

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

In re: : Chapter 11
: :
ALSET OWNERS, LLC, *et al.*,² : Case No. 09-11960 (BLS)
: (Jointly Administered)
Debtors. : **Hearing: July 22, 2009 @ 10:00 a.m.**
----- **Objections: July 15, 2009 @ 4:00 p.m.**

**DEBTORS' MOTION FOR ENTRY OF AN ORDER UNDER § 365(a)
OF THE BANKRUPTCY CODE AUTHORIZING THE DEBTORS
TO REJECT A CERTAIN NONRESIDENTIAL REAL PROPERTY LEASE**

Alset Owners, LLC, a Delaware limited liability company, and certain of its direct and indirect subsidiaries, debtors and debtors in possession in the above-captioned cases (collectively, the "Debtors"), by and through their undersigned counsel, hereby move this Court (the "Motion") for entry of an order under section 365(a) of the Bankruptcy Code authorizing the Debtors to reject a certain nonresidential real property lease (the "Rejected Lease") between Checkers Michigan, LLC and Musky Checkers, LLC (the "Landlord") for store premises located at 1785 Creston Street, Muskegon, Michigan (the "Restaurant"), effective June 30, 2009 (the "Rejection Date"). In support of the Motion, the Debtors respectfully represent:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

² The Debtors and the last four digits of their respective tax identification numbers are: Alset Owners, LLC, a Delaware limited liability company (7520); Altes, LLC, a Delaware limited liability company (6927); Setla, LLC, a Delaware limited liability company (6752); and Checkers Michigan, LLC, a Delaware limited liability company (8016). The Debtors' service address is Altes, LLC/Setla, LLC, 1200 North Federal Highway, Suite 111-B, Boca Raton, FL 33432-2813.

2. The statutory predicates for the relief sought herein are section 365(a) of the Bankruptcy Code, and Rules 2002(a)(7), 3002, 3003(c)(3), 6006 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

BACKGROUND

3. On June 5, 2009 (the “Petition Date”), the Debtors filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code. The Debtors’ chapter 11 cases are being jointly administered. The Debtors continue to manage and operate their businesses as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

4. On June 24, 2009, the Office of the United States Trustee filed a notice of appointment of an official committee of unsecured creditors (the “Committee”). No trustee or examiner has been appointed in these chapter 11 cases.

5. A thorough description of the Debtors and the events leading up to the Petition Date are set forth in the Amended Declaration of Leonard Levitsky in Support of Chapter 11 Petitions and First Day Relief (the “Declaration”) [Dkt. No. 34].

6. The Debtors are the largest franchisee of Checkers Drive-In Restaurants, Inc., the national franchisor of the Rally’s and Checkers’ restaurant chains. Specifically, Debtors Altes, LLC and Setla, LLC operate Rally’s restaurants in Arkansas, Missouri, Illinois, and Ohio. Checkers Michigan, LLC operated Checkers restaurants in Michigan but has recently ceased operations there.

7. At their peak, in 2007, the Debtors collectively operated approximately 120 restaurants with the Rally’s or Checkers brand in six states, and had over 2,500 employees. The competitive atmosphere, as well as the rise in food and labor costs, among other things, led

the Debtors to restructure their operations starting in late 2007. As of the Petition Date, the Debtors operated 77 restaurants, down from their peak of about 120 restaurants in 2007.

RELIEF REQUESTED

8. Prior to the Petition Date, the Debtors determined that the Restaurant was underperforming and therefore the Debtors planned to close the Restaurant prior to the Petition Date. However, shortly prior to the Petition Date, an entity named I.B. Corporation owned by an individual named Alan Balan (“Balan”) approached the Debtors and Checkers Drive-In Restaurants, Inc., the franchisor, and requested the ability to operate the Restaurant for a short period of time to determine whether Balan desired a long-term presence at the Restaurant. During such time, in accordance with an oral understanding, Balan paid the June rent to the Landlord and all expenses associated with the business of the Restaurant during June 2009. The Landlord and Balan have not requested that the Debtors assume and assign the Rejected Lease to Balan. Therefore, at this time, the Debtors have determined to reject the Lease effective as of the Rejection Date. As such, by this Motion, the Debtors seek rejection of the Lease pursuant to section 365(a) of the Bankruptcy Code to avoid the incurrence of any administrative rent of \$5,766.67 per month that that would otherwise be due to the Landlord.

BASIS FOR RELIEF

9. Section 365(a) of the Bankruptcy Code provides that a debtor in possession, “subject to the court’s approval, may. . . reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). *See also University Med. Ctr. v. Sullivan (In re University Med. Ctr.)*, 973 F.2d 1065, 1075 (3d Cir. 1992). “This provision allows a trustee to relieve the bankruptcy estate of burdensome agreements which have not been completely

performed.” *Stewart Title Guar. Co. v. Old Republic Nat’l Title Co.*, 83 F.3d 735, 741 (5th Cir. 1996) (citing *In re Muerexco Petroleum, Inc.*, 15 F.3d 60, 62 (5th Cir. 1994)).

10. The decision to assume or reject an executory contract or unexpired lease is a matter within the “business judgment” of the debtor. See *NLRB v. Bildisco (In re Bildisco)*, 682 F.2d 72, 79 (3d Cir. 1982) (“The usual test for rejection of an executory contract is simply whether rejection would benefit the estate, the ‘business judgment’ test.”); *In re Taylor*, 913 F.2d 102, 107 (3d Cir. 1990); see also *In re Federal Mogul Global, Inc.* 293 BR. 124, 126 (CD. Del. 2003); *In re HQ Global Holdings*, 290 BR. 507, 511 (Bankr. D. Del. 2003). The business judgment standard mandates that a court approve a debtor’s business decision unless the decision is the product of bad faith, whim or caprice. See *In re Trans World Airlines, Inc.*, 261 B.R. 103, 121 (Bankr. D. Del. 2001); see also *Summit Land Co. v. Allen (In re Summit Land Co.)*, 13 B.R. 310, 315 (Bankr. D. Utah 1981) (absent extraordinary circumstances, court approval of a debtor’s decision to assume or reject an executory contract “should be granted as a matter of course”).

11. Rejection of an executory contract or unexpired lease is appropriate where rejection of the lease would benefit the estate. See *Sharon Steel Corp. v. National Fuel Gas Distribution Corp. (In re Sharon Steel Corp.)*, 872 F.2d 36, 40 (3d Cir. 1989). The standard for rejection is satisfied when a debtor has made a business determination that rejection will benefit the estate. See *Commercial Fin. Ltd. v. Hawaii Dimensions, Inc. (In re Hawaii Dimensions, Inc.)*, 47 B.R. 425, 427 (D. Haw. 1985) (“under the business judgment test, a court should approve a debtor’s proposed rejection if such rejection will benefit the estate”).

12. If the debtor’s business judgment has been reasonably exercised, a court should approve the assumption or rejection of an unexpired lease or executory contract. See e.g.,

See NLRB v. Bildisco v. Bildisco, 465 U.S. 513, 523 (1984); *In re Federal Mogul Global, Inc.*, 293 B.R. 124, 126 (D. Del. 2003).

13. Pursuant to section 365(a) of the Bankruptcy Code, the Debtors, seek to reject the Rejected Lease effective as of the Rejection Date in order to avoid any administrative liability to the Landlord of the Rejected Lease. *See Bildisco*, 465 U.S. at 530 (stating that rejection relates back to the petition date). The Debtors no longer operate the Restaurant, focusing their efforts on maintaining the value of their other locations. Similarly, the Debtors, in the exercise of their business judgment, have determined that the Rejected Lease is not necessary and does not provide any value to the Debtors' estates and their creditors. Thus, the Debtors believe that it is an exercise of their sound business judgment to authorize the rejection of the Rejected Lease, effective as of the Rejection Date.

14. Although courts generally recognize that the effective date of rejection is the date in which the order is entered, *see In re National Record Mart, Inc.*, 272 BR. 131, 133 (Bankr. W.D.Pa. 2002), courts have allowed rejection on a *nunc pro tunc* basis. *See In re O'Neil Theaters, Inc.*, 257 B.R. 806, 807 (Bankr. E.D.La. 2000) (permitting *nunc pro tunc* rejection as of the petition date); *In re Amber's Stores*, 193 B.R. 819, 827 (Bankr. N.D.Tex. 1996) (finding that rejection of lease retroactive to the petition date was warranted as debtor turned over the keys and vacated the premises pre-petition).

15. The Debtors determined prior to the Petition Date that they did not desire continued operation of the Restaurant. Since Balan is not interested in being an assignee of the Rejected Lease, the Debtors have determined that the Rejected Lease must be rejected at this time. This Motion will be filed and served on the Landlord at the Restaurant. The Debtors

acknowledge that they will not have the right to withdraw this Motion prior to the hearing on the Motion.

NOTICE

16. Notice of this Motion has been provided to: (a) the Office of the United States Trustee; (b) counsel to the Committee, (c) Textron Financial Corporation; (d) counsel to Checkers Drive-In Restaurants, Inc.; (e) the Landlord; (f) all known equipment lessors with property that may be at the Restaurant; and (g) all parties that have filed notices under Bankruptcy Rule 2002. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary or required.

NO PRIOR REQUEST

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

WHEREFORE, the Debtors respectfully request that the Court. enter an order, substantially in the form attached hereto: (i) authorizing rejection of the Rejected Lease effective as of the Rejection Date, and (ii) granting such other relief as is just and proper.

Dated: June 30, 2009

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PROPOSED ATTORNEYS FOR
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