SO ORDERED.
SIGNED this 21st day of November, 2024

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

Suzanne H. Bauknight
CHIEF UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

BUILD BAYTOWN I, LLC

Case No. 3:24-bk-30748-SHB
Chapter 11

Debtor

MEMORANDUM AND ORDER

By filing its Chapter 11 petition, Build Baytown I, LLC ("Debtor") seeks to reorganize its business as a golf course operator and real estate developer. [Doc. 20 ¶ 1.] The City of Baytown, Texas (the "City"), which owns the real property on which the golf course is constructed and is Debtor's largest unsecured creditor, opposes Debtor's reorganization in this or any district because, it argues, the Agreements concerning the golf course property were terminated prepetition. Before the Court are two contested matters that were heard on November 14, 2024: (1) Motion of the City of Baytown to Transfer Venue of Bankruptcy Case (the "Transfer Motion") [Doc. 26][1] and (2) Motion to Extend Time to Perform Any Obligations Required

[1] The United States Trustee filed a brief in opposition to the City's request to transfer venue under 28 U.S.C. § 1408(1) [Doc. 98] but took no position as to the request for a transfer of venue under 28 U.S.C. § 1412. The United States Trustee's trial attorney appeared at but did not participate in the November 14 hearing.

Under the Lease and Chapter 380 Program[2] and to Extend Time to Assume or Reject the Lease and 380 Agreement (the "Extension Motion") [Doc. 39]. Because venue is proper in this district under 28 U.S.C. § 1408(1) and because the Court finds that the City has not met its burden to show that the interest of justice or the convenience of the parties compels transfer of the case to the Southern District of Texas under 28 U.S.C. § 1412, the Court will deny the Transfer Motion. Because the Court finds that Debtor's opportunity to cure prepetition defaults under the Lease and 380 Agreement did not expire until postpetition (specifically, at 11:59 p.m. on May 2, 2024), the Court overrules the City's objection to the Extension Motion and finds that Debtor has shown cause to extend the deadline of 11 U.S.C. § 365(d)(4)(B)(i). Further, the Court finds that the procedural history of these contested matters and the interest of justice mandate tolling of the maximum extensions permissible under § 365(d)(3) and (4)(B)(i) so that the deadlines will be extended to March 6, 2025.

I. RELEVANT FACTS[3]

As stipulated by the parties in their Joint Pretrial Statement [Doc. 100], Debtor is a limited liability company organized under the laws of the State of Texas. The City is a municipality located in Baytown, Texas. [*Id.*] Debtor has no employees, payroll, or sales tax obligation, and its purposes are to operate a golf course and develop real estate. [*Id.*] As of May 2, 2024, the petition date, Debtor's two members are Aurelio Valeriano and David Hinkle, with each owning a 50% membership interest in Debtor. Debtor's real estate developments and operations consist solely of the golf course located in Baytown, Texas, which sits in the Southern

[2] The agreements at issue between Debtor and the City are the Lease Agreement dated April 20, 2022 (the "Lease"), and the Chapter 380 Program Agreement for Economic Development Incentives dated March 18, 2022 ("380 Agreement") (collectively, the "Agreements"). [Doc. 100 at ¶ 15; Doc. 104-1 at pp. 2-43, 45-64.]

[3] This Memorandum and Opinion constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052(a), made applicable to these contested matters by Federal Rule of Bankruptcy Procedure 9014(c).

District of Texas. [*Id.*] The City owns the golf course property, which was leased to Debtor in April 2022, and Debtor's physical assets are located entirely in Baytown, Texas. [*Id.*]

In connection with the 380 Agreement, the City provided financial incentives to Debtor to develop the golf course and other golf-related amenities, features, and retail businesses. [*Id.*] The City provided Debtor with a grant of $6,000,000.00 plus the cost of certain bonds and waiver of certain project-related permit fees. [*Id.*] According to the testimony of the Assistant City Manager, Brant Gary, and David Hinkle, the grant to Debtor under the 380 Agreement has been disbursed except for a retainage of $120,000.00, which was withheld early in 2024 because the clubhouse kitchen was not complete. Although the City's obligations under the 380 Agreement are substantially performed, the 380 Agreement also contains a provision for the City to reimbursement any property tax that Debtor might become obligated to pay within 20 years while the Lease remains in effect. [Doc. 104-1[4] at p. 5 (¶ 4.3).] The Lease term is 480 months (until April 2062) unless terminated earlier under the Lease's terms and conditions. [Doc. 100.] The Lease required Debtor to make nominal annual rent payments and to develop the project into an operational golf course, and Debtor made all nominal rent payments due under the Lease. [*Id.*] The Agreements required Debtor to renovate an existing golf course into a newly developed and built double loop golf course[5] on approximately 118.46 acres. [*Id.*] Debtor also was obligated to improve the property to include a new renovated 17,800 square foot clubhouse, a 5,000 square foot golf cart storage facility, and a 5,000 square foot maintenance facility. [*Id.*]

The Agreements recited two notice addresses for Debtor, a post office box in Lenoir City, Tennessee, and an attorney's office in Houston, Texas. [*Id.*] Mr. Hinkle testified that he has

[4] As directed by the Court, the parties jointly tendered twenty-five exhibits at Doc. 104-1, with the Joint Exhibit List filed at Doc. 107. At the November 14 hearing, the Court admitted exhibits 1 through 12, 14 through 23, and 25.

[5] Mr. Hinkle testified that the unique golf course design constitutes valuable intellectual property of Debtor.

lived in Knoxville since 1988, and Mr. Valeriano lives in Lenoir City. Debtor was organized in Texas with its principal place of business in Lenoir City at Mr. Valeriano's address.[6] [Doc. 100.] Mr. Hinkle testified that many of the discussions with the City before and after the Agreements were executed were by Zoom and telephone but that he and Mr. Valeriano also had traveled to Texas for some in-person meetings. Vendor meetings primarily were held by Zoom and telephone from Knoxville. Debtor also opened bank accounts and conducted banking business in person at branches in the Knoxville area. Additionally, officials of the City travelled at least once to Knoxville.

Mid-way through development of the golf course, Debtor experienced problems with a landscaping contractor that had planted substandard grass on the course.[7] As a result, the golf course opened to the public on December 13, 2023, which was later than planned. [Doc. 100].

Debtor engaged Troon Golf, LLC ("Troon"), an international golf course management firm, to manage the golf course in Baytown. [*Id.*] Troon was responsible for the day-to-day operations of the golf course. According to the testimony, by mid-March 2024, Debtor was struggling financially and had not paid numerous vendors, including Troon. On March 22, 2024, Troon sent a notice of default to Debtor, giving a ten-day cure period. When Debtor did not cure its default with Troon, Troon terminated the management contract.

Although Debtor did not seek additional funding from the City, Debtor was trying to obtain additional financing that would have required it to pledge as collateral its leasehold interest in the City's property, a proposal that was untenable for the City. In March 2024,

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[6] Although the Court does not find it relevant to the question of the location of Debtor's principal place of business, Debtor acknowledges that it was not registered to do business in Tennessee until July 12, 2024, and that it did not seek to be registered with the Tennessee Secretary of State until April 30, 2024. [Doc. 104-1 at pp. 80, 82; Doc. 100 at ¶ 13.]

[7] Mr. Hinkle testified about the problems created by the contractor. Debtor asserts that its cause of action against the landscaping contractor is an asset of the bankruptcy estate.

representatives of the City and Debtor's principals began negotiations to right Debtor's financial ship, with the City requiring Debtor to address six items. According to Mr. Gary, the negotiation was for the City to take over operations of the golf course by the City engaging Troon to continue management operations. The City asked Debtor to provide information for an orderly transfer of operations, including production of records and invoices for Debtor's existing contractors, records of known issues concerning the project, and information about Debtor's potentially protected intellectual property. Most importantly, the City requested that Debtor provide a reconciliation or accounting of the nearly $6 million that had been paid by the City to Debtor under the 380 Agreement.

After some discussions and although Debtor provided some information sought by the City, on April 2, 2024,[8] the City's counsel sent to Debtor a formal Notice of Default, Demand, and Reservation of Rights to Debtor (the "Default Notice") under the Agreements. [Doc. 104-1 at pp. 66-69.] The Default Notice demanded that Debtor produce information on operations, outstanding projects, outstanding debts, and an accounting for Debtor's use of the grant funds, as well as other documentation concerning the golf course. [Doc. 100.] The Default Notice expressly referenced the Lease default provision [Doc. 104-1 at p. 67], which states that the following constitutes a default under the Lease:

> 12.1.2. Failure to Perform. The failure by Tenant to observe or perform any of the covenants, conditions or provisions of this Lease to be observed or performed by the Tenant, where such failure shall continue for a period of 30 days after written notice thereof by Landlord to Tenant; provided, however, that if the nature of Tenant's Default is such that more than 30 days are reasonably required for its cure, then Tenant shall not be deemed to be in Default if Tenant commences such cure within said 30-day period and thereafter diligently prosecutes and completes such cure within 120 days.

[8] The parties stipulated during the November 14 hearing that the Default Notice was emailed to Debtor during business hours on April 2, 2024.

[*Id.* at pp. 53-54.] The Default Notice required Debtor to provide the demanded information and cure the default "on or before May 1, 2024." [*Id.* at p. 68.]

The parties continued discussions after issuance of the Default Notice. [*Id.* at pp. 149-54.] To avoid a shutdown of the golf course, the City engaged Troon under an emergency agreement for Troon to manage the course on April 10, 2024. Presumably because Debtor had provided some of the information demanded in the Default Notice, which might have implicated the additional cure period in paragraph 12.1.2 of the Lease, on April 29, 2024, the City notified Debtor that neither the settlement conditions nor the cure requirements had been met by Debtor. On May 2, 2024, at 8:01 p.m. [*Id.* at p. 74], the City emailed its Notice of Termination to Debtor, stating: "Pursuant to Article 9.2 of the 380 Agreement and Article 12.2.1.3 of the Lease, the provisions of the Agreements that allow for termination upon default and failure to cure, the City hereby exercises its right to terminate the Agreements, effective May 3, 2024" [*Id.* at p. 71].

II. RELEVANT PROCEDURAL POSTURE

Debtor filed its bankruptcy petition on May 2, 2024, at 8:17 p.m. [Doc. 104-1 at p. 76.] The City has filed three proofs of claim. [Doc. 104-1 at pp. 161-256, 258-328, 330-535.] The largest claim ($5,880,494.17) seeks to recover the grant funding paid to Debtor that is subject to recapture according to the terms of the 380 Agreement. [*Id.* at pp. 161-256.] The other claims are for "pre-petition debt and operating subsidies" ($870,798.99) and for the City's payment of Debtor's prepetition debt on assignment of those debts to the City ($559,066.94). [*Id.* at pp. 258-328, 330-535.]

The Transfer Motion was filed on May 24, 2024, setting the initial hearing for July 11, 2024. [Doc. 26.] Notably, the hearing setting was outside the Court's maximum time period for hearings in contested matters. *See* E.D. Tenn. LBR 9013-1(f)(2)(ii) (requiring the hearing date

chosen by the movant to be at least 21 but no more than 40 days after service of the notice and motion).[9] At the initial hearing on July 11, the City requested limited discovery, and the parties agreed on a discovery deadline of September 13, with an evidentiary hearing to be held on October 8, 2024.

In the meantime, Debtor filed the Extension Motion on July 1, 2024, noticing it for the first hearing available under the Local Rules.[10] At the initial hearing on the Extension Motion on August 8, the parties indicated that they were discussing a potential overall resolution of the case, and they asked to continue the hearing on the Extension Motion to August 29. At that hearing, the parties asked to pass the hearing until September 26 for continuing negotiations.

On September 17, after the parties contacted chambers about the hearing date of October 8, the Court set a status conference on both motions for September 26. At that hearing, the attorneys informed the Court that they had been "overly optimistic" about resolution and asked for an evidentiary hearing to be scheduled on both motions for the same date. The City proposed October 16 as a new date for the joint hearing. Debtor asked for more time to investigate reorganization options after the negotiations with the City fell through. The parties then agreed to an evidentiary hearing on October 31, 2024. On October 21, 2024, however, the parties jointly moved to continue the hearing again – to November 14. That request originated with the City, and Debtor agreed to the continuance.

Since the case was filed, the City has taken the legal position that revenues from the golf course operations are not property of the bankruptcy estate because the Lease and 380

[9] The City noticed the hearing for July 11, 2024, which was 48 days after service of the motion and notice. [Doc. 26.]

[10] Twenty-one days from the date of the hearing notice on the Extension Motion was July 23, and the next regular Chapter 11 hearing date was August 8, 2024.

Agreement were terminated before Debtor filed its petition. Thus, Troon and the City have been managing and controlling funds and revenues of the golf course postpetition, and Debtor has not had access to records of postpetition operations.[11] Some information was provided by the City in connection with the exchange of information before the November 14 hearing, but Debtor needs to analyze the raw data provided by the City or obtain profit and loss statements from the City or Troon to be able to negotiate for potential debtor-in-possession financing and reorganization planning, which necessarily includes the decision about assumption or rejection of the Lease and 380 Agreement.

III. CONCLUSIONS OF LAW

The parties enumerated six legal issues in their Joint Pretrial Statement. [Doc. 100 at pp. 5-6.] This Memorandum and Order explains the Court's rulings on each of the six legal issues as delivered the end of the November 14 hearing:

> Legal Issue 1. Whether the United States Bankruptcy Court for the Eastern District of Tennessee is an appropriate venue for this Case pursuant to 28 U.S.C. § 1408(1)?
>
> November 14 ruling: Yes, because under the Supreme Court's "nerve center" test for an entity's principal place of business stated in *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), as applied to § 1408 venue by many bankruptcy courts, and as acknowledged by the City at the hearing, venue is appropriate here in the Eastern District of Tennessee.
>
> Legal Issues 2 and 3. Whether transfer of venue to the United States Bankruptcy Court for the Southern District of Texas would serve the convenience of the parties? Whether transfer of venue to the United States Bankruptcy Court for the Southern District of Texas would serve the interest of justice?
>
> November 14 ruling: The court exercises its discretion to deny transfer under 28 U.S.C. § 1412 to the United States Bankruptcy Court for the Southern District of Texas in the interests of justice or for convenience of the parties.
>
> Legal Issue 4. Whether the Lease constitutes an unexpired lease of nonresidential real property that may be assumed pursuant to 11 U.S.C. § 365(c)(3)?

[11] The Court finds that the City took its legal position in good faith notwithstanding the ruling herein that the City's Notice of Termination was not effective to terminate the Agreements prepetition.

> November 14 ruling: It does. The cure period under the Lease did not expire until 11:59 p.m. on May 2, 2024, notwithstanding that the Default Notice that was sent on April 2, 2024, stated a deadline for cure of May 1, 2024. This is because the Lease allows thirty days after the Default Notice to cure before the City could elect to terminate the Lease, and computation of the cure period under the express terms of the Lease, applying Texas law, does not include the date of the Notice.
>
> Legal Issue 5. Whether the 380 Agreement constitutes a financial accommodation pursuant to 11 U.S.C. § 365(c)(2)?
>
> November 14 ruling: Because the 380 Agreement financial-accommodation provision is merely one aspect of the unexpired agreement, and moreover, such financial-accommodation provision of the 380 Agreement is substantially performed, the Court finds that the 380 Agreement is not a financial accommodation for purposes of § 365(c)(2) and is unexpired for the same reason that the Lease is unexpired.
>
> Legal Issue 6. Whether Debtor has established cause for an extension of the deadline to assume or reject the Lease pursuant to 11 U.S.C. § 365(d)(4)(B)(i)?
>
> November 14 ruling: Yes. The Court finds that Debtor has established cause because the City's legal position that the ongoing operations under the Lease are not property of the bankruptcy estate and the Court's finding that the Lease is unexpired means that Debtor has a right to obtain from the City complete postpetition financial records concerning operation of the golf course and clubhouse, and Debtor needs time to review the same for reorganization planning, even if it eventually leads to liquidation.
>
> Notably, the parties' statement of legal issues did not include either the question of the expiration of the 380 Agreement or the futility of the requested extension, but the Court finds that the 380 Agreement was not expired and that it is not futile for Debtor to attempt to reorganize.

After delivery of the oral ruling, the Court also stated:

> As previously noted by the Court, if the statutory deadline for assumption of the unexpired nonresidential real property lease is not tolled, Debtor would have only fourteen days from [November 14] to assume or reject the Lease and cure postpetition defaults. Based on the delays in the hearings on these matters, the Court finds that the statutory deadline of § 365(d)(4)(B)(i) should be tolled from the initial hearing date on Debtor's motion (i.e., August 8, 2024) to today, which is 98 days. Thus, the deadline is tolled and extended 98 days past November 28, to March 6, 2025.

A. THE TRANSFER MOTION

1. Section 1408(1) Venue

Venue for bankruptcy cases is governed by 28 U.S.C. § 1408, which provides:

> Except as provided in section 1410 of this title, a case under title 11 may be commenced in the district court for the district—
>
> (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or
>
> (2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership.

28 U.S.C. § 1408. Any one of the four alternatives stated in subsection (1) will suffice to establish venue. *In re AnthymTV Co.*, 650 B.R. 261, 276 (Bankr. D.S.C. 2023).

Concerning an entity's "principal place of business" in the context of 28 U.S.C. § 1332(c)(1), governing federal diversity jurisdiction, the United States Supreme Court stated:

> "[P]rincipal place of business" is best read as referring to the place where the corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's "nerve center." And in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, i.e. the "nerve center," and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).

Hertz v. Friend, 559 U.S. 77, 92-93 (2010). Numerous bankruptcy courts have applied the "nerve center" test for principal place of business to venue under § 1408(1). *See In re AnthymTV Co.*, 650 B.R. at 277 (citing *In re Baltimore Food Sys., Inc.*, 71 B.R. 795, 800-01 (Bankr. D.S.C. 1986); *In re Peachtree Lane Assocs.*, 198 B.R. 272, 283 (Bankr. N.D. Ill. 1996), *aff'd* 206 B.R. 913 (N.D. Ill. 1997), *aff'd* 150 F.3d 788 (7th Cir. 1998)).

Here, as acknowledged by the City, Debtor's principals reside in and "direct, control, and coordinate the [Debtor's] activities" from the Eastern District of Tennessee. The 380 Agreement and Lease recite a notice address for Debtor in the Eastern District of Tennessee. Although the Southern District of Texas would also be a proper venue because Debtor is organized, and thus domiciled, in Texas, § 1408(1) also authorizes proper venue in the Eastern District of Tennessee as Debtor's principal place of business under the "nerve center" test.

2. Section 1412 Venue

The City asks the Court to transfer this case to the Southern District of Texas under 28 U.S.C. § 1412, which provides: "A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." Such a transfer is within the Court's discretion, and the movant seeking transfer bears the burden "to demonstrate, by a preponderance of the evidence, that the case should be transferred to a different venue in the interest of justice or for the convenience of the parties." *In re AnthymTV Co.*, 650 B.R. at 275; *see also Dwight v. TitleMax of Tenn., Inc.*, No. 1:09-CV-267, 2010 WL 330339, at *2 (E.D. Tenn. Jan. 21, 2010).

Debtor relies on thirteen factors collected by Bankruptcy Judge Richard Stair for consideration under § 1412. In *In re Bauer*, Bankr. No. 09-32001, Adv. No. 09-3137, 2010 WL 1905087, at *3-4 (Bankr. E.D. Tenn. May 12, 2010), Judge Stair listed the factors as follows:

> (1) proximity of creditors to the court; (2) proximity of the debtor to the court; (3) proximity of necessary witnesses; (4) availability of process to compel attendance of uncooperative or unwilling witnesses; (5) location of the assets; (6) location of relevant documents or records; (7) accessibility to sources of proof; ([8]) relative financial means of the parties; ([9]) locus of operative facts and events giving rise to the action; ([10]) each forum's familiarity with the governing law; ([11]) economical and efficient administration of the estate; ([12]) deference and weight accorded to the plaintiff's choice of forum; and ([13]) trial efficiency, fairness, and interests of justice based on a totality of the circumstances.

(citing *Dwight*, 2010 WL 330339, at *2 (quoting *Dunlap v. Friedman's, Inc.*, 331 B.R. 675, 680 (S.D. W. Va. 2005)); *Steed v. Buckalew* (*In re Rivas*), Bankr. No. 08-12333, Adv. No. 09-1055, 2009 WL 3493597, at *3 (Bankr. E.D. Tenn. Oct. 27, 2009) (quoting *Dorsey v. Hartford Life & Accident Ins. Co.*, No. 1:08-cv-243, 2009 WL 703384, at *3 (E.D. Tenn. Mar. 16, 2009)); *HLI Creditor Tr. v. Keller Rigging Constr., Inc.* (*In re Hayes Lemers Int'l Inc.*), 312 B.R. 44, 46 (Bankr. D. Del. 2004)). To this list, the City added a fourteenth factor: the "necessity for ancillary administration if liquidation should result," which the City argued at the November 14 hearing is the most important factor in this case. [Doc. 102 at p. 7 (citing *In re Rests. Acquisition I, LLC*, No. 15-12406, 2016 WL 855089, at *2 (Bankr. D. Del. Mar. 4, 2016)).] The parties acknowledge that these fourteen factors overlap.

The City argues that "it will be the creditor that is most—if not the only creditor—involved in throughout Debtor's" case. [Doc. 102 at p. 9.] Debtor's schedules reflect that approximately 37% of its creditors are headquartered in Texas. The City, indeed, holds the largest claim as it has reduced the number of other unsecured creditors by purchasing assignments of many of Debtor's prepetition obligations. [Doc. 104-1 at pp. 258-535.] The Court acknowledges that consideration of the proximity of creditors to the Court and the location of golf course and related assets weigh towards transfer.

Other locational factors, however, are neutral or favor retention of the case in this district. Debtor and its principals are here, as are its records.[12] A major concern of the City is Debtor's lack of accountability for the grant funding it received prepetition from the City under the 380

[12] The City argued at the hearing that the records of golf course operations since May are in Baytown, Texas. This is because the City treated the Lease as having been terminated and has not allowed Debtor access to postpetition operational records of the golf course and related facilities. Given the Court's ruling herein that the City acted prematurely (and thus, ineffectively) in terminating the Lease and 380 Agreement, the Court will not consider the location of records postpetition as an appropriate factor under § 1412.

Agreement. Records of those financial transactions (and related accessibility to sources of proof) are located either in Knoxville or in Debtor's financial institutions, the records of which are not tied to any particular locale. Although the construction of the improvements to the property governed by the Lease and 380 Agreement occurred in Baytown, Texas, the decisions about those improvements were made from this district. The City acknowledged that the availability of process to compel witnesses and each forum's familiarity with the governing law are neutral factors in this case.

The Court anticipates that the main parties to potential future disputes in the bankruptcy case and any adversary proceedings that might be filed (especially, the City suggests, if the case converts to Chapter 7 so that a Chapter 7 trustee would accede to Chapter 5 causes of action, including possible claims against Debtor's principals) would be representatives of the City, Debtor's principals, and any Chapter 7 or 11 trustee. (To the extent that Troon representatives might be involved as necessary witnesses, Troon is a global enterprise and not centered in the Southern District of Texas.) Thus, the Court concludes that the potential "ancillary administration on liquidation" by a trustee would be more convenient in this district, where Debtor's principals reside and have conducted Debtor's operations.

The City's counsel who represented the City prepetition and have ably represented the City in the Eastern District of Tennessee (and have an office in the district) would continue representation of the City in the case if it were transferred to the Southern District of Texas. Debtor, however, would need to retain counsel in the Southern District of Texas (presumably at significantly higher rates than in the Eastern District of Tennessee), which would be hampered significantly by the fact that Debtor is in bankruptcy with limited financial means. Thus, the relative financial means of the parties weighs in favor of retention.

The Court also notes that a "debtor's choice of forum is entitled to great weight if venue is proper." *In re Enron Corp.*, 274 B.R. 327, 342 (Bankr. S.D.N.Y. 2002); *see also In re Hanson*, 604 B.R. at 350 ("Ordinarily, the level of deference [to Debtor's choice of forum] is quite high." (quoting *In re Rivas*, 2009 WL 3493597, at *4)). Related to such deference is the consideration that "'the heart of a Chapter 11 proceeding is working up a financial plan of arrangement acceptable to all relevant parties,' making the location of the people 'charged with this responsibility' especially relevant." *In re BDRC Lofts, Ltd.*, No. 12-11559-CAG, 2013 WL 395129 at *2 (Bankr. W.D. Tex. Jan. 31, 2013) (quoting *Commonwealth of Puerto Rico v. Commonwealth Oil Refining Co.* (*In re Commonwealth Oil Refining Co., Inc.*), 596 F.2d 1239, 1247 (5th Cir. 1973)).

Ultimately, the factor stated as "economical and efficient administration of the estate" is a summary of all of the factors and has been considered as the "most important consideration." *In re Commonwealth Oil Refining Co.*, 596 F.2d at 1247. Consideration of the totality of the circumstances leads the Court to conclude that this district will provide the most economical and efficient administration of the estate. Based on the foregoing analysis, the Court finds that the City has not met its burden to prove that this case should be transferred to the Southern District of Texas in the interest of justice or for the convenience of the parties.

B. THE EXTENSION MOTION

When a debtor seeks to assume an unexpired nonresidential real property lease, the deadline is governed by § 365(d)(4)(A), which requires assumption by the earlier of "(i) the date that is 120 days after the order for relief; or (ii) the date of the entry of an order confirming a plan."[13] 11 U.S.C. § 365(d)(4)(A). That deadline may be extended for cause before expiration

[13] The deadline for Debtor to assume the 380 Agreement is governed by § 365(d)(2) at any time before confirmation of a plan.

of the 120-day period for an additional 90 days. 11 U.S.C. § 365(d)(4)(B)(i). If the 90-day extension is granted, further extension is not permitted absent "prior written consent of the lessor in each instance." 11 U.S.C. § 365(d)(4)(B)(ii).

Additionally, a debtor must timely perform all postpetition obligations under any unexpired lease of nonresidential real property until the lease is assumed or rejected. 11 U.S.C. § 365(d)(3). Such obligations must be performed within 60 days of the petition date, and although the Court may grant an extension for such performance, "the time for performance shall not be extended beyond such 60-day period." *Id.*

Debtor's Extension Motion was opposed by the City on the grounds that the City had terminated the Lease and 380 Agreement prepetition and that the 380 Agreement could not be assumed because it is a financial accommodation under § 365(c)(2). If the Agreements terminated prepetition, then it would be futile to grant the Extension Motion. Thus, the Court necessarily must decide whether the City's prepetition attempt to terminate the Agreements was effective.

The City acknowledged at the November 14 hearing that if the cure period for Debtor's default was not expired when the City sent its Notice of Termination on May 2, 2024, at 8:01 p.m., then the Lease and 380 Agreement would be unexpired and assumable under § 365. The Agreements are governed by Texas law. [Doc. 104-1 at pp. 9, 22.] Last year, the Texas Supreme Court confirmed that when measuring expiration of a deadline, the default common-law rule excludes such a "measuring date" from the calculation of a deadline if the deadline is "from" or "after" the measuring date. *Apache Corp. v. Apollo Exploration, LLC*, 670 S.W.3d 319, 321 (Tex. 2023). The specific context in that case was the anniversary of a measuring date, which is slightly different than the 30-day cure period in this case. That is, the court stated that

application of the default rule would mean that "[a] year 'from' or 'after' June 30 ends on June 30 of the following year, not June 29." *Id.*

Notwithstanding the distinction in the *Apache Corp.* case concerning an anniversary date, the same common-law default rule surely applies to the 30-day cure period in the City's Default Notice. The Default Notice was sent on April 2, 2024. Thus, the 30-day cure period did not end until the end of the thirtieth day after the Default Notice – i.e., 11:59 p.m. on May 2, 2024. The City could have modified the common-law default rule by making clear in the Agreements that the date of the Default Notice would be included in the calculation of the cure period. For example, the City could have stated that the cure period would end at the end of "normal business hours" of the thirtieth day.[14] Both the Lease and the 380 Agreement, however, give thirty days to cure any default "*after* written notice" of such default, and the Default Notice itself did not limit the cure period to the close of business or any other time on the day that was thirty days after the Notice.

Thus, notwithstanding that the City's Notice of Termination was given prepetition, nearly four hours remained for Debtor to cure under the Default Notice when it filed its bankruptcy petition at 8:17 p.m. on May 2, 2024. The City's Notice of Termination, sent before 11:59 p.m. on May 2, 2024, was premature, and the automatic stay of 11 U.S.C. § 362 intervened to prevent expiration of the cure period and termination of the Lease and 380 Agreement.

The City also asserts that the Extension Motion is futile because the 380 Agreement is a financial accommodation under § 365(c)(2) and not subject to assumption. Although the financial accommodation provisions of the 380 Agreement are not fully performed because the City has retained $120,000.00 of the $6 million grant, the City acknowledged that its postpetition

[14] Notably, the Lease includes a provision about when notices, requests, or instructions given under the Lease are deemed received, tying receipt of an email to whether it was sent during normal business hours. [Doc. 104-1 at p. 25.]

expenses incurred in connection with operating the golf course would be a set-off against the retainage. The question remains: what is executory about the 380 Agreement for purposes of Debtor's assumption of it under § 365? The answer is found at paragraphs 4.2 and 4.3 of the 380 Agreement, which provide for a fee waiver for any project permits obtained by Debtor and, more importantly, a requirement that the City reimburse Debtor for any property tax levied by the City while the Lease is in effect for twenty years. At least these two obligations remain alive even though the financial incentive provisions of the 380 Agreement are substantially performed.

For these reasons, the Court holds that it would not be futile for the Court to grant the Extension Motion. That determination, however, does not end the Court's inquiry.

In this case, the initial deadline under § 365(d)(4)(A)(i) for assuming the Lease was August 30, 2024. By the Extension Motion filed on July 1, 2024, Debtor sought to extend the deadline for assumption for 90 days, i.e., to November 28, 2024. Debtor's Extension Motion also sought an additional 90 days to perform any obligations required by § 365(d)(3) to assume the Lease and 380 Agreement. The Extension Motion was filed on the expiration date for the 60-day deadline for Debtor's postpetition performance of obligations under the Lease and 380 Agreement. Debtor set the Extension Motion for hearing on August 8, 2024, well within the initial 120-day deadline for assumption of the Lease under § 365(d)(4)(A)(i). The City's objection filed on July 22, 2024 [Doc. 47], acknowledges that the 120-day deadline for assumption of the Lease could be granted for an unexpired lease, but the City relied on its argument that the Lease and 380 Agreement were not unexpired and, thus, not executory or assumable.

Numerous courts, including the Sixth Circuit Bankruptcy Appellate Panel, have held that § 365(d)(4)(B)(i) allows extension of the assumption deadline for a nonresidential real property

lease only when the Court enters an order authorizing the extension *before* the deadline expires.[15] *See Cousins Props., Inc. v. Treasure Isles HC, Inc.* (*In re Treasure Isles HC, Inc.*), 462 B.R. 645, 650 (B.A.P. 6th Cir. 2011) ("We note that both pre and post-BAPCA versions of 11 U.S.C. § 365(d)(4) expressly require that a bankruptcy judge approve *extensions* of the time in which the trustee may assume or reject prior to the application deadline . . . ."). Indeed, the plain language of the text provides: "The court may extend the period determined under subparagraph (A), *prior to the expiration of the 120-day period*, for 90 days on the motion of the trustee or lessor for cause." 11 U.S.C. § 365(d)(4)(B)(i) (emphasis added).

The 60-day deadline of § 365(d)(3) prohibits extension of the time for performance of Debtor's postpetition obligations under the Lease beyond the sixtieth day after the petition was filed. 11 U.S.C. § 365(d)(3). Thus, absent tolling, the Court could not have granted an extension of the time to perform postpetition obligations beyond the date on which Debtor filed the Extension Motion.

Critically, neither the City's initial objection to the Extension Motion nor its trial brief [Doc. 101] objected to the Extension Motion as futile based on the Code's provision that an extension may not be granted only once the 120-day period under § 365(d)(4)(B)(i) expires. Nor has the City argued that Debtor's performance obligation must be performed within the 60-day deadline of § 365(d)(3). To be clear, it is the Court that has recognized the limiting text of the statute and caselaw that would preclude Debtor from receiving its requested extensions absent tolling.

[15] The same is not true for actual assumption, with "case law consistently hold[ing] that the mere filing of a motion to assume is sufficient." *Id.*

The Court must review whether the interest of justice requires the tolling of the deadlines in § 365(d)(3) and (4)(B)(i) based on the totality of the circumstances.[16] "Equitable tolling is presumed to apply to all federal statutes of limitations. . . ." *Feldman v. Lynch* (*In re Fitzpatrick Container Co.*), 663 B.R. 648, 659 (Bankr. E.D. Pa. 2024) (citing *Lozano v. Montoya Alvarez*, 572 U.S. 1, 11 (2014) ("Congress is presumed to incorporate equitable tolling into federal statutes of limitation because equitable tolling is part of the established backdrop of American law.")). Equitable tolling may be applied to excuse timely performance when a litigant pursues its rights diligently but some extraordinary circumstance stood in its way. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

Debtor's Extension Motion raised the following as cause for extending the deadlines under § 365(d)(3) and (d)(4)(B)(i):

> Obviously, the Debtor must have the financial information from the golf course operations for its business and the requirements of chapter 11. Despite requests/demands to Troon by letters dated May 6, 2024, and June 21, 2024 from Debtor's counsel for revenue and expense information, Troon has failed to provide that information.
>
> The Debtor has identified a lender, Red Fox Capital, willing to provide the financing necessary to operate during the chapter 11 and to successfully complete its reorganization. . . . .
>
> The additional time is necessary due to the Debtor's inability to obtain financial information on the operations of the golf course. That information is necessary to determine the amount of money to fully implement its plan of reorganization. The additional may also be necessary if litigation has to be undertaken to obtain the financial information.

[Doc. 39 at ¶¶ 7-9.]

[16] The Court raised the issue of tolling the deadlines of § 365(d) at the November 14 hearing, and the City did not express any objection to tolling.

Under similar circumstances, when a debtor desired to assume what it argued was an unexpired lease and the landlord disputed whether the lease could be assumed, the bankruptcy court tolled the deadline:

> [T]he right to assume could not be exercised until the right to redeem was established; establishment of the right to redeem was thus a precondition before the right to assume could be exercised. The right to redeem has now been established by this Opinion. Thus, the running of the 60-day period for exercising the right to assume (or obtaining an extension of time to exercise that right) should be tolled during the time that the matter of the right to redeem . . . remained under advisement by the Court.

In re Ted Liu's Szechuan Garden, Inc., 55 B.R. 8, 12 (Bankr. D.D.C. 1985).

Also instructive is *In re Hunan Rose, Inc.*, 146 B.R. 313 (Bankr. D.D.C. 1992), in which the bankruptcy court denied tolling of the assumption deadline while it was deciding the landlord's motion for a declaratory judgment that the lease was terminated prepetition. Critical to the court's refusal to toll the deadline was the fact that "the debtor . . . never filed any papers in the 60-day period of § 365(d)(4) evidencing an intention to assume its lease." *Id.* at 314. Further, the debtor had not "filed a paper even asserting the right to redeem and the question was never taken under advisement by the court such as to lull the debtor into inaction." *Id.*

Given the undisputed fact that the City and its agent Troon have not provided financial information to Debtor that would allow Debtor to formulate a plan of reorganization, which would include a decision on § 365 assumption of the Lease and 380 Agreement, the Court finds that tolling of the deadlines in § 365(d)(3) and (4)(B)(i) is required in the interest of justice. Debtor timely filed the Extension Motion and recited therein the facts showing that it would be impossible for Debtor "to determine the amount of money [needed] to fully implement its plan of reorganization." [Doc. 39 at ¶ 9.]

The totality of the circumstances constitutes extraordinary cause for tolling of the deadlines while the matters were under advisement. Thus, the deadline of § 365(d)(3) for performance of postpetition obligations is tolled and extended to 60 days beyond the November 14 hearing (i.e., to January 13, 2025).[17] The deadline of § 365(d)(4)(B)(i) for assumption or rejection of the Lease is tolled and extended for 98 days (derived from calculating the number of days from the initial hearing on the Extension Motion noticed by Debtor (August 8) through the hearing and decision date (November 14)), to March 6, 2025.

IV. ORDER

1. The Motion of the City of Baytown to Transfer Venue of Bankruptcy Case [Doc. 26] is DENIED.

2. The Motion to Extend Time to Perform Any Obligations Required Under the Lease and Chapter 380 Program and to Extend Time to Assume or Reject the Lease and 380 Agreement [Doc. 39] is GRANTED.

3. The deadline for Debtor to perform under 11 U.S.C. § 365(d)(3) is tolled and extended up to and through January 13, 2025.

4. The deadline for Debtor to assume or reject the unexpired nonresidential real property lease is tolled and extended up to and through March 6, 2025.

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[17] The Court did not differentiate the two deadlines during its abbreviated November 14 bench decision, but on further review of the strict deadline for performance under § 365(d)(3), the Court finds that the 60-day performance deadline should be tolled for only 60 days after the November 14 hearing date. This ruling is without prejudice to Debtor's seeking additional tolling on a showing of extraordinary circumstances related to obtaining information from the City and/or Troon concerning the postpetition obligations required to be performed under § 365(d)(3).