UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
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In re:	Chapter 11
CINEMEX HOLDINGS USA, INC.	Case No. 20-14696-LMI
Reorganized Debtor	(Formerly Jointly Administered Under Lead Case: Cinemex USA Real Estate Holdings, Inc., Case No. 20-14695-LMI)

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MOAC MALL HOLDINGS LLC'S BRIEF ON LEGAL ISSUES REGARDING REORGANIZED DEBTORS' EMERGENCY MOTION TO ENFORCE THIRD AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION AND CONFIRMATION ORDER

MOAC Mall Holdings LLC ("MOAC") submits this brief pursuant to the Court's directions in connection with the *Reorganized Debtors' Emergency Motion to Enforce Third Amended Joint Chapter 11 Plan of Reorganization and Confirmation Order* ("Motion to Enforce") (DE#204) filed by Cinemex Holdings USA, Inc., Cinemex USA Real Estate Holdings, Inc., and CB Theater Experience LLC ("Reorganized Debtors").[1] This brief addresses the following issues:

(1) when the Debtors, or Reorganized Debtors, may be deemed to have abandoned any interest in personal property located at the premises formerly leased by the Debtors from MOAC; and

[1] Cinemex Holdings USA, Inc., Cinemex USA Real Estate Holdings, Inc. and CB Theater Experience LLC filed voluntary Chapter 11 petitions commencing these cases on April 25, 2020 and April 26, 2020. On November 25, 2020, the Court entered its *Findings of Fact, Conclusions of Law and Order Confirming Third Amended Joint Chapter 11 Plan of Reorganization of Cinemex USA Real Estate Holdings, Inc., Cinemex Holdings USA, Inc. and CB Theater Experience LLC* ("Confirmation Order") (DE#936 in Case No. 20-14695) which, among other things, vested all assets of the debtors' estates in the Reorganized Debtors. MOAC will use "Debtors" to refer to the pre-confirmation debtors, and "Reorganized Debtors" to refer to the post-confirmation debtors.

(2) whether the provisions in the lease regarding entitlement to certain personal property remain effective upon rejection.

As explained herein: (1) any interest in the personal property left at the leased premises was deemed abandoned upon the Effective Date of the Plan; and (2) the lease provisions regarding ownership of personal property remain effective upon rejection and govern the landlord's ownership of and entitlement to the property.

BACKGROUND[2]

The MOA Lease

1. On or about July 13, 2016, MOAC entered into a lease agreement (the "MOA Lease") with Cinemex MOA, LLC ("Cinemex MOA") for the premises (a movie theater) located at Mall of America located in Bloomington, Minnesota. A copy of the lease is included within Exhibit F to the Motion to Enforce.

2. On or about that same day, CanAm Theatres MOA, LLC (an affiliate of MOAC) and Cinemex MOA entered into a Digital Projection Equipment Purchase and Sale Agreement (the "APA") for certain digital equipment, as listed on Exhibit A-1 to the APA, in exchange for $700,000.00.

3. Cinemex MOA was not an entity that filed bankruptcy in connection with the Cinemex jointly administered cases. Cinemex counsel has provided counsel for MOAC an Agreement and Plan of Merger between Cinemex MOA and CB Theater Experience LLC ("CB

[2] MOAC understands the Court wants legal briefs on these two discrete issues. Accordingly, MOAC is setting forth only such background as is reasonably necessary to address those issues, and not any additional matters relating to factual disputes regarding notice, the Debtors' and Reorganized Debtors' acts or inaction with regard to retrieval of the personal property, the Reorganized Debtors' claimed damages, and other legal issues and defenses to the matters asserted in the Motion to Enforce, as to which MOAC reserves all rights.

Theater") dated December 21, 2018 with an effective date upon the timing of a Certificate of Merger with the Delaware Secretary of State. MOAC has not been provided a filed Certificate of Merger and it is unknown if one was filed. Cinemex counsel has provided counsel for MOAC an Assignment and Assumption of Lease, dated January 11, 2019, between Cinemex MOA and CB Theater for the MOA Lease.

4. Section 9.3 ("Surrender of Premises") of the MOA Lease states:

> Tenant, at its expense, shall remove all personal property of the Tenant no later than the Expiration Date or earlier termination of this Lease. In the event Tenant fails to surrender the Premises as aforesaid or to remove its personal property as aforesaid, Landlord shall have the right, but not the obligation, to remove therefrom all or any part of the personal property located therein and such property shall be deemed to have been abandoned by Tenant and to have become property of Landlord, and may be retained or disposed of Landlord, as Landlord shall desire.

5. Section 10.3.B ("Tenant's Liens") of the MOA Lease states:

> All trade fixtures, equipment, and other property owned by Tenant shall remain the property of Tenant without regard to the means by which, or the person by whom, the same are installed in or attached to the Premises, and Landlord agrees that Tenant shall have the right at any time, and from time to time, to remove any and all of its trade fixtures, equipment, and other property, including but not limited to, projectors, screens, counters, shelving, showcases, mirrors, slides, and signs, except Tenant shall not remove in connection with the expiration or earlier termination of the Lease any screens or movie theater seating, which shall remain in the Premises and become the property of Landlord.

The Rejection of the MOA Lease

6. On or about April 26, 2020, CB Theater filed for bankruptcy under chapter 11 of title 11 of the Bankruptcy Code in this Court.

7. On April 30, 2020, Cinemex filed its Debtors' Motion to Reject Unexpired Leases as of April 30, 2020 (the "Motion to Reject") (DE#29 in Case No. 20-14695). The Motion to Reject included the MOA Lease.

8. This Court approved Cinemex's rejection of the MOA Lease on an interim basis in May 2020 (DE#72 in Case No. 20-14695) and on a final basis on June 8, 2020 (DE#270 in Case No. 20-14695).

9. In June 2020, Cinemex turned over the keys to MOAC for the MOA Lease and vacated the premises.

10. Nothing in the Court's rejection orders purported to modify any of the terms of the MOA Lease.

Confirmation of the Debtors' Plan

11. On November 25, 2020, the Court entered the Confirmation Order (DE#936 in Case No. 20-14695), confirming the Debtors' Third Amended Joint Chapter 11 Plan ("Plan") (DE#779 in Case No. 20-14695).

12. The Plan and Confirmation Order provide that all property of each of the Debtors' estates shall vest in the Reorganized Debtors:

> … all property in each Estate, all Causes of Action, and any property acquired by any of the Debtors pursuant to the Plan shall vest in each applicable Reorganized Debtor, free and clear of all Liens, Claims, charges, Interests, or other encumbrances other than those specifically granted pursuant to the Plan or the Confirmation Order. Except as otherwise provided in the Plan, on and after the Effective Date, each of the Reorganized Debtors may operate their business and may use, acquire, or dispose of property and compromise or settle any Claims, Interests, or Causes of Action without supervision or approval by the Bankruptcy Court and free of any restrictions of the Bankruptcy Code or Bankruptcy Rules.

(DE#936 at 54-55) (Confirmation Order ¶ 123); DE#772 at 33 (Plan Art. IV.N.).

13. The Plan became effective on December 18, 2020, as reflected by the Reorganized Debtors' Notice of Effective Date (DE#973 in Case No. 20-14695).

Cinemex's Post-Rejection Inaction

14. The Motion to Enforce states that the Reorganized Debtors first requested to retrieve "the remaining equipment and property from MOA" by a January 14, 2021 email from

Alejandro Muhech (at Cinemex) to "Joe Calasciebetta [sic] at MOAC." (DE#204 at 6, ¶19). The email reads: "We need to retrieve some equipment from MOA, how can we coordinate the access and dates to do it?" ("January 14 Email") (DE#204, Exhibit "A"). There are factual disputes as to whether this email to Mr. Calascibetta, who is not counsel to or an employee of MOAC, and which provided no specificity as to what was being sought by the Reorganized Debtors, was proper and effective notice to MOAC of any claim to the personal property at the premises. For present purposes, MOAC will not address those issues, but references the January 14 Email simply because it is the first instance claimed by the Reorganized Debtors of ***any*** communication regarding any personal property at the premises. Mr. Calascibetta responded that "CMX doesn't have any rights to equipment." (DE#204, Exhibit "A").

15. The Motion to Enforce provides no detail whatsoever on any response by the Reorganized Debtors or any further efforts by the Reorganized Debtors to retrieve any personal property at the MOA premises over the next several months.

16. On June 2, 2021, corporate counsel for MOAC (Kathy Hayden) initiated a discussion with Reorganized Debtors' counsel (Jeffrey Bast) about personnel records and purchasing equipment (POS) that contain confidential employee information (such as dates of birth and social security numbers) and possibly customer purchase information that were still in the possession of MOAC.

17. On June 4, 2021 counsel for the Reorganized Debtors (Jeffrey Bast) for the first time stated: "The preliminary report back from our client is that CMX's personal property at the location is much more extensive than what you have described/photographed, and it includes petty cash on site. So, the arrangements for retrieval may be more complicated. We have asked our client

to provide a more detailed inventory of what is there and will follow up with you when we have that information." DE#204, Exhibit B.

18. For the month of June 2021, counsel for Cinemex and counsel for MOAC continued to discuss and dispute the issue of any remaining personal property belonging to Cinemex at the MOA premises.

19. On July 15, 2021, Cinemex was allowed and did retrieve the personnel records as well as a significant amount of equipment related to the POS system abandoned at the MOA premises.

20. On July 27, 2021 – a year and two months after rejection, and more than seven months after the Effective Date – the Reorganized Debtors filed the Motion to Enforce.

DISCUSSION

I. The Reorganized Debtors Abandoned any Interest in the Personal Property Upon the Effective Date of the Plan

The issue this Court initially focused on was whether the Debtors could be deemed to have abandoned any interest in the personal property located at the premises by virtue of the rejection of the MOA Lease: ("… I asked Mr. Coaty specifically in July, is he aware of any case law that says upon rejection the property is deemed abandoned. He acknowledged, to his credit, that there was no case law that so provides.") (Transcript of October 26, 2021 Hearing at 22:10-14).[3] MOAC does not contend now that the Debtors' rejection of the MOA Lease constituted an abandonment of any interest in the personal property.

[3] Mr. Coaty's response was "I believe, your Honor, that is an ambiguous part of the law, there isn't a code that specifically says one way or the other" (Transcript of July 28, 2021 Hearing at 10:4-6); but in any event, as discussed herein, MOAC is not relying on the rejection as constituting an abandonment of the personal property.

MOAC does respectfully submit, however, that the Court's focus on the date of entry of the final decree on April 22, 2021 (DE#1065 in Case No. 20-14695) as being the earliest possible date for any abandonment of the personal property is misplaced. The Court's focus on the date of the Final Decree appears to have been driven by the language of 11 U.S.C. § 554(c), which provides: "Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of this title." It is generally true that absent notice and a hearing on abandonment under either 11 U.S.C. § 554(a) or (b), property that is "not otherwise administered" at the time of the closing of a case is "abandoned to the debtor" under § 554(c). Thus, for unadministered property, the date of case closing is relevant.

But here, the property at issue ***has*** been administered: all of the property of the Debtors' estates has been vested in the Reorganized Debtors in accordance with the Debtors' confirmed Plan. Thus, § 554(c) does not apply, and does not govern the abandonment of any interests of the Debtors or Reorganized Debtors. *See In re D&L Nicolaysen*, 228 B.R. 252, 261-62 (Bankr. E.D. Ca. 1998):

> [S]ection 554(c) has no applicability to these cases or to any chapter 11 case after a plan has been confirmed and the property of the estate has revested in the debtor. . . . [W]hen these case [sic] were closed, no abandonment pursuant to section 554(c) was necessary or possible because the property of the estate had previously re-vested in the Debtors when the Joint Plan was confirmed.

See also In re Troutman Enterprises, Inc., 253 B.R. 1, 6 (6th Cir. BAP 2000), *vacated on other grounds*, 286 F.3d 359 (6th Cir. 2002) (following *Nicolaysen* in finding that § 554 is not applicable in the context of a Chapter 11 case with a confirmed plan because, "upon plan confirmation, pursuant to § 1141(b), all of the property of the estate vests with the reorganized debtor"); *In re Sundale, Ltd.*, 471 B.R. 300, 304 (Bankr. S.D. Fla. 2012) (recognizing that property that vested in

reorganized debtors upon confirmation of chapter 11 plan did not revest in the debtor upon conversion to chapter 7).[4]

Here, whatever interest the Debtors had in the personal property left on the MOA premises was administered when it was vested in the Reorganized Debtors through the Plan. Upon the Effective Date, all interests of the Debtors in property – including any personal property at the MOA premises – were vested in the Reorganized Debtors. Accordingly, the date of the Final Decree is of no relevance; the operative date is the date of the entry of the Confirmation Order, or at the latest, the Effective Date of the Plan. Even if § 554(c) precluded an abandonment of the personal property by the Debtors without notice and hearing, once it was administered through the Plan and vested in the Reorganized Debtors, § 554 no longer applies. At that point, the Reorganized Debtors became vested in whatever rights the Debtors' estates had to the property "free of any restrictions of the Bankruptcy Code or Bankruptcy Rules."

Thereafter, by the express terms of the MOA Lease itself, as well as by operation of Minnesota law, any interest of the Reorganized Debtors in the personal property which was left behind for more than a half year after the Debtors vacated the premises was deemed abandoned. As noted above, Section 9.3 of the MOA Lease provides that Tenant shall remove all personal property of Tenant by no later than the Expiration Date or earlier termination of the Lease, and if Tenant fails to do so, "such personal property shall be deemed to have been abandoned by Tenant and to have become the property of Landlord, and may be retained or disposed of by Landlord, as Landlord shall desire." Minnesota state law, as applicable to the MOA Lease, similarly provides that "If a tenant abandons rented premises, the landlord may take possession of the tenant's

[4] The automatic stay under 11 U.S.C. § 362 as against property of the estate also terminates when the property vests in the Reorganized Debtors, because the property "is no longer property of the estate." 11 U.S.C. § 362(c)(1).

personal property remaining on the premises," and further provides that "The landlord may sell or otherwise dispose of the property 28 days after the landlord receives actual notice of the abandonment, or 28 days after it reasonably appears to the landlord that the tenant has abandoned the premises, whichever occurs last." MN Stat. Ann. § 504B.271(a), (b).

Thus, by operation of law, any interest of the Reorganized Debtors was deemed abandoned (a) as of the Effective Date, in accordance with the terms of the MOA Lease when it was left on the premises of a rejected lease and not removed prior to the Effective Date; or at the latest (b) 28 days thereafter, in accordance with Minnesota statutes entitling a landlord to take possession of personal property left on abandoned rented premises. As this Court has noted, and as discussed further below, neither the rejection orders nor the Court's Confirmation Order modify the unambiguous terms of the lease with regard to ownership and entitlement to personal property (whether it be abandoned property as addressed in Section 9.3, or the seats and screens specifically addressed in Section 10.3.B).

II. Rejection Does Not Modify the Lease Terms Regarding Entitlement to Personal Property.

The Court has already preliminary noted that the rejection of the lease does not modify the terms of the lease itself. ("And, Ms. Tomasco, as I said on your part, you are going to have to explain why any of this has anything to do with modifying the lease, and under – in what universe you have a claim to the seats and the screens, because I understand what the confirmation order says, I understand what all that says, but the lease is unambiguous, screens and seats stay, when our relationship is over, we get to keep the seats and the screens.") (Transcript of October 26, 2021 Hearing at 22:22-23:4). The Court's comments are fully consistent with the Supreme Court's recent decision in *Mission Product Holdings, Inc. v. Tempnology, LLC*, ___ U.S. ___, 139 S.Ct. 1652 (2019). In *Tempnology*, the Supreme Court was required to determine the consequences of a

debtor's rejection of a trademark licensing agreement. In doing so, the Supreme Court clarified that the "rejection" of a contract under 11 U.S.C. § 365 does not operate as a rescission of rights already granted to the counterparty. *Id.* at 1632. In preserving the counterparty's rights, "Section 365 reflects a general bankruptcy rule: The estate cannot possess anything more than the debtor itself did outside bankruptcy." *Id.* at 1363. Thus, "Whatever 'limitation[s] on the debtor's property [apply] outside of bankruptcy[] appl[y] inside of bankruptcy as well. A debtor's property does not shrink by happenstance of bankruptcy, but it does not expand, either.'" *Id.* (citation omitted). Accordingly, the Supreme Court concluded: "[W]e hold that under Section 365, a debtor's rejection of an executory contract in bankruptcy has the same effect as a breach outside bankruptcy. Such an act cannot rescind rights that the contract previously granted." *Id.* at 1666.

Consistent with *Tempnology*, the Debtors' rejection of the MOA Lease does not rescind or repudiate the rights previously granted to MOAC with respect to its entitlement to personal property not removed from the premises prior to surrender of the premises under Section 9.3, nor MOAC's right to the screens and seating under Section 10.3.B. The Reorganized Debtors could not have acquired any greater rights in the personal property than the Debtors had under the lease terms, which are not "rescinded" as a result of rejection.[5] Accordingly, Section 9.3 of the MOA Lease requires that the personal property not removed upon surrender of the premises becomes the landlord's property, and Section 10.3.B requires that the screens and seats remain and become the landlord's property upon the expiration or earlier termination of the lease.[6]

[5] Although *Tempnology* addresses § 365, there is no principled reason why the same conclusion does not apply to a Chapter 11 plan: a Plan and a Confirmation Order cannot confer greater property rights on a Reorganized Debtor than the Debtor held in the property outside of bankruptcy.

[6] To clarify how these sections both apply: Section 9.3 provides that any personal property not removed by the tenant prior to surrender is deemed abandoned to and property of the landlord; and

Thus, even if § 554 precluded an abandonment without notice and hearing prior to the administration of the property, as of the Confirmation Date or at the latest, the Effective Date, the personal property that had been left for several months post-rejection at the MOA premises without any effort to retrieve it became abandoned property deemed to belong to MOAC under the unambiguous terms of the MOA Lease. The earliest that the Reorganized Debtors claim to have made ***any*** inquiry about the personal property was January 14, 2021, more than seven weeks after the Confirmation Order was entered, and nearly a month after the Effective Date, at which point the abandonment was already effective.[7]

MOAC anticipates that the Reorganized Debtors may argue that Section 9.3 and Section 10.3.B are not effective here because they apply upon the "expiration of the Lease Term," with respect to Section 9.3, and upon the "expiration or earlier termination of the Lease" with respect to Section 10.3.B, and that "rejection" is not the equivalent of "termination." While it is true in some respects that rejection does not completely "terminate" the agreement – in particular, in the manner described in *Tempnology*, that rejection does not rescind rights previously given to a contract's counterparty – that should not be confused with the question of whether the ***term*** of a rejected lease is deemed terminated as a result of rejection. This issue was addressed by the Court in *In re 6177 Realty Associates, Inc.*, 142 B.R. 1017 (Bankr. S.D. Fla. 1992). In *6177 Realty*, the Court noted that with respect to non-residential real estate leases, 11 U.S.C. § 365(d)(4)

Section 10.3.B prohibits the tenant from removing the screens and seating in connection with the expiration or earlier termination of the lease. So in effect: the tenant can remove all personal property ***other than*** the screens and seats prior to surrender; and anything not removed prior to surrender is abandoned to the landlord.

[7] And regardless of whether or not abandoned, Section 10.3.B of the MOA Lease unambiguously provides that the seats and screens shall become landlord's property upon the expiration or earlier termination of the lease.

specifically provides that if a lease is deemed rejected, "the trustee shall immediately surrender such non-residential real property to the lessor." *Id.* at 1019. Based on this surrender language, the Court agreed that "It is clear Congress intended that rejecting a lease terminates the lease." *Id.* (citation omitted).

Accordingly, while rejection may not operate as a rescission or repudiation of all the counterparty's rights under a rejected agreement, it does, with respect to a non-residential lease anyway, have the effect of terminating the term of the lease. Very simply, the Debtors could not have rejected the MOA Lease, but still assert a right to continue to occupy the premises. The Debtors were obligated to vacate, and the "Lease Term" had expired. The rights of the landlord upon expiration of the Lease Term were thereby effective and vested any personal property abandoned on the premises, as well as the seats and screens, in the landlord.

CONCLUSION

For the foregoing reasons, MOAC respectfully submits that (1) any interest of the Debtors or Reorganized Debtors in the personal property left after vacating the premises was abandoned as of the Effective Date of the Plan; and (2) the provisions of the MOA Lease regarding MOAC's entitlement to abandoned property in the surrendered premises, and to the seats and screens, remain effective notwithstanding rejection of the lease. Accordingly, the Motion to Enforce should be denied.

KOZYAK TROPIN & THROCKMORTON, LLP
2525 Ponce de Leon Boulevard, 9th Floor
Coral Gables, Florida 33134
Tel: (305) 372-1800
Fax: (305) 372-3508

/s/ David L. Rosendorf
David L. Rosendorf
FL Bar No. 996823
dlr@kttlaw.com

Counsel for MOAC Mall Holdings, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on November 19, 2021, through the Court's Case Management/Electronic Case Filing system, which sent automatic email notices of electronic filing to all parties indicated on the electronic filing receipt.

/s/ David L. Rosendorf
David L. Rosendorf