

Charles B. Hendricks
State Bar No. 09451050
Emily S. Wall
State Bar No. 24079534
CAVAZOS HENDRICKS POIROT, P.C.
Suite 570, Founders Square
900 Jackson Street
Dallas, TX 75202
Phone: (214) 573-7302
Email: chuckh@chfirm.com

Craig A. Albert, Esq.
Cherry Peterson Landry Albert LLP
8350 N. Central Expressway
Dallas, Texas 75206
Phone: (214) 265-7007
Email: calbert@splalaw.com

Attorneys for David Stephen Donosky

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

	§	
In Re:	§	
	§	Case No. 22-30659 (MVL)
Northwest Senior Housing Corporation, <i>et al.</i> ,	§	
	§	Chapter 11
Debtors.	§	(Jointly Administered)
	§	

**OBJECTION OF DAVID STEPHEN DONOSKY
TO THIRD AMENDED PLAN OF REORGANIZATION**

David Stephen Donosky, aka Steve Donosky Company, (“Donosky”) files this *Objection to the Third Amended Plan of Reorganization of the Plan Sponsors Dated December 19, 2022* [Docket No. 933] (the “Plan”), and in support thereof respectfully shows as follows:

Summary of Argument

Over twenty-five years ago, Donosky was an integral part of the transaction that created the Ground Lease¹ that is the pivotal element of the Debtor's bankruptcy case and plan of reorganization. The term of the Ground Lease is 55 years. Donosky's interest was memorialized in a written agreement² that was acknowledged by the property owner/lessor and the Debtor/lessee. Since the closing of the Ground Lease, Donosky has been paid by the Debtor pursuant to the Ground Lease. Now, after over two decades of payment history, the Debtor seeks to disassociate its obligation to pay Donosky from the Ground Lease, while at the same time seeking to assume and assign the Ground Lease. This is not permitted under Section 365(f) of the Bankruptcy Code, and Donosky objects to any assumption and assignment of the Ground Lease that does not expressly include the Commission Agreement.

Factual Background

1. Intercity Investment Properties, Inc. ("Landlord" or "ICI") was the owner of property consisting of approximately 16.25 acres bounded by Northwest Highway on the south, Edgemere Road on the west, Thackery on the east, and Bandera Avenue on the north in Dallas, Texas (the "Property"). ICI negotiated a Ground Lease Option Agreement entered into as of September 9, 1997 and signed on November 7, 1997 (the "Option Agreement") with the Debtor's predecessor in interest, Northwest Lifecare Joint Venture, a Texas joint venture ("Northwest Lifecare").

2. On November 5, 1997, Donosky and Northwest Lifecare entered into the Commission Agreement. The Commission Agreement has terms that express the intent of the

¹ "Ground Lease" refers to the Ground Lease between Intercity Investment Properties, Inc. as Lessor and Northwest Senior Housing Corporation as Lessee dated November 1999.

² Northwest Lifecare Commission Agreement between Steve Donosky Company and Northwest Lifecare Joint Venture dated November 5, 1997 (the "Commission Agreement").

parties concerning the role of Donosky and how he is paid. Specifically, the Commission Agreement provides:

- a. Donosky is assisting Northwest Lifecare in negotiating the Option Agreement which in turn anticipates the Ground Lease (first recital);
- b. The expectation of Northwest Lifecare, Donosky, and ICI that the Option Agreement will be assigned, and that the assignee will assume “all obligations of Northwest thereunder including the commissions the subject hereof” (second recital) and that Northwest Lifecare and ICI would enter into the Ground Lease and that the commission of Donosky would be agreed to “in the event the Lease is consummated” (third recital);
- c. Donosky would be paid a “Primary Commission” of 2.5% of “Base Rentals due to ICI during the term of the Lease” with Base Rentals being defined as “the annual rental however and whenever paid in all events to ICI pursuant to the Lease, including any and all escalations thereto” (paragraph 1);
- d. The Primary Commission was payable only when the Ground Lease is executed (paragraph 3), and Northwest can reject any proffered lease transaction (paragraph 4);
- e. All covenants of the Commission Agreement shall survive any assignment of the Option Agreement and the Ground Lease (paragraph 6).

3. The Option Agreement between ICI and Northwest Lifecare included terms specifically related to the Commission Agreement and this Objection:

- a. In Section 13.8, the Option Agreement acknowledges the role of Donosky as broker and the payment obligation of Northwest Lifecare to Donosky. This Section also recognizes that Donosky would sign an acknowledgement, but that the

acknowledgement was not essential to and did not change the terms of the Option Agreement. The final terms would be expressed in the Ground Lease.

- b. The Receipt and Acknowledgement states that “[t]he Broker joins in the foregoing Agreement” and acknowledges the effectiveness of the commission obligation is expressly tied to the execution of the Ground Lease.

4. The Ground Lease, in turn, incorporated all of the terms of the parties, including the other agreements contemplated by the parties. Specifically, Section 9.18 of the Ground Lease provides that:

This Lease and those provisions of the Option Agreement continued thereunder as provided therein and those leases and service contracts to be assumed by Lessee hereunder constitute a complete integration of all prior agreements and all oral and written agreements and understandings made and entered into by the parties or their agents.

Thus, the Ground Lease clearly has in view the agreements relating to the Property, including the Commission Agreement, as one of the service contracts that would be assumed by the Lessee.

5. Upon the execution of the Ground Lease in November of 1999, the condition for effectiveness of the Commission Agreement (as contemplated by the Commission Agreement and the Option Agreement) had been met. The performance of the parties confirms this fact. Beginning in early 2000, the Debtor began making monthly payments to Donosky based on a percentage of the Base Rentals. The payments from the Debtor continued for over 20 years based upon the conclusive effect of the Commission Agreement through and including April 2022 – the month of the Debtor’s bankruptcy filing.

6. The Third Amended Disclosure Statement approved by the Court filed on December 19, 2022 [Docket No. 936] (the “Disclosure Statement”) addresses, among other

things, the Ground Lease. The Disclosure Statement states³ that on the Closing Date (as defined in the Plan), the Ground Lease shall be assumed and assigned to a purchaser subject to the rights of the Litigation Trustee as provided in the Plan, and notes the assertion of Donosky that the assumption of the Ground Lease requires assumption of the Commission Agreement. This assertion is disputed by the Plan Sponsors, and this dispute is to be resolved as part of the confirmation process.

Objection

7. Donosky files this Objection to preserve his rights with respect to the Commission Agreement and to assert that the Commission Agreement must be assumed and assigned under the Plan along with any proposed assumption and assignment of the Ground Lease.

8. Donosky is owed approximately \$87,000 under the Commission Agreement as of the filing of this objection, and any assignment of the Ground Lease must also include payment to Donosky under 11 U.S.C. § 365(b).⁴

9. As explained above, the Commission Agreement was an integral part of the Ground Lease. The parties specifically contemplated Donosky's Commission Agreement to be bound up by the bundle of agreements that constitute the Ground Lease. The intention of the parties is demonstrated not only by the express terms of the Commission Agreement but also by the conduct of the parties that continued for over two decades.

10. The Commission Agreement is an integral part of an executory contract. Not only has the Debtor been performing under that agreement according to its terms, Donosky remains obligated with respect to the indemnity rights of the Debtor and the Lessor of the Ground Lease.

³ Docket No. 934, page 45, paragraph 3.

⁴ The exact cure amount owed to Donosky is based upon actual Base Rent charged under the Ground Lease post-petition, which amount is not known to Donosky at this time.

Moreover, the terms of the Commission Agreement are dependent upon the Ground Lease. The definition of Base Rentals in the Commission Agreement incorporates the rentals contemplated by the Ground Lease.

11. Section 365(f) states the conditions under which a debtor may assume and assign an executory contract. A debtor must assume all of the obligations associated with the executory contract and does not have the right to pick and choose which obligations to be bound by and which it can leave behind. In order to assign an executory contract, the assignee has to provide adequate assurance of future performance as to the obligations of the contract. Section 365 has no provision allowing the debtor or an assignee to cherry pick which obligations in an executory contract they wish to assume and which they may wish to discard.

12. Because the Commission Agreement is inextricably intertwined with the Ground Lease, as ratified by the parties' performance for over 20 years, Donosky objects to any assumption and assignment of the Ground Lease that does not expressly include assumption and assignment of the Commission Agreement and cure in the form of payment to Donosky of all post-petition commissions he is owed.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Donosky prays that the Court enter its order sustaining his objection, finding that the Commission Agreement must be assumed and assigned under the Plan as part of any assumption and assignment of the Ground Lease, finding that defaults under the Commission Agreement must be cured in order for its assumption and assignment as part of the assumption and assignment of the Ground Lease, and for such other and further relief to which Donosky may be entitled.

Respectfully submitted,

/s/ Charles B. Hendricks

Charles B. Hendricks
State Bar No. 09451050
Emily S. Wall
State Bar No. 24079534
CAVAZOS HENDRICKS POIROT, P.C.
900 Jackson Street, Suite 570
Dallas, TX 75202
Phone: (214) 573-7302
Email: chuckh@chfirm.com
Email: ewall@chfirm.com

Craig A. Albert, Esq.
Cherry Peterson Landry Albert LLP
8350 N. Central Expressway
Dallas, Texas 75206
(214) 265-7007 Telephone
(214) 265-7008 Facsimile
calbert@splalaw.com

Attorneys for David Stephen Donosky

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Objection was served on February 14, 2023, by electronic transmission through the Court's automated Case Management and Electronic Docketing System for the U. S. Bankruptcy Court for the Northern District of Texas on all parties-in-interest submitting to service of papers in this case by said means, including counsel for the Debtors, Lifespace, UMB Bank, N.A., the Committee, and the United States Trustee.

/s/ Charles B. Hendricks

Charles B. Hendricks