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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

----- X
In re : Chapter 11
METROPARK USA, INC., :
Debtor. : Case No. 11-_____ (RDD)
----- X

**MOTION OF THE DEBTOR FOR ENTRY OF AN ORDER
AUTHORIZING THE DEBTOR TO REJECT UNEXPIRED LEASE
(LOCATED AT 2042 N. HALSTED STREET)
EFFECTIVE *NUNC PRO TUNC* TO THE PETITION DATE**

TO THE HONORABLE ROBERT D. DRAIN, UNITED STATES BANKRUPTCY JUDGE:

Metropark USA, Inc., as debtor and debtor in possession (the "Debtor"),¹ files this motion (the "Motion") for entry of an order authorizing the Debtor to reject an unexpired lease for real property located at 2042 N. Halstead Street, Chicago, Illinois 60614, including any modifications thereto (the "Lease"), effective *nunc pro tunc* to the Petition Date (as defined herein). In support of this Motion, the Debtor respectfully states as follows:

BACKGROUND

General

1. On the date hereof (the "Petition Date"), the Debtor commenced with this Court a voluntary case under chapter 11 of title 11 of the United States Code (the "Bankruptcy")

¹ The last four digits of the Debtor's federal tax identification number are 6659.

Code”). The Debtor is authorized to operate its businesses and manage its properties as debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner, or statutory creditors’ committee has been appointed in this chapter 11 case.

The Debtor’s Business

2. Metropark was founded in 2004 to capitalize on the large Gen Y segment (the 25-35 year old customer) who had moved on from teen retailers, but were still looking for fashion-forward apparel and accessories. Through a multi-channel sales strategy, including sales through brick-and-mortar stores and e-commerce, Metropark caters to trendsetting young adult customers by offering a unique and highly differentiated merchandise assortment introducing a “Fashion, Music, Art” philosophy into the marketplace.

3. Since its founding in 2004, Metropark has grown rapidly from its four original store locations to approximately 70 stores in 21 states, in addition to its newly redesigned online retail presence at www.metroparkusa.com. Metropark offers its customers a unique mix of premium quality apparel and accessories geared toward the 25-35 year old trendsetter. The Metropark retail stores provide a truly unique experiential lifestyle shopping environment including, style consultants, in-store events (e.g. live art installations, fashion shows and DJ performances) and a carefully edited inventory assortment of highly sought after brands with a strong offering of up and coming, fashion forward designer talent to deliver an authentic and culturally relevant mix of diverse brands to the customer.

4. As a result of several internal and external factors, the Debtor faced extraordinary liquidity constraints in the first quarter of 2011. Because of this reality, the Debtor spent the better part of the first quarter of 2011 trying to identify a financial partner to provide an equity infusion, debt investment or otherwise stabilize the financial wherewithal of the Company. Unfortunately, a transaction in the best interest of the Company, its creditors and its shareholders was not available outside of chapter 11 and the Company has reached the end of its liquidity runway. Accordingly, the Debtor has determined that the commencement of this

case would provide the sole opportunity to, among other things, sell substantially all of the assets of the Debtor as a going concern or liquidation and, if successful in identifying a going concern buyer, right-size the Debtor's business through (i) the evaluation and elimination of liabilities that serve as a drain on the Debtor's profitability, and (ii) operational improvements.

JURISDICTION

5. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory bases for the relief requested herein are sections 105(a), 554(a), and 365(a) of the Bankruptcy Code, and Rules 6006 and 6007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

RELIEF REQUESTED

6. By this Motion, the Debtor respectfully requests entry of an order authorizing the Debtor to reject the unexpired Lease identified on **Exhibit 1** attached hereto, located at the address identified thereon (the "Premises"), effective *nunc pro tunc* to the Petition Date. Additionally, the Debtor seeks authority under section 554(a) of the Bankruptcy Code and Bankruptcy Rule 6007 to abandon any fixtures, furniture, advertising displays, and other office and store equipment (the "Abandoned Property").

7. Pursuant to the Lease that is the subject of this Motion, the Debtor has used the Premises to operate a retail store and store inventory. On or prior to the Petition Date, the Debtor will have ceased operations at the Premises, vacated the Premises and surrendered possession and the keys to the landlord. Absent rejection of the Lease, the Debtor continues to be obligated to pay rent under the Lease, even though, as of the Petition Date, it will have no continuing operations in those facilities and no other productive use for those Premises. The estimated annual cost of the Lease is approximately \$210,000.

8. After careful review, the Debtor has determined in its business judgment that the Lease is unnecessary to the continued operation of the Debtor's businesses, has no

value to the estate, and should be rejected. In considering its options with respect to the Lease, the Debtor, in consultation with its proposed financial advisor, believes that there remains no other viable possibility other than rejection of the Lease. Moreover, the Debtor, in consultation with its advisors, has determined that the Lease has no marketable value beneficial to the Debtor's estate.

9. Through the rejection of the Lease, the Debtor will be relieved from paying the rent, as well as certain other costs, including taxes, utilities, insurance, operating expenses, and other related charges associated with the Lease. By rejecting the Lease as of the Petition Date, the Debtor will avoid incurring unnecessary administrative charges that provide no tangible benefit to the Debtor's estate. The resulting savings from the rejection of the Lease will increase the Debtor's future cash flow and assist in managing its estate.

10. The Debtor likewise has determined that the abandonment of the Abandoned Property is appropriate because such property is of inconsequential value and/or the cost of removing and storing such property exceeds its value to the Debtor's estate. Moreover, the Debtor believes that the Abandoned Property is no longer necessary for the operation of the Debtor's business.

11. Moreover, rejection of the Lease and abandonment of the Abandoned Property effective as of the Petition Date is necessary and justified under the circumstances. As of the Rejection Date, the Debtor will have vacated the Premises and surrendered possession and keys to the landlord. Accordingly, the Debtor believes that the rejection of the Lease and the abandonment of the Abandoned Property as of the Rejection Date is in the best interests of its estate, its creditors and other parties in interest.

BASIS FOR RELIEF REQUESTED

Rejection of the Lease is Supported by the Debtor's Business Judgment and Should be Approved by the Court

12. Section 365(a) of the Bankruptcy Code provides, in pertinent part, 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); see also NLRB v. Bildisco & Bildisco, 465 U.S. 513, 521 (1984); In re Lavigne, 114 F.3d 379, 386 (2d Cir. 1997). Section 365 of the Bankruptcy Code "allows a [debtor] to relieve the bankruptcy estate of burdensome agreements which have not been completely performed." Pheonix Exploration, Inc. v. Yaquinto (In re Muerexco Petroleum, Inc.), 15 F.3d 60, 62 (5th Cir. 1994).

13. In determining whether the rejection of an unexpired lease or executory contract should be authorized, courts apply the "business judgment" standard. See Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095, 1099 (2d Cir. 1993), cert. dismissed, 511 U.S. 1026 (1994). Rejection is appropriate based solely on the resultant benefit to the estate. See In re Stable News Assoc., Inc., 41 B.R. 594, 596 (Bankr. S.D.N.Y. 1984). Therefore, the business judgment standard is satisfied when a debtor determines that rejection will benefit the estate. See In re Child World, Inc., 142 B.R. 87, 89 (Bankr. S.D.N.Y. 1992); In re Ionosphere Clubs, Inc., 100 B.R. 670, 673 (Bankr. S.D.N.Y. 1989). See also In re TS Industries, Inc., 117 B.R. 682, 685 (Bankr. D. Utah 1990); In re Del Grosso, 115 B.R. 136, 138 (Bankr. N.D. Ill. 1990).

14. As more fully explained above, the Debtor no longer chooses to occupy the Premises relating to the Lease. Based upon the Debtor's efforts to date and its understanding of the current market conditions, the Debtor does not believe it is in the Debtor's estate's or the creditors' interests to market the Lease in an attempt to sell or sublease the affected Premises. Accordingly, the Debtor submits that there is no potential value that might be realized by a future sale or sublease of the Lease.

The Bankruptcy Code Authorizes the Abandonment of the Abandoned Property

15. With respect to the Debtor's request for authority to abandon property, the Debtor submits that the standard set forth in section 554(a) of the Bankruptcy Code is satisfied. Section 554(a) provides that a debtor in possession may abandon, subject to court approval, "property of the estate that . . . is of inconsequential value and benefit to the estate." 11 U.S.C. §554(a). Before authorizing abandonment of property, a bankruptcy court must find either: (i) the property is burdensome to the estate or (ii) the property is both of inconsequential value and inconsequential benefit to the estate. See, e.g., Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot., 474 U.S. 494, 497 (1986), reh'g denied, 475 U.S. 1091 (1986); In re Texaco, Inc., 90 B.R. 38, 44 (S.D.N.Y. 1988); In re Crowthers McCall Pattern, Inc., 114 B.R. 877, 882 n.7 (Bankr. S.D.N.Y. 1990). The personal property proposed to be abandoned in connection with the Lease would primarily consist of fixtures, furniture, advertising displays, and other office and store equipment that is (a) of no value or benefit to the Debtor's estate and/or (b) burdensome insofar as the costs of removal and storage of such property is likely to exceed the net proceeds realizable from their sale. **Exhibit 1** contains a description of the property proposed to be abandoned in accordance with Rule 6007-1 of the Local Bankruptcy Rules for the Southern District of New York. Accordingly, it is in the best interest of the Debtor and its estate to abandon the Abandoned Property on the Petition Date.

The Court Should Authorize the Rejection of the Contracts Effective Nunc Pro Tunc to the Petition Date

16. Bankruptcy courts are empowered to authorize retroactive rejection of an executory contract or unexpired lease under section 365(a) of the Bankruptcy Code when the balance of the equities favors retroactive rejection. See, e.g., Thinking Machs. Corp. v. Mellon Fin. Servs. Corp. (In re Thinking Machs. Corp.), 67 F.3d 1021, 1028–29 (1st Cir. 1995) (holding that when principles of equity dictate, a bankruptcy court may approve rejection of a nonresidential lease pursuant to section 365(a) retroactive to the motion filing date); BP Energy

Co. v. Bethlehem Steel Corp., No. 02-6419, 2002 WL 31548723, at *3 (S.D.N.Y. Nov. 15, 2002); see also In re Jamesway Corp., 179 B.R. 33, 36–37 (S.D.N.Y. 1995) (stating that section 365 does not include “restrictions as to the manner in which the court can approve rejection”).

17. The balance of the equities favors the relief requested herein. Without a retroactive date of rejection, the Debtor will be forced to incur unnecessary administrative expenses for the Lease, an agreement that provides no equivalent benefit to the Debtor’s estate. See 11 U.S.C. § 365(d)(3). Moreover, the non-debtor counterparty under the lease will not be unduly prejudiced if the rejection is deemed as effective as of the Petition Date. Contemporaneously with the filing of this Motion, the Debtor will cause notice of this Motion to be served on the Lease counterparty, thereby allowing sufficient opportunity to respond accordingly. The Debtor has sought the relief requested at the earliest possible moment in this chapter 11 case and does not seek to reject the Lease effective *nunc pro tunc* to the Petition Date due to any delay on their own part, but rather due to the scheduling of the “first day” hearing in this case.

18. Courts in this district have authorized similar relief on a retroactive basis. See, e.g., In re Chrysler LLC, No. 09-50002 (AJG) (Bankr. S.D.N.Y. May 20, 2009) (authorizing rejection of certain unexpired leases retroactive to the petition date); In re DJK Residential LLC, No. 08-10375 (JMP) (Bankr. S.D.N.Y. Feb. 26, 2008) (authorizing rejection of a certain unexpired lease retroactive to the petition date); In re Calpine Corp., No. 05-60200 (BRL) (Bankr. S.D.N.Y. Dec. 21, 2005) (authorizing the rejection of certain unexpired leases retroactive to the petition date).

19. Accordingly, the Debtor respectfully submits that it is fair and equitable for the Court to find that the Lease is to be rejected effective *nunc pro tunc* to the Petition Date.

WAIVER OF BANKRUPTCY RULE 6004(a) AND 6004(h)

20. To implement the foregoing successfully, the Debtor seeks a waiver of the notice requirements under Bankruptcy Rule 6004(a) and the 14-day stay of an order authorizing the use, sale, or lease of property under Bankruptcy Rule 6004(h).

NO PRIOR REQUEST

21. No prior motion for the relief requested herein has been made to this or any other court.

NOTICE

22. The Debtor has served notice of this Application on (i) the U.S. Trustee (Attn: Susan Golden, Esq.), (ii) Riemer & Braunstein LLP, Three Center Plaza, Boston, MA 02108 (Attn: Donald E. Rothman, Esq.) as counsel for Wells Fargo Bank, N.A., (iii) Solomon Ward Seidenwurm & Smith, LLP, 401 B Street, Ste. 1200 San Diego, CA 92101 (Attn: Michael D. Breslauer, Esq.) as counsel to Bricoleur Capital Partners, LP in its capacity as second lien agent, (iv) the Debtor's 30 largest unsecured creditors; and (v) all counter-parties under the Lease. In light of the nature of the relief requested, the Debtor submits that no other or further notice need be provided.

WHEREFORE, the Debtor respectfully requests that the Court grant the relief requested herein and such other and further relief as is just and appropriate.

Dated: May 2, 2011
New York, New York

Respectfully submitted,

By: /s/ Cathy Hershcopf
Cathy Hershcopf

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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

----- X
In re : Chapter 11
METROPARK USA, INC., :
Debtor. : Case No. 11-_____ (RDD)
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**ORDER AUTHORIZING THE DEBTOR TO REJECT UNEXPIRED LEASE
(LOCATED AT 2042 N. HALSTED STREET)
EFFECTIVE *NUNC PRO TUNC* TO THE PETITION DATE**

Upon the motion (the "Motion")¹ of the above-captioned debtor and debtor in possession (the "Debtor") for entry of an order (the "Order") authorizing the Debtor to reject the Lease effective *nunc pro tunc* to the Petition Date; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and venue being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that the relief requested in the Motion is in the best interests of the Debtor's estate, its creditors, and other parties in interest; and the Debtor having provided adequate and appropriate notice of the Motion under the circumstances; and after due deliberation and sufficient cause appearing therefor, it is hereby

ORDERED that the Motion is granted to the extent provided herein; and it is further

ORDERED that, pursuant to section 365(a) of the Bankruptcy Code, the Debtor is authorized to reject the Lease listed on Exhibit 1 hereto; and it is further

ORDERED that each Lease rejection is effective as of the Petition Date; and it is further

¹ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

ORDERED that all claims for damages arising as a result of the rejection of the Lease shall be filed by the later of (a) thirty (30) days following entry of this Order, or (b) the applicable bar date to be subsequently established in this case, or be forever barred from doing so; and it is further

ORDERED that, pursuant to section 554(a) of the Bankruptcy Code, the Debtor is authorized to abandon any fixtures, furniture, advertising displays, and other office and store equipment remaining at the Premises (as set forth on Exhibit 1 hereto) to the landlord for the Lease, and the landlord for the Lease may dispose of such Abandoned Property without liability to third parties claiming an interest in such Abandoned Property; and it is further

ORDERED that the Debtor shall serve a copy of this Order on all counterparties to the Lease and/or their respective attorneys (if known) within three (3) days of entry of this Order; and it is further

ORDERED that this Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation and/or enforcement of this Order; and it is further

ORDERED that notice of the Motion as provided herein shall be deemed good and sufficient notice of such Motion.

Dated: _____, 2011
White Plains, New York

HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

Exhibit 1

NON-RESIDENTIAL REAL PROPERTY LEASE REJECTION SCHEDULE

<u>Landlord</u>	<u>Address</u>	<u>Monthly Rent</u>	<u>Lease Expiration Date</u>	<u>Property Proposed to be Abandoned</u>
Berns & Assoc.	2042 N. Halsted Street Chicago, IL 60614	\$210,111.00	January 31, 2018	FF&E