

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

Return date: March 25, 2008  
10:00 a.m.

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In re

Chapter 11

***KOLLEL MATEH EFRAIM, LLC, a/k/a  
MATEH EPHRAIM LLC, a/k/a  
KOLEL MATEH EFRAIM***

***Case No. 04-16410 (SMB)***

Debtor.  
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**HELEN MAY HOLDING LLC'S OBJECTION TO THE CHAPTER 7 TRUSTEE'S  
MOTION FOR ORDERS PURSUANT TO 11 U.S.C. §§ 105(a) AND 363 AND FED. R.  
BANKR.P.2002, 6004, AND 9014 APPROVING BIDDING PROCEDURES AND SALE  
AND GRANTING RELATED RELIEF**

Helen May Holdings, LLC ("Helen-May"), the fee owner and creditor/licensor herein, by its attorneys, the Law Offices of David Carlebach, Esq., as and for its objection to the Chapter 7 Trustee's (the "Trustee") Motion for Orders Pursuant to 11 U.S.C. §§ 105(a) and 363 and Fed. R. Bankr.P. 2002, 6004, and 9014 Approving Bidding Procedures and Sale and Granting Related Relief (the "Motion"), respectfully represents as follows:

**PRELIMINARY STATEMENT**

1. Since the advent of the appointment of the Chapter 7 Trustee, Helen-May has sought to cooperate with the Trustee to assist in the orderly liquidation of this estate. Significantly, Helen-May has consented to a number of extensions of the Trustee's time to assume or reject the Contract. This was done in order to avoid further litigation and mindful of the fact that the Property was the subject of a foreclosure proceeding. As represented to the Court at the hearing on the Trustee's Motion to Extend Time in December of 2007, the parties were working together seeking to obtain

a purchaser for the Property. There were also discussions about possible consensual resolutions of the legal issues between the Trustee and Helen-May with respect to the Contract.

2. The Trustee, has now, out of the blue and without consulting Helen-May or obtaining Court approval, announced to the world, through the instant motion as well as by the web site of its auctioneer G.E.M. Auction Corp. that an auction of the Property and/or its purported contract rights will take place on April 1, 2008, at the Property, for the purchase price of \$1.4 million (plus \$150,000.00 for the Trustee).

3. The Motion as well as the auction announcement are patently improper for a number of reasons. Initially, the Motion fails to disclose the pendency of a 2004 Adversary Proceeding (Adv. Pro. No. 04-04545) (the "2004 Adversary Proceeding") where the question of whether the Contract still exists is at issue and was, indeed, the subject of a motion for Summary Judgement by Helen-May. Helen-May contends in the 2004 Adversary Proceeding that the Contract was terminated pre-petition by, *inter alia*, the Debtor's failure to cure upon notice. Helen-May also obtained a Lifting of the Stay as to the Debtor and served it another notice to cure. Thus, under any scenario the Contract rights have been terminated. How can the Trustee purport to assume and assign a contract before litigating to a successful conclusion, the issue of whether that Contract exists?

4. Moreover, even assuming, arguendo, that the Contract exists, this Court ruled unequivocally on July 20, 2005, that the cure amount for the Debtor to assume the Contract would be \$1,500.00 per day after September 27, 2004, the closing date, over and above the Contract price.

That constitutes *stare decisis* on that issue. That amount today is in excess of \$3 million. How can the Trustee seek to assume the contract at \$1.4 million dollars without curing the defaults?

5. Finally, in any event, the Trustee has put the cart before the horse by advertising a 363 Auction sale, solely upon the making of the Motion for approval of the proposed sale procedures, but prior to obtaining that approval. In doing so the Trustee has effectively sabotaged Helen-May's efforts to market its Property at its actual current value, its relationships with its brokers, which were all just beginning to bear fruit as the spring season begins.

6. Accordingly, the Court should deny the Trustee's Motion in its entirety, and for the reasons set forth more fully below.

### **STATEMENT OF FACTS**

7. The events surrounding the Contract, the commencement of this bankruptcy proceeding and throughout this case have been extensively set forth in several of Helen-May's prior submissions. Helen-May respectfully refers the Court to its Memorandum of Law in Support of its Motion for Summary Judgment in the 2004 Adversary Proceeding, Dated August 3, 2007 (the "Memorandum of Law"), (Exhibit A annexed hereto) for a detailed Statement of Facts, which Statement of Facts is fully incorporated herein by reference and made a part hereof. In addition, all defined terms herein shall have the same meaning as those in the Memorandum of Law.

## ARGUMENT

### I

**THIS COURT HAS RULED, AT THE HEARING ON THE TRUSTEE'S MOTION TO EXTEND ITS TIME TO ASSUME OR REJECT THE CONTRACT, THAT THE TRUSTEE CANNOT EXTEND HIS TIME TO ASSUME OR REJECT, LET ALONE ACTUALLY ASSUME THE CONTRACT, PRIOR TO THE DETERMINATION OF WHETHER THE CONTRACT EXISTS**

8. In or about December of 2007, the Trustee made a motion to Extend its time to assume or reject the Contract. Motion to Extend (without exhibits), Exhibit B. Helen May Objected to that extension. Exhibit C. One of the bases for the Objection was the fact that there was no contract in existence. The Court on the record essentially sustained that objection and said that it could not, as a matter of law, grant the motion without first making a finding that the Contract exists. Thus, even for a mere extension the Court has already advised the Trustee of the law, that the Trustee cannot get such an extension without a prior determination of this threshold issue as to the existence of the Contract rights.

9. In this Motion , the Trustee has gone even further, and takes the ludicrous position of seeking to actually assume the Contract before obtaining this determination. This is clearly inappropriate based on this Court's prior rulings as well as the dictates of simple logic that you cannot put the cart before the horse.

## II

### **HELEN-MAY PRESERVED ITS RIGHTS WHILE ACCOMMODATING THE TRUSTEE'S REQUEST FOR ADJOURNMENTS, AND THUS, THE TRUSTEE SHOULD NOT BE ALLOWED TO TRAMPLE ON THOSE RIGHTS BY THE INSTANT MOTION**

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10. Indeed, the only reason the Trustee was allowed to proceed without this determination was because of a Stipulation on the Record entered into by the parties at that hearing (the "Stipulation on the Record"). Both the Stipulation on the Record and subsequent adjournment letters concerning the Motion to Extend the Time for the Trustee to Assume or Reject the Contract specifically provides for the preservation of Helen-May's rights regarding the Contract and the Property. Exhibit D.

11. In the Motion, the Trustee, disingenuously, ignores Helen-May's rights and rides roughshod over those rights as if they do not exist. This is a clear violation of the terms of that Stipulation and should be grounds for that Stipulation being vitiated and the Contract being deemed rejected, as a matter of law.

12. Alternatively, the instant Motion should be denied in its entirety, and Helen-May's rights concerning the Contract should be determined by the Court. As set forth more fully below, Helen-May's rights are already before the Court in the 2004 Adversary Proceeding. See, Point III, infra. Thus, these issues must be litigated to conclusion before this Motion can be considered.

### III

#### **THE MOTION IS PRE-MATURE SINCE THERE ARE SEVERAL CRUCIAL ISSUES PENDING IN THE 2004 ADVERSARY PROCEEDING REGARDING THE DEBTOR'S AND HELEN-MAY'S CONTRACT RIGHTS**

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13. The Motion should be denied in its entirety since, as stated, it ignores the crucial contract rights issues raised in the pending 2004 Adversary Proceeding.

14. Therein, Helen-May raised a number of counterclaims concerning the Debtor's breach of the Contract. See, Complaint and Answer in 2004 Adversary Proceeding, Exhibits E and F.

15. In its Summary Judgment Motion, dated August 3, 2007, Helen-May sought summary judgment, for, *inter alia*, whether the Contract terminated pre-petition and its damages for the Debtor's breach of the Occupancy Agreement. See, Exhibit A. The Court dismissed the Debtor's fraud in the inducement and mutual mistake causes of action, and denied the remainder of the motion on procedural grounds. See, Summary Judgment Order, dated October 24, 2007, Exhibit G. Thus, the issue of whether the Debtor even has any Contract rights to assign was never decided, and the Trustee's Motion, attempting to do an end-run around this issue, should be denied.<sup>1</sup>

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<sup>1</sup> The instant Motion also ignores the Removed Action (Adv. Pro. No. 07-01937) which mirrors the allegations in the 2004 Adversary Proceeding, and the Declaratory Judgment Action (Adv. Pro. No. 07-02052), which raises the issue of the identity of the Debtor and possible alter-ego liability for the similarly named religious corporation. Thus, the Trustee's attempt to assign the purchase rights of the Contract, which presupposes that the LLC is the Debtor and the assignee, completely ignores the crucial issues raised and still pending in the Declaratory Judgment Action.

16. Notably, the summary judgment motion raised the issue of the Ten Day Notice to Quit and Vacate (See, Exhibit H) served on the Debtor after the Court lifted the stay (See, Exhibit I). The Debtor failed to cure within the time allowed, and thus, its contract rights terminated. This issue, which the Trustee's Motion ignores, would be decided in Helen-May's favor through a procedurally proper summary judgment motion.

17. Accordingly, the Trustee's Motion should be denied in light of the numerous pivotal issues pending in the 2004 Adversary Proceeding.

#### IV

**THE TRUSTEE'S MOTION SHOULD BE DENIED SINCE THE PROPOSED "ADEQUATE ASSURANCES" IS ONLY FOR NON-MONETARY DEFAULTS, WHEN IN REALITY, THERE EXISTS SIGNIFICANT MONETARY DEFAULTS WHICH NEED TO BE CURED PRIOR TO ASSUMPTION**

18. The Trustee's argument concerning adequate assurances (Motion, at 9, ¶ 28) is ludicrous. The Trustee only provides for adequate assurances of "non-monetary defaults" of the "Prepetition Purchase Agreement", which it describes as merely the Contract and the Assignment. Motion, Exhibit E. This position completely ignores this Court's July 20, 2005 Ruling, based on the testimony of Jack Lefkowitz, the Debtor's principal, concerning the amount needed for the Debtor to cure and assume the Contract. To illustrate, the Court ruled that in order to cure, the Debtor will have to pay Helen-May \$1,500.00 a day for all the time that it occupied the Property but did not close, in addition to \$40,500.00 under the Conditional Extension Agreement. See, Exhibit J, at 36, ln. 5-10.

19. Thus, it has long been established as the law of the case that, in order to assume the Contract, the Debtor would have to pay Helen-May \$1,500.00 a day from November 29, 2004 until the Debtor vacated the Property. Since the Debtor vacated the Property on November 29, 2007, the cure amount is \$1,642,500.00 for the \$1,500.00 a day obligation, and the additional \$40,500.00. The Trustee providing “adequate assurances” for “non-monetary defaults” is as nonsensical as it is meaningless.

20. The Trustee further ignores any and all of Helen-May’s rights under the Occupancy Agreement and the Conditional Extension Agreement, and assumes, incorrectly, that all of the Debtor’s/Purchasers rights are contained solely in the Contract. Motion, at 9, ¶9, ft. 1. This position is specious, since the Occupancy Agreement is a modification of the Contract. This is seen by the Occupancy Agreement modifying key terms of the Contract, including the closing date, an increase in the downpayment, and, significantly, the provision “Any default by Purchaser under the Occupancy Agreement shall represent a default under the Contract and shall terminate the rights of the Purchaser to occupy the Premises.” See, Exhibit K. The Conditional Extension Agreement also provides, in its very first paragraph that it is modifying the Occupancy Agreement, thus also modifying the Contract. See, Exhibit L.

21. Further demonstrating the speciousness of the Trustee’s position, the Debtor, in the 2004 Adversary Proceeding, has also stated that these letter agreements are a modification of the

Contract. The Debtor did so at the October 11, 2007 Hearing, when arguing that it had standing to assert the fraud claims. The Debtor's counsel stated: "We believe we have standing because the contract was modified by those other agreements." Exhibit M, at 27, ln. 1-2. The "other agreements" Mr. Krinsky was referring to are the aforementioned letter agreements. Furthermore, this position was clearly adopted in the Debtor's Opposition to Helen-May's Summary Judgment Motion. See, Exhibit N, Point VI(a) at 22. ("Plaintiff has standing to assert the fraud claims since it was a party to the occupancy and extension agreements which modified the contract." *Emphasis Added*).

22. Thus, the doctrine of judicial estoppel precludes the Trustee from now asserting that the subsequent letter agreements were entirely separate and distinct from the Contract based upon the doctrine of judicial estoppel. In re Adelpia Communications Corporation, et al., 367 B.R. 84, 93 (S.D.N.Y. 2007); Urban v. Hurley, 261 B.R. 587, 593 (Bkrtcy. S.D.N.Y. 2001); Wechsler v. Hunt Health Systems, Ltd., et al., 1999 WL 397751, at \* 9-10 (S.D.N.Y. 1999).

23. Accordingly, the Trustee's position regarding Helen-May's rights being solely contained in the Contract, and not being entitled to the cure amount derived from the Occupancy Agreement and Conditional Extension Agreement, is specious. Therefore, the Trustee's Motion should be denied.

**THE TRUSTEE'S MOTION SHOULD BE DENIED SINCE THE PROPOSED BIDDING PROCEDURES MISLEAD PROSPECTIVE BIDDERS CONCERNING THE AMOUNT NEEDED TO PURCHASE THE PROPERTY**

24. Moreover, the Trustee's proposed bidding procedures do not provide adequate disclosure to the prospective bidders. Since, as per the Court's July 20, 2005 Ruling, there is a cure amount of \$1,642,500.00 for the \$1,500.00 a day obligation, plus the addition \$40,500.00, the prospective bidders have no notice of the real purchase price. Thus, even though the Contract states a purchase price of \$1.4, the actual amount needed to cure, before the contract could be assumed, is the purchase price listed in the contract and \$1,683,000.00, totaling \$3,083,000.00. From the Trustee's proposed Notice, a prospective bidder would think that the minimum bid for the contract rights is \$1.4 million plus \$150,000.00 for the Trustee, when, in actuality, the amount needed to assume and cure more than doubles these figures.

25. On that same note, the proposed notice fails to mention that the very question of whether the Debtor has any contract rights to assign is currently being litigated in the 2004 Adversary Proceeding.

26. Thus, the Trustee's Motion should be denied since the proposed notice misleads prospective bidders as to the actual purchase price, and as to the very existence of any contract rights to assign.

**THE TRUSTEE'S ADVERTISING OF THE PROPOSED AUCTION, WITHOUT COURT APPROVAL, HAS VITIATED ALL OF HELEN-MAY'S EFFORTS AND PROGRESS IN OBTAINING PROSPECTIVE PURCHASERS**

27. Without a court order, the Trustee had its broker, G.E.M. Auction Corp., begin advertising the auction on its website. As a result, as evidenced by the affirmation of Daniel J. Scher, Esq., annexed hereto as Exhibit O, any and all leads Helen-May had for offers to sell the Property went dead cold. The total obliteration of Helen-May's efforts can be directly traced to auction advertisement of the Trustee. The mere fact the Trustee represented that he was auctioning the Property, in and of itself completely subverted Helen-May's position as owner of the Property.

28. Moreover, and more importantly, the Trustee's egregious misrepresentation of the price of the Property, by failing to include the cure amount in addition to the \$1.4 million, was fatal to Helen-May's efforts. Logically, when the prospective purchasers saw the \$1.4 Million price posted by G.E.M., any and all interest in dealing with Helen-May, which was seeking a price incorporating the cure amount, stopped.

29. The Trustee now has the audacity to seek the Court's blessings to trample on Helen-May's rights by seeking approval of the \$1.4 million purchase price, disregarding the need to first cure the Debtor's default.

30. Helen-May submits that such sabotage disguised under color of law through a Motion and retaining an auctioneer should not be countenanced by the Court, and the Trustee's Motion should be denied in its entirety.

**CONCLUSION**

31. For the foregoing reasons, the Trustee's Motion should be denied in its entirety.

Dated: March 20, 2008  
New York, New York

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