

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:) **Case No. 09-30029**
) **Chapter 11**
River Road Hotel Partners, LLC, et al.,) **Hon. Bruce W. Black**
) **Jointly Administered**
Debtor.)
) **Hearing Date: June 16, 2011**
) **Hearing Time: 11:00 a.m.**

**RARE HOSPITALITY MANAGEMENT, INC.’S LIMITED OBJECTION
TO CONFIRMATION OF THE LENDERS’ THIRD AMENDED JOINT PLAN**¹

RARE Hospitality Management, Inc. (“**RARE Hospitality**”), the owner and operator of *The Capital Grille* restaurant under a lease (the “**Lease**”) with Restaurant Pads (“**Pads**”), hereby submits this limited objection to confirmation of the Lenders’ Third Amended Joint Plan (the “**Plan**”) on the basis that (i) the 2007 “Subordination, Non-Disturbance, and Attornment Agreement” (the “**Non-Disturbance Agreement**”) between the Lenders and RARE Hospitality prohibits the Lenders from causing the Lease to be rejected and (ii) the release contained in Section 10.2 of the Plan is too broad under this law of this Circuit because it extinguishes direct claims of RARE Hospitality against the Lenders for breach of the Non-Disturbance Agreement and affects matters beyond the jurisdiction of this Court. In support of this limited objection, RARE Hospitality states as follows:

1. RARE Hospitality is the lessee of a parcel of land owned by Pads under a ten-year lease agreement dated September 18, 2006 (the “**Lease**”) that was assigned by Hotel Partners to Pads on February 28, 2007. After entering into the Lease, and at substantial cost, RARE Hospitality constructed its restaurant on the site.

¹ Capitalized terms used herein and not otherwise defined shall have the meanings set forth in the Plan.

2. Also on February 28, 2007, RARE Hospitality and Amalgamated Bank (“**Amalgamated**”), entered into a “Subordination, Non-Disturbance and Attornment Agreement” (the “**Non-Disturbance Agreement**”). Amalgamated executed the Non-Disturbance Agreement “as Trustee of Longview Ultra I Construction Loan Investment Fund ... for itself and in its capacity as administrative agent for San Diego National Bank.” A copy of the Non-Disturbance Agreement is attached hereto as **Exhibit A**.

3. Amalgamated is the proponent of the Plan in its capacity “as Trustee of Longview Ultra Construction Loan Investment Fund, f/k/a Longview Ultra I Construction Loan Investment Fund, in its Capacity as Administrative Agent for itself and co-lender U.S. Bank National Association and U.S. Bank National Association, successor-in-interest to the Federal Deposit Insurance Corporation as Receiver for San Diego National Bank.” (Plan, p. 1.) The proponent of the Plan, therefore, is the same entity that executed the Non-Disturbance Agreement.

4. The Lenders explained in the Disclosure Statement under the heading “General Structure of the Plan” that “the Plan provides for the transfer of substantially all of the Debtors’ assets to the Lenders on account of the Lenders’ claims.” (Disclosure Statement , p.8, Sec. F.) As it relates to Pads, the Plan accomplishes this by transferring the parcel on which *The Capital Grille* sits to the Plan Transferee through the Plan Implementation Deed for Restaurant Pads. (Plan, §§ 1.97, 6.1.)

5. On May 23, 2011, the Lenders filed Exhibit K to the Plan Supplement (Docket No. 736), which listed the executory contracts that would be assumed under the Plan. The Lease with RARE Hospitality was not included on this Exhibit, and counsel for the Lenders subsequently confirmed that the Lenders intended to reject and terminate the Lease between the Debtors and RARE Hospitality.

THE NON-DISTURBANCE AGREEMENT PROHIBITS THE LENDERS FROM CAUSING THE LEASE TO BE REJECTED

6. The Lenders' rejection of the RARE Hospitality Lease is prohibited by Paragraphs 5 and 7 of the Non-Disturbance Agreement, which was recorded with the Cook County Recorder of Deeds on March 7, 2007, and provides (in relevant part) as follows (emphasis added):

5. The Lender [*i.e.*, Amalgamated] agrees that so long as the Tenant is not in default under the Lease:

(a) The Tenant [*i.e.*, RARE Hospitality] shall not be named or joined as a party in any suit, action or proceeding for the foreclosure of the Mortgage or the enforcement of any rights under the Mortgage (unless the Tenant is a necessary party under applicable law); and

(b) **The possession by the Tenant of the Leased Premises and the Tenant's rights thereto shall not be** disturbed, affected or impaired by, nor will the Lease or the term thereof (including Tenant's exercise of any extension options granted by the terms of the Lease) be **terminated or otherwise materially adversely affected by** (i) any suit, action or proceeding for the foreclosure of the Mortgage or **the enforcement of any rights under the Mortgage, or by any judicial sale or execution or other sale of the Lease Premises, or any deed given in lieu of foreclosure,** or (ii) any default under the Mortgage.

7. **If the Lender** or any future holder of the Mortgage **shall become the owner of the Real Estate** by reason of foreclosure of the Mortgage or otherwise, **or if the Real Estate shall be sold** as a result of any action or proceeding to foreclose the Mortgage **or transfer of ownership by deed given in lieu of foreclosure, the Lease shall continue in full force and effect, without necessity for executing any new lease, as a direct lease between the Tenant and the new owner of the Real Estate as "landlord" upon all the same terms, covenants and provisions contained in the Lease** (subject to the exclusions set forth in subsection (b) below), and in such event:

(a) The Tenant shall be bound to such new owner under all of the terms, covenants and provisions of the Lease for the remainder of the term thereof ... and the Tenant hereby agrees to attorn to such new owner and to recognize such new owner as "landlord" under the Lease without any additional documentation to effect such attornment...;

(b) **Such new owner shall be bound to the Tenant under all of the terms, covenants and provisions of the lease for the remainder of the term thereof ...**; provided, however, that such new owner shall not be: ...

(ii) subject to any offsets or defenses which the Tenant has against any prior landlord (including the Landlord [*i.e.*, Pads]) unless the Tenant shall have provided the Lender with (A) notice of the Landlord's Default that gave rise to such offset or defense, and (B) the opportunity to cure the same, all in accordance with the terms of Section 6 above....

(See **Exhibit A**, ¶¶ 5, 7.)

7. RARE Hospitality has honored all its obligations under the Lease. Conversely, Pads defaulted under the Lease by failing to pay RARE Hospitality two \$430,000 installments of an agreed construction allowance that RARE Hospitality was entitled to receive under the Lease. Upon failing to receive the first \$430,000 installment, RARE Hospitality sent a notice of default to Pads with a copy to Amalgamated. (Copy attached as **Exhibit B**.) Another notice of Pads' continuing default was sent to Amalgamated on August 3, 2009. (Copy attached as **Exhibit C**.)

8. Because the Lenders are the proponents of a Plan that proposes to reject the Lease and dispossess RARE Hospitality of its rights as tenant, the Lenders have breached their obligations under the Non-Disturbance Agreement by, among other things, proposing to (i) terminate the Lease through rejection (**Exhibit A**, ¶ 5(b)) and (ii) transfer ownership to the Plan Transferee through the Plan Implementation Deed for Restaurant Pads without continuing the Lease in full force and effect. (**Exhibit A**, ¶¶ 7, 7(b)).

9. "The proponent of the plan bears the burden of establishing that each requirement set forth in § 1129(a) has been met." *In re Multiut Corp.*, 2011 WL 1486035, at *3 (Bankr. N.D. Ill. April 19, 2011) (*quoting In re Sentinel Mgmt. Group, Inc.*, 398 B.R. 291, 292 (Bankr N.D. Ill. 2008)). As relates to RARE Hospitality, the Plan violates the following Bankruptcy Code

provisions based on the Plan's proposal to terminate the Lease and thereby deprive RARE Hospitality of its non-disturbance and subordination rights:

(a) **11 U.S.C. § 1129(a)(1)**. Code Section 1129(a)(1) mandates that “[t]he plan compl[y] with the applicable provisions of this title.” 11 U.S.C. § 1129(a)(1). “The Code does not define the phrase ‘applicable provisions,’ however, it is aimed at compliance with 11 U.S.C. §§ 1122 and 1123.” *Multiut*, 2011 WL 1486035, at *4 (*citing In re S. & W. Enter.*, 37 B.R. 153, 158 (Bankr. N.D. Ill. 1984)). The Plan fails to properly classify RARE Hospitality's rights under the Non-Disturbance Agreement as a Class 2 Restaurant Pad Secured Claim. The Non-Disturbance Agreement was recorded with the Cook County Recorder of Deeds, and so represents a covenant running with the land. Such covenants are, among other things, property interests that cannot be unreasonably restrained and so are akin to lien claims. *See In re County Treasurer and ex Officio County Collector*, 869 N.E. 2d 1065 (Ill. App. 2007) (“A covenant touches and concerns the land if it ‘affects the use, value and enjoyment ... of the property.’”) (citations omitted); *SI Securities v. Bank of Edwardsville*, 841 N.E. 2d 995, 1001 (Ill. App. 2005) (“covenants running with the land inhere in the land and bind subsequent purchasers”). By treating the claims and rights of RARE Hospitality under the Lease as capable of rejection in violation of the Lenders' obligations under the Non-Disturbance Agreement, the Plan violates Code section 1122.

(b) **11 U.S.C. § 1129(a)(2)**. Section 1129(a)(2) of the Bankruptcy Code provides that the Court shall only confirm a plan if “[t]he proponent of the plan complies with the applicable provisions of this title.” 11 U.S.C. § 1129(a)(2).

The Plan violates this requirement by failing to comply with the express language of Code section 510(a), which provides that “[a] subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law.” 11 U.S.C. § 510(a).

Notwithstanding the enforceability of the Non-Disturbance Agreement under applicable nonbankruptcy law, the Plan completely disregards the Lenders’ subordination obligations to RARE Hospitality in violation of the requirements of Code section 510(a). *See GMGRSST, Ltd. v. Menotte (In re Air Safety Int’l, L.C.)*, 336 B.R. 843, 858-59 (Bankr. S.D. Fla. 2005) (defining a subordination agreement as one in which “a party having a superior right of some sort agrees with someone having an inferior right that, as between the two of them, the inferior right shall be treated as if it were superior,” and thereafter validating and strictly enforcing subordination agreement pursuant to Code section 510(a) and nonbankruptcy contract principles); *In re Cormarc, Inc.*, 29 B.R. 569, 571 (Bankr. S.D. Fla. 1983) (strictly enforcing a voluntary subordination agreement between landlord and bank under Code section 510(a), noting that “[t]he Court finds no justification for changing the order of priority of claims, which the parties themselves have established by contract.”).

(c) **11 U.S.C. § 1129(a)(3)**. Section 1129(a)(3) of the Bankruptcy Code provides that the Court shall only confirm a plan if “[t]he plan has been proposed in good faith and not by any means forbidden by law.” 11 U.S.C. § 1129(a)(3). The Plan fails this confirmation requirement by proposing in bad faith to terminate the rights of RARE Hospitality under the Lease in complete

disregard of the non-disturbance and subordination rights the Lenders granted under the Non-Disturbance Agreement.

(d) **11 U.S.C. § 1129(a)(7)**. Section 1129(a)(7) of the Bankruptcy Code provides that an impaired class of claims must either accept the plan or provide that such class “will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date.” 11 U.S.C. § 1129(a)(7). The Non-Disturbance Agreement recorded with the Cook County Recorder of Deeds created lien rights and independent covenants running with the land that would be retained by RARE Hospitality in a chapter 7 liquidation and would have to be honored as superior rights by the Lenders. Those rights in liquidation far exceed RARE Hospitality’s *de minimis* rights and recoveries under the Plan.

(e) **11 U.S.C. § 1129(b)(1)**. Section 1129(b)(1) of the Bankruptcy Code provides that “[n]otwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.” 11 U.S.C. § 1129(b)(1). As an initial matter, as noted herein, all of the applicable requirements of subsection 1129 of the Bankruptcy Code have not been met. Moreover, the Plan fails under Code section 1129(b)(1) because it unfairly discriminates against and is not fair and equitable to the claims of RARE

Hospitality. The Plan also discriminates unfairly because, as stated above, it improperly treats RARE Hospitality's claims as General Unsecured Claims and not as lien rights to which the Lenders' liens are subordinate.

(f) **11 U.S.C. § 1129(b)(2)**. Section 1129(b) of the Bankruptcy Code, as applied here, requires that the Plan be "fair and equitable" to lien rights, like those of RARE Hospitality, by the retention of lien rights and covenants running with the land. 11 U.S.C. §1129(b)(2)(A)(i)(I). By rejecting the Lease and terminating the covenants running with the land, the Plan violates Code section 1129(b)(2) by treating the Lenders' lien rights as superior to RARE Hospitality's recorded lien rights, contrary to the terms of the Non-Disturbance Agreement.

THE PLAN RELEASE IS TOO BROAD BECAUSE IT EXTINGUISHES DIRECT CLAIMS OF RARE HOSPITALITY AGAINST THE LENDERS FOR BREACH OF THE NON-DISTURBANCE AGREEMENT

10. A bankruptcy court may "release third parties from liability to participating creditors if the release is 'appropriate' and not inconsistent with any provision of the [B]ankruptcy [C]ode." *Multiut*, 2011 WL 1486035, at *9 (quoting *Airadigm Commc'ns, Inc. v. FCC (In re Airadigm Commc'ns, Inc.)*, 519 F.3d 640, 657 (7th Cir. 2008)). The release must be narrow in that it applies only to claims "arising out of or in connection with" the reorganization and does not include "willful misconduct." *Airadigm*, 519 F.3d at 657. Further, the release may not provide for "blanket immunity" and must not affect matters beyond the jurisdiction of the court or unrelated to the reorganization. *Id.* "A nondebtor release should only be approved in 'rare cases' ... because it is 'a device that lends itself to abuse.'" *In re Ingersoll Inc.*, 562 F.3d, 856, 865 (quoting *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141, 142 (2d Cir. 2005)).

11. The broad release in Section 10.2 of the Plan releases the Lenders from direct claims and causes of action that RARE Hospitality might pursue against the Lenders based on

their willful breach of the Non-Disturbance Agreement. This broad release violates the law of this Circuit because it applies to claims beyond those “arising out of or in connection with” the reorganization, affects matters beyond the jurisdiction of the Court and unrelated to the reorganization, and includes releases for “willful misconduct.”

RESERVATION OF RIGHTS

12. RARE Hospitality reserves all of its rights to amend or supplement this limited objection and to object to any modifications or amendments to the Plan, including as regards any proposed assumption of the Lease.

WHEREFORE, RARE Hospitality respectfully requests that, if the Plan is to be confirmed, the Lenders be required to assume the Lease and narrow the release of Section 10.2 of the Plan to exclude the direct claims of RARE Hospitality against the Lenders under the Non-Disturbance Agreement. In the absence of such changes, RARE Hospitality respectfully requests that the Court deny confirmation for the reasons stated herein.

Dated: June 6, 2011

RESPECTFULLY SUBMITTED,

By: /s/ Steve Jakubowski
Steve Jakubowski (IL ARDC No. 6191960)
THE COLEMAN LAW FIRM
77 West Wacker Drive, Suite 4800
Chicago, Illinois 60601
Tel: (312) 606-8641
Fax: (312) 444-1028
sjakubowski@colemanlawfirm.com

EXHIBIT A

ND



Doc#: 0706618073 Fee: \$48.00
Eugene "Gene" Moore RHSP Fee: \$10.00
Cook County Recorder of Deeds
Date: 08/07/2007 03:15 PM Pg: 1 of 18

This document was prepared by,
and after recording, return to:

Deutsch, Levy & Engel, Chartered
225 W. Washington Street, Suite 1700
Chicago, Illinois 60606
Attention: Kenneth W. Funk

This space reserved for Recorders use only.

Permanent Tax Index Number[s]:

12-10-100-011
12-10-100-072

Property Address:

Southwest Corner of River Road and Berwyn Avenue, Rosemont, Illinois

SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT

13

This SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT dated as of February 28, 2007 (the "Agreement"), is executed by and among RIVER ROAD RESTAURANT PADS, LLC, an Illinois limited liability company ("Landlord"), RARE HOSPITALITY MANAGEMENT, INC., a Delaware corporation (the "Tenant"), and AMALGAMATED BANK, a bank organized under the laws of the State of New York, as Trustee of the Longview Ultra I Construction Loan Investment Fund, a collective trust fund organized under the laws of the State of New York for itself and in its capacity as administrative agent for San Diego National Bank, a national banking association (for purposes hereof, the "Lender").

RECITALS:

A. The Lender is the mortgagee under that certain Construction Loan Mortgage, Security Agreement and Assignment of Leases and Rents dated February 28, 2007, to be recorded concurrently herewith (the "Mortgage"), which Mortgage encumbers the Real Estate (as hereinafter defined) and secures a principal indebtedness in the amount of Seven Million Five Hundred Thousand and 00/100 Dollars (\$7,500,000.00).

B. The Tenant has entered into that certain lease agreement dated September 18, 2006 with the Landlord (or the Landlord's predecessor-in-interest) (the "Lease Agreement", the Lease Agreement, together with all amendments and modifications thereof, being collectively referred to herein as the "Lease"), pursuant to which the Tenant has leased certain premises (the

9 of 10
257232 Mc
of RECORD FILE Order #

"Leased Premises") on the parcel of land ("Real Estate") legally described on Exhibit "A" attached hereto and made a part hereof.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby covenant and agree as follows:

AGREEMENTS:

1. The Tenant represents and warrants to the Lender that the Lease constitutes the entire agreement between the Tenant and the Landlord with respect to the Leased Premises and there are no other agreements, written or verbal, governing the tenancy of the Tenant with respect to the Leased Premises.

2. The Tenant has executed and delivered to the Lender that certain Tenant Estoppel Certificate dated on or about the date hereof (the "Estoppel Certificate"). The provisions of the Estoppel Certificate are hereby incorporated into this Agreement as if fully set forth in this Agreement in their entirety, and the Tenant acknowledges that the Lender will be relying on the statements made in the Estoppel Certificate in determining whether to disburse the proceeds of the loan secured by the Mortgage and whether to enter into this Agreement.

3. The Tenant covenants with the Lender that the Lease shall be subject and subordinate to the lien and all other provisions of the Mortgage and to all modifications and extensions thereof, to the full extent of all principal, interest and all other amounts now or hereafter secured thereby and with the same force and effect as if the Mortgage had been executed and delivered prior to the execution and delivery of the Lease. Without limiting the generality of the foregoing subordination provision, in the event the Leased Premises or any part thereof shall be taken for public purposes by condemnation or transfer in lieu thereof or the same are damaged or destroyed, the rights of the parties to any condemnation award or insurance proceeds shall be determined and controlled by the applicable provisions of the Lease.

4. The Tenant acknowledges that the Landlord has collaterally assigned to the Lender any and all leases affecting the Real Estate, including the Lease, and the rents and other amounts, including, without limitation, lease termination fees, if any, due and payable under such leases. In connection therewith, the Tenant agrees that, upon receipt of a notice of a default by the Landlord under such assignment and a demand by the Lender for direct payment to the Lender of the rents due under the Lease, the Tenant will honor such demand and make all subsequent rent payments directly to the Lender and Landlord acknowledges and agrees that such payments by Tenant shall satisfy Tenant's payment obligations under the Lease. The Tenant further agrees that any Lease termination fees payable under the Lease shall be paid jointly to the Landlord and the Lender.

5. **The Lender agrees that so long as the Tenant is not in default under the Lease:**

(a) The Tenant shall not be named or joined as a party in any suit, action or proceeding for the foreclosure of the Mortgage or the enforcement of any rights under the Mortgage (unless the Tenant is a necessary party under applicable law); and

(b) The possession by the Tenant of the Leased Premises and the Tenant's rights thereto shall not be disturbed, affected or impaired by, nor will the Lease or the term thereof (including Tenant's exercise of any extension options granted by the terms of the Lease) be terminated or otherwise materially adversely affected by (i) any suit, action or proceeding for the foreclosure of the Mortgage or the enforcement of any rights under the Mortgage, or by any judicial sale or execution or other sale of the Leased Premises, or any deed given in lieu of foreclosure, or (ii) any default under the Mortgage.

6. Prior to pursuing any remedy available to the Tenant under the Lease, at law or in equity as a result of any failure of the Landlord to perform or observe any covenant, condition, provision or obligation to be performed or observed by the Landlord under the Lease (any such failure being hereinafter referred to as a "Landlord's Default"), the Tenant shall: (a) provide the Lender with a notice of the Landlord's Default, specifying the nature thereof, the section of the Lease under which such Landlord's Default arose, and the remedy which the Tenant will elect under the terms of the Lease or otherwise, and (b) allow the Lender not less than thirty (30) days following receipt of notice of the Landlord's Default to cure the same, such thirty (30) day period to run concurrently with the time allowed Landlord under the Lease to cure such default; provided, however, that, if such Landlord's Default is not readily curable within such thirty (30) day period, the Tenant shall give the Lender such additional time as the Lender may reasonably need to obtain possession and control of the Real Estate and to cure such Landlord's Default so long as (a) the Lender has commenced to cure such default within the thirty (30) day period and thereafter diligently and continuously pursues the cure to completion, and (b) if possession is required, the Lender has commenced action to acquire possession within the thirty (30) day period and, immediately upon obtaining possession, commences to cure such default and thereafter diligently and continuously pursues the cure to completion. The Tenant shall not pursue any remedy available to it as a result of any Landlord's Default unless the Lender fails to cure same within the time period specified above.

7. If the Lender or any future holder of the Mortgage shall become the owner of the Real Estate by reason of foreclosure of the Mortgage or otherwise, or if the Real Estate shall be sold as a result of any action or proceeding to foreclose the Mortgage or transfer of ownership by deed given in lieu of foreclosure, the Lease shall continue in full force and effect, without necessity for executing any new lease, as a direct lease between the Tenant and the new owner of the Real Estate as "landlord" upon all the same terms, covenants and provisions contained in the Lease (subject to the exclusions set forth in subsection (b) below), and in such event:

(a) The Tenant shall be bound to such new owner under all of the terms, covenants and provisions of the Lease for the remainder of the term thereof (including the extension periods, if the Tenant elects or has elected to exercise its options to extend the term), and the Tenant hereby agrees to attorn to such new owner and to recognize such new owner as "landlord" under the Lease without any additional documentation to effect

such attornment (provided, however, if applicable law shall require additional documentation at the time the Lender exercises its remedies then the Tenant shall execute such additional documents evidencing such attornment as may be required by applicable law);

(b) Such new owner shall be bound to the Tenant under all of the terms, covenants and provisions of the Lease for the remainder of the term thereof (including the extension periods, if the Tenant elects or has elected to exercise its options to extend the term); provided, however, **that such new owner shall not be:**

(i) liable for any act or omission of any prior landlord (including the Landlord); provided, however, that such non-liability shall in no way diminish Tenant's rights, or the new owner's liability under the Lease, concerning a continuing failure of the new owner, as the successor landlord, to perform the obligations of Landlord under the Lease after the date on which the new owner succeeds to Landlord's interest under the Lease;

(ii) **subject to any offsets or defenses which the Tenant has against any prior landlord (including the Landlord) unless the Tenant shall have provided the Lender with (A) notice of the Landlord's Default that gave rise to such offset or defense, and (B) the opportunity to cure the same, all in accordance with the terms of Section 6 above;**

(iii) bound by any base rent, percentage rent, additional rent or any other amounts payable under the Lease which the Tenant might have paid in advance for more than the current month to any prior landlord (including the Landlord) unless, and only to the extent that, such prepayment is required by the Lease;

(iv) liable to refund or otherwise account to the Tenant for any security or other deposits not actually paid over to such new owner by the Landlord;

(v) bound by any amendment or modification of the Lease made after the date hereof without the Lender's consent, which shall not be unreasonably withheld, conditioned or delayed;

(vi) bound by, or liable for any breach of, any representation or warranty or indemnity agreement contained in the Lease or otherwise made by any prior landlord (including the Landlord); or

(vii) personally liable or obligated to perform any such term, covenant or provision, such new owner's liability being limited in all cases to its interest in the Real Estate (including any rental or revenue or other proceeds therefrom).

8. Any notices, communications and waivers under this Agreement shall be in writing and shall be (a) delivered in person, (b) mailed, postage prepaid, either by registered or certified mail, return receipt requested, or (c) by overnight express carrier, addressed in each case as follows:

To the Lender Amalgamated Bank
1825 K Street NW
Washington, DC 20006
Attention: Roy Dickinson

With a copy to: Amalgamated Bank
15 Union Square
New York, New York 10003
Attention: Ronald E. Luraschi
Executive Vice President

and to: Deutsch, Levy & Engel, Chartered
225 W. Washington Street, Suite 1700
Chicago, Illinois 60606
Attention: Kenneth W. Funk, Esq.

To the Landlord: River Road Restaurant Pads, LLC
333 N. Michigan Ave., #2222
Chicago, Illinois 60601
Attention: David P. Bossy

With a copy to: Schain Burney Ross & Citron Ltd.
222 N. LaSalle Street, Suite 1910
Chicago, Illinois 60601
Attention: Michael E. Ross, Esq

To the Tenant: Rare Hospitality Management, Inc.
c/o Rare Hospitality International, Inc.
8215 Roswell Road, Building 600
Atlanta, Georgia 30350
Attn: Real Estate Department

With a copy to: Rare Hospitality International, Inc.
8215 Roswell Road, Building 600
Atlanta, Georgia 30350
Attn: Legal Department

or to any other address as to any of the parties hereto, as such party shall designate in a written notice to the other party hereto. All notices sent pursuant to the terms of this section shall be

deemed received on the date of delivery. In connection with the courtesy copy to Landlord or Tenant's counsel above, Lender will exercise reasonable efforts to provide copies of any notices given to the Landlord or Tenant, as the case may be, to such party's counsel; however, Lender's failure to furnish copies of such notices shall not limit Lender's exercise of any of its rights and remedies under any document evidencing, securing or governing the Loan from Lender to the Landlord or its rights under this Agreement.

9. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto, their respective successors and assigns and any nominees of the Lender, all of whom are entitled to rely upon the provisions hereof. This Agreement shall be governed by the laws of the State of Illinois.

10. This Agreement may be executed in multiple counterparts and all of such counterparts together shall constitute one and the same Agreement.

11. Tenant, by its execution hereof, is not assuming any liability or obligation under the Mortgage or with respect to the indebtedness secured thereby. Neither the Mortgage nor any other security device executed in connection therewith shall cover or be construed as subjecting in any manner to the lien thereof any trade fixtures, signs or other personal property at any time purchased by Tenant or furnished or installed by Tenant or its permitted subtenants on the Leased Premises, regardless of the manner or mode of attachment thereof.

(Signature Page Follows)

IN WITNESS WHEREOF, the parties hereto have executed this Subordination, Non-Disturbance and Attornment Agreement the day and year first above written.

LANDLORD:

RIVER ROAD RESTAURANT PADS, LLC, an Illinois limited liability company

By: Michael D. Finsel
Name: MICHAEL D. FIRSEL
Its: MANAGER

TENANT:

RARE HOSPITALITY MANAGEMENT, INC., a Delaware corporation

By: _____
Name: _____
Title: _____

LENDER:

AMALGAMATED BANK, a bank organized under the laws of the State of New York, as Trustee of the Longview Ultra I Construction Loan Investment Fund, a collective trust fund organized under the laws of the State of New York, for itself and in its capacity as administrative agent for San Diego National Bank, a national banking association

By: _____
Name: _____
Title: _____

IN WITNESS WHEREOF, the parties hereto have executed this Subordination, Non-Disturbance and Attornment Agreement the day and year first above written.

LANDLORD:

RIVER ROAD RESTAURANT PADS, LLC, an Illinois limited liability company

By: _____
Name: _____
Its: _____

TENANT:

RARE HOSPITALITY MANAGEMENT, INC., a Delaware corporation

By: Eugene I. Lee, Jr.
Name: Eugene I. Lee, Jr.
Title: President

LENDER:

AMALGAMATED BANK, a bank organized under the laws of the State of New York, as Trustee of the Longview Ultra I Construction Loan Investment Fund, a collective trust fund organized under the laws of the State of New York, for itself and in its capacity as administrative agent for San Diego National Bank, a national banking association

By: _____
Name: _____
Title: _____

IN WITNESS WHEREOF, the parties hereto have executed this Subordination, Non-Disturbance and Attornment Agreement the day and year first above written.

LANDLORD:

RIVER ROAD RESTAURANT PADS, LLC, an Illinois limited liability company

By: _____
Name: _____
Its: _____

TENANT:

RARE HOSPITALITY MANAGEMENT, INC., a Delaware corporation

By: _____
Name: _____
Title: _____

LENDER:

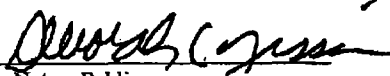
AMALGAMATED BANK, a bank organized under the laws of the State of New York, as Trustee of the Longview Ultra I Construction Loan Investment Fund, a collective trust fund organized under the laws of the State of New York, for itself and in its capacity as administrative agent for San Diego National Bank, a national banking association

By: 
Name: Roy W. Dickinson
Title: Senior Vice President

DISTRICT OF COLUMBIA)
) SS.
)

The undersigned, a Notary Public in and for said DISTRICT OF COLUMBIA, DO HEREBY CERTIFY that ROY W. DICKINSON, the SENIOR VICE PRESIDENT of AMALGAMATED BANK, a bank organized under the laws of the State of New York, as Trustee of the Longview Ultra I Construction Loan Investment Fund, a collective trust fund organized under the laws of the State of New York, a national banking association, as trustee as aforesaid, for itself and in its capacity as administrative agent for San Diego National Bank, a national banking association who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that as such SENIOR VICE PRESIDENT HE signed and delivered the said instrument as his/her own free and voluntary act and as the free and voluntary act of said banking association, as trustee as aforesaid, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this 27TH day of FEBRUARY, 2007.



Notary Public
My Commission Expires: _____
DEBORAH C. NISSON, Notary Public
in and for the District of Columbia
My Commission Expires October 31, 2010

STATE OF _____)
) SS.
COUNTY OF _____)

The undersigned, a Notary Public in and for the said County, in the State aforesaid, DO HEREBY CERTIFY that _____, the _____, of RIVER ROAD RESTAURANT PADS, LLC, an Illinois limited liability company, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument as such _____, appeared before me this day in person and acknowledged that he/she signed and delivered the said instrument as his/her own free and voluntary act and as the free and voluntary act of said limited liability company, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this _____ day of _____, 20__.

Notary Public
My Commission Expires: _____

This document was prepared by,

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

The undersigned, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that _____, the _____ of AMALGAMATED BANK, a bank organized under the laws of the State of New York, as Trustee of the Longview Ultra I Construction Loan Investment Fund, a collective trust fund organized under the laws of the State of New York, a national banking association, as trustee as aforesaid, for itself and in its capacity as administrative agent for San Diego National Bank, a national banking association who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that as such _____, he/she signed and delivered the said instrument as his/her own free and voluntary act and as the free and voluntary act of said banking association, as trustee as aforesaid, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this _____ day of _____, 200__.

Notary Public
My Commission Expires: _____

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

The undersigned, a Notary Public in and for the said County, in the State aforesaid, DO HEREBY CERTIFY that MICHAEL D. FIRSEL, the MANAGER, of RIVER ROAD RESTAURANT PADS, LLC, an Illinois limited liability company, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument as such MANAGER, appeared before me this day in person and acknowledged that he/she signed and delivered the said instrument as his/her own free and voluntary act and as the free and voluntary act of said limited liability company, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this _____ day of _____, 20__.

Diane C. Cunningham
Notary Public
My Commission Expires: 10/31/08



STATE OF ~~ILLINOIS~~ ^{Georgia})
) SS.
COUNTY OF Fulton)

The undersigned, a Notary Public in and for the said County, in the State aforesaid, DO HEREBY CERTIFY that Eugene J. Lee, Jr., the President of Rare Hospitality Management, Inc., a Delaware corporation, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument as such President, appeared before me this day in person and acknowledged that he/she signed and delivered the said instrument as his/her own free and voluntary act and as the free and voluntary act of said corporation, for the uses and purposes therein set forth.

GIVEN under my hand and notarial seal this 26th day of February, 2007.

Kimberley G. Bowers
Notary Public

My Commission Expires:

KIMBERLEY G. BOWERS
Notary Public - State of Georgia
Qualified in Fulton County
My Commission Expires October 14, 2007

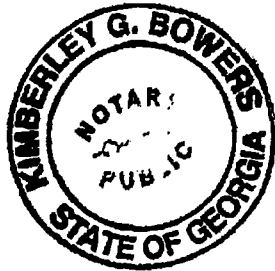


EXHIBIT "A"

LEGAL DESCRIPTION OF REAL ESTATE

PARCEL 3 (aka Proposed Lot 3):

THAT PART OF LOTS 4 AND 5 IN HENRY HACHMEISTERS DIVISIONS, BEING A SUBDIVISION IN THE NORTHWEST QUARTER OF SECTION 10, TOWNSHIP 40 NORTH, RANGE 12 EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO THE PLAT, THERE OF RECORDED APRIL 6, 1908 AS DOCUMENT NO. 4183101 IN COOK COUNTY, ILLINOIS, BEING DESCRIBES AS FOLLOWS:

COMMENCING AT A POINT ON THE WESTERLY RIGHT-OF-WAY LINE OF DES PLAINES RIVER ROAD AS DEDICATED PER DOCUMENT NO. 0030302949, RECORDED MARCH 4, 2003 AND A POINT ON THE SOUTHERLY RIGHT-OF-WAY LINE OF A 66.00 FOOT PUBLIC RIGHT-OF-WAY AS DEDICATED PER DOCUMENT NO. 0030302948, RECORDED MARCH 4, 2003; THENCE SOUTHEASTERLY ALONG SAID WESTERLY RIGHT-OF-WAY LINE HAVING AN ILLINOIS COORDINATE SYSTEM (EAST ZONE) GRID BEARING OF SOUTH 09 DEGREES 39 MINUTES 06 SECONDS EAST, A DISTANCE OF 20.18 FEET TO A POINT ON A LINE 20.00 FEET SOUTH OF (MEASURES PERPENDICULAR TO), AND PARALLEL WITH SAID SOUTHERLY RIGHT-OF-WAY LINE DEDICATED BY DOCUMENT NO. 0030302948, SAID POINT BEING THE POINT OF BEGINNING; THENCE CONTINUING SOUTH 09 DEGREES 39 MINUTES 06 SECONDS EAST, 122.43 FEET ALONG SAID WESTERLY RIGHT-OF-WAY LINE; THENCE SOUTH 87 DEGREES 52 MINUTES 17 SECONDS WEST, 130.29 FEET; THENCE NORTH 02 DEGREES 07 MINUTES 41 SECONDS WEST, 121.40 FEET TO A POINT ON SAID PARALLEL LINE 20.00 FEET SOUTH OF SAID SOUTHERLY RIGHT-OF-WAY LINE DEDICATED PER DOCUMENT NO. 0030302948; THENCE NORTH 87 DEGREES 52 MINUTES 52 SECONDS EAST, 114.26 FEET ALONG SAID PARALLEL LINE TO THE POINT OF BEGINNING, IN COOK COUNTY, ILLINOIS

12-10-100-011
-072

EXHIBIT B

GMRI, INC.

GMRI, Inc. is a wholly owned subsidiary of Darden Restaurants, Inc.

Red Lobster Olive Garden* LongHorn Steakhouse* The Capital Grille* Bahama Breeze* Seasons 52**

Joseph Kern
Division Counsel
Development Law

April 6, 2009

VIA OVERNIGHT MAIL

River Road Restaurant Pads, LLC
c/o Mid-America Development Partners
Attention: Michael Firsel
Suite 350
1110 Jorie Boulevard
Oak Brook, IL 60523

The Harp Group
Attention: Timothy G. Franzen
Suite 604
Two Mid-America Plaza
Oakbrook Terrace, IL 60181

Schain, Burney, Ross & Citron, Ltd.
Attention: Michael E. Ross
222 North LaSalle Street, Suite 1910
Chicago, IL 60601

Re: Lease Agreement dated as of September 18, 2006, between RARE Hospitality Management, Inc., ("Tenant") and River Road Restaurant Pads LLC, ("Landlord") as amended by the First Amendment to Lease dated October 1, 2007 (the "Lease")

Dear Gentlemen:

Pursuant to the provisions of Section 4.05(b) of the Lease, and in particular the second paragraph of said Section 4.05(b), Tenant submitted its request for payment of 50% of the Construction Allowance (as defined in the Lease) on September 30, 2008. To date, Tenant has not received payment of the \$430,000.00 currently owed by Landlord to Tenant pursuant to said Section. Since that time one of the contractors filed then released a claim of lien. A recorded copy of that Release is enclosed with this letter.

Landlord's failure to timely pay the amount due Tenant as set forth above is a default under the Lease. If said sum is not immediately paid to Tenant, Tenant may elect to exercise any

April 6, 2009
Page 2

remedies provided under the Lease, under law or in equity, including without limitation, its rights under Section 15.05(a) of the Lease to offset such amount against rent until Tenant is fully paid. A copy of this notice has been provided to your lender as required by the Lease.

GOVERN YOURSELF ACCORDINGLY,

RARE Hospitality Management, Inc.

By: 

Joseph G. Kern, Division Counsel

Enclosure

cc: Sally Blackmun, Esq. (electronic mail)
Suk Singh (electronic mail)
John Roberts, Esq. (electronic mail)
Amalgamated Bank, Attn: Roy Dickinson (via overnight mail)
Amalgamated Bank, Attn: Ronald E. Luraschi (via overnight mail)
Kenneth W. Funk, Esq. (via overnight mail)

EXHIBIT C

Rare Hospitality International, Inc.

Rare Hospitality International, Inc. is a wholly owned subsidiary of GMRI, Inc.

LongHorn Steakhouse®

The Capital Grille®

Joseph G. Kern
Division Counsel
Development Law
Phone: 407-245-6098
Fax: 407-872-3779
Email: jkern@darden.com

August 3, 2009

VIA OVERNIGHT MAIL

Amalgamated Bank
1825 K Street NW
Washington, DC 20006
Attention: Roy Dickinson

Amalgamated Bank
15 Union Square
New York, New York 10003
Attention: Ronald E. Luraschi

Deutsch, Levy & Engel, Chartered
225 W. Washington Street, Suite 1700
Chicago, IL 60606
Attention: Kenneth W. Funk, Esq.

Re: Lease Agreement dated as of September 18, 2006, between RARE Hospitality Management, Inc., ("Tenant") and River Road Restaurant Pads LLC, ("Landlord") as amended by the First Amendment to Lease dated October 1, 2007 (the "Lease") – SNDA between Landlord and Amalgamated Bank ("Lender") dated February 28, 2007 (the "SNDA")

Dear Gentlemen:

In accordance with the terms of the SNDA, Tenant agreed to notify Lender of any defaults by Landlord under the Lease. Although Tenant has advised Landlord of previous claims of default regarding Landlord's failure to pay the Tenant Allowance under the Lease, Tenant hereby notifies Lender of the continuing default of Landlord as evidenced by the matters set forth in the attached Second Amended Compliant filed by Tenant.

RARE Hospitality Management, Inc.

By: 
Joseph G. Kern, Division Counsel

Enclosure

cc: Sally Blackmun, Esq. (via electronic mail)
Brian Bennett, Esq. (via electronic mail)