

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

BERTUCCI'S HOLDINGS, INC., *et al.*¹

Debtors.

Chapter 11

Case No. 18- 10894 ()

(Joint Administration Requested)

**DEBTORS' FIRST OMNIBUS MOTION FOR ENTRY OF AN ORDER AUTHORIZING
THE DEBTORS TO (I) REJECT CERTAIN UNEXPIRED LEASES *NUNC PRO TUNC*
TO THE PETITION DATE AND (II) ABANDON ANY REMAINING PROPERTY AT
THE REJECTED LOCATIONS**

ANY PARTY RECEIVING THIS MOTION SHOULD LOCATE ITS NAME AND ITS
REJECTED LEASE IDENTIFIED ON EXHIBIT A TO THE PROPOSED ORDER

The above-captioned debtors and debtors-in-possession (the "Debtors") by and through their undersigned counsel, hereby submit the *Debtors' First Omnibus Motion for Entry of an Order Authorizing the Debtors to (I) Reject Unexpired Leases Nunc Pro Tunc to the Petition Date and (II) Abandon Any Remaining Property at the Rejected Locations* (the "Motion"). In support of the Motion, the Debtors state as follows:

JURISDICTION

1. The United States Bankruptcy Court for the District of Delaware (the "Court") has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware* dated as of February 29, 2012. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2), and the

¹ The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Bertucci's Holdings, Inc. (0243), Bertucci's Holdings, LLC (8034), Bertucci's Corporation (1266), Bertucci's, Inc. (7209), Two Ovens Restaurant Corp. (4922), Bertucci's Restaurant Corp. (4750), Bertucci's of Anne Arundel County, Inc. (4761), Bertucci's of Columbia, Inc. (4758), Bertucci's of Baltimore County, Inc. (9001), Bertucci's of Bel Air, Inc. (4759), and Bertucci's of White Marsh, Inc. (4760). The Debtors' corporate headquarters and the mailing address is 155 Otis Street, Northborough, Massachusetts 01532.

Court may enter a final order consistent with Article III of the United States Constitution.²

2. The statutory bases for the relief sought herein are sections 365(a), 105(a) and 554(a) of title 11 of chapter 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (as amended or modified, the “Bankruptcy Code”) together with rule 6006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

BACKGROUND

3. On the date hereof (the “Petition Date”), the Debtors commenced the above-captioned chapter 11 cases (the “Chapter 11 Cases”) by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

4. The Debtors continue to operate their business and manage their properties as debtors-in-possession, pursuant to Bankruptcy Code sections 1107(a) and 1108.

5. Additional information regarding the circumstances leading to the commencement of these Chapter 11 Cases and information regarding the Debtors’ business and capital structure is set forth in detail in the *Declaration of Brian Connell in Support of the Debtors’ Chapter 11 Petitions and First Day Pleadings* (the “First Day Declaration”) ³ filed contemporaneously herewith and incorporated herein by reference.

6. Prior to the Petition Date, the Debtors retained Hilco Real Estate, LLC (“Hilco”) to analyze the Debtors’ real estate leases. Hilco and the Debtors engaged in a comprehensive review of the financial performance of the Debtors’ restaurants and an analysis of their real estate lease portfolio. As a result of this analysis, the Debtors identified certain restaurant

² Pursuant to rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), the Debtors hereby confirm their consent to entry of a final order by this Court in connection with this Motion if it is later determined that this Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

³ Capitalized terms used but not otherwise defined in this Motion shall have the meanings ascribed to them in the First Day Declaration.

locations that were unprofitable and did not fit into the Debtors' go-forward strategy. Hilco also was asked to, among other things, (i) seek to obtain more favorable terms under the Debtors' leases and (ii) identify opportunities to monetize the Debtors' leaseholds for restaurants that were identified as underperforming locations.

7. Based on the Debtors' analysis, the restaurants (collectively, the "Rejected Locations") subject to the unexpired leases set forth on Exhibit A to the Proposed Order (collectively, the "Rejected Leases") were identified as being inconsistent with the Debtors' go-forward business plan based on the Rejected Locations' underperformance. As a result, the Debtors ceased operating at the Rejected Locations on or before the Petition Date and have vacated the premises.

8. Hilco has advised that it received limited interest in the Rejected Leases and were unable to find parties who were willing to purchase the Rejected Leases from the Debtors at a price at which it would be viable for the Debtors to sell the Rejected Leases, taking into account occupancy and transactional costs that would be associated with executing on such transaction.

9. Prior to vacating the Rejected Locations, the Debtors removed personal property that, in their business judgment, has more than *de minimis* value to the Debtors and their estates. However, certain personal property remained at the Rejected Locations when the Debtors tendered possession to the applicable landlords, including, but not limited to, furniture, fixtures and equipment, as well as any leased or other goods owned by third parties under a contractual agreement (collectively, the "Remaining Property"). The Remaining Property was left at the Rejected Locations because it is either prohibitively expensive or difficult to remove, relative to its value, such that the economic benefits of removing the Remaining Property is exceeded by

the attended costs thereof. Therefore, the Debtors request the Court's approval to abandon any Remaining Property at the Rejected Locations.

RELIEF REQUESTED

10. By this Motion, the Debtors request the entry of an order pursuant to Bankruptcy Code sections 365(a), 105(a) and 554(a) authorizing and approving (i) the Debtors' rejection of the Rejected Leases *nunc pro tunc* to the Petition Date and (ii) abandonment by the Debtors of the Remaining Property at the Rejected Locations as of the Petition Date.

BASIS FOR RELIEF REQUESTED

A. Rejection of the Rejected Leases is an Exercise of the Debtors' Sound Business Judgment

11. Bankruptcy Code section 365(a) provides in pertinent part:

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

11 U.S.C. § 365(a).

12. The assumption or rejection of an unexpired lease by a debtor-in-possession is subject to judicial review under the business judgment standard. *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 39-40 (3d Cir. 1989); *In re Fed. Mogul Global, Inc.*, 293 B.R. 124, 126 (D. Del. 2003). If such business judgment has been reasonably exercised, the court should approve the proposed assumption or rejection. *See NLRB v. Bildisco and Bildisco*, 465 U.S. 513, 523 (1984). Generally, a court will approve a debtor's business decision unless the decision is the product of bad faith, whim or caprice. *Fed. Mogul*, 293 B.R. at 126; *In re G. Survivor Corp.*, 171 B.R. 755, 757 (Bankr. S.D.N.Y. 1994) (holding that "[i]n determining whether a debtor may be permitted to reject an executory contract, courts usually apply the

business judgment test. Generally, absent a showing of bad faith, or an abuse of business discretion, the debtor's business judgment will not be altered"). Moreover, rejection of an unexpired lease or executory contract is appropriate where rejection would benefit the estate. *See Sharon Steel*, 872 F.2d at 40.

13. The Debtors have determined in their business judgment that the rejection of the Rejected Leases is reasonable and necessary, which resulted from careful consideration of factors that included the respective benefits and costs related to the Rejected Leases. The Debtors also believe any benefit in continuing to attempt to identify a potential party to acquire the Rejected Leases would likely be substantially outweighed by the cost of maintaining the Rejected Leases and a hindrance to their efforts in these Chapter 11 Cases.

14. As such, the Debtors believe that continuing to accrue potential administrative expenses on account of the Rejected Leases will not offer any additional value to their estates and, thus, immediate rejection of the Rejected Leases is appropriate in order to relieve the burden on the Debtors' estates. In this context, the Debtors, in their sound and reasonable business judgment, believe that the Rejected Leases are no longer necessary for the Debtors' business and that rejecting the Rejected Leases is in the best interests of the Debtors and their creditors and stakeholders.

B. Nunc Pro Tunc Rejection is Appropriate

15. Bankruptcy courts are empowered to grant retroactive rejection of a contract or lease under Bankruptcy Code sections 105(a) and 365(a). Courts have authorized rejection of executory contracts and unexpired leases, including retroactive rejections, based on the equities under the circumstances. *See In re Chi-Chi's, Inc.*, 305 B.R. 396, 399 (Bankr. D. Del. 2004) (acknowledging that a bankruptcy court may approve a rejection retroactive to the date the

motion is filed after balancing the equities in a particular case); *In re Fleming Cos., Inc.*, 304 B.R. 85, 96 (Bankr. D. Del. 2003) (stating that “rejection has been allowed *nunc pro tunc* to the date the [m]otion is filed or the premises is surrendered ...”); *Thinking Machines Corp. v. Mellon Fin. Servs. Corp. (In re Thinking Machines Corp.)*, 67 F.3d 1021, 1028 (1st Cir. 1995) (finding that, “[i]n the section 365 context, this means that bankruptcy courts may enter retroactive orders of approval, and should do so when that balance of equities preponderates in favor of such remediation”); *New Valley Corp. v. Corp. Prop. Assocs. (In re New Valley Corp.)*, No. 98-982, 2000 WL 1251858, at *16 (D.N.J. Aug. 31, 2000) (finding that equities weighed in favor of retroactive rejection to the date the debtor allowed a lessor to resume control of the property).

16. To avoid incurring additional obligations under the Rejected Leases, the Debtors seek to reject the Rejected Leases as of the Petition Date. The Debtors have done all that is required for rejection of the Rejected Leases *nunc pro tunc* to the Petition Date. Specifically, prior to the date of this Motion, the Debtors ceased their operations at the Rejected Locations, unequivocally surrendered the premises and provided actual or constructive notice of their intent to reject the Rejected Leases to the applicable landlords. In addition, the Debtors will serve notice of this Motion by overnight mail on the date it is filed to each of the applicable landlords. The Debtors also acknowledge that they will not withdraw this Motion. Finally, while no creditors’ committee has been appointed, to the extent one is formed, it will have the opportunity to be heard with respect to the relief requested in this Motion.

17. Based upon the foregoing facts and circumstances, the Debtors submit that *nunc pro tunc* rejection of the Rejected Leases is supported by the equities of these cases, that rejection of the Rejected Leases is supported by their sound business judgment, and that rejection is necessary, prudent and in the best interests of the Debtors, their estates, their creditors, and

other parties in interest.

C. Authorizing the Debtors to Abandon Any Personal Property Remaining at the Rejected Locations Is Appropriate

18. To the extent that any Remaining Property remains at any of the Rejected Locations, the Debtors request that this Court approve the Debtors' abandonment of that property pursuant to Bankruptcy Code section 554(a).

19. Bankruptcy Code section 554(a) provides that after notice and hearing, a debtor "may abandon any personal property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a). The right to abandon is virtually unfettered, unless abandonment of the property will contravene laws designed to protect public health and safety and the property poses an imminent threat to the public's welfare. *See In re Midlantic Nat'l Bank*, 474 U.S. 494, 501 (1986). Neither of these limitations is relevant in these Chapter 11 Cases.

20. The Debtors submit that the Remaining Property is of inconsequential value or is otherwise burdensome to their estates to remove from the Rejected Locations. Among other things, the Debtors believe that the cost of retrieving, marketing and reselling the Remaining Property outweighs any recovery that the Debtors and their estates could reasonably hope to attain for such Remaining Property. As a result, the Debtors have determined in their business judgment that abandonment of the Remaining Property, effective as of the Petition Date, is necessary and in the best interests of the Debtors' estates, their creditors and stakeholders.

REQUEST FOR WAIVER OF STAY

21. To implement the foregoing, the Debtors seek a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), any "order authorizing the use, sale, of lease of property other than cash collateral is stayed until the

expiration of 14 days after entry of the order, unless the court orders otherwise.” The Debtors submit that the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtors for the reasons set forth herein. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the 14-day stay imposed by Bankruptcy Rule 6004(h), to the extent applicable.

22. Further, to implement the foregoing immediately, the Debtors also request a waiver of the notice requirements of Bankruptcy Rule 6004(a) to the extent they are deemed applicable.

NOTICE AND NO PRIOR REQUEST

23. Notice of this Motion has been given to the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee for the District of Delaware; (b) the First Lien Lenders; (c) the DIP Lender; (d) each of the Debtors’ creditors holding the twenty (20) largest unsecured claims as set forth in the consolidated list filed with the Debtors’ petitions; (e) the Internal Revenue Service; (f) the United States Department of Justice; (g) all parties who have requested notice in these Chapter 11 Cases pursuant to Bankruptcy Rule 2002; and (h) the counterparties to the Rejected Leases. In light of the nature of relief requested in this Motion, the Debtors respectfully submit that no further notice is necessary.

24. No prior request for the relief sought in this Motion has been made to this or any other court.

WHEREFORE, the Debtors respectfully request that this Court enter an order authorizing the rejection of the Rejected Leases and abandonment of the Remaining Property *nunc pro tunc* to the Petition Date and granting the Debtors such other and further relief as is just and proper.

Dated: April 15, 2018
Wilmington, Delaware

LANDIS RATH & COBB LLP



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*Proposed Counsel to the Debtors
and Debtors-In-Possession*

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

BERTUCCI'S HOLDINGS, INC., *et al.*¹

Debtors.

Chapter 11

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(Joint Administration Requested)

ORDER GRANTING DEBTORS' FIRST OMNIBUS MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS TO (I) REJECT CERTAIN UNEXPIRED LEASES *NUNC PRO TUNC* TO THE PETITION DATE AND (II) ABANDON ANY REMAINING PROPERTY AT THE REJECTED LOCATIONS

Upon the *Debtors' First Omnibus Motion for Entry of an Order Authorizing the Debtors to (I) Reject Unexpired Leases Nunc Pro Tunc to the Petition Date and (II) Abandon Any Remaining Property at the Rejected Locations* (the "Motion");² and the Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware* dated as of February 29, 2012; and the Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Court may enter a final order consistent with Article III of the United States Constitution;³ and the Court having found that venue of this proceeding and this Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that sufficient notice of the Motion has been given; and it appearing that the relief requested by the Motion is necessary and appropriate and in the best interests of the Debtors' estates and their creditors; and

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good and sufficient cause appearing therefor; it is hereby

ORDERED that the Motion is GRANTED as set forth herein; and it is further

ORDERED that pursuant to Bankruptcy Code sections 365(a) and 105(a), the Debtors are authorized to reject the Rejected Leases identified on Exhibit A hereto *nunc pro tunc* to the Petition Date; and it is further

ORDERED that nothing in the Motion or this Order shall be deemed or construed as an approval of an assumption of any lease, sublease or contract pursuant to Bankruptcy Code section 365, and all such rights are reserved; and it is further

ORDERED that pursuant to Bankruptcy Code section 554(a) the Debtors are authorized to abandon any Remaining Property at the Rejected Locations; and it is further

ORDERED that to the extent that Bankruptcy Rule 6004(h) is applicable, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry; and it is further

ORDERED that the Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion; and it is further

ORDERED that this Court shall retain jurisdiction with respect to all matters arising from or related to the implementation or interpretation of this Order.

Dated: _____, 2018
Wilmington, Delaware

United States Bankruptcy Judge

EXHIBIT A

EXHIBIT A**Rejected Leases**

LANDLORD	LANDLORD NOTICE ADDRESS	RESTAURANT NUMBER	RESTAURANT LOCATION
795 Merrick, Inc.	560 5 th Avenue New York, New York 10036	38	Westbury, NY 795 Merrick Avenue Westbury, NY 11590
Bishop's Corner Realty, LLC	600 Loring Avenue Salem, MA 01970	24	West Hartford, CT 330 North Main Street West Hartford, CT 06117
Boston University Office of Rental Property Management	19 Deerfield Street 1 st Floor Boston, MA 02215	123	Kenmore Square, MA 533 Commonwealth Ave. Boston, MA 02215
Brass Mill Center	495 Union Street Suite 139 Waterbury, CT 06706	80	Waterbury, CT 495 Union Street Waterbury, CT 06701
DDR Perimeter Point, LLC	3300 Enterprise Pkwy Beachwood, OH 44122	83	Sandy Springs, GA 1155 Mt. Vernon Hwy Atlanta, GA 30338
Fishman, Martin H.	7121 North Hamlin Lincolnwood, IL 60712 Chicago Title Land Trust Company c/o Chicago Trust Company 10 S. LaSalle Street Chicago, IL 60603 Steven H. Lavin, Esq. Lavin & Waldron, P.C. 1849 Green Bay Road Suite 440 Highland Park, IL 60035	76	Fox River Commons, IL 844 South Route 59 Naperville, IL

LANDLORD	LANDLORD NOTICE ADDRESS	RESTAURANT NUMBER	RESTAURANT LOCATION
The India Building LLC	c/o Lincoln Property Company 84 State Street Boston, MA 02109 Parking 75 State Street Boston, MA 02109	12	Faneuil Hall, MA 22 Merchants Row Boston, MA 02109
InnZen Hospitality	1100 Cornwall Road Suite 115 Monmouth Junction, NJ 08852	114	North Brunswick, NJ 2313 Route 1 South North Brunswick, NJ 08902
Intrum Corporate Management	180 Wells Avenue Suite 104 Newton, MA 02495	14	Wellesley, MA 380 Washington Street Wellesley, MA 02481
King Properties, Ltd.	163 King George Street Annapolis, MD 21401	47	Annapolis, MD 2207 Forrest Drive Annapolis, MD 21401
Newport Office Center VI, LLC	c/o Midstate Management 97-77 Queens Boulevard Rego Park, NY 11374	117	Jersey City, NJ 560 Washington Blvd. Jersey City, NJ 07310
Regency Centers	1919 Gallow Road Suite 1000 Vienna, VA 22182	136	Gainesville, VA 8114 Stonewall Shops Gainesville, VA 20155
Tysons Properties, LLC	c/o Keane Management LLC Attn: Tina Kitto P.O. Box 708 Ashburn, VA 20146	128	Ashburn, VA 4402 Pipeline Plaza Ashburn, VA 20147
Wellesley Centre, L.C.	c/o TGM Realty - Thalhimer 1313 East Main Street P.O. Box 702 Richmond, VA 23218- 0702	124	Short Pump, VA The Shoppes at Westgate 11721 Broad Street Richmond, VA 23233