

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY**

Caption in Compliance with D.N.J. LBR 9004-2(c)

Paul H. Aloe
KUDMAN TRACHTEN ALOE POSNER LLP
488 Madison Avenue, 23rd Floor
New York, New York 10022
Tel: (212) 868-1010
Email: paloe@kudmanlaw.com

*Attorneys for Walber 419 Company LLC, 419 Park
Avenue South Associates LLC, Walsam 130 MAD
LLC, and 36 LLC*

In re:

WEWORK INC., *et al.*,

Debtors.¹

Chapter 11

Case No. 23-19865 (JKS)

(Jointly Administered)

**LIMITED OBJECTION AND RESERVATION OF RIGHTS OF WALBER 419
COMPANY LLC, 419 PARK AVENUE SOUTH ASSOCIATES LLC, WALSAM 130
MAD LLC, AND 36 LLC TO DEBTORS' MOTION FOR ENTRY OF AN ORDER
(I) AUTHORIZING (A) REJECTION OF CERTAIN UNEXPIRED LEASES AND
(B) ABANDONMENT OF ANY PERSONAL PROPERTY, EFFECTIVE
AS OF THE REJECTION DATE AND (II) GRANTING RELATED RELIEF**

Walber 419 Company LLC, 419 Park Avenue South Associates LLC, Walsam 130 Mad LLC, and 36 LLC (collectively, the "W&S Landlords"), by and through their undersigned counsel, Kudman Trachten Aloe Posner LLP, respectfully submit this limited objection and reservation of rights (the "Objection") in response to the *Motion for Entry of an Order (I) Authorizing (A) Rejection of Certain Unexpired Leases and (B) Abandonment of any Personal Property, Effective as of the Rejection Date and (II) Granting Related Relief* (the "Rejection Motion") filed on November 7, 2023 [Docket No. 14], and respectfully state as follows:

¹ A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors' claims and noticing agent at <https://dm.epiq11.com/WeWork>. The location of Debtor WeWork Inc.'s principal place of business is 12 East 49th Street, 3rd Floor, New York, NY 10017; the Debtors' service address in these chapter 11 cases is WeWork Inc. c/o Epiq Corporate Restructuring, LLC 10300 SW Allen Blvd. Beaverton, OR 97005.

BACKGROUND

1. On November 6, 2023 (the “Petition Date”), the above-captioned debtors (collectively, the “Debtors”) filed voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code (the “Bankruptcy Code”).

2. Prior to the Petition Date, each of the W&S Landlords entered into written lease agreements with certain of the Debtors to occupy spaces in certain commercial buildings in Manhattan.

3. 419 Park Avenue South Tenant LLC, the Debtor under Case No. 23-20163, leased commercial space at 419 Park Avenue South, New York, New York, 10016 from Walber 419 Company LLC and 419 Park Avenue South Associates LLC pursuant to written lease agreements dated April 19, 2019, and July 11, 2019, as amended (collectively, the “419 Park Avenue South Lease”).

4. 130 Madison Avenue Tenant LLC, the Debtor under Case No. 23-19981, leased commercial space at 130 Madison Avenue, New York, New York 10016 from Walsam 130 Mad LLC pursuant to a written lease agreement dated September 28, 2018, as amended (the “130 Madison Lease”).

5. 315 W 36th Street Tenant LLC, the Debtor under Case No. 23-20188, lease commercial space at 315 West 36th Street, New York, New York 10018, from 36 LLC pursuant to a written lease agreement dated March 5, 2015, as amended (the “315 West 36th Lease”).

6. On November 7, 2023, the Debtors filed the Rejection Motion, by which they seek the Court’s permission, pursuant to section 365(a) of the Bankruptcy Code, to reject, among other leases, the 419 Park Avenue South Lease, the 130 Madison Lease, and the 315 West 36th Lease.

7. On November 14, 2023, the W&S Landlords each received identical emails from an associate at Hilco Real Estate, a real estate advisory firm that has been working the Debtors in negotiations with their landlords both before and after the Petition Date, stating as follows:²

To Whom it May Concern:

This email is to confirm that the WeWork Inc. affiliate (“Tenant”) that is a tenant in your building has surrendered the premises, all WeWork-issued key cards have been deactivated, and Landlord may re-key the premises. Effective as of 11/6/2023, Tenant no longer has beneficial occupancy of the premises. Any property of Tenant remaining in the premises is deemed abandoned.

8. Prior to these emails, the applicable Debtors under the 419 Park Avenue South Lease, the 130 Madison Lease, and the 315 West 36th Lease had not formally surrendered and returned the leased premises to the W&S Landlords.

LIMITED OBJECTION

9. In general, an executory contract is deemed rejected as of the date of the bankruptcy court’s order authorizing rejection. *See In re Fleming Cos., Inc.*, 304 B.R. 85, 96 (Bankr. D. Del. 2003). A bankruptcy court can authorize retroactive relief, deeming the contract rejected at an earlier date, only in “certain circumstances.” *Id.* Such relief is an exercise of the court’s equitable powers and is only appropriate when a balancing of the equities calls for an earlier rejection date. *In re TW, Inc.*, No. 03-10785 (MFW), 2004 WL 115521, at *2 (D. Del. Jan. 14, 2004) (affirming the bankruptcy court’s refusal to grant retroactive rejection).

10. Bankruptcy courts generally refuse to authorize retroactive application of a rejection order, regardless of equities, prior to the date on which the property in question is duly surrendered to the counterparty. *See, e.g., Fleming*, 304 B.R. at 96 (“Rejection has been allowed *nunc pro tunc* to the date the Motion is filed or the premises is surrendered, *whichever is later*,

² Copies of the emails that the W&S Landlords received are attached as **Exhibit A**.

only in certain circumstances.”) (emphasis added); *see also TW*, 2004 WL 115521, at *2 (denying retroactive application of rejection order when debtor did not properly surrender premises); *In re Chi-Chi’s, Inc.*, 305 B.R. 396, 399 (Bankr. D. Del. 2004) (affirming bankruptcy court’s refusal to grant retroactive rejection as of the petition date and instead allowing rejection as of the date the debtors surrendered possession of the premises to their landlords); *In re New Valley Corp.*, No. CIV. A. 98-982, 2000 WL 1251858, at *15–16 (D.N.J. Aug. 31, 2000) (allowing rejection as of the date the landlord was known to be in full control of the premises, preparing it for a new tenant).

11. In the Rejection Motion, the Debtors seek the Court’s permission to reject the 419 Park Avenue South Lease, the 130 Madison Lease, and the 315 West 36th Lease “effective as of the later of (i) the “Rejection Date” identified in Schedule 1 or (ii) the date the Debtors relinquish control of the premises by notifying the affected landlord in writing (email being sufficient), of the Debtors’ surrender of the premises and (a) turning over keys issued by the landlord, key codes, and/or security codes, if any, to the affected landlord or (b) notifying such affected landlord or such landlord’s counsel (if any) in writing (email being sufficient) that the property has been surrendered, all WeWork-issued key cards have been deactivated unless otherwise agreed with the landlord, and the landlord may rekey the leased premises.” Rejection Motion ¶ 10.

12. Schedule 1 to the Proposed Order granting the Rejection Motion purports to identify November 6, 2023, as the rejection date for the 419 Park Avenue South Lease, the 130 Madison Lease, and the 315 West 36th Lease. However, as noted above, it was not until November 14, 2023, that the applicable Debtors, through Hilco Real Estate, provided written notice and formally surrendered the leased premises to the W&S Landlords in accordance with the requirements that the Debtors created for themselves in the Rejection Motion.

13. Accordingly, the W&S Landlords object to the Rejection Motion to the extent that it seeks to deem November 6, 2023, as opposed to November 14, 2023, as the rejection date for the 419 Park Avenue South Lease, the 130 Madison Lease, and the 315 West 36th Lease.

14. The operative rejection date is important because the W&S Landlords are entitled to assert administrative claims under section 503(b)(1) of the Bankruptcy Code for the Debtors' post-petition and pre-rejection use and occupancy of the leased premises. *See In re Goody's Fam. Clothing Inc.*, 610 F.3d 812, 818 (3d Cir. 2010) ("When a debtor occupies post-petition non-residential space it leases, that § 365(d)(3) provides when the rent obligation arises does not erase when lessors may make § 503(b)(1) claims for the value conferred post-petition by that occupancy. We thus conclude that the Landlords may assert a § 503(b)(1) claim for 'stub rent.'").

15. Allowing the Debtors to artificially dictate an early rejection date that pre-dates their actual surrender and return of the leased premises would cut off the W&S Landlords' rights to recover the amounts owed to them as an administrative expense for the Debtors' post-petition use, occupancy, and possession of their properties.

16. For these reasons, the Court should deny the Rejection Motion to the extent that it purports to effectuate the rejection of the 419 Park Avenue South Lease, the 130 Madison Lease, and the 315 West 36th Lease as of November 6, 2023, and clarify in any order granting the Rejection Motion that the rejection of the 419 Park Avenue South Lease, the 130 Madison Lease, and the 315 West 36th Lease is effective as of no earlier than November 14, 2023.

RESERVATION OF RIGHTS

17. This Objection is not, nor shall it be deemed to be, (a) a waiver or release of any of the W&S Landlords' rights against any person, entity, or property; (b) an election of remedies; or (c) a waiver or release of any claims that are currently owing and not identified in this Objection

and/or claims that may become due and owing to the W&S Landlords subsequent to the filing of this Objection. The W&S Landlords each expressly reserve all of their respective rights to assert administrative, rejection damages, and any other applicable claims against the Debtors.

WHEREFORE, the W&S Landlords respectfully request that the Court enter an order: (i) denying the Rejection Motion to the extent that it purports to effectuate the rejection of the 419 Park Avenue South Lease, the 130 Madison Lease, and the 315 West 36th Lease as of November 6, 2023; (ii) clarifying that that any rejection of the 419 Park Avenue South Lease, the 130 Madison Lease, and the 315 West 36th Lease is effective as of no earlier than November 14, 2023; and (iii) granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
November 21, 2023

By: /s/ Paul H. Aloe
Paul H. Aloe
KUDMAN TRACHTEN ALOE POSNER LLP
488 Madison Avenue, 23rd Floor
New York, New York 10022
Tel: (212) 868-1010
Email: paloe@kudmanlaw.com

*Attorneys for Walber 419 Company LLC, 419 Park
Avenue South Associates LLC, Walsam 130 MAD
LLC, and 36 LLC*

EXHIBIT A

Surrender Emails to W&S Landlords

From: Nadler, Ari <ANadler@hilcoglobal.com>
Sent: Tuesday, November 14, 2023 5:57 PM
To: Peter Weiss <pweiss@walter-samuels.com>
Cc: Hsu, Jeremiah <JHsu@hilcoglobal.com>; Lindsay Van Houten <lindsay.vanhouten@wework.com>
Subject: WeWork - 419 Park Avenue South, New York, NY 10016

To Whom it May Concern:

This email is to confirm that the WeWork Inc. affiliate ("Tenant") that is a tenant in your building has surrendered the premises, all WeWork-issued key cards have been deactivated, and Landlord may re-key the premises. Effective as of 11/6/2023, Tenant no longer has beneficial occupancy of the premises. Any property of Tenant remaining in the premises is deemed abandoned.

Thank you,

Ari Nadler

Associate

Hilco Real Estate, LLC

o: 847-418-2153 | c: 224-277-6106

anadler@hilcoglobal.com

5 Revere Drive, Suite 410

Northbrook, IL 60062

www.hilcorealestate.com

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From: Nadler, Ari <ANadler@hilcoglobal.com>
Sent: Tuesday, November 14, 2023 5:43 PM
To: Peter Weiss <pweiss@walter-samuels.com>
Cc: Hsu, Jeremiah <JHsu@hilcoglobal.com>; Lindsay Van Houten <lindsay.vanhouten@wework.com>
Subject: WeWork - 130 Madison Avenue, New York, NY 10016

To Whom it May Concern:

This email is to confirm that the WeWork Inc. affiliate ("Tenant") that is a tenant in your building has surrendered the premises, all WeWork-issued key cards have been deactivated, and Landlord may re-key the premises. Effective as of 11/6/2023, Tenant no longer has beneficial occupancy of the premises. Any property of Tenant remaining in the premises is deemed abandoned.

Thank you,

Ari Nadler

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DISCLAIMER: Contents of this communication are put forth as business consultations, and are not to be construed as legal guidance or advice. Any terms or proposal contained herein are non-binding and for discussions purposes only, unless formally documented and mutually executed by all parties involved.

From: Nadler, Ari <ANadler@hilcoglobal.com>
Sent: Tuesday, November 14, 2023 5:55 PM
To: Peter Weiss <pweiss@walter-samuels.com>
Cc: Hsu, Jeremiah <JHsu@hilcoglobal.com>; Lindsay Van Houten <lindsay.vanhouten@wework.com>
Subject: WeWork - 315 W 36th Street, New York, NY 10017

To Whom it May Concern:

This email is to confirm that the WeWork Inc. affiliate ("Tenant") that is a tenant in your building has surrendered the premises, all WeWork-issued key cards have been deactivated, and Landlord may re-key the premises. Effective as of 11/6/2023, Tenant no longer has beneficial occupancy of the premises. Any property of Tenant remaining in the premises is deemed abandoned.

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