

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re)	Chapter 11
)	Case No. 10-10206 (MFW)
In re TELOGY, LLC, <i>et al.</i> , ¹)	(Jointly Administered)
)	
Debtors.)	

Hearing Date: March 19, 2010 at 9:30 a.m. (requested)
Objection Deadline: March 18, 2010 at 4:00 p.m. (requested)

**MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR
ENTRY OF AN ORDER COMPELLING THE REJECTION OF THE DEBTORS'
UNEXPIRED LEASE OF NON-RESIDENTIAL REAL PROPERTY**

The Official Committee of Unsecured Creditors (the “Committee”) of Telogy, LLC, and e-Cycle, LLC (collectively, the “Debtors”), hereby moves that the Court enter an order, pursuant to 11 U.S.C. §§ 105(a) and 365(d), compelling the Debtors to reject that certain Lease Agreement dated as of July 6, 2000 (as amended, the “Real Property Lease”) and entered into by and between Telogy, LLC, as tenant (“Telogy”), and Woodstock Bowers, LLC, as landlord (the “Landlord”), in respect of certain premises commonly referred to as 3220 Whipple Road, Union City, California (the “Leased Premises”), effective as of the closing date of a sale (the “Sale”) of all or substantially all of the Debtors’ assets that does not include the assumption and assignment of the Real Property Lease (the “Rejection Date”). In support of this motion, the Committee further states as follows:

¹ The Debtors are the following entities (with the last four digits of their federal tax identification numbers in parentheses): (i) e-Cycle, LLC (1582) and (ii) Telogy, LLC (1530). The Debtors’ executive headquarters are located at 3200 Whipple Road, Union City, California 94587.

Jurisdiction, Venue and Statutory Authority

1. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157(b) and 1334(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief requested herein are Sections 105(a) and 365(d) of Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”).

Factual Background and Procedural History

3. On January 24, 2010 (the “Petition Date”), the Debtors each filed a *Voluntary Petition* for relief under Chapter 11 of the Bankruptcy Code. Since the Petition Date, the Debtors have continued in the possession of their assets and in the management of their businesses as debtors-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

4. On January 26, 2010, the Court entered an order [Docket No. 29] allowing the Debtors’ motions for the joint administration of their respective Chapter 11 cases.

5. Also on the Petition Date, the Debtors filed, as one of their many “first day” motions, the *Motion of Telogy, LLC for Orders: (A)(I) Approving Bid Procedures in Connection with Sale of Substantially All of Its Assets; (II) Scheduling Hearing to Consider Sale of Assets; (III) Approving Form and Manner of Notice Thereof; and (IV) Approving Break-Up Fee and Expense Reimbursement; (B)(I) Authorizing and Approving Sale of Assets Free and Clear of Liens, Claims, Encumbrances, and Interests; (II) Approving Assumption and Assignment of Executory Contracts and Unexpired Leases; and (C) Granting Related Relief* [Docket No. 14] (the “Sale Motion”), pursuant to which the Debtors seek this Court’s authority to sell

substantially all of their assets to McGrath RentCorp (the “Potential Purchaser”) pursuant to the *Asset Purchase Agreement* (the “APA”) submitted with the Sale Motion.²

6. Prior to the Petition Date, Telogy was a tenant in the Leased Premises that are the subject of the Real Property Lease. The APA with the Potential Purchaser does not provide for the assumption and assignment of the Real Property Lease to the Potential Purchaser. Rather, the APA contemplates the execution and delivery of a Transition Services Agreement (the “TSA”) by and between Telogy and the Potential Purchaser, which provides for, among other things, the grant of an irrevocable license to the Potential Purchaser to enter the Leased Premises for a period of 90 days following closing of the sale contemplated by the APA. The proposed TSA provides that the Potential Purchaser shall pay a license fee equal to the monthly rent for the Leased Premises under the Real Property Lease “plus any out-of-pocket documented expenses reasonably incurred by the Seller.” *See* APA at Exhibit I.

7. On February 3, 2009, the Office of the United States Trustee formed the Committee pursuant to Section 1102 of the Bankruptcy Code.

Relief Requested

8. By way of the instant motion, the Committee seeks the entry of an order under sections 105(a) and 365(d) of the Bankruptcy Code compelling the Debtors to reject the Real Property Lease effective as of the Rejection Date.

9. Section 365(d)(4) of the Bankruptcy Code provides that an unexpired lease of nonresidential real property is deemed rejected upon the earlier of 120 days after the commencement of the debtor’s case or entry of an order confirming the debtor’s plan of reorganization. 11 U.S.C. § 365(d)(4)(A). Reduction of the time by which a debtor must assume

² Capitalized terms used but not defined in this Motion shall have the meanings ascribed to them in the Sale Motion or the APA.

or reject an unexpired lease is permissible where the debtor has had a reasonable period of time to make a determination concerning the lease. *In re Theatre Holding Corp. v. Mauro*, 681 F.2d 102, 105 (2d Cir. 1982) (observing that court’s discretion “must be construed in the context of the broad purposes of the entire [Bankruptcy] Code.”). Following the closing of a Sale to the Potential Purchaser, or any other potential purchaser that does not seek assumption and assignment of the Real Property Lease, the Debtors will no longer require the Leased Premises for the orderly wind-down of their operations. Accordingly, the Real Property Lease, at such time, will no longer serve any benefit to the Debtors or their estates.

10. In an effort to reduce post-petition administrative costs and potential unsecured claims arising from the rejection of the Real Property Lease, the Committee asserts that rejecting the Real Property Lease as of the Rejection Date is in the best interests of the Debtors’ estates, their creditors and parties in interest.

11. As contemplated under the TSA, the Potential Purchaser has agreed to pay a license fee to the Debtors in an amount equal to the monthly rent due under the Real Property Lease plus documented out-of-pocket expenses. The Committee respectfully submits that it is improper for the Debtors to act as *de facto* guarantors of the Potential Purchaser’s performance under the TSA at the risk of further administrative expense to the Debtors’ estates. Moreover, the TSA anticipates, and the Real Property Lease requires, that the Landlord has consented to the grant of a license by Telogy to the Potential Purchaser. It is unclear whether the Landlord has provided such consent, as there is nothing in the Sale Motion so indicating.

12. Delaying the rejection of the Real Property Lease may result in a greater claim for rejection damages. Section 502(b)(6) caps a landlord’s claim for damages resulting from the rejection of its lease of non-residential real property at “the rent reserved by such lease, without

acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease[.]” 11 U.S.C. § 502(b)(6). Section 502(b)(6) will likely cap the Landlord’s rejection damages claim at one year’s rent measured from the Petition Date. Rejection of the Real Property Lease effective as of the Rejection Date is preferable to the Committee and beneficial to the Debtors’ estates because it permits the Potential Purchaser to enter into an arrangement with the Landlord directly, thereby mitigating the Landlord’s rejection claim and reducing the general unsecured claims asserted against the Debtors’ estates. *See* CAL. CIV. CODE § 1951.2 (West 2010) (requiring lessor to mitigate damages resulting from lessee’s breach); *see also Solow v. PPI Enter. (U.S.), Inc. (In re PPI Enter. (U.S.), Inc.)*, 324 F.3d 197, 208 n.17 (3d Cir. 2003) (mitigation reduces landlord’s recovery after application of Section 502(b)(6)).

13. Moreover, no person has expressed an interest in purchasing or taking an assignment of the Real Property Lease. Accordingly, the Committee believes that, unless a potential purchaser indicates a willingness to acquire the Real Property Lease, the rejection of the Real Property Lease effective as of the Rejection Date is in the best interests of the Debtors’ estates, their creditors and parties in interest.

Conclusion

14. Based upon the foregoing, the Committee respectfully requests that this Court enter an order, substantially in the form submitted herewith, compelling the Debtor to reject the Real Property Lease pursuant to sections 105(a) and 365(a) of the Bankruptcy Code, and granting to the Committee such other and further relief as the Court deems just and proper.

Dated: Wilmington, Delaware
March 15, 2010

Respectfully submitted,

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*Counsel to the Official Committee
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

_____)	
In re)	Chapter 11
)	Case No. 10-10206 (MFW)
TELOGY, LLC <i>et al.</i> ,)	
)	Re: Docket No.
Debtors.)	
_____)	

**ORDER COMPELLING REJECTION OF THE DEBTORS’
UNEXPIRED LEASE OF NON-RESIDENTIAL REAL PROPERTY**

THIS MATTER having come before the Court upon the *Motion of the Official Committee of Unsecured Creditors Committee for an Order Compelling the Rejection of the Debtors’ Unexpired Lease of Non-Residential Real Property* (the “Motion”); and good and sufficient notice of the Motion having been given; and the Court having reviewed the responses and objections filed in connection with the Motion, if any; and for good cause shown; it is hereby

ORDERED that the Motion is **GRANTED** in all respects; and it is further

ORDERED that the Lease Agreement, entered into by and between Telogy, LLC, as tenant, and Woodstock Bowers, LLC, as landlord, dated as of July 6, 2000 and amended from time to time is hereby deemed rejected effective as of the closing date of a sale of all or substantially all of the Debtors’ assets that does not include the assumption and assignment of the Real Property Lease (the “Rejection Date”); and it is further

ORDERED that this Court shall retain jurisdiction over any and all matters arising from or relating to the interpretation or implementation of this order.

Dated: _____, 2010
Wilmington, Delaware

Mary F. Walrath
United States Bankruptcy Judge