UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
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Hearing Date
November __, 2004
9:30 a.m.

In re

Chapter 11

Kollel Mateh Efraim, LLC

Case No. **04-16410-cb**

Debtor.

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MOTION FOR AN ORDER:

(1) DECLARING THAT THE AUTOMATIC STAY IS INAPPLICABLE TO THE PROPERTY PURSUANT TO SECTIONS 362(B)(10) & 541(B)(2) OF THE BANKRUPTCY CODE SINCE THE OCCUPANCY AGREEMENT EXPIRED PRE-PETITION; OR ALTERNATIVELY

(2) GRANTING RELIEF FROM THE AUTOMATIC STAY PURSUANT TO SECTIONS 362(D)(1) & (2) OF THE BANKRUPTCY CODE; OR ALTERNATIVELY

(3) ASSUMING, ARGUENDO, THAT THE DEBTOR HAS SOME TYPE OF ASSUMABLE LEASEHOLD INTEREST IN THE PROPERTY, WHICH IT CLEARLY DOES NOT, THE COURT SHOULD COMPEL THE DEBTOR TO IMMEDIATELY REJECT SUCH INTEREST PURSUANT TO SECTION 365 OF THE BANKRUPTCY CODE; AND

(4) DIRECTING THE DEBTOR TO IMMEDIATELY SURRENDER THE PROPERTY TO THE MOVANT PURSUANT TO SECTION 365 (D)(4) OF THE BANKRUPTCY CODE AND/OR SECTION 105 OF THE BANKRUPTCY CODE; AND

(5) COMPELLING THE DEBTOR TO PAY THE POST-PETITION EXPENSES AND PAYMENTS THAT HAVE ACCRUED TO DATE PURSUANT TO SECTION 365(D)(3) OF THE BANKRUPTCY CODE AND SECTIONS 503(B) AND 105 OF THE BANKRUPTCY CODE.

TO THE HONORABLE CORNELIUS BLACKSHEAR,
UNITED STATES BANKRUPTCY JUDGE:

Helen-May Holdings, LLC, the fee owner and licensor herein (hereinafter referred to as "Helen-May" or "Movant") hereby moves this Court, for an Order (i) Declaring That The Automatic Stay Is Inapplicable to The Property Pursuant to Sections 362(b)(10) & 541 B(2) of The Bankruptcy Code Since The Occupancy Agreement Expired Pre-petition; or Alternatively (ii) Granting Relief From The Automatic Stay Pursuant to Sections 362(d)(1) & (2) of The Bankruptcy Code; or Alternatively (iii) Directing The Debtor to Immediately Surrender The Property to The Movant Pursuant to Section 365 (D)(4) of The Bankruptcy Code And/or Section 105 of The Bankruptcy Code; And (iv) compelling The Debtor to Pay The Post-petition Expenses And Payments That Have Accrued to Date Pursuant to Section 365(d)(3) of The Bankruptcy Code And Sections 503(b) And 105 of The Bankruptcy Code; respectfully represents as follows:

<u>JURISDICTION</u>

1. This motion, is a contested matter brought pursuant to Sections 362(b)(10), 541 (b)(2), 365(c)(3), 365(d)(3)&(4), 503(b) and 105 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 (the "Bankruptcy Code") and Federal Rules of Bankruptcy Procedure 4001(a), 6006, 9013 and 9014, of which this Court has jurisdiction pursuant to 28 U.S.C. § 1334, and is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

PROCEDURAL HISTORY SINCE THE FILING OF THE CHAPTER 11 PETITION

2. Kollel Mateh Efraim, LLC, the debtor and debtor-in-possession herein (the "Debtor") filed its voluntary bankruptcy petition with this Court for relief under Chapter 11 of the Bankruptcy Code on October 5, 2004 (the "Petition Date").

3. Movant is uncertain whether the Debtor is a real entity. The Debtor does not list a tax identification number in the Petition where required, presumably because none exists. Moreover, all payments made by the Debtor, both on the deposit on the contract, and on the occupancy payments discussed below, were not through its own name but either through attorney escrow checks and primarily through a third party corporation known as Maskil El Dal. Inc. Movant has made diligent effort through various database searches to determine the existence and corporate status of the Debtor but has been unable to locate such an LLC or Corporation. If indeed no such Corporation or LLC exists then the sworn representations in its Rule 1007 affidavit that the Debtor is a "limited liability company" and thereafter also as a "corporation" would be inaccurate, (either way, at least , one of the statements is inaccurate.) The Chapter 11 filing would be a complete nullity since no such Debtor actually existed at the time of the filing. This Court would be required to, *sua sponte,* immediately dismiss the case on jurisdictional grounds. Thus, as a threshold matter the Debtor should be required to demonstrate that it was indeed a validly formed entity at the time of the filing of the petition.

4. Since the filing of its skeletal petition on October 4, 2004, the Debtor has done nothing to further its cause. No schedules have been filed within the statutory 15 day period required under Rule 1007. No motion to retain counsel has been made and the Debtor is, thus, without representation. No other standard first day orders have been applied for. This case appears to be nothing short of a bad-faith filing and a massive abuse of process.

PRE-PETITION EVENTS LEADING UP TO THE FILING

The Contract of Sale

5. Prior to the Petition Date on or about April 29, 2004, Helen-May entered into a contract of sale (the "Contract; Exhibit A") with an individual known as Aron Fixler for the sale of the property known as the Meadows Resort located at 1141 County Road 114, Fosterdale, New York (the "Property").

6. Thereafter, by assignment dated May 18, 2004, provided in the Contract, Aron Fixler assigned the Contract to the Debtor. From the outset, Movant was advised by the Debtor's real estate counsel that the Debtor was short of funds, but expected them in any day. Not surprisingly, however, when the final "time of the essence" closing date, September 27, 2004, came and went, the Debtor was unable to close. This actually begs the question as to why the Debtor then filed the instant petition in what can only be described a garden variety default on a real estate contract.

7. The Debtor's purported reason for filing the Chapter 11 petition is set forth in the Debtor's Rule 1007 Affidavit (Exhibit B) as follows:

> 11. The closing was scheduled for September 27, 2004, with an agreement to extend based upon the payment of fee to the Seller.
>
> 12. On September 27, 2004, however, the survey of the property that the Debtor had ordered months before arrived. That survey showed that the Property consisted of 60 acres of land. Up until that moment, based upon the Seller's representations, the marketing materials for the Property, and the tax map for the Property, the Debtor believed that the Property consisted of 77 acres.
>
> 13. Given the substantial reduction in acreage, the sale contract is no longer viable.

8. In point of fact, even if the above scenario were true, that the Debtor was in effect induced by the misrepresentations of the Movant, which is a far cry from reality and as set forth in detail below, it would still not constitute a viable reason for filing a bankruptcy petition. Any relief the Debtor would be entitled to is available to it in State Court in a common law action. In any event, this is at best a two-party dispute that belongs in State Court.

9. Moreover, as set forth more specifically below the Debtor is not entitled to any relief under Section 108(c) of the Bankruptcy Code since it filed on October 4, 2004, a week after the September 27, 2004, time of the essence closing date had come and gone. Thus, there was no legitimate bankruptcy purpose whatsoever for the filing of this case other than to frustrate and delay the Movant herein.

The Contract for the Property Was "As is" and Explicitly Makes No Representation as to the Acreage of the Property

10. The purported reason given for the filing and the complete failure to perform under the Contract is totally false and a complete sham. The Contract contains the specific provision that the property was being sold "as is". It also contains a merger clause which bars, as a matter of law, any extraneous representations or understandings with respect to the Contract other than those contained in the four corners of the Contract. The provision states as follows:

> §25. The Purchaser represents that the Purchaser has inspected the premises and is purchasing said premises "as is", as of the date hereof, reasonable wear and tear excepted. This contract, as written, contains all the terms of the contract entered into between the parties, and the Purchaser acknowledges that the Seller has made no representations, is unwilling to make any representations, and held out no inducements to the Purchaser, other than those herein expressed, and the Seller is not liable or bound in any manner by expressed or implied warranties, guarantees, promises, statements, representations or information pertaining to the said premises as to the physical condition, income, expense, operation, or to what use the premises can be applied, including but not limited to any matter or thing affecting or relating to the said premises, except as herein specifically set forth. Without limitations as to the extend of any defects in the condition of the premises, Purchaser acknowledges that Purchaser is aware of certain leaking conditions in the roof(s) of certain of the structures, conditions disclosed in the Phase I report of Middleton Environmental, Inc. dated February 27, 2004 as well as other disclosed, observed, undisclosed or unobserved conditions of and at the premises. [Emphasis added.]

11. Even more significantly, the contract contains an additional and specific disclaimer provision with respect to the amount of the acreage which states as follows:

> §46. Seller makes no representation as to the actual land area or acreage of the premise conveyed and which is more particularly described in Schedule “A”.

Thus, the Debtor assumed all the risk of the transaction and doesn’t have a leg to stand on with respect to these claims.

12. Even, assuming, arguendo, that there is any validity to the Debtor’s claim that; a) the acreage is indeed less than indicated on the tax map and that; b) the reduced acreage makes the deal unviable for the Debtor, nevertheless, as a matter of law, the Contract, by its own terms, bars any of these spurious claims made by the Debtor.

13. Even without such language in the Contract, the Statute of Frauds and the Parol Evidence rule would bar any such allegations of extraneous representations concerning a writing pertaining to a real estate transaction.

14. Furthermore, the Debtor’s stated purpose for the purchase of the Property in the Contract is as follows:

> §47. It is acknowledged that the Purchaser is seeking to acquire this property for use as a Yeshiva School with facilities for a dormitory.

Accordingly, the size of the acreage, whether it is 60 or 77 acres should have no bearing whatsoever on the purchase since the actual buildings only take up a fraction of the entire acreage and would have no effect whatsoever on the Debtor's ability to make a Yeshiva School. Thus, the claim of "unviability" is, in any event, patently untrue.

15. In truth, the purported survey, which supposedly arrived the very same day as the scheduled closing, September 27, 2004, is nothing more than a convenient excuse for the Debtor to not honor its commitment and keep its word and is nothing more than a smokescreen for the Debtor's inability to close.

If Anything the Event That Precipitated the Filing Herein was the Million Dollar Fraudulent Conveyance Complaint Filed Against Jack Lefkowitz and His Entities on September 27, 2004, by a Bankruptcy Trustee

16. If anything, what may have precipitated the filing herein was another event, effecting the Debtor's principal and funder, Jack Lefkowitz, which took place on that very same date, September 27, 2004. Attached hereto as Exhibit C is a docket sheet and Summons and Complaint filed on September 27, 2004, against Jack Lefkowitz, the Debtor's principal herein, Maskil El Dal Ltd., the funder of the Debtor herein, and Olympia Capital Group, an entity which shares the same address as the Debtor herein, and controlled by Jack Lefkowitz, by the Trustee, Marc Pergament in a bankruptcy case known as In re Herja Associates LLC (the "Herja Complaint"). This case is related to the notorious Allou Distributors bankruptcy case where all of the principals were

criminally indicted for multiple federal frauds. Indeed, the name Herja is an acronym of the principal of the Allou Distributors principal Herman Jacobowitz.

17. The gravamen of the Complaint is that Lefkowitz and his entities received a million dollars from the Allou principals or their relatives from the sale of a property by Herja Associates without ever paying for an interest in that property or performing any services in connection with the sale of that property. The Trustee is suing for the return of those monies.

18. It is respectfully submitted that, if anything, the Herja Complaint probably had much more to do with Mr. Lefkowitz' ability or inability to close than the survey. In other words, Mr. Lefkowitz probably never had the full consideration himself and now must nurse his remaining funds for far more serious issues and has no ability or possibility of obtaining the money to close. Indeed it is unclear whether he ever had an ability to close. Thus, the sole purpose of the bankruptcy filing is to delay and frustrate the Movant. It also appears to be a negotiating tactic whereby through its sham, self-serving claim regarding the survey, hopes to somehow pressure the Movant to lower its fairly bargained for price.

The Debtor herein, Unlike the Related Debtor in Nassau Equities, Filed It's Petition a Week after the Time of the Essence Period Expired and Has No Recourse under Section 108(c) of the Bankruptcy Code

19. Similarly, in the case cited by the Debtor as the related matter, Nassau Equities, Mr. Lefkowitz used the same modus operandi where he filed a day before a time of the essence clause was to expire in order to buy two months under section 108(c) of the Bankruptcy Code. Attached hereto as Exhibit D is a copy of the Rule 1007 Affidavit filed in that case. Thus, Mr. Lefkowitz has established a pattern of entering into deals he cannot close and then utilizing the Bankruptcy Court to buy time.

20. From the standpoint of law, however, this case is very different from Nassau Equities. In Nassau Equities, the Debtor filed prior to the expiration of the relevant time period and was, therefore, able to take advantage of the two month extension afforded by Section 108(c) of the Bankruptcy Code. Here, by the Debtor's own admission, a time of the essence closing was to take place on September 27, 2004. The instant bankruptcy filing, however, took place on October 4, 2004. Thus, the Debtor cannot seek to utilize Section 108(c) of the Bankruptcy Code since the time period had already expired. Indeed, unlike the Rule 1007 Affidavit in Nassau Equities, drafted by the same counsel, where citation is made to Section 108(c), here no citation is made to that statute, effectively acknowledging that it has no application here.

21. In that connection Debtor states in its Rule 1007 Affidavit as follows:

> 11. The closing was scheduled for September 27, 2004, with an agreement to extend based upon the payment of fee to the Seller.

That statement is a bit misleading because the extension of time was, admittedly, predicated upon a payment which was not made. Indeed, said agreement dated September 22, 2004, between Movant and the Debtor to extend the time of the essence clause through November 29, 2004 (the "Conditional Extension Agreement; Exhibit E"), was expressly conditioned on the immediate payment of an additional fee of $20,250.00, with a second payment of $20,250.00 due on October 27, 2004. In that regard the Conditional Extension Agreement states as follows:

> The Purchaser will pay the additional sum of $20,250.00 upon return of this letter and $20,250.00 on or before October 27, time being of the essence.

22. If that were not clear enough, a second follow-up letter dated September 23, 2004 (Exhibit F), further stated specifically that without the payments the Conditional Extension Agreement was not effective. It states:

> We would like to remind you[r] client that, by its terms, it is not effective until the $20,250.00 payment and that he has obligations regarding insurance he must comply with

23. Suffice it to say prior to the filing, the Debtor complied with none of the conditions of the Conditional Extension Agreement and has not complied to date. The Debtor sent a check but

then immediately advised the Movant through counsel payment on that the check was being stopped. Indeed, the check was deposited by Movant and returned with that indication (Exhibit G). The time to make the second payment of $20,250.00 was October 27, 2004, has also passed without payment being made. The insurance endorsement has never been finished and the premium payments for Movant's policy have not been paid at all and are now overdue and at risk of cancellation. Thus, the Debtor never obtained the additional time and on September 27, 2004, all of the Debtor's rights under the Contract terminated.

24. Accordingly, the Debtor's statement in its Rule 1007 Affidavit (Exhibit B) with respect to the purpose of the filing:

> 15. The Debtor filed this petition to preserve its claims arising from the Contract and the Property.

is wishful thinking, since, as demonstrated above, the Debtor has not preserved any of those claims.

The Debtor's Equitable Arguments with Respect to the Purported Improvements to the Property Were Performed Illegally And, in Any Event, Forfeited by Virtue of the Debtor's Failure to Timely Close on the Contract

25. Ostensibly acknowledging that from a strictly legal point of view it has no rights whatsoever, in the Rule 1007 affidavit the Debtor attempts to make certain equitable arguments which upon careful examination have no merit whatsoever.

26. The Debtor in its Rule 1007 Affidavit (Exhibit B) states as follows:

> 9. Thereafter, upon the agreement of the Debtor and the Seller, the Debtor took occupancy of the Property and invested at least $600,000 in improvements. In addition, the Debtor purchased two adjacent properties for the purpose of developing the Property.
>
> 10. A number of vendors and investors have claims against the Debtor arising from the Debtor's investment in the Property. Those claims exceed $1.5 million, as set forth in the Debtor's petition.

27. In other words, the Debtor is arguing that since it put so much money into the Property it has some type of equitable interest in the Property. Moreover, it claims to have claims of 1.5 million as well as improvements of $600,000.00.

28. In the first instance, it must be pointed out that the Debtor's occupancy was effectuated through a letter agreement dated June 3, 2004, (the "Occupancy Agreement") attached hereto as Exhibit H . The making of improvements was permitted only through the prior approval of the Movant, as follows:

> They must maintain the premises in good order and may not make improvements that require the approval of any governmental agency. A list of all proposed improvements Purchaser proposes must be furnished to Seller and its attorney (by FAX) in writing no less than three (3) days prior to the commencement of such work for Seller's approval. Seller may withhold approval for such improvements for any reason, or no reason at all. In the event that Seller does not object

> and decline to approve such improvement within seventy-two (72) hours of receipt of the notice, Purchaser may proceed with the improvement. Further, Purchaser may not operate in any manner that requires any governmental approval without first obtaining same.

The Debtor never sought prior written approval for any improvements. Work which was done completely violated this requirement . Attached hereto as Exhibit I is a series of seven (7) letters from June through August of 2004 repeatedly requesting information as to proposed or actual improvements in accordance with the terms of the Occupancy Agreement. What becomes immediately evident from these correspondence is that the Debtor never once complied with the terms of the Occupancy Agreement in this regard and each and every improvement was done in breach and in violation of the terms of the Occupancy agreement.

29. Having thus egregiously violated the terms of the Occupancy Agreement with respect to the improvements, the Debtor clearly has no legal recourse whatsoever with respect to those improvements. Indeed, if anything those illegal improvements give rise to significant claims for damages against the Debtor by the Movant. The illegal alterations have significantly damaged the Property and appear to give rise to numerous building code violations. For example:

- Metal fire escape replaced with a wooden structure;
- Walls erected where none existed;
- Existing walls were breached;
- Unauthorized and incompatible plumbing and electrical modifications;
- Kitchen equipment removed and/or discarded;

- Fixtures Fittings & Equipment removed and/or discarded;
- Erection of a barrier around pool;
- Crusher run (gravel and concrete mixtures) on grassy meadows;
- Breach of barrier (natural and man-made) between the premises and neighboring properties ;
- A boiler was damaged during occupancy and needs replacing.

40. Moreover, even had the Debtor requested and been granted approval with respect to the improvements, which, as stated previously it clearly did not, the Debtor would still have no legal recourse whatsoever with respect to the improvements. The Occupancy Agreement, which was initiated and requested by the Debtor, who operated the Property during the Summer of 2004, was done in contemplation of the imminent closing. Indeed it was really an accommodation to the Debtor who could not close by the initial date which was thirty days after the date of the signing of the Contract. By failing to close the Debtor has essentially forfeited all of the benefits it bargained for under the Occupancy Agreement.

41. For example, the Occupancy Agreement states as follows:

> Purchasers agree that except for the willful default of the Seller in refusing to close, they will not file a Notice of Pendency or other lien against the Property in connection with a lawsuit or otherwise. In connection with the Occupancy Agreement, they will execute a document in recordable form to that effect. Thereafter if they do file such a Notice of Lien which Sellers are successful in having vacated, the shall be additionally liable to the Seller for the additional liquidated amount of $100,000.00 per month for each month or portion thereof that the lien or notice remains of record together with attorneys fees incurred.

This provision, among others, is a specific waiver by the Debtor of filing any type of claim against the Movant with respect to the occupancy of the Debtor. It might even be argued that the filing of this bankruptcy proceeding with, *inter alia,* the rationale of the of the performance of improvements has the same effect as such a lien and the Debtor should be subject to the liquidated damage amount. These conditions were the only conditions under which Movant agreed to allow the Debtor to occupy its Property prior to closing, which was done for the Debtor's sole benefit and as accommodation to it . For the Debtor, now egregiously in default on the closing date, to come and assert its bogus improvement claims, is in clear violation of the both the letter and spirit of the Occupancy Agreement and gives new meaning to the adage of adding insult to injury.

42. Furthermore, notwithstanding all of the above, in point of fact, the $600,000.00 figure cited with respect to the improvements appears to be completely inflated.

43. By the same token, the claims listed in the Debtor's list of Twenty Largest Unsecured Creditors (Exhibit J), which appear to have been incurred in connection with the aforestated improvements, appear to be grossly overstated. For example, there is a claim from All Refrigeration and Equipment of $230,000.00. While some refrigerators were installed on the Property, the cost could be nothing approaching those numbers. The claim of SOS Communication for $90,000.00 on its face also appears to be wildly exaggerated.

44. In that regard, the most significant of the claims which "exceed 1.5 million", is none other than the alleged claim of the Movant for $1,260,000.00. Said claim, however, presupposes that the Contract of 1.4 million dollars for the Property is still in effect or that the Debtor owned the property, which it does not. The Debtor is crediting itself for the $140,000.00 contract deposit and deems the Movant as having a "disputed" claim for the balance of $1,260,000.00. As stated above, however, the Contract is no longer in force. Having failed to close timely the Debtor has forfeited its deposit, forfeited its illegal improvements, and forfeited its right to remain in the Property.

45. Thus, while the Debtor tries to create the appearance that this is a real bankruptcy case with real creditors, in reality this is nothing more than a two-party dispute which has no business in this Court. As the facts become clearer, it becomes quite obvious that this is nothing more than a real estate deal where the purchaser came up short. Rather than cutting its losses with dignity, this Debtor has instead attempted to construct a sham bankruptcy proceeding in order to obfuscate the plain fact that it is a dollar short and a day late.

The Occupancy Agreement Through Which the Debtor Obtained Possession of the Property Has Been Breached in Every Possible Way and Has, Thus, Been Terminated by its Own Terms

46. The Debtor's present possession of the Property was solely through the Occupancy Agreement entered into between the parties and attached hereto as Exhibit H. That agreement essentially allowed the Debtor to operate the Property during the period between Contract and Closing and called for the Debtor to be responsible for all operating expenses of the Property as well as to make certain other payments to the Movant and/or its principals. It also, as stated previously,

required the Debtor to submit any proposed improvements for approval to the Movant. The Debtor has been in default of virtually all of these provisions almost from day one.

47. In that respect, the Occupancy Agreement (Exhibit H) states as follows:

> Your client is responsible for paying our client all of their carrying charges, including, but not limited to:
>
> Mortgage: $9,750.00
>
> Insurance: $2,500.00
>
> Interest on our clients credit card debt: $3,500.00
>
> With the increase of the liability coverage, we expect the insurance premium to increase. Your client will pay any increases as a result of the increased coverage or such increase which may be the result of their use of the premises, if any.
>
> Your clients will be responsible for the payment of all utilities, including, telephone, oil, propane, etc. and other ongoing expenses of operating the Meadows.

Indeed, the Debtor has paid none of the Properties post-petition expenses including insurance and electricity. Indeed, the electricity on the Property may already have been shut off. The Property has, therefore, been placed at serious risk as a result of the Debtor's malfeasance. The Debtor has also failed to pay reimburse Movant for its September and October mortgage payments.

48. Presently the following <u>post-petition</u> amounts are due an owing under the Occupancy Agreement:

October & November Mortgage payments:	$19,500
Insurance:	11,840
Electricity:	3,706.53
<u>Cable (ordered by Debtor):</u>	<u>2,501.80</u>
Total	$**37,528.33**

Assuming arguendo that Conditional Extension Agreement is in effect then the October 27, 2004, payment is due and owing in the amount of:	**<u>$20,250</u>**
Aggregate Total	**$57,778.33**
Aggregating Total Including $1,500.00 per day fee set forth below:	**<u>$63,000.00</u>**
Sum Total of all post-petition charges:	**$120,778.33**

There are also Taxes Due which they are obligated to pay.

49. Furthermore, under the Occupancy Agreement (Exhibit H) the Debtor is required to pay the Movant $1,500.00 per day for each additional day it remains in the Property in the event it fails to close timely. Needless to say such payments have not been forthcoming. The Occupancy Agreement states as follows:

> In the event that the Purchaser fails to close on or before September 27, 2004, for each day the continue to occupy the premises they shall become liable to the Seller for the additional sum of $1,500.00 which will continue to accrue until they quit the premises and remove all of their belongings.

The aggregate total that will have accrued from the petition date, October 4, 2004, to the return date of this motion, (utilizing an approximate date of November 15, 2004), or (42 days x 1500) will be approximately $63,000.00.

50. In summary, any rights the Debtor may have had under the Occupancy agreement have terminated by virtue of the Debtor's numerous breaches including its failure to timely close as well as its failure to pay any of the payments set forth above all of which are express conditions of

the Occupancy Agreement. Presently the Debtor is merely occupying the Property without even the color of law asserting an automatic stay when none exists since all of the Debtor's rights have terminated pre-petition.

ARGUMENT

I

THE AUTOMATIC STAY IS INAPPLICABLE TO THE PROPERTY PURSUANT TO SECTIONS 362(B)(10) & 541 B(2) OF THE BANKRUPTCY CODE SINCE THE OCCUPANCY AGREEMENT EXPIRED PRE-PETITION

51. It is axiomatic that the protection of the automatic only extends to the property included the Debtor's estate. Where, as here, the Debtor's interest in the Premises expired before the filing of the petition the automatic stay is inapplicable. In truth, the Debtor's interest was not that of a tenant as it was merely an occupant pursuant to the Occupancy Agreement, as opposed to having any kind of formal lease. In any event, whatever interest the Debtor had expired pre-petition. Thus, the Code's treatment of lessees whose tenancies expire pre-petition is instructive in this regard. This is set forth in Section 362(b)(10) of the Bankruptcy Code. Section 362(b)(10) states as follows:

§ 362. Automatic Stay.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application of the Securities Investor Protection Act of 1970, does not operate as a stay--

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of non-residential real property that has terminated by the expiration of

the stated term of the lease before the commencement of or during the case under this title to obtain possession of such property;

The corresponding provision of Section 362(b)(10) is Section 541(b)(2) which, once again, sets forth clearly that in such circumstances the debtor's estate has no interest in such a premises. Section 541(b)(2) states as follows:

§ 541. Property of the estate.

(b) Property of the estate does not include --

(2) any interest of the debtor as a lessee under a lease of non-residential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of non-residential real property that has terminated at the expiration of the stated term of such lease during the case;

Thus, since the Occupancy Agreement terminated before the filing of the petition the automatic stay is clearly inapplicable as to the Property.

52. Accordingly, if this Court concludes, as it should, that the Debtor has no property interest in the Property, this prong of the motion may be characterized as merely seeking a "comfort order", affirming that the automatic stay is inapplicable as to Movant. See, In re Damianopoulos, 93 Bankr. 3, 6 (Bankr. N.D.N.Y. 1988). ("Thus, if the Court concludes that the Debtor has no possessory interest in the Café lease or that said lease is not property of the estate, the automatic stay does not affect it. This would be true regardless of whether the lease terminated pre or post-petition

and would effectively render HRR's motion moot. Code §§ 541(b)(2) and 362(b)(10). See also Town of Islip v. Northeastern Int'l Airways, Inc. (In re Northeastern Int'l Airways, Inc.), 56 B.R. 247, 249 (S.D.Fla. 1986)").

53. Indeed, many courts have held that a state court final eviction order is sufficient to terminate the Debtor's right to a premises and a continued holdover does not create a new property interest. In re Cohoes Indus. Terminal Inc. 70 B.R. 214 (S.D.N.Y. 1986) (automatic stay did not apply where Debtor's right to leased premises was terminated by court order pre-petition regardless of Debtor's unauthorized possession of premises); In re Darwin 22 B.R. 259 (E.D.N.Y. 1982); In re Liberty Lady Tavern, Corp. 94 B.R. 812 (S.D.N.Y. 1988) (automatic stay does not operate to enjoin actions respecting property in which the Debtor no longer has an interest at the time of the filing of the petition); But see,In re Richards Pontiac Inc. 6 B.R. 773 (E.D.N.Y. 1980) (Debtor may have some equitable right to possession even after a warrant of eviction has issued although "the exact nature of this property right is unclear").

54. Thus, in the instant case where there was never a lease or even a tenancy but merely and Occupancy Agreement which terminated before the filing of the petition, the Debtor's continued occupancy of the Property does not create an interest protected by the automatic stay.

55. Accordingly, this Court should find that the Debtor's has no interest in the Property and is not protected by the automatic stay as to Movant.

II

ASSUMING, ARGUENDO, THAT THE DEBTOR HAS SOME TYPE OF POSSESSORY/EQUITABLE INTEREST IN THE PREMISES, WHICH IT DOES NOT, THE COURT SHOULD GRANT RELIEF FROM THE AUTOMATIC STAY PURSUANT TO SECTIONS 362(D)(1) & (2) OF THE BANKRUPTCY CODE

56. Assuming, arguendo, that this Court should find that the Debtor's occupying the Property has created some type of equitable or possessory interest, Movant is, nevertheless, clearly entitled to relief from the stay under the standard stay relief provisions of Section 362 of the Bankruptcy Code.

57. Section 362(d)(1) of the Bankruptcy Code for "cause, including the lack of adequate protection of an interest in property." In that regard the Debtor's failure to make any post-petition insurance or electricity payments or the payments required to be paid to the Movant under the Occupancy Agreement is substantial cause for this Court to lift the stay with respect to whatever tenuous interest the Debtor may have in the Property. Certainly, Movant's interest in the Property is not being adequately protected by the Debtor. Indeed, the Property is at imminent serious risk of loss by virtue of the Debtor's failure to pay the carrying charges of the Property including, the mortgage, electricity and insurance.

58. Similarly, the Debtor's uncertain status as a corporation, failure to provide a tax ID number, failure to timely file schedules, provide a thirty day budget or its source of funds and the overwhelming evidence of administrative insolvency demonstrated by its total inability to pay its expenses pre- and post-petition, all constitute cause to lift the stay herein.

59. Similarly, under Section 362(d)(2) Movant would be entitled to relief since the Debtor's tenuous non-assignable interest has no value let alone equity. Nor could the Debtor seriously argue about its "prospects of reorganization" when it has not demonstrated the ability to pay its basic ongoing expenses.

60. Moreover, the Debtor's prospects with respect to the Property are inextricably intertwined with the Contract. To the extent that the Contract has terminated pre-petition by virtue of the Debtor's failure to close prior to September 27, 2004, and its failure to pay the agreed fee to extend the time, there is no Contract. The Debtor, thus, has no hope or prospects of any kind with respect to this Property.

61. Accordingly, it is obvious, that even if the automatic stay does apply to the Debtor's tenuous interest in the Property, it should be immediately lifted pursuant to Section 362(d)(1) & (d)(2) of the Bankruptcy Code.

62. Moreover, said relief should be granted, *in rem*, to prevent further abuse and further bankruptcy filings as to the Property.

III

ASSUMING, ARGUENDO, THAT THE DEBTOR HAS SOME TYPE OF ASSUMABLE LEASEHOLD INTEREST IN THE PROPERTY, WHICH IT CLEARLY DOES NOT, THE COURT SHOULD COMPEL THE DEBTOR TO IMMEDIATELY REJECT SUCH INTEREST PURSUANT TO SECTION 365 OF THE BANKRUPTCY CODE

63. Assuming, arguendo, that the Debtor has some type of assumable leasehold interest in the Premises, which it clearly does not, the Court should compel the Debtor to immediately reject such interest pursuant to Section 365 of the Bankruptcy Code. The Debtor's failure to make any post-petition payments for its occupancy of the Premises is sufficient cause to grant such relief.

64. In order to assume a lease a debtor must promptly cure all defaults and provide adequate assurance of future performance. Pursuant to Section 365(b)(1) of the Bankruptcy Code. This Debtor's history, both pre and post-petition, demonstrate beyond cavil that it has no ability to comply with either one of the above requirements.

65. In any event, as a matter of law, it is clear that the Debtor has no interest which it can assume or reject. Section 365(c)(3) of the Bankruptcy Code states clearly that where a lease

terminates pre-petition it cannot be assumed or assigned by the Debtor. Section 365(c)(3) provides as follows:

§ 365. Executory contracts and unexpired leases.

> (c) The trustee may not assume or assign an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--
>
> > (3) such lease is of non residential real property and has been terminated under applicable non-bankruptcy law prior to the order for relief

Thus, where, as here, the Lease has expired by its own terms pre-petition, the Debtor cannot assume or assign said interest.

66. The rationale of Section 365(c)(3), set forth above, is simply that where a lease has expired by its own terms or otherwise terminated pre-petition, there is nothing left to assume, assign or reject. <u>In re P&J Marketing, Inc.</u>, 142 B.R. 608 (Bankr. D.R.I. 1992) (bankruptcy Court's equitable powers did not confer upon it the authority to revive expired lease); <u>In re Seven Stars Restaurant, Inc</u>. 122 B.R. 213 (Bankr. S.D.N.Y. 1990) (debtor/tenant was not entitled to cure defaults and resurrect terminated lease); <u>In re Emilio Cavallini, Ltd.</u>, 112 B.R. 73 (Bankr. S.D.N.Y. 1990).

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67. Moreover, the Occupancy Agreement is not a lease at all but, at best, a licensing agreement which, in any event, is not governed by Section 365.

68. In summary, the Debtor has no assumable interest and, consequently, has no interest to reject, but even if it had an assumable interest, which it clearly does not, then the Debtor should be compelled to immediately reject such leasehold interest.

IV

THE DEBTOR SHOULD BE DIRECTED TO IMMEDIATELY SURRENDER THE PREMISES TO MOVANT PURSUANT TO SECTION 365 (D)(4) OF THE BANKRUPTCY CODE AND/OR SECTION 105 OF THE BANKRUPTCY CODE

69. In any event, regardless of whether the Debtor does or does not have some type of possessory or equitable interest in the Property, the Debtor should, nevertheless, be directed to immediately surrender the Property to Movant pursuant to section 365 (d)(4) of the Bankruptcy code and/or section 105 of the Bankruptcy Code. Section 365(d)(4) of the Bankruptcy Code provides as follows:

§ 365. Executory contracts and unexpired leases.

> (d)(4) Notwithstanding paragraphs (1) and (2) in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within **60 days** after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor. [Emphasis added.]

Thus, the plain language of the Code clearly mandates that upon a rejection of the lease the Debtor must "immediately" cede actual possession of the premises to the lessor.

70. By the language of this statute Congress has empowered the Bankruptcy Court to grant relief to lessors, above and beyond that given to garden-variety lift stay movants, who are merely permitted to proceed against the Debtor in State Court upon gaining relief from the stay. Another words, the Bankruptcy Court may order an immediate transfer of actual possession of the premises to the lessor, thus obviating the need for any further enforcement proceedings by the lessor in state court.

71. The reasoning behind this special form of relief is that Congress, sensitive to the costs and delays already incurred by lessors through the filing of the petition, wanted to spare the lessor the additional delay and expense of a state court eviction proceeding.

72. This reading of the statute is amplified in a case known as In re Elm Inn, Inc., 942 F.2d 630 (9th Cir. 1991) where, as here, the lessor sought an immediate turnover of the premises following a rejection of the lease. The Court was prepared to grant such relief and explained its decision as follows:

> There is, as the BAP explained, some disagreement among the courts over whether a lessor in the Andersons' position can, by motion, obtain a court order to require the trustee or debtor to surrender the leased property. *See In re Elm Inn, Inc.*, 105 Bankr. at 550. Some courts have held that the deemed rejection of a lease under section 365(d)(4) "merely places the creditor[-lessor] in a position to pursue

remedies under the state law of landlord and tenant to obtain possession of the premises." *In re Adams*, 65 Bankr. 646, 649 (Bankr. E.D. Pa. 1986)*; see also In re Re-Trad Corp.*, 59 Bankr. 251, 258 (Bankr. D. Minn. 1986) ("such relief is properly sought by complaint").

The majority and far more persuasive view, however, is that such an order is available to an entitled party. See, e.g., *In re U.S. Fax, Inc.*, 114 Bankr. 70, 73 (Bankr. E.D. Pa. 1990) (rejecting *Adams* and holding that "the language and legislative history of section **365(d)(4)** demonstrate that Congress did not intend for creditors to pursue state-law remedies and that requiring creditors to pursue such remedies would frustrate the statute's purpose"); *In re Chris-Kay Foods East, Inc.*, 118 Bankr. 70, 72 (Bankr. E.D. Mich. 1990) (granting surrender order and holding that " 365(d)(4) prevails over contrary state law"); *In re Damianopoulos*, 93 Bankr. 3, 6 (Bankr. N.D.N.Y. 1988) (granting surrender order and holding that when a lease is deemed rejected under section 365(d)(4) it is "no longer property of the [bankrupt] estate"); *In re O.P. Held, Inc.*, 77 Bankr. 388, 391 (Bankr. N.D.N.Y. 1987) (granting surrender order); *In re Hurst Lincoln-Mercury, Inc.*, 70 Bankr. 815, 817 (Bankr. S.D. Ohio 1987) (same).

As these courts have noted, the plain language and purpose of section **365(d)(4)**, the necessarily preemptive force of the Bankruptcy Code, and the broad equitable powers of bankruptcy judges all weigh in favor of granting a surrender order to a lessor who, under the terms of the provision, clearly deserves one. See 11 U.S.C. 105(a) (1988) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."). To the extent that they have addressed this issue at all, the courts of this circuit have agreed with this reasoning and have endorsed the majority view. *See In re Southwest Aircraft Servs., Inc.*, 53 Bankr. 805, 811 (Bankr. C.D. Cal. 1985) (granting surrender order), *aff'd*, 66 Bankr. 121 (Bankr. 9th Cir. 1986), *rev'd on other grounds*, 831 F.2d 848 (9th Cir. 1987), cert. denied, 487 U.S. 1206, 101 L. Ed. 2d 885, 108 S. Ct. 2848 (1988); *In re Gillis*, 92 Bankr. 461, 469 (Bankr. D. Haw. 1988) (approvingly citing *O.P. Held*). As a purely legal matter, therefore, the Andersons appear to be entitled to the order they seek. [Emphasis added.]

See also, In re Pudgie's Dev. of N.Y., 202 B.R. 832, 833 (Bankr. S.D.N.Y. 1996), [set forth more fully below] (the Court stated in dicta that it had "granted the landlords motion to reject the leases and ordered the Debtor's to turn over possession of all of the abandoned premises to the landlords forthwith"). In the case at bar, this Court too, should grant an immediate surrender to the Movant, who clearly deserves such an order. Every day that the Debtor remains in possession it is costing Movant substantial amounts of operating expenses and lost revenue. Moreover, the Movant cannot market the property to a legitimate purchaser as long as the Debtor asserts control over the Property.

73. It should be very clear to this Court that this Debtor is not an honest Debtor deserving of any latitude by this Court. Rather the Debtor has defrauded Movant from the outset, misrepresenting its ability to close the deal, milking the Property while stringing Movant along, and now commencing abusive litigation tactics and bogus sham allegations to keep the Property from Movant.

74. Moreover, such an order is appropriate under any theory of relief that the Court is prepared to grant here. Whether the Debtor has some type of bare possessory interest or has no interest whatsoever, it should nevertheless come within the purview of the "immediate surrender" language of Section 364(d)(4), and as set forth above. Either pursuant to section 362 or under Section 105 of the Code, or as a form of adequate protection under Section 361 of the Bankruptcy Code, it is well within this Court's jurisdiction to grant a surrender order to Movant.

75. Any other result would create the odd and unfair specter of a tenancy-at-sufferance, or at best tenancy-at-will, being treated more favorably by the Bankruptcy Court then a bonafide lessee. While a lessee would be forced to immediately turn over possession by the Bankruptcy Court under 365(d)(4), the a squatter would be able to freeload until evicted by a state court. Obviously such a result makes no sense. Section 105 of the Code, was designed to give Bankruptcy Courts a vehicle to prevent precisely this type of inequity and injustice.

76. Finally, even if this Court finds that under 362(b)(10) there is no automatic stay in effect at all, nevertheless, the Debtor, having essentially, utilized the Bankruptcy Court to shield itself from such eviction process, should not be allowed to be in a better position then a real lessee. Indeed in Elm, supra, the Court cited as supporting authority the case of Damianopoulos, supra, for the dual proposition that (a) a surrender order should be granted and that (b) when a lease is deemed rejected under section 365(d)(4) it is "no longer property of the [bankrupt] estate. Damianopoulos, supra. Clearly, a premises not being part of the estate is not a bar to the granting of a surrender order.

77. Accordingly, even if the Court finds that the Premises is not property of the estate, that is clearly not a jurisdictional obstacle to the granting of a surrender order and is well within the intent of Congress and this Court's broad powers under Section 105 of the Bankruptcy Code.

V

THE DEBTOR SHOULD BE COMPELLED TO PAY THE POST-PETITION PAYMENTS THAT HAVE ACCRUED UNDER THE OCCUPANCY AGREEMENT THAT HAVE ACCRUED TO DATE PURSUANT TO SECTION 365(D)(3) OF THE BANKRUPTCY CODE AND SECTIONS 503(B) AND 105 OF THE BANKRUPTCY CODE.

78. As set forth above the Debtor has failed to make any post-petition payments despite the fact that it is presently utilizing the Premises to conduct its business. While this admittedly not a lease situation it is nevertheless analogous to that of a lessee who under Section 365(d)(3) of the Code is clearly required to effectuate "timely performance" of all obligations pending assumption or rejection of the lease:

79. Section 365(d)(3) states in pertinent part as follows:

§ 365. Executory contracts and unexpired leases.

> (d)(3) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of non residential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.... [Emphasis added.]

Thus, the Debtor is required to make its agreed upon payments in an ongoing and timely fashion pending assumption or rejection of the lease.

80. Furthermore, in a recent Southern District decision, In re Pudgie's Dev. of N.Y., 202 B.R. 832, (Bankr. S.D.N.Y. 1996) (landlords were seeking immediate payment of post-petition rent on an abandoned premises where the lease had been rejected by order of the Court and turned over to the landlords) Judge Hardin, as a threshold matter, held that a lessor does not have to submit to the "benefit" or "actual and necessary" administrative expense test of Section 503(b)(1) but is simply entitled to the rent owed.

81. Moreover, and more significantly, Judge Hardin held that the landlord was entitled to immediate payment of the post-petition rent ahead of all other administrative expense claims. In explaining the rationale for this the Court stated as follows

> ...The purpose of Congress to treat post-petition rent as section 363c operating expenses and to prefer landlords over administrative creditors is perfectly clear on the face of the statute. Section 365 undoubtedly does grant preferred treatment to parties to executory contracts, who may be *compelled* to continue performing post-petition whereas virtually every other category of administrative creditor who extends credit or provides goods or services post-petition does so voluntarily with knowledge of the degree of risk of administrative insolvency. A landlord in particular is subjected to compulsory continued performance [post-petition by the automatic stay and the provisions of 365(b)(1) and 365(d)(3) unambiguously grant priority status to this class of involuntary claimant whether the lease is assumed or

> rejected. The reasoning of Judge Wedoff in *In re Telesphere* 148 B.R. at 528-32 is most illuminating. Judge Wedoff explains that claims under section 365(d)(3) should not be labeled "administrative expenses. Instead Judge Wedoff continues, "[g]iven this structure of the code the language of section 365(d)(3) should be read as requiring that rental payments be made according to the procedure for operational payments under section 363(c)(1)." *Id* at 531.
>
> Accordingly this court will follow *In re Telesphere* and the decisions which apply section 365(d)(3) as it is written. In addition this Court will invoke section 105(a) of the code to the extent necessary if at all for authority to provide a remedy to the landlords in order to carry out the provisions of title 11. The landlords of the abandoned premises are entitled to immediate payment of all post-petition rent due and owing on the abandoned premises through the dates of the relinquishment of the respective abandoned premises to the landlord.

Thus, under Pudgies, supra, it is clear that Movant is entitled to an order for the immediate payment of all post-petition rent.

82. Significantly, in Pudgies, supra, the Court, ordered immediate payment pursuant to the statute, despite the fact that the premises were abandoned at all times in question. Here, where the Debtor has been at all times, and presently continues to utilize the Property to run its business, and the actual and necessary benefit to the estate is beyond question, certainly the Debtor should be required to make immediate payment of post-petition occupancy payments and operating expenses.

83. Such payment must be ordered whether or not the Court grants the motion to lift the stay and/or the immediate surrender of the Premises to the Movant. Even if the Debtor is ordered

to leave it should not be allowed to abuse the process by getting a free windfall during the period it has remained under the protection of Chapter 11 but rather a judgement should be entered against the Debtor and its principal, Jack Lefkowitz, for all of the post-petition payments owed.

84. Moreover, even if the Court finds for the Movant under an alternative theory of relief, i.e. under Section 362 a lifting of the stay or holding that the stay is inapplicable, nevertheless the rationale of Pudgies, supra, that the protection of the lessor as an unwilling participant in this bankruptcy proceeding is applicable here as well. This Court, therefore, should invoke its broad powers under Section 105, as the Court did in Pudgies, supra, to protect Movant from being unwillingly victimized by the Debtor, and within the intent of Congress under Section 365. Alternatively, such immediate payment should be authorized as adequate protection for Movant's interest under Section 362 and 361 of the Code.

85. Additionally, and as set forth above, any other finding, would mean that the Debtor has actually profited from its status as squatter and is in a better position than would be a bonafide lessee. This Court, obviously, should not countenance such an inequitable result. In addition to the lift stay relief the case should be dismissed with prejudice.

CONCLUSION

The essential relief Movant seeks is not complicated. It wants back the Premises so that it can relet them to a paying tenant or sell the Property to a legitimate purchaser. It also wants immediate payment of its post-petition expenses and occupancy payments which it has been compelled to involuntarily contribute to this bankruptcy proceeding. In light of the uncertain nature of the Debtor's interest in the Premises, Movant has proposed a variety of theories of relief pursuant to which this Court may grant it the relief it seeks.

WHEREFORE, Movant respectfully requests that the Court grant the relief requested and such other further and different relief as may be just and proper.

Dated: New York, New York
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