

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

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

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In re:

WEWORK INC., *et al.*,

Debtors.¹

Chapter 11

Case No. 23-19865 (JKS)

(Jointly Administered)

(Application for Order Shortening Time for
Hearing filed concurrently herewith)

Requested Hearing Date: Dec. 11, 2023 at 10:00 a.m. (ET)

Objection Deadline: At the Hearing

**MOTION OF CUSHMAN & WAKEFIELD U.S., INC. FOR ORDER COMPELLING
ASSUMPTION OR REJECTION OF EXECUTORY CONTRACT OR IN THE
ALTERNATIVE, FOR RELIEF FROM THE AUTOMATIC STAY**

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.

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

Cushman & Wakefield U.S., Inc. (“Movant”) states as follows in support of this Motion for Order Compelling Assumption or Rejection of Executory Contract Or in the Alternative, For Relief From the Automatic Stay (the “Motion”):

Summary of Argument and Relief Requested

1. Through this Motion, Movant seeks entry of an order, substantially in the form attached hereto as **Exhibit A**, (1) compelling the Debtors (defined below) to assume or reject the Master Services Agreement and Canada Participation Agreement entered into by and between Movant and the Debtors (collectively, and with all addenda, schedules, exhibits, and attachments thereto, the “MSA”), a true and correct copy of which is attached to the Declaration of Erin Leahy (“Leahy Declaration”) as Exhibit 1²; and (2) if rejected, granting Movant relief from the automatic stay under section 362(d) of the Bankruptcy Code.

2. Under the MSA, Movant, in many instances through the use of subcontractors and other third party vendors (the “Vendors”), provides many of the services necessary for the Debtors to operate nearly all of their locations throughout the United States and Canada. Specifically, not only does Movant have approximately 200 employees that are dedicated to and work solely on projects for the Debtors, but Movant also provides facilities management services necessary to keep the Debtors’ locations up and running – services such as HVAC repair and maintenance, elevator repair and maintenance, electrical and plumbing services, repair and maintenance of fire and life safety systems, and pest control, just to name a few. The services provided by Movant

² A copy of the MSA is not currently attached to the Motion because it contains confidential and proprietary information. Movant is seeking an order of the Court to file the MSA under seal pursuant to a separate motion filed concurrently herewith.

and the Vendors also ensure that the Debtors meet their lease and occupancy requirements, including member space, support and service expectations.

3. Despite the all-encompassing and critical nature of the services provided by Movant, the Debtors have failed and refused to pay any pre-petition sums owed to Movant under the terms of the MSA (including those owed to the Vendors and to reimburse payroll), or to assume the MSA pursuant to Section 365 of the Bankruptcy Code, or to deem Movant a critical vendor.

4. Many of the Vendors have expressed grave concerns about receiving payment in full and some have already ceased performing any further services until they receive payment for pre-petition services. If the Vendors are not immediately paid for their pre-petition services, they could refuse to provide post-petition services. If that happens, quite literally, the Debtors' operations could cease. If the buildings are not operational, or lease requirements are not met, not to mention if the Debtors' members are not receiving the "member experience" that they expect from the Debtors, there will be no business to reorganize in these Chapter 11 Cases (defined below). If post-petition services are not performed due to non-payment, the Debtors also risk being sanctioned by regulatory agencies, liens placed on Debtors' property by the Vendors, potential breaches of the Debtors' leases, loss of business due to unsatisfied members, and disruption (if not a complete shut-down) of the Debtors' day to day business operations.

5. For all these reasons which will be discussed in greater detail below, Movant respectfully requests the Court grant the Motion and enter an order compelling Debtors to assume or reject the MSA immediately.

6. Moreover, the Motion must be heard now because a substantial amount of pre-petition invoices will come due in the next week, meaning that the risk of the Vendors refusing to

perform additional services (and thus, disruption to the Debtors' operations) heightens dramatically.

Jurisdiction and Venue

7. The United States Bankruptcy Court for the District of New Jersey (the "Court") has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Standing Order of Reference to the Bankruptcy Court Under Title 11, entered July 23, 1984, and amended on September 18, 2012 (Simandle, C.J.). Movant confirms its consent to the Court entering a final order in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

8. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

9. The bases for the relief requested herein are Sections³ 105(a), 362(d), 365(d), 503(a) and (b) and 1108 of title 11 of the United States Code (the "Bankruptcy Code"), rule 6004(h) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and rules 9013-1 and 9013-2 of the Local Bankruptcy Rules for the District of New Jersey (the "Local Rules").

10. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). The Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (G) and (O).

Background

Background of Bankruptcy Case

11. On November 6, 2023 (the "Petition Date"), the above-captioned debtors and debtors in possession (the "Debtors") commenced with the Court voluntary cases under chapter

³ The capitalized term "Section" shall refer to the section of the Bankruptcy Code found at title 11 of the United States.

11 of the Bankruptcy Code (the “Chapter 11 Cases”). Movant was listed on the Debtors’ Schedule of the Thirty Largest Unsecured Creditors with a general unsecured claim in the incorrect and lower amount of \$2,535,989.66 [Docket No. 1].⁴

12. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. A committee has been appointed but no trustee or examiner has been appointed in any of the Chapter 11 Cases. The Chapter 11 Cases are being jointly administered for procedural purposes only pursuant to Bankruptcy Rule 1015(b).

13. On November 8, 2023, the Court entered the Interim Order (I) Authorizing Debtors to Pay Prepetition Claims of Certain Critical Vendors, Foreign Vendors, 503(B)(9) Claimants, and Lien Claimants, (II) Granting Administrative Expense Priority to All Undisputed Obligations on Account of Outstanding Orders, and (III) Granting Related Relief (the “Critical Vendor Order”) [Docket No. 96] authorizing the Debtors to, on an interim basis and in their sole discretion, pay certain prepetition claims of certain vendors.

14. Also on November 8, 2023, the Court entered the Interim Order (I) Authorizing Debtors to (A) Maintain and Administer Their Customer Programs and (B) Honor Certain Prepetition Obligations Related Thereto, and (II) Granting Related Relief (“the “Customer Programs Order”) [Docket No. 86] authorizing the Debtors to, on an interim basis, pay certain prepetition claims relating to customer programs offered to the Debtors’ members to incentivize customer retention, attract new customers and increase customer satisfaction and loyalty. Of note, and quite curiously, the Debtors have agreed to pay pre-petition sums owed to Movant for

⁴ Movant disputes this amount and asserts the pre-petition balance owed to Movant is much higher.

brokerage and lease administration/consulting services under the Customer Programs Order, but not sums due under the MSA which are more crucial for customer retention.

Summary of the Services Provided By Movant

15. On or about May 18, 2022, Movant and Debtors entered into the MSA. A true and correct copy of the MSA is attached to the Leahy Declaration as Exhibit 1.

16. Pursuant to the terms of the MSA, Movant provides various facilities management services in support of substantially all of the Debtors' locations in the United States and Canada, on which Movant has oversight, management, and complete responsibility for and on behalf of the Debtors for the services provided under the MSA. Such services include oversight and management of the building mechanical systems (such as repair, maintenance and replacement of HVAC systems), building electrical systems, plumbing services, repair and maintenance of the buildings, fire and life safety systems (such as sprinkler systems, smoke/heat detectors, emergency lights, exit signs, etc. to ensure continuous and appropriate operations during emergency situations), pest control, and asset lifecycle management. In exchange, the Debtors pay Movant a fee, provide funds to Movant for Movant to pay the Vendors, and reimburse Movant for payroll and other employee related expenses. *See*, Leahy Declaration at €7.

17. Quite literally, at the moment, Movant provides the services necessary for the operations, business continuity and co-compliance required for occupancy at nearly all of the Debtors' locations in the United States and Canada. *See*, Leahy Declaration at €8.

18. In addition, Movant provides services necessary to maintain the so-called "WeWork member experience." Specifically, Movant provides services to ensure the Debtors' members receive the amenities and perks which they expect as members of WeWork. Such

services are necessary to ensure member satisfaction, keep current members and attract new members. *See*, Leahy Declaration at €9.

Relevant Terms of the Underlying Master Services Agreement

19. In support of its services under the MSA, Movant may, in its discretion, hire certain Vendors. *See*, Leahy Declaration at €10.

20. The MSA is unique in that in order for a Vendor to receive payment from Movant, Movant must first receive payment from the Debtors under the MSA. Specifically, the Vendor Agreement between Movant and the Vendor provides as follows:

Section 22.(d) Contractor acknowledges and agrees that (i) C&W is the sole point of contact regarding the Services, including with respect to payment; and (ii) Contractor shall not be paid until and unless C&W receives funds from Client [WeWork] specifically designated for payment of the obligations due or to become due to Contractor.

Section 23 LIMITATION ON C&W'S OBLIGATIONS. Notwithstanding anything to the contrary contained herein, Contractor acknowledges and agrees that C&W's obligation to make payment to Contractor of any compensation hereunder shall be conditional upon Client providing C&W with funds sufficient to pay such compensation to Contractor. In the event Client shall fail or refuse for any reason whatsoever to provide C&W with funds sufficient to pay the compensation due to Contractor hereunder, then C&W will not be able to make any payment of such compensation to Contractor.

A true and correct copy of the Vendor Agreement is attached to the Leahy Declaration as Exhibit 2.

21. Likewise, the purchase order provided by Movant to the Vendor provides the following language (emphasis supplied):

Submit your invoice with this Purchase Order number indicated thereon. AVOID PARTIAL INVOICES. In a manner and form reasonably acceptable to Purchaser, Vendor/Contractor shall

provide correct and complete invoices to Purchaser within fourteen (14) business days of completion of work or as otherwise agreed up in writing by the parties. Payment shall be due within ninety (90) days of the date of receipt of such invoice. Purchaser shall not be liable for payment of any invoice amount for services or expenses not billed in a timely manner, and in no event for fees for services more than ninety (90) days after such is performed or incurred as the case may be. Vendor/Contractor agrees that it will not be paid for the services until and unless Owner furnishes funds to Purchaser specifically designated for payment of the obligations due or to become due to Vendor/Contractor hereunder; in the event Owner shall fail or refuse for any reason whatsoever to provide Purchaser with funds sufficient to pay the compensation due to Vendor/Contractor hereunder, then Purchaser will not be able to make any payment of such compensation to Vendor/Contractor, and Vendor/Contractor shall have no claim for payment against Purchaser. In the event that Owner becomes subject to a bankruptcy or insolvency proceeding and any fees and costs paid by Owner to Purchaser (which formed the basis of Purchaser paying Vendor/Contractor) are avoided and recovered pursuant to 11 U.S.C. Section 547, or similar state insolvency law, Vendor/Contractor shall be required to refund the fees and costs Vendor/Contractor received from Purchaser on account of such avoided transfer within 30 days after Purchaser provides Vendor/Contractor with proof of such payment by Purchaser to Owner's bankruptcy estate. If an amount less than the full amount of the alleged preferential payment is avoided, such as by way of settlement or partial defense, Vendor/Contractor's refund obligations to Purchaser shall be limited to Vendor/Contractor's pro rata share of any such avoided transfer(s).

22. A true and correct copy of a form purchase order used by Movant is attached to the Leahy Declaration as Exhibit 3.

23. Thus, it is abundantly clear that the Vendors providing services under the MSA will not receive payment until after Movant first receives payment from the Debtors. The Debtors were fully aware of, and agreed to, such payment terms and conditions with the Vendors as part of the MSA. Specifically, the FM Schedule to the MSA provides as follows at Section 5 (with emphasis supplied):

Unless as otherwise set forth in this Schedule as to the payment of specific Approved Expenses, the Approved Expenses shall be invoiced by C&W on a bi weekly basis to Client, and Client shall pay C&W the Approved Expenses within sixty (60) days of invoice. Time is of the essence in the payment of the Approved Expenses by Client. C&W will pay Subcontractors only after C&W is paid by Client. Client acknowledges and agrees that Services may be delayed or not be delivered if C&W does not receive timely payments. Subject to the limitations of liability included in the Master Agreement, Client shall indemnify, defend and hold harmless C&W from any and all loss or claims including, but not limited to, late penalties, damages, liens, causes of action, or otherwise, resulting from the failure of Client to timely pay C&W the Approved Expenses, except to the extent caused by the negligence, willful misconduct and fraud of C&W, including C&W's failure to include in the contracts with Subcontractors payment terms that are consistent with Client's payment terms herein and that allow C&W to make timely payments.

The FM Schedule is included with the MSA at Exhibit 1 to the Leahy Declaration.

24. Accordingly, Movant is under no obligation to pay the Vendors unless and until payment is received by Movant from the Debtors. This fact was specifically acknowledged and agreed to by the Debtors as part of the MSA. The Debtors further acknowledged that if Debtors do not timely pay Movant, then services under the MSA may be delayed or not delivered.

25. Thus, Movant cannot be compelled to advance funds to the Vendors if the Debtors do not provide payment to Movant. If the Vendors are not paid, it will jeopardize whether post-petition services are provided to the Debtors under the MSA through no fault or breach of Movant.

26. Also, as part of the MSA, approximately 200 of the Debtors' employees are dedicated and work solely on projects related to the Debtors, and their wages must be reimbursed by the Debtors to Movant. *See*, Leahy Declaration at ¶19. Specifically, Section 2 of the FM Schedule attached to the MSA provides in pertinent part as follows (with emphasis supplied):

2. Premises Employees.

Subject to the limitations provided in this Schedule, C&W agrees to use best efforts to perform the Services so as to operate, manage and/or maintain the Premises in accordance with commercial facility management industry standards and the provisions of this Schedule and the Master Agreement. C&W will use reasonable care in the

hiring of its employees assigned to provide Services hereunder with respect to the Premises and to comply with the applicable provisions of the Master Agreement.

...

C&W will, commencing on the effective date of such employee's employment by C&W: (a) pay all wages (including overtime for non-exempt employees), salaries, annual and one-time bonus payments and other compensation due to or on behalf of such employees including all Benefits Costs as defined herein. "Benefits Costs" include all payable in respect to the payroll such as, but not limited to, the following: (i) benefits administration fees, incentive compensation, FICA, Medicare, FUTA, SUI, 401k (employer contribution), pension contribution, severance*, employee-based workers' compensation insurance, short term disability insurance, long term disability insurance, medical, dental and vision insurance and life insurance, or included in any collective bargaining agreements which C&W may enter into on behalf of Client for reimbursable employees in the United States; and (ii) similar taxes, insurance and benefits (including health, welfare and pension plans) customarily paid for by employers for reimbursable employees in countries other than the United States (all hereinafter referred to as "C&W Employee Costs").

...

C&W shall invoice Client for C&W's Employee Costs on a bi-weekly basis and such C&W Employee Costs shall be reimbursed to C&W by Client within five (5) days from date of invoice, provided that all invoicing requirements are satisfied. Time is of the essence in the payment of the Employee Costs by Client.

27. Pursuant to the above, Movant employs approximately 200 prior employees of the Debtors and/or Debtors' previous supplier, who work solely on the Debtors' projects. Thus, while such individuals are on Movant's payroll, they are effectively employees of the Debtors. As of the date of this Motion, the Debtors owe to Movant the sums of USD\$ 2,548,583.92 and CAD\$ 176,972.09 in pre-petition payroll that has come due and not been paid by the Debtors to Movant for these employees. *See*, Leahy Declaration at €20.

28. Finally, it should be noted that if the Debtors terminate the MSA, the MSA provides for various compensation to be paid by the Debtors to Movant, including but not limited to any severance that Movant may pay to its employees. *See*, Leahy Declaration at ¶21. This includes severance obligations that could be \$3.4 million or more, the reimbursement of transition costs that could be up to \$1.4 million, and the remaining unamortized share of the settlement amount of over \$1.735 million.⁵ Specifically, the MSA provides as follows (with emphasis supplied):

4.22 De-Scoping of Services. Upon not less than thirty (30) days' prior written notice to C&W, C&W shall De-Scope any Service upon Client's request, provided that any material change in the volume or scope of the Services shall be addressed by the Parties in accordance with Exhibit 5 (Governance/Change Control) to the Schedule for Facilities Management Services. To the extent Client performs such De-scoped Service itself or retains any third-party service provider (other than an Integrated Facilities Management Competitor of C&W) to do so, C&W shall reasonably cooperate with Client and such designated third party service provider during the applicable period to De-Scope in connection with the performance of such De-scoped Services. For avoidance of doubt adding or removing Premises does not constitute a De-Scoping of Services. Further, to the extent that such De-Scoping results in a material change to the scope of services included in the Schedule for Facilities Management Services as of the Effective Date, the parties agree that Client shall reimburse C&W for the relevant portion of the remaining unamortized transition costs at that time (for example, if the fiscal year approved Budget is reduced by 25%, then only 25% of the transition costs should be amortized over the Term), which under no circumstances would exceed \$1,400,000, and for all severance costs incurred by C&W as a result of such De-Scoping of Services. Material change shall be defined as a twenty-five percent (25%) decrease in the overall then current fiscal year approved Budget, provided that any amount of budget reduced due to savings or efficiencies should not count towards this threshold. Notwithstanding the foregoing, if a Client De-Scoping of Services resulting in the material change to the scope of services described in this Section 4.22 occurs prior to December 31, 2022, Client shall reimburse C&W for a proportionate, remaining unamortized share of the Settlement Amount. The Parties further agree that should a

⁵ A prior Master Services Agreement dated November 6, 2019 by and among Movant, the Debtors and Jones Lang LaSalle Americas, Inc. was terminated for convenience with a termination date of August 19, 2022. As part of the termination, Debtors agreed to pay to Movant a settlement sum which is referenced in the MSA.

material change (up or down) to the scope of Services included in the Schedule for Facilities Management Services as of the Effective Date, occur after the Effective Date, the Parties shall discuss in good faith whether an equitable adjustment to the Facilities Management Fee would be appropriate given the material change to the scope of services.

17.5 Termination of Agreement for Convenience. Notwithstanding anything to the contrary contained in this Section 17, either party may terminate this Master Agreement (and/or any Participation Agreement hereunder), in whole or in part, without cause upon ninety (90) days prior written notice.

(a) In the event Client terminates the Master Agreement for convenience or C&W terminates for cause, then Client shall reimburse to C&W, within thirty (30) days of termination, (i) the relevant portion of the remaining unamortized Settlement Amount remaining at that time, and (ii) any remaining unamortized portion of the transition costs (which under no circumstances shall exceed \$1,400,000). In either event, Client shall further reimburse C&W for (a) the actual severance costs paid to C&W's employees as a result of such termination who: (a) were solely dedicated to the Client account; (b) were not hired or offered to be hired by the Client or the incoming service provider; and (c) were unable, after reasonable efforts by C&W, to be redistributed within C&W's organization or to provide services to its other clients.

Pre-Petition Services Performed and Unpaid

29. Despite the very critical nature of the services provided by Movant, its employees, and the Vendors, the Debtors have failed to pay to Movant a substantial sum of money for services performed pre-petition. Specifically, the Vendors are owed over USD\$ 5.5 million and nearly CAD\$ 500,000 for services performed pre-petition, left unpaid because the Debtors have not paid Movant. In addition, the Debtors owe Movant over USD\$ 2.5 million and over CAD\$ 176,000 for the reimbursement of pre-petition payroll as outlined above.⁶ See, Leahy Declaration at €22.

⁶ The Debtors have also not paid Movant any of the fees or other compensation owed directly to Movant under the MSA which totals over USD\$ 500,000.00 and over CAD\$ 34,000.00. As an alternative interim relief, Movant will agree to defer payment of such sums if the Vendors and the employees are paid their pre-petition sums.

30. The sums owed to third-party pass-through entities (the Vendors) must be paid immediately because if the Vendors remain unpaid, the Vendors may not perform post-petition and the Debtors will not receive the benefit of their bargain under the MSA post-petition, through no fault or breach by Movant. Moreover, if post-petition services are not performed due to non-payment, the Debtors risk sanctions by regulatory agencies, disruption to the Debtors' day to day business operation, liens placed on Debtors' property by the Vendors, potential breaches of Debtors' leases, and loss of business due to unsatisfied members. *See*, Leahy Declaration at €24.

31. The Vendors do not have to continue working if they remain unpaid; a fact acknowledged by the Debtors in the MSA. In fact, many of the Vendors have threatened to cease performing services, either because they have not been paid in full for their pre-petition services or because the Vendor is concerned it will not be paid in full due to the Debtors' bankruptcy filing. *See*, Leahy Declaration at €25. Without the Debtors' assumption of the MSA, Movant is unable to provide the Vendors with any assurance that their pre-petition outstanding balances will be paid. To wit, at least twenty-four (24) Vendors have either put Movant on hold or are refusing to provide further services until their pre-petition amounts are paid. *See*, Leahy Declaration at €26. At least one Vendor already filed multiple notices of claims on various locations in order to preserve its lien rights. An example of one such notice of claims received by Movant is attached as Exhibit 4 to the Leahy Declaration. Movant expects many more notices of claims to be filed in short order as pre-petition invoices continue to become overdue. *See*, Leahy Declaration at €26. Furthermore, without the Debtors' assumption of the MSA, Movant is unable to provide its current employees (and hiring for open positions) with any assurance of continued employment, making it more likely that employees will leave and open positions will not be filled. *See*, Leahy Declaration at €27.

32. The services provided under the MSA can be described as nothing short of critical and necessary to the Debtors' continued operations in anticipation of its go forward plan. The services include exactly those services the Debtors deem as critical in the Critical Vendor Motion. Specifically, "critical repair and maintenance, building securities, building access control, cleaning and janitorial services that often require prompt attention on short notice, pest control, vertical transportation and lift maintenance, fire and life safety maintenance repairs, and inspection services, all to ensure that the locations are regulatorily compliant and to avoid diminishing or disrupting members' experience." *See*, Critical Vendor Motion at page 7. These are exactly the services that Movant provides under the MSA.

33. Likewise, Movant provides "various office supplies and amenities that are integral to the WeWork member experience," which is critical to Debtors' continued operations. *See*, Critical Vendor Motion at page 9.

34. The scope of the services provided under the MSA is so pervasive that the Debtors will have no ability to continue operations if the Vendors and employees continue to walk off jobs due to the continued uncertainty. The Debtors must assume the MSA and pay the sums due under the MSA to ensure that the Debtors receive the benefit of the MSA post-petition and are able to continue operations as usual.

Attempts to Resolve Issues Between the Parties

35. Since immediately prior to the Petition Date, Movant and the Debtors have been in discussions regarding the MSA, the amounts owed thereunder, and how it will be treated in the Chapter 11 Cases. In fact, the morning of the filing of the Chapter 11 Cases, representatives of the Debtors and Alvarez & Marsal ("A&M") told Movant that Movant is one of their most important vendors and that Movant will fit nicely into one (1) of the three (3) buckets of what they

consider to be critical vendors. *See*, Leahy Declaration at ¶28. A&M advised Movant something very similar in a later call that same day at 4:00 p.m. on November 6, 2023. *See*, Leahy Declaration at ¶28. Directly contrary to such conversation, the Debtors now assert that Movant cannot be paid as a critical vendor or otherwise, even under the Customer Programs Order.

36. Since the Petition Date, Movant and the Debtors have continued their discussions and also involved counsel. Despite nearly constant communication over the last thirty (30) days, the parties have been unable to reach a resolution. While the Debtors continue to assure Movant that it is absolutely important and critical to the Debtors, the Debtors have refused to pay any pre-petition sums owed under the MSA and have refused to advise whether the MSA will be assumed or rejected.

37. Despite Movant's best efforts to obtain payment of all pre-petition sums owed, the Debtors insisted on obtaining information only on those Vendors who are most critical (but in fact all Vendors are critical to Debtors operations). Movant obliged and provided to the Debtors the amount owed to those Vendors who are most critical but still the Debtors continue to refuse to pay any pre-petition sums owed.

38. Apparently to appease Movant, the Debtors are paying to Movant a set weekly sum to be credited toward post-petition services. While Movant appreciates this, these are amounts the Debtors are obligated to pay in any event and the payment does nothing to provide assurance to the Vendors and employees so that they will continue to perform post-petition. As outlined above, it is the pre-petition sums owed to the Vendors and the pre-petition payroll to the employees that the Debtors must pay immediately to ensure the Vendors and employees will continue to perform post-petition.

39. Movant exhausted all efforts, and took all steps possible, to try to reach an amicable resolution with the Debtors before filing this Motion. Unfortunately, the parties could not reach an agreement and so to protect itself (and more importantly, its employees, the Vendors and Movant's reputation with Vendors who are at the heart of Movant's business), Movant felt it had no choice but to file the Motion.

Basis For Relief

Relevant Authority and Case Law

40. Bankruptcy Code Section 365(d)(2) provides in pertinent part as follows:

In a case under chapter ... 11 ... of this title, the trustee may assume or reject an executory contract ... of the debtor at any time before confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

11 U.S.C. § 365(d)(2).

41. Accordingly, on request of the non-debtor party to the lease or executory contract, the court may order the debtor to assume or reject the lease within a specified "reasonable time." *See, e.g., In re Hawker Beechcraft, Inc.*, 483 B.R. 424, 429 (Bankr. S.D.N.Y. 2012) (granting a motion to compel the debtor to assume or reject a contract within a specified time period where the circumstances warranted a determination "at the earliest possible date"). The U.S. Court of Appeals for the Third Circuit has observed that section 365(d)(2) is intended to "prevent parties in contractual or lease relationships with the debtor from being left in doubt concerning their status vis-à-vis the estate." *Univ. Med. Ctr. V. Sullivan (In re Univ. Med. Ctr.)*, 973 F.2d 1065, 1078-79 (3d Cir. 1992) (citations and internal quotation marks omitted).

42. What constitutes a "reasonable time" is left to the bankruptcy court's discretion in light of the circumstances of the particular case. *See, e.g., Hawker Beechcraft*, 483 B.R. at 429. In exercising that discretion, courts consider a variety of factors including, among others, (i) the

nature of the interests at stake; (ii) the balance of the harm to the litigants; (iii) the good to be achieved; (iv) the safeguards afforded the litigants; (v) the debtor's failure or ability to satisfy post-petition obligations; and (vi) the damage that the non-debtor will suffer beyond the compensation available under the Bankruptcy Code. *See id.* (quoting *In re Adelphia Commc'ns Corp.*, 291 B.R. 283, 293 (Bankr. S.D.N.Y. 2003)). Courts will also consider the importance of the contract to a debtor's business and reorganization. *Adelphia Commc'ns Corp.* 291 B.R. at 293 (citing *In re Teligent*, 268 B.R. 723, 738 (Bankr. S.D.N.Y. 2001); *South St. Seaport Ltd. Pshp. v. Burger Boys (In re Burger Boys)*, 94 F.3d 755, 761 (2d. Cir. 2003)).

43. It is within the Court's discretion to avoid unnecessary delay by establishing a deadline by which a debtor must make its Section 365(a) election. *See, e.g., In re Winn-Dixie Stores, Inc.*, 345 B.R. 402, 406 (Bankr. M.D.Fla. 2006). In doing so, the Court must balance the interests of the debtor against those of the non-debtor party to the contract. *See, e.g., In re Physician Health Corp.*, 262 B.R. 290, 292 (Bankr. D. Del. 2001). This is an equitable inquiry in which the Court balances the potential harm to the estate from making an accelerated decision against the potential harm to the counter-party to the contract from having to wait for assumption or rejection. *See, e.g., In re Kmart Corp.*, 290 B.R. 614, 619 (Bankr. N.D. Ill. 2003).

44. While debtors are afforded some breathing space as a result of a Chapter 11 filing, such "breathing space ... is not without limits." *In re Enron Corp.*, 279 B.R. 695, 702 (Bankr. S.D. N.Y. 2002). Courts will consider whether the non-debtor counterparty of the executory contract will suffer any harm or prejudice through the continued utilization of its services prior to assumption or rejection. *See, In re Wheeling-Pittsburgh Steel Corp.* 54 B.R. 385, 389 (Bankr. W.D. Pa. 1985) ("When the Debtor-in-Possession continues to perform its post-petition obligations, and the obligee under the executory contract or unexpired lease is suffering no harm or prejudice

through the continued utilization of its computer services, there is no need to require the Debtor to assume or reject prior to the confirmation of a plan of reorganization”); *see also, In re Bonita Glen II*, 152 B.R. 751, 754 (holding that where a movant can “show real prejudice...he may move the Court to set an earlier date by which the debtor must assume or reject the lease”).

Prejudice to the Debtors and to Movant if the Motion is Denied

45. Here, both the Movant and the Debtors will be prejudiced if the Motion is denied. The Debtors will be harmed because post-petition services may not be performed if the Vendors do not receive payment for their pre-petition services. Movant cannot be compelled to advance sums to the Vendors. Thus, if the Debtors do not provide funds to Movant to pay the Vendors for pre-petition services, the Debtors will not receive the benefit of the MSA post-petition and will be unable to continue operations as usual. Further, if post-petition services are not provided by the Vendors, the Debtors are put at extreme risk of sanctions by regulatory agencies, disruption to the Debtors’ day to day business operation, filing of liens, potential breach of leases, and loss of business due to unsatisfied members.

46. Movant appreciates that the Debtors have discretion to not pay Movant as a critical vendor (despite the fact that the services provided under the MSA are nearly identical to those quoted in the Critical Vendor Motion as critical) and/or because there is an executory contract in place. Movant also understands that Section 365 affords the Debtors a significant amount of time to decide whether to assume or reject contracts. But this is not a garden variety executory contract between two parties that can be enforced. Here, the Vendors are essentially third party pass-through entities who are only paid by Movant if Movant first receives payment from the Debtors. Movant has no obligation to advance any sums to the Vendors.

47. If the Vendors are unpaid, they can refuse to perform post-petition. Thus, the reality is that the Debtors do in fact risk the loss of post-petition services if, at the very least, the Vendors are not paid their pre-petition amounts. Furthermore, without the Debtors' assumption of the MSA, Movant is unable to provide its current employees (and hiring for open positions) with any assurance of continued employment, making it more likely that employees will leave and open positions will not be filled.

48. Quite frankly, Movant is shocked that the Debtors are taking such a narrow view of the MSA and the Bankruptcy Code. Debtors seem to not truly comprehend the unique and relevant nature of the MSA and the disastrous affect it would have on the Debtors' business if it is not assumed. The scope of the services provided under the MSA is so pervasive that the Debtors will have no ability to operate their business in the short-term if the Vendors continue to walk off jobs or put Movant on hold, which they are entitled to do if unpaid and in fact, many have already done, not to mention employees leaving and open roles going unfulfilled because Movant is unable to provide the appropriate assurances.

49. To allay the Debtors' concerns about payment of the pre-petition sums, any such payment is essentially the payment of an administrative expense under Section 503⁷ – such payments would benefit the estates by ensuring that post-petition services are performed that are absolutely necessary and critical to preserving the Debtors' estates and the Debtors' continued operations.

⁷ Section 503(b)(1)(A) states in pertinent part as follows: “(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including-(1)(A) the actual, necessary costs and expenses of preserving the estate including”-

50. Movant will be further prejudiced if the Motion is denied because failure to pay the Vendors will likely affect Movant's reputation in the community and will affect Movant's ability to perform on its other contracts. Certain of the Vendors may not agree to work with Movant on projects for Movant's other clients. Moreover, Movant risks losing its employees (and being unable to fill open positions) if the Debtors fail to reimburse Movant for employee payroll and other costs.

51. Finally, it is unfair for Movant to carry a pre-petition balance of over \$9 million in pre-petition payroll, payments owed to Vendors, and sums owed to Movant under the terms of the MSA. Movant cannot continue to carry this balance without knowing whether the MSA will be assumed or rejected given all the efforts that Movant has made to ensure that the Debtors' locations remain open and operating for the Debtors' members.

52. Any further delay will serve to harm not only the Movant, but also the Debtors and their estates. The MSA must be assumed immediately so that the Debtors can assure that post-petition services are performed under the MSA and that there is no threat to Debtors' ability to operate.

53. If, however, the Debtors are unable to pay all sums due under the MSA, then the Court should order the rejection of the MSA before the accrual of additional administrative expenses to prevent erosion of the Debtors' estates and their assets. In such case, there is cause for relief from the automatic stay under 11 U.S.C. § 362(d)(1) so that Movant may exercise its rights and remedies for breach of the MSA under applicable law.

54. In the alternative, if the Court is not inclined to grant the Motion at this time, in the interim, the Debtors should be made to pay to Movant, at the very least, the pre-petition sums owed to the Vendors who remain critical to Debtors' business operations (USD\$ 2,997,629.99 plus

CAD\$ 270,777.14) and the pre-petition payroll (USD\$ 1,759,122.45 plus CAD\$ 187,873.76) so that the Vendors and the employees continue to perform post-petition and the Debtors receive the benefit of the MSA post-petition.

No Prior Request

55. No prior request for the relief sought in this Motion by Movant has been made to this Court or any other court.

Notice

56. Movant will provide notice of this Motion to the following parties or their respective counsel: (a) Kirkland & Ellis LLP, as counsel for the Debtors; (b) the U.S. Trustee for the District of New Jersey; (c) Riker Danzig LLP and Paul Hastings LLP, as counsel to the Official Committee of Unsecured Creditors; (d) Davis Polk & Wardwell LLP and Greenberg Traurig, LLP, as counsel to the Ad Hoc Group; (e) Weil, Gotshal & Manges LLP and Wollmuth Maher & Deutsch LLP, as counsel to SoftBank; (f) Cooley LLP, as counsel to Cupar Grimmond, LLC; (g) the agents under each of the Debtors' prepetition secured credit facilities and counsel thereto; and (h) any party that has requested notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, no other or further notice need be given.

57. WHEREFORE, Movant requests that the Court enter an order, in substantially the form submitted herewith, granting the relief requested herein and such other relief as is just and proper under the circumstances.

[Signature Page to Follow]

Dated: December 6, 2023

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EXHIBIT A

Proposed Order

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

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

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Counsel for Cushman & Wakefield U.S., Inc.

In re:

WEWORK INC., *et al.*,

Debtors.¹

Chapter 11

Case No. 23-19865 (JKS)

(Jointly Administered)

**ORDER COMPELLING DEBTORS TO ASSUME OR REJECT EXECUTORY
CONTRACT**

The relief set forth on the following pages, numbered two (2) and three (3), is hereby
ORDERED.

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.

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Debtors: WeWork Inc., *et al.*

Case No.: 23-19865 (JKS)

Caption of Order: Order Compelling Debtors to Assume or Reject Executory Contract

UPON CONSIDERATION of the Motion of Cushman & Wakefield U.S., Inc. (“Movant”) for an Order (1) compelling the Debtors to assume or reject the Master Services Agreement and Canada Participation Agreement entered into by and between Movant and the Debtors on or about May 18, 2022 (collectively, and with all addenda, schedules, exhibits, and attachments thereto, the “MSA”), a true and correct copy of which was attached to the Declaration of Erin Leahy in support of the Motion as Exhibit 1; (2) if rejected, granting Movant relief from the automatic stay; and the Debtors’ Opposition and any other responses thereto, and the representations, proffered testimony, and testimony at the hearing; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. § 1334; and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409, and after due deliberation and sufficient cause appearing therefor, it is hereby ORDERED as follows:

1. The Motion is GRANTED in part, as set forth herein.
2. The Debtors shall assume or reject the MSA within three (3) days of the date of entry of this Order.
3. If the Debtors assume the MSA, the Debtors shall pay all payments due or past due under the MSA by no later than December 15, 2023, and fully perform all other obligations thereunder.
4. If the Debtors reject the MSA, the Court hereby lifts the automatic stay of Section 362(a) of the Bankruptcy Code to allow Movant to proceed with any and all of its rights and remedies under applicable for breach of the MSA by the Debtors as a result of the rejection of the MSA.

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Debtors: WeWork Inc., *et al.*

Case No.: 23-19865 (JKS)

Caption of Order: Order Compelling Debtors to Assume or Reject Executory Contract

5. This Order is entered without prejudice to Movant's or the Debtors' rights to seek further or different relief or to a later determination of the amounts of any pre- or post-petition date claims by Movant.

6. This Court shall retain jurisdiction to hear and determine all matters arising from the implementation and interpretation of this Order.