

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
Greenbelt Division**

IN RE:)	
)	
JOANNE’S BED & BACK STORES, INC.)	Case No. 08-14606 (TJC)
)	(Chapter 11)
Debtor)	

**MOTION TO REJECT NON-RESIDENTIAL
REAL ESTATE AS OF THE PETITION DATE**

JoAnne’s Bed & Back Stores, Inc., a Maryland corporation, debtor and debtor-in-possession herein (the “Debtor”), by and through its undersigned counsel, hereby moves this Court for entry of an order Rejecting Non-Residential Real Estate Leases Nunc Pro Tunc (the “Motion”). In further support of this Motion, the Debtor alleges:

BACKGROUND

1. On April 2, 2008 (the “Petition Date”), the Debtor filed in this Court a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”).
2. The Debtor has continued in possession of its property and has continued to operate and manage its business as debtor-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.
3. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this proceeding and this Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicate for the relief sought herein is 11 U.S.C. § 365.
4. Prior to the Petition Date, the Debtor operated sixteen (16) retail stores including a warehouse in Maryland, Washington, DC and Virginia, which sell ergonomic mattresses,

adjustable beds, office, lounge and massage chairs, seat lift chairs, comfort accessories and other furniture.

RELIEF REQUESTED

5. The Debtor entered into certain pre-petition leases with various parties for non-residential real property. A list of the leases the Debtor is seeking to reject (the “Rejected Leases”) is attached hereto as Exhibit A¹ and incorporated herein by reference.

6. The Rejected Leases require payments in excess of \$14,500 per month.

7. In its business judgment, the Debtor has decided to consolidate its business operations prior to a sale of substantially all of its assets and has vacated the properties under the Rejected Leases. Both properties were vacated prior to the Petition Date.

8. The Debtor seeks entry of an order authorizing the rejection of the Rejected Leases pursuant to section 365(a) of the Bankruptcy Code, effective as of the Petition Date.

AUTHORITIES

9. Section 365 of the Bankruptcy Code states that a debtor-in-possession, “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). The decision to assume or reject an executory contract or unexpired lease is a matter within the “business judgment” of the debtor. See Nat’l Labor Relations Bd. v. Bildisco and Bildisco (In re Bildisco), 682 F.2d 72, 79 (3d Cir. 1982) (stating that “the usual test for rejection of an executory contract is simply whether rejection would benefit the estate, the ‘business judgement’ test”). The business judgment standard mandates that a court approve a debtor’s business decision unless the decision is the product of “bad faith,

¹ The leases themselves are voluminous and copies will be made available only upon request to Debtor’s counsel.

whim or caprice.” Lubrizon Enters. v. Richmond Metal Finishes, 756 F.2d 1043, 1047 (4th Cir. 1980).

10. The Debtor has evaluated each of the Rejected Leases in the context of the Bankruptcy Code. In the exercise of its business judgment and in light of the facts and circumstances surrounding each Rejected Lease, the Debtor has determined that the Rejected Leases are not useful for its ongoing operations, and as a result, such Rejected Leases are more burdensome than beneficial to the estate. The Rejected Leases represent leases which, based on the Debtor’s careful review, are unnecessary for the Debtor’s current needs and essentially are empty spaces.

11. The Debtor seeks to reject the Rejected Leases, effective as of the Petition Date, to ensure that any claims under such will be treated as unsecured pre-petition claims in accordance with section 365(g)(1) of the Code. See Nat’l Labor Relations Bd. v. Bildisco and Bildisco, 465 U.S. 513, 530 (1984) (stating that rejection relates back to the petition date). The Debtor does not believe the Rejected Leases provide the basis for a claim for administrative expense priority because the Rejected Leases are a burden rather than a benefit to the estate. See In re O.P.M. Leasing Services, Inc., 56 B.R. 678, 683 (Bankr. S.D.N.Y. 1986).

12. The equities surrounding the circumstances of the Rejected Leases weigh in favor of approving a lease rejection date in accordance with this Motion. See Amber’s Stores, Inc., 193 B.R. 819, 827 (Bankr. N.D. Tex. 1996) (holding that “nothing precludes a bankruptcy court, based upon the equities of the case, from approving the trustee’s rejection of a non-residential real property lease retroactively to an earlier date”). See also In re Thinking Machines Corp., 67 F.3d 1021, 1028 (1st Cir. 1995) (stating that “bankruptcy courts may enter retroactive orders of approval, and should do so when the balance of equities preponderates in favor of such

remediation”). Consequently, rejection of the Rejected Leases is in the best interests of the Debtor and the estate.

NOTICE

13. Notice of the Motion has been given to (i) the United States Trustee, (ii) the affected landlords; and (iii) the twenty largest unsecured creditors. In light of the nature of the relief requested herein, the Debtor submits that no further notice need be given.

14. No previous application for the relief requested herein has been made by the Debtor to this or any other court.

WHEREFORE, the Debtor respectfully requests that this Court enter an order rejecting the non-residential real estate leases listed at Exhibit A as of the Petition Date, and granting such other and further relief as is just and proper.

Respectfully submitted,

**SHULMAN, ROGERS, GANDAL,
PORDY & ECKER, P.A.**

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EXHIBIT A

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