IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
FRESH-G RESTAURANT	:	Case No.: 16-12174 (CSS)
INTERMEDIATE HOLDING, LLC	:	(Jointly Administered)
et al.,	:	
	:	
Debtors.	:	
	:	

OPINION

THE ROSNER LAW GROUP LLC
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-and-

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Date: December 20, 2017

Sontchi, J._____

INTRODUCTION

Before the Court is a limited objection to the proposed Sale Order regarding the assumption and assignment of a Lease.[1] The question at issue is whether the lessee Tenant may exercise an Option to renew the Lease during bankruptcy proceedings, even though the Debtors had certain defaults, which they have cured, and the Lease specifies that it mayd not be renewed if defaults exist at the time the Option is exercise. Landlord submits that the Tenant failed to properly exercise the Option due to pre- and post-petition defaults, and as such the Debtors may only assign and assume the Lease to the Purchaser to the extent of its remaining term.

The Court finds that the Tenant validly exercised its Option. The exercise was timely, and any defaults that existed at the time the Tenant exercised the renewal did not prevent its right in the Option from vesting. Since the lease has been cured of any prior defaults and because the renewal option was a vested right, the Option can be relieved from forfeiture pursuant to Section 3275 of the California Civil Code.

In addition, the Court declines to apply its equitable powers to amend the substantive state contract rights of the parties outside bankruptcy. At least in this case, the California anti-forfeiture regime sufficiently balances the interests of debtors and creditors and does not conflict with the rationale of Section 365. Nor is there reason to believe that Section 365(d) should preempt state law.

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[1] Undefined terms used in the Introduction have the meaning set forth below.

The Court therefore denies the Landlord's limited objection regarding the assignment and sale of the Lease.

JURISDICTION

This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 11 U.S.C. § 157(b)(2)(A), (N), and (O). Venue is proper before the United States Bankruptcy Court for the District of Delaware under 28 U.S.C. §§ 1408 and 1409. The Court has the judicial authority to enter a final order.

STATEMENT OF FACTS

A. Procedural Background

On October 3, 2016 (the "Petition Date"), Garden Fresh Restaurant Corp. (the "Tenant") filed this Chapter 11 case, which is jointly administered with its affiliates (collectively with Tenant, the "Debtors").[2] On November 17, 2016, Debtors moved in their *Amended Notice of (I) Possible Treatment of Contracts and Leases, and (II) Fixing of Cure Amounts, And (III) Deadline to Object Thereto* (the "Notice") to, among other things, assume and assign the subject Lease between Tenant and DK Connections LLC (the "Landlord") as part of a motion (the "Sale Order") to sell certain assets to proposed-buyer, GFRC Acquisition, LLC (the "Purchaser").[3]

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[2] The Debtors include the following: Fresh-G Restaurant Intermediate Holding, LLC; Fresh-G Holdings, Inc.; Fresh-GF Holdings, Inc.; Fresh-G Restaurant Corp.; and Fresh-G Promotions, LLC. Del. Bankr. No. 16-12177, D.I. 4. Hereafter, all references to this bankruptcy proceeding will be signified by the format "D.I. __".

[3] D.I. 361.

On December 9, 2016, Landlord filed a limited objection to the Sale Order regarding the assumption and assignment of the relevant Lease. The Landlord renewed its objection in a subsequent filing ten days later.[4] On October 12, 2017, Landlord filed its *Supplement to Objection of DK Connections LLC to Proposed Sale, and Related Assumption and Assignment of Shopping Center Lease*, addressing the question at issue in this opinion.[5] On October 26, the Purchaser filed a reply to the Landlord's supplement, and on October 31 the Court heard argument on the issue. Further supplemental briefing was requested at the hearing and provided by both parties on November 13. The issue is now ripe for review and fully briefed.

B. Factual Background

The current dispute involves a lease between Tenant and Landlord dated as of May 2, 2006 and relating to premises at Unit E-3, Beverly Connection Shopping Mall, La Ciegna Boulevard, Los Angeles, California (the "Lease"). The premises were initially leased to the Tenant by the Landlord's predecessor, Bevcon I, LLC, which subsequently assigned the Lease to the current Landlord.

Under Article 2.1 of the Lease, and as confirmed in the Certificate of Commencement, the primary Lease term commenced on February 4, 2008 and will expire on January 31, 2018.[6] Interpretations of the Lease are governed under California law under

[4] D.I. 421, 460.

[5] D.I. 1041.

[6] D.I. 1041, Exh. B, *Certificate of Commencement.*

the contract's choice of law provision. The Lease also allowed for an option to extend the lease for two five-year periods under the following terms:

> 2.2 Option to Extend. To the extent that such option(s) is (are) reflected in Paragraph H, Landlord grants to Tenant the option(s) ("Option(s)") of extending the Initial Term for the Extension Period(s) described in Paragraph H pursuant to the terms set forth herein. With respect to any and each Extension Period; Tenant may exercise the Option by giving Landlord notice (in the manner prescribed by Section 17.3) of Tenant's irrevocable exercise of the Option not more than eighteen (18) months nor less than twelve (12) months in advance of the prospective Extension Period. Failure to effectively exercise the Option for any Extension Period shall automatically terminate and nullify the Option for such Extension Period and any subsequent Extension Period.
>
> Tenant's right to exercise the Option for any Extension Period is subject to satisfaction of the following conditions precedent: (i) this Lease shall be in effect at the time notice of exercise of the Option is given and on the last day of the Term prior to its extension; (ii) *Tenant shall not be in Default (as defined in Section 13.1) under any provision of this Lease at the time notice of exercise of the Option is given* nor shall a Default exist as of the last day of the Term prior to its extension; (iii) an Uncured Default (as defined in Section 13.2) shall not have occurred at any time during the Term; (iv) the notice of exercise of the Option shall be delivered in strict compliance with the requirements and limitations set forth in this Section; and (v) Tenant is open and operating its business in the Premises on a full-time basis as of the date that notice of exercise of the Option is given and throughout the period thereafter through and including the day the subject Extension Period is to commence. Any Option shall immediately and automatically terminate and shall be of no further force or effect in the event that this Lease is terminated in accordance with the terms and provisions of this Lease.[7]

Landlord later filed a post-petition limited objection to the Debtors' Notice because of a lack of information regarding Purchaser's adequate assurance of future

[7] *Id.* at Exh. A, ¶ 2.2, 17.11, *Beverly Connection Restaurant Lease Fundamental Lease Provisions* (emphasis added).

performance on the Lease.[8] Landlord renewed its objection on a lack of adequate assurance ten days later, after reviewing an adequate assurance letter provided by Debtors' counsel.[9] While the parties were in discussion over the proposed assumption and assignment of the Lease, the Tenant attempted to exercise the first option for a five-year extension of the Lease, which would run from February 1, 2018 through January 31, 2023 (the "Option").[10] Tenant purported to exercise the Option via a letter to the Landlord dated January 27, 2017. Under the Lease, the final deadline under which the Tenant could provide notice of the renewal was January 31, 2017.[11]

Landlord rejected the renewal in their responding letter, dated February 1, 2017, by way of Tenant's failure to pay certain alleged rent and additional payments.[12] The Landlord's limited objection outlined the full extent of alleged defaults, totaling $139,573.24. This included $83,350.30 in pre-petition rent and CAM charges. It also included the following alleged post-petition defaults: $30,255.30 for stub rent between October 3 and October 31, 2016; $11,353.49 for CAM charges in that same period; two repair bills totaling $6,297.63;[13] CAM charges for January of $4,886.48; and late charges

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[8] The parties agreed to a resolution on the issue of adequate assurance of future performance. *Id.* at n.1; *see also* D.I. 421.

[9] D.I. 460.

[10] D.I. 1095, Exh. B, *Tenant Letter for Extension of Lease*.

[11] D.I. 1041, Exh. A, ¶ 2.2.

[12] *Id.* at Exh. D.

[13] Under the Lease, the Tenant has obligations to reimburse the Landlord for certain necessary repairs within ten days after receipt of a bill. *Id.* at Exh. A, ¶ 7.4; *see also id.* at Exh. E.

and Interest Due totaling $3,430.04.[14] All post-petition defaults were later cured on or about June 24, 2017.[15]

LEGAL DISCUSSION

The Landlord argues that the Option was not properly exercised under its terms due to Defaults, as defined in the Lease, which existed at the time the Tenant attempted to exercise the Option. As a result, Landlord argues that the Tenant is barred from exercising the Option to renew beyond the existing lease period ending on January 31, 2018.[16] In response, the Purchaser has argued that to the extent that Defaults existed at the time of exercise, their subsequent cure should save the Option from forfeiture and allow the Purchaser to assume both the original Lease term and the first five-year extension. The parties made arguments under both California state law and federal bankruptcy law. This Court will address each argument in turn and as necessary.

A. Section 3275 of the California Civil Code

In matters of contract interpretation, a bankruptcy court will "rely on applicable state law in construing a contract's terms."[17] The Lease is governed under California law, as stipulated by the Lease's choice of law provision. The express choice

[14] *Id.* at ¶ 14.

[15] *Id.* at ¶ 17.

[16] *Id.* at Exh. D.

[17] *Marks v. New Century TRS Holdings, Inc. (In re New Century TRS Holdings, Inc.)*, 2011 WL 1811050, *2 (Bankr. D. Del. May 10, 2011) (citing *Tesler v. Certain Underwriters at Lloyd's, London (In re Spree. com Corp.)*, 2002 WL 1586274, *7 (Bankr. E.D. Pa. June 20, 2002)).

of state law, as selected by the parties in the contract governing the actual mechanics of the transaction, should be respected and followed by the Court.[18]

The dispute over exercise of a renewal option pits two principles of California law against each other. First is the well-established idea that the acceptance or exercise of any option must be "in strict compliance with its terms."[19] In the alternative is the "equitable principle that a party to a contract should not suffer a forfeiture as the result of a minor or trivial breach of that contract," as supported by the state anti-forfeiture statute.[20] Specifically, California Civil Code § 3275 provides the following protections:

> Whenever, by the terms of an obligation, a part thereto incurs a forfeiture, or a loss in the nature of forfeiture, by reason of his failure to comply with its provisions he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty.

According to the California Supreme Court, an offer "[f]rom the viewpoint of the optionee … is an irrevocable offer which the optionee can convert by acceptance of the offer."[21] The requirements for accepting an offer have been construed conservatively by California courts, even in comparison to other states.[22] As a result, an optionee that fails to exercise the option within the exact time and manner specified in the contract

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[18] *GEC Industries Inc. v. Colonial Rubber Works, Inc. (Matter of GEC Industries, Inc.)*, 128 B.R. 892, 896 (Bankr. D. Del. 1991) (citing *In re Burger*, 125 B.R. 894, 900 (Bankr. D. Del. 1991)).

[19] *Farina Focaccia & Cucina Italiana, LLC v. 700 Valencia Street LLC*¸ 2016 WL 5672961, *9 (N.D. Cal. Oct. 2, 2016) (citing *Renewable Land, LLC v. Rising Tree Wind Farm, LLC*, No. CV 12-0809 RT, 2013 WL 497628, at *1 (E.D. Cal. Feb. 7, 2013)).

[20] *Id.* (citing *Superior Motels, Inc. v. Rinn Motoro Hotels, Inc.*, 195 Cal.App.3d 1032, 1051 (1987) and Cal. Civ. Code § 3275).

[21] *Palo Alto Town & Country Village v. BBTC Co.*, 11 Cal.3d 494 (1974).

[22] *Sheils v. Pfizer, Inc.*, 156 Fed. Appx. 446, 450 (3d Cir. 2005).

loses the ability to do so at a later date.[23] The exceptions to this rule have traditionally been narrow, limited only to situations where "there is a waiver by the optionor or evidence of conduct which might estop the optionor from insisting on strict compliance … such as fraud, evasion, acceptance of a nonconforming tender, or other conduct by the optionor calculated to frustrate effective exercise of the option."[24]

In cases where an optionee has acted or failed to act in an attempt to exercise an option, as is the case here, the court must consider whether the party in fact accepted the irrevocable offer to form a contract.[25] If the offer is accepted, the party exercising the option converts what would otherwise be a privilege into a vested right.[26]

Despite language in certain cases suggesting that California forfeiture law cannot apply to the loss of a lease renewal option, there is little doubt that a landlord's refusal to allow the renewal of a lease pursuant to an option can give rise to a forfeiture in certain circumstances.[27] To say otherwise would be inconsistent with cases applying California law from both the California Supreme Court and Ninth Circuit.[28] The Court agrees with the Northern District of California's review of the state case law regarding

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[23] *Simons v. Young*, 93 Cal. App.3d 170, 182 (1979).

[24] *Farina Focaccia*, 2016 WL 5672961 at *9 (citing *Renewable Land, LLC*, 2013 WL 497628 at *1) (internal quotations omitted).

[25] *Sheils v. Pfizer, Inc.*, 156 Fed. Appx. at 449-50.

[26] *See Swift v. Occidental Mining & Petroleum Co.*, 141 Cal. 161, 173 (1903).

[27] *But see Bekins Moving & Storage Co. v. Prudential Ins. Co.*, 176 Cal. App. 3d 245, 254 (1985).

[28] *Farina Focaccia*, 2016 WL 5672961 at *10-11 (citing *e.g.*, *Holiday Inns of Am., Inc. v. Knight*, 70 Cal. 2d 327, 330 (1969), and *Title Ins. & Guar. Co. v. Hart*, 160 F.2d 961, 963 (9th Cir. 1947)).

forfeitures and its application to lease renewals: holding that an "optionee must strictly comply with the requirements of the option provision as it relates to the *timing* and *manner* in which the option is exercised."[29]

As construed in *Farina,* parties to lease renewals may only accept an available option upon "the terms specified in the offer." But whereas timing requirements have generally been strictly construed, requirements preventing renewal due to material or immaterial defaults are given greater leeway.[30] California courts have applied equitable principles, as embodied in § 3275, to allow the curing of lease renewal options where the loss amounts to a forfeiture. For example, forfeitures were found in *Holiday Inns*, *Title Insurance*, and *Kaliterna*, LL situations where the lessee had invested substantially in or made serious improvements to a lease location.[31]

Yet California courts have also recognized that capital improvements are not the only means by which lease renewal options may become vested rights. In *Holiday Inns of America*, the Supreme Court of California reviewed an option contract for the purchase of real property where the optionee was obligated to make four yearly payments of $10,000 in addition to the purchase price in order to exercise the option. The contract stipulated that a failure to make the yearly payments on time would automatically cancel the option without notice. The optionee paid the first two $10,000 payments on time, but the third payment arrived a day later than allowed under the

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[29] *Id.* at *13.

[30] *Compare Bekins*, 176 Cal. App. 3d at 253-54 *with Holiday Inns*, 70 Cal. 2d at 330.

[31] *Farina Focaccia*, 2016 WL 5672961 at *12-13.

contract. The Supreme Court overturned a lower court ruling, holding that the optionee should have received relief from forfeiture. The court rejected the optionee's invitation to consider expenditures made in surrounding real estate as part of the court's forfeiture analysis, and instead focused on the optionee's prior yearly payments. The two $10,000 payments were a "substantial part" of the price for the right to exercise the option in the contract's remaining two years. Thus, the optionee had "not received what they bargained for and they ha[d] lost more than the benefit of their bargain." The consideration provided a sufficient reason to allow the option to be saved from forfeiture.[32]

Ultimately, a court may take a less restrictive interpretation of a renewal option's conditions relating to defaults for the purposes of equity, particularly in situations where the parties follow the remaining requirements as stipulated within the contract, the optionor receives the benefit of the bargain intended in the original agreement, and where the defaults are relatively minor or waived.[33] In such circumstances, where the investment of the tenant is great and the defaults are minimal, the "failure to renew a lease … would be in the nature of a forfeiture," and subject to the protections of state anti-forfeiture law.[34] Courts in these circumstances look for "faithful

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[32] *Holiday Inns*, 70 Cal. 2d at 331-32.

[33] *See Kaliterna v. Wright*, 94 Cal. App. 2d 926, 936 (1949), *overruled in part on other grounds by, State Farm Mut. Auto. Ins. Co. v. Superior Court*, 47 Cal. 2d 428, 304 (1956); *Holiday Inns*, 70 Cal. 2d at 331-32.

[34] *Kaliterna*, 94 Cal. App. 2d at 936.

compliance" with the option terms, and whether the defaults are significant when placed in the perspective of the total investment on the property.[35]

In this dispute, the Tenant's letter exercising the Option was dated before the deadline to exercise the Option under the Lease terms. Indeed, the only substantive objection made by the Landlord at this point to the renewal was in connection with the payment defaults they allege at the time of the exercise. Because of the Defaults caused by rent and additional payments due, Landlord contends that the Option was not timely exercised. However, to the extent the Option is a vested right and the Defaults cured, the Option was otherwise timely exercised and in compliance with the remaining terms of Section 2.2 of the Lease.

Much like the California courts above, the Court here finds that valuable consideration was provided by the Debtors to the Landlord that created a vested right in the Option. The Debtors paid over $2 million throughout the course of the Lease, in addition the Landlord received an additional $795,909.50 in post-petition payments. Furthermore, the Landlord has benefited from extended negotiations with the Debtors and Purchaser as they have bargained around the assumption and assignment of the Lease. The payment parallels the circumstances in *Holiday Inns*. In both cases, the parties committed to substantial financial performance before and after the exercise of the renewal option to ensure compliance with the contractual terms, providing economic consideration in the process. While the breaches here may be more severe than in in

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[35] *Title Ins.*, 160 F.2d at 968.

Holiday, at least one California bankruptcy has found a vested right in a lease extension option under lesser circumstances, looking solely at the prior relationship of the parties, which in this case extended nine years.[36]As a result, the Option has been accepted by the Tenant and is not simply an offer or privilege outside forfeiture law.

Furthermore, whereas the Landlord alleges a laundry list of pre- and post-petition defaults, the majority of these defaults were not payable or due at the time the renewal was exercised given the bankruptcy proceedings. Upon filing for bankruptcy, the payments available to be paid out under the Lease changed. In no sense could it be expected that pre-petition defaults were due at the time the Option was exercised, given that it occurred after the Petition Date. The Debtors furthermore did not maintain an active duty to immediately pay stub-rent payments for the month of the Petition Date under Delaware bankruptcy law; neither retroactively applied CAM charges that were billed after the Option was exercised; nor late charges or interest as administrative expenses.[37] The remaining defaults, which amount to two repair bills totaling $6,297.63 and a CAM charge for the remaining month of October totaling $11,353.49 are otherwise *de minimis* defaults. The two bills constitute less than 2.5% of the total amount paid out as part of the Lease post-petition, furthermore there is no evidence in the record that shows the Landlord intentionally avoided payment as these debts were irregular and subject to the slower process of the bankruptcy proceedings and negotiations.

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[36] *West Pico Terrace-Let, LLC v. Flora Terrace East LLC (In re Plaza Healthcare Ctr., LLC)*, 2016 Bankr. LEXIS 3938, *3 (Bankr. C.D. Cal. Nov. 8, 2016).

[37] *See Goody's Family Clothing, Inc. v. Mountaineer Prop. Co. II, LLC (In re Goody's Family Clothing, Inc.)*, 401 B.R. 656, 664 (D. Del. 2009).

Landlord's argument that the defaults were "willful," and thus outside the scope of § 3275, also falls flat. California law makes clear that a willful breach need only be intentional and deliberate.[38] However, such willful breaches can be waived where the lessor fails to enforce its lease obligations.[39] Here, the Landlord and the Purchaser already bargained in good faith around the adequate assurance objections to the assumption and assignment of the Lease. In doing so, the Landlord received financial benefits from the Purchaser tied to its desire to assume and assign the Lease. To prevent the renewal, which was not in the initial objection of the Landlord and argued after the settlement of the adequate assurance objection and post-petition cures, would provide the Landlord with a windfall as it attempts to enforce lease provisions in selective fashion and in strategic timing. While allowing a debtor to extend a lease term prior to deciding whether to assume the lease leaves open the possibility of gamesmanship on part of the debtor, the opposite result creates opportunities for the landlord. A court that never allows a debtor to renew a contract before assumption in effect allows the landlord to deploy the benefits of bankruptcy selectively, as might be the worry here.[40]

Furthermore, there is no reason to believe that given the cures the Landlord will not receive the benefit of the bargain intended under the original lease, a significant point towards applying state forfeiture laws under *Holiday Inns*. Instructive to this point

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[38] *Wilson v. Security-First Nat. Bank of Los Angeles* v. *Moore*, Civ. 15893, CA Ct. App. (1948) (finding a forfeiture as there is "a substantial right after a long and amicable relationship between the parties" of 20 years.)

[39] *Swift*, 141 Cal. at 173.

[40] *In re Leisure Corp.*, 234 B.R. 916, 922-23 (B.A.P. 9th Cir. 1999).

is *In re Seven Hills, Inc.* from the United States Bankruptcy Court for the District of New Jersey. In that case, the debtor in possession provided the landlord with proper and timely notice to renew the lease in question, despite defaults under the lease that existed at the time of renewal. The court was willing to overlook those default as the landlord did "not lose the benefit of its bargain, because [the debtor] may assume the [l]ease under § 365 only if [the debtor] cures its pre-petition default and provides adequate assurances of future performance."[41] In other words, the terms of the Lease will remain in place as part of the ultimate assumption and assignment, and there is no reason to believe the Tenant will not receive the benefit of the bargain it initially contracted for.

The pre- and post-petition Defaults by the Tenants in this case do, in fact, fit under the anti-forfeiture scheme employed by California. The Court concludes that the continued post-petition performance of obligations, the settlement of adequate assurance claims, the minimal size of the payment defaults, and the ultimate economic position of the parties favors the application of state forfeiture law. Pursuant to § 3275, the Option was revived based upon the total cure of any post-petition Defaults that existed at the time the Option was exercised.

B. Section 365 of the Bankruptcy Code

As discussed already, the Court finds that California Civil Code § 3275 entitles the Debtors to exercise the Option upon curing the defaults. Absent a compelling federal

[41] *In re Seven Hills, Inc.*, 403 B.R. 327, 335 (Bankr. D. N.J. 2009).

interest, the pre-petition state law rights of the parties should govern.[42] The Court acknowledges the parties' arguments and case law from other circuits reviewing lease renewal options under section 365.[43] However, given the clear substantive rights provided under the California anti-forfeiture statute, the Court declines to invokes its broad equitable powers under § 105(a) to alter those nonbankruptcy rights "absent exceptional circumstances."[44]

Landlord argues in the alternative that California Civil Code § 3275 directly conflicts with the Third Circuit's interpretation of section 365(d)(3) of the Bankruptcy Code. To the extent that it does, Landlord contends the state statute cannot be applied to the exercise of the Option.

Supreme Court law supports taking a restrained approach to federal preemption. As the Third Circuit has stated, "[t]hese cases stand for the proposition that unless federal bankruptcy law has *specifically* preempted a state law restriction imposed on property of the estate, the trustee's rights in the property are limited to only those

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[42] *See Butner v. United States*, 440 U.S. 48, 54 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law … [u]nless some federal interest requires a different result").

[43] *See, e.g.*, *In re Seven Hills, Inc.*, 403 B.R. at 335; *Coleman Oil Co., Inc. v. Circle K Corp. (In re Circle K Corp.)*, 127 F.3d 904 (9th Cir. 1997); *In re Leisure Corp.*, 234 B.R. at 922 (citing *Circle K*, 127 F.3d at 909) (noting the need to balance state law contract rights of the creditor to receive the benefits of his bargain with the federal law equitable right of the debtor to attempt reorganization).

[44] *In re 210 Roebling, LLC*, 336 B.R. 172, 176 (Bankr. E.D.N.Y. 2005) (citing *Johnson v. First Nat'l Bank of Montevideo Minn.*, 719 F.2d 270, 274 (8th Cir. 1983)).

rights that the debtor possessed pre-petition."[45] Without express language within the Bankruptcy Code evincing a Congressional intent to supersede state law, the Third Circuit has been previously unwilling to infer federal preemption within the bankruptcy context.[46]

The Landlord's preemption argument lacks sufficient legal support. Section 365 governs the assumption and assignment of a debtor's unexpired leases. By permitting the debtor to assume or reject executory contracts, this section allows the debtor to maximize the value of the estate by assuming those contracts that are beneficial to the estate and rejecting those that are not.[47] However, no direct language exists in section 365(d) of the Bankruptcy Code to support the preemption of state law here. Unlike section 365(d), numerous other provisions within section 365 expressly take into account "applicable law" or "applicable nonbankruptcy law." The inclusion of such statutory language in some instances and its absence in others must be considered intentional.[48] Furthermore, the limited case law available directly addressing the connection between

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[45] *Integrated Solutions, Inc. v. Service Support Specialties, Inc.*, 124 F.3d 487, 492-93 (3d Cir. 1997) (emphasis added).

[46] *Id.* (citing *In re Roach*, 824 F.2d 1370, 1372 (3d Cir. 1987).

[47] *In re Rickel Home Ctrs., Inc.*, 209 F.3d 291, 298 (3d Cir. 2000).

[48] *See, e.g.*, 11 U.S.C. § 365(c), (e), (f), (h), (n); *cf. Geron v. Valeray Realty Co., Inc. (In re Hudson Transfer Group, Inc.)*, 245 B.R. 456, 460 (Bankr. S.D.N.Y. 2000) (citing *Fields v Mans*, 516 U.S. 59, 66 (1995) and *Gozion-Peretz v. U.S.*, 498 U.S. 395, 404 (1991)) ("Where Congress expressly includes an element in one provision of a statute, and fails to include it in another, it manifests an intent to confine the element to the specified instance").

section 365 and state anti-forfeiture laws has either affirmed the use of, declined to address, or found compatible with federal law the relevant state laws.[49]

Landlord contends that the California anti-forfeiture law nevertheless contravenes the Third Circuit's decision in *Montgomery Ward*, but this too is incorrect. The court in *Montgomery Ward* noted that section 365(d)(3) "was intended to alleviate …[the] burdens of landlords by requiring timely compliance with the terms of the lease."[50] As a result "the terms of the lease will determine the nature of the 'obligation' and when it 'arises.'"[51] Where an "obligation" is one where the debtor "is legally required to perform under the terms of the lease and … [which] arises when one becomes legally obligated to perform."[52] Interpreting this language, the District of New Jersey held that where a written provision in a lease provides a landlord with a claim to attorney's fees "enforceable under state law" the landlord is entitled to such rights post-petition under the holding in *Montgomery*.[53] In other words, the Third Circuit's requirement of timely

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[49] *In re C.A.F. Bindery, Inc.*, 199 B.R. 828, n. 7 (Bankr. S.D.N.Y. 1996) (unwilling to cure rent defaults when state anti-forfeiture laws already equitably treats parties); *Coleman Oil Co., Inc. v. Circle K Corp. (In re Circle K Corp.)*, 190 B.R. 370, 378 (B.A.P. 9th Cir. 1995) (declining to reach the lower bankruptcy court's state law theory for granting summary judgment on the exercise of a renewal option based on state anti-forfeiture provisions given the court's affirmation on section 365 grounds).

[50] *Centerpoint Properties v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205, 212 (3d Cir. 2001).

[51] *In re WCI Communities, Inc.*, 2010 WL 3523061, at *2 (Bankr. D. Del. Sept. 2, 2010).

[52] *Montgomery Ward*, 268 F.3d at 209.

[53] *See In re Pelican Pool & Ski Center, Inc.*, 2009 WL 2244573, at *15-16 (D. N.J. July 27, 2009) (citing *Montgomery Ward*, 268 F.3d at 209) (holding landlord entitles to attorney's fees when the lease allows such fees and such provisions are enforceable under the relevant state law).

compliance with lease obligations merely allows parties to enforce their preexisting contractual lease rights *under* the governing state law. It stands to reason then that the obligation created in the Option is similarly governed by its ability to be cured under the appropriate state anti-forfeiture laws.

Both the statute and case law show a lack of support for federal preemption of California's anti-forfeiture law. Nor does Third Circuit precedent prevent the application of the governing state law to the terms of the Lease. As a result, the Court declines to address the section 365 argument given our decision on the state law claim, and finds that the state anti-forfeiture law is not preempted in this case.

CONCLUSION

For the foregoing reasons, the Landlord's *Supplement to Objection of DK Connections LLC to Proposed Sale, and Related Assumption and Assignment of Shopping Center Lease* is denied.