

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)	
)	Chapter 11
AMES HOLDING CORP., <i>et al.</i> , ¹)	
)	Case No. 09-14406
)	
Debtors.)	Joint Administration Pending

**MOTION OF DEBTORS TO REJECT
NON-RESIDENTIAL REAL PROPERTY LEASES**

NOTICE: IF YOU WERE SERVED WITH THIS MOTION, THE DEBTORS SEEK AUTHORITY TO REJECT THE FORTY-FOUR (44) LEASES LISTED ON EXHIBIT A TO THIS MOTION. THE LANDLORDS ON THE LEASES THE DEBTORS SEEK TO REJECT ARE LISTED BELOW AND ON EXHIBIT A.

LANDLORDS ON LEASES TO BE REJECTED

1030MS, LLC	Oberer-TCC, Ltd.
2902 Falkenburg, LLC	Palm Property Management, Inc.
2902 Falkenburg KSS, LLC	Peter Rosmarin
40 HI, L.L.C.	Pioneer Industrial Park, Inc.
ALS, LLC	Pollard & Bagby, Inc.
American Industrial Center Ltd.	Pucci Properties, LLC
Apache Plaza, LLC	R&M Real Property Group, LLC
CB Associates, LLC	Saravanos Properties, LLC
CBCC, LLC	Saib Talia
Clarke-Hook Corporation	Silver Torch LLC
Crawford-Austin Properties, Ltd.	Southfront Partners, LLC
ED169, LLC	Steeple Chase Properties, LLC
Group Four Equities LLC	Sunbelt Enterprises
Harry and Wendy Brandon	Tacoma Manor Building LLC

[List of Names Continued on Next Page]

¹ The Debtors in these cases, along with the last four digits of the federal tax identification number for each of the Debtors, are Ames Holding Corp (6130), Axia Incorporated (5251), TapeTech Tool Co., Inc. (7106), and Ames Taping Tool Systems, Inc. (6440). The Debtors' corporate offices are located at 3350 Breckinridge Boulevard, Suite 100, Duluth, Georgia 30096

LANDLORDS ON LEASES TO BE REJECTED (Cont'd)

Holly Park Properties, LLC	The Prudential Insurance Company of America
Hulse-Kinsey Trust	TYN Limited Partnership
JKH Properties, LLC	Universal Plumbing, Inc.
John and Justine Litsch	Urban Investments, LLC
JRD&E, LLC	Vernalis Enterprises, Inc.
Leonard and Sharon Lee	Vista Business Park, Inc.
M&E Realty Co.	Washington Real Estate Investment Trust
Merrit-059 LLC	Wengreen, LLC
Northgate Commons Partnership, LLLP	

Ames Holding Corp. ("Ames Holding"), Axia Incorporated ("Axia"), TapeTech Tool Co., Inc. ("Tape Tech"), and Ames Taping Tool Systems, Inc. ("Ames") (each a "Debtor" and collectively, the "Debtors"), as debtors and debtors in possession, by this motion (the "Motion"), seek entry of an Order authorizing the Debtors, pursuant to sections 105 and 365(a) of title 11 of the United States Code (the "Bankruptcy Code") and Rule 6006 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), to reject forty-four (44) leases of non-residential real property, effective as of December 14, 2009, the date on which the Debtors filed their bankruptcy petitions. In support of the Motion, the Debtors rely on the *Declaration of R. Andrew Garner in Support Of Chapter 11 Petitions and First Day Motions* (the "Garner Declaration") and show as follows:

Jurisdiction and Venue

1. On December 14, 2009 (the "Petition Date"), the Debtors each filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

2. Venue of these chapter 11 cases and this Motion in this district are appropriate pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The predicates for the relief sought in this Motion are sections 105, 365(a), 365(d)(3), 1107 and 1108 of the Bankruptcy Code and Bankruptcy Rule 6006.

4. No trustee or examiner has been appointed for any of the Debtors. Each of the Debtors continues to operate their respective businesses and properties as a debtor in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

Background

5. The Debtors are the leading designers, manufacturers, marketers, and distributors of “automatic taping and finishing” (“ATF”) tools used to increase productivity in interior drywall finishing. These ATF tools, invented by Ames beginning in 1939, enable interior finishing contractors to finish drywall joints substantially faster than less productive hand finishing methods.

6. Axia is a wholly-owned subsidiary of Ames Holding, and Ames and TapeTech are wholly-owned subsidiaries of Axia. Axia manufactures the ATF tools and then either sells or rents these tools to Ames and TapeTech. Axia also provides administrative services to Ames and TapeTech, including accounting services, information technology support, marketing, human resources, and customer service, for which Ames and TapeTech pay a specified fee per month. TapeTech is engaged in the business of selling ATF tools wholesale through a network of independent tool dealers and distributors in the U.S. and internationally. These tools are purchased from Axia and sold under the brand name “TapeTech.” Ames is engaged primarily in the business of renting ATF tools directly to interior finishing contractors to finish drywall joints prior to painting, wallpapering or other forms of final treatment. Ames offers these ATF tools through two avenues: (i) stores leased by Ames and (ii) franchises granted principally to drywall suppliers.

7. Prior to the Petition Date, to obtain the funds necessary to operate their respective businesses, Axia entered into that certain Amended and Restated Credit Agreement (the “Credit

Agreement”) dated as of April 1, 2008, with a group of lenders party thereto, pursuant to which the lenders agreed to extend certain term loans and a revolving line of credit to Axia. Ames Holding, TapeTech and Ames jointly and severally guaranteed full payment of the indebtedness owing by Axia under the Credit Agreement. To secure this indebtedness, each of the Debtors granted the lenders security interests in and liens upon all or substantially all of their personal property of every kind and nature. As of the Petition Date, the principal balance of the Debtors’ indebtedness under the Credit Agreement totaled approximately \$161,000,000. Additional details regarding the Debtors’ secured obligations are set forth in the Garner Declaration.

8. The financial viability of the Debtors has been severely impacted by the dramatic decline in commercial and residential construction in the United States, particularly as a result of declines in construction in late 2007. By late 2007, a widespread and dramatic downturn in the commercial and residential markets in the United States was occurring. Commercial and residential construction levels plummeted as a result. This downturn was followed by a severe crisis in United States and global credit markets. This precipitous fall in the commercial and residential construction in the United States led to a significant decrease in the demand for and use of ATF tools and other products sold and rented by the Debtors and has, therefore, materially and adversely impacted the Debtors’ revenue streams.

9. Faced with such substantially diminished revenues from sales and rentals of the ATF tools throughout the Debtors’ regional markets, the Debtors were unable to generate the funds necessary to cover operating and maintenance costs, including amounts needed to service their secured indebtedness. Confronted by this rapid and dramatic decline in commercial and residential construction and the significantly reduced demand for the Debtors’ products, beginning in late 2007, the Debtors pursued a number of actions to reduce fixed costs, including (i) reducing significantly

the number of employees and the amount of wages and (ii) closing a number of the Ames' leased locations and negotiating lower monthly rental payments with the landlords for other Ames' locations.

10. Although through these efforts the Debtors were able to reduce their costs significantly, with insufficient revenues, quickly decreasing liquidity and no source of additional financing, the Debtors had no realistic choice but to file the Petitions to enable them to reorganize their affairs and to preserve the value of their business operations. The Debtors hope to achieve as soft a landing as possible by attempting to manage an orderly transition to a purchaser, through a section 363 sale within the first 90 days of bankruptcy, that is willing and able to purchase substantially all the Debtors' assets. The Debtors intend to file a motion early in these chapter 11 cases to establish and seek approval of bid procedures for a sale of substantially all of their assets in cooperation with the Lenders.

Relief Requested

11. Through this Motion, the Debtors seek an Order, pursuant to section 365(a) of the Bankruptcy Code authorizing the Debtors to reject the forty-four (44) non-residential real property leases identified on Exhibit A attached to this Motion.

Rejection of Leases

12. As mentioned above, one of the primary avenues for Ames to rent ATF tools to builders has been to lease locations throughout the United States in which Ames maintains an inventory of ATF tools for lease and related drywall tools and products manufactured by other companies for sale.

13. As of the Petition Date, Ames had 118 leases in effect for these locations.

14. As part of its ongoing efforts to reduce its costs, to eliminate unprofitable operations, and streamline its business operations, Ames has reviewed all of these leases and has identified locations which Ames, in the exercise of its business judgment, has determined to be unprofitable and unnecessary to its efforts to reorganize. These leases are identified on Exhibit A attached to this motion (the “Unwanted Leases”).

15. The Unwanted Leases are burdensome to the bankruptcy estate and should be rejected as soon as possible. The Unwanted Leases were all negotiated at a time when the economic climate for leased space of this nature was far more favorable than it is today. Consequently, the Unwanted Leases provide for rents that exceed current market rates. Because the Unwanted Leases are uneconomical under current market conditions, the Unwanted Leases contribute significantly to the losses suffered by Ames. For these same reasons, the Unwanted Leases are not attractive to persons looking for commercial space to lease. Therefore, there is no reasonable possibility that the Unwanted Leases could be assumed and assigned to the financial advantage of Ames.

16. In addition, the Unwanted Leases should be deemed rejected as of the Petition Date, the date on which the Debtors filed this Motion. The Debtors have sought rejection of the Unwanted Leases on the first day possible and have requested that the Motion be heard on an expedited basis. For each of the locations subject to the Unwanted Leases, the Debtors already have vacated the premises and notified the respective landlords, so each of these locations is available for re-letting by the landlord.

17. The rejection of the Unwanted Leases effective as of the Petition Date is in the best interests of Ames’ bankruptcy estate and its creditors.

Basis for Rejection of Leases

18. Section 365(a) of the Bankruptcy Code provides that a debtor, “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” In re Joseph C. Spiess Co., 145 B.R. 597, 600 (Bankr. N.D. Ill. 1992). The decision to assume or reject an executory contract or unexpired lease is a matter within the “business judgment” of the debtor. See National Labor Relations Board v. Bildisco (In re Bildisco), 682 F.2d 72, 79 (3d Cir. 1992) (usual test for rejection of an executory contract is simply whether the debtor determines that rejection will benefit the estate); In re Bullet Jet Charter, Inc., 177 B.R. 593, 601 (Bankr. N.D. Ill. 1995) (under the business judgment rule, “courts should approve a debtor’s decision to reject . . . where [the debtor] demonstrates that rejection will benefit the debtor’s estate or reorganization efforts”) (citation omitted).

19. If a debtor’s business judgment has been reasonably exercised, a court should approve the assumption or rejection of an unexpired lease. See, e.g., Group of Institutional Investors v. Chicago M. St. P. & P.R.R. Co., 318 U.S. 527, 549 (1943); In re Orion Pictures Corp., 4 F.3d 1095, 1099 (2d Cir. 1993); In re Minges, 602 F.2d 38, 43 (2d Cir. 1979); Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303, 1311-12 (5th Cir. 1985); Matter of Tilco, Inc., 558 F.2d 1369, 1372 (10th Cir. 1977); In re Gucci, 193 B.R. 411, 414-15 (S.D.N.Y. 1996); In re Prime Motor Inns, 124 B.R. 378, 381 (Bankr. S.D. Fla. 1991).

20. In applying the “business judgment” standard, courts show great deference to a debtor’s decision to reject. See Summit Land Co. v. Allen (In re Summit Land Co.), 13 B.R. 310, 315 (Bankr. D. Utah 1981) (absent extraordinary circumstances, court approval of a debtor’s decision to assume or reject an executory contract “should be granted as a matter of course;” under this test, the debtor’s business judgment on whether to reject an executory contract must be accorded

deference unless it is shown that the debtor's decision was taken in bad faith or in gross abuse of discretion).

21. In adopting section 365 of the Bankruptcy Code, Congress intended a debtor to assume only those leases that benefit the estate. Conversely, a debtor is expected to reject leases that are unprofitable or burdensome to the estate. See, e.g., In re Rickel Home Centers, Inc., 209 F.3d 291, 297 (3d Cir.) (“Section 365 enables the trustee to maximize the value of the debtor’s estate by assuming executory contracts and unexpired leases that benefit the estate and rejecting those that do not.”), cert. denied, 531 U.S. 873 (2000); In re Whitcomb & Keller Mortgage Co., 715 F.2d 375, 379 (7th Cir. 1983) (“[S]uccessful reorganization under chapter 11 depends on relieving the debtor of burdensome contracts and prepetition debts so that additional cash flow thus freed is used to meet current operating expenses,” quoting H.R. Rep. No. 595, 95th Cong. 1st Sess. 221 (1977)).

22. There is ample justification for Ames to reject the Unwanted Leases. As discussed above, the Unwanted Leases are burdensome to Ames because these leases require the payment of above-market rents and are a significant factor contributing to the poor financial performance of Ames. Because the rents under the Unwanted Leases are not competitive, Ames cannot expect to derive any financial benefit from an assumption and assignment of these leases. Therefore, rejecting the Unwanted Leases is in the best interest of Ames’ estate and its creditors and is an exercise of sound business judgment.

23. In addition, the Debtors request the entry of an order authorizing the rejection of the Unwanted Leases retroactively effective as of the Petition Date. Courts have authorized rejections of executory contracts and unexpired leases, including retroactive rejections, based on the equities of the circumstances. See In re Chi-Chi’s, Inc., 305 B.R. 396, 399 (Bankr. D. Del. 2004) (acknowledging that a bankruptcy court may approve a rejection retroactive to the date the motion is

filed after balancing the equities in the particular case); In re Fleming Cos., Inc., 304 B.R. 85, 96 (Bankr. D. Del. 2003) (stating that rejection has been allowed *nunc pro tunc* to the date of the motion or the date the premises were surrendered); see also Thinking Machines Corp. v. Mellon Fin. Servs. Corp. (In re Thinking Machines Corp.), 67 F.3d 1021, 1028 (1st Cir. 1995) (finding that, “[i]n the section 365 context, this means that bankruptcy courts may enter retroactive orders of approval, and should do so when the balance of equities preponderates in favor of such remediation”). Courts that have permitted retroactive rejection generally have permitted rejection of an executory contract or unexpired lease to be effective as of the date on which the nondebtor party to the executory contract or unexpired lease was given definitive notice of the debtor’s intent to reject. See, e.g., In re FLYi, Inc., Case No. 05-20011 (MFW) (Bankr. D. Del. Aug. 21, 2006); In re Loewen Group Int’l, Inc., Case No. 99-1244 (PJW) (Bankr. D. Del. Aug. 18, 2000) (authorizing rejection of a nonresidential real property lease effective as of the date of the filing of the rejection motion); In re Imperial Home Décor Group, Inc., Case No. 00-19 (MFW) (Bankr. D. Del. Feb. 25, 2000) (authorizing rejection *nunc pro tunc* of car lease as of the date the car was returned to the lessor).

24. Under the circumstances, there is ample reason for the Unwanted Leases to be deemed rejected as of the Petition Date. The Debtors have filed this Motion on the first day possible. The Debtors already have vacated each of the premises subject to the Unwanted Leases, so each of these locations was available to the landlords for re-letting as of the Petition Date. Having the rejection of the Unwanted Leases be effective as of the Petition Date will promote the purposes of section 365(d) of the Bankruptcy Code. Sections 365(d)(3) and (4) together operate to compel a debtor to make its decision to assume or reject a lease quickly. By declaring the rejection of the Unwanted Leases effective as of the Petition Date, the Court will relieve the Debtors’ bankruptcy estates of the financial burden of paying rent for space the Debtors have determined they do not need

or want and will confirm the surrender of the premises to the landlord so that the space can be re-let. Each landlord here will receive this Motion indicating the Debtors' unequivocal intent to surrender the premises and to reject each of the Unwanted Leases. The Debtors believe, therefore, that due to their financial condition and the need to reduce unnecessary administrative claims against their estates, the equities under the circumstances weigh in favor of the retroactive rejection of the Unwanted Leases effective as of the Petition Date.

25. Such retroactively effective rejection is appropriate where, as here, the Debtors (i) have vacated the premises subject to the Unwanted Leases and have turned over keys or key codes, if any, (ii) have served on the landlords notice of this Motion indicating the Debtors' unequivocal surrender of each of the Unwanted Leases, and (iii) will not withdraw this Motion as to any Unwanted Lease absent the consent of the landlord. See In re Namco Cybertainment, Inc., Case No. 98-00173 (PJW) (Apr. 15, 1998).²

Notice and Prior Motions

26. The Debtors propose to serve notice of this Motion on (i) the Office of the United States Trustee for the District of Delaware, (ii) those creditors identified on the list filed pursuant to Rule 1007(d) of the Bankruptcy Rules, (iii) the Internal Revenue Service, (iv) counsel to the Debtors' prepetition secured lenders, and (v) all of the parties to the Unwanted Leases. In light of the nature of the relief requested, the Debtors submit that no other or further notice need be provided.

27. No previous request for the relief requested herein has been made to this or any other Court.

² A transcript of this ruling is attached hereto as Exhibit B.

WHEREFORE, the Debtors respectfully request that this Court enter an Order substantially in the form attached hereto as Exhibit C, and grant such other and further relief as this Court deems just and proper.

Dated: December 15, 2009
Wilmington, Delaware

Respectfully submitted,



Mark D. Collins (No. 2981)
Michael J. Merchant (No. 3854)
L. Katherine Good (No. 5101)
Drew G. Sloan (No. 5069)
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- and -

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Proposed Counsel For the Debtors and Debtors-in-Possession

EXHIBIT A

Unwanted Leases

EXHIBIT A

Unwanted Leases

STORE #	Property Address	Current Landlord
1102	10362 Leadbetter Road Ashland, Virginia	Pollard & Bagby, Inc. P.O. Box 2488 Richmond, VA 23218-2488
1105	14501 Lee Jackson Memorial Highway, Unit B Chantilly, Virginia 20151-1635	Clarke-Hook Corporation 14506 E. Lee Road Chantilly, VA 22021
1110	1275 Blackwood-Clementon Road Clementon, NJ 08021	Group Four Equities LLC 17000 Horizon Way, Suite 100 Mt. Laurel, New Jersey 08054
1117	1015 Wellwood Ave. N. Lindenhurst, New York 11757	Peter Rosmarin c/o Cougar Management & Realty Services, Inc. 3000 Hempstead Turnpike Suite 302 Levittown, New York 11756
1118	TJ Maxx Plaza 440 Middlesex Road Tyngsborough, MA	TYN Limited Partnership c/o Stavins & Axelrod Properties, Inc. 1730 Rhode Island Avenue, N.W., Suite 909 Washington, D.C. 20036
1122	2253 Vista Parkway Unit 1 West Palm Beach, Florida 33411	Vista Business Park, Inc. c/o McCraney Property Company, Inc. 1560 Latham Road, Suite 7 West Palm Beach, FL 33409
1123	830 County Road 427 Unit 192 Longwood, FL	American Industrial Center Ltd. 830 South CR 427, Suite #162 Longwood, FL 32750 Attn: Daniel J. Wood
1124	Suite 1 5301 State Road 82 Fort Myers, FL	Palm Property Management, Inc. 2441 South State Road 7 Fort Lauderdale, Florida 33317-6999

1126	Suite 405 8260 N.W. 27th Street Miami, Florida 33122	The Prudential Insurance Company of America Two Ravinia Drive, Suite 1400 Atlanta, GA 30346-2110 Attn: PRISA Asset Manager
1128	1979 Northgate Blvd. Sarasota, FL 34234	Northgate Commons Partnership, LLLP 380 Interstate Court - Suite 206 Sarasota, FL 34240
1132	580 E. Burgess Rd. Suite B-2 Pensacola, FL 32504	CBCC, LLC c/o Beck Property Company, Inc. 4890 Bayou Blvd. Pensacola, FL 32503 Attention: Don Neal, Property Manager
1133	268 North Wickham Road Melbourne, FL 32935	Harry and Wendy Brandon, d/b/a Wickham Center 1103 W. Hibiscus Blvd., Suite 301 Melbourne, FL 32901
1134	Bldg. E 2912 S. Falkenburg Rd. Riverview, FL	2902 Falkenburg, LLC and 2902 Falkenburg KSS, LLC 111 E. 61st Street New York, NY 10021
1201	2211 Riverside Parkway Lawrenceville, Georgia	R&M Real Property Group, LLC 1185 Village Cove NE Atlanta, GA 30319
1204	1635 Woodruff Road Greenville, SC	Leonard & Sharon Lee and S/L Properties 340 Old Plantation Trail Travelers Rest, SC 29690
1217	13134 Dairy Ashford Suite 700 Sugarland, TX 77478	Crawford-Austin Properties, Ltd. c/o Eastman Management 3418 Highway 6 South, Suite B, PMB 346 Houston, TX 77082
1223	9020 Highway 64 Lakeland, TN 38002	CB Associates, LLC c/o Garfunkel Development Corp. 400 Mall Boulevard, Suite M Savannah, GA 31406

1224	3408-E W. Wendover Ave. Greensboro, NC 27407	Wengreen, LLC c/o SB Management Corporation 433 North Camden Drive, Suite 1070 Beverly Hills, California 90210 Attention: Kathy R. Stimson
1225	45 Odell School Road Suites D & E Concord, NC	JKH Properties, LLC 18611 Starcreek Drive Cornelius, NC 28031
1226	Suite 3 5890 Bethelview Rd. Cumming, GA 30040	Steeple Chase Properties, LLC P.O. Box 80034 Atlanta, GA 30366
1228	3630 Commerce Drive Suites 111-112 Baltimore, MD 21227	Merrit-059 LLC c/o Merritt Properties, LLC 2066 Lord Baltimore Drive Baltimore, MD 21244-2501
1229	178 West Lancaster Ave. Malvern, PA 19355	Universal Plumbing, Inc. P.O. Box 238 Paoli, PA 19301-0238
1231	Northern Virginia Industrial Park Bldg. #2, 8938 Telegraph Road Lorton, Virginia 22079	Washington Real Estate Investment Trust 6110 Executive Blvd. Rockville, Maryland 20852 Attn: Asset Manager
1233	1302 Enterprise Avenue Unit D Myrtle Beach, SC 29577	ALS, LLC c/o H.B. Springs Co. Real Estate 2511 N. Oak Street Myrtle Beach, SC 29577
1234	Suite B 1026 Marietta Street, NW Atlanta, GA 30318	1030MS, LLC P.O. Box 93391 Atlanta, GA 30377
1306	7375 Washington Ave. Edina, Minnesota	ED169, LLC c/o Northcrest Corporation 7517 Washington Ave. South Edina, MN 55439

1309	Bay # 1 2544 County Road 10 Mounds View, Minnesota 55112	M&E Realty Co. 4210 West Old Shakopee Road Bloomington, MN 55437-2951
1313	17501 East 40 Highway Suite 224 Independence, Missouri 64055	40 HI, L.L.C. c/o The R. H. Johnson Company 801 West 47th Street, Suite 219 Kansas City, Missouri 64112
1315	101-105 Saravanos Drive Yorkville, Illinois	Saravanos Properties, LLC 15317 Dan Patch Plainfield, Illinois 60544 Attn: Elefterios Saravanos
1316	Suite 509 7800 N. Sommer Street Peoria, Illinois	Pioneer Industrial Park, Inc. 7820 N. University Street, Suite 208 Peoria, Illinois 61614
1320	2059 E. Maple Road Troy, Michigan 48083	Saib Talia 1624 Milverton Drive Troy, MI 48083
1323	10128 Princeton Glendale Drive Cincinnati, Ohio 45246	Oberer-TCC, Ltd. c/o Gold Key Realty 9080 Springboro Pike, Suite 100 Miamisburg, Ohio 45342
1325	8225 Pfeiffer Farms Drive SW Suite C Byron Center, Michigan 49315	Pucci Properties, LLC 8225 Pfeiffer Farms Drive Byron Center, Michigan 49315
1402	7079 S. Jordan Road Unit 4 Centennial, Colorado 80112	JRD & E, LLC 6780 E. Hampden Avenue Denver, Colorado 80224
1502	10501 NE Highway 99 Suite 41 Vancouver, Washington 98686	Holly Park Properties, LLC P.O. Box 65458 Vancouver, Washington 98665

1505	11317 Steele Street Suite 104 Tacoma, Washington, 98444	Tacoma Manor Building LLC 2814 Rucker Avenue Everett, Washington 98201
1520	5635 Riggins Court Unit 7 Reno, Nevada 89502	Hulse-Kinsey Trust c/o Gaston & Wilkerson Management Group P.O. Box 10590 Reno, Nevada 89510-0590
1611	6242 Preston Avenue Livermore, CA 94550	Southfront Partners, LLC c/o The Terrill Company 1111 Civic Drive, Suite 395 Walnut Creek, CA 94596
1612	7401 White Lane Unit 2 Bakersfield, CA 93309	Silver Torch LLC 1904 West Washington Blvd. Los Angeles, CA 90018
1710	41675 Enterprise Circle South Suite B Temecula, CA	John and Justine Litsch 16717 Evergreen Circle Fountain Valley, CA 92708
1713	Suite 101-103 Apache Plaza Shopping Center Apache Trail Apache Junction, Arizona	Apache Plaza, LLC c/o Romano Real Estate 3900 E. Via Palomita Tucson, AZ 85718
1723	2575 E. Craig Road Suite M North Las Vegas, Nevada 89030	Vernalis Enterprises, Inc. c/o H&L Realty & Management Co. 720 South Fourth Street, Suite 201 Las Vegas, Nevada 89101
1724	2370 Eastman Ave. Suite 107 Oxnard, CA	Sunbelt Enterprises 1801 Solan Drive Suite 250 Oxnard, CA 93031-9031
1801	3136 Calvary Drive Suite 105 Raleigh, NC 27604	Urban Investments, LLC P.O. Box 99326 Raleigh, NC 27624

EXHIBIT B

Transcript of In re Namco Cybertainment

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:)
)
NAMCO CYBERTAINMENT, INC.,) Case No. 98-173 (PJW)
)
Debtor.)

United States Bankruptcy Court
Courtroom No. 2
Sixth Floor
824 North Market Street
Wilmington, Delaware 19801

Wednesday, April 15, 1998
4:00 p.m.

BEFORE: HONORABLE PETER J. WALSH
United States Bankruptcy Judge

TRANSCRIPT OF PROCEEDINGS

WILCOX & FETZER
1330 King Street - Wilmington, Delaware 19801
(302) 655-0477



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ORIGINAL

1097D

1 MR. BRADY: Good afternoon, Your
2 Honor. Robert Brady on behalf of Namco Cybertainment,
3 Inc.

4 Your Honor, we have three matters on
5 the agenda for this afternoon. The first is our motion
6 to extend the 365(d)(4) period.

7 As the agenda letter reflects, there
8 were several responses. I'm pleased to report we
9 believe we've resolved all of those responses to our
10 extension. Here today with me is John Voorhees from
11 Mayer, Brown and Platt, and he'll be presenting this
12 motion on behalf of the debtor this afternoon.

13 THE COURT: Okay.

14 MR. VOORHEES: Good afternoon, Your
15 Honor. John Voorhees on behalf of Namco Cybertainment,
16 Inc.

17 Your Honor, as Mr. Brady stated, this
18 is our motion to extend the time to assume or reject
19 unexpired nonresidential real property leases. We
20 request that the date be extended until July 15th,
21 1998, and believe that Namco has demonstrated in its
22 papers that cause exists under 365(d)(4) to grant that
23 extension,

24 If Your Honor recalls, this case was



1 filed primarily to deal with uneconomic leases. Namco
2 runs 372 amusement centers, which are essentially video
3 arcades in shopping malls. And the primary cost
4 component for those centers is the rent. What used to
5 be economic leases with revenues that would support
6 those rents no longer are economic, due to various
7 shifts in the marketplace in the video arcade game
8 industry.

9 We have been working diligently with
10 our landlords, both prepetition and postpetition, to
11 try and negotiate rent relief that will allow those
12 centers to return the viability and will give landlords
13 a market rent. It takes time, however, to negotiate
14 372 leases. And negotiations are a two-way process
15 that require both the cooperation of both Namco and the
16 landlords.

17 I'm happy to report we've had lots of
18 cooperation from our landlords. But obviously, it
19 takes time for landlords to review proposals that we
20 make and then time for us to respond to any
21 counterproposals that we receive.

22 I'm happy to report, Your Honor, that
23 the committee supports this motion for extension.
24 Before we actually filed the motion, we sat down with



1 the committee and its members and counsel and asked for
2 them to support an extension.

3 The committee raised a lot of the
4 same concerns that the other objectors have raised to
5 our motion today. And after substantial negotiations
6 with the committee and in the context of a broader
7 agreement with the committee that accelerates both the
8 plan process and the lease-decision process, the
9 committee was willing to support our motion for an
10 extension today.

11 That deal with the committee is as
12 follows. Namco has agreed that by May 4th, it will
13 file a plan of reorganization. Attached to that plan
14 will be three lists. One will list all the leases that
15 Namco intends to assume. Another will list all of the
16 leases that Namco intends to reject. And a third list,
17 not to exceed 93 leases, which is essentially 25
18 percent of our leases, will list leases for which we've
19 not made a decision yet with respect to assumption or
20 rejection.

21 With respect to that undecided list,
22 Namco must make a decision, either assume or reject, by
23 September 11th. With respect to any of those leases
24 that are rejected after August 15th, the landlord for



1 the premises of that rejected lease will have the
2 option to require Namco to stay on the premises through
3 the end of 1998 and pay rent through the end of 1998,
4 which gives the landlord some back-end protection for
5 the Christmas season.

6 In addition, the committee has
7 reserved its right to seek to accelerate the assumption
8 or rejection of some, but not all, of those undecided
9 leases at a time before September 11th.

10 This deal is premised on the party's
11 acknowledgment that to the extent the business were to
12 drop off the table, Namco might not be able to file
13 such a plan. But it's our expectation at this point
14 that we will be able to do so. And we're working very
15 hard to get those lists put together for the May 4th
16 deadline.

17 Of the 372 leases that we have, we
18 received objections from only six landlords, which, I
19 think, in and of itself reflects the reasonableness of
20 the requests that we've made today. As Mr. Brady
21 stated, I think that we've come to an understanding
22 with all of the parties that filed objections. And I
23 don't believe that anyone is going to be going forward
24 with those objections.



1 But to the extent anyone has any
2 statements they'd like to make, I'd like it to respond.

3 THE COURT: Okay. Anyone else wish
4 to be heard?

5 MR. GALARDI: Your Honor, just very
6 briefly. Mr. Voorhees has accurately described the
7 settlement with the committee.

8 First, a little background about the
9 committee, Your Honor, is that it is comprised of only
10 five landlord groups. As Mr. Voorhees said at the
11 outset, this is essentially a case designed to account
12 for the problems that the debtors have been having with
13 their landlord. So, the settlement you see is the
14 result of people who Your Honor is very familiar with--
15 Kevin Newman, Ron Tucker--all of whom have appeared
16 before Your Honor and represent significant landlords.

17 The other thing, and I will say that
18 the debtor has been on schedule, is that the debtor has
19 provided us already with a draft plan of reorganization
20 which was also called for under the settlement, has
21 done so. And we are going to comment. So, I believe
22 we are on the time frame for the May 4th filing.

23 And that date was, in part, chosen by
24 the committee because there is the ICI convention,

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1 where landlords go in the middle of May. And the point
2 of identifying those leases was to give landlords as
3 much time as possible before that meeting to be able to
4 shop whatever lease, minimize any damage the debtors
5 may have, and give them full information.

6 So, we do think it is a reasonable
7 settlement. At this time, we hope to push the plan
8 forward.

9 With those representations, I know
10 I've spoken to many of the landlords; and they have
11 withdrawn their objections. But they can speak for
12 themselves.

13 MR. MYERS: Good afternoon, Your
14 Honor. Jeffrey Meyers, Pollack, Meyers, & Rosenblum.

15 I think I just need one point of one
16 minor clarification. I did not negotiate this
17 settlement. Mr. Galardi did and we sort of joined in
18 and we appreciate his efforts. But when I heard Mr.
19 Voorhees describe the settlement, I think he said only
20 the bubble leases would be assumed or rejected by
21 September 11th.

22 THE COURT: Only what?

23 MR. MEYERS: Only the bubble leases,
24 which are those leases where they're not sure. Is that

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1 right?

2 MR. VOORHEES: That's correct. Your
3 Honor, I suppose what we intend to do is, we intend to
4 assume leases as part of the plan which should occur
5 long before that date. There may be some leases, the
6 bubble leases, that would be decided after confirmation
7 of a plan, assuming that a plan is confirmed in that
8 time frame.

9 MR. MYERS: Your Honor, then, I think
10 I do have a problem in that there is a letter from Mr.
11 Galardi, appended to debtor's response. And in
12 paragraph 3 of the letter, it says as follows: "The
13 debtor shall assume or reject all leases of
14 nonresidential property, including the bubble leases,
15 no later than September 11th."

16 So, there appears to be some,
17 perhaps, a mix-up, a misunderstanding. And I'll yield
18 to Mr. Galardi.

19 MR. GALARDI: Your Honor, I think the
20 two statements can be reconciled, everything with
21 respect to leases' assumptions, rejections will be done
22 by September 11th period. What has happened and what
23 we've left open in that settlement is, When will the
24 plan of reorganization be confirmed?



1 If we stick to the schedule that we
2 have, at least, preliminarily discussed, the plan will
3 be filed May 4th. That, with normal solicitation
4 disclosure, probably gets us very close to September
5 15th, the date for which the current extension runs.

6 If that's the case and if the plan is
7 confirmed that day, then, as Mr. Voorhees just
8 mentioned, the leases that have been identified as
9 assumed will be assumed. The leases that would have
10 been identified as rejected will either be rejected on
11 that date or a previous date.

12 And what the committee and the
13 debtors are now contemplating, and which Your Honor is
14 familiar with from another case, is the issue of
15 whether there can be such a thing as posteffective
16 confir--assumption or rejection. What the committee
17 has done and the settlement has said, if there's an
18 issue and if the plan is confirmed prior to the
19 September 11th date, that will be an individual
20 landlord issue to fight with the debtors.

21 The committee is going to step out of
22 that issue, because we think it is beneficial to the
23 creditors as a whole to get the plan confirmed, to get
24 the distributions out, and let individual landlords

1 decide whether they want to fight the issue of whether
2 a lease can be postconfirmation assumed or rejected.

3 But this case will be and all leases
4 will either be assumed or rejected by September 11.
5 And that's what's in the third paragraph.

6 THE COURT: So, in other words, you
7 could have a confirmed plan on August 15 that would
8 leave open a subsequent assumption or rejection?

9 MR. GALARDI: Of no more than the
10 bubble. And in fact, what we're doing monitoring
11 through this out is try to get that bubble as small as
12 possible. And what the debtor has done is conceded, if
13 anything goes past August 15th through the end of the
14 year, to give the protection to the landlord to the end
15 of the year that the store could be maintained and
16 operated as Your Honor orders.

17 MR. VOORHEES: Your Honor, that is
18 correct.

19 THE COURT: Okay. Mr. Meyers, do you
20 have any.

21 MR. MYERS: I think I understand it,
22 Your Honor. Maybe possible resolution, if it's not
23 already been resolved, is, append a letter agreement,
24 signed on behalf of the debtor and signed by the



1 committee, to the order. And that way it says what it
2 says.

3 MR. VOORHEES: Your Honor, I prefer
4 not to do that; simply because the letter agreement
5 goes far beyond the relief that we've requested from
6 the Court. We've asked for an extension. This goes
7 far beyond that.

8 And we've agreed with the committee
9 that we would abide by this schedule. We have every
10 intention to and we're going to live by that.

11 THE COURT: Yeah. I don't think it
12 needs to be a part of the order. But let me ask the
13 question. What happens if you don't meet the schedule?

14 MR. VOORHEES: Your Honor, I suspect
15 the committee will have us in here relatively quickly,
16 seeking some sort of relief, whether that's terminating
17 exclusivity or what.

18 THE COURT: Okay.

19 MR. GALARDI: Your Honor, just one
20 note on that. Just to clarify, we've talked,
21 obviously, about the letter.

22 Though it's not completely satisfying
23 to Mr. Meyers or myself, the order now provides that
24 based upon the settlement, various objections have been

1 withdrawn. So, there is, at least in the order, a
2 representation acknowledging that there is this
3 settlement agreement that they did in fact withdraw
4 their objections based on the settlement letter that
5 was attached to the debtor's response.

6 THE COURT: Okay. And for example,
7 if, come May 10, no plan is filed, then any landlord
8 would be entitled to come in and ask for a filed motion
9 seeking time to assume or reject short of July 15th?

10 MR. PERNICK: Okay. Good afternoon,
11 Your Honor.

12 THE COURT: And I assume the order
13 provides they have that right in any event.

14 MR. PERNICK: Norman Pernick on
15 behalf of Urban Retail Properties on this motion for
16 three malls: Fox Valley Center, Hawthorne Center, and
17 Town Center.

18 Your Honor, there's a proposed form
19 of order that's been sent around. I'm not sure if the
20 Court has it. But I have one change to that, which, I
21 think, has been agreed to by everybody. So, if that
22 gets passed up to the Court, perhaps, I could point the
23 Court towards that.

24 THE COURT: Okay.

1 MR. PERNICK: It's in paragraph 3.
2 There was some proposed language from Mr. Minuti which
3 the debtor and the committee modified. And that's what
4 you see in paragraph 3. And I'm okay with that with
5 one addition.

6 And the order would read, and we can
7 interlineate the Court's copy: "This order is without
8 prejudice with (a) the right of any lessor to seek to
9 compel the assumption or rejection of any lease prior
10 to July 15th, 1998." And I would add in parentheses
11 "or any later date granted by the Court, and of
12 parentheses." And then it would read on.

13 The reason for that is, we had
14 originally tied it to confirmation. I think the July
15 15th date was selected by the committee because that's
16 when they expect to be an outside date for
17 confirmation.

18 My only point is, if, for some
19 reason, that schedule gets bumped, I don't want to have
20 somebody argue that I don't have the right to file that
21 kind of motion to compel the assumption or rejection at
22 some date after July 15th. And I think everybody
23 agrees with that, that we would have that right in that
24 event.

1 THE COURT: What happens if we get to
2 July 15 and the plan hasn't been confirmed?

3 MR. PERNICK: I think the debtor--if
4 Your Honor signs this order, you will have a 365(d)(4)
5 date of July 15th. And the debtor, I assume, sometime
6 before that, will be moving to extend that. And then I
7 will be coming in, moving to extend our time to file
8 appropriate motion to compel some date after that. The
9 deadlines are meant to go together.

10 THE COURT: Okay.

11 MR. PERNICK: I don't want to speak
12 for the debtor, but I assume that's what will happen.

13 MR. VOORHEES: That's correct, Your
14 Honor. I assume that if we're not to confirmation by
15 July 15th, we'll be very close to confirmation. And if
16 we need a few extra weeks, we may seek a further
17 extension. But we'll have to address that when it
18 comes.

19 We've only spoken to the committee in
20 very general terms about the timing of confirmation. I
21 expect that we'll be discussing that with them shortly,
22 within the next week or two, when we get to the terms
23 of the plan that we circulate to them.

24 THE COURT: Okay. So, I take it, you

1 have no problem with the insertion that Mr. Pernick
2 wants to make?

3 MR. VOORHEES: I have no problem with
4 that, Your Honor.

5 THE COURT: Okay.

6 MR. COUSINS: Good afternoon, Your
7 Honor. Scott Cousins on behalf of 3290 Sunrise
8 Investments. Your Honor, we no longer have an
9 objection to the 365(d)(4) extension.

10 Two caveats: Apparently, there's an
11 order entered by the Court regarding ordinary-course
12 practices by the debtor. They can switch machines
13 periodically. That's consistent with our prepetition
14 practice.

15 Our landlord had some problems
16 involving the sheriff when the debtor tried to come in
17 and move machinery equipment around because it was
18 blocking shipping access, etc. I wanted a
19 clarification by the debtor that when they say "in the
20 ordinary course," that's consistent with their
21 prepetition practice.

22 In other words, what they've been
23 doing, consistent with the prepetition practice is,
24 call the landlord, saying, "We want to switch the

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1 equipment. When's a convenient time to switch the
2 equipment?"

3 That way we don't have a problem with
4 them blocking access to the shipping bays. And they
5 don't have a problem with a landlord who may call the
6 sheriff, for instance, if there's confusion or
7 misunderstanding with respect to them moving the
8 machinery.

9 Second, Your Honor--

10 THE COURT: What does that have to do
11 with this motion?

12 MR. COUSINS: Well, part of--Mr.
13 Voorhees and I were discussing the ordinary course
14 order. Part of--I guess it's not a happy marriage
15 between my client and the debtor.

16 THE COURT: I guess not if he calls
17 the sheriff on you.

18 MR. COUSINS: He's maybe a little bit
19 excitable. But one of the understandings, at least I
20 thought I had with the debtor, is, we wanted to clarify
21 another point that relates to 365(d)(4).

22 We're getting paid rent. We're not
23 sure if it's the right amount. By our calculations,
24 it's not the right amount; but we're going to take a



1 look at how the rent is calculated.

2 It's based on a percentage of gross.
3 The debtor has indicated that that's the way they've
4 been paying us for a considerable amount of time.
5 We've asked the debtor for an accounting so we can go
6 back and so they can go back and figure out exactly how
7 to count rent under the lease. But in addition, Mr.
8 Voorhees raised this issue about my client calling the
9 sheriff.

10 So, it's not directly related to the
11 365(d)(4); but it's related it's an ancillary issue
12 with respect to the calculation of rent in the
13 discussions that Mr. Voorhees and I had.

14 MR. PERNICK: Your Honor, just one
15 correction for the record. I think, as you might have
16 noticed, there's two sets of counsel for Urban Retail
17 Properties. It's different malls.

18 And I incorrectly stated that I
19 represented Fox Valley, Hawthorne, and Town Center. We
20 actually have about twelve malls, but it's not those
21 three. We didn't file a formal objection to the
22 365(d)(4) motion, but we worked out our language before
23 that objection was filed. I just want to correct the
24 record before Mr. Bowden gets really upset.

1 MR. VOORHEES: Your Honor, if I may,
2 I don't want to dwell on what Mr. Cousins has raised.
3 I don't think it's relevant to this motion. But by way
4 of background, if Your Honor recalls, the first day of
5 this case, we sought an order that confirmed that in
6 the ordinary course of business, Namco couldn't move
7 equipment, game equipment from one store to another,
8 which it has always done and which it continues to do
9 at all of its locations.

10 We had an unfortunate incident at Mr.
11 Cousins' client's location, where we went in to remove
12 a game and they called the sheriff in violation of the
13 automatic stay. I think that we've got that resolved.

14 We have agreed with Mr. Cousins that
15 we will inform them next time we're planning to come
16 out there, for the record. We're not required to do
17 that under our lease. But it's a reasonable request.
18 Our only caveat is, we don't want every time we notify
19 the landlord that we need to take equipment out, it
20 becomes a negotiation of when it will happen. We
21 expect both sides will act reasonably.

22 Secondly, there does seem to be a
23 dispute as to how much rent should be paid. We've been
24 paying Mr. Cousins' client the same amount of rent

1 we've paid prepetition.

2 We have told them that we will work
3 with them and see if we can answer the questions. I
4 assume if we're unable to work it out that Mr. Cousins
5 will be before Your Honor again and seek to compel us
6 to pay them some amount different.

7 MR. COUSINS: The only point is, if
8 they have an order that they can do something in the
9 ordinary course and they have a prepetition practice
10 and now postpetition they don't do it consistent with
11 the prepetition practice, that's, at least in my
12 understanding of the vertical and horizontal test of
13 ordinary course, not in the ordinary course. So, in
14 the past, my understanding is everybody's been very
15 reasonable, accommodating. The truck's coming in,
16 moving equipment around; and we certainly intend to do
17 so in the future.

18 And I also dispute the fact that
19 violated the automatic stay. Whether my client was on
20 notice with respect to the ordinary course order is
21 something that he believes. He's never seen it. So,
22 it's certainly not a willful violation of the automatic
23 stay.

24 THE COURT: Okay.

1 MR. MONACO: Good afternoon, Your
2 Honor. Frank Monaco for CBM Associates.

3 Your Honor, we filed an objection to
4 the debtor's motion, but it's my understanding that the
5 businesspeople are working things out. There's an
6 agreement in principle. So, we are withdrawing our
7 objection.

8 I also wanted to note for the record
9 that we also filed a motion for relief that was
10 originally scheduled to be heard on April 1. And it
11 was supposed to be heard today. But we will also be
12 withdrawing that motion as well.

13 Your Honor, I also represent
14 Bensonville Associates, which filed an objection to the
15 Section 365(d)(4) motion. They're the owner of the
16 Bensonville, Illinois, premises.

17 Your Honor, we filed this objection
18 as a precautionary measure. Based on our position, the
19 lease had been terminated prepetition. And the debtor,
20 of course, filed a response disputing that position.

21 I had a conversation with Mr. Brady
22 yesterday, and I believe that we're in agreement that
23 the debtor and Bensonville agree that the entry of this
24 extension order will not affect Bensonville's rights if

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1 the lease was terminated prepetition. And therefore,
2 both parties reserve their rights with respect to this
3 issue.

4 I have two follow-up points in
5 connection with the response. One is that we did file
6 a motion for relief, which is scheduled to be heard on
7 June 1. Hopefully, we'll work things out before then.
8 But if not, we'll be before Your Honor with respect to
9 this prepetition termination issue.

10 Finally, Your Honor, there was some
11 mention in the response about letters that went to the
12 debtor's officers and directors. I've advised my
13 cocounsel not to take any further action in connection
14 with those letters, and I've informed Mr. Brady of the
15 same. So, with that, Your Honor, I believe that our
16 objection has been resolved.

17 THE COURT: Okay.

18 MR. BOWDEN: Your Honor, Bill Bowden
19 on behalf of Urban Retail Properties Co. as the
20 managing agent for the landlords of Fox Valley Center,
21 Hawthorne Center, and Town Center. I appreciate Mr.
22 Pernick's clarifying who he was here on behalf of. We
23 had an issue in Camelot concerning that issue not too
24 long ago.



1 With the modifications in the
2 proposed order Mr. Pernick mentioned, we're satisfied
3 and withdraw the objection, Your Honor. Thanks.

4 THE COURT: Okay. You've got to
5 watch him. He'll steal your clients.

6 Okay. Anyone else? Okay. You want
7 to make this change that Mr. Pernick wanted?

8 MR. VOORHEES: Yes, Your Honor.

9 THE COURT: Okay. Next item.

10 MR. VOORHEES: Your Honor, the next
11 motion is Namco's motion to reject an additional four
12 leases. We have received no objection with respect to
13 two of those leases and previously submitted an order
14 to that effect to Your Honor.

15 With respect to the other two leases,
16 both of which are Urban Retail Properties, Urban has no
17 objection to the rejection per se. However, we've
18 taken the position that the effective date of the
19 rejection should be the date upon which we turn over
20 the keys to the landlord and not the date the Court
21 enters an order or the date the motion was filed.

22 Your Honor, it's my understanding
23 from Your Honor's Homeplace decision that as a general
24 rule, you have held that the date the order is entered

1 is the effective date of the rejection. However, the
2 Court has discretion as an equitable matter, if the
3 debtor demonstrates an unequivocal intent to reject a
4 lease, that an earlier date can be chosen. And here, I
5 think, we've shown that intent.

6 What happened was, and you have to
7 keep this in the context of this case, first of all,
8 this case is about uneconomic leases. And I think all
9 the landlords incurred, including Urban, know that we
10 don't have any below-market leases that we can market
11 to third parties.

12 Secondly, our real estate consultant,
13 Retail Consulting Services, both prepetition and
14 postpetition, has had a dialog with the landlords,
15 including Urban, which essentially Urban was notified
16 that if in fact we were unable to negotiate sufficient
17 rent concessions to make a go of the center that we
18 would be rejecting the lease. And that's, in fact,
19 what we did.

20 On March 6th, we turned over the keys
21 to the Stratford Square mall property. On March 9th,
22 we turned over the keys to the West Oaks mall property
23 in Texas. For both of those, when we turned over the
24 keys, we received written receipts from the landlord,



1 which we have attached to our response.

2 On March 24th, we filed our motion to
3 reject. And we're before Your Honor today on April
4 15th, seeking the relief on that motion.

5 I know that Urban has claimed that
6 until they have an order from this Court, they are
7 unable to have the certainty they need to go out and
8 market the property. And I think, while that may be
9 true in some cases, it's not in this case.

10 We turned over the keys. We didn't
11 have an ability to market the property if we wanted to
12 change our mind and try to assign this property to a
13 third party. We turned over the keys. We told them
14 all along once we did that, we were going to reject the
15 lease. That's what we did.

16 They could have started the process.
17 While they didn't believe they could have committed
18 financially to a new tenant, they could have contacted
19 brokers and done a number of things, we think, under
20 the circumstances. The equities weigh in favor of
21 making an effective date of rejection when we turned
22 over the keys.

23 MR. BOWDEN: Your Honor, Bill Bowden
24 for Urban Retail as the managing agent for the West



1 Oaks mall location. Your Honor, the reality, as I see
2 it here, is really this.

3 Unless and until an order is entered,
4 we cannot tell a prospective new tenant that we have
5 the absolute right to release these premises. And if
6 we entered into a lease between the date they turn over
7 the keys, the date they file the motion with a new
8 tenant and, heaven forbid, Namco out of the blue, let's
9 say, gets an offer to purchase this lease and property,
10 we've entered into a potential transaction with a new
11 tenant that exposes us to liability. There is no
12 assurance no matter what the circumstances, in my view,
13 Your Honor, I submit, that a debtor can say
14 unequivocally that it might not receive an offer to
15 take an assignment of a lease between the time it turns
16 over the keys and the time the Court enters an order.

17 And if during that period, we enter
18 into a lease with a new tenant, Your Honor, and it
19 turns out a minute before the hearing that there's a
20 buyer for this lease, the debtor--and Your Honor,
21 perhaps, the code puts the debtor in the hot seat--the
22 debtor's got a fiduciary duty, it seems to me, to
23 maximize the profit for the estate and say, "I want to
24 take the motion to reject off the table, Urban, because

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1 I've got a deal over here that could put money in the
2 pocket." If I represent the creditor's committee,
3 that's certainly what I want the debtor to do.

4 With respect to--Your Honor, a couple
5 other points on this issue.

6 THE COURT: Well, let me just respond
7 to that one. It seems to me that in that situation,
8 unless there were some terribly persuasive facts that
9 are beyond what you've suggested, I would grant the
10 rejection motion and deny the motion to assume; because
11 the landlord would have taken action detrimental to
12 itself in reliance upon the debtor's representations.
13 And I wouldn't allow those representations to be
14 withdrawn.

15 MR. BOWDEN: I appreciate that, Your
16 Honor. But at the same point in time, there's no
17 assurance to that until we get to the court, have a
18 hearing, and the order is entered.

19 With respect to--

20 THE COURT: Well, there are cases out
21 there that give the Court some discretion under
22 principles of equity to have the order predate the
23 hearing.

24 MR. BOWDEN: I understand that.

1 THE COURT: And the reason for that
2 is obvious; that given the crowded calendar, why should
3 a debtor have to pay for premises it's not using simply
4 because the Court can't get to the motion that it filed
5 maybe a month ago?

6 MR. BOWDEN: Your Honor, I
7 acknowledge those cases exist. There are also cases
8 that I'm sure Your Honor is aware of that say the
9 landlord shouldn't have to bear the burden because of
10 the delay in hearing the Court process. But even aside
11 from that, Your Honor, I think that there is a solution
12 here that could perhaps be implemented to give both
13 sides the certainty that they want.

14 I don't know of any case where this
15 has been done. In addition to turning the keys over,
16 perhaps, and leaving the premises in broom-clean
17 condition, the debtor can advise the landlord that it
18 has agreed to release or waive any right it might have
19 to seek an assignment of this lease. And as far as the
20 debtor is concerned, the landlord can go out and start
21 to remarket the lease as if the lease had been
22 rejected. Take that issue off the table. That's not
23 what I have ever seen, Your Honor, done.

24 With respect to the equities of the



1 case, Your Honor, I recognize that there are certain
2 circumstances where the Court is permitted and the case
3 law makes it clear, Thinking Machines and a couple of
4 other cases and, I believe, one of Your Honor's rulings
5 in Homeplace, where Your Honor rules that in the
6 appropriate circumstances, the equities of the case
7 permit that the rejection be made retroactive to the
8 date the motion is filed. They deal with situations
9 where the landlord has unnecessarily delayed in moving
10 in remarketing the property.

11 Thinking Machines discusses
12 penalizing the debtor for the landlords, not penalizing
13 the debtor for undue delay on the part of the landlord.
14 I have taken a look and the best I can determine,
15 that's not the case here.

16 The New Valley case, which is the
17 opinion, I think, appended to the limited objection we
18 filed, the circumstances there, what the Court
19 determined, that the rejection should be made
20 retroactive. The landlord knew four years before the
21 debtor was ceasing--before the motion was filed, the
22 debtor was ceasing operations at that location. The
23 debtor not only vacated the location, the landlord had
24 begun to construct and pulled out new space for a new

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1 tenant.

2 The bottom line, Your Honor, is, in
3 the circumstances present here, I don't think the
4 equities of the case, based upon what the case law
5 says, the equities in the case even justify retroactive
6 approval of this motion and rejection date. For the
7 reasons that I set forth before, I think the more
8 appropriate approach here is that the rejection be made
9 effective the date that the order is entered.

10 MR. PERNICK: Good afternoon, Your
11 Honor. Norman Pernick on behalf of Urban as agent for
12 the Stratford Square mall. And let me embellish a
13 little bit on Mr. Bowden's arguments.

14 First, when we look at 365(d)(3),
15 it's pretty clear that what it says is, "the debtor
16 shall timely perform all obligations until the lease is
17 assumed or rejected." And I think the cases are pretty
18 clear and counsel for the debtors acknowledge that what
19 that means is, the majority. And the general rule is,
20 it's the date the order is entered. And absent there
21 certainly can be an equitable determination. And
22 that's a possibility here.

23 I guess the problem I have here is a
24 technical one, but it's also a pretty large one.

1 There's no evidence in the record that's been presented
2 by the debtor to get over that burden. And it is their
3 burden to do that.

4 THE COURT: Evidence of what?

5 MR. PERNICK: Evidence of the
6 equities that should be used by the Court to change the
7 majority rule. Now, there is some evidence in the
8 record, which I'll point the Court to.

9 But, for example, counsel for the
10 debtor mentioned that these are uneconomic leases. I'm
11 not sure that there's evidence on these leases, these
12 particular leases, that that's the case. So, I don't
13 think the Court really can consider that. And I'm not
14 sure that it really matters in this analysis, anyway.

15 They did agree that the landlords
16 could not have committed until this court enters an
17 order. We all agree what the practicalities are. The
18 practicalities are that the lease would probably be
19 rejected. But it's not a commitment until the Court
20 signs the order.

21 The equities that I think are in the
22 record are pretty simple ones. The keys were turned
23 over on March 6th. We agree with that. The motion
24 wasn't filed until March 26. I think waiting three

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1 weeks--

2 THE COURT: I thought it was March
3 24.

4 MR. PERNICK: I'm sorry. We were
5 served on March 26th. I think it was filed on the
6 24th. It's almost three weeks later from the date the
7 keys were turned over. It seems to me that maybe the
8 debtor's in a little better position to argue the
9 equities of the situation when they jump on it right
10 away, turn the keys over, and get their motion filed so
11 that this hearing can take place as quickly as
12 possible.

13 This is not a situation that the
14 Court referred to, I don't believe, where we had an
15 issue of the court's crowded calendar. They waited
16 three weeks to even try to get on the calendar.

17 And here we are at April 15th. So,
18 at a minimum, I think our position is that it ought to
19 be as of March 26th the effective date, the date they
20 filed the motion. We don't agree that's the position,
21 but I don't know how they can stand up in front of you
22 and argue that it should be before that.

23 Mr. Bowden referenced what I think is
24 just a self-evident fact; that we practically can't



1 rerent that premises, and the debtor admitted that,
2 until the order is signed. We can shop the properties.
3 I don't think there's any evidence in the record
4 whether the landlords did or didn't shop the
5 properties.

6 But the fact of the matter is, you
7 probably can take tenants in there. That's not--the
8 issue is, Can you commit? You can't commit, at least
9 as a landlord's counsel, can't tell my client that they
10 can sign up a new tenant until I have this Court's
11 order rejecting the lease.

12 And the committee, even though I
13 agree that they probably don't come in, we had no
14 assurances that the committee, for instance, here
15 wasn't going to come in and object to the rejection or
16 come in with an offer to buy that lease. So, I think
17 that uncertainty alone and the fact that the motion was
18 filed three weeks after the keys were turned over are
19 the equities that are in our favor and not a reason to
20 change what, certainly, is the general rule and
21 everybody recognizes is the general rule.

22 Based on that, we think the motion
23 should be denied. The effective date should be the
24 date the order is entered, which is today. Thank you.



1 MR. VOORHEES: Your Honor, if I could
2 respond briefly. I don't think we could have sent a
3 stronger message to the landlords that we intended to
4 reject these properties. We turned over the keys; and
5 we have written evidence that those keys were received
6 on that date, which is attached--which are attached to
7 our response.

8 As far as Mr. Bowden's comments with
9 respect to our fiduciary duty, the debtor takes its
10 fiduciary duty very seriously. When we turned over the
11 keys, we made a determination on that date there is no
12 equity in this lease. We weren't going to be able to
13 market it. And we had to return it to the landlord
14 because we were going to reject it.

15 That's the date we decided to reject.
16 And we sent that message to the landlord clearly as
17 soon as we turned over those keys.

18 As far as waiting three weeks to file
19 the motion, Your Honor, the only reason we waited a few
20 weeks was because we didn't want to crowd this Court's
21 calendar with four motions instead of one. We knew
22 that we had three or four leases that we're going to
23 have to reject in the near term. We knew that we
24 weren't going to turn the keys over on the exact same

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1 day for every one of them.

2 As soon as we got the last set of
3 keys turned in, we put together a motion. We filed it.
4 That's all. That's the reason we waited a few weeks.

5 But it was the date that we turned
6 over the keys, not the date we filed the motion. The
7 landlords knew as a practical matter in this case that
8 we weren't going to do anything with this--we weren't
9 going to be able to market these leases and that we
10 were rejecting them.

11 THE COURT: Does the committee have a
12 position on this?

13 MR. GALARDI: No, Your Honor, we have
14 no position.

15 THE COURT: Okay. Well, it does seem
16 to me that where it is patently clear that the lease is
17 going to be rejected that as a matter, some equity
18 relief ought to be granted.

19 And I think the role that I am
20 inclined to adopt--and I'm not going to apply it in
21 this case because for the reasons I mentioned--I
22 believe that if the premises are surrendered with an
23 unequivocal statement to the landlord that the debtor
24 is abandoning and thereafter the debtor files a motion

1 to reject, then I believe that it would be equitable to
2 allow the rejection date to be effective on the date
3 that that motion is served, provided that the motion
4 contains a representation that the committee agrees
5 with the motion; because if that representation were in
6 the motion, then I can't conceive of the circumstances
7 under which the motion would be denied.

8 And if a landlord wants--I'm sorry.
9 If the debtor wants a rejection date prior to the
10 hearing date, then to the extent it seeks that date,
11 then a part of my rule would be that the debtor cannot
12 change its mind.

13 So, if you want a rejection date
14 prior to the hearing, it seems to me that it could be
15 done in the circumstances where (a) prior to the filing
16 of the motion, the keys were surrendered, the premises
17 surrendered with an unequivocal statement to the
18 landlord of abandonment; (b) the motion is served and
19 filed on the landlord; (c) the motion states that the
20 committee agrees with the motion; and (d) that the
21 debtor acknowledges that it will not have the right to
22 withdraw that motion prior to the hearing. Given those
23 situation--given those factors, I would permit the
24 rejection effective as of service of the motion.

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1 You don't have those facts in this
2 case. So, I wouldn't apply the rule in this case.

3 However, it does seem to me that
4 there was an objection deadline of April 6th, 1998.
5 Nobody objected to the rejection. And it certainly
6 seems to me that a rejection date of April 6 would be
7 appropriate under these circumstances. So, I'll sign
8 an order authorizing the rejection as of April 6.

9 MR. VOORHEES: Your Honor, we will
10 modify our order and submit it to Your Honor.

11 Your Honor, the final matter before
12 the Court today is a preliminary matter with respect to
13 our motion to sell the Magic Edge facility that Namco
14 owns out in California. We're not asking Your Honor to
15 approve the sale today. What we're asking is that we
16 allow the prospective purchaser to go in and operate
17 the premises to preserve its going-concern value.

18 We close--this is a center that's a
19 little different than the other operations Namco has.
20 It's a flight simulator combination restaurant, flight
21 simulator facility, that just hasn't done particularly
22 well.

23 Namco tried to market it for some
24 time, both before the case was filed and since. In the

1 end of February, on February 27th, we closed the
2 facility because we didn't have any takers. Since
3 then, we've had a couple interested parties; and one
4 has come to us and actually made an offer.

5 The center's been closed for about a
6 month. The offer to purchase the center is contingent
7 on the prospective purchaser being able to go in and
8 open it right away and preserve its going-concern
9 value. They will be operating it at their own cost and
10 risk.

11 They've indemnified the debtor. The
12 parent company has guaranteed that indemnification.
13 And they're going to have general liability insurance
14 coverage sufficient to cover any claims while they may
15 be operating.

16 I believe the committee has no
17 objection to this aspect of the relief we've requested.
18 And we would ask Your Honor to allow them to both start
19 operating and to set a hearing date three to four weeks
20 out on the actual sale.

21 THE COURT: Okay. Anyone else want
22 to be heard on this?

23 MR. GALARDI: Your Honor, Mr.
24 Voorhees is correct. The committee has reviewed it



1 with respect to what, I guess, he's referred to as
2 subparts A and B. The committee has no objection to
3 their operating the company pending a sale motion
4 hearing.

5 MR. VOORHEES: Your Honor, we will be
6 amending the motion slightly to account for some
7 additional cure costs that we discovered after we
8 initially filed it. We thought there were only \$700
9 worth of cure costs, and there are going to be more
10 than that. And we will change the motion to reflect
11 that and make sure that all those parties of those
12 executory contracts have notice of the motion and the
13 hearing on the sale.

14 THE COURT: Okay. You need a date--

15 MR. VOORHEES: Yes, we do.

16 THE COURT: --for the sale hearing?
17 Does your agreement with the buyer address a deadline
18 for a hearing?

19 MR. VOORHEES: No, it doesn't, Your
20 Honor. We would like to have it, if possible, three to
21 four weeks out so that they can have some certainty
22 that they will be able to operate as the actual owner.

23 THE COURT: The only time I can see
24 is May 22 at, let's say, 11:30.

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MR. VOORHEES: Your Honor, if I may
tender the orders.

THE COURT: Okay.

MR. VOORHEES: This is the letter
with respect to Magic Edge. And this is the rejection
order.

THE COURT: Okay. Anything else?

MR. VOORHEES: That's all, Your
Honor.

THE COURT: Okay. We stand and
recess.

(The hearing concluded at 4:50 p.m.)

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State of Delaware)
County of New Castle)

C E R T I F I C A T E

I, Jerusha R. Simon, Registered Professional Reporter, Certified Realtime Reporter, and Notary Public, do hereby certify that the foregoing record, pages 1 to 39 inclusive, is a true and accurate transcript of my stenographic notes taken on April 15, 1998, in the above-captioned matter before the Honorable Peter J. Walsh.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 17th day of April, 1998, at Wilmington.

Jerusha R. Simon
Jerusha R. Simon, RPR, CRR

1087D



EXHIBIT C

Proposed Order

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

In re:)	
)	Chapter 11
AMES HOLDING CORP., et al.,¹)	
)	Case No. 09-14406
)	
Debtors.)	Joint Administration Pending
_____)		

**ORDER GRANTING MOTION OF DEBTORS TO
REJECT NON-RESIDENTIAL REAL PROPERTY LEASES**

This matter came to be heard upon the motion (the “Motion”) of the Debtors Ames Holding Corp., Axia Incorporated, TapeTech Tool Co., Inc., and Ames Taping Tool Systems, Inc. (the “Debtors”) for entry of an Order, pursuant to sections 105, 365(a), 365(d)(3), 1107 and 1108 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq* (the “Bankruptcy Code”) and Rule 6006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), authorizing the Debtors, pursuant to sections 105 and 365(a) of title 11 of the United States Code (the “Bankruptcy Code”) and Rule 6006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), to reject forty-four (44) leases of non-residential real property, effective as of December 14, 2009, the date on which the Debtors filed their bankruptcy petitions;² a hearing having been held on the Motion on _____, 2010 (the “Hearing”), at which time all parties in interest had an opportunity to be heard on the Motion; the Court having considered the Motion and heard the arguments of the parties presented at the Hearing and having determined that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) this matter is a core

¹ The Debtors in these cases, along with the last four digits of the federal tax identification number for each of the Debtors, are Ames Holding Corp. (6130), Axia Incorporated (5251), TapeTech Tool Co., Inc. (7106), and Ames Taping Tool Systems, Inc. (6440). The Debtors’ corporate offices are located at 3350 Breckinridge Boulevard, Suite 100, Duluth, Georgia 30096

² Capitalized terms used, but not otherwise defined, herein shall have the meaning ascribed to them in the Motion.

proceeding under 28 U.S.C. § 157(b), (c) notice of the Motion and of the Hearing was due and proper under the circumstances, and no other or further notice of either the Motion or of the Hearing need be given, (d) the rejection of the Unwanted Leases is within the sound business judgment of the Debtors and is in the best interests of the Debtors' estates, creditors and other parties in interest;

NOW, THEREFORE, based upon the Motion and all of the proceedings before this Court, and after due deliberation and sufficient cause appearing therefor, it is hereby:

ORDERED that the Motion is GRANTED; and it is further

ORDERED that the Debtors are authorized to reject the Unwanted Leases effective as of the Petition Date (the "Rejection Date"), pursuant to sections 105 and 365(a) of the Bankruptcy Code and that, as of the Rejection Date, each of the Unwanted Leases shall be deemed rejected and the Debtors shall have no further obligation to perform under any of the Unwanted Leases; and it is further

ORDERED that a holder of any claim allegedly arising from the rejection of any Unwanted Lease who fails to file a proof of such claim on or prior to the deadline set by the Court for submitting such proofs of claims shall be (a) forever barred from asserting such claim against any of the Debtors or their respective estates; (b) forever barred from sharing, on account of such claim, in any distribution of any Debtors' estate or assets under any plan of reorganization confirmed in these chapter 11 cases or under any Order of the Court authorizing a distribution from any Debtor's estate; and (c) bound by the terms of any plan of reorganization confirmed in these chapter 11 cases or any Order of the Court authorizing a distribution from any Debtor's estate; and it is further

ORDERED that the Debtors shall serve a copy of this Order upon all parties to the Unwanted Leases; and it is further

ORDERED that the Court shall retain jurisdiction to hear and determine all matters arising from the implementation of this Order.

Dated: _____, 2010
Wilmington, Delaware

UNITED STATES BANKRUPTCY JUDGE