

**IN THE UNITED STATES BANKRUPTCY
COURT FOR THE SOUTHERN DISTRICT OF
TEXAS HOUSTON DIVISION**

In re: Chapter 11

SOUTHERN FOODS GROUP, LLC, *et al.*,
Debtors.

Case No. 19-36313 (DRJ)¹

Jointly Administered

**LIMITED OBJECTION AND RESERVATION OF RIGHTS
TO ASSUMPTION NOTICE (DOC. 1771)**

Bernon Land Trust, LLC (“BLT”), by and through its undersigned counsel, hereby submits this limited objection (the “Objection”) to the *Notice of Proposed Assumption and Assignment of Executory Contracts and Unexpired Leases for Dairy Farmers of America, Inc. [Docket No. 1771](the “Assumption Notice”)*.

In support of this Objection, BLT respectfully states as follows:

¹ The debtors and debtors in possession in these chapter 11 cases, along with the last four digits of their respective Employer Identification Numbers, are as follows: Southern Foods Group, LLC (1364); Dean Foods Company (9681); Alta-Dena Certified Dairy, LLC (1347); Berkeley Farms, LLC (8965); Cascade Equity Realty, LLC (3940); Country Fresh, LLC (6303); Dairy Information Systems Holdings, LLC (9144); Dairy Information Systems, LLC (0009); Dean Dairy Holdings, LLC (9188); Dean East II, LLC (9192); Dean East, LLC (8751); Dean Foods North Central, LLC (7858); Dean Foods of Wisconsin, LLC (2504); Dean Holding Company (8390); Dean Intellectual Property Services II, Inc. (3512); Dean International Holding Company (9785); Dean Management, LLC (7782); Dean Puerto Rico Holdings, LLC (6832); Dean Services, LLC (2168); Dean Transportation, Inc. (8896); Dean West II, LLC (9190); Dean West, LLC (8753); DFC Aviation Services, LLC (1600); DFC Energy Partners, LLC (3889); DFC Ventures, LLC (4213); DGI Ventures, Inc. (6766); DIPS Limited Partner II (7167); Franklin Holdings, Inc. (8114); Fresh Dairy Delivery, LLC (2314); Friendly’s Ice Cream Holdings Corp. (7609); Friendly’s Manufacturing and Retail, LLC (9828); Garelick Farms, LLC (3221); Mayfield Dairy Farms, LLC (3008); Midwest Ice Cream Company, LLC (0130); Model Dairy, LLC (7981); Reiter Dairy, LLC (3675); Sampson Ventures, LLC (7714); Shenandoah’s Pride, LLC (2858); Steve’s Ice Cream, LLC (6807); Suiza Dairy Group, LLC (2039); Tuscan/Lehigh Dairies, Inc. (6774); Uncle Matt’s Organic, Inc. (0079); and Verifine Dairy Products of Sheboygan, LLC (7200). The debtors’ mailing address is 2711 North Haskell Avenue, Suite 3400, Dallas, TX 75204.

BACKGROUND

1. The Debtors filed these bankruptcy cases on November 12, 2019 (the “Petition Date”). On February 17, 2020, the Debtors filed the Sale Motion, and on March 19, 2020, the Court entered an order (the “Bid Procedures Order”) [Docket No. 1178] approving bidding procedures for an auction.

2. On March 19, 2020, the Debtors filed the Notice of Potential Assumption and Assignment of Executory Contracts or Unexpired Leases and Cure Costs [Docket No. 1183]. The Notice contains a schedule listing the potential contracts to be assumed under the Sale Transaction and the proposed cure amounts.

3. On April 5, 2020, the Court entered an order [Docket No. 1572] (the “Sale Order”), among other things, authorizing the sale of certain assets to Dairy Farmers of America, Inc., which refrained from approving any assumption and assignment of any contracts.

4. On April 24, 2020, the Debtors filed the Notice of Proposed Assumption and Assignment of Executory Contracts and Unexpired Leases for Dairy Farmers of America, Inc. [Docket No. 1771].

5. BLT is the successor and current landlord under that certain lease between Rhode Island Hospital Trust National Bank, Trustee under Bernon Land Trust u/d/t January 4, 1977, as landlord and Garelick Farms, Inc. as tenant dated December 30, 1986 (the “BLT Lease”).

6. The Assumption Notice includes the BLT Lease among the executory contracts and unexpired leases intended for assumption and assignment to DFA. The relevant portion of the Assumption Notice sets forth:

772	BERNON LAND TRUST LLC C/O CHACE RUTTENBERG & FREEDMAN LLP ATTN ROBERT B BERKELHAMMER 1 PARK ROW, STE 300 PROVIDENCE, RI 02903	Garelick Farms, LLC	LEASE: BUILDING AND LAND DATED 02/22/2017
773	BERNON LAND TRUST LLC C/O ROBERT B BERKELHAMMER ONE PARK ROW, STE 300 PROVIDENCE, RI 02903	Garelick Farms, LLC	LEASE: BUILDING AND LAND
774	BERNON LAND TRUST LLC C/O ROBERT B BERKELHAMMER ONE PARK ROW, STE 300 PROVIDENCE, RI 02903	Garelick Farms, LLC	LEASE: BUILDING AND LAND

7. Debtors propose to assume and assign only the BLT Lease and no other agreements among BLT and Debtors.

LIMITED OBJECTION

Debtors' Can Only Assume and Assign Those Agreements Specified in the Assumption Notice

8. BLT objects to the assumption and assignment of any agreements between BLT and Debtors that are not listed on the Assumption Notice.

9. Specifically, Debtors cannot assume and assign the Option to Purchase dated June 30, 1997 between Robert Berkelhammer as Trustee of the Bernon Land Trust and Garelick Farms, Inc. (the "Option").

10. Because the Option is not specified in the Assumption Notice, it cannot be assumed and assigned.

The Option Is Not An Executory Contract Under Sec. 365

11. Even if the Debtors amend the Assumption Notice to purportedly include the Option for assumption and assignment, the Option cannot be assumed or assigned because it is not an executory contract under 11 U.S.C. § 365.

12. An executory contract is one under which both parties owe substantial performance. See In re Goodrich Petroleum, Corp., 554 B.R. 817, 821 (Bankr. S.D. Texas 2016).

13. The Option is not executory because BLT “already performed essentially all of its obligations under the contract.” Id.

14. Accordingly, the Option is not an executory contract that Debtors can assume and assign.

RESERVATION OF RIGHTS

15. BLT hereby expressly reserves all rights, including, without limitation, (a) the right to supplement and/or amend this Objection and (b) all claims, defenses, and remedies concerning the Debtors (or other parties), including but not limited to, the right to assert any claims, setoffs, or rights of recoupment under relevant agreements, applicable law or otherwise. Nothing in this Objection is intended to be or should be construed as a waiver by BLT under the BLT Lease, the Bankruptcy Code, or applicable law.

WHEREFORE, for the reasons stated in this Objection, BLT respectfully requests that the Court enter an order that (i) sustains this Objection, and (ii) grants BLT such other and further relief as the Court deems appropriate.

DATED: May 4, 2020

Respectfully submitted,

SINGER & LEVICK, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that Notice of this document will be electronically mailed to the parties that are registered or otherwise entitled to receive electronic notices in this case pursuant to the Electronic Filing Procedures in this District, and to the parties listed below via electronic mail as shown, on this 4th day of May, 2020.

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