

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In Re:

SUFFOLK READY MIX, LLC,

Debtor

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Chapter 11

Case No. 09-75473-reg

**ORDER TO SHOW CAUSE FOR AN ORDER EXTENDING DEBTOR-IN-
POSSESSION’S TIME TO ASSUME OR REJECT A CERTAIN
NON-RESIDENTIAL REAL PROPERTY LEASE**

Upon the annexed Application of SUFFOLK READY MIX, LLC, the debtor and debtor-in-possession in this Chapter 11 case (hereinafter, the "Debtor") dated November 13, 2009 and the Affirmation of Exigent Circumstances of Michael G. Mc Auliffe, Esq., counsel to the Debtor, dated November 13, 2009, seeking entry of an order: (a) under 11 U.S.C. Section 364(d)(4) extending the Debtor’s time to assume or reject the Debtor’s non-residential real property lease (the “Lease”) for the premises located at 131 Old Northport Road, Kings Park, New York 11754 (the “Demised Premises”) through and including February 19, 2010 or the date of the confirmation of the Debtor’s chapter 11 plan, whichever is earlier, without prejudice; and (b) for such other and further relief as this Court deems just and equitable under the circumstances, and upon due deliberation and sufficient cause appearing therefor, it is hereby

ORDERED, that the Office of the United States Trustee, the Official Unsecured Creditors’ Committee, Antonio Enterprises, Inc. (the “Landlord”) and all persons having filed notices of appearance in this case, show cause before the Honorable Robert E. Grossman, United States Bankruptcy Judge, at the United States Bankruptcy Court, 290 Federal Plaza, Central Islip, New York 11722, at a hearing on the 18th day of November, 2009 at _____ p.m. or as soon

thereafter as counsel may be heard, why an order should not be entered: (a) under 11 U.S.C. Section 364(d)(4) extending the Debtor's time to assume or reject the Debtor's Lease for the Demised Premises through and including February 19, 2010 or the date of the confirmation of the Debtor's chapter 11 plan, whichever is earlier, without prejudice; and (b) for such other and further relief as this Court deems just and equitable under the circumstances, and it is further

ORDERED, that service of this Order to Show Cause and the papers upon which it is granted upon the Office of the United States Trustee, the Official Unsecured Creditors' Committee, the Landlord and all persons having filed notices of appearance in this case on or before November _____, 2009, by fax or overnight or priority mail, shall constitute good and sufficient service and notice hereof.

Dated: Central Islip, New York
November , 2009

ROBERT E. GROSSMAN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In Re:

Chapter 11

SUFFOLK READY MIX, LLC,

Case No. 09-75473-reg

Debtor

APPLICATION

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TO THE HONORABLE ROBERT E. GROSSMAN, UNITED STATES BANKRUPTCY
JUDGE:

The above-named chapter 11 debtor-in-possession (the "Debtor"), by its counsel herein, the Law Offices of Michael G. Mc Auliffe, Esq., respectfully shows this Honorable Court and represents as follows:

1. On July 24, 2009 (the "Filing Date"), the Debtor filed a voluntary petition for relief herein under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. Sections 101-et seq. (the "Bankruptcy Code").

2. No trustee has been appointed in the Debtor's case. Consequently, the Debtor is continuing to act as a debtor in possession, with all the rights, duties, and responsibilities set forth at 11 U.S.C. sections 1107(a) and 1108.

3. There has been a duly authorized Official Committee of Unsecured Creditors constituted in this case under section 1102 of the Bankruptcy Code.

RELIEF REQUESTED HEREIN

4. In accordance with 11 U.S.C. Section 365(d)(4), the Debtor's time to assume or reject its non-residential real property lease is presently due to expire on November 21, 2009,

which is one hundred and twenty (120) days after the Filing Date, unless otherwise extended for good cause shown.

5. The Debtor's only non-residential real property lease (the "Lease", a copy of which is annexed hereto at Exhibit "A") is for the premises located at 131 Old Northport Road, Kings Park, New York 11754 (the "Demised Premises").

6. The Debtor is in the business of concrete production/manufacture and runs its operation from the Demised Premises.

7. It is respectfully submitted that, given the potential significant claims that could arise from assumption of the Lease if it is later rejected by the Debtor under 11 U.S.C. Section 503(b)(7), it is much too early in the Debtor's case for the Debtor to make a fair, reasoned, intelligent determination as to whether assumption of the Lease is in the best interest of the Debtor and its Estate.

8. Consequently, by way of the instant motion, the Debtor hereby applies for the issuance of an Order extending the Debtor's time to assume or reject its non-residential real property Lease described above, pursuant to 11 U.S.C. Section 365(d)(4), through and including February 19, 2010 or the date of the confirmation of the Debtor's chapter 11 plan, whichever is earlier, without prejudice.

APPLICABLE LAW

9. Section 365(d)(4) provides, in full:

(4)

(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by

the earlier of—

- (i) the date that is 120 days after the date of the order for relief; or
- (ii) the date of the entry of an order confirming a plan.

(B)

- (i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.
- (ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

See 11 U.S.C. Section 365(d)(4)

10. “Whether to grant an extension of time to assume or reject a lease is “within the discretion of the bankruptcy court.” *In re Burger Boys, Inc.*, 94 F.3d 755, 761 (2d Cir. 1996) (citation and quotation marks omitted). In exercising this discretion, bankruptcy courts must consider several factors, including: (1) whether the debtor was paying for use of the property; (2) whether the debtor's continued occupation . . . could damage the lessor[] beyond the compensation available under the Bankruptcy Code; (3) whether the lease is the Debtor's primary asset; and (4) whether the Debtor has had sufficient time to formulate a plan of reorganization.” Vermont Partners, Ltd. v. Thaler (In re Poseidon Pool & Spa Recreational, Inc.), 377 B.R. 52, 61 (E.D.N.Y. 2007)(Bianco, J.)

11. Additionally, “the factors to be considered under §§ 365(d)(4) include whether the lease is the primary asset, whether the landlord would receive a windfall, whether rent has been or is being paid, the complexity of the case, and the amount of time the trustee has had to analyze the estate.” South Street Seaport Limited Partnership v. Burger Boys, Inc. (In re Burger Boys, Inc.), 94 F.3d 755, 761 (2nd Cir. 1996)(citing 2 Lawrence P. King, *Collier on Bankruptcy P*

365.03[3], at 365-38 [15th ed. 1995]). See also Theater Holding Corp. v. Mauro, 681 F.2d 102 (2d Cir. 1982); In re Wedtech Corp., 72 B.R. 464 (Bankr. S.D.N.Y. 1987).

12. Given these criteria, the Debtor respectfully submits that adequate "cause" exists to justify the extension for the period sought herein pursuant to 11 U.S.C. Section 365(d)(4).

13. During the almost four months that the Debtor has been in chapter 11, it has been working diligently to maximize the benefit derived from the breathing room afforded by the filing of its chapter 11 case.

14. Since the Filing Date, the Debtor has taken affirmative steps to reduce its monthly expenses, and has done so by approximately \$18,000.00 per month. It has done so by: (a) reducing its payroll obligations by laying off two employees; (b) reducing its obligation to pay employee's health insurance; and (c) negotiating a highly beneficial deal with a supplier of powder to significantly reduce the cost thereof.

15. At the same time the Debtor has been aggressively pursuing several large jobs (including government projects), which, if obtained, will provide significant revenue to the Debtor.

16. While the aforementioned actions have served to improve the Debtor's operations, the Debtor requires additional time to continue its concerted efforts to effectuate further beneficial changes and fully evaluate its future prospects.

17. The Lease is a primary asset of the Debtor's Estate. Moreover, the Demised Premises is especially unique, being specifically designed for use by a ready-mix company. As such, not only would the Debtor have substantial difficulty in finding an alternate location from which to operate its business, the Landlord would have substantial difficulty finding a substitute

tenant, as the Demised Premises is designed for use by a ready-mix company.

18. Thus, it is respectfully submitted that the Landlord would far more potential harm from the immediate rejection of the Lease by the Debtor (as it would have substantial difficulties finding a replacement tenant) than it would from an extension of the Debtor's time to assume or reject the Lease, as it is in the best interest of the Landlord to retain the Debtor as a tenant.

19. Given the unique properties of the Demised Premises, the decision to assume or reject the Lease will be central to the Debtor's plan of reorganization. However, such a decision cannot be made lightly, and it is respectfully submitted, should not be made until the Debtor has had sufficient time to effectuate further beneficial changes and assess the projected earnings and expenses that result. As set forth above, this is especially so given the potential significant claims that could arise from an assumption of the Lease at this time if it is later rejected by the Debtor.

20. Based upon the foregoing, the Debtor satisfies almost all of the criteria that allow for the granting of the extension of time under Section 365(d)(4). However, there is one criteria that the Debtor does not reach at this time. As of the date of this Application, the Debtor is not current with its obligations on the Lease. However, the Debtor believes that it will be able to become current shortly. The Debtor is currently due for the September, October and November rental payments due under the Lease. The principal of the Debtor has advised that the September rental payment will be paid by November 17, 2009 and the October payment will be paid by November 30, 2009. Thus, the Debtor should be only due for November by month's end, and that any arrears shall be cured within a reasonable time thereafter.

21. Fortuitously, it is well settled that a debtor does need to be current on the rent

under a lease in order to obtain the extension of time under 11 U.S.C. Section 365(d)(4). See South Street Seaport Limited Partnership v. Burger Boys, Inc. (In re Burger Boys, Inc.), 94 F.3d 755, 761 (2nd Cir. 1996).

22. “Although §§ 365(b)(1) may require that a debtor, before it assumes a lease, become current on or provide adequate assurance of its payment of past-due lease obligations... we see nothing in §§ 365(d)(4) that requires a debtor to be current before the bankruptcy court grants a motion for an extension of time.” South Street Seaport Limited Partnership v. Burger Boys, Inc. (In re Burger Boys, Inc.), 94 F.3d 755, 761 (2nd Cir. 1996).

23. “The Second Circuit has held that bankruptcy courts may not condition such extensions [pursuant to 11 U.S.C. Section 365(d)(4)] solely on debtors becoming current on post-petition rent...” Vermont Partners, Ltd. v. Thaler (In re Poseidon Pool & Spa Recreational, Inc.), 377 B.R. 52, 61 (E.D.N.Y. 2007)(Bianco, J.).

24. As set forth above, the Debtor satisfies most of the non-payment criteria at issue here. These criteria clearly evidence the importance of the Lease to the Debtor, the potential harm to be suffered by the Landlord upon an immediate rejection of the Lease, the Debtor’s need for additional time to evaluate its decision to assume or reject the Lease, and the Debtor’s significant efforts to move expeditiously to a position where it will be able to make the decision that is in its best interest and in the best interest of its estate. It is respectfully submitted that these factors outweigh the lag in payments under the Lease.

25. Should the relief requested herein be denied, the Debtor will be deemed to have rejected the Lease by operation of 11 U.S.C. Section 365(d)(4) and will be required to “immediately surrender” the Demised Premises. Without a place to operate its business, the

Debtor will be unable to function and its chapter 11 case will fail, to the detriment to its Estate and its creditors.

26. Conversely, the potential prejudice to the Landlord is insignificant, especially given the Debtor's anticipated schedule to become current with the payments due under the Lease.

27. It is respectfully submitted that such a result would be contrary to one of the underlying aims of the Bankruptcy Code, to rehabilitate financially distressed entities.

CONCLUSION

28. As reviewed above, the Debtor requires additional time to reorganize its operations before it can formulate a plan and seek to successfully emerge from Chapter 11 herein. Therefore, the Debtor believes it is in the best interest of its Estate to request that the extension be granted through and including February 11, 2010 or the date of the confirmation of the Debtor's chapter 11 plan, whichever is earlier, without prejudice.

29. No prior application for the relief sought herein has been made to this or any other Court.

WHEREFORE, the Debtor respectfully requests that the Court grant the relief requested herein together with such other, further and different relief as this Court deems just and proper under the circumstances.

Dated: Melville, New York
November 13, 2009

LAW OFFICES OF MICHAEL G. Mc AULIFFE
Counsel to the Debtor

By: /s/ Michael G. Mc Auliffe
Michael G. Mc Auliffe, Esq.
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(631) 465-0044

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In Re:

Chapter 11

SUFFOLK READY MIX, LLC,

Case No. 09-75473-reg

Debtor

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AFFIRMATION AS TO EXIGENT CIRCUMSTANCES

MICHAEL G. MC AULIFFE, ESQ., an attorney duly licensed to practice law before this Court and all the courts of the State of New York, affirms the following under penalties of perjury:

1. I am the principal attorney of the Law Offices of Michael G. McAuliffe, attorneys for SUFFOLK READY MIX, LLC (the “Debtor”), the Debtor and Debtor-in-Possession herein and I respectfully submit this Affirmation of Exigent Circumstances in support of the Debtor’s Order to Show Cause seeking Order extending the Debtor’s time to assume or reject its non-residential real property lease, pursuant to 11 U.S.C. Section 365(d)(4), through and including February 19, 2010 or the date of the confirmation of the Debtor’s chapter 11 plan, whichever is earlier, without prejudice.

2. As the Debtor filed its bankruptcy petition on July 24, 2009, the 120-day period under 11 U.S.C. Section 365(d)(4) pursuant to which the Debtor is to assume or reject its only nonresidential real property lease (the “Lease”) for its business premises located at 131 Old Northport Road, Kings Park, New York 11754 (the “Demised Premises”) expires on November 21, 2009. However, I inadvertently mis-calculated the aforementioned expiration date, and as such, the Debtor did not bring its motion seeking an extension of said period before today.

3. On November 12, 2009 I spoke with Anthony Persico, the President of Antonio

Enterprises, Inc. (the “Landlord”), the landlord of the Demised Premises. Mr. Persico advised me that the Landlord consents to the Debtor’s extension of time sought in the attached Order to Show Cause.

4. As the Landlord consents to the relief sought in the Order to Show Cause, it is respectfully submitted that there will be no prejudice to the Landlord or any other person or entity.

5. Conversely, if the Lease for the Demised Premises is deemed rejected and the Debtor is required to surrender the Demised Premises, the Debtor and its Estate will be severely prejudiced, as the Demised Premises is its sole base of operations.

WHEREFORE, the Debtor respectfully requests that the Court enter the annexed proposed Order, together with such other, further relief to the Debtor and its Estate as is just and proper under the circumstances herein.

Dated: Melville, New York
November 13, 2009

LAW OFFICES OF MICHAEL G. Mc AULIFFE
Counsel to the Debtor

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