

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

THQ INC., *et al.*,

Debtors.

Chapter 11

Case No. 12-13398 (MFW)

Jointly Administered

Hearing Date: February 19, 2013 at 9:30 a.m. (ET)

Objection Deadline: February 12, 2013 at 4:00 p.m. (ET)

Re: Docket No. 294

OBJECTION OF CHURCH STREET SQUARE, LLC TO THQ INC.'S SECOND MOTION FOR ORDER, PURSUANT TO BANKRUPTCY CODE SECTIONS 105(a), 365(a) AND 554(a) AND BANKRUPTCY RULES 6006 AND 6007, AUTHORIZING THQ INC. TO (I) REJECT CERTAIN UNEXPIRED NON-RESIDENTIAL REAL PROPERTY LEASES, EFFECTIVE AS OF JANUARY 31, 2013, AND (II) ABANDON ANY PROPERTY THAT REMAINS ON THE PREMISES COVERED BY THESE LEASES

Church Street Square, LLC ("CSS"), landlord of a portion of the third floor of certain real property commonly known as Church Street Square and by both of the following street addresses: 125 West Church Street, Champaign, Illinois 61820 and 206 North Randolph Street, Champaign, Illinois 61820 (the "Premises") by and through its undersigned counsel, hereby files this objection (the "Objection") to the motion (the "Motion") of debtor THQ Inc. ("Debtor" or "THQI") for an Order, pursuant to sections 105(a), 365(a) and 554(a) of title 11 of the United States Code (the "Bankruptcy Code") and Rules 6006 and 6007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), authorizing THQI to (i) reject certain unexpired non-residential real property leases, including a lease between CSS and THQI and a sublease between THQI and 004 Technologies USA Inc. ("004") relating to the Premises, that THQI has determined are no longer necessary or useful to its estate, effective as of January 31, 2013 (the "Rejection Date"), and (ii) abandon any personal property of THQI that remains on the

Premises as of the Rejection Date [Docket No. 294]. In support of its Objection, CSS respectfully represents as follows:

PRELIMINARY STATEMENT

1. CSS is not surprised by, nor does it oppose, the Debtor's request to reject the Lease. The case law is clear as to the low standard required for a debtor to successfully reject a lease or an executory contract. Rather, CSS files this Objection because 004, an additional lessee under the Lease (as the term is defined below) and a party to the Sublease (as that term is defined below) between 004 and THQI, to date, has failed to surrender possession of the Premises to CSS and CSS, therefore, objects to the attempt to reject the Lease as of January 31, 2013. THQI's attempt to shift the risk associated with obtaining legal possession of the Premises from 004 to CSS is improper, particularly considering that THQI recently provided written notice of termination of the Sublease to 004 so that 004 is not required to vacate until May 15, 2013. Providing such notice adversely affected CSS's rights under the Lease. THQI has enjoyed – and continues to enjoy – the rights and benefits of the Sublease, and based on upon this Court's recent decision of *In re Amicus Wind Down Corp.*, 2012 WL 604143 (Bankr. D. Del. 2012), must also bear any burdens that result from the Sublease, which here would include making any rejection of the Lease effective only and until such time as 004 surrenders possession of the Premises.

BACKGROUND

2. On or about November 16, 2007, CSS and Debtor entered in a certain lease (the "Lease") for the Debtor's use of the Premises. A true and correct copy of the Lease is attached hereto as Exhibit A.

3. On or about April 1, 2011, Debtor and 004 entered into a sublease agreement (the “Sublease”) for a portion of the Premises (the “Subleased Premises”). A true and correct copy of the Sublease is attached hereto as Exhibit B. As provided in the Consent to Sublease, both THQI and 004 are jointly and severally obligated to CSS under the Lease.

4. On December 19, 2012 (the “Petition Date”) each of the above-captioned debtors (the “Debtors”), including THQI, commenced these cases pursuant to chapter 11 of the Bankruptcy Code by filing their respective voluntary petitions. Pursuant to sections 1107(a) and 1108 of the Bankruptcy Code, the Debtors continue to operate their businesses and manage their properties as debtors in possession.

5. On January 15, 2013, THQI provided written notice of its early termination of the Sublease to 004 effectively terminating the Sublease as of or about May 15, 2013. A true and correct copy of THQI’s January 15, 2013 written notice of early termination of the Sublease is attached hereto as Exhibit C.

6. On January 31, 2013, THQI filed the Rejection Motion by and through which it seeks to reject the Lease and Sublease, effective as January 31, 2013.

OBJECTION

7. It is well-established that when a lease is deemed rejected pursuant to section 365(d)(4) of the Bankruptcy Code, any subleases under the lease will also be deemed rejected since the sublessee’s rights in the property extinguish with those of the sublessor. *Chatlos Systems, Inc. v. Kaplan*, 147 B.R. 96, 100 (D. Del. 1992). However, if a rejection date, as here, is requested prior to the hearing (*i.e.*, *nunc pro tunc* lease rejection), the circumstances providing for such relief are fairly limited. *See In re Namco Cyberainment, Inc.*, Case No. 98-173 (PJW), 4/15/98 Hr’g Tr., p. 35 (a copy of which is attached hereto as Exhibit D (*nunc pro tunc* lease

rejection is appropriate in circumstances where “(a) prior to the filing of the motion, the keys were surrendered, the premises surrendered with an unequivocal statement to the landlord of abandonment; (b) the motion is served and filed on the landlord; (c) the motion states that the committee agrees with the motion; and (d) that the debtor acknowledges that it will not have the right to withdraw that motion prior to the hearing.”) The Debtor has failed to meet these requirements here. Further, under Bankruptcy Code section 365(h)(1)(A)(ii), in the event that a debtor rejects a sublease, the subtenant may nonetheless “retain its rights under such lease.” 11 U.S.C. § 365(h)(1)(A)(ii). Accordingly, while rejection frees a debtor from its performance obligations, debtor’s subtenant, may be permitted to continue to use and possess the property in accordance with the payment and payment timing terms of the sublease. *See In re Amicus Wind Down Corp.*, 2012 WL 604143 at *2.

8. CSS objects to the Debtor’s proposed rejection of the Lease because 004 has failed to surrender possession of the Premises as of the Rejection Date. THQI and 004 became jointly liable to CSS under the Lease and any Order rejecting the Lease must expressly provide that reject is effective only upon 004’s surrendering of the Premises. As stated in the Motion, while THQI appears to have vacated a portion of the Premises, 004 has retained possession – yet, THQI to date has failed to make any post-petition rental payments to CSS under the Lease, including any payments made by 004 under the Sublease.¹

9. The Rejection Date of the Lease should be set as of the date when 004 surrenders possession of the Premises particularly because THQI limited CSS’s rights under the Lease when it recently provided notice of termination of the Sublease. On January 15, 2013, THQI provided

¹ THQI has failed to make any post-petition payments to CSS under the Lease, yet presumably has received post-petition payments from 004 under the Sublease. Any and all post-petition payments received from 004 to THQI relating to the Premises should be immediately turned over to CSS. Because a significant portion of CSS’s claim against THQI is in flux, CSS expressly reserves its right to file any claim and/or any motion for an allowed administrative expense.

004 with written notice of its Early Termination option set forth in the Sublease that provided 004 with possession of the Subleased Premises on or until May 15, 2013. See Sublease (Exhibit B) at ¶16 and THQI's January 15, 2013 letter (Exhibit C). The Termination Date of the Sublease, therefore, is May 15, 2013, and until such time, the Debtor cannot provide CSS with possession of the Premises and under the holding of *In re Amicus Wind Down Corp.*, may not reject the Lease as of the proposed Rejection Date. As Judge Gross noted:

Further, allowing a debtor-lessor to merely surrender the property to the over-landlord without delivering possession ignores the fact that there is no legal privity between the over-landlord and the subtenant, and the over-landlord will face significant legal obstacles if it wants to evict the subtenant. This is especially true if the over-landlord prefers to evict the current subtenant, rather than "enter into new agreements with the current tenants [the subtenants]."

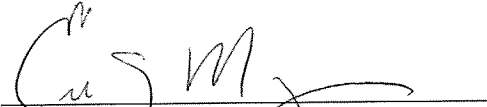
In re Amicus Wind Down Corp., 2012 WL 604143 at *2, fn. 2. As a practical matter, as a result of THQI providing written notice of early termination of the Sublease to 004, CSS cannot evict 004 and/or relet the Premises until 004 surrenders possession thereof, which likely will be on or after May 15, 2013.

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WHEREFORE, Church Street Square, LLC respectfully requests entry of an Order: (i) deeming the Lease rejected pursuant to 11 U.S.C. § 365 effective only as of the date when 004 Technologies USA Inc. surrenders possession of the Premises; and (ii) granting to Church Street Square, LLC such other and further relief as is just and proper.

Dated: February 12, 2013

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