

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

	X	
	:	
In re:	:	Chapter 11
	:	
Alcor Energy, LLC, ¹	:	Case No. 18-12839 (___)
	:	
Debtor.	:	Hearing Date: TBD
	:	Obj. Deadline: TBD
	X	

DEBTOR’S MOTION FOR ENTRY OF AN ORDER, PURSUANT TO SECTIONS 105(a), 365(a), AND 554 OF THE BANKRUPTCY CODE, AUTHORIZING THE DEBTOR TO (I) REJECT THAT CERTAIN UNEXPIRED LEASE OF NONRESIDENTIAL REAL PROPERTY LOCATED AT 3207 NCR 1108, MIDLAND, TEXAS 79706, *NUNC PRO TUNC* TO THE PETITION DATE AND (II) ABANDON ANY REMAINING PROPERTY AT SUCH LOCATION

Alcor Energy, LLC (the “Debtor”) hereby moves (this “Motion”) the Court for entry of an order, substantially in the form attached hereto as Exhibit A (the “Proposed Order”), pursuant to sections 105(a), 365(a), and 554 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “Bankruptcy Code”), and Rules 6004 and 6006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), (a) authorizing the Debtor to reject, *nunc pro tunc* to the Petition Date (as defined below), that certain unexpired lease of nonresidential real property (the “Lease”), by and between Sunmore 5109, LLC (the “Landlord”) and the Debtor for the premises located at 3207 NCR 1108, Midland, Texas 79706 (the “Office and Warehouse Space”), which the Debtor has determined in its business judgment should be rejected, and (b) authorizing the Debtor to abandon any remaining property located at the Office and Warehouse Space. In support of this Motion, the Debtor relies upon and incorporates by reference the *Declaration of Don Pitts, Chief Financial Officer, in Support of Chapter 11 Petition and First Day Motions* (the

¹ The last four digits of the Debtor’s taxpayer identification number are 0924. The Debtor’s address is 7754 East Velocity Way, Mesa, Arizona 85212.

“First Day Declaration”),² filed concurrently herewith. In further support of this Motion, the Debtor respectfully represents as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334(b) and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b), and pursuant to Rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), the Debtor consents to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

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

3. The statutory and legal predicates for the relief requested herein are sections 105(a), 365(a), and 554 of the Bankruptcy Code and Bankruptcy Rules 6004 and 6006.

BACKGROUND

A. General

4. On the date hereof (the “Petition Date”), the Debtor commenced a case by filing a petition for relief under chapter 11 of the Bankruptcy Code (the “Chapter 11 Case”) as a “small business debtor” as that term is defined in the Bankruptcy Code.

5. The Debtor continues to operate its business and manage its properties as a debtor and debtor in possession under sections 1107(a) and 1108 of the Bankruptcy Code.

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the First Day Declaration.

6. To date, no creditors' committee has been appointed in the Chapter 11 Case by the Office of the United States Trustee for the District of Delaware (the "United States Trustee"). No trustee or examiner has been appointed in the Chapter 11 Case.

7. Additional factual background information regarding the Debtor, including its business operations, its corporate and capital structure, and the events leading to the Chapter 11 Case, is set forth in detail in the First Day Declaration, which is incorporated herein by reference.

B. The Office and Warehouse Space

8. Employees of the Debtor occupied the Office and Warehouse Space since April 30, 2018 and used such space for office and warehousing purposes. However, all personnel vacated the premises several months prior to the Petition Date. The current lease term expires on April 29, 2023.

9. The Debtor has been conducting a review of its operations and has determined in its business judgment that the Office and Warehouse Space is no longer necessary to the Debtor's operations, and that rejecting the Lease is in the best interests of its estate. Accordingly, the Debtor seeks to reject the Lease.

10. The Debtor finished removing all personnel, records, and property of value from the Office and Warehouse Space and turned possession to the premises over to the Landlord several months prior to the Petition Date.

11. The Debtor has determined in its business judgment that the remaining personal property at the Office and Warehouse Space, including any remaining furniture, fixtures, and equipment, (collectively, the "Remaining Property") is of inconsequential value to the Debtor's estate and/or will be difficult or expensive to remove or store, such that the economic benefits of removing and/or storing the Remaining Property will be exceeded by the attendant costs thereof.

Thus, the Debtor seeks authorization to abandon any Remaining Property at the Office and Warehouse Space as of the Petition Date.

RELIEF REQUESTED

12. Pursuant to sections 105(a), 365(a), and 554 of the Bankruptcy Code, the Debtor requests entry of the Proposed Order (a) authorizing the Debtor to reject, *nunc pro tunc* to the Petition Date, the Lease and (b) authorizing the Debtor to abandon the Remaining Property.

BASIS FOR RELIEF REQUESTED

A. Rejection of the Lease Is Authorized by Section 365(a) of the Bankruptcy Code

13. Section 365(a) of the Bankruptcy Code provides that a trustee or debtor in possession, “subject to the court’s approval may . . . reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a). “This provision allows a trustee to relieve the bankruptcy estate of burdensome agreements which have not been completely performed.” Stewart Title Guar. Co. v. Old Republic Nat’l Title Ins. Co., 83 F.3d 735, 741 (5th Cir. 1996) (quoting Phoenix Expl., Inc. v. Yaquinto (In re Murexco Petroleum, Inc.), 15 F.3d 60, 62 (5th Cir. 1994)).

14. The decision to assume or reject an executory contract or unexpired lease is a matter within the “business judgment” of the debtor in possession. See Sharon Steel Corp. v. Nat’l Fuel Gas Distr. Corp., 872 F.2d 36, 40 (3d Cir. 1989) (discussing executory contracts); NLRB v. Bildisco & Bildisco (In re Bildisco), 682 F.2d 72, 79 (3d Cir. 1982) (“The usual test for rejection of an executory contract is simply whether rejection would benefit the estate, the ‘business judgment’ test.”); see also In re Tayfur, 599 Fed. Appx. 44, 49–50 (3d Cir. 2015) (extending the standard articulated in Sharon Steel Corp. to unexpired leases); In re HQ Glob. Holdings, 290 B.R. 507, 511 (Bankr. D. Del. 2003). The business judgment standard mandates

that a court approve a debtor's business decision unless the decision is the product of bad faith, whim, or caprice. See Comput. Sales Int'l, Inc. v. Fed. Mogul (In re Fed. Mogul Glob., Inc.), 293 B.R. 124, 126 (D. Del. 2003) (holding that court should approve a debtor's decision to reject a contract unless the decision is the product of bad faith or a gross abuse of discretion); In re HQ Glob. Holdings, 290 B.R. at 511 (stating that a debtor's decision to reject an executory contract is governed by the business judgment standard and can only be overturned if the decision was the "product of bad faith, whim, or caprice").

15. Rejection of an executory contract or unexpired lease is appropriate where rejection of the contract or lease would benefit the estate. Sharon Steel Corp., 872 F.2d at 39. The standard for rejection is satisfied when a trustee or debtor has made a business determination that rejection will benefit the estate. See Commercial Fin., Ltd. v. Hawaii Dimensions, Inc. (In re Hawaii Dimensions, Inc.), 47 B.R. 425, 427 (D. Haw. 1985) ("Under the business judgment test, a court should approve a debtor's proposed rejection if such rejection will benefit the estate."). Thus, if the debtor's business judgment has been reasonably exercised, a court should approve the assumption or rejection of an executory contract or an unexpired lease. See, e.g., In re Fed. Mogul Glob., Inc., 293 B.R. at 126.

16. Here, for the reasons described in this Motion, the Debtor seeks to reject the Lease, pursuant to section 365(a) of the Bankruptcy Code, to avoid the potential incurrence of any additional, unnecessary expenses related to the Lease and the maintenance of the Office and Warehouse Space. Because the Debtor has vacated the Office and Warehouse Space, incurring expenses for the remainder of the Lease term is not in the Debtor's best interest. The Debtor has determined, in the exercise of its sound business judgment, that there is no net benefit that is likely to be realized from the Debtor's continued efforts to retain the Lease. Accordingly, the

Debtor has concluded that rejection of the Lease is in the best interest of the Debtor's estate, its creditors, and other parties in interest.

17. In order to avoid paying any unnecessary expenses related to the Lease, the Debtor seeks to reject the Lease *nunc pro tunc* to the Petition Date. A court may permit such retroactive rejection to avoid unduly exposing a debtor's estate to unwarranted post-petition administrative or other expenses. In re Chi-Chi's, Inc., 305 B.R. 396, 399 (Bankr. D. Del. 2004); see also Stonebriar Mall Ltd. P'ship v. CCI Wireless, LLC (In re CCI Wireless, LLC), 297 B.R. 133, 140 (D. Col. 2003) (holding that a bankruptcy court "has authority under section 365(d)(3) to set the effective date of rejection at least as early as the filing date of the motion to reject"); In re Fleming Cos., Inc., 304 B.R. 85, 96 (Bankr. D. Del. 2003) (holding, with respect to unexpired leases, that rejection *nunc pro tunc* is permitted to the date of the motion or the date the premises surrendered in certain circumstances); In re Amber's Stores, 193 B.R. 819, 827 (N.D. Tex. 1996); Thinking Machs. v. Mellon Fin. Servs. Corp. (In re Thinking Machs. Corp.), 67 F.3d 1021, 1028 (1st Cir. 1995) ("In the section 365 context . . . bankruptcy courts may enter retroactive orders of approval, and should do so when the balance of equities preponderates in favor of such remediation."); Constant Ltd. P'ship v. Jamesway Corp. (In re Jamesway Corp.), 179 B.R. 33, 37-38 (S.D.N.Y. 1995) (affirming bankruptcy court's retroactive approval of lease rejection). Generally, courts have permitted retroactive rejection of executory contracts and unexpired leases when the non-debtor party to the agreement was given definite notice of the intention to reject. See, e.g., In re Namco Cybertainment, Inc., Case No. 98-00173 (PJW) (Docket No. 45) (Bankr. D. Del. Feb. 6, 1998).

18. The facts in this Chapter 11 Case and the balance of the equities favor the Debtor's rejection of the Lease *nunc pro tunc* to the Petition Date. Without a retroactive date of

rejection, the Debtor may incur unnecessary administrative charges for a lease that is not necessary to the Debtor's chapter 11 efforts. Moreover, the Debtor submits that it has fulfilled the requirements for retroactive rejection of the Lease by providing adequate notice of the Debtor's intent to reject to the Landlord and demonstrating its unequivocal intent to surrender the Office and Warehouse Space. In light of the foregoing, the Debtor respectfully submits that its rejection of the Lease under section 365(a) of the Bankruptcy Code is a sound exercise of its business judgment and is necessary, prudent, and in the best interests of the Debtor, its estate, and its creditors.

B. Abandonment of Any Remaining Property Located at the Office and Warehouse Space is Authorized by Section 554(a) of the Bankruptcy Code

19. Section 554(a) of the Bankruptcy Code provides that “[a]fter notice and a hearing, the [debtor] may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.” 11 U.S.C. § 554(a); see also Hanover Ins. Co. v. Tyco Indus., Inc., 500 F.2d 654, 657 (3d Cir. 1974) (“[A trustee] may abandon his claim to any asset, including a cause of action, he deems less valuable than the cost of asserting that claim.”). The right to abandon property is virtually unfettered, unless (a) abandonment of the property will contravene laws designed to protect public health and safety or (b) the property poses an imminent threat to the public's welfare. See, e.g., In re Contract Research Sols., Inc., Case No. 12-11004, 2013 WL 1910286, at *4 (Bankr. D. Del. May 1, 2013) (“[A debtor] need only demonstrate that [it] has exercised sound business judgment in making the determination to abandon.”); see In re Midlantic Nat'l Bank, 474 U.S. 494, 501 (1986). Neither of these limitations is relevant under the instant facts.

20. The Debtor submits that the Remaining Property is either of inconsequential value to the Debtor's estate, or that the costs to the Debtor of retrieving, marketing, and reselling the

Remaining Property will exceed the recoveries, if any, that the Debtor and its estate could reasonably obtain in exchange for such property.

21. Accordingly, the Debtor has determined that, in the exercise of its sound business judgment, abandonment of any Remaining Property is in the best interest of the Debtor, its estate, and its creditors.

REQUEST FOR WAIVER OF STAY

22. To implement the foregoing, the Debtor seeks a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), any “order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise.” The Debtor submits that the relief requested in this Motion is necessary to avoid immediate and irreparable harm to the Debtor. Accordingly, for the reasons set forth herein, the Debtor submits that ample cause exists to justify a waiver of the 14-day stay imposed by Bankruptcy Rule 6004(h), to the extent applicable.

23. To implement the foregoing immediately, the Debtor respectfully requests a waiver of the notice requirements of Bankruptcy Rule 6004(a) to the extent that they are deemed applicable.

DEBTOR’S RESERVATION OF RIGHTS

24. The Debtor may have claims against the Landlord arising under, or independently of, the Lease. The Debtor does not waive such claims by the filing of this Motion or by the rejection of the Lease.

25. Nothing contained herein is intended or should be construed as an admission of the validity of any claim against the Debtor; a waiver of the Debtor’s rights to dispute any claim;

or an approval, assumption, or rejection of any agreement, contract, lease, or sublease under section 365 of the Bankruptcy Code except as expressly set forth herein.

NOTICE

26. Notice of this Motion shall be given to (i) the United States Trustee; (ii) the Office of the United States Attorney for the District of Delaware; (iii) the Internal Revenue Service; (iv) counsel for the DIP lender; (v) the Debtor's cash management banks; (vi) those creditors holding the twenty (20) largest unsecured claims against the Debtor's estate; (vii) the Landlord (by overnight mail); and (viii) all parties who have filed a notice of appearance and request for service of papers pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested herein, the Debtor submits that no other or further notice is necessary.

CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court enter the Proposed Order, granting the relief requested herein and such other and further relief as may be just and proper under the circumstances.

Dated: December 19, 2018
Wilmington, Delaware

YOUNG CONAWAY STARGATT &
TAYLOR, LLP

/s/ Elizabeth S. Justison _____

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*Proposed Counsel for Debtor and Debtor in
Possession*

EXHIBIT A

Proposed Order

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

	X	
	:	
In re:	:	Chapter 11
	:	
Alcor Energy, LLC, ¹	:	Case No. 18-12839 (___)
	:	
Debtor.	:	Ref. Docket No. __
	:	
	X	

ORDER, PURSUANT TO SECTIONS 105(a), 365(a), AND 554 OF THE BANKRUPTCY CODE, AUTHORIZING THE DEBTOR TO (I) REJECT THAT CERTAIN UNEXPIRED LEASE OF NONRESIDENTIAL REAL PROPERTY LOCATED AT 3207 NCR 1108, MIDLAND, TEXAS 79706, NUNC PRO TUNC TO THE PETITION DATE AND (II) ABANDON ANY REMAINING PROPERTY AT SUCH LOCATION

Upon the motion (the “Motion”) of the Debtor, pursuant to sections 105(a), 365(a), and 554 of title 11 of the Bankruptcy Code and Bankruptcy Rules 6004 and 6006, for an order (a) authorizing the Debtor to reject, *nunc pro tunc* to the Petition Date, that certain unexpired lease of nonresidential real property (the “Lease”), by and between Sunmore 5109, LLC (the “Landlord”) and the Debtor for the premises located at 3207 NCR 1108, Midland, Texas 79706 (the “Office and Warehouse Space”), which the Debtor has determined in its business judgment should be rejected, and (b) authorizing the Debtor to abandon any remaining property located at the Office and Warehouse Space; and this Court having found that it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012; and this Court having found that venue of these cases and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having

¹ The last four digits of the Debtor’s taxpayer identification number are 0924. The Debtor’s address is 7754 East Velocity Way, Mesa, Arizona 85212.

found that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); and this Court having found that it may enter a final order consistent with Article III of the United States Constitution; and it appearing that notice of the Motion has been given as set forth in the Motion and that such notice is adequate and no other or further notice need be given; and this Court having found that the relief sought in the Motion is in the best interest of the Debtor, its estate, its creditors, and other parties in interest; and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The relief requested in the Motion is GRANTED as set forth herein.
2. The Debtor is authorized to reject the Lease *nunc pro tunc* to the Petition Date.
3. The Debtor is authorized to abandon any personal property, including, but not limited to, furniture, fixtures, and equipment (the “Remaining Property”) located at the Office and Warehouse Space free and clear of all liens, claims, encumbrances, interests, and rights of third parties. Once such property is abandoned, the Landlord is authorized to dispose of the Remaining Property, without further notice and without any liability to any individual or entity that may claim an interest in such Remaining Property, and such abandonment shall be without prejudice to Landlord’s right to assert any claim based on such abandonment, and without prejudice to the Debtor’s and to any other party in interest’s right to object thereto. The automatic stay is modified to the extent necessary to allow such dispositions.
4. If the Debtor has deposited monies with the Landlord as a security deposit or other arrangement, the Landlord may not setoff or recoup or otherwise use such deposit without the prior authority of this Court.

5. Any person or entity that holds a claim that arises from the Lease must file a proof of claim based on such rejection by no later than 30 days after the service of this Order.

6. Within five (5) calendar days after entry of this Order, the Debtor shall serve this Order on the Landlord to the Lease.

7. Any claims held by the Debtor against the Landlord, whether or not such claims arise under, are related to the rejection of, or are independent of the Lease, are fully preserved.

8. Nothing in this Order shall impair, prejudice, waive, or otherwise affect any rights of the Debtor or its estate to contest any claims for damages arising from the Debtor's rejection of the Lease, to assert that any claims for damages arising from the Debtor's rejection of the Lease are limited to any remedies available under any applicable termination provisions of such Lease, or that any such claims are obligations of a third party and not those of the Debtor or its estate.

9. Nothing in the Motion or this Order shall be deemed or construed as an approval of an assumption of any lease, sublease, or contract pursuant to section 365 of the Bankruptcy Code, and all such rights are reserved.

10. To the extent that Bankruptcy Rule 6004(h) is applicable, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

11. The Debtor is authorized to take all actions necessary to effectuate the relief granted pursuant to this Order.

12. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: _____, 2019
Wilmington, Delaware

UNITED STATES BANKRUPTCY JUDGE