part of a review of Rupari's deficient performance under the License Agreement, Roma engaged a third party to audit Rupari's books and records to determine the accuracy of Rupari's sales reports and Royalty Payments and whether any amounts were due and owing through September 31, 2016 (the "Audit Period"), among other issues. Rupari failed to cooperate fully with Roma's auditor and continues to withhold certain financial information necessary to complete the audit. Based on the portion of audit results that were finalized, Roma gave written notice on January 16, 2017 that Rupari owed more than $3.5 million plus interest based on underpayments during the Audit Period (the "January 16 Letter"). Pursuant to the January 16 Letter, Roma further advised Rupari that if the royalty payments were not paid by February 15, 2017, Roma reserved its right to pursue all claims and damages against Rupari. On January 18, 2017, Roma also gave Rupari written notice that the Licensed Products, in Rupari packaging, were being sold outside of the U.S. in violation of the License Agreement (the "January 18 Letter"). The January 18 Letter referenced correspondence from almost a year prior, March 17, 2016, notifying Rupari of similar unauthorized out-of-territory sales. The January 18 Letter stated that despite Rupari's promises, Roma had evidence that Rupari was continuing to sell to customers that were shipping Licensed Products outside of Rupari's authorized territory. Roma demanded that Rupari cease its violations of the License Agreement and reserved its rights. On March 2, 2017, Roma sent written notice that Rupari was in material breach of the License Agreement due to Rupari's: (a) failure to remit the past due royalty payments and (b) continued sale of Licensed Products to customers that were shipping Licensed Products outside of Rupari's authorized territory, among other defaults. In addition, Roma requested information necessary to complete the audit and regarding actions Rupari was taking to prevent the unauthorized, out-of-territory sales. Roma

reiterated its reservation of rights and stated that it did not waive any past breaches. As a result of the written notices sent in January, Roma was entitled to terminate the License Agreement in accordance with Section 12 thereof, including giving notice, as early as February 15, 2017.

10. Roma engaged in discussions with Rupari throughout this period in an attempt to resolve the parties' differences. However, Rupari failed to cure any of the on-going material breaches. Finally, after Rupari's continued failure to cure, on March 27, 2017, Roma sent written notice terminating the License Agreement in accordance with Section 12 (the "Termination Notice"). The License Agreement was therefore validly terminated prior to the petition date.

11. Section 13(d) of the License Agreement provides that after expiration, Rupari may sell, on a non-exclusive basis, Licensed Products that it has on hand or are in the process of manufacture at the time of expiration or termination. This right continues for a period of six months following the expiration or termination of the License Agreement (the "Sell-off Period"), subject to certain conditions, including that "Royalty Payments and Minimum Guarantees are current." License Agreement ¶13(d). Pursuant to the License Agreement, during the Sell-off Period, Rupari is required to pay royalties and provide Roma a detailed, written account of the inventory of Licensed Products on hand and work in progress. *Id.* To date, Rupari has neither paid royalties, nor provided Roma the information required during the Sell-off Period after repeated requests from Roma.

B. Rupari's Adversary Proceeding Against Roma

12. On April 10, 2017 (the "Petition Date)," the Debtors filed voluntary petitions for relief under the Bankruptcy Code with the United States Bankruptcy Court for the District of Delaware (the "Court").

13. On the same day, Rupari filed its Complaint in the adversary proceeding captioned, *Rupari Food Servs. v. Roma Dining, LLC, et al.*, Adv. Pro. No. 17-50345 (KJC) (the "Adversary Proceeding"). Rupari's Complaint requested a declaratory judgment that "Roma lack[ed] a legal basis to eliminate the License Agreement and/or that the contract was not terminated in accordance with the notice requirements of the License Agreement, and accordingly Roma's attempted termination of the License Agreement [was] void." Compl. ¶ 41.

14. Rupari asserted two defenses to Roma's valid, pre-petition termination of the License Agreement:

a. the termination was not proper pursuant to the terms of the License Agreement; and

b. the breaches were waived, and the License Agreement was permanently amended by the parties' course of conduct.

15. Concurrently with filing its Complaint, Rupari filed a Motion to Expedite Adversary Proceeding [Adv. Docket No. 4] (the "Motion to Expedite"), seeking an order of this Court to try the issues asserted in the Adversary Proceeding within 60 days. On April 14, 2017, Roma filed an objection [Adv. Docket No. 10] to the Motion to Expedite, stating that the fact-intensive nature of Rupari's chosen defenses and the scope of the requested discovery prevented a trial of the Adversary Proceeding in 60 days.

16. At a hearing held on April 17, 2017, the Court scheduled trial dates for July 10-12, 2017 and instructed the parties to confer regarding an appropriate scheduling order.

17. On May 1, 2017, Rupari filed a Bankruptcy Rule 7041 Notice of Voluntary Dismissal [Adv. Docket No. 20] dismissing, without prejudice, the Adversary Proceeding.

C. The Sale Motion

18. On April 11, 2017, the Debtors filed the Sale Motion. The Sale Motion identified CBQ as the Stalking Horse purchaser pursuant to an asset purchase agreement (the "Stalking Horse Agreement") for the purchase of substantially all of Rupari's assets. The Stalking Horse Agreement required, as a condition precedent the entry of a final order:

> . . . finding that the [License] Agreement is in full force and effect, assigning the [License] Agreement to Buyer, approving Buyer's assumption of the [License] Agreement, providing that Seller is responsible for all Cure Costs Associated with the [License] Agreement, providing that Buyer shall have no Liability for any Cure Costs associated with the [License] Agreement, and prohibiting the counterparty to the [License] Agreement from terminating or modifying its performance under the [License] Agreement as [a] result of non-payment of the Cure Costs by the Seller (the "Assignment Order").

Stalking Horse APA, Art. 9.2(i).

19. On April 20, 2017, Roma filed the *Objection of Roma Dining, LLC and Romacorp., Inc. to Motion of Debtors for Entry of Order (I) (A) Approving and Authorizing Bidding Procedures in Connection with the Sale of Substantially All Assets; (B) Approving Stalking Horse Protections; (C) Approving Procedures Related to Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, (D) Approving the Form and Manner of Notice Thereof; (II) (A) Approving and Authorizing Sale of Substantially All of Debtor Assets to Successful Bidder Free and Clear of All Liens, Claims, Encumbrances, and Other Interests; (B) Approving Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Related Thereto; and (C) Granting Related Relief* [Docket No. 72] (the "Bidding Procedures Objection"). In the Bidding Procedures Objection, Roma objected to entry of an order approving

the Bidding Procedures on the basis that the proposed transaction could not be consummated because it depended on the validity of the License Agreement, which Roma had properly terminated. Roma also stated that, even if the Court found that License Agreement was not validly terminated, the License Agreement and well-settled trademark law required Roma's consent in order to assume the License Agreement and assign it to a purchaser. Given Roma's dissatisfaction with Rupari's manufacture of the Licensed Products, Roma would not give consent absent significant capital improvements to existing operations.

20. On April 26, 2017, the Debtors filed a revised Stalking Horse Agreement [Docket No. 95], which removed the sale condition requiring entry of an Assignment Order and replaced it with the following provision:

> The Parties shall have either (i) received a Sale Order entered by the Bankruptcy Court as a Final Order that authorizes Buyer to buy, manufacture and sell Inventory under the Tony Roma's brand for six (6) months following the Closing (the "***Sell Off Period***") and provides that in exchange for the Sell Off Period, Roma Dining LP shall receive royalties as provided in Section 3 of the [License] Agreement for sales made by Buyer during the Sell Off Period, or (ii) entered into an amendment to this Agreement providing for a an additional escrow amount and a potential adjustment of the Purchase Price in an amount of Two Million Dollars ($2,000,000) to account for all inventory, supplies, packaging, or finished goods relating to the [License] Agreement and purchased by Buyer hereunder, and unused and unsaleable within a reasonable period of time as of the Closing Date, assuming for this purpose that the [License] Agreement was terminated as of the Closing Date with Buyer having no further right to operate under the [License] Agreement for any additional period.

21. On April 27, 2017, Roma objected to the revised Stalking Horse Agreement to the extent that the Debtors sought unilaterally to extend the term of the Sell-Off Period beyond six months following termination of the License Agreement.

22. At the hearing on the Bidding Procedures,

a. the Debtors' counsel represented that:

   i. The dispute as to whether Roma validly terminated the License Agreement was "now moot" and "no longer a closing condition." Hearing Transcript (Apr. 27, 2017) (relevant excerpts attached hereto as Exhibit A) at 16:14-19 & 34:21-24.

   ii. If the Debtors could not obtain a sale order that authorizes an extension of the Sell-off period, they "have the escrow accounts of $2 million [to fund the purchase price reduction pursuant to the Stalking Horse Agreement]." *Id.* 35:4-9.

b. CBQ's counsel represented that, "The current APA does not contemplate an assumption of the [License Agreement]" and that the APA alternatively seeks a six-month Sell-off Period or a purchase price reduction. *Id.* 29:22-30:12.

c. Roma's counsel stated that:

   i. "To the extent the Debtors attempt to assume the License Agreement or grant themselves a unilateral extension of the Sell-off Period, Roma would continue to assert its objections." *Id.* 25:16-25.

   ii. "The new provision is seeking an extension of [the Sell-off Period to] six months after the closing, and we don't agree with that." *Id.* 26:2-4.

D. The Cure Notice

23. On May 2, 2017, the Debtors filed the Cure Notice, which identifies the License Agreement as an executory contract that may be assumed and assigned by the Debtors. The Cure Notice proposes a cure amount of $461,620.45.

24. According to Roma's records, the Debtors owe Roma: (i) approximately $3,598,943 for royalties during the Audit Period; (ii) all royalties due and owing under the License Agreement during the first quarter of 2017; and (iii) $40,220 representing the amount by which Rupari's royalty payment to Roma for the last quarter of 2016 was deficient.

25. With respect to the first quarter of 2017, to date, while Rupari has provided Roma with an unverified statement regarding product sold and royalties due, it has not paid Roma the royalties due for such period, in the approximate amount of $461,576, which is the approximate value asserted by the Debtors to be the cure amount. But, as noted, this sum omits both the royalties identified as due in the audit and other unpaid amounts for the last quarter of 2016.

III. ARGUMENT

A. The License Agreement Should Not Be Included on the Cure Schedule

26. As set forth in Roma's Bidding Procedures Objection, and on the record during proceedings before the Court in both the Bankruptcy Case and the Adversary Proceeding, the License Agreement has been validly terminated, and therefore cannot be assumed and/or assigned by the Debtors. *See Counties Contracting and Const. Co. v. Constitution Life Ins. Col.*, 855 F.2d 1054, 1061 (3d. Cir. 1988) ("Once a contract ends, a debtor's rights, such as to assume, [end] as well."); *In re Triangle Laboratories, Inc.*, 663 F.2d 463, 467 (3d. Cir. 1981) ("[F]or Section 365 to apply, the contact or lease must be in existence. If the contract or lease has expired by its own terms or has been terminated prior to the commencement of the bankruptcy case, then there is nothing left for the trustee to assume or assign.")(internal quotations omitted); *In re Clearpoint Business Resources, Inc.*, 442 B.R. 292, 296 (Bankr. D. Del. 2010 (quoting *Counties Contractin*g for proposition that contract validly terminated prepetition terminates a debtor's right to assume it).

27. The revised asset purchase agreement filed on April 26, 2017 [Docket No. 95] does not contemplate assumption or assignment of the License Agreement. To the extent that the Debtors seek to do so, Roma's objection to the assumption and assignment and the related discussion set forth in Roma's objection to the bidding procedures [Docket No. 75] is incorporated herein.

28. As Roma has stated on the record in the Bankruptcy Case and the Adversary Proceeding, Roma objects to any efforts to extend the Sell-off Period. There exists no legal or contractual basis to extend the Sell-off Period provided in the terminated License Agreement. The Debtors request also exceeds the administrative authority granted to them by the Bankruptcy Code. *See In re Fleming Cos.*, No. 03-10945 (MFW), 2004 Bankr. LEXIS 198, at *7-8 (U.S. Bankr. D. Del. Feb. 27, 2004) ("[A] debtor's assumption and assignment cannot modify an agreement's express terms . . . . The contract must be assigned and enforced according to its terms."); *Official Comm. for Unsecured Creditors v. Aust (In re Network Access Sols., Corp.),* 330 B.R. 67, 74 (Bankr. D. Del. 2005). As a result, the term of the Sell-off Period cannot be extended without Roma's prior, express consent.

29. Due to the numerous reasons set forth herein, the Debtors cannot assume and assign the License Agreement and should be judicially estopped from attempting to do so. The Debtors represented to Roma and the Court that they no longer sought to assume or assign the License Agreement and voluntarily dismissed the Adversary Proceeding consistent with the spirit of those representations. Less than one week later, without any discussion with Roma or its counsel, the Debtors filed the Cure Notice indicating the Debtors may seek to assume and assign the License Agreement. The Debtors evidently want it both ways – to say they will not assume and assign the License Agreement on the one hand, clearing the way for entry of the

order on the Bidding Procedures, and on the other, including the License Agreement on the Cure Schedule which surely will be viewed by potential bidders and would be a basis for the successful bidder to expect the Debtors to assume and assign the License Agreement. The Debtors cannot assert the course-of-conduct defense asserted in the now-dismissed Adversary Proceeding to justify an assumption and assignment of the License Agreement. The doctrine of judicial estoppel prevents a party from taking these sort of inconsistent positions that would result in a miscarriage of justice. *See In re TWA,* 261 B.R. 103, 111 (Bankr. D. Del. 2001).

30. For the reasons identified above, Roma requests that the Court order the Debtors to remove the License Agreement from the Cure Schedule and accord no weight to the proposed cure amount.

B. To the Extent the Debtors are Permitted to List the License Agreement in the Cure Schedule, the Cure Amount is Incorrect

31. As set forth above and in Roma's prior filings, the audit conducted by Roma's auditor indicates that Rupari owes Roma more than $3.5 million plus interest in unpaid royalties for the Audit Period. Roma provided Rupari written notice that the unpaid royalties were due and owing on January 16, 2017 and again on February 15, 2017.

32. As further set forth above, the Debtors owe Roma royalties for the first quarter of 2017, which were due on or before April 30, 2017, in an amount no less than $461,576. In addition, the Debtors owe Roma $40,220, which is the amount by which Rupari's royalty payment to Roma was deficient for the last quarter of 2016.

33. To the extent the Debtors attempt to rely on the cure amount proposed in the Cure Schedule to quantify the royalties Rupari owes Roma in accordance with the License Agreement, no weight should be given to such asserted amount. The Debtors' statement of the royalties owing to Roma do not constitute the true amount due and owing. When the calculations of

royalties owed to Roma are required, but in any case, by no later than the bar date, Roma will provide a proper accounting.

IV. RESERVATION OF RIGHTS

34. Roma reserves the right to update the royalty amounts set forth herein.

35. Roma reserves the right to object to any other relief sought by the Debtors in connection with the proposed sale of substantially all of their assets or the attempt to assume and/or assign the License Agreement.

V. CONCLUSION

36. For the foregoing reasons, Roma respectfully requests that the Court sustain this Objection and provide such other relief as the Court deems just and proper.

Dated: May 16, 2017

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