

HON. KAREN A. OVERSTREET
CHAPTER: 11
LOCATION: SEATTLE
HEARING DATE: MARCH 22, 2013
HEARING TIME: 9:30 AM
RESPONSE DATE: MARCH 20, 2013

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re:

West Seattle Fitness,

Debtor.

NO. 12-18818

TRUSTEE'S OMNIBUS REPLY TO
RESPONSES TO SALE MOTION

Richard A. Hooper (“**Trustee**”), the court appointed chapter 11 trustee in this case, by and through his counsel, hereby files this omnibus reply to the numerous objections/responses (Dkt. Nos. 106 – 164, and 166 – 173) (the “**Responses**”) filed to the Trustee’s *Motion For Order (1) Approving Sale of Assets Free and Clear of Liens Pursuant to Section 363; and (2) Authorizing the Assumption and Assignment, and Rejection, of Certain Executory Contracts Pursuant to Section 365* (the “**Sale Motion**”) (Dkt. No. 94) which was filed in this case on March 5, 2013. Because the response and reply deadlines for the *Trustee’s Motion to Limit Notice of Future Motions/Hearings* (Dkt. No. 99) (the “**Notice Motion**”) have not yet occurred, the Trustee will not be responding to the objections/responses to the Notice Motion at this time and reserves all rights to respond thereto in accordance with the Local Rules.

TRUSTEE'S OMNIBUS REPLY TO RESPONSES TO
SALE MOTION - 1

CAIRNCROSS & HEMPELMANN, P.S.
ATTORNEYS AT LAW
524 2nd Ave, Suite 500
Seattle, WA 98104
office 206 587 0700 fax: 206 587 2308

1 1. Many of the Responses filed appear to have been filed based on a typographical
2 error in the Notice of Hearings sent to the creditors and members of the fitness club located at
3 2629 SW Andover Street, Seattle, WA 98126 operated by the Debtor and commonly known as
4 ALLSTAR FITNESS (the “**Club**”). The Notice of Hearings stated in part:

5 The Trustee also seeks Court approval to (1) assume and assign to the buyer the
6 contracts of those members on month-to-month contracts and those members on
7 prepaid long term memberships who purchased those membership **AFTER** the
8 start of this bankruptcy case on August 27, **2013**, and (2) to reject and terminate
9 the contracts of the remaining long term prepaid members upon the sale of the
10 Club to the buyer.

11 (emphasis added)

12 Accordingly, a number of members believed their contracts would not be assumed and
13 assigned to the Buyer when in fact the underlying motion and purchase and sale agreement made
14 clear that it is the intention of the proposed purchaser of the Club, West Seattle Fitness Club,
15 LLC (the “**Buyer**”), to assume all membership contracts entered into by the Debtor on or after
16 August 27, **2012**, as this bankruptcy case did not commence until August 27, 2012,

17 2. This typographical error was further compounded by what the Trustee discovered
18 to be partially inaccurate records kept by the Debtor with respect to the date of entry of many of
19 the long-term prepaid contracts in its system. In preparing Exhibit B to the Trustee’s Declaration
20 filed in support of the Motion (Dkt. No. 95), the Trustee relied on Club data to prepare a list of
21 those members with contracts dated prior to August 27, 2012. Unfortunately, the data provided
22 by the Club proved inaccurate, as a number of members who entered contracts dated after
23 August 27, 2012 appeared on the list of pre-petition long-term prepaid contracts being rejected.

24 3. In order to further clarify the intentions of the Buyer and the Trustee with respect
25 to which contracts and agreements will be assumed by the estate and assigned to the Buyer, and
26

1 those rejected, the Trustee and Buyer have entered into a First Amendment (the “**Amendment**”)
2 to the Asset Purchase Agreement dated March 1, 2013 (the “**APA**”) attached as **Exhibit A**
3 hereto. The Trustee would further propose that any order approving the Sale Motion reflect
4 similar language.

5
6 4. Most simply put, the Buyer is prepared to assume all rights and obligations of
7 Debtor under all month-to-month contracts (the “**Month-to-Month Contracts**”) and all Club
8 membership and personal training contracts and agreements entered into by the Seller on or after
9 August 27, 2012 and prior to the Closing Date (the “**Post-Petition Member Contracts**”). The
10 Buyer is not prepared and does not wish to assume any Club membership and personal training
11 contracts and agreements entered into by the Seller prior to August 27, 2012 (the “**Pre-Petition**
12 **Contracts**”).

13
14 5. The Pre-Petition Contracts carry with them an estimated collective liability in
15 excess of \$1,000,000. The assumption of these Pre-Petition Contracts would result in months, or
16 years, of obligations to provide services/expenses with no revenue to fund the ongoing
17 operations and expenses of the Club. In the case of some contracts, it would result in a lifetime of
18 such obligations. The forced assumption of the Pre-Petition Contracts would make the Club
19 inoperable from a financial perspective. Further, the Buyer has agreed to assume the Month-to-
20 Month Contracts as well as the Post-Petition Member Contracts despite the fact it will receive no
21 proration or credit for the liability associated with the Post-Petition Member Contracts.

22
23 6. The Trustee appreciates that the structure of the APA and rejection of the Pre-
24 Petition Contracts will result in the loss of a significant number of memberships and the creation
25 of a significant number of unsecured claimants. However, as set forth in the Sale Motion, the
26 deal structured with the Buyer was the only economically viable transaction which would keep

1 the Club in operation under the circumstances. The only other alternative at this point in time is
2 to simply shut the Club doors, terminate all of the employees, and liquidate the equipment, in
3 which case all members would lose their memberships. In the Trustee's business judgment, the
4 proposed sale, and the proposed assumption/assignment and rejection of the member contracts is
5 in the best interests of the estate and should be approved.
6

7 7. With respect to the objection filed by GRE 509 Olive LLC ("**GRE**") (Dkt. No.
8 155), the Trustee believes this objection should be overruled for a number of reasons. First, GRE
9 states it has a security interest in substantially all of the Debtor's assets yet fails to describe how
10 that interest arose, or provide adequate documentation of its claim. As noted by H-P
11 Properties/All Star, LLC (the "**Landlord**"), GRE has not filed a proof of claim in this case, nor
12 has it provided the Court with a security agreement or other document authorizing its filing of a
13 financing statement. The Trustee is currently investigating the Debtor's prior dealings with GRE
14 in an effort to determine whether the transactions leading up to the creation of GRE's purported
15 security interest may give rise to a claim for fraudulent transfer and/or preference. Unfortunately
16 at this time, those investigation and analysis are not yet complete. GRE further questions the
17 Buyer's ability to perform under the APA and conditions precedent to closing. The Buyer is an
18 experienced operator of health and fitness clubs, and according to the Landlord and Buyer, has a
19 lease in place for the building in which the Club operates contingent upon this Court's entry of
20 an order approving the proposed sale.
21

22 8. For the foregoing reasons, the Trustee respectfully requests the Court overrule the
23 Responses and approve the Sale Motion, enabling the Trustee to consummate the sale to the
24 Buyer and ultimately keep the Club open.
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TRUSTEE'S OMNIBUS REPLY TO RESPONSES TO
SALE MOTION - 4

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ATTORNEYS AT LAW
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Seattle, WA 98104
office 206 587 0700 fax: 206 587 2308

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DATED this 21st day of March, 2013.

CAIRNCROSS & HEMPELMANN, P.S.

/s/ Yousef Arefi-Afshar
John R. Rizzardi WSBA No. 9388
Yousef Arefi-Afshar WSBA No. 40754
Attorneys for Chapter 11 Trustee Richard A.
Hooper

FIRST AMENDMENT TO ASSET PURCHASE AGREEMENT

This First Amendment to Asset Purchase Agreement (this "**Amendment**"), dated as of March 21, 2013, is entered into by and between West Seattle Athletic Club, LLC, a Washington limited liability company ("**Buyer**") and West Seattle Fitness, LLC, a Washington limited liability company ("**WSF**" or "**Seller**") by and through its Court appointed Chapter 11 Trustee, Richard A. Hooper (the "**Trustee**").

RECITALS:

A. Buyer and Seller are parties to that certain Asset Purchase Agreement, dated March 1, 2013 (the "**Purchase Agreement**"), Sellers agreed to sell to Buyer and Buyer agreed to purchase from Seller certain assets (the "**Transferred Assets**") utilized in the Business operated by Seller. "**Business**" means the health club business conducted at 2629 SW Andover Street, Seattle, WA 98126 (the "**Club**").

B. Buyer and Seller would like to amend the Purchase Agreement on the terms and conditions set forth herein.

AMENDMENT

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. **Section 1.1(b) and Schedule 1.1(b) – Post-Petition Member Contracts.** Section 1.1(b) is hereby deleted in its entirety and replaced with the following language.

All rights and obligations of Seller under all Club membership and personal training contracts and agreements entered into by the Seller on or after August 27, 2012 and prior to the Closing Date (the "Post-Petition Member Contracts");

Schedule 1.1(b) is deleted in its entirety.

2. **Schedule 1.2(b) – Excluded Contracts.** The text of Schedule 1.2(b) is hereby deleted in its entirety and replaced with the following language.

All contracts and agreements to which the Seller is a party and existing in connection with the operation of the Club and/or Business, which are not expressly being assumed and assigned by Buyer, including, without limitation, the Lease and any Club membership contracts not identified in Sections 1.1(a) or (b) above. For the avoidance of doubt, the "Excluded Contracts" shall include all Club membership and personal training contracts and agreements entered into by the Seller prior to August 27, 2012.

3. **Ratification.** Except as expressly modified by this Amendment, the Purchase Agreement is hereby ratified and affirmed, and remains in full force and effect as originally executed and thereafter amended from time to time. In the event of any conflict between the

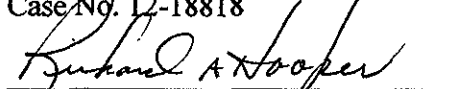
Purchase Agreement and this Amendment, this Amendment shall control over the Purchase Agreement to the extent necessary to give effect the intent of the parties hereunder.

4. **Counterparts.** This Amendment may be executed in counterparts, each of which shall be deemed an original, and when taken together shall constitute a single integrated agreement. Signed counterparts of this Amendment may be delivered by facsimile or other electronic transmission.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date first written above by their respective officers thereunto duly authorized.


Seller:

WEST SEATTLE FITNESS, LLC,
a Washington limited liability company, by and
through its court-appointed Chapter 11 trustee,
RICHARD A. HOOPER, pursuant to that certain
Order Approving Appointment of Trustee, dated
January 14, 2013, by the United States Bankruptcy
Court for the Western District of Washington in
Case No. 12-18818


Richard A. Hooper

Buyer:

WEST SEATTLE ATHLETIC CLUB, LLC,
a Washington limited liability company


By: Sam Adams
Its: Manager