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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF HAWAI'I

In re HAWAI'I OUTDOOR TOURS, INC., dba Naniloa Volcanoes Resort and Naniloa Volcanoes Golf Club, Debtor and Debtor-in-Possession.	Case No. 12-02279 (Chapter 11) *Hearing:* Date: November 6, 2013 Time: 9:30 a.m. Judge: Honorable Robert J. Faris *Docket Reference 455*

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COUNTY OF HAWAI'I'S RESPONSE TO TRUSTEE'S MOTION FOR ORDER AUTHORIZING (I) SALE OF HOTEL ASSETS, FREE AND CLEAR OF LIENS AND ENCUMBRANCES, (II) ASSIGNMENT OF UNEXPIRED STATE OF HAWAI'I GENERAL LEASE NO. S-5844 OF NON-RESIDENTIAL REAL PROPERTY FREE AND CLEAR OF LIENS AND ENCUMBRANCES, AND (III) PARTIAL DISTRIBUTION OF SALES PROCEEDS; EXHIBITS A to G

The County of Hawai'i hereby submits this Response to the Trustee's Motion for Order Authorizing: (I) Sale of Hotel Assets, Free and Clear of Liens and Encumbrances; (II) Assignment of Unexpired State of Hawai'i General Lease No. S-5844 of Non-residential Real Property Free and Clear of Liens and Encumbrances; and (III) Partial Distribution of Sales Proceeds ("Motion to Sell")

I. ARGUMENT

The County of Hawai'i is an interested party and as per Section 7 of the Department of Land and Natural Resources ("DLNR") Lease,[1] has standing to respond to the Trustee's Motion to Sell. The assumption and assignment of the DLNR Lease requires that the Trustee comply with 11 U.S.C. § 365(b),[2] which requires that the Trustee, or its assignee,

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[1] DLNR Lease, Section 7 provides,

> 7. Compliance with laws. The Lessee shall comply with all of the requirements of all municipal, state and federal authorities and observe all municipal, state and federal laws applicable to the premises, no in force or which may be in force.

[2] 11 U.S.C. § 365(b) provides,

(1) cure or promptly cure any existing monetary and "curable" non-monetary defaults;

(2) provide "adequate assurance of future performance".

The County will address each of these elements.

A. MONETARY CURE.

The Trustee's Motion to approve the Purchase and Sale Agreement recognizes the delinquent County of Hawai'i real property taxes must be paid as a condition of the sale. As per the Declaration of Stanley A. Sitko, the current amount due is $411,430.27. See Exhibit A, Declaration of Stanley A. Sitko.

> (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

Nonetheless, if "promptly" paid, the County has no objection to the treatment of the payment of the County's delinquent real property taxes.

B. THE ORDERS OF OCTOBER 8, 2013 AND OCTOBER 28, 2013 ESTABLISH CIVIL FINES FOR THE TRUSTEE AND THE ESTATE AND ARE ADMINISTRATIVE EXPENSE CLAIM.

The County of Hawai'i has issued two Orders of Violation with respect to conditions at the Naniloa Hotel. Exhibits B and C. These Orders of October 8, 2013 and October 28, 2013 provide for civil fines as set forth in the Orders. The County has also issued Notices of Violation of May 9, 2013, June 25, 2013, October 10, 2013 and the Second Declaration of Gantry Andrade regarding the violations of the Fire Code. See Exhibits D, E, F and G, respectively.

It is the County's position that these regulatory fines are 11 U.S.C. § 503(b) administrative expense priority claims and must be paid as administrative expenses as provided for in the Trustee's Motion by way of a distribution from the Administrative Expense Fund.

The County's claim for administrative expense priority treatment for the County's civil fines is based on a line of cases beginning with Reading Co. v. Brown, 391 U.S. 471, 88 S.Ct. 1759 (1968) as followed in In re Charlesbank Laundry, Inc., 755 F.2d 200 (1st Cir. 1985)[3] (Coffin, J).

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[3] In Charlesbank Laundry, plaintiff business owners obtained a preliminary injunction enjoining the defendant adjoining laundry owner from violating a

While this Response is not the place to fully brief the complex issue whether a governmental entity's civil fines is an administrative expense of a debtor's estate, the Ninth Circuit Court of Appeals in In re Abercrombie, 139 F.3d 755 (9th Cir. 1998), has addressed the issue, and gives some guidance for the allowance of the County's civil fines as an administrative expense of the estate.

> [Party] seeks to bring itself within Reading v. Brown, 391 U.S. 471, 20 L. Ed. 2d 751, 88 S.Ct. 1759 (1968), which created a venerable but limited exception to the postpetition transaction requirement. There, tort claimants were awarded administrative expense priority for damages sustained in a postpetition fire caused by the negligence of a receiver. Clearly, these claimants had not transacted with the estate postpetition. Rather, they suffered an unanticipated injury due to the receiver's negligence. The Reading court determined that administrative expense priority was appropriate because the damage to the plaintiffs was caused by the postpetition operation of the estate's business. The bankruptcy laws allow an insolvent business to continue in operation with the hope that its creditors will benefit from a partial or complete rehabilitation of the debtor. In the Court's words, the tort plaintiff "had an insolvent business thrust upon it by operation of law." Reading, 391 U.S. at 478. Thus, the tort claimants were allowed to recover ahead of the creditors for whose benefit the continued operation of the business was allowed.

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zoning ordinance. Defendant was unable to obtain a variance and continued to operate in violation of the zoning laws. The Defendant then filed a Chapter 11 petition, and the automatic stay was vacated to allow plaintiffs' state court action to proceed. The action was settled by a consent judgment, ordering the defendant-debtor to pay a compensatory civil fine for violating the injunction, in the amount of plaintiffs' costs. The court held that the principal of fairness required that the plaintiffs' claims, which arose by defendant's operation of his business in violation of an injunction, post-petition, should recover ahead of those for whose benefit the business was carried on the creditors of the estate.

> The Reading exception operates to deter the trustee from injuring third parties. Several circuit cases have applied the Reading exception in differing contexts. For example, the First Circuit has held that the administrative expense priority is appropriate when the trustee's intentional violations of the law injure others. See In re Charlesbank Laundry, Inc., 755 F.2d 200 (1st Cir. 1985) (trustee continued to operate laundry facility in violation of zoning laws and injunction); see also In re Copeland Enterprises, 991 F.2d 233 (5th Cir. 1993) (trustee deliberately withheld state sales tax payments in hopes of earning interest for the estate): In re N.P. Mining Co., 963 F.3d 1449 (11th Cir. 1992) (trustee violated state environmental regulations while operating tie debtor's business postpetition).

The issue of whether the County's civil fines are a § 503(b), administrative claim, is complex, but it is clear that, as in Reading Co. v. Brown, the NOVs and civil fines were incurred in the operation of the Naniloa for the benefit of the First-Citizens Bank, the secured creditor, and the other creditors generally.

In fact, the Office of the United States Trustee's Statement Regarding Trustee's Motion for Order Authorizing Sale of Hotel Assets and Assignment of Unexpired Lease that,

> No reorganization plan is contemplated in the present case. The Trustee seeks to sell the estate's primary asset and then dismiss the case. The motion to sell as currently structured (absent overbidding) would result in no benefit to the unsecured creditors. Only the Trustee and his professionals and secured creditors First-Citizens Bank and the State DOT will get paid. If this is the ultimate result from the Trustee's motion, the motion should be denied.

It is apparent that the Naniloa was, and is, being operated in violation of the County of Hawai'i's building, plumbing, electrical and fire codes, to keep it operating while the Trustee sought a buyer for the Hotel, for the primary benefit of First-Citizens Bank and possibly the State of Hawai'i, Department of Taxation ("DOT"), but no other creditors.

If that is the case, that the Naniloa was being operated for the benefit of the creditors, albeit the secured creditors, then the civil fines should be either (1) an administrative expense claim and paid through the proposed Administrative Expense Fund, or (2) if the County's civil fines are not paid through the Administrative Expense Fund, then Trustee should transfer or assign its 11 U.S.C. § 506(c) rights to impose on First-Citizens Bank's collateral or sales proceeds a surcharge in the amount of the civil fines incurred in operating the Naniloa for the benefit of the secured creditors.

The line of cases from Reading Co. v. Brown, as interpreted by the Ninth Circuit in Abercrombie, would appear to require that the County's civil fines be treated as an administrative expense priority of the Estate, since the civil fines arose directly out of the operations of the hotel, for the benefit of the creditors, and resulted in injury or potential injury to the public safety, the third party injury, discussed in Reading co. v. Brown and the Abercrombie case. Based on the

Reading Co. v. Brown, precedent from the Supreme Court to the Ninth Circuit, In re Abercrombie, the County is an administrative expense creditor.

As provided for by In re Abercrombie, the civil fines fit the requirements of an "administrative expense," claim since the fines were generated during the operation of the hotel and effected third-party non-creditors, the public at large. As such, the County of Hawai'i's civil fines, should be included in the "Administrative Claims Fund" and be paid like all other administrative claims.[4]

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[4] The Trustee's Motion to Sell at pp. 13-14, provides:

> The sales proceeds will be substantially less than First-Citizens' first priority lien. As such, there is no value attributable to DOT's junior liens and DOT will not receive any payment on account of its liens. The proposed distribution of the Hotel sale proceeds will be to pay (a) all usual and customary closing costs paid by the Seller as provided in the PSA; (b) to fund a reserve, subject to mutual agreement with First-Citizens, in an amount ("Administrative Claims Fund") that the Trustee believes is appropriate for administrative expense claims and the Trustee's professional expense, after having the opportunity to review administrative expense claims that either are filed by the Court-ordered deadline of August 22, 2013 (Dkt #247) or are known to the Trustee, (c) compensation under 11 U.S.C. § 326 to the Trustee in the reduced amount to which the Trustee and First-Citizens have agreed, subject to Court approval; and (d) the balance to First-Citizens on account of its senior lien secured by the Hotel.

C. TRUSTEE'S REQUEST FOR A SALE "FREE AND CLEAR" OF LIENS AND ENCUMBRANCES MUST BE REVIEWED UNDER THE PROPER STANDARDS.

The Trustee seeks to sell the estate's interest "free and clear of all liens and encumbrances" pursuant to 11 U.S.C. § 363(f). Under applicable law, the Trustee need satisfy only one of the five § 363(f) factors.

The Trustee believes he can proceed pursuant to § 363(f)(2), by obtaining the consent of two (2) secured creditors, including First-Citizens Bank and the State of Hawai'i, Department of Taxation. The County of Hawai'i is also a secured creditor, but the payment of the delinquent real property taxes is being satisfied in full.

If the Trustee does not obtain the consent of the secured creditors and cannot proceed pursuant to § 363(f)(2), the Trustee cannot proceed pursuant to § 363(f)(3) after In re Canonigo, 276 B.R. 257 (Bankr.N.D. Cal. 2002) (holding that a sale under § 363(f)(3) requires a sales price equal to or higher than the face amount of the lien). Then without § 363(f)(2)-"consent" by all of the secured creditors and lien holders the Trustee must proceed pursuant to 11 U.S.C. § 363(f)(5), because the sales proceeds and price are less than the face amount of the liens.

While the Trustee discusses § 363(f)(5), at page 12 of his Memorandum, and refers this Court to In re Jolan, 403 B.R. 866 (Bankr.W.D.

Wash. 2009), the Trustee does not refer to In re PW, LLC, 391 B.R. 25 (9th Cir.B.A.P. 2008) (Markell, BJ) (hereinafter "Clear Channel") or discuss its application, as does the judge in In re Jolan, 403 B.R. at 868-70.

Since the Trustee is seeking a § 363(m) "good faith" designation, it is incumbent for the Trustee to address the interpretation of § 363(f)(5), if he cannot proceed pursuant to § 363(f)(2).

Until the Trustee addresses the application, BAP's Clear Channel case interpreting § 363(f)(5), if the Trustee cannot proceed pursuant to § 363(f)(2), then no "good faith" designation should be given by the Court to the Buyer, or approval of the sale under § 363(f).

D. THE SALE SHOULD NOT BE FREE OF ANY INTEREST OF THE COUNTY OF HAWAI'I'S CIVIL NOTICES OF VIOLATION OR FINES.

The Trust seeks to sell the Naniloa and the property of the Estate, pursuant to 363(f), essentially free and clear of "liens and interests". The term "lien" is defined in 11 U.S.C. § 101(37), however the term "interests" is not defined in the Code. First, for the County, the question is whether the county's civil fines of the Orders of October 8, 2013 and October 28, 2018 and the Notices of Violation are "interests" that can be "stripped off" by a § 363(f) sale to the Buyer. The County does not believe that the NOVs or Orders are "interests" that can be stripped off.

The County is concerned that the Trustee might be considering the sale free and clear of the "interests" of the County of Hawai'i's Orders and NOVs. For example, In re Leckie Smokeless Coal, 99 F.3d 573 (4th Cir. 1996), the court held that debtor, a coal operator, could sell its assets under section 363(f) free of successor liability that would otherwise arise under the Coal Industry Retiree Health Benefit Act of 1992. Under the Coal Act, a "successor in interest" of an operator was liable as an operator. In upholding the sale free of Coal Act liability, the Fourth Circuit rejected a narrow definition of "interest" that would limit the term to in rem interests and also rejected as overly broad a definition stating that any entity with a right to demand money from a debtor held an "interest." Although the Fourth Circuit defined the term, the court suggested that the term "interest" was intended to refer to obligations that are connected to, or arise from, the property being sold. For example, in Leckie the court observed that the purchaser might, absent a Section 363(f) "free and clear" sale, have successor liability because it was purchasing coal assets. In other words, although the Coal Act liability did not operate as a lien on the property, it was the purchase of that particular property that lead to the liability.

In Myers v. United States, 297 B.R. 774 (S.D.Cal. 2003), the defendant, a successor company by way of a bankruptcy § 363(f) order, filed a motion to dismiss the plaintiff's actions alleging, *inter alia,* conducting an

ultrahazardous activity. The plaintiff was unaware of the bankruptcy filing, the bankruptcy court granted her relief to file a complaint to prosecute her personal injury lawsuit, subject to the § 363(f) order.

The successor moved to dismiss the lawsuit because the bankruptcy court order provided that the successor acquired the assets free and clear of the plaintiff's claims and the asset purchasers were not subject to the claims of successor liability. The bankruptcy court order purportedly transferred the assets free and clear, including the plaintiff's personal injury claim.

In the district court, the successor argued that the bankruptcy court held that the pre-closing liability of the debtor and purchaser could not become liabilities of the successor based on the following:

> The Debtors [IT and OHM] may sell the Assets free and clear of all Claims of any kind of nature whatsoever because, in each case, one or more of the standards set forth in 11 U.S.C. § 363(f)(l)-(5) has been satisfied.
>
> The (i) transfer of the Assets to Shaw and (ii) assumption and assignment to Shaw of the Assumed Contracts and Liabilities, except as otherwise agreed by Shaw, will not subject Shaw to any liability with respect to the operation of the Debtor's business prior to the closing date.
>
> The transfer of the Assets pursuant to the Sale shall not subject Shaw to any liability, except as set forth in the Agreement, with respect to the operation of the Debtor's [IT and OHM] business prior to the Closing Date.

The successor purchaser argued that not only did the bankruptcy court hold that the purchase acquired the assets "free and clear" of any claims, including the personal injury claims of the plaintiff, the plaintiff was barred from filing suit on its claims.

As to the § 363(f) sale, the plaintiff argued that because she held an unsecured claim, the Bankruptcy Court lacked the authority to approve the sale of assets free and clear of the Plaintiff's claim. According to the Plaintiff, the Sale Order was issued pursuant to § 363(f) of the Bankruptcy Code, 11 U.S.C. § 363(f), which allows for the sale of debtor's property "free and clear" of any "interest in such property." Plaintiff contended she did not hold an interest but merely an unsecured claim "to which Section 363(f) does not apply." The Plaintiff expounded a statutory interpretation of the word "claim" and stated that the Ninth Circuit had not yet ruled on the precise definition of the term "interest' in the context of Section 363(f). Providing a multitude of cases from other jurisdictions, Plaintiff argued that within this context the term "interest" as used in section 363(f) did not apply to general unsecured claims such as that held by the Plaintiff. The Bankruptcy Court, therefore, lacked authority to sell IT and OHM's assets 'free and clear' of the Plaintiffs unsecured claim.

The defendants, as purchasers, argued that the Trans World Airlines, 322 F.3d 283 (3rd Cir. 2003), upheld limiting successor liability and the Myers court followed the Trans World Airlines case.

> The court is not persuaded by Plaintiff's argument, and finds that the In re Trans World Airlines case does support Defendant's position. In In re Trans World Airlines, two lawsuits were pending against Trans World Airlines ("TWA") when TWA entered Chapter 11 bankruptcy proceedings. One suit was an employment discrimination claim, and other involved a voucher program awarded to flight attendants in settlement of a sex discrimination class action. The 'bankruptcy court in Delaware approved the sale of TWA's assets to American Airlines ("American"), and determined that there was no basis for successor liability on the part of American, and held that the two pending claims were unsecured claims. Id. 322 F.3d 283, [WL] at *2. The Third Circuit held that these two interests "are interests in property within the meaning of section 363(f) in the sense that they arise from the property being sold."

As to the argument that the interest did not "arise from" the property, the court found,

> Plaintiff argues that her claim for personal injury does not "arise from" the property being sold because the property belongs to the U.S. government. The court does not agree: the property being sold in the Delaware bankruptcy action are the contracts which the U.S. government awarded to IT and OHM to transport toxic materials. Plaintiff's alleged injury arose from IT and OHM's claimed negligent handling of these toxic materials pursuant to these contracts. The court finds that Plaintiffs claim for personal injury does arise from the property being sold, i.e., the contracts to transport toxic materials.

In this case, like the Coal Act claim in Leckie and the personal injury claim in Myers, the NOVs and Orders arose from the property, and might be

deemed possibly "stripped off" in a § 363(f) sale, unless this Court specifically preserves those NOV "interests".

Finally, in In re TWA, the Third Circuit authorized the sale of an airline's assets free and clear of travel vouchers that were issued to settle employment discrimination claims. The Third Circuit reasoned that the travel vouchers were connected to the airline property in the same way as liability in Leckie under the Coal Act for future premiums, because the liability arose solely because of the precise nature of the use to which the debtor and its purchaser put the property. The court also reasoned that the claims were unsecured and to permit them to follow the assets into the hands of a purchaser under a successor liability theory would effectively grant them greater priority against the assets than a secured claim, which is limited to the proceeds of sale, and that such reordering of priorities would be inconsistent with the statute. In that sense, one could say that the court included even general unsecured claims within the definition of "interests" for purposes of section 363(f), but such a reading would probably extend too far, as the court addressed the issue only in the sale free and clear of state's statutory tax interest on the property, see also WBQ P'ship v. Commonwealth of Virginia Dep't of Medical Assistance Servs. (In re WBQ P'ship), 189 B.R. 97 (Bankr. E.D. Va. 1995) (same); In re White Motor Credit

Corp., 75 B.R. 944 (Bankr.S.D. Ohio 1987) (section 363(f) precludes tort claims against asset purchaser).

To protect the County of Hawai'i's claims under the NOVs and Order, the County requests protection pursuant to 11 U.S.C. § 363(e), which provides,

> (e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

On this basis, if this Court allows the Trustee to sell the Naniloa free and clear, that order approving the sale must provide the County's "interests," including the NOVs and the civil fines as per the Orders of October 8, 2013 and October 28, 2013 , and the interests shall continue to be attached to the property and the Buyer must be responsible to "cure" the "interests" and pay the civil fines attached to the property in the hands of the Buyer, notwithstanding § 363(f).

E. NON-MONETARY DEFAULTS ARE PRESERVED AND MUST BE CURED PURSUANT TO § 7 OF THE PURCHASE AND SALE AGREEMENT.

In addition to the preserving the NOVs and civil fines, in the property for the Buyer, the Trustee or Buyer must cure the non-monetary defaults. As to the cure of the non-monetary defaults, as a condition of assumption and assignment of

an executory contract and non-residential lease, the court in In re Empire Equities Capital Corp., 405 B.R. 687, 690-91 (Bankr.S.D.N.Y. 2009) described, the evolution of § 365(b)(1)(A) and the 2005 amendments.

> Before the enactment of the 2005 Amendments to the Bankruptcy Code, courts disagreed on the effect of the cure requirements of § 365 on non-monetary defaults. Compare In re Claremont Acquisition Corp., Inc., 113 F.3d 1029, 1033 (9th Cir. 1997), followed by New Breed, 278 B.R.[ ] at 321 [ ] (debtor must cure all material non-monetary defaults and if cure is impossible, contract cannot be assumed), with Eagle Ins. Co. v. BankVest Capital Corp., 360 F.3d 291, 296-301 (1st Cir. 2004); In re Walden Ridge Dev., LLC, 292 B.R. 58, 66-67 (Bankr.D.N.J. 2003) (debtors are relieved from the" obligation to cure non-monetary defaults altogether). This division of authority arose in part from the pre-2005 language of § 365(b)(2)(D), as the statute was ambiguous as to whether it exempted from cure all non-monetary defaults or just penalty provisions triggered by non-monetary defaults. See 3 Collier on Bankruptcy ¶ 365.05[3][c] (15th ed. rev. 2008). In 2005 Congress revised the language of § 365(b)(2)(D) by including the word "penalty" as a modifier to the word "provision," making it clear that most non-monetary defaults are not exempted from the cure requirements. 11 U.S.C. § 365(b)(2)(D).
>
> At the same time, Congress also gave debtors limited relief from the obligation to cure non-monetary prepetition defaults, and it partially overruled the result in Claremont, Congress did so, however, not by rejecting Claremont's statutory reading of § 365(b)(2)(D) but by adding new language in § 365(b)(1)(A) that requires a cure only of defaults other than those "arising from any failure to perform non-monetary obligations under an unexpired lease of real property." 11 U.S.C. § 365(b)(1)(A) (emphasis added).[6]

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[6] Debtors only have limited time to cure such defaults under non-residential real property leases. 11 U.S.C. § 365(b)(1)(A)

As to the § 365(b)(1)(A), requirements for the cure of non-monetary defaults to assume a non-residential lease, the court in In re Patriot Place Ltd., 486 B.R. 773 (Bankr.W.D.Texas 2013), wrote, as to the assumption of non-residential leases:

> Significantly, §365(b)(l)(A) provides that if a nonmonetary "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…" 11 U.S.C. §365(b)(l)(A) (emphasis added). In short, since the Shopping Center Lease is a nonresidential (commercial) real property lease, as long as [Debtor] is not currently committing a nonmonetary default at the time of assumption, then it is performing under the lease and §365(b)(l)(A) will excuse any previous uncurable nonmonetary defaults. See 3 Collier on Bankruptcy, § 365.06[3][c] (16th ed). As one court explained, through the 2005 amendments to the Bankruptcy Code, Congress provided debtors with limited relief from the obligation to cure nonmonetary *pre-petition defaults*, by adding new language in §365(b)(l)(A) that requires a cure only of defaults other than those "arising from any failure to perform non-monetary obligations under an unexpired lease of real property". In re Empire Equities Capital Corp., 405 B.R. 687, 690 (Bankr. S.D.N.Y. 2009). Simply put, the cure requirement for past nonmonetary defaults under § 365(b)(1)(A) is different for real property leases (like the Shopping Center Lease) than it is for non-real property leases (like executory contracts)."
>
> For example, if the Shopping Center Lease was not a real property lease, then *any past incurable nonmonetary defaults* by [Debtor] would result in the contract not being assumable in bankruptcy. See In re Escarent Entities, L.P., 423 Fed. Appx.

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> 462, 465 (5th Cir. 2011) (where the Fifth Circuit held that § 365 precludes assumption of a contract—which was not a real property lease—if a nonmonetary default is incurable). (emphasis supplied)

486 B.R. at 797.

The Patriots Place court noted that with respect to a lease, after the 2005 amendment, the *pre-petition* non-monetary defaults must be "cured" before the debtor is allowed to assume a lease. The 2005 amendments to the Code, § 365(b)(1)(A), excused a debtor from curing a pre-petition *incurable* non-monetary default with respect to a non-residential lease, as a condition to assume the non-residential lease. The reason for the 2005 amendment to § 365(b)(1)(A), In re Claremont Acquisition Corp., 113 F.3d 1029 (9th Cir. 1997), involved a *pre-petition* "going-dark" clause, which could not be cured post-petition, because the default was incurable after the filing of the petition. However, while the 2005 amendments to § 365(b)(1)(A) excused a debtor from curing pre-petition non-monetary defaults in a non-residential lease, as to post-petition non-monetary defaults, like the health and safety violations, the building and structural violations and fire violations, these post-petition on-going non-monetary defaults of the Trustee must be "cured" as part of the Trustee's assumption of the DLNR Lease. If these post-petition non-monetary defaults cannot be cured before assumption and assignment, the assignee/purchaser must cure, or provide adequate assurance of the "cure" as a condition of the assumption and assignment.

Since the Debtor/Trustee must comply with all state and local laws, the Trustee and the Buyer must satisfy and "cure" these non-monetary defaults.

Section 7 of the Agreement, the "AS IS" section, states that the Buyer takes the property "AS IS". It is the County's position, given § 365(b)(1) that the Trustee and/or Buyer must "cure" or provide adequate assurance of future performance including the "cure" of non-monetary defaults. The NOVs and civil fines of October 8, 2013 and October 28, 2013, must be "cured" on the assumption or assignment[5] of the DLNR Lease.

Section 7 of the Purchase and Sale Agreement, the "AS IS" clause, requires the Buyer to take the property "AS IS," which under the County's interpretation of § 365(e) and § 365(b) requires the attachment of the County's NOVs and Orders of October 8, 2013 and October 28, 2013, when the property is transferred to the Buyer.

II. CONCLUSION

County of Hawai'i, submits that the Trustee authorized to assume and assign the DLNR Lease and sell assets of the estate on the following conditions:

[5]In In re Eastman Kodak Co., 495 B.R. 618 (Bankr.S.D.N.Y. 2013), the court recognized that the assumption and assignment can take in two steps. In this case, the Trustee could assume the DLNR Lease, but the assignment of the Lease to the buyer would be effective when the Buyer "cures" the non-monetary defaults in the County's NOVs and Order of October 8, 2013 and October 28, 2013.

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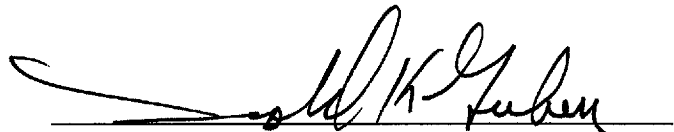
(1) the existing civil fines as per the Orders of October 8, 2013 and October 28, 2013 and any other fines incurred before the closing are administrative expenses and must be paid pursuant to the Administrative Expense Fund;

(2) that if the DLNR Lease is assigned and the Estate's property sold, the County's Notices of Violations and Orders continue in place, and if there is a 11 U.S.C. § 363(f) sale, the sale is not free of the "interests" of the County of Hawai'i.

(3) the "AS IS" provision of the Purchase and Sale Agreement requires the Buyer take the Naniloa and other property of the Estate subject to the County of Hawai'i's Notices of Violation and Orders of October 8, 2013 and October 28, 2103, and any other Notices of Violation and Orders issued by the County prior to closing.

DATED: Honolulu, Hawai'i, November 4, 2013.



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