

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

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In re:	:	Chapter 11
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THQ INC., <i>et al.</i> ,	:	Case No. 12-13398 (MFW)
	:	
Debtors. <sup>1</sup>	:	Jointly Administered
	:	
	:	RE: Docket Nos. 294 and 340
	X	

**DEBTOR’S REPLY TO CHURCH STREET SQUARE, LLC’S OBJECTION TO THQ INC.’S SECOND MOTION 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 THE LEASES**

THQ Inc. (“THQI” or the “Debtor”), by and through its undersigned counsel, respectfully submits this reply (the “Reply”) to the objection [D.I. 340] (the “Objection”) filed by Church Street Square, LLC (“CSS”) 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 the Leases* [D.I. 294] (the “Motion”),<sup>2</sup> and respectfully states as follows:

**PRELIMINARY STATEMENT**<sup>3</sup>

1. By the Motion, THQI seeks to reject the Champaign Lease and Champaign Sublease effective as of January 31, 2013, the date THQI filed the Motion, provided

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<sup>1</sup> The Debtors in these chapter 11 cases and the last four digits of each Debtor’s taxpayer identification number are as follows: THQ Inc. (1686); THQ Digital Studios Phoenix, Inc. (1056); THQ Wireless Inc. (7991); Volition, Inc. (4944); and Vigil Games, Inc. (8651). The Debtors’ principal offices are located at 29903 Agoura Road, Agoura Hills, CA 91301.

<sup>2</sup> Capitalized terms not defined herein shall have the meanings ascribed to them in the Motion.

<sup>3</sup> Capitalized terms not defined in the Preliminary Statement shall have the meanings ascribed herein.

notice to both CSS, the CSS and the subtenant, 004, of the proposed rejection, and surrendered its interests in the Premises, including the right to possess the Premises. Citing an inapposite case, *In re Amicus Wind Down Corp.*, 2012 WL 604143 (Bankr. D. Del. Feb. 24, 2012), CSS objects to the proposed effective date of the rejection of the Champaign Lease claiming THQI has not satisfied the requirement to “surrender” the Premises because the subtenant remains in possession of approximately 10% of the Premises. The CSS further contends that THQI should be prohibited from rejecting the Champaign Lease unless and until 004 surrenders possession of its interest in the Premises. Such a result is inconsistent with the Bankruptcy Code and should not be approved by this Court. The CSS which consented to the sublease to 004 should not be permitted to saddle the estates with undue expenses. Rather, the CSS can to exercise whatever state law remedies exist with respect to 004 and the Premises upon such rejection. The Objection should be overruled, and an appropriate order rejecting the Champaign Lease and Champaign Sublease as of January 31, 2013 should be entered.

#### **RELEVANT BACKGROUND**

2. On or around November 16, 2007, CSS, as lessor, and THQI, as lessee, entered into the Champaign Lease of certain office space located on the third floor of the building located at 125 West Church Street, Champaign, Illinois, 61820 and commonly known as Church Street Square (the “**Champaign Location**” or the “**Premises**”).

3. On or around April 1, 2011, THQI, as sublessor, and 004, as sublessee, entered into the Champaign Sublease for a sublease of a portion of the Premises. CSS consented and agreed to THQI subletting a portion of the Premises to 004, pursuant to that certain Consent to Sublet, dated March 14, 2011, by and among CSS, THQI, and 004, and 004 was added to the

Champaign Lease as an additional lessee.<sup>4</sup> *See* Consent to Sublet ¶ 2. In addition, pursuant to the Consent to Sublet, 004 became jointly and severally obligated to CSS under the Champaign Lease. *Id.*

4. By its original terms, the Champaign Sublease expires on May 31, 2014, unless sooner terminated in accordance with the terms of the Champaign Sublease. *See* Champaign Sublease ¶ 3. On January 15, 2013, prior to filing the Motion, THQI, in an effort to reduce liability and claims against the estate, exercised its right to terminate the Champaign Sublease early and, in accordance with the terms of the Champaign Sublease, provided four-months' written notice to 004 that the termination date of the Champaign Sublease is May 15, 2013.

5. On January 31, 2013, THQI filed and served upon CSS and 004 the Motion, which proposed January 31, 2013 as the rejection date.

### REPLY

6. CSS's argument seems to turn on whether THQI adequately and appropriately surrendered its interest in the Premises upon the proposed effective date of rejection.<sup>5</sup> Where administrative costs to the estate will be saved, equity favors rejection effective as the date when the debtor surrendered its interest in the property. *See New Valley Corp. v. Corp. Prop. Assocs. (In re New Valley Corp.)*, 2000 WL 1251858 \*15-16 (D.N.J. Aug. 31, 2000) (affirming bankruptcy court's use of equitable powers to order lease rejection effective date as date that debtor surrendered its interest in the property).

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<sup>4</sup> A copy of the Consent to Sublet and the Champaign Sublease is attached as Exhibit B to the Objection.

<sup>5</sup> CSS also asserts in the Objection that THQI has failed to make any post-petition rental payments to CSS under the Champaign Lease, including any payments made by 004 under the Champaign Sublease. (Obj. ¶ 8.) THQI believes it has made postpetition payments to CSS and, to the extent CSS believes additional monies are owed, CSS has the right to file a motion seeking an administrative claim, but such claim is not the subject of the Motion.

7. In this case, the CSS seeks to use the sublease as a sword to impede the ability of a debtor to exercise its business judgment and reduce its postpetition expenses by rejecting existing leases. *See Chatlos Sys., Inc. v. Kaplan*, 147 B.R. 96, 100 (D. Del 1992) (“The surrender remedy specially provided in § 365(d)(4) by Congress embodies a federal policy to ensure that unless extended by the Court, landlords obtain possession of their property within sixty (60) days of the filing if the lease is not assumed. It would be contrary to this policy to allow mortgagees or sublessees whose rights are derived solely from the debtor’s interest as direct lessee to continue to tie up the property with litigation in bankruptcy court or in state court.”).

8. Here, CSS does not seek THQI’s surrender of its interest in the Champaign Location, but seeks to compel THQI to deliver possession of the Premises, including the subleased portion of the Premises. Such a requirement is inconsistent with the Bankruptcy Code and case law in this jurisdiction. A debtor’s rejection of a lease of property occupied by a subtenant is effective on the date the debtor provides proper notice to both the landlord and the subtenant that all debtor interests in the property have been surrendered. *See, e.g. Chatlos Sys., Inc.*, 147 B.R. at 100 (recognizing that a debtor-lessee fulfilled its duty to surrender the property by giving notice of rejection to the landlord even though the subtenant was still in possession of the property); *In re Chi-Chi’s, Inc.*, 305 B.R. 396, 399 (Bankr. D. Del. 2004) (rejecting a lease with a subtenant occupying the premises as of “the day the Debtors surrendered the premises to the Landlords, and the Landlords were able to enter into agreements with the current tenants”). THQI is required to, and did, provide appropriate notice of the proposed rejection and surrendered any interest the estate retained in the Premises. Further, the CSS’s argument is inequitable. The CSS consented to the sublease to 004. (*See* Obj. Ex. B.) CSS benefited from

the consent because 004 became jointly and severally liable with respect to the sublease. *Id.* The CSS should not be permitted to benefit from its consent to the sublease and then turn around and use it as a sword against THQI to argue that THQI has not “surrendered” the subleased Premises.

9. CSS cites to *In re Amicus Wind Down Corp.*, 2012 WL 604143 (Bankr. D. Del. Feb. 24, 2012), as support for the proposition that the Champagne Lease cannot be rejected until 004 surrenders possession of the Premises. (Obj. ¶9.) The instant facts, however, are distinguishable from those in *Amicus* for several reasons. First, in *Amicus*, the court entered an order approving certain rejection procedures for the rejection of executory contracts and unexpired leases (the “**Lease Rejection Order**”). *Id.* at \*1. The Lease Rejection Order provided that a notice of rejection would be served and the effective date of the rejection would not be before service of the notice nor “before the date the Debtors relinquish (or already have relinquished) *control of the applicable premises by delivering keys and/or security codes to the landlord.*” *Id.* (emphasis added). The debtors then failed to comply with the Lease Rejection Order and deliver the keys and/or security codes to the landlord because the premises were sublet. Because there was no privity between the CSS and the subtenant under New York law and the debtors did not comply with the Lease Rejection Order, the court held that the effective date of the rejection of the lease would be the date the debtors delivered the keys or security codes to the landlord. *Id.* at \*2.

10. Here, neither THQI’s Motion nor the proposed rejection order contemplate the additional requirement of delivering keys and/or security codes to a landlord prior to the proposed rejection date of January 31, 2013. Rather, by providing appropriate notice of the proposed rejection and surrendering any interest THQI retained in the Premises, THQI satisfied

any obligation to surrender the Premises to obtain rejection of the Champaign Lease retroactive to January 31, 2013.

11. Further, even if the Court finds that THQI did not satisfy the requirements to obtain retroactive relief, the effective date of rejection should be the date the order is entered approving the Motion, not the date 004 surrenders possession as CSS contends (Obj. ¶ 9). *See, e.g., In re Fleming Cos.*, 304 B.R. 85, 96 (Bankr. D. Del. 2003) (“Normally, the effective date of a rejection is the date the Order is entered.”) There is no requirement under section 365(a) of the Bankruptcy Code for THQI to surrender the Premises for the Court to approve the rejection of the Champaign Lease. Rather, the Court may approve the rejection of the Champaign Lease if such rejection is made in the exercise of the Debtor’s sound business judgment, and if such rejection benefits its estate. *See, e.g., In re AbitibiBowater Inc.*, 418 B.R. 815, 831 (Bankr. D. Del. 2009) (stating that a debtor’s decision to assume or reject an executory contract will stand so long as “a reasonable business person would make a similar decision under similar circumstances.”). As set forth in the Motion, THQI has ample justification to reject the Champaign Lease, and, therefore, THQI submits that an order approving the Motion should be entered on February 19, 2013.

12. Second, the privity issues raised in *Amicus* and cited by CSS (Obj. ¶9) are inapplicable to the Champaign Lease and Sublease. In *Amicus*, the court found that it would be difficult for the landlord to evict the subtenant because there was no privity of contract between the subtenant and the landlord. *Amicus*, 2012 WL 604143 at \*2. In this case, there is privity between the prime landlord, CSS, and the subtenant, 004. Pursuant to the Consent to Sublet, CSS consented and agreed to THQI subletting a portion of the Premises to 004 and 004 was added to the Champaign Lease as an additional lessee. *See* Consent to Sublet ¶ 2. In addition,

pursuant to the Consent to Sublet, 004 became jointly and severally obligated to CSS under the Champaign Lease. *Id.* Because privity exists between CSS and 004, upon rejection of the Champaign Lease and Sublease, CSS can pursue whatever state law remedies exist directly against 004. *See Chatlos*, 147 B.R. at 99 (stating that rejection of both the lease and the sublease, “will leave [the landlord] and [the sublessee] to vie for possession of the premises according to” state law).

13. CSS also asserts, without any substantiation, that THQI’s written notice of the early termination adversely affected CSS’s rights under the Champaign Lease. “[R]ejection and surrender of a nonresidential real property lease is a breach of the lease and not a termination thereof.” *Doral Commerce Park, Ltd. v. Teleglobe Comm’ns Corp. (In re Teleglobe Comm’ns Corp.)*, 304 B.R. 79, 83 (D. Del. 2004). THQI exercised its early termination right to reduce claims against the estate related to the Champaign Sublease and any rejection thereof. The exercise of the early termination right does not prohibit THQI from rejecting the Champaign Sublease prior to the termination date nor does it prevent CSS from choosing to treat rejection of the Champaign Lease as a termination event and pursue state law remedies directly against 004.

Accordingly, THQI requests that the Court overrule the Objection and enter an order approving the rejection of the Champaign Lease effective as of January 31, 2013.

Dated: February 13, 2013  
Wilmington, Delaware

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