

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	
CONEXANT SYSTEMS, INC., <i>et al.</i> ,	:	Case No. 13-10367 (BLS)
	:	
Debtors.	:	Jointly Administered
	:	Related to Docket No. 18
	:	

**PRES-4340 VON KARMEN LP'S OBJECTION TO DEBTORS'
MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE
REJECTION OF CERTAIN UNEXPIRED LEASES, EFFECTIVE
NUNC PRO TUNC TO THE PETITION DATE**

PRES-4340 Von Karman, LP ("Von Karman"), by and through its undersigned attorneys, hereby files this objection (the "Objection") to the *Debtors' Motion for Entry of an Order Authorizing the Rejection of Certain Unexpired Leases, Effective Nunc Pro Tunc to the Petition Date* [Docket No. 18] (the "Lease-Rejection Motion") filed by the above-captioned debtors (the "Debtors") and respectfully represents as follows:

BACKGROUND

1. On February 28, 2013 (the "Petition Date"), the Debtors filed voluntary petitions for relief pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").
2. As of the Petition Date, Von Karman, as landlord, and debtor Conexant Systems, Inc (the "Debtor") as tenant were parties to a written lease dated December, 2001, as amended (the "Master Lease"), pursuant to which the Debtor leased certain non-residential real property located at 4340 Von Karman Avenue, Newport Beach, California 92660 (the "Premises").
3. The Premises consists of an office building containing approximately 64,849 rentable square feet of floor area.

4. As detailed in the Lease Rejection Motion, the Debtor, as sublessor, has sublet (collectively, the "Sub-Leases") portions of the Premises to each of GIGACOM Semiconductor LLC (Chronical Technology); Citivest Inc.; MBit Wireless; Alliance Acceptance Corporation; CCH Incorporated; Medvision, Inc. and Bitcentral, Inc. (collectively the "Subtenants"), each of whom remain in possession of their respective portion of the Premises.

5. On the Petition Date, the Debtors filed the Lease-Rejection Motion. By the Lease Rejection Motion, the Debtors seek, *inter alia*, Court approval to reject the Master Lease and the Subleases effective as of the Petition Date. Among other arguments, the Debtors assert that retroactive rejection of the Master Lease and Subleases is appropriate because "the Debtors have surrendered the premises under the Office Leases and have, or are in the process of, returning keys to the counterparties to the Office Leases . . . with an unequivocal statement of the Debtors' intent to relinquish their interests under the Office Leases." *See* Lease Rejection Motion at ¶ 13.

OBJECTION

6. The Debtor cannot reject the Master Lease under Bankruptcy Code Section 365(a) unless and until it can deliver possession of the Premises to Von Karman. As is clear from the Lease Rejection Motion, the Subtenants continue to occupy the Premises, and as such, the Debtor is in no position to surrender the Premises to Von Karman as contemplated by the Bankruptcy Code.

7. Absent a controlling federal rule, the determination of property rights is to be analyzed under state law. *Nobelman v. Am. Saving Bank (In re Nobleman)*, 508 U.S. 324, 329 (1993). Pursuant to Section 39(a) of the Master Lease, the Master Lease is governed by California law.

8. Under California law, there is no privity between an owner/over-lessor and a sub-lessee. *Marchese v. Standard Realty & Dev. Co.*, 74 Cal. App. 3d 142,147, 141 Cal. Rptr. 370 (1st Dist. 1977). Therefore, even though the Debtor no longer operates at the Premises, Von Karman does not maintain legal possession of the Premises. For this reason, any attempt by Von Karman to evict the Subtenants may be costly, time-consuming and may not result in Von Karman obtaining possession of the Premises.

9. The ability of Von Karman to compel eviction of the non-debtor Subtenants is also restrained by the Bankruptcy Code. Pursuant to Section 365(g) of the Bankruptcy Code and well established case law, rejection of an unexpired sublease during a bankruptcy proceeding is a breach of the sublease, not a termination. 11 U.S.C. § 365(g). Rejection of the lease “frees the bankruptcy estate from its obligation to perform” but “it does not make the contract disappear.” *Med. Malpractice Ins. Assoc. v. Hirsch (In re Lavigne)*, 114 F.3d 379,387 (2nd Cir. 1997)(quoting *In re Drexel Burnham Lambert Group, Inc.*, 138 B. R. 687, 703 (Bankr. S.D.N.Y. 1992)).

10. Furthermore, it has been held that, under Bankruptcy Code Section 365(h)(1)(A)(ii), the rejection of a sublease allows the subtenant to “retain its rights under the lease.” This is true even if the sub-lessee is not in physical possession of the premises. *Lee Road Partners, Ltd. v. Woolworth (In re Lee Road Partners Ltd.)*, 169 B.R. 507 (E.D.N.Y. 1994) (court construed Section 365(h) to mean that the lessee needs only constructive possession of the leasehold—not actual possession—in order to remain in possession of the premises after rejection of the lease). Accordingly, Von Karman may not be able to dispossess the Subtenants.¹

¹ At least one California court has held that a subtenant has no right to possession following the rejection of the over-lease *Syufy Enterprises, L.P. v. City of Oakland*, 104 Cal.App.4th 869 (Dec. 20, 2002). In the unlikely event that the Court were to grant the Debtors’ Motion to Reject over Von Karman’s objection,

11. Judge Gross faced this exact situation in *In re Friendly's Ice Cream Corp., Inc., et al.*, Case No. 11-13167 (KG), Memorandum Order dated February 24, 2012 (**Exhibit A**), where the debtors sought to simultaneously reject a lease and sublease for property located in New York. The debtor in *Friendly's* claimed to have surrendered possession of the premises to the landlord through the delivery of a rejection notice, notwithstanding the fact that its subtenant continued to maintain control over the leased premises. In denying the debtors' motion to reject, Judge Gross held:

Because the Subtenant retains its possessory rights under the Sublease by application of the Bankruptcy Code and interpreting case law, the question is which party should bear the burden of obtaining legal possession of the property through state law action in New York? The Debtors enjoyed the right, and the benefit, of the Sublease, and now they must also bear any burdens that result from the Sublease, including the present situation. The Debtors, not [the landlord] are in privity of contract with the Subtenant, and the Debtors are best legally situated to resolve this situation in the New York Courts.

See Memorandum Opinion at p. 4-5.²

12. Like the landlord in *Friendly's*, Von Karman is not in privity with the Subtenants and may not be able to dispossess the Subtenants. Like the debtor in *Friendly's*, the Debtor here enjoyed all the rights and benefits of the Subleases, and now must bear the burdens of dispossessing the Subtenants, so that the Premises can be returned to Von Karman.

13. In these circumstances, the Debtor cannot reject the Master Lease under Bankruptcy Code Section 365(a), because it has not, and cannot deliver possession of the Premises to Von Karman.

Von Karman reserves all of its rights, including its right to argue that the Subtenants have no right to remain in possession of the Premises.

² Judge Gross' decision in *Friendly's* was also based upon the fact that the debtors sought to reject the lease pursuant to a Court approved lease rejection procedure which specifically required the debtors to deliver possession of the premises to the over-landlord. *Id.* at p. 5.

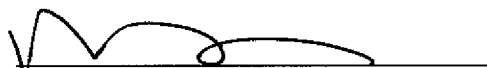
14. While the Court does have discretion to grant retroactive rejection when principles of equity so dictate, *In re Thinking Machines Corp.*, 67 F. 3d 1021, 1028 (1st Cir. 1995), retroactive rejection is not appropriate when the debtor has not surrendered possession of the subject leased premises. *See TW, Inc. v. Angelastro (In re TW, Inc.)*, No. 03-10785, 2004 WL 115521, at *2 (D. Del. Jan. 14, 2004). Here, and for the reasons set forth above, the Debtor cannot satisfy the standard necessary for retroactive rejection until the Debtor deliver possession of the Premises to Von Karman.³

15. For all of the above reasons, the Debtors' Lease Rejection Motion should be denied and/or the effective date of rejection should be the date upon which the Debtor is capable of delivering possession of the Premises to Van Karman.

WHEREFORE, Von Karman respectfully requests that the Court deny the Lease Rejection Motion and grant Von Karman such other and further relief as is just and proper.

Dated: April 5, 2013

SAUL EWING LLP


Mark Minuti (No. 2659)
222 Delaware Avenue, Suite 1200
P.O. Box 1266
Wilmington, DE 19899
(302) 421-6840
(302) 421-5873 (Fax)
Email: mminuti@saul.com

Counsel for PRES-4340 Von Karman LP

³ The Debtor also should not receive retroactive rejection of the Master Lease to the extent the Subtenants are paying rent to the Debtor since the Petition Date.

Exhibit A

In re Friendly's Ice Cream Corp., Inc., et al.
Case No. 11-13167 (KG)
Memorandum Order dated February 24, 2012

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

In re:) Chapter 11
)
AMICUS WIND DOWN CORPORATION,) Case No. 11-13167 (KG)
) (Jointly Administered)
Debtors.)
)
) **Re Dkt. Nos. 594, 630, 741**

MEMORANDUM ORDER

The Court has before it the Debtors' Notice of Rejection of Executory Contract and Unexpired Leases (the "Rejection Notice") (D.I. 594) and the Objection of Park Tysen Associates to Proposed Rejection of Lease (the "Objection") (D.I. 630). Upon review of the pleadings and following a hearing on February 21, 2012, the Court ORDERS that the Objection is sustained and the Debtors' lease rejection is denied without prejudice.

JURISDICTION

The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 157 and 1334(b). This is a core proceeding under 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. § 1409.

BACKGROUND

On March 17, 2008, Friendly Ice Cream Corporation ("Friendly" or "Debtors") and Park Tysen Associates LLC (the "Over-Landlord" or "Park Tysen") entered into a lease for property (the "Over-Lease") located at 2720 Hylan Boulevard, Staten Island, New York (the "Premises"). Subsequently, on March 28, 2008, Friendly entered into a sublease with Rappan Restaurants, Inc. (the "Subtenant" or Rappan") for the Premises (the "Sublease"). Rappan has been in sole possession of the Premises from the date the Sublease was executed until the present.

As part of the Debtors' first day pleadings, the Debtors filed the *Debtors' Motion for Entry of an Order Authorizing and Approving Expedited Procedures for (A) Rejection of Executory Contracts and Unexpired Leases and (B) Abandonment of Personal Property*, (the "Rejection Procedures Motion") (D.I. 5). On October 25, 2011, the Court entered an order approving the proposed rejection procedures (the "Rejection Procedures") for the rejection of executory contracts and unexpired leases (the "Lease Rejection Order") (D.I. 224). The Lease Rejection Order, (§2.a(iii)) provides that "the proposed effective date of the rejection of each such contract(s), which date may not be before the date of service of the Rejection Notice nor before the date the Debtors relinquish (or already have relinquished) control of the applicable premises by delivering keys and/or security codes to the affected landlord"

On December 30, 2011, the Debtors filed and serve the Rejection Notice on the Over-Landlord and Subtenant. The Rejection Notice proposed December 31, 2011, as the effective date of rejection of the Over-Lease between Friendly and Park Tysen and the Sublease between Friendly and Rappan. That same day, Friendly's general counsel sent a letter to both Rappan and Park Tysen (the "Rejection Letters") informing both parties that Rappan's continued possession of the property as a sublessee was a matter between Rappan and Park Tysen. On January 3, 2012, Rappan filed a petition for relief under chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of New York.¹

Finally, on January 9, 2012, the Over-Landlord filed its Objection to prevent rejection of the Over-Lease. The Over-Landlord interprets this Court's Lease Rejection Order as requiring the

¹ At the February 21, 2012, hearing, Rappan's counsel informed the Court that the Rappan Debtor is under the control of a Chapter 7 trustee.

Debtors to deliver the keys and/or security codes for the Premises to the Over-Landlord before the rejection is effective. Although Rappan ceased operating as of January 9, 2012, certain kitchen equipment and restaurant furniture remain on the Premises. As of February 21, 2012, the Debtors had not delivered the keys/and or security codes for the Premises to the Over-Landlord, but only surrendered the property through the Rejection Notice and Rejection Letters.

DISCUSSION

The Debtors argue that their service of the Rejection Notice and Rejection Letters is a valid rejection of the Over-Lease and that under section 365(h) of the Bankruptcy Code the Debtors are not required to deliver possession of the property to the Over-Landlord. The Debtors argue that for the rejection to be valid, all that is required is that the Debtors surrendered their interests in the Premises, even though the Subtenant had not relinquished its interest in the Premises.² The Court disagrees with the Debtors' arguments. The Bankruptcy Code and the Lease Rejection Order contemplate and require that the Debtors deliver, at least, constructive possession of the premises.

New York law provides that there is no privity between an owner/over-lessor and a sublessee. *Federated Retail Holding, Inc. v. Weatherly 39th Street, LLC, et al.*, 77 A.D.3d 573, 911 N.Y.S.2d 5 (1st Dep't 2010); *Clarkton Estates, Inc. v. Chiaro*, 122 Misc.2d 721, 471 N.Y.S.2d 942 (N.Y. City

² The Debtors rely on *In re CHI-CHI'S INC.*, 305 B.R. 396 (Bankr. D. Del. 2004) (J. Case) to support their argument. The Debtors cite *In re CHI-CHI's Inc.*, for the proposition that the effective date for a lease rejection is the "day the Debtors surrendered the premises to the Landlords, and the Landlords were able to enter into agreements with the current tenants." *Id.* at 399. This Court disagrees with the proposition of law because it disregards Section 365(h)(1)(A)(ii) of the Bankruptcy Code which explicitly provides that the subtenant retains its rights under the lease. Further, allowing a debtor-lessor to merely surrender the property to the over-landlord without delivering possession ignores the fact that there is no legal privity between the over-landlord and the subtenant, and the over-landlord will face significant legal obstacles if it wants to evict the subtenant. This is especially true if the over-landlord prefers to evict the current subtenant, rather than "enter into new agreements with the current tenants [the subtenant]."


Civ. Ct. 1983). Additionally, the Bankruptcy Code further constrains an owner/over-landlord's right to compel an eviction of a non-debtor sublessee. Section 365(h)(1)(A)(ii) of the Bankruptcy Code provides that the rejection of a sub-lease allows the Subtenant to "retain its rights under the lease". The subtenant retains its rights under the lease even if it is not in physical possession of the premises. *Lee Road Partners, Ltd. v. Woolworth (In re Lee Road Partners, Ltd.)*, 169 B.R. 507 (E.D.N.Y. 1994). Rejection of the lease "frees the bankruptcy estate from its obligation to perform" but "it does not make the contract disappear." *Med. Malpractice Ins. Assoc. v. Hirsch (In re Lavigne)*, 114 F.3d 379, 387 (2d Cir. 1997) (quoting *In re Drexel Burnham Lambert Group Inc.*, 138 B.R. 687, 703 (Bankr. S.D.N.Y. 1992)). Although it is now in a chapter 7 bankruptcy, the Subtenant is still in physical possession of the property. At the February 21, 2012, hearing, counsel indicated that there is still kitchen equipment and restaurant furniture on the Premises. Even if it attempts to evict the Subtenant, the Over-Landlord could face significant cost and legal challenges because the Over-Landlord is not in privity of contract with the Subtenant, and the Subtenant has retained all of its possessory rights under its sub-lease with the Debtors.

Because the Subtenant retains its possessory rights under the Sublease by application of the Bankruptcy Code and interpreting case law, the question is which party should bear the burden of obtaining legal possession of the property through state law actions in New York? The Debtors enjoyed the right, and the benefit, of the Sublease, and now they must also bear any burdens that result from the Sublease, including the present situation. The Debtors, not Park Tysen, are in privity of contract with the Subtenant, and the Debtors are best legally situated to resolve this situation in the New York courts. Moreover, this Court's Lease Rejection Order provided that the rejection would be effective once the Debtors (1) served the Rejection Notice, and (2) the "Debtors relinquish

(or already have relinquished) control of the applicable premises by delivering keys and/or security codes to the affected landlord." The Lease Rejection Order required delivery of possession of the property to the Over-Landlord, not merely surrender of the Debtors' interest in the Premises as the Debtors argue. The Debtors did not deliver possession of the property to Park Tysen because absent eviction proceedings in the New York courts, the Debtors can not unilaterally surrender the Subtenant's possessory rights in the Premises. Therefore, as is required under the Lease Rejection Order, the rejection shall be effective on the date that the Debtors deliver keys or security codes to Park Tysen for the Premises. Additionally, the Court suggests that the Debtors should (1) file a motion in the Subtenant's chapter 7 proceedings which are pending in the Eastern District of New York, for an order authorizing the chapter 7 trustee to abandon the Premises or relinquish its possessory interest in the Premises, or (2) bring a motion in the Subtenant's chapter 7 proceeding to lift the automatic stay to allow the Debtors to commence an eviction proceeding under New York law.

For the foregoing reasons IT IS ORDERED THAT the Park Tysen's Objection is sustained, and the Rejection of the Over-Lease will not be effective until the Debtors relinquish control of the Premises by possession to Park Tysen by wresting possession from Rappan.

Dated: February 24, 2012



KEVIN GROSS, U.S.B.J.

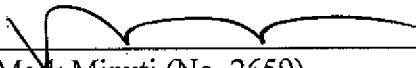
UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
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CONEXANT SYSTEMS, INC., <i>et al.</i> ,	:	Case No. 13-10367 (BLS)
	:	
Debtors.	:	Jointly Administered
	:	

CERTIFICATE OF SERVICE

I, Mark Minuti, hereby certify that on April 5, 2013, I caused a copy of **PRES-4340 Von Karmen LP's Objection to Debtors' Motion for Entry of an Order Authorizing the Rejection of Certain Unexpired Leases, Effective *Nunc Pro Tunc* to the Petition Date** to be served on the parties on the attached service list in the manner indicated therein.

SAUL EWING LLP

By: 
 Mark Minuti (No. 2659)
 222 Delaware Avenue, Suite 1200
 P. O. Box 1266
 Wilmington, DE 19899
 (302) 421-6840

Dated: April 5, 2013

CONEXANT SYSTEMS, INC., et al.
Service List

Via Hand Delivery:

Domenic E. Pacitti, Esquire
Klehr Harrison Harvey Branzburg, LLP
919 N. Market Street, Suite 1000
Wilmington, DE 19801

Chris L. Dickerson, Esquire
DLA Piper
203 N. LaSalle Street, Suite 1900
Chicago, IL 60601

Tiiara Patton, Esquire
Office of the United States Trustee
844 King Street, Room 2207
Lockbox #35
Wilmington, DE 19899-0035

Robert L. Eisenbach, Esquire
Cooley LLP
101 California Street, 5th Floor
San Francisco, CA 94111-5800

Kevin J. Mangan, Esquire
Womble Carlyle Sandridge & Rice LLP
222 Delaware Avenue, Suite 1501
Wilmington, DE 19801

James Carr, Esquire
Kelley Drye & Warren LLP
101 Park Avenue
New York, NY 10178

Via Electronic Mail and

U.S. Mail:

Joshua A. Sussberg, Esquire
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022

Morton Branzburg, Esquire
Klehr Harrison Harvey Branzburg, LLP
1835 Market Street, Suite 1400
Philadelphia, PA 19103

Dennis Gallagher, Esquire
Conexant Systems, Inc.
4000 MacArthur Blvd.
Newport Beach, CA 92660

Michael S. Stamer, Esquire
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, NY 10036