

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.

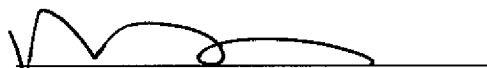
14. While the Court does have discretion to grant retroactive rejection when principles of equity so dictate, *In re Thinking Machines Corp.*, 67 F. 3d 1021, 1028 (1st Cir. 1995), retroactive rejection is not appropriate when the debtor has not surrendered possession of the subject leased premises. *See 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

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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.