

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)

Re: Docket Nos. 361, 418

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

Hearing: June 1, 2023 @ 9:30 a.m.

**AMENDED² OBJECTION AND RESERVATION OF RIGHTS OF NATIONWIDE
THEATRES WEST FLAGLER, LLC TO THE (I) NOTICE OF POSSIBLE
ASSUMPTION AND ASSIGNMENT WITH RESPECT TO EXECUTORY CONTRACTS
AND UNEXPIRED LEASES OF THE DEBTORS AND (II) PROPOSED SALE OF
SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS**

Nationwide Theatres West Flagler, LLC, a Delaware limited liability company, as successor-in-interest to Main Street Concourse, LLC (“Landlord”), by and through the undersigned counsel, files this objection and reservation of rights (the “Objection”) to the *Notice of Possible Assumption and Assignment with Respect to Executory Contracts and Unexpired Leases of the Debtors* [D.I. 418] (the “Notice”) and the proposed sale of the Debtors’ assets pursuant to the *Order (I) Approving Bidding Procedures In Connection With The Sale Of Substantially All Of Debtors’ Assets, (II) Scheduling Bid Deadlines And The Auction, (III) Approving Form And Manner And Notice Thereof, And (IV) Granting Related Relief* [D.I. 361] (the “Bid Procedures Order”). In support thereof, Landlord respectfully states:

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 This Amendment modifies the Cure Amount as set forth in the *Objection and Reservation of Rights of Nationwide Theatres West Flagler, LLC to the (I) Notice of Possible Assumption and Assignment With Respect to Executory Contracts And Unexpired Leases of the Debtors and (II) Proposed Sale of Substantially of the Debtor’s Assets* [D.I. 490], filed on May 22, 2023.



JURISDICTION

1. The United States Bankruptcy Court for the District of Delaware (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(D) and (M).

BACKGROUND

2. On February 22, 2023 (the “Petition Date”), each of the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the Court.

3. 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.

4. Debtor, CBC Restaurant Corp., and Landlord, as successor-in-interest, are parties to an unexpired lease of nonresidential real property dated on or about April 9, 2007 (including all amendments thereto, the “Lease”) for commercial property located at 2789 N. Main Street, Santa Ana, California, 92705 (the “Premises”).

5. On April 7, 2023, the Debtors filed their Bid Procedures Motion [D.I. 289], and on April 20, 2023, the Court entered the Bid Procedures Order, which among other things, approved Bidding Procedures and procedures for (i) filing objections to the sale of substantially all assets of the Debtors (the “Sale”) and (ii) providing notice to lease counterparties of the potential assumption and assignment of leases. Objections to the Sale and the assumption and assignment of leases are due by May 22, 2023, except that certain adequate assurance or other sale related objections may be raised at the sale hearing.

6. Under the Bid Procedures Order, bids are due by May 25, 2023 and an auction to select the winning bidder (the “Successful Bidder”) is scheduled for May 30, 2023 with a sale hearing on June 1, 2023.

7. On May 1, 2023, the Debtors filed the Notice which identifies certain unexpired leases and executory contracts which may be assumed and assigned in connection with the Sale, including Landlord’s Lease. The Notice indicates that \$26,835.00 is the aggregate amount necessary to cure all monetary defaults under the Lease (the “Proposed Cure Amount”).

OBJECTION

8. Landlord objects to the Sale to the extent that the terms of any potential sale order (the “Sale Order”) seek to impair or limit Landlord’s rights under the Lease, the Bankruptcy Code or other applicable law. Any assumption of the Lease must be conditioned on the Debtors’ compliance with the requirements of section 365 of the Bankruptcy Code, including, but not limited to, paying all amounts due and owing under each of the Lease through the effective date of the assumption of the Lease and providing adequate assurance of future performance information to Landlord in accordance with the terms of the Bid Procedures Order and the Bankruptcy Code.

A. Objection to Proposed Cure Amount

9. The Proposed Cure Amount is not reflective of all monetary defaults or deferred amounts due under the Lease. As of the date of this Objection, the aggregate cure amount owing under the Lease is **\$113,648.03** (“Cure Amount”), which is comprised of: (1) \$79,054.40 in pre-petition amounts; (2) \$6,419.63 post-petition amounts for prorated rent, rent, late fees, and CAM; and (3) attorney’s fees in the amount of \$28,174.00, which are specifically allowed under the terms

of the Lease, as detailed on **Exhibit A**. The Landlord has filed a proof of claim with exhibits reflecting amounts due, which is incorporated herein by reference.

10. The Cure Amount represents the amounts currently due and owing to Landlord under the Lease. The Cure Amount may increase prior to any actual date of assumption and assignment of the Lease if the Debtors do not pay all amounts that accrue after the date of this Objection, and any taxes, common area maintenance and other amounts that may come due, pursuant to the terms of the Lease, and regardless of when those amounts accrued.

11. Landlord notes that the Lease imposes certain indemnification and contribution obligations that arise out of litigation or other claims that may be asserted or threatened against Landlord in connection with the Lease. Each of these indemnification and contribution covenants and obligations must be assumed, and otherwise cured if the Lease is to be assumed and assigned as part of the Sale. Landlord objects to the Proposed Cure Amount to the extent that it fails to include amounts related to the indemnification and contribution covenants and obligations for which the Debtors are responsible to Landlord under the Lease.

12. In connection with the assumption and assignment of the Lease, all rights of Landlord under the Lease (including defenses thereto) must be preserved. As such, any order approving the Sale should specify that Landlord's setoff, recoupment, and subrogation rights are preserved, and that the Debtors and any proposed assignee remain liable to Landlord for (i) any accrued but unbilled charges under the Lease, including but not limited to, year-end adjustments for common area maintenance, taxes and similar charges; (ii) any regular or periodic adjustment or reconciliation charges that come due under the Lease; (iii) any percentage rent that may be due under the Lease; (iv) any non-monetary defaults; and/or (v) any insurance, indemnification and other contractual obligations under the Lease regardless of when they accrued. This result is mandated by the requirement that the Debtors cure all

arrears and that the Debtors provide adequate assurance of future performance under the terms of the Leases. *See* 11 U.S.C. § 365(b)(1).

13. To the extent that rent, attorneys' fees, interest, and/or other charges continue to accrue, and/or Landlord suffers other pecuniary losses with respect to the Lease, Landlord further reserves the right to amend the Cure Amount to: (i) reflect such additional amounts; and (ii) to account for year-end adjustments, (collectively, the "Adjustment Amounts"), which have not yet been billed or have not yet become due under the terms of the Lease. The Debtors or any assignee of the Lease must be responsible for satisfying the Adjustment Amounts when due in accordance with the terms of the Lease regardless of when such Adjustment Amounts were incurred.

14. Further, under section 365(k) of the Bankruptcy Code the Debtors remain responsible for any contractual obligations under the Lease that arose prior to the assumption and assignment of the Lease, thus, any provision in the proposed order approving the Sale that purports to release the Debtors from any further liability under the Lease, including those contractual obligations that arose prior to the assumption and assignment of the Lease should be stricken.

15. Finally, the proposed order approving the Sale or any order approving the assumption and assignment of the Lease must provide, among other things, that the Debtors, the Successful Bidder or the proposed assignee promptly pay to Landlord all amounts due and owing under the Lease through the effective date of assumption and assignment of the Lease (i.e., the Cure Amount), as the same may increase to reflect attorneys' fees and any other amounts that become due or are determined after the date of this Objection.

B. Debtors Must Demonstrate Adequate Assurance of Future Performance

16. In accordance with section 365 of the Bankruptcy Code, Landlord must be provided with sufficient information with respect to adequate assurance of future performance prior to the potential assumption and assignment of the Lease to the Successful Bidder or proposed assignee.

17. The adequate assurance of future performance information provided to Landlord as part of the Sale must demonstrate the heightened standards for adequate assurance of future performance in a shopping center will be satisfied by the Successful Bidder or proposed assignee in accordance with section 365 of the Bankruptcy Code.

18. Under this requirement, the Debtors must provide to Landlord assurances: (a) of the source of rent and other consideration due under the Lease, and that the financial condition and operating performance of the Successful Bidder or proposed assignee and any guarantor shall be similar to the financial condition and operating performance of the Debtors and any guarantor of the Debtors at the time the Debtors entered into the Lease; (b) that any percentage rent due under the Lease, if applicable, will not decline substantially; (c) that assumption and assignment of the Lease is subject to all provisions of the Lease, including but not limited to radius, location, use or exclusivity provisions, and will not breach any such provision contained in another lease; and (d) that assumption or assignment of the Lease will not disrupt any tenant mix in the Leased Premises. *See* 11 U.S.C. § 365(b)(3). The Debtors bear the burden of demonstrating the Successful Bidder or proposed assignee's ability to provide adequate assurance of future performance. *In re Lafayette Radio Electronics Corp.*, 12 B.R. 302, 312 (Bankr. E.D.N.Y. 1991). *See also In re Federated Dept. Stores, Inc.*, 135 B.R. 941, 944 (Bankr. S.D. Ohio 1991); *In re TSW Stores of Nanuet, Inc.*, 34 B.R. 299, 308 (Bankr. S.D.N.Y. 1983).

19. In order to satisfy the heightened adequate assurance of future performance burden, the Successful Bidder or any proposed assignee of the Lease must provide the following information: (i) the specific name of the proposed assignee, and the proposed name under which the proposed assignee intends to operate the store; (ii) the proposed assignee's intended use for the space; (iii) potential assumption and assignment of the Lease to the Successful Bidder or proposed assignee audited financial statements and annual reports for the past three (3) years, including all supplements or amendments thereto; (iv) cash flow projections for the proposed assignee, the proposed assignee's most recent business plan, all cash flow projections for the Lease, and any financial projections, calculations and/or proformas prepared in contemplation of purchasing the Lease; (v) all documents and other evidence of the proposed assignee's retail experience and experience operating stores in a shopping center; and (vi) a contact person for the proposed assignee Landlord may directly contact in connection with the adequate assurance of future performance information.³

20. Landlord demands strict proof of the Successful Bidder's or the proposed assignee's ability to establish adequate assurance of future performance with respect to the Lease. Landlord is entitled to the full benefit of its bargain under the Lease and the full protections provided by section 365 of the Bankruptcy Code. Any assumption and assignment of the Lease must be in accordance with all provisions of the Lease and the Bankruptcy Code. *See, e.g., In re Entertainment, Inc.*, 223 B.R. 141, 151 (Bankr. N.D. Ill. 1998).

³ Landlord expressly reserves the right to request further adequate assurance information that Landlord may deem necessary, in its sole and unfettered discretion, to make an informed decision as to the ability of any proposed assignee of a Lease to satisfy the requirements of section 365 of the Bankruptcy Code.

C. The Debtors are Required to Assume and Assign the Potentially Assigned Leases in Their Entirety, Including Any and All Obligations Contained Therein, and all Landlord's Rights Under the Lease and Applicable Law Must be Preserved

21. Any assumption and assignment of the Lease requires the Debtors to assume and assign such leases in their entirety, including any and all conditions, covenants, monetary and non-monetary obligations and terms contained in each of the Lease for which the Debtors are responsible. *See, e.g., In re New York Skyline, Inc.*, 432 B.R. 66, 77 (Bankr. S.D.N.Y. 2010) (citations omitted) (“When a debtor assumes the lease...it must assume both the benefits and burdens of the contract. Neither the debtor nor the bankruptcy court may excise material obligations owing to the non-debtor contracting party.”); *Shangra-La, Inc. v. Three Sisters Partner, L.L.C.*, 176 F.3d 843, 849 (4th Cir. 1999) (citing *Adventure Resources, Inc. v. Holland*, 137 F.3d 786, 798 (4th Cir.), cert. denied, 117 S.Ct. 404 (1998)) (“When the Debtor assumes its unexpired lease...it assumes it cum onere—the debtor must accept the obligations of the executory contract along with the benefits.”); *see also Citibank, N.A. v. Tele/Resources, Inc.*, 724 F.2d 266 (2nd Cir. 1983) (“An assignment does not modify the terms of the underlying contract. It is a separate agreement between the assignor and the assignee which merely transfers the assignor’s contract rights, leaving them in full force and effect as to the party charged....Insofar as an assignment touches on the obligations of the other party to the underlying contract, the assignment moves into the shoes of the assignor.”) (citations omitted). Further, the Sale cannot override the parties’ contractually bargained for rights under the Potentially Assigned Leases. *See In re Nat’l Gypsum Co.*, 208 F.3d 498, 506 (5th Cir. 2000) (executory contracts are assumed cum onere, subject to all its benefits and burdens).

22. Depending on what adequate assurance information is received, Landlord may request that the Successful Bidder provide cash or letter of credit security deposits and/or a guaranty from an affiliate or parent company.

RESERVATION OF RIGHTS

23. Nothing in this Objection is intended to be, or should be construed as, a waiver by Landlord of any of its rights under the Lease, the Bankruptcy Code, or applicable law. Landlord expressly reserves all such rights, including, without limitation, the right to: (a) supplement and/or amend this Objection and to assert any additional objections with respect to the Proposed Cure Amount, adequate assurance of future performance, the Sale, the Asset Purchase Agreement, or the

JOINDER

24. Landlord joins in any objections to the Sale that are filed by Debtors' other landlords to the extent that they are not inconsistent with this Objection.

WHEREFORE, Landlord requests that this Court (a) sustain this Objection; (b) require the Debtors and the buyer to comply with each and every term, condition and obligation set forth in the Lease; and (c) grant such other and further relief as this Court deems just and appropriate under the circumstance.

Dated: May 26, 2023

Respectfully submitted,

/s/ J. Cory Falgowski

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CERTIFICATE OF SERVICE

I, J. Cory Falgowski, hereby certify that on May 26, 2023, a true and correct copy of the foregoing has been served on the parties listed below via electronic mail and upon all parties entitled to service via this Court's electronic filing system.

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Dated: May 26, 2023

/s/ J. Cory Falgowski
J. Cory Falgowski (No. 4546)

EXHIBIT A

A/R balance as of BK filing, 2/22/23:	\$ 36,499.17
Includes:	
- \$4,116.27 for 15 th (final) installment of the deferment repayment billed 2/1/23	
- 2022 CAM reconciliation billed 3/1/23	
- February rent prorated from 2/1 – 2/22/23	
Forbearance of base rent and accrued late fees:	\$ 42,555.23
- \$15,436.00 1/1-1/31/21 base rent forborne	
- \$27,119.23 Late fees forborne	
Balances due after BK filing through 5/31/23 :	\$ 6,419.63
- February charges for 2/23-2/28/23 prorated, included here	
- Late fee billed 3/11/23	
- Rent and CAM through May 2023	
Attorney's Fees and Costs:	<u>\$ 28,174.00</u>
TOTAL CURE:	\$ 113,648.03