

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

	)	
In re:	)	Chapter 11
	)	
CONEXANT SYSTEMS, INC., <i>et al.</i> , <sup>1</sup>	)	Case No. 13-10367 ( )
	)	
Debtors.	)	Joint Administration Requested
	)	

**DEBTORS' MOTION FOR ENTRY OF AN  
ORDER AUTHORIZING THE REJECTION OF CERTAIN  
UNEXPIRED LEASES, EFFECTIVE *NUNC PRO TUNC* TO THE PETITION DATE**

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Conexant Systems, Inc. and its debtor affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "*Debtors*"),<sup>2</sup> respectfully represent:

**Jurisdiction**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).
2. Venue is proper in this District pursuant to 28 U.S.C. § 1408.
3. The bases for the relief requested herein are section 365 of the Bankruptcy Code, and Bankruptcy Rules 2002, 6004 and 6006 of the Federal Rules of Bankruptcy Procedure (the "*Bankruptcy Rules*") and Rule 9013-1 of the Local Rules for the District of Delaware (the "*Local Rules*").

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal taxpayer-identification number, are: Conexant Systems, Inc. (9439); Conexant CF, LLC (6434); Brooktree Broadband Holding, Inc. (5436); Conexant, Inc. (8218); and Conexant Systems Worldwide, Inc. (0601). The Debtors' main corporate address is 4000 MacArthur Blvd., Newport Beach, California 92660.

<sup>2</sup> A detailed description of the Debtors and their businesses, and the facts and circumstances supporting this motion and the Debtors' chapter 11 cases, are set forth in greater detail in the Declaration of Sailesh Chittipeddi, President and CEO of Conexant Systems, Inc., in Support of First Day Pleadings (the "*First Day Declaration*"), filed contemporaneously with the Debtors' voluntary petitions for relief filed under chapter 11 of title 11 of the United States Code (the "*Bankruptcy Code*"), on February 28, 2013 (the "*Petition Date*").

**Relief Requested**

4. By this motion, the Debtors seek entry of an order, substantially in the form attached hereto as **Exhibit A** (the “***Order***”), authorizing the rejection of (a) office space leases located at 9808 and 9868 Scranton Road in San Diego, California, and all associated subleases (collectively, the “***Scranton Road Leases***”), and (b) an office space lease located at 4340 Von Karman Avenue Suite 300, Newport Beach, California, and all associated subleases (collectively, the “***Von Karman Lease***” and together with the Scranton Road Leases, the “***Office Leases***”), as identified on **Exhibit 1** annexed to **Exhibit A** attached hereto, effective *nunc pro tunc* to the Petition Date.<sup>3</sup>

**Basis for Relief**

**A. The Office Leases**

5. Before the Petition Date, with the assistance of their advisors, the Debtors began the process of reviewing and analyzing their real estate portfolio to identify leases that are burdensome to their estates and should be rejected pursuant to section 365 of the Bankruptcy Code. The Debtors have identified the Office Leases, as set forth on **Exhibit 1** annexed to **Exhibit A** hereto, as leases that are burdensome to the Debtors’ estates and should be rejected.<sup>4</sup>

6. As discussed in more detail in the First Day Declaration, throughout the past few years, the Debtors’ have sold certain business segments, resulting in a significant reduction of their workforce and leaving the Debtors with more facilities than their current businesses require. The Office Leases represent real property leases for office space that the Debtors do not occupy.

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<sup>3</sup> To the extent that a conflict exists or arises between Kirkland & Ellis LLP and a counterparty to an Office Lease, the Debtors’ conflicts counsel, Klehr Harrison Harvey Branzburg LLP will represent the Debtors in connection with such conflict. Kirkland & Ellis LLP has not, to date, identified any such conflict.

<sup>4</sup> The Debtors will continue to review their contracts and leases throughout these chapter 11 cases and reserve all of their rights to assume or reject additional contracts and leases at a later date pursuant to section 365 of the Bankruptcy Code.

The Debtors' monthly aggregate rent for the Office Leases is approximately \$595,000.

7. In an effort to reduce the cash drain from the unoccupied space, the Debtors sublet parts of the office facilities. Despite the Debtors' best efforts to produce income-producing or break-even subleases, the above-market rates of the original leases — combined with structural and use limitations — have limited the monthly sublease income to approximately \$290,000 to the Debtors (resulting in a monthly net loss to the Debtors of approximately \$305,000). Thus, the Debtors have determined to reject the Office Leases, in their sound business judgment, and avoid the continued cash burn.

### Supporting Authority

#### **A. Rejection of the Office Leases Reflects the Debtors' Sound Business Judgment**

8. 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 Univ. Med. Cent. v. Sullivan (In re Univ. Med. Ctr.)*, 973 F.2d 1065, 1075 (3d Cir. 1992). For the benefit of the estate, a debtor may, under section 365 of the Bankruptcy Code, relieve itself of burdensome agreements where performance still remains. *See Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp. (In re Sharon Steel Corp.)*, 872 F.2d 36, 39–40 (3d Cir. 1989); *see also Stewart Title Guar. Co. v. Old Republic Nat'l Ins. Co.*, 83 F.3d 735, 741 (5th Cir. 1996) (stating that section 365 "allows a [debtor] to relieve the bankruptcy estate of burdensome agreements which have not been completely performed" (citation omitted)).

9. The decision to assume or reject an executory contract or unexpired lease is a matter within the debtor's "business judgment." *See Nat'l Labor Relations Bd. v. Bildisco & 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.” (citation omitted)); *see also In re Fed. Mogul Global, Inc.*, 293 B.R. 124, 126 (D. Del. 2003); *In re HQ Global Holdings, Inc.*, 290 B.R. 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 In re Fed. Mogul Global*, 293 B.R. at 126 (rejecting counterparty’s argument that a finding of hardship is a prerequisite to application of the business judgment test); *Summit Land Co. v. Allen (In re Summit Land Co.)*, 13 B.R. 310, 315 (Bankr. D. Utah 1981) (noting that, 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”).

10. The Debtors have satisfied the business judgment standard. The Debtors have determined that they no longer need the premises occupied pursuant to the Office Leases and expending the time or resources necessary to market the Office Leases is not compatible with the Debtors’ larger efforts to stabilize their business at the outset of these chapter 11 cases. Moreover, the Debtors have already spent considerable time and effort attempting to sublet their office facilities. Accordingly, the Debtors have determined, after reviewing their overall operations and in the sound exercise of their business judgment, that it is in the best interests of the Debtors, their estates, and their creditors to reject the Office Leases.

**B. The Court Should Authorize the Rejection of the Office Leases Effective *Nunc Pro Tunc* to the Petition Date**

11. The Debtors respectfully submit that it is appropriate for the Court to order that the Petition Date is the effective date of rejection for the Office Leases. While section 365 of the Bankruptcy Code does not specifically address whether courts may order rejection to be effective retroactively, courts in this district and others have held that bankruptcy courts may exercise their equitable powers in granting such a retroactive order when doing so promotes the purposes

of section 365(a). *See, e.g., Thinking Machs. Corp. v. Mellon Fin. Servs. Corp. (In re Thinking Machines Corp.)*, 67 F.3d 1021, 1028-29 (1st Cir. 1995) (holding that “rejection under section 365(a) does not take effect until judicial approval is secured, but the approving court has the equitable power, in suitable cases, to order a rejection to operate retroactively” to the motion filing date); *see also Pacific Shore Dev., LLC v. At Home Corp. (In re At Home Corp.)*, 392 F.3d 1064, 1067 (9th Cir. 2004) (same); *In re Chi-Chi’s, Inc.*, 305 B.R. 396, 399 (Bankr. D. Del. 2004) (same); *In re Visteon Corp.*, No. 09-11786 (CSS) (Bankr. D. Del. June 23, 2009) (granting debtors’ motion for rejection of certain leases retroactive to the petition date); *TW, Inc. v. Angelastro (In re TW, Inc.)*, No. 03-10785, 2004 WL 115521, at \*2 (D. Del. Jan. 14, 2004) (holding that bankruptcy courts may approve rejection of a nonresidential lease retroactive to the motion filing date “when principles of equity so dictate” (citation omitted)); *In re CCI Wireless, LLC*, 297 B.R. 133, 140 (Bankr. D. Colo. 2003) (same); *In re Fleming Cos., Inc.*, 304 B.R. 85, 96 (Bankr. D. Del. 2003) (same).

12. Courts may approve retroactive rejection of nonresidential leases “after balancing the equities” and concluding that they weigh in favor of the debtor. *See In re Chi-Chi’s, Inc.*, 305 B.R. at 399. In *In re Namco Cybertainment, Inc.*, the Court stated that retroactive rejection of an unexpired lease was permissible, provided: (a) the premises (and the keys thereto) were surrendered with an unequivocal statement of abandonment to the landlord; (b) the motion was served on the landlord; (c) the official committee consented to the requested relief; and (d) the debtor waived its right to withdraw the motion. No. 98-173 (PJW) (Bankr. D. Del. Feb. 6, 1998). *See also TW, Inc. v. Angelastro (In re TW, Inc.)*, No. 03-10785, 2004 WL 115521, at \*2 (D. Del. Jan. 14, 2004) (upholding bankruptcy court ruling denying rejection of leases *nunc pro tunc* to the petition date when the debtor had not surrendered possession prior to the petition date).

13. The balance of the equities in these cases clearly favors the Debtors. *First*, 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 (collectively, the “*Landlords*”) with an unequivocal statement of the Debtors’ intent to relinquish their interests under the Office Leases. *Second*, the Debtors are providing telephonic, fax and email notice of this motion on the Landlords and to all subtenants under the Office Leases. *Third*, while an official committee has yet to be formed, it is unlikely that, based on the significant cost savings generated by the rejections, any official committee would object to the retroactive relief requested herein. *Fourth*, the Debtors will not withdraw this motion with respect to any of the Office Leases, absent the Landlords’ consent.

14. Numerous courts in this district have authorized relief similar to that requested herein. *See, e.g., In re Eastern Energy, LP*, No. 11-14138 (KJC) (Bankr. D. Del. May 17, 2012) (approving rejection of certain unexpired leases effective *nunc pro tunc* to the date of motion filing); *In re Evergreen Solar, Inc.*, No. 11-12590 (MFW) (Bankr. D. Del. Jan. 5, 2012) (same); *In re Natural Products Group, LLC*, No. 10-10239 (BLS) (Bankr. D. Del. Mar. 11, 2011) (same); *In re Visteon Corp.*, No. 09-11786 (CSS) (Bankr. D. Del. June 23, 2009) (same); *In re Buffets Holdings, Inc.*, No. 08-10141 (MFW) (Bankr. D. Del. Feb. 13, 2008) (same).<sup>5</sup>

#### Motion Practice

15. This motion includes citations to the applicable rules and statutory authorities upon which the relief requested herein is predicated, and a discussion of their application to this motion. Moreover, in addition to all entities otherwise entitled to receive notice, the Debtors have given notice of this motion to all entities believed to have or be claiming an interest in the

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<sup>5</sup> Because of the voluminous nature of the orders cited herein, such orders have not been attached to this motion. Copies of these orders are available upon request of the Debtors’ proposed counsel.

subject matter of the proposed order or who, it is believed, otherwise would be affected by the proposed order. Accordingly, the Debtors submit that this motion satisfies Local Rule 9013-1.

**The Debtors' Reservation of Rights**

16. Nothing contained herein is intended or should be construed as an admission as to the validity of any claim against the Debtors, a waiver of the Debtors' rights to dispute any claim or an approval or assumption of any agreement, agreement, contract or lease under section 365 of the Bankruptcy Code. Additionally, nothing contained herein is intended or should be construed as an admission as to the validity of any claim against the Debtors or a waiver of the Debtors' rights to dispute any claims regarding escheatment. The Debtors expressly reserve their rights to contest any claim or billing dispute. Likewise, if this Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended and should not be construed as an admission as to the validity of any claim or a waiver of the Debtors' rights to subsequently dispute such claim.

**Notice**

17. The Debtors have provided notice of this motion to: (a) the Office of the United States Trustee for the District of Delaware; (b) the entities listed on the Consolidated List of Creditors Holding the 30 Largest Unsecured Claims filed pursuant to Bankruptcy Rule 1007(d); (c) counsel to the Debtors' prepetition secured lender and debtor in possession lender; (d) the agent for the Debtors' prepetition secured notes; (e) counsel to each of the prepetition equity holders; (f) the Delaware Secretary of State; (g) the Delaware Secretary of Treasury; (h) the Delaware State Attorney General; (i) the Office of the United States Attorney General for the State of Delaware; (j) the Internal Revenue Service; and (k) the Securities and Exchange Commission. In light of the nature of the relief requested in this motion, the Debtors respectfully submit that no further notice is necessary.

**No Prior Request**

18. No prior motion for the relief requested herein has been made to this or any other court.

*[Remainder of page intentionally left blank.]*

WHEREFORE, for the reasons set forth herein and in the First Day Declaration, the Debtors respectfully request entry of the Order granting the relief requested herein and such other and further relief as is just and proper.

Dated: February 28, 2013  
Wilmington, Delaware

*/s/ Domenic E. Pacitti*

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Domenic E. Pacitti (DE Bar No. 3989)  
Michael W. Yurkewicz (DE Bar No. 4165)  
**KLEHR HARRISON HARVEY  
BRANZBURG LLP**  
919 N. Market Street, Suite 1000  
Wilmington, Delaware 19801  
Telephone: (302) 426-1189  
Facsimile: (302) 426-9193

- and -

Morton Branzburg (*pro hac vice* admission pending)  
1835 Market Street, Suite 1400  
Philadelphia, Pennsylvania 19103  
Telephone: (215) 569-2700  
Facsimile: (215) 568-6603

- and -

Paul M. Basta (*pro hac vice* admission pending)  
Joshua A. Sussberg (*pro hac vice* admission pending)  
Christopher T. Greco (*pro hac vice* admission pending)  
**KIRKLAND & ELLIS LLP**  
601 Lexington Avenue  
New York, New York 10022  
Telephone: (212) 446-4800  
Facsimile: (212) 446-4900

*Proposed Co-Counsel to the Debtors  
and Debtors in Possession*