

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re:) Case No. 10-60702
Schwab Industries, et al.) (Jointly Administered)
Debtors) Judge Russ Kendig
)
) Chapter 11

**MOTION OF QUICKEN LOANS ARENA PURSUANT TO 11 U.S.C. § 365 FOR AN
ORDER COMPELLING THE ASSUMPTION OR REJECTION OF A SUITE LICENSE
AGREEMENT, OR IN THE ALTERNATIVE GRANTING MOVANT LEAVE TO
MITIGATE ITS DAMAGES**

Cavaliers Operating Company, LLC d/b/a Quicken Loans Arena (“Quicken”) files this Motion for an Order Compelling Schwab Industries, Inc. (“Debtor” or “Schwab”) to Assume or Reject a Certain Suite License Agreement or in the Alternative Granting Movant Leave to Mitigate its Damages, and respectfully represents as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§157 and 1334. This is a core proceeding pursuant to 28 U.S.C. §157(b). The relief requested is based upon 11 U.S.C. §§365(d)(2) and other sections of the Bankruptcy Reform Act of 1978, as amended (the “Bankruptcy Code”), and pursuant to Rules 6006(b), 9014, and other rules of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). The Court has jurisdiction over the matters raised in this Motion.

2. Venue is proper pursuant to 28 U.S.C. §§1408 and 1409.

II. BACKGROUND

3. The Bankruptcy Cases. On February 28, 2010 (the “Petition Date”), the Debtor and its affiliated chapter 11 debtors and debtors-in-possession (“Debtors”) filed petitions

for relief under Chapter 11 of the Bankruptcy Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division.

4. Since the Petition Date, the Debtors have managed their own affairs and conducted their business as debtors-in-possession, pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee has been appointed in this bankruptcy case.

5. On March 9, 2010, the United States Trustee appointed an official committee of unsecured creditors in this case pursuant to section 1102 of the Bankruptcy Code.

6. The License Agreement. On or about October 6, 1993, Schwab entered into a Suite License Agreement (Founders’ Program) for Gund Arena Suite 233 (the “License”) by and between Cavs/Gund Arena Company dba Cavaliers/Gund Arena as Licensor and Schwab as Licensee. Quicken is the successor-in-interest by merger to the Licensor. Under the License and subject to the terms thereof, Schwab has the license to use Suite 233 at Quicken Loans Arena, situated in downtown Cleveland, Ohio.

7. On or about August 30, 2004, Schwab and Licensor entered into an Extension Amendment to Suite License Agreement (the “Extension Agreement”). A copy of the License Agreement, together with the Extension Agreement, is attached hereto as **Exhibit A**.

8. Pursuant to the Extension Agreement, the License expires on September 30, 2011.

9. Prior to the Petition Date, Schwab was in default of the License. Quicken advised Schwab in writing that Schwab was in default, prior to the Petition Date. Schwab has failed to pay the License Fees due under the License for over a year prior to the Petition Date. As of the Petition Date, Schwab owes nearly \$300,000 in past due License Fees. In addition, the License requires Schwab to purchase tickets for National Basketball Association playoff games.

It is highly unlikely that Schwab will be authorized to pay for these tickets, thus increasing Quicken's damages.

10. An additional installment under the License came due on March 1, 2010. That installment amount is approximately \$139,200.00. Thus, as of the date of this Motion, Schwab's cure amount under the License is well over \$400,000.00.

11. Schwab's failure to pay any installment of the License Fees within five (5) days of the due date is an Event of Default under the License. Pursuant to § 18.2 (b) of the License, Quicken has the right to deny Schwab admission to Quicken Loans Arena and to deny Schwab any use of Suite 233.

12. Quicken desires to find other licensees for Suite 233 prior to the National Basketball Association playoffs, in an effort to mitigate its damages under the License. Alternatively, if Schwab wishes to retain the License, it is vital to Quicken that Schwab immediately cure its defaults under the License.

III. RELIEF REQUESTED

13. Quicken requests that this Court enter an order, pursuant to section 365 of the Bankruptcy Code, directing the Debtor to decide immediately whether to assume or reject the License. Any temporary or interim stay of the requested order should be waived by the Court in order to allow Quicken to mitigate its damages.

IV. BASIS FOR RELIEF

14. Section 365 of the Bankruptcy Code authorizes a trustee or debtor-in-possession to assume, assume and assign or reject the debtor's executory contracts and unexpired leases subject to the approval of the Court.

15. Section 365(d)(2) of the Bankruptcy Code provides in relevant part as follows:

In a case under Chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract . . . of the debtor at any time before the confirmation of the plan, but the court, on request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract.

11 U.S.C. § 365(d)(2). Accordingly, section 365(d)(2) provides that the debtor may wait until plan confirmation to determine whether to assume or reject an executory contract, but that the non-debtor party to the contract may request an order compelling the debtor to assume or reject the contract by an earlier time.

16. Section 365(d)(2) allows the debtor a reasonable time within which to determine whether to assume or reject an executory contract, but the debtor's time period is not without limits. *In re Adelpia Communications Corp.*, 291 B.R. 283, 292 (Bankr. S.D.N.Y. 2003) (citations omitted). Courts interpreting Section 365(d)(2) have applied a balancing test to determine the appropriate limitation on the deadline for the debtor to make its determination. Courts have utilized numerous factors, including: (1) the nature of the interests at stake; (2) the balance of hurt to the litigants; (3) the good to be achieved; (4) the safeguards afforded to the litigants; (5) the damages that the non-debtor will suffer beyond the compensation available under the Bankruptcy Code; and (6) the importance of the contract to the debtor's business and reorganization. *Adelpia*, 291 B.R. at 293 (citations omitted).

17. Applying these factors to the License, factors (1), (2), (5), and (6) favor setting an early date to assume or reject the License.

18. Nature of Interests at Stake. The License is not a vital asset of the Debtor's bankruptcy estate. The Debtor's conduct over the last year demonstrates this fact. As its

economic circumstances have worsened, the Debtor has failed to make the payments necessary to retain its rights under the License. Nor is it likely that any third party will want to assume the cure costs required to assume the License, since other suites are available with no cure costs. As Licensor, Quicken has an immediate and direct financial interest in assuring that the suite is filled at the earliest possible date.

19. Balance of Harm. Quicken will be irreparably and immediately damaged if the Debtor continues to control the License – particularly without paying the License Fees due post petition. The Debtor’s budgets submitted to this court do not contemplate such post-petition payments. Under these circumstances, the balance of harm weighs in favor of Quicken.

20. Uncompensated Harm. As set forth, Quicken will suffer significant lost income if the Debtor does not assume the License promptly. This harm cannot reasonably be expected to be compensated if the Debtor eventually rejects the License and leaves Quicken with a general unsecured claim. It is highly unlikely that the Debtor will propose a plan that pays all unsecured creditors in full. An early order compelling assumption or rejection, on the other hand, will have little or no impact on the Debtor’s estate, since the cure costs overwhelm any value to the estate in retaining the License.

21. Importance to the Debtor’s Estate. The License has little or no value to the Debtor’s estate. If the Debtor intends to maintain the License, it will have to pay over \$250,000 in License Fees in the next few months. This cost is disproportionate to any benefit to the estate in maintaining the License. The License has no value to the estate, or at best has a value that pales in comparison to the maintenance and cure costs.

22. For all of the foregoing reasons, the relief requested in the Motion is warranted and appropriate and should be approved pursuant to sections 365 and 362 of the Bankruptcy Code.

V. ALTERNATIVE RELIEF - MITIGATION

23. Alternatively, Quicken seeks an order of this Court permitting Quicken the right to find other licensees of the Suite during the upcoming National Basketball Association playoffs.

24. This relief is consistent with case law under § 365, which recognizes that even rejection of an executory contract does not terminate the contract or the rights of the parties to that contract. Section 365(g) of the Bankruptcy Code provides that rejection of an executory contract operates as a breach of the contract, but does not affect the parties' substantive rights under the contract. Pending the decision to assume or reject, the parties must abide by the terms of the contract. *See, e.g., Palace Quality Services Industries, Inc.*, 283 B.R. 868 (Bankr. E.D. Mich. 2002) (“[N]one of [the provisions of § 365 permit the trustee to ignore the terms of an executory contract ...during the post-petition interval when she is deciding whether to assume or reject it.”)

25. Quicken has the right under the License Agreement to exclude Schwab's access to Suite 233, and Quicken has exercised that right prior to the Petition Date. Quicken also has the right (and likely the obligation) under common law to mitigate its damages by finding other licensees for that suite. Quicken seeks an order of this Court authorizing it to do so.

VI. REQUEST FOR HEARING

26. Quicken requests a hearing on its Motion on this Court's next Omnibus Hearing Date – April 15, 2010.

VII. NOTICE

27. Pursuant to Federal Rules of Bankruptcy Procedure and Local Rules, notice of this Motion has been given to all parties listed on the attached certificate of service. Quicken submits that no other or further notice need be provided.

VIII. CONCLUSION

WHEREFORE, Quicken respectfully requests that the Court enter an order which:

1. Requires the Debtor to assume or reject the License immediately;
2. Grants Quicken the immediate right to enter into negotiations with potential sublicensees prior to Debtor’s assumption or rejection of the License;
3. Waives any applicable stay of the Court’s order; and
4. Grants such other and further relief to Quicken as the Court may deem just and proper.

Respectfully submitted,

/s/ Jeffrey Baddeley
Jeffrey Baddeley (0013900)
Ulmer & Berne LLP
1660 West 2nd Street, Suite 1100
Cleveland, Ohio 44113
Telephone: 216.583.7036
Fax: 216.583.77037
jbaddeley@ulmer.com

Counsel for Quicken Loans Arena

CERTIFICATE OF SERVICE

Copies of the foregoing Motion of Quicken Loans Arena Pursuant to 11 U.S.C. § 365 for an Order Compelling the Assumption or Rejection of A Suite License Agreement, or in the Alternative Granting Movant the Right to Mitigate its Damages were sent to the following parties in the manner noted below this ____ day of April, 2010:

Court Electronic Mail Notice

- David D Black dblack@cdf.com, reeccee@yahoo.com
- Wanda Borges borgeslawfirm@aol.com
- Kate M Bradley kbradley@brouse.com, tpalcic@brouse.com;mmiller@brouse.com
- Carrie M Brosius cmbrosius@vorys.com, mborr@vorys.com
- Beth A Buchanan bbuchanan@fbtlaw.com, ahammerle@fbtlaw.com
- Jon Chatalian chatalian.jon@pbgc.gov, efile@pbgc.gov
- D. Elaine Conway econway@jw.com, tdenton@jw.com
- Brian G Dattilo Brian@TSOhiolaw.com
- Daniel A DeMarco dademarco@hahnlaw.com, hlpcr@hahnlaw.com
- James W. Ehrman jwe@kjk.com, rlh@kjk.com;newpleadings@gmail.com
- David G. Finley david@dfinleylaw.com, denise@dfinleylaw.com,matthew@dfinleylaw.com,pat@dfinleylaw.com
- Patricia B Fugee pfugee@ralaw.com, tburgin@ralaw.com,cbaker@ralaw.com
- Emily S Gottlieb emily.gottlieb@gardencitygroup.com, jeffrey.miller@gardencitygroup.com,elizabeth.vrato@gardencitygroup.com,heather.montgomery@gardencitygroup.com,PACERTeam@gardencitygroup.com
- Aaron L. Hammer ahammer@freebornpeters.com, bkdocketing@freebornpeters.com
- Vaughn A Hoblet hoblet@marshall-melhorn.com, bartoe@marshall-melhorn.com
- Stuart L. Larsen sllarsen@day-ketterer.com, mac@day-ketterer.com
- Alan R Lepene alan.lepene@thompsonhine.com
- Douglas L Lutz dlutz@fbtlaw.com, ahammerle@fbtlaw.com
- Marc Merklin mmerklin@brouse.com, tpalcic@brouse.com
- Lawrence E Oscar leoscar@hahnlaw.com, hlpcr@hahnlaw.com
- Mark E Owens marko@sonkinkoberna.com
- Christopher W Peer cpeer@hahnlaw.com, hlpcr@hahnlaw.com
- Teri G Rasmussen trasmussen@plunkettcooney.com, etopolosky@plunkettcooney.com
- Diana M Thimmig dthimmig@ralaw.com, lrobinson@ralaw.com;cwoodruff@ralaw.com;jsharpes@ralaw.com
- Lawrence E Tofel letofel@tofellow.com, jworden@tofellow.com;mallison@tofellow.com
- United States Trustee (Registered address)@usdoj.gov
- Curtis L. Tuggle curtis.tuggle@thompsonhine.com

Manual E-mail Notice List

- Louis Amato - Louisa@louamato.com
- David Cesar - dcesar@parkland.com
- David R. Exley - dexley@schwab-ind.com
- Maria D. Giannirakis - Maria.d.giannirakis@usdoj.gov
- Laurence V. Goddard - lgoddard@parkland.com
- William N. Howard - whoward@freebornpeters.com
- Richard S. Lauter - rlauter@freebornpeters.com
- David L. Moreland - dmoreland@schwab-ind.com

Regular U.S. Mail, Postage Prepaid

Brouse McDowell
388 S. Main Street Suite 500
Akron, OH 44311

Ken Burton
Manatee County Tax Collector
PO Box 25300
Bradenton, FL 34206-5300

/s/ Jeffrey Baddeley
Jeffrey Baddeley (0013900)
Ulmer & Berne LLP
Counsel for Quicken Loans Arena