

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

ALSET OWNERS, LLC, *et al.*,

Debtors.

Chapter 11

Case No. 09-11960 (BLS)

Jointly Administered

**LIMITED OBJECTION OF ERAM, LLC TO DEBTORS' MOTION FOR ENTRY
OF AN ORDER UNDER SECTION 365(a) OF THE BANKRUPTCY CODE
AUTHORIZING, TO THE EXTENT NECESSARY, THE DEBTORS TO
REJECT CERTAIN NONRESIDENTIAL REAL PROPERTY LEASES**

ERAM, LLC ("ERAM"), by and through its undersigned counsel, hereby files this limited objection (the "Objection") to the *Debtors' Motion for Entry of an Order Under Section 365(a) of the Bankruptcy Code Authorizing, to the Extent Necessary, the Debtors to Reject Certain Nonresidential Real Property Leases* (the "Motion"). In support of its Objection, ERAM states as follows:

1. Alsert Owners, LLC and its affiliated entities (collectively, the "Debtors") initiated the above-captioned bankruptcy case by filing voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") on June 5, 2009 (the "Petition Date").

2. Also on the Petition Date the Debtors filed the Motion seeking to reject certain unexpired leases of non-residential real property, including the unexpired lease held with ERAM of nonresidential real property located at 1220 Truman Blvd., Crystal City, Missouri (the "Leased Property").

3. In the Motion the Debtors describe the Leased Property as a "Closed Restaurant" which they claim was vacated by the Debtors prior to the Petition Date. The Debtors further represent that the keys to the Leased Property were similarly returned prior to the Petition Date.

4. Despite representations of the Debtors, the keys to the Leased Property were not received by ERAM until on or around June 25, 2009 (the “Surrender Date”). Therefore, ERAM was denied possession of the Leased Property until on or around June 25, 2009.

OBJECTION

5. Rejection of leases may be effective *nunc pro tunc* to “the date the Motion is filed or the premises is surrendered, whichever is later, only in certain circumstances.” *In re Fleming Co., Inc.*, 304 B.R. 85, 96 (Bankr. D. Del. 2003).

6. For example, retroactive rejection has been denied where a debtor has failed to surrender the premises to the landlord. *See e.g., In re Chi-Chi’s, Inc.*, 305 B.R. 396, 399 (Bankr. D. Del. 2004). In such circumstances, because the landlord has been denied the ability to enter into new leases until actual surrender of the premises, equity does not justify the retroactive rejection. *See id; see also TW, Inc. v. Angelastro (In re TW, Inc.)*, 2004 WL 115521 (D. Del. Jan. 14, 2004) (affirming bankruptcy court’s order denying retroactive rejection where debtor had failed to properly surrender property). Thus, rejection effective as of the date of surrender is more appropriate.

7. In this case, the Debtors are seeking retroactive rejection of the Leased Property despite their failure to surrender possession until on or around June 25, 2009 – approximately 20 days following the date which the Debtors seek as the effective rejection date.

8. During the time period between the Petition Date and the Surrender Date the Debtors had the opportunity to continue to enjoy possession of the Leased Property for business operations and/or storage of property of the estate. ERAM however has been denied the ability to enter the Leased Property in efforts to seek replacement tenants.

9. Further, by seeking rejection prior to the Surrender Date, the Debtors are effectively seeking an order from this Court depriving ERAM of the administrative expense it is

entitled to as a result of the post-petition use of its property from the Petition Date through the Surrender Date. *See* 11 U.S.C. § 365(c)(3) (requiring timely performance of obligations under nonresidential real property leases prior to assumption or rejection); 11 U.S.C. § 503(b)(1)(A) (providing administrative priority for the actual, necessary costs and expenses of preserving the estate.”); *see also In re DVI, Inc.*, 308 B.R. 703 (Bankr. D. Del. 2004) (finding landlord entitled to administrative expense priority for post-petition use of property prior to rejection).

10. Therefore, because ERAM has been denied possession of the Leased Property between the Petition Date and the Surrender Date it is inequitable for this Court to enter an order retroactively rejecting the Leased Property, thereby permitting the Debtors’ estate to benefit from the use and possession of the Leased Property to the detriment of ERAM.

WHEREFORE, ERAM respectfully requests this Court enter an Order denying the Motion to the extent it seeks retroactive rejection of the Leased Property prior to June 25, 2009.

Dated: June 30, 2009
Wilmington, Delaware

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing *Limited Objection of ERAM, LLC to Debtors' Motion for Entry of an Order Under Section 365(a) of the Bankruptcy Code Authorizing, to the Extent Necessary, the Debtors to Reject Certain Nonresidential Real Property Lease* was served, via regular U.S. Mail, postage prepaid, and/or electronic mail on this 30th day of June, 2009, upon the following:

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