

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

CBC RESTAURANT CORP. *et al.*,¹

Debtors.

Chapter 11

Case No. 23-10245 (KBO)

(Jointly Administered)

Objection Deadline: May 22, 2023 @ 4:00 p.m.

Hearing Date: June 1, 2023 at 9:30 a.m. (EDT)

Re: Docket Nos. 361, 418

**OBJECTION OF CERTAIN LANDLORDS TO NOTICE OF
POSSIBLE ASSUMPTION AND ASSIGNMENT WITH RESPECT
TO EXECUTORY CONTRACTS AND UNEXPIRED LEASES OF THE DEBTORS**

DDRTC Village Crossing, LLC and Regency Centers, L.P. (each, a “Landlord,” and collectively, the “Landlords”), by and through their undersigned counsel, submit this objection (the “Objection”) to the *Notice of Possible Assumption and Assignment With Respect to Executory Contracts and Unexpired Leases of the Debtors* (the “Assumption and Assignment Notice”).² In support of this Objection, the Landlords respectfully state as follows:

PRELIMINARY STATEMENT

1. The above-captioned debtors (collectively, the “Debtors”) are in the midst of a sale process, and have stated that they may seek to assume and assign the Leases (as defined below) to a stalking horse bidder or an unknown successful bidder or backup bidder. The Landlords are not conceptually opposed to assumption and assignment of their Leases to an entity capable of providing adequate assurance of future performance, curing all defaults, and complying with all

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, include: CBC Restaurant Corp. (0801), Corner Bakery Holding Company (3981), and CBC Cardco, Inc. (1938). The Debtors’ service address is 121 Friends Land, Suite 300, Newtown, PA 18940.

² Docket No. 418. Capitalized terms used, but not defined, herein shall have the meanings ascribed to them in the Assumption and Assignment Notice.



provisions of the Lease on a go-forward basis; *however*, as the auction of the Debtors' assets has not occurred yet, it is unclear to whom the Debtors may seek to assign the Leases.

2. The Landlords file this Objection to address two key issues: (i) the cure amount for each Lease must include all amounts due and owing under the applicable Lease and must address all non-monetary defaults that must be cured; and (ii) the Debtors must provide the Landlords with adequate assurance of future performance with respect to the proposed assignee of the Leases.

3. First, in connection with the potential assumption and assignment of the Leases, the Debtors must be required to pay the cure amounts set forth in the column "Landlord Cure Amount" on Exhibit A, attached hereto, plus any additional pecuniary losses suffered by the Landlords, including reasonable attorneys' fees. The Debtors must also cure or provide adequate assurance that they or their assignee will cure all non-monetary defaults under the Leases.

4. Second, to satisfy the Debtors' burden under section 365 of the Bankruptcy Code, the Debtors must furnish the Landlords with sufficient adequate assurance information to determine if any proposed assignee is creditworthy and could be a viable operator of the business, specifically in the context of heightened requirements afforded to counterparties to shopping center leases under section 365(b)(3) of the Bankruptcy Code.

5. Third, as part of adequate assurance of future performance, the Debtors or the proposed assignee must satisfy any Adjustment Amounts (as defined below) which have not yet been billed or have not yet become due under the terms of the Lease. The Debtors or the proposed assignee must also (i) be required to comply with all contractual obligations to indemnify and hold the Landlords harmless with regard to events which occurred before assumption and assignment, but which were not known to the Landlords as of the date of the assumption and assignment, and (ii) continue to timely pay all rent, additional rent, and percentage rent due under the Leases until

the Leases are assumed, assumed and assigned, or rejected pursuant to section 365(d)(3) of the Bankruptcy Code.

6. The Landlords hope to resolve some, if not all, of the issues raised herein with the Debtors consensually, but reserve the right to argue these issues at the hearing.

BACKGROUND

7. The Landlords are the owners or affiliates of or managing agents for the owners of shopping centers located throughout the United States where the Debtors lease retail space pursuant to written leases (each, a “Lease,” and collectively, the “Leases”) for the stores at the locations listed on the attached Exhibit A (collectively, the “Leased Premises”). Most or all of the Leased Premises are located in shopping centers, as that term is used in section 365(b)(3) of the Bankruptcy Code. *See, e.g., In re Joshua Slocum, Ltd.*, 922 F.2d 1081 (3d Cir. 1990).

8. On February 22, 2023 (the “Petition Date”), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) with this Court. Since the Petition Date, the Debtors have continued to manage their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

9. On February 24, 2023, the Debtors filed the *Debtors’ Motion for Entry of Orders: (I)(A) Approving Bidding Procedures for the Sale of All or Substantially All of the Debtors’ Assets; (B) Authorizing the Debtors to Enter Into a Stalking Horse Agreement; (C) Scheduling an Auction and Approving the Form and Manner of Notice Thereof; (D) Approving 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 (III) Granting Related Relief* (the “Sale

Motion”).³ The Sale Motion sought to establish, among other things, (i) bidding procedures for the sale of the Debtors’ assets, including the Leases (the “Bidding Procedures”); (ii) procedures for the assumption and assignment of the Leases to a potential stalking horse bidder, or, alternatively, another party with the highest and best bid at an auction (the “Assignment Procedures”); and (iii) a timeline for the bidding and sale process.

10. On April 20, 2023, the Court entered an order granting certain relief requested in the Sale Motion, specifically approving the Bidding Procedures and Assignment Procedures, with certain modifications (the “Sale Order”).⁴

11. On May 1, 2023, the Debtors filed the Assumption and Assignment Notice, which advises counterparties to certain executory contracts or unexpired leases that such contracts or leases may be assumed and assigned to the Stalking Horse Bidder, Successful Bidder, or Backup Bidder. The Assumption and Assignment Notice also lists the proposed cure amounts for numerous unexpired leases of non-residential real property, including the Leases. For the Leases, the cure amounts listed in the Cure and Assignment Notice are included on Exhibit A, attached hereto, in the column “Debtor Cure Amount.”

OBJECTION

I. The Debtors Must Provide Evidence of Adequate Assurance of Future Performance Under the Leases

A. Adequate Assurance of Future Performance for the Shopping Center Leases

12. In connection with the assumption and assignment of leases, shopping center landlords are afforded special statutory protections under the Bankruptcy Code in the form of

³ Docket No. 289.

⁴ Docket No. 361.

adequate assurance of future performance. *In re Joshua Slocum*, 922 F.2d at 1086; *see also In re Trak Auto Corp.*, 277 B.R. 655 (Bankr. E.D. Va. 2002). Section 365(f)(2) provides:

The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2).

13. Section 365(b)(1) of the Bankruptcy Code provides:

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 . . . ;

(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).

14. In connection with the assumption and assignment of a shopping center lease, adequate assurance of future performance includes adequate assurance:

(A) of the source of rent . . . due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee . . . shall be similar to the financial condition and operating performance of the debtor . . . as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption . . . of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement related to such shopping center; and

(D) that assumption . . . of such lease will not disrupt any tenant mix or balance in such shopping center.

11 U.S.C. § 365(b)(3).

15. The Debtors bear the burden of proving adequate assurance of future performance in connection with the potential assumption and assignment of the Leases. *In re F.W. Rest. Assoc., Inc.*, 190 B.R. 143 (Bankr. D. Conn. 1995); *In re Rachels Indus. Inc.*, 109 B.R. 797, 802 (Bankr. W.D. Tenn. 1990); *In re Lafayette Radio Elecs. Corp.*, 12 B.R. 302, 312 (Bankr. E.D.N.Y. 1981).

16. To determine whether the requirements of adequate assurance of future performance will be satisfied, at a minimum, the Landlords and their attorneys must receive the following information from the proposed assignee of the Leases (collectively, the “Adequate Assurance Information”):

- a. The exact name of the entity that will be designated as the assignee of the Leases and any guarantor;
- b. Audited (or un-audited, if audited is not available) financial statements and any supplemental schedules for the calendar or fiscal years ended 2021, 2022, and 2023 for the proposed assignee and any guarantors;
- c. Any and all documents regarding the proposed assignee’s and any guarantor’s experience operating restaurants;
- d. The number of restaurants the proposed assignee and any guarantor operates and all trade names used;
- e. The proposed assignee and any guarantor’s 2023 and 2024 business plans including sales and cash flow projections;
- f. A statement setting forth the proposed assignee’s intended use of the premises; and

- g. Any financial projections, calculations, and/or financial *pro-formas* prepared in contemplation of purchasing the Leases.

17. The Landlords may also need similar information for the Debtors in the years when the Debtors entered into the Leases to appropriately evaluate the ability of the proposed assignee to provide adequate assurance of future performance.

18. While the Debtors have received certain information for the Stalking Horse Bidder that the Debtors proposed on May 19, 2023, such information does not include all of the information set forth herein, including, but not limited to, paragraph 16. Unless and until the Landlords receive all of the foregoing information about the Stalking Horse Bidder and the Successful Bidder, the Debtors have not satisfied their burden pursuant to 11 U.S.C. § 365(b)(3).

B. *The Leases Must Be Assumed and Assigned Cum Onere*

19. Section 365(b)(3)(C) of the Bankruptcy Code provides that the assumption of a shopping center lease “is subject to all the provisions thereof” 11 U.S.C. § 365(b)(3)(C). Bankruptcy courts have described the assumption of an unexpired lease as “an all-or-nothing proposition – either the whole contract [or lease] is assumed or the entire contract [or lease] is rejected.” *See, e.g., In re CellNet Data Sys., Inc.*, 327 F.3d 242, 249 (3d Cir. 2003).

20. As the court noted in *In re Washington Capital Aviation & Leasing*:

Adequate assurance of future performance by the assignee is important because 11 U.S.C. § 365(k) “relieves the . . . estate from any liability for any breach of such . . . lease occurring after such assignment.” A party subject to a contractually created obligation ordinarily cannot divest itself of liability by substituting another in its place without the consent of the party owed the duty. *See* Douglas G. Baird and Thomas H. Jackson, Bankruptcy 285 (2d ed. 1990) (citing Restatement (Second) of Contracts § 318(3) (1981) (“delegation of performance . . . does not discharge any duty or liability of the delegating obligor”)). While the assignee may be entitled to perform for the original obligor, the original obligor remains ultimately liable until discharged by performance or otherwise. Section 365(k) changes this common law rule and

relieves the estate from all liability under the lease following assignment.

156 B.R. 167, 175 n.3 (Bankr. E.D. Va. 1993); *accord Am. Flint Glass Workers Union v. Anchor Resolution Corp. (In re Anchor Resolution Corp.)*, 197 F.3d 76, 80 (3d Cir. 1999); *see also In re Rickel Home Ctrs., Inc.*, 209 F.3d 291, 299 (3d Cir. 2000) (stating that adequate assurance is “necessary to protect the rights of the non-debtor party to the contract or lease, because assignment relieves the trustee and the estate from liability arising from a post-assignment breach”). The Debtors are not entitled to the benefits and protections of section 365(k) if they do not assume and assign a lease *cum onere* — with all benefits and burdens. *See, e.g., Anchor Resolution Corp.*, 197 F.3d at 80.

21. Furthermore, the Debtors or the proposed assignee must be required to comply with all contractual obligations to indemnify and hold the Landlords harmless for events which occurred before assumption and assignment, but which were not known to the Landlords as of the date of the assumption and assignment. This includes, but is not limited to: (i) claims for personal injury that occurred at the Leased Premises; (ii) damage and destruction to the Leased Premises or property by the Debtors or their agents; and (iii) environmental damage or clean-up. To cure possible pre-assignment, non-monetary defaults and provide adequate assurance of future performance with respect to the indemnification obligations under the Leases, either (a) the Debtors or the proposed assignee must be required to satisfy any and all such claims, notwithstanding anything to the contrary contained in a plan or any court order, or (b) the Debtors must be required to demonstrate or obtain adequate insurance (by purchase of "tail" coverage or otherwise) in order to satisfy potential indemnification obligations based on events or occurrences that occurred prior to the effective date of an assignment. Such claims for indemnity could include claims for personal injury occurring at the Leased Premises where the applicable Landlord is

joined as a party to a lawsuit or for damage and destruction of property by the Debtors or their agents or employees.

22. Finally, the Landlords assert that, if the Debtors seek to assume and assign the Leases, the proposed assignee should be required to execute short-form assumption and assignment agreements with the Landlords in connection with the proposed assignment of the Leases so that the Landlords will be in privity with their new tenant.

II. The Proposed Cure Amounts Are Incorrect

23. The Landlords dispute the cure amounts proposed by the Debtors in the Cure and Assignment Notice. The correct cure amounts for the Leases are set forth on Exhibit A, attached hereto, in the “Landlord Cure Amount” column, which includes an estimate of attorneys’ fees incurred to date. The Landlords reserve the right to amend the cure amounts to include additional amounts that continue to accrue, including non-monetary repair obligations, and any other obligations that arise and/or become known to the Landlords prior to assumption and assignment of the Leases.

24. Pursuant to the Leases, the Debtors are obligated to pay regular installments of fixed monthly rent, percentage rent, and/or gross rent, as well as a share of common area maintenance costs, real estate taxes, and assessments. In addition, prior to assumption and assignment of the Leases, the Debtors are required by section 365(b)(1) of the Bankruptcy Code to cure all outstanding defaults under each respective Lease and compensate the Landlords for any actual pecuniary loss, including the payment of related attorneys’ fees. *See* 11 U.S.C. §365(b)(1)(B). Attorneys’ fees due under the Leases are compensable. *See LJC Corp. v. Boyle*, 768 F.2d 1489, 1494–96 (D.C. Cir. 1985); *In re Bullock*, 17 B.R. 438, 439 (B.A.P. 9th Cir. 1982); *In re Crown Books Corp.*, 269 B.R. 12, 14–15 (Bankr. D. Del. 2001); *In re BAB Enters., Inc.*, 100 B.R. 982, 984 (Bankr. W.D. Tenn. 1989); *In re Westview 74th St. Drug Corp.*, 59 B.R. 747, 757

(Bankr. S.D.N.Y. 1986); *In re Ribs of Greenwich Vill., Inc.*, 57 B.R. 319, 322 (Bankr. S.D.N.Y. 1986). Accordingly, as part of its pecuniary losses, the Landlords are entitled to attorneys' fees in connection with the Debtors' obligation to cure all monetary defaults under the Leases.

III. The Debtors or the Proposed Assignee Must Be Responsible for (A) Payment of Adjustment Amounts When They Come Due in the Ordinary Course of Business, and (B) Satisfaction of Indemnification Obligations

25. To the extent that rent, attorneys' fees, interest, and/or other charges continue to accrue, and/or the Landlords suffer other pecuniary losses with respect to the Leases, the Landlords hereby reserve the right to amend the Landlord Cure Amounts to reflect such additional amounts or to account for year-end adjustments, including, without limitation, adjustments for 2022 and 2023, which have not yet been billed or have not yet become due under the terms of the Leases (the "Adjustment Amounts"). The Debtors or the proposed assignee must be responsible to satisfy all accrued but unbilled obligations under the Leases, including the Adjustment Amounts, if any, when due in accordance with the terms of the Leases, regardless of when such Adjustment Amounts were incurred.

IV. The Landlords Are Entitled to Security

26. In the ordinary course of business, the Landlords require security deposits, letters of credit, or guaranties when leasing (or assessing an assignment of a lease) to certain companies based on their financial information and history. In connection with the proposed assumption and assignment of the Leases, the Landlords hereby demand such security in one of those forms as required by section 365(l) of the Bankruptcy Code, which provides, in pertinent part:

If an unexpired lease under which the debtor is lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

11 U.S.C. § 365(l).

27. Until the exact financials of the proposed assignee are known to the Landlords, the Landlords reserve their right to specify the exact form and amount of such security; however, the Landlords would typically require a parent or personal guaranty in connection with leasing to a new tenant.

V. The Debtors Must Be Responsible for Timely Payment of All Post-Petition Rent and Additional Rent Due Under the Leases Until They Are Assumed, Assumed and Assigned, or Rejected

28. Section 365(d)(3) of the Bankruptcy provides, in pertinent part:

The [debtor] shall timely perform all the obligations of the debtor...arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of [the Bankruptcy Code].

11 U.S.C. § 365(d)(3).

29. The Landlords request that the assumption and assignment of the Leases be conditioned upon the Debtors' timely performance of all obligations arising under the Leases before the Leases are assumed, assumed and assigned, or rejected pursuant to section 365(d)(3) of the Bankruptcy Code, including, without limitation, the payment in full of rent on the first day of each month.

RESERVATION OF RIGHTS

30. The Landlords reserve the right to amend and/or supplement this Objection on any basis, including, without limitation, by adding or supplementing objections to the Debtors' proposed cure amount and by adding or supplementing objections to the adequate assurance of future performance provided by the Debtors or any proposed assignee(s).

CONCLUSION

WHEREFORE, the Landlords request that the Court enter an order:

(i) conditioning the assumption and assignment of the Leases on the Debtors or the proposed assignee (a) providing adequate assurance of future performance in accordance with section 365(b) of the Bankruptcy Code, and (b) promptly paying the cure amounts set forth in the column titled “Landlord Cure Amount” on Exhibit A, plus any additional pecuniary losses suffered by the Landlords, including reasonable attorneys’ fees; (ii) requiring the Debtors or the proposed assignee to continue to comply with all obligations under the Leases, including payment of the Adjustment Amounts and satisfaction of any indemnification obligations in the regular course of business; (iii) requiring the proposed assignee to enter into short-form assumption and assignment agreements with the Landlords; (iv) requiring the proposed assignee to provide security to the Landlords pursuant to section 365(l) of the Bankruptcy Code; and

(v) granting such other and further relief as the Court deems just and proper.

Dated: May 22, 2023

LAW OFFICE OF SUSAN E. KAUFMAN, LLC

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EXHIBIT A**Leased Premises**

<u>Store No.</u>	<u>Shopping Center</u>	<u>Location</u>	<u>Landlord</u>	<u>Debtor Cure Amount</u>	<u>Landlord Cure Amount</u>
181	Village Crossing	Skokie, IL	DDRTC Village Crossing, LLC c/o Nuveen Real Estate Group	\$22,473.00	\$84,160.33
208	Valencia Crossroads	Valencia, CA	Regency Centers, L.P.	\$15,248.00	\$47,964.35
270	Market at Round Rock	Round Rock, TX	Regency Centers, L.P.	\$1,891.00	\$31,923.80

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	
)	Chapter 11
CBC Restaurant Corp., <i>et al.</i> ,)	Bk. No. 23-10245 (KBO)
)	(Jointly Administered)
Debtors.)	

CERTIFICATE OF SERVICE

I, Susan E. Kaufman, Esquire, certify that I am not less than 18 years of age, and that on May 22, 2023, I served the attached *Objection of Certain Landlords to Notice of Notice of Possible Assumption and Assignment With Respect to Executory Contracts and Unexpired Leases of the Debtors* upon the parties listed below as indicated:

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Dated: May 22, 2023

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