UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	§	**Chapter 11**
	§	
NEIGHBORS LEGACY HOLDINGS, INC, *et al*	§	**Case No. 18-33836 (MI)**
	§	
	§	
	§	**Jointly Administered**

OBJECTION OF CLEAR CHANNEL OUTDOOR, INC. TO DEBTORS' NOTICE OF CURE RELATED TO EXECUTORY CONTRACTS SUBJECT TO POSSIBLE ASSUMPTION

NOW COMES Clear Channel Outdoor, Inc. ("CCO"), and hereby submits this objection (the "Objection") to the Debtors' Notice of Executory Contracts and Unexpired Leases Subject to Possible Assumption and Assignment, and Proposed Cure Amounts filed on August 15, 2017 (Docket No. 236) (the "Assumption and Cure Notice"), which Objection is submitted pursuant to the protocols set forth in the Order (A) Authorizing and Scheduling an Auction for the Sale of Debtors' Assets and (B) Approving Auction and Bid Procedures entered by this Court on August 8, 2018 (Docket No. 203) (the "Sale Procedures Order"),. In support of the Objection, CCO states the following:

BACKGROUND

1. On July 12, 2018 (the "Petition Date"), the related Debtors herein each filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of Texas, Houston Division (the "Court").

2. The Debtors continue to operate their businesses as debtors-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

3. Prior to the Petition Date, CCO entered into several contracts with certain of the Debtors (the "CCO Contracts")[1] whereby CCO provides the Debtor(s) with advertising/display services consisting of the display, at certain specified locations, certain media/messaging provided by the applicable contracting Debtor(s). Specifically, the CCO Contracts relevant to the Sale Motion (defined *infra*) and Assumption and Cure Notice are identified as follows:

Contract No.	Location
9947648	Baytown
9947610	Bellaire
9948507	Crosby
10008869	Kingwood
9947649	Pasadena
9947613	Pasadena
9947695	Yorktown
9947576	Yorktown
9947611	Yorktown

4. Each of the CCO Contracts contains a provision precluding the assignment of same without CCO's consent. Specifically, paragraph 8 (b) of the each contract provides that "[c]ustomer may not assign or transfer this contract without first obtaining the written consent of Clear Channel, nor is Clear Channel required to post, install, or maintain any material under this contract for the benefit of any person or entity other than the Customer named in the Sales Contract." Additionally, paragraph 8 (a) of each contract provides that same is to be governed by the laws of the State of New York.

5. Pursuant to paragraph 3 of each of the contracts, CCO "at its sole discretion, may reject or remove any advertising material, art or copy…."

[1] Copies of the CCO Contracts are attached hereto as Exhibit "A".

6. Additionally, paragraph 4 of each of the contracts requires the counterparty to produce content and artwork for the displays at its sole cost and expense, regardless of whether such content is static or digital.

7. On July 12, 2018 the Debtor moved for an Order Approving Auction and Bid Procedures, Scheduling an Auction and Authorizing Assumption and Assignment of Executory Contracts and Leases (the "Sale Motion") (Docket No. 20). On August 8, 2018 the Court entered the Sale Procedures Order. Among the attachments to said Order was a Purchase and Sale Agreement executed between the Debtors and stalking horse purchasers Altus Health Systems Opco, LLC and Altus Health System Realty, LLC for the purchase of the Debtors' Houston Assets. That said, the Sale Procedures Order contemplates an auction so the ultimate purchaser approved by the Court could be a party or parties other than the stalking horse purchasers.

8. On August 15, 2018, the Debtors filed the Assumption and Cure Notice (Docket No. 236) required under the Sale Procedures Order, which Notice includes an Exhibit A which identifies certain executory contracts that they may assume and assign in connection with the proposed sale of the Debtors' Houston Assets, and the proposed cure costs in connection with any such assumption and assignment.

9. The Assumption and Cure Notice has five (5) separate entries identifying certain of the CCO Contracts; two (2) of which identify specific contracts by number, with the remaining three (3) listings designated solely by geographic location. Certain of those geographic locations involve multiple contracts. he Assumption and Cure Notice specifically identifies the following CCO Contracts subject to possible assumption with the corresponding proposed cure amounts:

Contract No.	Contracting Debtor	Cure Amount	Location
9947588[2]	Neighbors Health, LLC and NEC Baytown Emergency Center, LP	$990.55	Baytown
9947610	Neighbors Health, LLC and NEC Bellaire Emergency Center, LP	$2,732.14	Bellaire
9947655[3]	Neighbors Health, LLC and NEC Crosby Emergency Center, LP	$484.20	Crosby
No contract # listed	Neighbors Health, LLC and NEC Kingwood Emergency Center, LP	$405.45	Kingwood
No contract # listed[4]	Neighbors Health, LLC and NEC Pasadena Emergency Center, LP	$2,943.92	Pasadena
No contract # listed[5]	Neighbors Health, LLC and NEC Yorktown Emergency Center, LP	$3,073.28	Yorktown
Total		$10,629.54	

10. The Notice of Assumption and Cure is vague and unclear as to the CCO Contracts that are asserted to be subject to Assumption and Assignment. In two (2) cases, the listed Contract No. is inaccurate. In three (3) other cases, there is no Contract No. listed, and in two (2) of those cases, the listed locations involve multiple contracts. As to the multiple contract locations, it is unclear whether the Debtors are proposing to assume all of the CCO contracts associated with the listed location, or a subset of said contracts.

11. In addition to the inaccuracies in identification, CCO is presentlyunable to verify the proposed cure amounts listed by the Debtor and therefore files the Objection to prevent those figures from becoming final and non-challengeable as of the August 23, 2018 deadline. CCO believe it can confirm the account balances and/or otherwise resolve the issue with the Debtors prior to the Sale Hearing Date. To the extent the issues cannot be resolved and to the

[2] Per paragraph 4, *supra*, this Contract No. is actually 9947648.

[3] Per paragraph 4, *supra*, this Contract No. is actually 9948507.

[4] Per paragraph 4, *supra*, there are actually two (2) contracts for this location.

[5] Per paragraph 4, *supra*, there are actually three (3) contracts for this location.

extent otherwise appropriate, CCO will file an Amendment to this Objection setting forth its calculation of the necessary cure amounts. CCO also notes that the proposed cure amounts set forth in the Notice of Assumption and Cure do not include any post-petition fees due to CCO,[6] nor do they include CCO's actual pecuniary losses arising from the Debtors' defaults which items would likewise be properly included in any cure amount calculated under 11 U.S.C §365(b)(1)(B).

OBJECTION AND RESERVATION OF RIGHTS

12. CCO is open to the concept of Assumption and Assignment as long as same is accomplished consistent with 11 U.S.C §365, as long as the proposed cure amounts are accurate and as long as the ultimate purchaser is acceptable to CCO and CCO otherwise consents to the Assumption and Assignment. Having said that, based on the ambiguities and inaccuracies in the Assumption and Cure Notice, and based upon the uncertainties as to the identity and wherewithal of the ultimate purchaser, CCO cannot consent at this time and therefore objects and otherwise reserves its rights as to any proposed assumption, pending clarification and or further negotiation.

A. The Proposed Assumption of the CCO Contracts Does Not Satisfy The Requirements of 11 U.S.C. §365.

13. A bankruptcy court order is required for a debtor to assume an executory contract. 11 U.S.C. §365(a). The legislative history indicates that in permitting assumption, bankruptcy courts must protect the non-debtor's bargain, including nonmonetary considerations, under all contracts. H.R. Rep. No. 595, 95th Cong. 1st Sess. 348 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6034-6305; see also, In re Ionosphere Clubs, Inc., 85 F. 3d 992, 999 (2d Cir. 1996)

[6] There may be post-petition balances outstanding as of the closing of any approved sale which post-petition charges would not only be allowable as Chapter 11 administrative expenses, but would also be properly payable as part of the Debtor's cure obligation.

(Congress' intent in imposing cure and adequate assurance conditions on ability of bankruptcy debtor to assume executory contract was to ensure that contracting parties receive full benefit of the bargain if they are forced to continue performance).

14. The Bankruptcy Code provides that, subject to court approval, a debtor may assume or reject any executory contract or unexpired lease to which it is a party. 11 U.S.C. § 365(a). There is no doubt that the CCO Contracts are executory contracts. A contract is executory if the parties' obligations under the contract "are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." In re Pacific Express, Inc., 780 F.2d 1482, 1487 (9th Cir. 1986) (citing Countryman, Executory Contracts in Bankruptcy: Part I, 57 Min. L. Rud. 439, 460) (1973)).

15. Where there has been a default in an executory contract, as there has been with the CCO Contracts a debtor must clear three (3) specific hurdles as a condition of assumption: That is,

> (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 . . . ;
> >
> > (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).

16. Compliance with each requirement is required before assumption can be approved. See In re Rachels Industries, Inc., 109 B.R. 797, 802 (Bankr. W.D. Tenn. 1990) (citations omitted). The party seeking to assume the executory contract bears the burden of proving that the contract is one subject to assumption and that all of the requirements for assumption have been met. Id.

17. By this Objection and its proof of claim, submitted substantially contemporaneously herewith, CCO has established material defaults under the CCO Contracts. That is, the Sale Motion does not satisfy the statutory requirements for assumption of the CCO Contracts as the Debtor (i) has not accurately identified the contracts it seeks to assume; (i) has not accurately identified the amount necessary to cure the pre- and post-petition monetary defaults; and does not propose to compensate CCO for the actual pecuniary loss suffered as a result of the Debtors' defaults. Furthermore, as the ultimate purchaser is presently unknown, the Debtor cannot be said to have provided adequate assurance of future performance under the CCO Contracts.

(i) The Debtor Must Cure the Defaults Under the CCO Contracts.

18. As a condition of assumption, the Debtor is required to cure the defaults under the CCO Contracts or provide adequate assurance that such defaults will be promptly cured. 11 U.S.C. §365(b)(1)(A). CCO is owed pre-petition fees due under the CCO Contracts in at least the amount set forth by the Debtors in the Notice of Assumption and Cure. CCO may be also be owed post-petition fees in an amount to be determined, with such post-petition fees continuing to accrue through closing. As a pre-condition of assumption of the CCO Contracts, the Debtors, *inter alia*, must be required to cure the full and actual amount of the monetary default(s) by paying the amount of the then outstanding pre-petition and post-petition indebtedness to CCO, or provide adequate assurance that such defaults will be cured shortly after assumption.

(ii) The Debtors Have Not Compensated CCO For Actual Pecuniary Loss.

19. In order to satisfy the second pre-condition of assumption, the Debtor must compensate CCO for "actual pecuniary loss" resulting from the defaults under the CCO Contracts which the Debtor seeks to assume. 11 U.S.C. §365(b)(1)(B). In addition to the unpaid fees, CCO is entitled to repayment of its costs and expenses associated with the default(s), including reasonable attorneys' fees and other costs of collection. See In re Entertainment, Inc., 223 B.R. 141, 149 (Bankr. N.D. Ill. 1998). In addition to legal fees, actual pecuniary loss could include, among other things, expenses caused by a change in advertiser/customer. That is, to the extent the CCO Contracts are assumed and assigned to a new party, CCO would have a new customer and, arguably, the content in each of the installations covered under the assumed contract(s) would have to be swapped out. Even though the CCO Contracts require the counterparty to produce all content at their own cost and expense, the mechanics involved in switching out content could result in cost and expense to CCO as part of that process. Such costs should be deemed a cost of "content" and be payable by the customer under the contract(s) but, to the extent they are not, same would be a pecuniary loss suffered by CCO and payable by the Debtors as a condition of assumption

(iii) The Debtors Have Provided No Assurance of Future Performance.

20. The final prong of 11 U.S.C. §365(b)(1) requires the Debtor(s) to provide adequate assurance of future performance under the CCO Contracts. The Sale Motion is devoid of any proffer of adequate assurance of future performance with respect to the CCO Contracts to be assumed. See In re Ok Kwi Lynn Candles, Inc., 75 B.R. 97, 102 (Bankr. N.D. Ohio 1987) (denying assumption because of want of adequate assurances). CCO reserves the right to object to the adequacy of any assurance of future performance which the Debtor may proffer in the future.

B. The CCO Contracts are Personal Service Contracts and Cannot be Assigned without CCO's Consent.

21. Under Section 365(c) of the Bankruptcy Code an executory contract that cannot be assigned under applicable non-bankruptcy law may not be assumed and assigned by a trustee or a debtor-in-possession without permission of the contracting party. Lawrence P. King, *et al*., 3 Collier on Bankruptcy ¶365.06[1] (15th ed. 1997). Section 365(c)(1) of the Bankruptcy Code provides that a debtor-in-possession may not "assume or assign any executory contract ... whether or not such contract ... prohibits or restricts assignment of rights or delegation of duties" if:

> (1) (A) applicable law excuses a party, other than the debtor, to such contract .. from accepting performance from ... an entity other than the debtor or the debtor in possession, whether or not such contract ... prohibits or restricts assignment of rights or delegation of duties; and
>
> (B) such party does not consent to such assumption or assignment ....;

11 U.S.C. §365(c)(1) (emphasis added).[7]

22. It is also a well-settled precept of law that a party may not assign a contract that is personal to that party. See In re Catapult Entertainment, Inc., 165 F.3d 747 (9th Cir. 1999).

[7] Indeed, the plain language of 11 U.S.C. §365(c)(1) requires application of a "hypothetical test," under which a debtor-in-possession may not even assume an executory contract over objection if applicable law bars the assignment of the contract, even if the debtor-in-possession does not intend to assign the contract to any other party. In re Catapult Entertainment, Inc., 165 F.3d 747, 750 (9th Cir.), cert. denied, 528 U.S. 924, 120 S.Ct. 369, 145 L.Ed. 2d 248 (1999). Accord In re James Cable Partners, 27 F.3d 534, 537 (11th Cir. 1994); In re West Elec. Inc., 852 F.2d 79 (3rd Cir. 1988).

This concept is plainly illustrated in the case of In re West Electronics, Inc., 852 F 2d 79 (3rd Cir. 1988). In that case, the Debtor contracted with the United States government to supply missile launcher equipment to the Air Force. After the Debtor filed for bankruptcy, the government moved for relief from the automatic stay in order to terminate the contract. The Bankruptcy Court denied the government's motion. After the District Court affirmed, the Third Circuit reversed and held that the government should have granted stay relief to terminate the contract. In so holding, the Third Circuit analyzed Section 365(c)(1) of the Bankruptcy Code and its legislative history, and concluded that if non-bankruptcy law provided that the government would have to consent to an assignment of the contract, then the Debtor would not be able to assume the contract without the government's consent. Specifically, the Third Circuit states:

> Thus, if non-bankruptcy law provides that the government would have to consent to an assignment of the West contract to a third party, i.e., someone "other than the debtor or debtor in possession," then West, as the debtor in possession, cannot assume the contract. This provision limiting assumption of contracts is applicable to any contract subject to a legal prohibition against assignment.

Id. at 83 (citations omitted)

"Whether the personality of one or both of the parties is material depends on the intention of the parties, as shown by the language which they have used, and upon the nature of the contract." In re Magness, 972 F.2d 689, 696 (6th Cir. 1992).

23. Generally speaking, a personal service contract can be said to involve the performance of non-delegable duties, requiring the exercise of special judgment, taste, skill or ability. 6A C.J.S. *Assignment* § 32 (1975). Here, the nature of the CCO Contracts, particularly the requirement that CCO approve the subjective content to be displayed under the contracts, renders the CCO Contracts and services provided thereunder personal in nature. As such, provided that applicable non-bankruptcy law excuses CCO from performance as to a party other than the Debtor(s), then the CCO Contracts cannot be assigned to a third party without CCO's consent.

24. Personal service contracts are typically not assignable, as assignment would also require the delegation of duties. *See, e.g.*, In re Terrace Apartments Ltd., 107 B.R. 382 (Bankr. N.D. Ga. 1989); In re Pioneer Ford Sales Inc., 729 F.2d 27(1st Cir. 1984). State contract law is applicable non-bankruptcy law that may excuse contractual performance and prevent the assumption/assignment of a personal services contract without consent of the contracting party. In re Pioneer Ford Sales Inc., 729 F.2d at 28-29. Specifically, under New York State law, which governs the CCO Contracts, personal services contracts are not assignable. See In re Compass Van & Storage Corp., 65 B.R. 1007, 1010 (Bankr. E.D.N.Y. 1986) ("The nonassignability imprint of personal service contracts is firmly established New York law. 6 Am. Jur. 2d *Assignments* § 11 (1963). The general rule has been extended to encompass contracts with corporations as well as individuals. New York Bank Notes Co. v. Hamilton Bank Note Engraving & Printing Co., 180 N.Y. 280, 293, 73 N.E. 48, 52 (1905)); see also In re D. H. McBride & Co., 132 F. 285, 288

(S.D.N.Y. 1904) ("Rights arising out of contracts involving a relation of personal confidence cannot be transferred *in invitum.")(citations omitted)*

25. Because the advertising/messaging is displayed on property and equipment owned or controlled by CCO, it can be perceived by consumers as a reflection on CCO. Accordingly, CCO is extremely particular over what may be displayed on its systems and who may contract for such displays. CCO is also careful to insure that its contracts provide for its consent and approval as to all displays, so that CCO will not find itself associated with unsuitable content and/or unsuitable customers.

26. The majority of Circuit Courts of Appeal which have addressed the issue are in accord. In the Catapult Entertainment case, the debtor was barred from assuming patent licenses without the licensor's consent. The court specifically noted that federal patent law constitutes "applicable law" within the meaning of section 365(c) and that nonexclusive patent licenses are "personal and assignable only with the consent of the licensor." Catapult, 165 F.3d at 750 (citing Everex Sys. V. Cadtrak Corp. (In re CFLC, Inc.), 89 F.3d 673, 680 (9th Cir. 1996). Consequently, the court held that the Debtor was precluded from assuming the patent licenses on the basis that applicable non-bankruptcy law excused the licensor from accepting performance from any hypothetical third party – even though the Debtor had not intended to assign the contract to a third party. Id. at 747-54. See also RCI Tech Corp. v. Sunterra Corp. (In re Sunterra Corp.), 361 F.3d 257, 262-71 (4th Cir. 2004) (holding that debtor was precluded from assuming a computer software licensing agreement because applicable copyright law excused the other party to the contract from accepting performance from a hypothetical third party – even though the debtor had not intended to assign the contract to a third party).

C. The CCO Contracts are an Integrated Transaction and Therefore Must be Assumed or Rejected *en toto*.

27. An executory contract may not be assumed in part and rejected in part. Century Indem. Co. v. Nat'l Gypsum Co. Settlement Trust (In re National Gypsum Co.), 208 F.3d 498, 506 (5th Cir. 2000) (citing COLLIER ON BANKRUPTCY § 365.03[1]). "Where the debtor assumes an executory contract, it must assume the entire contract, *cum onere*—the debtor accepts both the obligations and the benefits of the executory contract." In re National Gypsum Co., 208 F.3d at 506 (*citing* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 531, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984)). A debtor may not assume parts of a single, indivisible agreement while rejecting other parts. It must assume or reject an agreement *in toto*. Sharon Steel Corp. v. Nat'l Fuel Gas Distribution Corp., 872 F.2d 36, 40 (3d Cir. 1989); In re Teligent, Inc., 268 B.R. 723 (Bankr. S.D.N.Y. 2001); In re Buffets Holdings, Inc., 387 B.R. 115, 119 (Bankr. D. Del. 2008).

28. State law governs the question of whether an agreement is divisible or indivisible for the purposes of assumption or rejection under the Bankruptcy Code. Buffets Holdings, 387 B.R. at 120; Teligent, 268 B.R. at 728. The CCO Contracts herein are governed by New York law. Under New York law, the test for severability depends on the intent manifested by the parties viewed in the surrounding circumstances. In re Teligent, 268 B.R. at 728; Rudman v. Cowles Commc'ns, Inc., 30 N.Y.2d 1, 13, 280 N.E.2d 867, 873 (1972).

29. Here, Debtor Neighbor's Health, LLC is a co-signatory for each of the CCO Contracts along with a specified operating LLC in the locality of the advertising display. The contracts are, on a substantive basis, substantially identical in terms of the nature of same and the services to be provided. It is CCO's position that same represent an integrated transaction whereby CCO was to provide advertising/display services for Neighbor's Health LLC and its affiliates at

specified locations. As an integrated transaction, the Debtor(s) cannot pick and choose among them, but rather must assume, or reject, the CCO Contracts, *en toto*.

WHEREFORE, Clear Channel Outdoor objects to the Assumption and Cure Notice and reserve all rights with respect to the CCO Contracts and/or other agreements between the Debtors and CCO.

Dated: August 23, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 23, 2018, I caused the attached Objection to be electronically filed with the Clerk, United States Bankruptcy Court, Southern District of Texas, by ECF and a true and correct copy of the foregoing was served upon the parties who have requested e-notice, via the CM/ECF electronic notice system.

Dated: August 23, 2018

/s/ *Michael T. Murphy*