IT IS SO ORDERED.

Dated: November 19, 2025

Mina Nami Khorrami
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	*	**Case No. 2:23-bk-53043**
WELCOME GROUP 2, LLC *et al.*,[1]	*	**Chapter 11**
	*	**Judge Mina Nami Khorrami**
Debtors.	*	**Jointly Administered**

MEMORANDUM OPINION AND ORDER DENYING IN PART HILTON FRANCHISE HOLDING LLC'S MOTION FOR RELIEF FROM AUTOMATIC STAY REGARDING HILLIARD HOTELS, LLC (DOC. #166) AND GRANTING THE MOTION FOR ORDER AUTHORIZING THE ASSUMPTION OF FRANCHISE AGREEMENT WITH HILTON FRANCHISE HOLDINGS, LLC (DOC. #420)

I. Introduction

Hilliard Hotels, LLC (the "Debtor) entered into a franchise agreement (the "Franchise Agreement") with Hilton Franchise Holding LLC ("Hilton") to be able to operate a hotel under

[1] The Debtors and the last four digits of their federal tax identification numbers are as follows: Welcome Group 2, LLC (6795), Hilliard Hotels, LLC (6063), Dayton Hotels, LLC (1123), and Dayton Hotels 2, LLC (0707). The Debtors' headquarters are located at 5955 E. Dublin Granville Road, New Albany, Ohio 43054.

the Hampton Inn brand. At the time the Franchise Agreement was executed, the Debtor was also required to complete a property improvement plan (the "PIP") within a specified period. The initial period specified by the PIP was subsequently extended by Hilton. In breach of the Franchise Agreement, the Debtor was unable to complete the necessary improvements by the initial and subsequent deadlines. The Debtor filed for voluntary relief under chapter 11 of the Bankruptcy Code on September 1, 2023 and seeks to assume the Franchise Agreement and cure its prepetition monetary default for unpaid franchise fees and its nonmonetary default of failing to timely complete the PIP under 11 U.S.C. § 365.[2] The Debtor proposes to make a payment to Hilton for the unpaid prepetition franchise fees no later than thirty days after a joint plan of reorganization is confirmed and to complete the requirements of the PIP no later than twenty-four months.

Prior to the Motion to Assume being filed, however, Hilton filed a motion for relief from the automatic stay (the "MFRS")[3] under 11 U.S.C. § 362(d) requesting, among other things, that the automatic stay be modified for cause to permit Hilton to terminate the Franchise Agreement on the bases that: (1) failing to complete the PIP by the required deadline constitutes an incurable default that prohibits the Debtor from assuming the Franchise Agreement; (2) the Franchise Agreement cannot be assumed without Hilton's consent as a matter of law under 11 U.S.C. § 365(c)(1) because applicable nonbankruptcy law prohibits the assignability of it regardless of whether the Debtor intends on assigning the Franchise Agreement[4]; (3) Hilton lacks adequate

[2] The Debtor filed its *Motion For Order Authorizing The Assumption Of Franchise Agreement With Hilton Franchise Holdings, LLC* (Dkt. No. 420) (the "Motion to Assume") to which Hilton filed the *Opposition Of Hilton Franchise Holding To Debtor's Motion For Order Authorizing Assumption Of Franchise Agreement* (Dkt. No. 421). Thereafter, the Debtor filed its *Amended Reply To Objection To Assumption Of Franchise Agreement With Hilton Franchise Holdings, LLC* (Dkt. No. 441).

[3] Hilton filed *Hilton Franchise Holding LLC's Motion for Relief from Automatic Stay Regarding Hilliard Hotels, LLC* (Dkt. No. 166) on February 28, 2024, and in response the Debtor filed its *Objection of Hilliard Hotels, LLC to Hilton Franchise Holding LLC's Motion for Relief from Automatic Stay* (Dkt. No. 191) on March 25, 2024.

[4] The Debtor and Hilton (collectively, the "Parties") agreed to initially brief this single issue for the Court to determine whether the hypothetical or actual test applied to assumption of the Franchise Agreement here. On July 10, 2024, the

protection because the Debtor is not protecting the reputation and intellectual property interests of Hilton due to the Debtor's non-compliance with the property improvement plan[5]; and (4) the Debtor defaulted on its post-petition monetary obligations under the Franchise Agreement.

Here, the Court must decide whether the Debtor has provided: 1) adequate assurance of a prompt cure, 2) compensation for any actual pecuniary loss resulting from the defaults, and 3) adequate assurance of the Debtor's future performance under the Franchise Agreement pursuant to 11 U.S.C. § 365(b)(1). And more specifically, the Court must determine whether 11 U.S.C. § 365(b)(1) prohibits the Debtor from assuming the Franchise Agreement with Hilton because of the historical default that is technically incurable, and thereby "cause" exists under 11 U.S.C. § 362(d) to terminate the Franchise Agreement with Hilton.

For the reasons stated below, the Court concludes that the historical and technically incurable default relating to the deadline by which the Debtor was required to complete the PIP does not prohibit the Debtor from assuming the Franchise Agreement because the default is neither material nor has it caused substantial economic harm to Hilton. The Debtor has also provided adequate assurance that the Debtor will promptly cure the monetary and non-monetary defaults and that it will be able to perform under the Franchise Agreement in the future. Accordingly, relief from the automatic stay based on the Debtor's inability to assume the Franchise Agreement is not warranted here.

Court entered its opinion ("*Welcome Group I*") and ultimately decided that the actual test is the appropriate test to apply when considering assumption of an executory contract under 11 U.S.C. § 365(c)(1). *In re Welcome Grp. 2, LLC*, 660 B.R. 874, 877 (Bankr. S.D. Ohio 2024). After *Welcome Group I* was entered by the Court, the final hearing on the MFRS was continued by agreement of the Parties several times, but once the Motion to Assume was fully briefed, the Court held an evidentiary hearing (the "Hearing") on July 22, 2025, to consider the remaining issues in the MFRS and the Motion to Assume. At the Hearing, Ira Thomsen and Denis Blasius appeared on behalf of the Debtor and David Catuogno appeared on behalf of Hilton.

[5] At the Hearing, counsel for Hilton requested that the Court reserve consideration of the issue regarding adequate protection until after a decision was made as to whether the Franchise Agreement could be assumed by the Debtor. The Court will not consider this issue in this Opinion but will schedule a subsequent hearing to consider whether Hilton is adequately protected.

II. Jurisdiction

The Court has jurisdiction over this matter under 28 U.S.C. § 1334 and the Amended General Order 05-02 entered by the United States District Court for the Southern District of Ohio, referring all bankruptcy matters to this Court. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (G), and (O). Venue is properly before this Court under 28 U.S.C. §§ 1408 and 1409.

III. Findings of Facts

A. Franchise Agreement[6]

The Parties entered into the Franchise Agreement along with any executed amendments to same on June 30, 2017. Stip. ¶ 3(k), Dkt. No. 428.[7] To better explain the franchise process as it relates to Hilton, the Parties stipulated to the following facts.

Hilton International Holding LLC ("HIH"), an affiliate of Hilton, owns the service marks Hampton by Hilton as well as various related trade names, trademarks, service marks, and logos, along with any derivations of same. Stip. ¶ 3(a), Dkt. No. 428. HIH granted Hilton the right to license these service marks along with "other business names, copyrights, designs, distinguishing characteristics, domain names, emblems, insignia, logos, slogans, service marks, symbols, trademarks, trade dress and trade names (whether registered or unregistered) used in the System (as defined in the applicable license or franchise agreement)" (collectively, the "Hilton Marks") when it authorizes franchises to hotels in the United States. Stip. ¶¶ 3(b)-(c), Dkt. No. 428. Hilton

[6] The facts here are based on the *Stipulation Between Debtor Hilliard Hotels LLC And Hilton Franchise Holding LLC Regarding Exhibits And Stipulated Facts In Connection With Debtor's Motion To Assume Franchise Agreement And Hilton's Motion For Relief From The Automatic Stay* (Dkt. No. 428) (the "Stipulations") as well as the testimony of Abhijit Vasani ("Mr. Vasani") and the exhibits admitted at the Hearing.

[7] Although the Parties agreed that the Franchise Agreement was entered into on June 30, 2017, the evidence from the Hearing established that the Franchise Agreement was not fully executed by the Parties until July 17, 2017, as reflected in the Franchise Agreement. Debtor's Ex. A 34. The Franchise Agreement is governed by New York law. Debtor's Ex. A 27.

provides a system (the "Hilton System"), which is subject to revisions and updates, that promotes and assists independently owned hotels. Stip. ¶¶ 3(d) and (f), Dkt. No. 428. The Hilton System includes "common use and promotion of certain Hilton Marks, copyrights, trade secrets, centralized advertising programs, referral programs and centralized support functions such as a nationwide computer reservation system." Stip. ¶ 3(e), Dkt. No. 428.

Several hotels that operate under the Hilton Marks are independently owned and operated as third-party franchisees. Stip. ¶ 3(g), Dkt. No. 428. These franchisees are authorized by Hilton to operate their hotels while using the Hilton Marks and Hilton System under an individual license or franchise agreement. Stip. ¶ 3(h), Dkt. No. 428. Hilton can market, promote and provide services to its franchisees that use the Hilton System. Stip. ¶ 3(i), Dkt. No. 428. Hilton permits its franchisees to use the Hilton Marks and associate their hotels' services with a Hilton brand. Stip. ¶ 3(j), Dkt. No. 428. In this case specifically, the Franchise Agreement executed by the Parties authorizes the Debtor to use the Hilton Marks and Hilton System so that the Debtor can operate its hotel as a Hampton Inn by Hilton located at 1600 Hampton Court, Sidney, Ohio (the "Hampton Inn"). Stip. ¶ 3(l), Dkt. No. 428.

The Franchise Agreement specifically provides:

> **9.1.2** You acknowledge that these Marks have acquired a secondary meaning or distinctiveness which indicates that the Hotel Brand and System are operated by or with our approval. All improvements and additions to, or associated with, the System, all Marks, and all goodwill arising from your use of the System and the Marks, will inure to our benefit and become our property (or that of our applicable Affiliates), even if you develop them.
>
> . . .
>
> **9.6.1** You agree, as a direct covenant with us and our Affiliates, that you will comply with all of the provisions of this Agreement related to the manner, terms and conditions of the use of the Marks and the termination of any right on your part to use any of the Marks. Any non-compliance by you with this covenant or the terms of this Agreement related to the Marks, or any unauthorized or improper use of the System or the Marks, will cause irreparable damage to us and/or our Affiliates and is a material breach of this Agreement.

> . . .
>
> **14.0 TERMINATION**
>
> **14.1 Termination with Opportunity to Cure.** We may terminate this Agreement by written notice to you and opportunity to cure at any time before its expiration on any of the following grounds:
>
> . . .
>
> **14.1.2** You fail to begin or complete the Hotel Work by the relevant dates set forth in the Addendum or fail to open the Hotel on the Opening Date, and do not cure that default within the cure period set forth in the notice, which shall not be less than ten (10) days[.]
>
> . . .
>
> **17.10 Economic Conditions Not a Defense.** Neither general economic downturn or conditions nor your own financial inability to perform the terms of this Agreement will be a defense to an action by us or one of our Affiliates for your breach of this Agreement.

Debtor's Ex. A 15-28. Since the filing of this bankruptcy case, the Debtor continues to: "(i) operate the [hotel] as a Hampton Inn franchised location; (ii) use the Hilton Marks and Hilton System; (iii) hold its hotel out to the general public as being affiliated with Hilton." Stip. ¶ 3(n), Dkt. No. 428. Consequently, the Debtor was able to generate revenue post-petition using the Hilton Marks and Hilton System (Stip. ¶ 3(o)), and Hilton continued to invoice the Debtor for and receive payment from the Debtor post-petition for that use based on Mr. Vasani's testimony.

B. The PIP

The only witness to testify at the Hearing was Mr. Vasani who is the sole owner of InnVite Opco, Inc ("InnVite Opco").[8] InnVite Opco is the sole owner of the Debtor which owns the Hampton Inn. Mr. Vasani has been involved in the hotel industry for twenty-five years and currently owns and operates nine hotels including the Debtor. Mr. Vasani manages all aspects of the Hampton Inn and was the person who executed the Franchise Agreement. The Franchise Agreement is for a period of fifteen years, expiring in July 2032. According to Mr. Vasani,

[8] Hilton did not call any of its own witnesses at the Hearing.

property improvement plans are commonplace in the hotel industry especially if there has been a change in a hotel's ownership. A property improvement plan is performed to refresh and renovate a hotel that may be older and/or where there has been a change in ownership. During Mr. Vasani's career in the hotel industry, he has completed nine property improvement plans with respect to hotels that he has owned and/or managed.

At the time of execution, the Franchise Agreement included the PIP as part of the agreement. Debtor's Ex. A 36. The timeline for completing the PIP began July 17, 2017, the date on which the Franchise Agreement was fully executed. According to the PIP, the longest period that was permitted for completion of certain improvements was thirty-six months. Debtor's Ex. A 38-43. Thus, the items listed in the PIP were required to be completed no later than July 17, 2020 (the "Initial Completion Date") which is thirty-six months from July 17, 2017. The Debtor did not complete the PIP by the Initial Completion Date. The Initial Completion Date, however, was modified at some point to provide the Debtor an extension of time to complete the PIP, though the specific date is not in evidence. Based on the MFRS, "all work pursuant to the PIP was required to be completed by March 2023." Mot. for Relief from Stay 2 n.2, Dkt. No. 166.

Mr. Vasani on the other hand indicated that Hilton had agreed to extend the deadline to December 2023 to comply with the PIP.[9] Nonetheless, the Debtor failed to complete the PIP by the Initial Completion Date and the Modified Completion Date. Hilton, however, never sent a notice of termination of the Franchise Agreement to the Debtor for failing to complete the PIP or for other reasons. To the contrary, the Debtor and Hilton continued to communicate and work together to complete the PIP until the last communication from Hilton in January 2024. Mr. Vasani

[9] The exact date of the extension that was provided by Hilton is not material to the Court's decision. For ease of reference, the Court will refer to the extension dates collectively as the "Modified Completion Date."

testified that at the time of the Hearing that the Debtor continues to work on completing items on the PIP.

Mr. Vasani, who oversees and manages the Debtor's PIP with Hilton, testified regarding the itemized property improvements listed in the PIP and stated that twelve items were partially completed, twenty items were fully completed, and fifty items were not yet completed. As of the Hearing, the Debtor had expended more than $1.5 million to comply with the PIP requirements. Specifically, the Debtor invested more than $750,000 between 2022 and 2023 to complete the following items listed in the PIP:

a. Guest Room Showers: Bulk bath amenities purchased and installed in every room.
b. New HVAC in breakfast and common areas.
c. Onity locks (RFID compliant)
d. New ceiling tiles
e. Removed old wallpaper and applied knockdown texture with Hilton approved paint in all guest rooms, meeting rooms, conference rooms and common areas through the hotel.
f. Install Hilton approved wallpaper in all guest bathrooms.
g. Upgraded landscaping and exterior paint.
h. Replaced pool equipment and new pool paint in the pool room as well as the pool itself.
i. Removed all wall mounted hairdryers and purchased new hairdryers for guest rooms.
j. Upgraded Hilton signage with new logos where applicable.

Debtor's Ex. D ¶ 1(a) – (j). The Debtor expended $21,373 to purchase Wi-Fi equipment that was required by the PIP. Debtor's Ex. D ¶ 2. In September 2023, architects for the Debtor were permitted access to the Hilton Design Portal.[10] Debtor's Ex. D ¶ 3. Additional funds of more than $45,000 were spent on the installation of the Wi-Fi equipment in October 2023. Debtor's Ex. D ¶ 4. Hilton required new computers and software be installed which the Debtor completed in

[10] Hilton required the Debtor to submit its proposed renovation designs through the Hilton Design Portal before Hilton would respond with its approval or comments. And the Debtor was required to obtain Hilton's approval for the Debtor's renovation designs before the Debtor could begin work on the renovations.

November 2023, and the Hampton Inn migrated to using Hilton's new computer system on November 27, 2023. Debtor's Ex. D ¶¶ 5, 8. The next month, Hilton approved the Debtor's partial exterior drawings for renovation. Debtor's Ex. D ¶ 6.

Mr. Vasani emphasized that the Debtor was not permitted to proceed with renovations until it submitted proposed renovation plans to Hilton and waited until it received approval of same from Hilton. Thereafter, in January 2024, the Debtor received full exterior approval for its renovations. Debtor's Ex. D ¶ 7. On January 10, 2024, Mr. Vasani received an email from Hilton confirming this approval and further indicating that Hilton was reviewing the Debtor's proposed interior plans as well. On April 22, 2024, the Hampton Inn implemented Hilton's guest messaging system. *See* Debtor's Ex. D ¶ 8. Hilton required specific credit card readers be used at the front desk of the Hampton Inn, which have been installed. Debtor's Ex. D ¶ 8. The Hampton Inn installed Hilton's required network system to facilitate hotel guests using streaming services on the televisions in the guest rooms. *See* Debtor's Ex. D ¶ 9. At the time of the Hearing, the Debtor was also replacing the Hampton Inn's current televisions with new televisions that would be compatible with the new network system, and the expense for that was included in the cash collateral budget that was in effect.

On February 2, 2024, the general manager of the Hampton Inn was contacted by Hilton to secure a multi-year commitment for a major international company for the Hampton Inn. Debtor's Ex. D ¶ 10. Mr. Vasani testified that at the time of the Hearing, the Hampton Inn was ranked as the number one hotel in Sidney, Ohio on Tripadvisor.com. And further, based on Hilton's own rating system on its website, the Hampton Inn had the highest ranking (i.e., 4.5 out of 5) for hotels in the area. Debtor's Ex. D ¶ 17. As of the Hearing, Hilton continued to invite the Hampton Inn to participate in requests for proposal ("RFPs"), which are reserved for hotels that maintain a

certain reputation and threshold of guest satisfaction, and the Hampton Inn has secured over $1.5 million in business from the RFPs. Debtor's Ex. D ¶¶ 19-20. After the filing of this bankruptcy case, the Debtor proposed a modified PIP to counsel for Hilton with an accelerated completion date of December 2024 instead of March 2025. Debtor's Ex. D ¶ 22. The Debtor, however, never received approval from Hilton as to the revised PIP.

C. Proposed Cure for Monetary and Nonmonetary Defaults

The Debtor proposes to cure both the monetary default and the nonmonetary default with Hilton. The monetary default in the amount of $133,699.99 (the "Monetary Default") represents the pre-petition franchise fees that had not been paid before the bankruptcy and is evidenced by proof of claim number 6-1 filed by Hilton on October 31, 2023. *See* Stip. ¶ 3(m), Dkt. No. 428. The Debtor is current on its post-petition franchise fees owed to Hilton. Debtor's Ex. D ¶ 21. The nonmonetary default relates to the Debtor's non-compliance with the PIP by the Initial Completion Deadline and/or the Modified Completion Deadline (collectively, the "PIP Default").

To cure the Monetary Default, the Debtor intends to pay the full prepetition arrears within seven to thirty days after confirmation of the Debtor's joint plan of reorganization (the "Plan").[11] As to curing the PIP Default, the Debtor proposes to complete the improvements required by the PIP within fourteen to twenty-four months after the date of the Hearing, July 22, 2025 (collectively, the "PIP Timeline"). Based on the Motion to Assume, the estimated cost will be $1.5 million (the "PIP Costs"). Mr. Vasani specified that there are essentially three factors that may impact the PIP Timeline. First, the Debtor will need to seek and obtain full approval from Hilton regarding the renovation plans. And this process may require the Debtor to hire professionals, including

[11] Mr. Vasani acknowledged that the Plan (Plan, Dkt. No. 363) along with the disclosure statement (Disclosure Stmt., Dkt. No. 362) that are currently of record here are going to be amended once a determination regarding assumption is made by this Court.

architects or interior designers, who would prepare and submit a design package to Hilton through its specific renovation portal. After the design package is submitted, the Debtor must wait to receive approval from Hilton before it can proceed with renovating. Based on Mr. Vasani's experience, the approval process with Hilton can take anywhere from thirty to ninety days.

Another factor that may impact the PIP Timeline is the process of ordering case goods which generally take three to four months to receive after the order is placed. And the last factor that could impact the PIP Timeline is the completion of the renovation work. Mr. Vasani prefers to wait until all the materials for any given project or renovation have been received and are on site before beginning the labor portion of the renovation. In his experience if the construction crew is on site but the case goods are delayed, then it is hard to get the crew back to complete the work once the deliveries arrive. In addition, the prep work for the renovation may render a guest room unusable until the renovation is finally complete, so it is imperative that once the prep work is done that the finish work can be performed to minimize the time a guest room is unusable due to renovations.

To fund the cures for the Monetary Default and the PIP Default, the Debtor intends on drawing from several sources. First, the Debtor has access to funds in its operating account in the approximate amount of $100,000 - $150,000. Second, the Debtor has a money market account that yields 3.51% interest and has a balance of more than $260,000. Notice of Updated Acct., Dkt. No. 285. In sum, the Debtor has current funds in the approximate amount of $360,000 - $410,000 to dedicate to curing the defaults. After accounting for the payment to cure the Monetary Default, the Debtor would have available funds in the approximate amount of $250,000 to apply to the PIP

Costs which Mr. Vasani believes to be sufficient to continue work on the PIP. And as noted, the Debtor's current cash collateral budget contains a line item for capital expenditures for the PIP.[12]

Additional funding to cover the PIP Costs in the approximate amount of $1.0 million to $1.25 million are anticipated to be contributed to fund the Plan by either the Debtor's current equity owner, InnVite Opco, or InnVite 2, LLC ("InnVite 2) as successor entity owner of the equity in the Debtor.[13] In addition, Mr. Vasani has friends and family members who have indicated a willingness to invest at least $1 million or more if necessary to contribute to funding the Plan. Mr. Vasani testified that he reviewed proof of funds from these potential investors but has only verbal commitments from them at this point.[14] In addition, the financial projections (the "Plan

[12] For example, the Debtor's cash collateral budget that was in effect at the time of the Hearing includes the cost of replacing the guest room televisions so that they would be compatible with the new network system that the Debtor was required to install under the PIP.

[13] The disclosure statement (the "DS") provides that:

> InnVite 2 LLC, who will succeed in interest to InnVite Opco, Inc. as the sole member of the Debtors, will infuse $500,000.00 into the Debtors primarily to cure any pre-petition franchise fee arrearages of Hilton Holding Company, LLC and Super 8 Worldwide, Inc., and fund the PIP, as will be more fully addressed in the Plan. InnVite 2 LLC will also commit to up to an additional $500,000.00 to be infused into the Debtors to fund the PIP to the extent it cannot be funded by the ongoing operations of the Debtors . . . .

Disclosure Stmt. 39, Dkt. No. 362. Hilton noted at the Hearing that the DS indicates that the additional funding will be used to fund the financial obligations of the other two debtors in addition to the Debtor's obligations, thereby calling into question whether there will be adequate funds to cover the PIP Costs. In contrast, Mr. Vasani testified that the DS is going to be amended and additional funding is available; Mr. Vasani testified that he is confident that there is sufficient funding available to complete the PIP, whether through Invite 2 or other additional sources. The Court finds this testimony credible and after considering that the Plan and the DS will be modified shortly after this opinion is entered by the Court, it is satisfied that additional funding is available for completion of the PIP.

[14] Mr. Vasani did not obtain term sheets or letters of intent from any of the potential investors to evidence their intent to provide more funding because he said to do so would be premature since the Court has not authorized the assumption of the Franchise Agreement yet. Though the Court is satisfied with the explanation at this time, it cautions the Debtor that it may have to provide more specific information regarding the additional funding (whether that is in the form of letters of intent, proofs of funds, etc.) when the Court is considering the adequacy of the disclosure statement and confirmation of the plan after they are amended. As one judge on this Court observed while rejecting a creditor's argument that relief from stay was warranted because no reorganization was in prospect, "as the case progresses, so too does the debtor's burden of proving that successful reorganization may be reasonably expected." *In re Ashgrove Apts. of DeKalb Cnty., Ltd.*, 121 B.R. 752, 756 (Bankr. S.D. Ohio 1990); *In re Rollingwood Apts., Ltd.*, 133 B.R. 906, 912-13 (Bankr. S.D. Ohio 1991).

Projections") attached to the Plan show that the annual net income for the year 2025-2026 is $39,092.36 which is a combined net income for the Debtor and the other two debtors, Welcome Group 2, LLC and Dayton Hotels, LLC.[15] The Plan Projections do not include a line item in the expense column representing the PIP Costs. Mr. Vasani testified, however, that the funding for the PIP Costs will come from sources other than the annual net income of the debtors.

D. Benefit of Assumption

If the Debtor is permitted to assume the Franchise Agreement, there may only be five years remaining of the fifteen-year franchise term once the PIP is completed. After much consideration, however, Mr. Vasani determined that incurring the expense to complete the PIP makes the most economic sense for the Debtor because there is significant value in doing so. Mr. Vasani has personal experience with a hotel unrelated to this case that recently completed a property improvement plan with Hilton. After completing the property improvement plan, the hotel experienced a 3-4% increase in occupancy and a minimum 10% increase in the average daily rate charged by the hotel. Based on this experience, Mr. Vasani is of the opinion that the Debtor's revenues should increase by at least 10% after completion of the PIP. Consequently, Mr. Vasani believes that in his best business judgment retention of the Hilton Franchise Agreement and completing the PIP is the best option for the Debtor to rehabilitate.

IV. Positions of the Parties

Hilton contends that cause exists under 11 U.S.C. § 362(d) to terminate the automatic stay because (1) the PIP Default is an incurable default that prevents the Debtor from assuming the Franchise Agreement under 11 U.S.C. § 365 and (2) Hilton is not adequately protected due to the

[15] The Court authorized the joint administration of the case for the debtor Dayton Hotels 2, LLC, on September 11, 2025, which was after the filing of the Plan and when the Hearing was held. Order, Dkt. No. 452. Accordingly, the financial projections attached to the Plan do not include any figures for the debtor Dayton Hotels 2, LLC.

Debtor not following Hilton's brand standards. Mot. for Relief from Stay 5-7 and 12-15, Dkt. No. 166; Obj. to Mot. to Assume ¶ 20, Dkt. No. 421. Hilton argues that the Debtor cannot assume the Franchise Agreement for several reasons. First, Hilton contends that the PIP Default is incurable because the Initial Completion Date and Modified Completion Date have passed, and there is no future performance or cure that can change that historical fact. Obj. to Mot. to Assume ¶ 47, Dkt. No. 421. Second, Hilton asserts that the proposed cure period of more than fourteen to twenty-four months for the PIP Default is too long and is not prompt for purposes of § 365(b)(1). Obj. to Mot. to Assume ¶ 49, Dkt. No. 421. Third, the Debtor fails to propose compensation to Hilton for its actual pecuniary loss resulting from the defaults under the Franchise Agreement as required by § 365(b)(1)(B). Obj. to Mot. to Assume ¶ 53, Dkt. No. 421. Fourth, the Court should not authorize Debtor's assumption of the Franchise Agreement because the financial projections and proposed plan funding are insufficient to provide adequate assurance of the Debtor's future performance. Obj. to Mot. to Assume ¶ 58, Dkt. No. 421. And finally, Hilton argues that the Motion to Assume does not satisfy the business judgment test because the Debtor has presented no evidence that the bankruptcy estate will benefit from the assumption. Obj. to Mot. to Assume ¶ 62, Dkt. No. 421.

In contrast, the Debtor contends that the PIP Default is not an incurable breach because future performance is possible and the economic purpose continues to be viable under the Franchise Agreement; thus, the PIP Default can be cured under 11 U.S.C. § 365. Am. Reply 4, Dkt. No. 441. The Debtor further argues that the cure periods proposed by the Debtor are prompt, Hilton has not experienced any actual pecuniary losses because of the defaults, and the Debtor has provided adequate assurance of future performance. Am. Reply 6-9, Dkt. No. 441. Finally, the Debtor asserts that assuming the Franchise Agreement will benefit the Debtor and bankruptcy estate. Am. Reply 9-11, Dkt. 441.

V. Legal Analysis

As noted by the Court in *Welcome Group I*, unless a franchise agreement is terminated before the bankruptcy case is filed, a debtor continues to have a property interest in that agreement post-petition, and that property interest becomes property of the bankruptcy estate under 11 U.S.C. § 541. *See In re Tornado Pizza, LLC*, 431 B.R. 503, 506 (Bankr. D. Kan. 2010). The automatic stay applies to a debtor's interest in a nonterminated franchise agreement, and as such, a franchisor must request relief from the automatic stay before it can terminate the franchise agreement. *See Elder-Beerman Stores Corp. v. Thomasville Furniture Indus. (In re Elder-Beerman Stores Corp.)*, 195 B.R. 1019, 1024 (Bankr. S.D. Ohio 1996) ("[W]hile parties may otherwise be permitted to terminate an agreement under state contract law, in bankruptcy such a termination would be in violation of the stay, and the parties must seek permission of the court to act.") (citation omitted); *Comput. Commc'ns, Inc. v. Codex Corp. (In re Comput. Commc'ns, Inc.)*, 824 F.2d 725, 730 (9th Cir. 1987) (holding that an entity violated the automatic stay by unilaterally terminating the contract).

A. Automatic Stay

The Bankruptcy Code under § 362(d) provides that "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay . . . such as by terminating, annulling, modifying, or conditioning such stay . . . for cause, including the lack of adequate protection of an interest in property of such party in interest[.]" 11 U.S.C. § 362(d)(1). A debtor's inability to assume an executory contract under 11 U.S.C. § 365 would constitute "cause" under 11 U.S.C. § 362(d). *See In re Cumberland Corral, LLC*, No. 313-06325, 2014 Bankr. LEXIS 936, *21 (Bankr. M.D. Tenn. Mar. 11, 2014) ("It is undisputed that the Franchise Agreements are executory contracts within the meaning provided in 11 U.S.C. § 365. If the Debtor is not able to

assume [the agreements, the franchisor] would be entitled to relief."). The party requesting relief from the automatic stay "has the burden of proof on the issue of the debtor's equity in property[,] and . . . the party opposing such relief has the burden of proof on all other issues." 11 U.S.C. § 362(g). In this case, if the Debtor is prohibited from assuming the Franchise Agreement, then Hilton will be entitled to relief from the automatic stay to terminate that agreement. To determine whether relief from the automatic stay is warranted here, the Court must first determine whether the Debtor has met its burden to satisfy the requirements of 11 U.S.C. § 365.

B. Assumption of Executory Contract and Business Judgment

11 U.S.C. § 365(a) governs assumption and provides that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). A debtor in possession possesses the same rights and powers as a trustee subject to certain exceptions not applicable here. *See* 11 U.S.C. § 1107(a). Thus, a debtor in possession may assume or "reject any executory contract -meaning a contract that neither party has finished performing" under § 365(a). *Mission Prod. Holdings v. Tempnology, LLC*, 587 U.S. 370, 372, 139 S. Ct. 1652, L. Ed. 2d 876 (2019) (internal quotation marks and citation omitted). An executory contract is both an asset and a liability to the debtor; the debtor is entitled to the future performance of the counterparty (i.e., asset) while also having to perform under the agreement (i.e., liability). *Tempnology*, 587 U.S. at 373. Section 365(a) allows a debtor to determine whether the executory contract is beneficial to the estate, and if so, the debtor may assume the contract. *Id.*

The Debtor in this case has exercised its reasonable business judgment in seeking to assume the Franchise Agreement. "[T]he Bankruptcy Code does not provide a standard for analyzing a decision to assume or reject a contract or lease . . . ." *In re IYS Ventures, LLC*, 659 B.R. 308, 321 (Bankr. N.D. Ill. 2024). That said, courts apply what is commonly known as "a deferential

business judgment test" when determining whether a debtor may assume or reject an executory contract. *See id.*; *see also In re Senior Care Ctrs., LLC*, 607 B.R. 580, 587 (Bankr. N.D. Tex. 2019) ("A court evaluates whether a lease should be assumed or rejected employing the business judgment standard." (citation omitted)). "A court [must] consider whether assumption of the contract in question will further either the rehabilitation or liquidation of the bankruptcy estate." *In re Superior Toy & Mfg. Co., Inc.*, 78 F.3d 1169, 1172 (7th Cir. 1996) (citation omitted). "[T]he business-judgment rule does not ask whether the debtor has made the best possible business decision. Rather, it asks at most whether the debtor's estate will benefit from assumption of the relevant contracts." *Campamento Contra las Cenizas en Peñuelas, Inc. v. Fin. Oversight & Mgmt. Bd. (In re Fin. Oversight & Mgmt. Bd.)*, 9 F.4th 1, 15 (1st Cir. 2021) (citations omitted); *see also Century Indem. Co. v. NGC Settlement Tr. (In re Nat'l Gypsum Co.)*, 208 F.3d 498, 505 (5th Cir. 2000) ("The act of assumption must be grounded, at least in part, in the conclusion that maintenance of the contract is more beneficial to the estate than doing without the other party's services." (citation modified)).

"In most cases, a court will not second-guess a debtor's business judgment concerning whether the assumption or rejection of an executory contract or unexpired lease would benefit the debtor's estate." *In re Avianca Holdings S.A.*, 618 B.R. 684, 698 (Bankr. S.D.N.Y. 2020) (citation modified). "[A]s long as assumption of a [contract] appears to enhance a debtor's estate, a bankruptcy court should only withhold approval when the debtor's judgment is clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code." *In re J. C. Penney Direct Mktg. Servs., L.L.C.*, 50 F.4th 532, 534 (5th Cir. 2022) (citation modified).

Mr. Vasani testified that assuming the Franchise Agreement will economically benefit the Debtor. Based on Mr. Vasani's experience with completing a Hilton property improvement plan

for an unrelated hotel, he expects that the Debtor in this case will also experience a 3-4% increase in occupancy rates and a minimum increase of 10% in the average daily rate that the Debtor can charge for its guest rooms at the Hampton Inn once the PIP is completed. Consequently, Mr. Vasani projects that the Debtor's revenue should increase by at least 10% after the PIP is complete, which will advance the Debtor's reorganization and benefit the estate. No evidence was presented at the Hearing to suggest that the Debtor's judgment to assume the Franchise Agreement to increase the Debtor's revenue was clearly erroneous, too speculative, or otherwise unsound. Thus, the Court finds no reason to second guess the Debtor's business judgment here and concludes that the Debtor exercised reasonable business judgment in deciding to assume the Franchise Agreement.

Once a debtor has established that it exercised sound judgment in deciding to assume an executory contract, the debtor must also show that it can satisfy the requirements of 11 U.S.C. § 365(b) if there has been a default with respect to the contract to be assumed. *See* 11 U.S.C. § 365(b).

C. Assumption under 11 U.S.C. § 365(b)

The ability to assume an executory contract is subject to certain requirements and restrictions. One such restriction can be found in § 365(b)(1). If a default under the contract has occurred, the debtor must cure the default or provide adequate assurance that it will do so, to be able to assume the contract. *See Quantum Diversified Holdings, Inc. v. Wienheimer (In re Escarent Entities, L.P.)*, 423 Fed. App'x 462, 465 (5th Cir. 2011) (citing 11 U.S.C. § 365(b)). "One purpose served by this requirement is to insure that the contracting parties receive the full benefit of their bargain if they are forced to continue performance." *Id.* (citation modified). Section 365 of the

Bankruptcy Code applies to both monetary and nonmonetary defaults. *Beckett v. Coatesville Hous. Assocs.*, No. 00-5337, 2001 U.S. Dist. LEXIS 9281, *16 (E.D. Pa. July 5, 2001).

The Bankruptcy Code, under § 365(b), requires that "in order for a court to approve assumption of an executory contract or lease, the debtor-in-possession must cure certain defaults, compensate the counterparty and provide adequate assurance of future performance." *In re IYS Ventures, LLC*, 659 B.R. 308, 328 (Bankr. N.D. Ill. 2024). 11 U.S.C. § 365(b)(1) provides as follows:

> (b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—
>
> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

The burden of proof with respect to assumption of an executory contract is a shifting one. *In re Minesen Co.*, 635 B.R. 533, 542 (Bankr. D. Haw. 2021).

> As the party moving to assume an executory contract or unexpired lease, the trustee has the ultimate burden of proving that (i) the agreement is subject to assumption, and (ii) all requirements for assumption have been satisfied. Importantly, where a non-debtor counter-party disputes assumption because of a default under the agreement, the non-debtor counterparty has the initial burden of demonstrating the occurrence of such default. If the non-debtor counterparty proves

> the existence of a default, the burden then shifts back to the trustee as the party seeking to assume the agreement to demonstrate that such default has been cured or will be cured, and that adequate assurance of future performance has been provided.

In re FKA FC, LLC, 545 B.R. 567, 573-574 (Bankr. W.D. Mich. 2016) (citation modified). The Parties here do not dispute that defaults under the Franchise Agreement exist. Hilton established that both the Monetary Default and the PIP Default exist here, and the Debtor acknowledged same. The Parties do, however, disagree as to whether the PIP Default is a historical fact that is incurable and whether the PIP Default thereby prohibits the Debtor from assuming the Franchise Agreement.

1. Historical Fact And Capability of Cure

Hilton contends that the PIP Default occurred when the Debtor failed to complete its required property improvements by specific dates and because those dates have passed, it is now impossible for the Debtor to go back in time and complete the improvements as required by the Initial Completion Date and the Modified Completion Date. Hilton thus argues that the PIP Default is a historical fact that cannot be cured. In contrast, the Debtor responds that based on the course of dealings between the Debtor and Hilton with respect to the PIP Default, the default was not material enough to be incurable because it did not defeat the purpose of the Franchise Agreement and continued performance to complete the PIP is possible.

Whether a historical fact is capable of being cured under § 365(b) is not a novel issue and has been the subject of conflicting opinions. Indeed, before the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23, courts differed with respect to the application of the cure requirements under § 365 to

nonmonetary defaults.[16] *In re Empire Equities Cap. Corp.*, 405 B.R. 687, 690 (Bankr. S.D.N.Y. 2009) (comparing cases). Some courts required a debtor to cure all material nonmonetary defaults, and if the nonmonetary default was incurable, the debtor was not permitted to assume the contract. *Id.*; *see also Worthington v. Gen. Motors Corp. (In re Claremont Acquisition Corp.)*, 113 F.3d 1029 (9th Cir. 1997) (concluding that the debtor was not relieved of curing the incurable nonmonetary default and as a result could not assume the contracts); *In re New Breed Realty Enters., Inc.*, 278 B.R. 314, 325 (Bankr. E.D.N.Y. 2002) (holding that the debtor could not assume the contract because it could not cure the nonmonetary default arising from its failure to close by the closing date when the contract provided for time to be of the essence).

In contrast, other courts determined that debtors were not required to cure nonmonetary defaults. *Empire*, 405 B.R. at 690 (listing cases); *see also Eagle Ins. Co. v. Bankvest Cap. Corp. (In re Bankvest Cap. Corp.)*, 360 F.3d 291, 300 (1st Cir. 2004) (holding that Congress did not intend to prevent a debtor "from assuming a contract based on historical events that it cannot remedy" because doing so undermines the purpose § 365). Through the enactment of BAPCPA, however, Congress made it clear that "most nonmonetary defaults are not exempted from the cure requirements" of § 365(b).[17] *Empire*, 405 B.R. at 690 (citing 11 U.S.C. § 365(b)(2)(D)).

[16] Prior to the enactment of BAPCPA, 11 U.S.C. § 365(b)(2)(D) provided that the cure requirements contained in § 365(b)(1) did not apply to a contract provision relating to "the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease." 11 U.S.C. § 365(b)(2)(D) (2004). Courts interpreted the statutory language differently depending on whether they determined that the word "penalty" modified the word "rate" only or if it also modified the word "provision." *Eagle Ins. Co. v. Bankvest Cap. Corp. (In re Bankvest Cap. Corp.)*, 360 F.3d 291, 297-98 (1st Cir. 2004).

[17] In 2005 Congress provided "limited relief from the obligation to cure non-monetary prepetition defaults . . . by adding new language in § 365(b)(1)(A) that requires a cure only of defaults other than those arising from any failure to perform non-monetary obligations *under an unexpired lease of real property*." *Empire*, 405 B.R. at 690 (citation modified). This limited relief is not applicable to the Debtor in this case. Congress also revised § 365(b)(2)(D) to clarify that the exemption from curing defaults under that section applied to any "penalty rate or *penalty* provision" relating to nonmonetary defaults. 11 U.S.C. § 365(b)(2)(D); *see also Empire*, 405 B.R. at 690.

11 U.S.C. § 365(b)(2) exempts certain defaults from the cure requirements provided for in § 365(b)(1). The cure provisions of § 365(b)(1) do not apply to the following defaults if they relate to contract provisions regarding the following:

> (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
> (B) the commencement of a case under this title;
> (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or
> (D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

11 U.S.C. § 365(b)(2). In addition, the Bankruptcy Code exempts curing nonmonetary defaults under real property leases. 11 U.S.C. § 365(b)(1)(A). None of these statutory exemptions apply to the Debtor in this case. Thus, the Court must examine whether the PIP Default precludes the Debtor from assuming the Franchise Agreement.

As noted by several courts, if a nonmonetary provision of an executory contract requires a debtor to perform by a date certain and that date certain has passed without performance by the debtor, the default of that nonmonetary obligation under the contract is by definition incapable of cure. *See In re New Breed Realty Enters., Inc.*, 278 B.R. 314, 320 (Bankr. E.D.N.Y. 2002) (listing cases). In this case, the deadlines for completing the PIP were July 17, 2020, March 2023, and/or December 2023, which are now historical facts that cannot be overcome by any future performance as those dates have passed. The inquiry then becomes whether such an incurable nonmonetary default prohibits a debtor from assuming an executory contract.

Courts disagree whether an incurable default is a per se prohibition to a debtor assuming an executory contract under § 365. Some courts are of the opinion that the element of materiality is not appropriate to consider when determining whether a default can be cured. *See Smart Cap. Invs. I, LLC v. Hawkeye Ent., LLC (In re Hawkeye Ent., LLC)*, 49 F.4th 1232, 1239 (9th Cir. 2022)

(holding that "default" under § 365(b) should not be narrowly interpreted to refer to only material defaults); *see also In re Senior Care Ctrs., LLC*, 607 B.R. 580, 588 (Bankr. N.D. Tex. 2019) (determining that materiality is not a factor to be considered under § 365(b) and noting that the word "material" does not appear in the statute).

On the other hand, other courts have determined that when an incurable default exists, a debtor is prohibited from assuming the executory contract under § 365 "only if the default was material or if the default caused substantial economic detriment." *New Breed Realty*, 278 B.R. at 321 (quoting *In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1092 (3d Cir. 1991)) (citation modified); *see also In re Walden Ridge Dev., LLC*, 292 B.R. 58, 67 (Bankr. D.N.J. 2003) (agreeing with the *Slocum* court that a nonmonetary default must either be material or cause substantial economic harm to prevent assumption); *In re IYS Ventures, LLC*, 659 B.R. 308, 331 (Bankr. N.D. Ill. 2024) (listing cases and holding that "a noncurable default should not preclude assumption if it is not material, and there are no damages").

This Court is persuaded by the analysis of the courts that hold that an incurable default prohibits assumption only if the default is material or substantial economic harm has resulted from the default because it permits the Debtor "to maximize the viability of [its] ability to assume a contract in bankruptcy." *In re Vent Alarm Corp.*, No. 15-09316-MCF11, 2016 Bankr. LEXIS 1725, *6 (Bankr. D.P.R. Apr. 18, 2016) (deciding a motion to stay pending appeal and agreeing with other courts that the materiality and economic significance of the nonmonetary default should be considered when determining a motion to assume). Further, this Court concludes that this approach most aligns with the purpose of the Bankruptcy Code:

> Debtor's assumption of executory contracts is one of the basic reorganizational tools available to debtors under the Bankruptcy Code. The authority to reject an executory contract is vital to the basic purpose of a Chapter 11 reorganization, because it can release the debtor's estate from burdensome obligations that can

> impede a successful reorganization. By permitting debtors to shed disadvantageous contracts but keep beneficial ones, § 365 advances one of the core purposes of the Bankruptcy Code: to give worthy debtors a fresh start.

Vent Alarm, 2016 Bankr. LEXIS 1725, at *6 (citation modified). With this approach, this Court must now determine whether the PIP Default constitutes a material default or if Hilton suffered substantial economic harm as a result.

a. Materiality of Default

In determining the materiality of a default, courts often consider whether the default involved a contract provision that "goes to the very essence of the contract, i.e., the bargained for exchange." *In re Joshua Slocum, Ltd.*, 922 F.2d 1081, 1092 (3rd Cir. 1990); *see, e.g.*, In *re Clearwater Nat. Res.*, No. 09-70011, 2009 Bankr. LEXIS 2461, *11-12 (Bankr. E.D. Ky. July 23, 2009) (citing *Slocum* for same). Hilton contends that the Debtor's non-compliance with the Initial Completion Deadline and the Modified Completion Deadline was material and went to the essence of the contract because the Debtor's PIP Default negatively impacts Hilton's brand. In support of this argument, Hilton noted various provisions of the Franchise Agreement that in brief provide that any non-compliance with the terms of the Franchise Agreement will cause Hilton irreparable damage and is a material breach of the agreement (Debtor's Ex. A § 9.6.1 at 17) and the failure to complete renovation work by the dates established by the Franchise Agreement, permits Hilton to terminate the agreement (Debtor's Ex. A § 14.1.2).

The evidence before the Court suggests that the PIP Default and the resulting non-compliance with Hilton's brand is not a material default for the following reasons. First, on the day that Hilton and the Debtor executed the Franchise Agreement, the PIP was in effect, with the Initial Completion Deadline of three years. The fact that Hilton was willing to enter into the Franchise Agreement with the Debtor knowing that the Hampton Inn would likely be non-

compliant with Hilton's brand for three years, demonstrates that compliance with the brand was not as material as Hilton contends. Moreover, the Hampton Inn is currently rated as the number one hotel in its area on Tripadvisor.com and receives the highest rating based on Hilton's own rating system that is maintained on Hilton's website, even though the Hampton Inn is not in compliance with Hilton's brand requirements. The Debtor's high customer ratings suggest that the customers are having positive experiences when staying at the Hampton Inn, so it is not clear then how the Hilton brand is being harmed due to the PIP Default considering the high customer ratings.

The Court's conclusion that the PIP Default is not material is further supported by Hilton's own actions in continuing to work with the Debtor toward getting the PIP completed even after the PIP Default. Mr. Vasani testified that even though the Debtor failed to complete the PIP by the Initial Completion Date, Hilton continued to communicate and work with the Debtor for more than three years in trying to complete the PIP; Hilton even provided the Debtor extensions for completing the PIP. Mr. Vasani further testified that the last communication he recalled receiving from Hilton about the completion of the PIP occurred post-petition in January 2024 when Hilton sent an email to Mr. Vasani approving the proposed exterior design plans and stated that Hilton was still reviewing the proposed interior plans. The Court notes that the Debtor has expended over $1.5 million in its attempt to complete the PIP. And as discussed previously, the Initial Completion Deadline expired in July 2020, yet Hilton never sent a termination notice to the Debtor even though it could have done so up until the time that the Debtor filed for bankruptcy on September 1, 2023. The Court questions Hilton's overall contention that the PIP Default is negatively impacting Hilton's brand such that it is a material default in view of: 1) the Debtor's non-compliance with brand standards was acceptable for the first three years of the Franchise Agreement and another

three years before the filing of the bankruptcy; 2) the Hampton Inn is a highly rated hotel within the Hilton system and third party applications even after the PIP Default; and 3) most notably, Hilton failed to ever send a notice of termination to the Debtor for its brand violations.[18]

"[W]hen a party materially breaches a contract, the non-breaching party must choose between two options: it can elect to terminate the contract or continue it. If the non-breaching party chooses to continue to perform or accept performance, it loses its right to terminate the contract based on the prior breach." *See Kamco Supply Corp. v On the Right Track, LLC*, 149 A.D.3d 275, 282, 49 N.Y.S.3d 721 (App. Div. 2d Dep't 2017) (citation omitted). In addition, a party to a contract can waive its right to assert time is of the essence if the non-defaulting party chooses not to terminate the contract when it otherwise would be entitled to do so. *See Please Me, LLC v. State of New York*, 215 A.D.3d 1149, 1151, 187 N.Y.S. 3d 415 (App. Div. 3d Dep't 2023) (holding that defendant waived its right to assert time is of the essence when it failed to terminate the contract "immediately or shortly after" the deadline for performance passed); *McPherson Bldrs., Inc. v Performance Premises, LLC*, 171 A.D.3d 1270, 1271, 97 N.Y.S.3d 766 (App. Div. 3d Dep't 2019) ("[D]efendant would be estopped from relying on plaintiff's failure to substantially complete its work by December 30, 2016 as a basis for terminating or rescinding the contract" because "defendant allowed plaintiff to continue to work past this date."). The Court thus concludes that based on the course of dealings between the Debtor and Hilton, the PIP Default was not material.

b. Substantial Economic Detriment

Mr. Vasani stated on the record several times during the Hearing that the Debtor is current on its post-petition franchise fees owed to Hilton, and he further characterized the pre-petition

[18] The Court notes that Hilton did not present any of its own witnesses or exhibits at the Hearing to explain these apparent discrepancies.

Monetary Default as being relatively small. As such, Hilton appears to have continually benefitted financially from the Debtor and its operation of the Hampton Inn even though the PIP has not been completed. With respect to whether the Hilton brand is being harmed due to the PIP Default, the only evidence in the record regarding the public's perception of the Hampton Inn is that it is ranked as the number one hotel in the Sidney, Ohio area on Tripadvisor.com according to Mr. Vasani's testimony. Moreover, Mr. Vasani testified that the Hampton Inn has the highest rating of a 4.5 on a 5.0 scale for hotels in the area based on Hilton's own website rating system. The Hampton Inn received these high ratings while being out of compliance with the PIP. As a result, the Court cannot envision how the PIP Default could have caused substantial economic harm to Hilton when the Hampton Inn is a highly rated hotel in its respective geographical area; and without any evidence to the contrary, the Court must conclude that the PIP Default did not result in any substantial economic detriment to Hilton. Again, the Court notes that Hilton provided no evidence at the Hearing to suggest that Hilton has in fact suffered substantial economic harm because of the PIP Default. Accordingly, the Court must find that the PIP Default did not cause substantial economic harm to Hilton.

Having concluded that the PIP Default was neither a material default nor was there any evidence that the PIP Default caused substantial economic harm to Hilton, the Court concludes that completion of the PIP was not an integral part of the bargained-for exchange between Hilton and the Debtor. *Cf.* 3 COLLIER ON BANKRUPTCY ¶ 365.09[1] (Richard Levin & Henry J. Sommer eds., 16th ed.) ("A contract term is material if it was integral to the bargained-for exchange and is economically significant if performance is required to give the contract counterparty the full benefit of its bargain."). Hilton continues to receive the benefit of its bargain by receiving payment of the franchise fees by the Debtor. Thus, the Debtor is not prohibited from assuming the Franchise

Agreement because of the PIP Default being incurable. The Court must now determine whether the requirements under § 365(b) have been satisfied.

2. Prompt Cure or Adequate Assurance of Prompt Cure - § 365(b)(1)(A)

"As a condition to assuming an executory contract, the Bankruptcy Code also requires the debtor to cure any default or provide adequate assurance that the debtor will promptly cure any default under the contract." *In re Edison Mission Energy*, No. 12-49219, 2013 Bankr. LEXIS 3872, *16 (Bankr. N.D. Ill. Sept. 16, 2013) (citation omitted). "There is no bright-line test as to what constitutes 'prompt' for all cases." *In re Everest Crossing, LLC*, Case No. 09-16664-FJB, 2010 Bankr. LEXIS 6409, *8 (Bankr. D. Mass. Feb. 24, 2010) (determining that an eighteen-month cure period for a cure amount of $118,258 was prompt). "A party may either cure any defaults at the time of assumption or provide adequate assurance that it will promptly cure them. Prompt cure is determined based upon the facts and circumstances of each case." *In re Senior Care Ctrs., LLC*, 607 B.R. 580, 588 (Bankr. N.D. Tex. 2019) (citations omitted). With respect to curing a monetary default, such as unpaid rent, "[a]dequate assurance of a prompt cure requires that there be a firm commitment to make all payments and at least a reasonably demonstrable capability to do so." *In re R.H. Neil, Inc.*, 58 B.R. 969, 971 (Bankr. S.D.N.Y. 1986) (citation omitted).

> What constitutes a "prompt" cure as required by § 365(b)(1)(A) depends upon the facts and circumstances of each case. *In re Embers 86th Street, Inc.*, 184 B.R. 892, 900 (Bankr. S.D.N.Y. 1995). While courts are often reluctant to find that a default is being promptly cured when the proposed period for such cure exceeds two years, *see Matter of DiCamillo*, 206 B.R. 64, 72 (Bankr. D.N.J. 1997) and cases cited therein, there is not a clear litmus test or set of factors which can be rigidly applied in order to make this determination. *See In re Coors of North Mississippi, Inc.*, 27 B.R. 918 (Bankr. N.D. Miss. 1983) [curing of $ 110,000-$ 115,000 default within 3-year period considered prompt in light of prospective longevity of successful business operations]. Some courts have found it useful to contrast the proposed "curing" period with the remaining life of the unexpired lease, and have found a proposed cure to be "prompt" so long as the proposed period for curing the

> default does not extend to the end of the lease period. *See, e.g. In re Gold Standard at Penn, Inc.*, 75 B.R. 669, 673 (Bankr. E.D. Pa. 1987) [finding proposal to cure over 5-year period unacceptable since only six years remaining on the lease]; *accord, In re R/P International Technologies,* 57 B.R. 869 (Bankr. S.D. Ohio 1985); *In re Berkshire Chemical Haulers, Inc.*, 20 B.R. 454, 458 (Bankr. D. Mass. 1982).

In re PRK Enters., Inc., 235 B.R. 597, 601 (Bankr. E.D. Tex. 1999).

The Debtor proposes to cure the Monetary Default by making a lump sum payment for the full amount owed to Hilton within seven to thirty days of confirmation of the Debtor's Plan and cure the PIP Default within fourteen to twenty-four months after the Hearing. Although the date of confirmation is not known at this point, the Debtor has provided adequate assurance of a prompt cure because the proposed cure period is almost immediately after the plan is confirmed. The seven to thirty day cure period is well within the acceptable time range for curing a monetary default promptly. *See In re Everest Crossing, LLC*, Case No. 09-16664-FJB, 2010 Bankr. LEXIS 6409, *8 (Bankr. D. Mass. Feb. 24, 2010) (determining that an eighteen-month cure period for a cure amount of $118,258 was prompt).

The Court must take into consideration several factors when determining whether the proposed cure period for the PIP Default is prompt. As noted, the proposed cure period for the PIP Default ranges from fourteen months to twenty-four months, so the latest date for completion of the PIP would be July 2027. Mr. Vasani listed several variables that may impact the PIP Timeline which are outside of his control. One of the variables is the renovation approval process mandated by Hilton which may require the Debtor to hire specific design professionals in addition to the time it takes Hilton to review, comment upon, and then approve the Debtor's proposed design plans. The other two factors that may impact the PIP Timeline are the time required to order and receive the case goods for the renovations and the actual construction time that will be necessary for completion of the PIP.

While some if not all these factors are mostly out of the Debtor's control, Mr. Vasani proposes to do what he can to minimize interruptions in the renovation process by ensuring that he has all the case goods on site before beginning the construction. Mr. Vasani believes that employing this strategy is the more efficient method for completing renovations because it avoids the construction crew leaving the Hampton Inn to work on another job if the delivery of the case goods is delayed. Mr. Vasani emphasized that if the construction crew leaves the job site, it could take more time to get them to return to the site if this happens. Considering these factors and how they may impact the PIP Timeline, the Court finds that what the Debtor has proposed is reasonable and prompt under the facts and circumstances in this case. Moreover, Hilton did not present any evidence to rebut the testimony of Mr. Vasani which this Court finds credible.

It is clear to the Court that the Debtor is positioning itself to complete the PIP as quickly as it can. The Debtor has spent over $1.5 million toward completing the PIP and continues to do so, and after completing the PIP, the Debtor will have at least five years remaining to operate the Hampton Inn under the Franchise Agreement. As a result, the cure period is sufficiently less than the remaining life of the Franchise Agreement. *Cf. In re Berkshire Chemical Haulers, Inc.*, 20 B.R. 454, 458 (Bankr. D. Mass. 1982) (determining that the proposed cure period of eighteen months was not prompt because it would complete contemporaneously with the expiration of the lease term). The cure period of twenty-four months does not appear to be outside of an acceptable range considering the circumstances of this case and the fact that this involves a nonmonetary default, specifically one involving design approval and renovations, that must be cured. *See In re PRK Enters., Inc.*, 235 B.R. 597, 602 (Bankr. E.D. Tex. 1999) (deciding cure was prompt because "all arrearages owing to [creditor] under the leases will have been paid with **three years** still remaining on the original term of each lease" (emphasis added)); *see also In re Gold Standard at Penn, Inc.*,

75 B.R. 669, 673 (Bankr. E.D. Pa. 1987) (noting that "a period of time in excess of a year could be prompt depending on the circumstances"). Having concluded that the Debtor has provided adequate assurance that it will promptly cure the Monetary Default and the PIP Default, the Court must now determine if the Debtor has provided compensation for or adequate assurance that it will compensate Hilton for any pecuniary loss resulting from the defaults as required by 11 U.S.C. § 365(b)(1)(B).

3. Compensation for Actual Pecuniary Loss - § 365(b)(1)(B)

> Section 365(b) of the Bankruptcy Code does not provide an independent basis for recovery of attorneys' fees. 11 U.S.C. § 365(b); *In re Best Prods. Co.*, 148 B.R. 413, 414 (Bankr. S.D.N.Y. 1992). A landlord is entitled to recover attorneys' fees in connection with lease assumption pursuant to § 365(b) only to the extent provided for in the lease. *In re Ames Dep't Stores, Inc.*, 306 B.R. 43, 81 (Bankr. S.D.N.Y. 2004); *Best Prods.*, 148 B.R. at 414; *Westview*, 59 B.R. at 756. It has been held that attorneys' fees are not recoverable "[w]here litigated issues involve not basic contract enforcement questions, but issues peculiar to bankruptcy law." *Best Prods*., 148 B.R. at 414.

In re M. Fine Lumber Co., Inc., 383 B.R. 565, 569 (Bankr. E.D.N.Y. 2008). Hilton asserted a claim for compensation for actual pecuniary loss in the form of attorney fees and costs and interest. Obj. to Mot. to Assume ¶¶ 53-56, Dkt. No. 421. Yet Hilton did not file an amended proof of claim to include these pecuniary losses, nor did Hilton present any evidence at the Hearing regarding its claim for actual pecuniary losses. Hilton did, however, request that it be permitted to file an affidavit regarding the pecuniary losses if the Court permits assumption. In contrast, the Debtor contends that Hilton has not established any evidence for the record that any actual pecuniary losses exist, and thus the Debtor has no obligation to reimburse or compensate Hilton for same. Am. Reply 8-9, Dkt. No. 441. Counsel for the Debtor further noted that under the Franchise Agreement, either of the Parties may be entitled to attorney fees. Consequently, the Parties clearly dispute whether Hilton is even entitled to compensation for actual pecuniary losses, and in fact,

the Debtor appears to suggest that it may be entitled to attorney fees under the Franchise Agreement based on the statement of counsel at the Hearing. Based on the lack of evidence in the record and the apparent dispute between the Parties regarding whether Hilton should be compensated for actual pecuniary losses, the Court will grant the assumption based on the evidence presented.[19] The final element for assumption under 11 U.S.C. § 365(b)(1)(C) requires the Debtor to show adequate assurance of the Debtor's future performance under the Franchise Agreement.

4. Adequate Assurance of Future Performance - § 365(b)(1)(C)

The Bankruptcy Code does not define what constitutes "adequate assurance of future performance" under § 365(b)(1)(C), and as such, a bankruptcy court must determine based on the facts of each case whether the debtor has satisfied this prerequisite for assuming an executory contract. *See Androse Assocs. of Allaire, LLC v. Great Atl. & Pac. Tea Co. (In re Great Atl. & Pac. Tea Co.)*, 472 B.R. 666, 674 (S.D.N.Y. 2012); *see also In re Gen. Oil Distrib. Inc.*, 18 B.R. 654, 658 (Bankr. E.D.N.Y. 1982) ("What constitutes adequate assurance is a factual question to be determined on a case by case basis with due regard to the nature of the parties, their past dealings and present commercial realities" (citation omitted)). The Sixth Circuit discussed the standard of confidence required to show adequate assurance of future performance under 11 U.S.C. § 365(b)(1)(C) as follows:

> "Adequate assurance" is a term of art in the Bankruptcy Code that denotes the assurance of performance that a trustee must provide to assume a contract or lease after a default. 11 U.S.C. § 365(b)(1)(C). This level of assurance falls below "absolute guarantee," *In re Fine Lumber Co.*, 383 B.R. 565, 573 (Bankr. E.D.N.Y. 2008), and can mean "a strong likelihood," *In re Bygaph, Inc.*, 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986), or "more probable than not," *In re Patriot Place, Ltd.*, 486 B.R. 773, 803-04 (Bankr. W.D. Tex. 2013).

[19]To provide Hilton with an opportunity and in accordance with the request of counsel for Hilton, the Court will schedule a pretrial conference to discuss the amount owed to Hilton under its proof of claim which may impact the plan confirmation.

Dow Corning Corp. v. Claimant's Advisory Comm. (In re Settlement Facility Dow Corning Tr.), 592 Fed. App'x 473, 478 (6th Cir. 2015) (footnote omitted).[20] In discussing the standard for adequate assurance of future performance with respect to the assumption of a lease, the *Citrus Tower* court determined that:

> Debtor can only assume the Lease if it is able to demonstrate "adequate assurance of future performance." § 365(b)(1)(C). Assurance of future performance is adequate 'if performance is likely (i.e. more probable than not)' and the degree of assurance necessary to be deemed adequate 'falls considerably short of an absolute guaranty.' *In re M. Fine Lumber Co.*, 383 B.R. 565, 573 (Bankr. E.D.N.Y. 2008). The burden is on the movant. *In re Tex. Health Enters., Inc.*, 246 B.R. 832, 835 (Bankr. E.D. Tex. 2000). A debtor need not prove that it will "thrive and make a profit." *In re M. Fine Lumber Co.*, 383 B.R. at 573. It must simply appear that the rent will be paid and other lease obligations met. *Id.*

In re Citrus Tower Blvd. Imaging Ctr., LLC, Case No. 11-70284-MGD, 2012 Bankr. LEXIS 2208, *15 (Bankr. N.D. Ga. Apr. 2, 2012).

The Debtor has established adequate assurance of future performance. The Debtor is current on its post-petition franchise obligations to Hilton, which is evidence of the Debtor's capacity to perform its future obligations under the Franchise Agreement with respect to the franchise fees associated with it. The Debtor has expended over $1.5 million to comply with the PIP requirements, and more specifically it has invested more than $750,000 between 2022 and 2023 by making numerous upgrades and other improvements to the Hampton Inn. The Debtor has continued to communicate with and seek design approval from Hilton as recently as January 2024. According to Mr. Vasani, the Debtor has never stopped trying to comply with the PIP

[20] The Sixth Circuit had occasion to interpret a contract provision in a settlement fund distribution agreement that established a payment scheme for certain claimants pursuant to a chapter 11 debtor's confirmed plan of reorganization which provided payments may be authorized if "all Allowed and allowable First Priority Claims and all Allowed and allowable Litigation Payments have been paid or *that adequate provision has been made to assure such payment . . .*" *Dow Corning*, 592 Fed. App'x at 476 (citation modified). In that case, the Sixth Circuit decided what the standard was for showing that "adequate provision . . . to assure payment" had been satisfied, and in so doing, the court discussed the meaning of "adequate assurance of future performance" under § 365(b)(1)(C). *Id.* at 477-78.

requirements. The continued efforts to satisfy the PIP requirements evidence Mr. Vasani's commitment to rehabilitating the Debtor. The Court finds that the testimony regarding the Debtor's ability to fund the proposed cures was credible. The PIP Costs are estimated on the high end to be $1.5 million, and the Monetary Default is $133,699.99. The Debtor has approximately $360,000 - $410,000 in liquid funds available to pay the Monetary Default and the PIP Costs. After payment of the Monetary Default, the Debtor will have approximately $250,000 of those liquid funds to contribute to the completion of the PIP. Moreover, the Debtor anticipates receiving a minimum of $1.0 million from investors to dedicate to the PIP Costs; and the investors are willing to contribute more if necessary. And although the investors have not entered into any formal agreements with the Debtor yet, Mr. Vasani testified that he has seen proofs of funds and can attest that the investors funds are available. And finally, Mr. Vasani has twenty-five years' experience in the hotel industry and notably has completed nine other property improvement plans associated with other hotels that he owns or manages. He testified that the Franchise Agreement is a valuable asset for the Debtor and critical to its operation and that assuming it will increase the Debtor's revenue. Taking into consideration all these factors, the Court concludes that the Debtor has shown that the likelihood that Debtor can perform in the future is more probable than not. The Debtor has therefore demonstrated adequate assurance of future performance under the Franchise Agreement.

VI. Conclusion

For all these reasons, the Court finds that the Debtor can assume the Franchise Agreement under 11 U.S.C. § 365(b)(1).

Therefore, **IT IS ORDERED** that the request for relief from automatic stay to terminate the Franchise Agreement on the basis that the Debtor is prohibited from assuming the Franchise Agreement under 11 U.S.C. § 365(b)(1) is DENIED. It is further,

ORDERED that the *Motion For Order Authorizing The Assumption Of Franchise Agreement With Hilton Franchise Holdings, LLC* (Dkt. No. 420) is GRANTED.

IT IS SO ORDERED.

Service List:

Default List