IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
KIKO USA, Inc.,[1]	)	Case No. 18-10069 (MFW)
Debtor.	)	**Hearing Date: April 23, 2018 at 11:30 a.m. (ET)** **Objection Deadline: April 9, 2018 at 4:00 p.m. (ET)**

DEBTOR'S SECOND MOTION FOR AN ORDER (I) AUTHORIZING THE REJECTION OF CERTAIN UNEXPIRED LEASES OF NONRESIDENTIAL REAL PROPERTY, (II) AUTHORIZING THE DEBTOR TO ABANDON CERTAIN PERSONAL PROPERTY, AND (III) GRANTING RELATED RELIEF

By this Motion (this "**Motion**"), KIKO USA, Inc. ("**KIKO**" or the "**Debtor**"), as debtor and debtor in possession, seeks entry an order (the "**Proposed Order**"), substantially in the form attached hereto as **Exhibit A**, authorizing the rejection of certain unexpired leases of nonresidential real property and abandonment of certain personal property of the Debtor's estate. **Parties receiving notice of this Motion should locate their names and leases on Exhibit "1" to the Proposed Order.** In support of this Motion, the Debtor respectfully represents:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware* dated February 29, 2012.

2. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and, pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States

[1] The last four digits of the Debtor's federal tax identification number are 0805. The principal place of business for the Debtor is 470 Park Avenue South, 15th Floor New York, NY, 10016.

Bankruptcy Court for the District of Delaware (the "**Local Rules**"), the Debtor consents to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

3. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The statutory basis for the relief requested herein is section 365(a) of the Bankruptcy Code.

BACKGROUND

5. On January 11, 2018 (the "**Petition Date**"), the Debtor commenced with this Court a voluntary case under chapter 11 of the Bankruptcy Code (the "**Chapter 11 Case**"). The Debtor continues to operate its business and manage its properties as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

6. The Debtor is a retailer of cosmetics and a wholly-owned subsidiary of KIKO S.p.A., an Italian corporation. Through the Debtor, KIKO-branded products are advertised, marketed, and sold in retail stores in the United States as affordable European-designed and produced products for every consumer, without a particular targeted consumer. The Debtor's products are also available in the United States via online sales via the Debtor's website http://www.kikocosmetics.com/en-us and, more recently, on Amazon.com utilizing the Fulfillment by Amazon program (Amazon Prime). The products are sourced and purchased by the Debtor through KIKO S.p.A., and warehoused locally and supplied into the U.S.A. operations (Stores and Ecommerce) through a third party external logistics provider (Wit Logistics) based in Monroe Township, New Jersey.

7. The Debtor has faced a challenging commercial environment over the past several years brought on by increased competition and the shift away from shopping at brick-and-mortar stores, especially in shopping malls. Given the Debtor's substantial brick-and-mortar presence at the outset of this Chapter 11 Case (29 retail locations, of which 26 are located in shopping malls), and the expenses associated therewith, the Debtor's business was been heavily dependent on physical consumer traffic, and resulting sales conversion, to meet sales and profitability targets. Unfortunately, the Debtor's retail sales have not been sufficient to cover its costs, which consist primarily of rent and labor.

8. Beginning in late July 2017, the Debtor had discussions directly with its landlords (collectively, the "**Landlords**"), trying to negotiate lower rents and/or early termination payments for most of its physical retail locations.

9. While the Debtor approached most of its Landlords, and offered buyout payments for early termination, it was only able to achieve one early termination agreement. Additionally, the Debtor has exercised its contractual termination rights based on store sales at its Garden State Plaza, New Jersey location, with such termination to be effective in May 2018. All other Landlords declined to negotiate or consider alternatives. This inaction further exacerbated the Debtor's ongoing operating income losses.

10. On January 19, 2018, the Debtor filed a motion (the "**First Rejection Motion**"), seeking to reject non-residential real property leases related to 24 of its physical retail locations. On February 9, 2018, this Court entered an order granting the relief requested in the First Rejection Motion [D.I. 130].

11. The Debtor has identified two (2) additional stores (the "**Rejected Premises**") that it intends to close during this Chapter 11 Case. The leases for these stores are listed on **Exhibit 1** to the Proposed Order (the "**Rejected Leases"**).

12. Further, at each of the Rejected Premises, the Debtor maintains certain personal property, furniture, fixtures and/or equipment related to its business (such as equipment, fixtures, furniture, advertising displays and other personal property), which is either owned by the Debtor, leased by the Debtor from third parties, or subject to equipment financing agreements with third parties (collectively, the "**Personal Property**").

13. The Debtor seeks an effective date of rejection (the "**Rejection Date**") for each of the Rejected Leases of March 31, 2018. Debtor will vacate the Rejected Premises and return the keys thereto to the respective Landlord by the Rejection Date.

RELIEF REQUESTED

14. By this Motion, Debtor seeks authority from this Court to terminate or reject the Rejected Leases pursuant to section 365 of the Bankruptcy Code, effective as of the Rejection Date.

15. The Debtor also requests authority, in its sole discretion, prior to and through the applicable Rejection Date, to remove Personal Property from the Rejected Premises. The Debtor will not remove property that is owned by an applicable Landlord.

16. To the extent that the Debtor determines that its interest in the Personal Property has little or no value, or that the preservation of the Personal Property will be burdensome to the estate (as compared with the expense of removing and storing such Personal Property), the Debtor requests authority to abandon any such Personal Property remaining at the Rejected

Premises as of the applicable Rejection Date. The Debtor shall not abandon Personal Property subject to a true lease without first rejecting the underlying lease for such Personal Property.

17. In all events, including if Personal Property is not retrieved by the applicable Rejection Date, the Debtor requests that any such Personal Property be deemed abandoned pursuant to section 554 of the Bankruptcy Code as of the Rejection Date and, except as set forth above, that the Landlord(s) be authorized to dispose of such abandoned Personal Property without liability to any third party claiming an interest in such abandoned Personal Property.

18. The Debtor further requests that any Landlord or other counterparty to a Rejected Lease be required to file a proof of claim relating to rejection damages so as to be received no later than thirty (30) calendar days after entry of an order authorizing the rejection of the Rejected Leases.

BASIS FOR RELIEF REQUESTED

19. Section 365(a) of the Bankruptcy Code allows debtors to reject any executory contract or unexpired lease if such rejection represents a reasonable exercise of their business judgment. *See In re Armstrong World Indus. Inc.,* 348 B.R. 136, 162 (D. Del. 2006); *Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989); *In re Orion Pictures Corp.*, 4 F.3d 1095, 1099 (2d Cir. 1993); *In re Bullet Jet Charter, Inc*., 177 B.R. 593, 601 (Bankr. N.D. Ill. 1995); *In re Del Grosso*, 115 B.R. 136, 138 (Bankr. N.D. Ill. 1990); *Johnson v. Fairco Corp.*, 61 B.R. 317, 319-20 (N.D. Ill. 1986). The business judgment test requires only that debtors demonstrate that the rejection will benefit the estate. *See e.g. In re G Survivor Corp.*, 171 B.R. 755, 757 (Bankr. S.D.N.Y. 1994). Furthermore, a "debtor's determination to reject an executory contract can only be overturned if the decision was the product of bad faith, whim or caprice." *In re HQ Global Holdings, Inc.*, 290 B.R. at 511 (*citing In re Trans World Airlines, Inc.*, 261 B.R. 103, 121 (Bankr. D. Del. 2001))

20. 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 Machines 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"); *In re Fleming Cos., Inc.*, 304 B.R. 85, 96 (Bankr. D. Del. 2003) (same).

21. Additionally, section 554(a) of the Bankruptcy Code provides that a debtor in possession may abandon, subject to Court approval, "property of the estate that . . . is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a). Before authorizing abandonment of property, a bankruptcy court must find either: (i) the property is burdensome to the estate or (ii) the property is both of inconsequential value and inconsequential benefit to the estate. *See, e.g., Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 497 (1986), *reh'g deni*ed, 475 U.S. 1091 (1986); *In re Texaco, Inc.*, 90 B.R. 38, 44 (S.D.N.Y. 1988).

22. In the present case, the relief requested in the Motion clearly satisfies the business judgment standard. The Debtor has reviewed and analyzed its leases and determined that the Rejected Leases do not provide any value to the Debtor or its estate. Instead, the continued obligation to pay rent and conduct business at the Rejected Premises would be detrimental to the Debtor's efforts to reorganize.

23. Rejection of the Rejected Leases will further maximize the value of Debtor's estate and eliminate operating losses associated therewith. Accordingly, the Debtor seeks to reject the Rejected Leases because such leases provide no meaningful value or benefit to the Debtor's estate. Immediate rejection of the Rejected Leases is further necessary in order to prevent the estate from potentially incurring unnecessary administrative expense, to the detriment of the Debtor's creditors and other parties in interest.

24. Moreover, any Personal Property that the Debtor would abandon in connection with the Rejected Leases is of inconsequential value to the Debtor's estate, as it would primarily consist of fixtures, furniture, and other office equipment. The Debtor believes that the cost of retrieving, marketing and reselling any such Personal Property far outweighs any recovery the Debtor could hope to attain for the same. Thus, the Debtor has determined that the abandonment of any such Personal Property as of the Rejection Date is in the best interests of the Debtor, its estate and its creditors.

25. Lastly, the inclusion of a Rejected Lease on **Exhibit 1** to the Proposed Order is not an admission by the Debtor that such lease is, in fact, executory. The Debtor hereby reserves its rights with respect to any existing defaults of the non-debtor counterparties to the Rejected Leases, and all defenses and counterclaims to any rejection damages claims are preserved,

including, without limitation, defenses or counterclaims relating to a Rejected Lease's expiration or a non-debtor party's material default.

BANKRUPTCY RULE 6006(F)

26. Bankruptcy Rule 6006(f) requires that a motion to reject multiple unexpired leases or executory contracts:

a) state in a conspicuous place that parties receiving the omnibus motion should locate their names and their contracts or leases listed in the motion;

b) list parties alphabetically and identify the corresponding contract or lease;

c) be numbered consecutively with other omnibus motions to assume, assign, or reject executory contracts or unexpired leases; and

d) be limited to no more than 100 executory contracts or unexpired leases.

27. The Debtor believes that the Motion complies with the requirements of Bankruptcy Rule 6006(f).

REQUEST FOR IMMEDIATE RELIEF

28. The Debtor submits that waiver of the stay imposed by Rule 6004(h) is necessary to preserve the value of their estates. Accordingly, the Debtor respectfully requests that the Court waive the 14-day stay imposed by Rule 6004(h) as the nature of the relief sought herein warrants immediate relief.

NO PRIOR REQUEST

29. No previous request for the relief sought herein has been made to this or any other Court.

NOTICE

30. No trustee, examiner, or statutory committee of creditors has been appointed in this Chapter 11 Case. Notice of this Motion will be provided to (i) the Office of the United States Trustee for the District of Delaware; (ii) each of Debtor's 20 largest unsecured creditors

on a consolidated basis; (iii) the Internal Revenue Service; (iv) the United States Attorney's Office for the District of Delaware; (v) the offices of the attorneys general for each of the states in which the Debtor operates; (vi) the U.S. Department of Justice; (vii) all parties to the Rejected Leases; and (viii) any other party entitled to notice pursuant to Local Rule 9013-1(m).

31. In light of the nature of the relief requested, the Debtor submits that no further notice is required.

WHEREFORE, the Debtor respectfully requests the entry of an order, substantially in the form of the Proposed Order, (i) authorizing the rejection of the Rejected Leases such that no rights are retained thereunder after such rejection, effective as of the respective Rejection Date, (ii) authorizing the Debtor to abandon any Personal Property remaining at the Rejected Premises as of the Rejection Date, and (iii) granting such other and further relief as may be just and proper.

(Remainder of Page Left Intentionally Blank -- Signature Page to Follow)

Dated: March 26, 2018
Wilmington, Delaware

/s/ *Monique B. DiSabatino*

Mark Minuti (DE Bar No. 2659)
Monique B. DiSabatino (DE Bar No. 6027)
SAUL EWING ARNSTEIN & LEHR LLP
1201 N. Market Street, Suite 2300
P.O. Box 1266
Wilmington, Delaware 19899
Telephone: (302) 421-6840
Facsimile: (302) 421-5873
mark.minuti@saul.com
monique.disabatino@saul.com

-and-

Sharon L. Levine
SAUL EWING ARNSTEIN & LEHR LLP
1037 Raymond Boulevard, Suite 1520
Newark, New Jersey 07102
Telephone: (973) 286-6718
Facsimile: (973) 286-6821
sharon.levine@saul.com

-and-

John S. Kaplan
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: (2016) 359-8408
Facsimile: (206) 359-9408
jkaplan@perkinscoie.com

-and-

Jeffrey D. Vanacore
PERKINS COIE LLP
30 Rockefeller Plaza, 22nd Floor
New York, New York 10112-0085
Telephone: (212) 262-6912
Facsimile: (212) 977-1642
jvanacore@perkinscoie.com

Counsel for Debtor and Debtor-in-Possession