

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:

CBC RESTAURANT CORP.,
et al.,

Debtors.

Chapter 11

Case Nos. 23-10245 (KBO), *et seq.*
(Jointly Administered)

**LIMITED OBJECTION OF PENDER, L.L.C. TO NOTICE OF POSSIBLE
ASSUMPTION AND ASSIGNMENT WITH RESPECT TO EXECUTORY
CONTRACTS AND UNEXPIRED LEASES OF THE DEBTORS**

(relates to Docket Nos. 289, 361, 418)

Pender, L.L.C. (“Pender”), by its undersigned attorneys, files this objection (the “Objection”) to the Notice Of Possible Assumption And Assignment With Respect To Executory Contracts And Unexpired Leases Of The Debtors (the “Cure Notice”) (Docket No. 418) and to the sale of assets pursuant to the Motion for Entry of Orders: (I)(A) Approving Bidding Procedures of the Sale of All or Substantially All of the Debtors’ Assets; (B) Authorizing the Debtors to Enter Into Stalking Horse Agreement; (C) Scheduling an Auction and Approving the Form and Manner of Notice Thereof; (D) Approving the Assumption and Assignment Procedures; and (E) Scheduling a Sale Hearing and Approving the Form and Manner of Notice Thereof; (II)(A) Approving the Sale of the Debtors’ Assets Free and Clear of Liens, Claims, Interests and Encumbrances and (B) Approving the Assumption and Assignment of Executory Contracts and Unexpired Leases; and



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(III) Granting Related Relief (Docket No. 289) (the “Sale Motion”) filed by the above-captioned debtors and debtors in possession (collectively, “Debtors”). In support of its Objection, Pender states as follows:

BACKGROUND

1. On February 23, 2023 (the “Petition Date”), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

2. Pender is the landlord of certain real property located at 3903B Fair Ridge Drive, Fairfax, VA 22033 (the “Leased Premises”) upon which one of the Debtors, CBC Restaurant Corp. (the “Debtor”) is the tenant pursuant to that certain Deed of Lease dated February 12, 2013 (the “Original Lease”), as amended by First Amendment to Deed of Lease dated June 30, 2020 (the “First Amendment”), and as amended by Second Amendment to Deed of Lease dated April 21, 2021 (the “Second Amendment,” and together with the Original Lease and the First Amendment, collectively, the “Lease Agreement”). The Debtor was operating its Corner Bakery store on the Leased Premises on the Petition Date and continues to occupy that property.

3. Pursuant to the Lease Agreement, the Debtor is required to make regular monthly payments of minimum rent, as well as operating charges, real estate taxes, utilities, and other charges.

4. The Lease Agreement is an unexpired lease of non-residential real property as that term is used in 11 U.S.C. § 365.

5. On April 7, 2023, the Debtors filed the Sale Motion seeking, among other things, authority to sell substantially all of their assets free and clear of liens, claims, and other encumbrances. As part of that proposed sale, the Debtors also seek to assume and assign certain unexpired leases.

6. On May 1, 2023, the Debtors filed and served the Cure Notice purporting to identify unexpired leases that the Debtors may seek to assume and assign to the successful buyer as part of the proposed sale. Exhibit A of the Cure Notice lists an agreement with Pender for which the proposed cure amount is \$24,165.

OBJECTION TO NOTICE OF CURE COSTS

7. Provided that the requirements of the Bankruptcy Code are satisfied, Pender does not object to, but rather supports, the assignment and assumption of the Lease Agreement and desires to work with the Debtors and any proposed assignee on such assignment. Pender objects to the proposed cure amount,

however, and instead asserts that the actual amount due should be \$69,842.75 as of the May 1, 2023 effective date of the Cure Notice.¹

8. Pender understands that the Debtors intend for any buyer to rely upon the cure amounts listed in Cure Notice, as may be modified by the Debtors or the Court. Pender therefore notes that the actual cure amount stated above does not include: (i) amounts coming due after May 1, 2023, through and including the time of assumption and assignment, (ii) amounts due for operating charges, real estate taxes, utilities, and other charges on account of periods before May 1, 2023 but that did not yet become payable as of May 1, 2023, and (iii) any payments made by the Debtors to Pender after May 1, 2023.

9. The Bankruptcy Code requires the Debtor to cure all defaults under an unexpired lease as of the date of assumption. Section 365(b)(1) of the Bankruptcy Code provides:

- (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 . . . ;

¹ The Cure Notice does not state the date for which the Debtors propose the cure amount, so Pender presumes that they intend the date the Notice was filed with the Court (i.e., May 1, 2023). Pender is presently aware of two transactions occurring after May 1, 2023 that will affect the ultimate cure amount: a \$17,159.81 payment on 5/2/2023 and a \$1,506.73 electricity charge on 5/8/2023. In determining the actual cure amount as of the time of the assumption and assignment of the Lease Agreement, Pender intends to factor in these transactions as well as any other debits or credits after May 1, 2023 that may apply.

- (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
- (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

10. The Debtors are also required to cure all nonmonetary and/or unliquidated obligations under the Lease Agreement including, without limitation, repair and maintenance and tax indemnification obligations under the Lease Agreement. *See* 11 U.S.C. § 365(b)(2); *In re Akron Thermal, L.P.*, No. 07-51884, 2008 WL 1886171, *17 (Bankr. N.D. Ohio Apr. 25, 2008); *In re Fleming Cos., Inc.*, No. 03-10945, 2004 WL 385517, *5 (Bankr. D. Del. Feb. 27, 2004).

11. The Debtors in this case are therefore required to provide (a) adequate assurance that the correct cure cost will be paid and any unliquidated obligations, such as tax indemnification obligations and repair, maintenance and similar obligations (collectively, the “Unliquidated Obligations”) will be cured, and (b) adequate assurance of future performance as mandated by section 365 of the Bankruptcy Code. 11 U.S.C. § 365(b)(1).

12. In addition, Pender is entitled to recover its attorneys’ fees and costs incurred in the enforcement of the covenants and obligations of the Lease

Agreement. *See In re Revco D.S., Inc.*, 109 B.R. 264, 273 (Bankr. N.D.Ohio 1989); *In re Senior Care Ctr., LLC*, 607 B.R. 580, 592 (Bankr. N.D.Tex. 2019). Pender requires payment of these amounts as a condition of the assumption and assignment of the Lease Agreement, and to the extent additional amounts come due after the assumption and assignment of the Lease Agreement, Pender objects to any request by the Debtors or any assignee to limit Pender's recovery or deem a waiver of them by failure to identify them before they come due. These amounts came due after May 1, 2023 so they are not included in the actual amount due listed above, and Pender estimates them at \$2,500.00 at this time (assuming that this Objection is not opposed).

13. Pender objects to any order approving a sale of the Debtors' assets that does not (a) require that the full amount of the cure cost under the Lease Agreement be paid at or prior to assumption and assignment, and (b) provide that any and all Unliquidated Obligations shall be cured at or prior to assumption and assignment or survive the assumption and assignment, and that any assignee shall take the Lease Agreement subject to all of its respective terms and undertake to satisfy all monetary and non-monetary obligations under the Lease Agreement, regardless of whether such obligations could be argued to have existed, occurred, or accrued prior to the assumption and assignment of the Lease Agreement.

14. Finally, Pender reserves the right to require that the Debtors provide information to establish any proposed purchaser's ability to perform under the Lease Agreement, and Pender objects to the approval of any assignment thereof absent such information.

RESERVATION OF RIGHTS

15. Nothing in this Objection is intended to be, or should be construed as, a waiver by Pender of any of its rights under the Lease Agreement, the Bankruptcy Code, or applicable law. Pender expressly reserves all such rights including, without limitation, the right to: (a) supplement and/or amend this Objection to assert any additional objections with respect to the Sale Motion, the Cure Notice, and/or any proposed assumption and assignment of the Lease Agreement; (b) amend the cure costs under the Lease Agreement; (c) assert any additional unliquidated obligations and/or nonmonetary defaults under the Lease Agreement; (d) object to the assumption and assignment of the Lease Agreement to any proposed purchaser with providing adequate assurance of future performance; (e) assert a claim for allowance of administrative expenses under § 503 of the Bankruptcy Code; and (f) demand immediate payment of all amounts due under, and full compliance with, the Lease Agreement to the extent required under § 365(d)(5).

WHEREFORE, Pender respectfully requests that this Honorable Court:

(A) Condition the Debtors' request for assumption (including the assumption and assignment) of the Lease Agreement upon (i) payment of the correct cure cost, including attorneys' fees and expenses, on or before closing, (ii) curing all Unliquidated Obligations prior to closing, or survival of such Unliquidated Obligations after the assumption and assignment, and (iii) the Debtors' providing of adequate assurance of future performance under the Lease Agreement by any proposed assignee thereof; and

(B) Grant Pender such further relief as this Court deems just and proper.

Dated: May 22, 2023
Wilmington, Delaware

Respectfully submitted,

HILLER LAW, LLC

/s/ Adam Hiller

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Attorney for Pender, L.L.C.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 22, 2023, I caused copies of the foregoing Limited Objection of Pender, L.L.C. to Notice Of Possible Assumption And Assignment With Respect To Executory Contracts And Unexpired Leases Of The Debtors to be served via first-class mail, postage prepaid, upon the parties listed on the attached matrix.

Dated: May 22, 2023
Wilmington, Delaware

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