

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

Caption In Compliance With D.N.J. LBR 9004-1

DUANE MORRIS LLP

Morris S. Bauer, Esq.

(NJ Bar No. 039711990)

200 Campus Drive, Suite 300

Florham Park, New Jersey 07932-1007

Telephone: (973) 424-2037

Facsimile: (973) 556-1380

E-mail: MSBauer@duanemorris.com

*Counsel for International Business Machines
Corporation*

In re:

WEWORK, INC., *et al.*,

Debtors.¹

Chapter 11

Case No. 23-19865 (JKS)

(Jointly Administered)

Hearing Date: May 30, 2024

**LIMITED OBJECTION AND RESERVATION OF RIGHTS OF INTERNATIONAL
BUSINESS MACHINES CORPORATION TO DEBTORS' THIRD AMENDED JOINT
CHAPTER 11 PLAN OF REORGANIZATION OF WEWORK INC. AND ITS DEBTOR
SUBSIDIARIES**

International Business Machines Corporation (“IBM”), by and through its undersigned counsel, hereby files this limited objection and reservation of rights (“IBM Limited Objection and Reservation of Rights”) in response to the captioned debtors’ (“Debtors”) *Notice of Assumption of Certain Executory Contracts and/or Unexpired Leases* [Doc 1858] (“Assumption Notice”), the

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.

First Amended Plan Supplement [Doc 1997] (“Plan Supplement”) and to confirmation of the Debtors’ proposed *Third Amended Joint Chapter 11 Plan of Reorganization of WeWork Inc. and Its Debtor Subsidiaries* [Doc 1816] (“Plan”).

IBM files this IBM Limited Objection and Reservation of Rights out of an abundance of caution because: (i) the Debtors have not scheduled IBM’s contracts in either the Assumption Notice or the Plan Supplement; and further, (ii) a non-debtor is a party to the IBM Contracts and it is unclear as to whether the Plan release provisions would preclude IBM’s claims under the IBM Contracts, as that term is defined below, against the non-debtor. If (a) the IBM Contracts are deemed assumed upon confirmation of the Plan, as appears may be the case according to its terms, (b) the Debtors provide clarity on the issues of adequate assurance to IBM and (c) the non-debtor parties to the IBM Contracts remain responsible notwithstanding certain Plan release provisions, then the IBM limited objection would be resolved.² However, as of this date, IBM has not received notice of the Debtors’ proposed cure amounts for their assumption of the IBM Contracts nor are the IBM Contracts referenced in either the Assumption Notice or Plan Supplement. In support of this IBM Limited Objection and Reservation of Rights, IBM respectfully submits as follows:

BACKGROUND

1. IBM is party to executory contracts (the “IBM Contracts”) with Debtor WeWork Companies (US) LLC (“WeWork US”).³
2. IBM and WeWork US signed a Client Relationship Agreement for Services dated September 9, 2016 (the “US CRA” or “9-9-16 CRA”).

² Similarly, if the IBM Contracts are rejected, IBM can then proceed to appropriate steps in response to such rejection, including filing requests for payment on outstanding obligations.

³ *In re WeWork Companies (US) LLC*, Case No. 23-19874. Due to a scrivener’s error, WeWork US is denoted as “WeWork Companies Inc.” in the IBM Contracts.

3. IBM and WeWork US had also signed a Client Relationship Agreement for Services on March 31, 2016 (the “3-31-16 Agreement”) and assigned to non-debtor WeWork Companies (International) BV (“WeWork BV”) as of September 7, 2016 (the “International CRA” or “9-7-16 CRA” and, together with the US CRA, the “Agreements”).

4. The administrative and other services provided by IBM to the WeWork companies pursuant to the Agreements (collectively, the “Services”) were set forth in a Statement of Work (the “Original SOW”) contemporaneous to the US CRA and the International CRA. IBM, WeWork US and WeWork BV were the signatories to the Original SOW.

5. The Original SOW was amended and restated a number of times over the following six years. The Sixteenth Amendment to the Original SOW, the relevant Statement of Work incorporating the terms of the Agreements and setting forth the scope of the Services as of the Petition Date (the “Current SOW”), was signed on August 5, 2022 by IBM, WeWork US and non-debtor WeWork International Limited (“WWIL”).

6. On November 6, 2023 (the “Petition Date”), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code, commencing the captioned cases.

7. In the Schedules of Assets and Liabilities for Debtor WeWork US, filed on January 7, 2024 [Doc 594] (the “US Schedules”), the Debtors scheduled the Agreements, with IBM as the relevant counter-party, as executory contracts in Schedule G of the US Schedules. [Doc 594, Sch. G at 2.256 & 2.257].

8. In the Schedules of Assets and Liabilities for Debtor WeWork Management LLC (“WeWork Mgmt”), filed on January 7, 2024 [Doc 653] (the “Mgmt Schedules”), the Debtors

scheduled the 3-31-16 Agreement⁴ and two other alleged contracts⁵, with IBM as the relevant counter-party, as executory contracts in Schedule G of the Mgmt Schedules. [Doc 653, Sch. G at 2.1059 to 2.1061].

9. IBM is owed \$159,938.53 for unpaid pre-petition Services, for which WeWork US, WeWork BV and WWIL are jointly and severally liable.

10. IBM is owed a total of \$1,838,134.40 for unpaid post-petition Services. IBM is paid \$884,777.93 each month for Services under the Current SOW. Most of the recited unpaid total is for post-petition Services provided in April and May of this year, plus a residual unpaid pre-April 2024 balance of \$68,578.54.

11. According to the Debtors' *Certificate of Service of Solicitation Documents* [Doc 1965] filed on May 21, 2024, IBM was only served a Combined Hearing Notice; IBM did not receive the full solicitation package which would have included, along with a ballot or notice of non-voting status, a *Third Party Release Opt-Out Form*. See, e.g., Doc 1965 at 3-4 & Exh. 18 at 152-53.

12. As of this date, the Debtors have given no indication to IBM whether they intend to assume or reject the IBM Contracts nor does the Plan provide clarity.

⁴ In re WeWork Management LLC, Case No. 23-20318. It is unclear to IBM why the Debtors separately scheduled [Doc 653, Sch. G at 2.1061] the 3-31-16 Agreement apart from the International CRA in the Mgmt Schedules: WeWork Mgmt, although a beneficiary to the Contracts, as with the other debtor and non-debtor WeWork entities, is not the relevant WeWork signatory to the 3-31-16 Agreement.

⁵ The Debtors scheduled [Doc 653, Sch. G at 2.1060] a "3-21-16 Client Relationship Agreement"; IBM submits that this is either a mislabeled duplication of the 3-31-16 Agreement, or, at best, a precursor document also subsumed into the Agreements. The Debtors also scheduled [Doc 653, Sch. G at 2.1059] a "Data Protection Addendum" dated 2-11-20 (the "DPA"). It is IBM's understanding that the DPA, which IBM acknowledges does exist, is not executory.

LIMITED OBJECTION AND RESERVATION OF RIGHTS

13. IBM seeks to expressly reserve and preserve all rights provided for in the IBM Contracts, which include the Agreements and the Current SOW, and under applicable law related to the IBM Contracts and the Debtors' chapter 11 cases.

14. Further, IBM objects to the release provisions set forth in the Plan to the extent that such provisions purport to release any non-Debtor affiliates of any obligations due and owing to IBM under the IBM Contracts. IBM respectfully requests that the Plan and confirmation order expressly provide that any non-Debtor affiliate party to the IBM Contracts is not released from the applicability of the IBM Contracts to such non-Debtor affiliate, including any liabilities thereunder due and owing to IBM.

A. Assumption and Cure or Rejection of IBM Contracts.

15. The Debtors' Assumption Notice and Plan Supplement do not give IBM any indication of the Debtors' intentions concerning the Agreements or the future of the WeWork – IBM business relationship more generally. None of the Agreements or IBM Contracts were scheduled in either filing for either rejection or assumption.

16. IBM's uncertainty continues, as the Debtors have again failed to account for the IBM Contracts in their *First Amended Plan Supplement* [Doc 1997], filed on May 26, 2024.

17. Article V.A of the Plan sets forth the "Assumption and Rejection of Executory Contracts and Unexpired Leases" and states:

On the Effective Date, except as otherwise provided herein, all Executory Contracts or Unexpired Leases will be deemed assumed by the applicable Reorganized Debtor in accordance with the provisions and requirements of sections 365 and 1123 of the Bankruptcy Code, other than those that: (1) are Unexpired Leases of non-residential real property that are not expressly set forth in the Schedule of Assumed Executory Contracts and Unexpired Leases and assumed by the deadline set forth in section 365(d)(4) or any applicable Extension Order; (2) are identified on the Schedule of Rejected Executory Contracts and Unexpired

Leases, which schedule shall be subject to the consent of the Required Consenting Stakeholders; (3) have previously expired or terminated pursuant to their own terms or agreement of the parties thereto, forfeiture or by operation of law; (4) have been previously assumed or rejected by the Debtors pursuant to a Final Order; (5) any obligations of WeWork Inc. arising under contracts or leases that are not assumed; or (6) are, as of the Effective Date, the subject of (a) a motion to reject that is pending or (b) an order of the Bankruptcy Court that is not yet a Final Order. For the avoidance of doubt, the Unexpired Leases and Executory Contracts described in subsection (1) of this paragraph will be deemed rejected pursuant to section 365 of the Bankruptcy Code.

18. Pursuant to this Article of the Plan, one is lead to believe that non-lease executory contracts are deemed assumed upon confirmation. However, this Article then proceeds through a litany of items that appear to be exceptions to the general statement and appear to leave open infinitum the Debtors decision relating to same. This provision becomes confusing, misleading and leaves a counter-party such as IBM with uncertainty as to the status of the IBM Contracts.

19. If the Debtors intend to reject the IBM Contracts, including the Agreements (which necessarily includes the Current SOW), it appears that the Debtors would need to serve Notice of same on IBM, which notice may be delivered as late as the Effective Date. IBM, as of the time of this filing, has received no such Notice.

20. It appears that the Debtors may be able to assume the IBM Contracts, including the Agreements, pursuant to the Plan, through confirmation and possibly as late as the Effective Date.

21. While the IBM Contracts' assumption or rejection decision remains open, the Debtors would still need to continue to pay their post-Petition Date obligation thereunder and if assumed. The Debtors would be required to pay the full cure amounts based upon the actual amounts that are due on the date that the IBM Contracts are assumed. *See* 11 U.S.C. § 365(b)(1).

22. As recited *supra*, IBM is owed \$159,938.53 for unpaid pre-petition Services and \$1,838,134.40 for unpaid post-petition Services. Accordingly, the total cure amount under the Agreements (and thus the Current SOW) as of the date hereof is no less than \$1,998,072.33.

23. In addition to requiring that defaults be cured, section 365(b)(2) of the Bankruptcy Code obligates a debtor to provide adequate assurance of future performance under the contract before the executory contract may be assumed. *See* 11 U.S.C. § 365(b)(2).

24. In light of the Debtors' failure to provide either adequate assurance of prompt payment of the cure or of future performance under the IBM Contracts, IBM is unable to determine whether Debtors have complied, or will comply, with all of the requirements of section 365(b) of the Bankruptcy Code.⁶

25. Any order permitting the assumption of the Contracts, including the Agreements and the Current SOW, must direct that the Debtors fully pay all amounts due to IBM under the IBM Contracts as of the Effective Date, as a condition precedent to such assumption.

26. Accordingly, IBM reserves its right to be heard regarding all assumption and cure issues.

B. The IBM Contracts Should be Excepted from the Release Provisions.

27. The Plan provides for overly-broad releases, including to third-parties. *See* Plan at Article VIII (the "Releases").

28. Under the Plan, "Released Parties" include "Related Parties" to Debtors, including "subsidiaries". *See* Plan at I.A ¶¶ 231-32.

29. Non-Debtor and Current SOW counter-party WWIL would appear to qualify as a "released party" because, as a subsidiary of a WeWork Debtor, it is a "related party."

30. WWIL would also qualify as an "Exculpated Party" under the Plan, as a "related party" to a Debtor. *See* Plan at I.A ¶ 153.

⁶ IBM also notes Article V.E of the Plan, which states that "Rejection of any Executory Contract or Unexpired Lease pursuant to this Plan or otherwise shall not constitute a termination of preexisting obligations owed to the Debtors or the Reorganized Debtors, as applicable, under such Executory Contracts or Unexpired Leases." To the extent that the Debtors would bind counter-parties to provide performance under rejected contracts, IBM objects to Article V.E.

31. Non-Debtor and counter-party to the International CRA and the Original SOW, WeWork BV, would also qualify as a Released and / or Exculpated Party.

32. The Plan defines “Releasing Parties” broadly, to include any “Holder” of any “Claim” that has not affirmatively opted out of granting the Releases through checking a box on a ballot or “notice of nonvoting status.” *See* Plan at I.A ¶ 234.

33. A Holder of a Claim may also avoid becoming a Releasing Party by filing an objection to confirmation of the Plan. *See id.*

34. IBM has received no ballot or notice of nonvoting status, and thus, IBM has not been afforded an opportunity to opt out of granting the Releases. *See supra* ¶ 11. IBM must therefore object to confirmation of the Plan, according to its own terms, in order to ensure that the Debtors and their Related Parties cannot bind it as a Releasing Party.

35. Section 524(e) of the Bankruptcy Code prohibits the release and permanent injunction of claims against non-debtors in most circumstances. *See* 11 U.S.C. § 524(e) (“Except as provided in subsection (a)(3) . . . discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.”).

36. As the United States Court of Appeals for the Third Circuit has recognized, the non-consensual release of a non-debtor’s claims against another non-debtor may be permissible only in “extraordinary cases.” *See Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 212 (3d Cir. 2000); *see also In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 139 (3d Cir. 2019) (“Our precedents regarding nonconsensual third-party releases . . . in the bankruptcy plan context set forth exacting standards that must be satisfied if such releases . . . are to be permitted, and suggest that courts considering such releases do so with caution.”); *In re Washington Mutual, Inc.* 442 B.R. 314, 351 (Bankr. D. Del. 2011) (stating that the Third Circuit

“has recognized that [third party releases] are the exception, not the rule”); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 608 (Bankr. D. Del. 2001) (“The *Continental* court cited cases which warned against the exercise of unfettered discretion to discharge nondebtors from liability, and explained that a permanent injunction limiting the liability of nondebtor parties is a rare thing that should not be considered absent a showing of exceptional circumstances.”) (internal quotations omitted).

37. The Delaware bankruptcy court has also held that “any third party release is effective only with respect to those who affirmatively consent to it by voting in favor of the Plan and not opting out of the third party releases.” *Washington Mutual*, 442 B.R. at 355.

38. IBM therefore objects to the Plan to the extent that the Releases would preclude it, as a Releasing Party, from pursuing any claims for the amounts owed to it for Services under the IBM Contracts by non-Debtors, such as WWIL and WeWork BV, as Released and / or Exculpated Parties.

39. To resolve its objection, the Debtors must modify the Plan to make clear that IBM’s rights to seek payment for amounts owed to it for Services under the IBM Contracts from non-Debtors, such as WWIL and WeWork BV, are not released, enjoined or otherwise affected, and instead are expressly preserved.

WHEREFORE, IBM respectfully reserves all of its rights and requests that this Court enter an order that: (i) approves assumption of the IBM Contracts, assuming that is the Debtors’ intentions, only to the extent consistent with the foregoing; (ii) conditions any confirmation of the Plan to include the modifications requested herein; and (iii) grants such further relief to IBM as this Court deems just and equitable.

Dated: May 28, 2024

Respectfully submitted,
DUANE MORRIS LLP

/s/ Morris S. Bauer

Morris S. Bauer, Esq.
(NJ Bar No. 039711990)
200 Campus Drive, Suite 300
Florham Park, New Jersey 07932-1007
Telephone: (973) 424-2037
Facsimile: (973) 556-1380
E-mail: MSBauer@duanemorris.com

*Counsel for International Business
Machines Corporation*