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UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

IN RE:)
NORTHWEST TERRITORIAL MINT, LLC,)
Debtor.) 16-11767-CMA

TRANSCRIPT OF THE DIGITALLY RECORDED PROCEEDINGS
BEFORE THE HONORABLE CHRISTOPHER M. ALSTON
JANUARY 20, 2017

PREPARED BY: SHARI L. WHEELER, CCR NO. 2396

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APPEARANCES

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SEATTLE, WASHINGTON; JANUARY 20, 2017

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THE COURT: Good morning, Mr. Gearin.

Good morning, Mr. Calvert.

MR. GEARIN: Good morning, Your Honor.

THE COURT: And, Mr. Zack, you're here as well on this, I see.

I'm thinking this is uncontested, more or less. I don't know. You tell me.

MR. GEARIN: All right. I will, Your Honor. Thank you.

So we have the motion addressing three lease issues.

THE COURT: Yes.

MR. GEARIN: And as you know, Mr. Calvert has been working for some time at consolidating, reducing costs, conserving cash. It's important to get us through to a plan presentation process, and these lease issues are part of that kind of conservation -- those conservation efforts.

So uncontested. There were three leases that were at issue. One in Green Bay, Wisconsin, where Mr. Calvert negotiated for a new lease on reduced terms. There's no objection to that component of the motion.

The second one is the Springfield, Virginia

1 lease, motion to reject. No objection to that component of
2 the motion either.

3 The Auburn lease, we originally filed a motion
4 to assume the lease. After we filed the motion to assume, the
5 trustee realized he needed to further conserve resources; and
6 he made the decision to move the Auburn facility down to
7 Dayton, Nevada. He reached out and contacted the Auburn
8 landlord and talked to him about a joint marketing program, an
9 assumption and assignment of the lease, an assumption and a
10 sublease, or a rejection -- an outright rejection. And that's
11 what they were having conversations about, whether there
12 should be an assumption and assignment component, rather than
13 an outright rejection.

14 THE COURT: Okay.

15 MR. GEARIN: The landlord really came down, at
16 one point, and basically said that he would not agree to any
17 of these to assume and assign. He wanted the lease assumed.
18 So he filed this acceptance of the motion and --

19 THE COURT: Which the motion was to assume,
20 so --

21 MR. GEARIN: It was to assume. Right. No
22 question.

23 THE COURT: Yeah.

24 MR. GEARIN: But the trustee, at this point, has
25 started the process of moving out of Auburn. He's basically

1 almost out of there. He will be out by the end of the month.
2 The rent has been paid current, you know, per -- we had a
3 prior hearing with this same landlord early on in the case,
4 and I believe the rent has been paid like clockwork. So at
5 this point, the trustee wants to withdraw the motion to assume
6 and believes that's in the best interest of the estate. We
7 think that if we do withdraw, the lease would be deemed
8 rejected pursuant to the code. And, therefore, we want to set
9 a rejection damages deadline.

10 THE COURT: All right.

11 MR. GEARIN: So I think Mr. Zack is here to
12 respond to those issues. I think his client still thinks the
13 lease ought to be assumed, and I think we do have to have
14 argument about that component. But the trustee's request, at
15 this point, is to withdraw the motion to assume.

16 THE COURT: Okay.

17 MR. GEARIN: One last thing about the rejection
18 of the Springfield lease. We originally -- we set this
19 hearing originally in December, and it was continued over into
20 January. We had a rejection damages bar date, I think, at the
21 end of December in the prior motion. I want to continue that.
22 I think we're thinking, like, March 31st as a rejection
23 damages deadline for the Springfield landlord to file a claim.

24 THE COURT: All right. That was on my notes of
25 things to discuss, what the new deadline would be. But that

1 sounds fine.

2 All right. I guess I'll hear from Mr. Zack.

3 MR. ZACK: Good morning, Your Honor.

4 THE COURT: Good morning.

5 MR. ZACK: Jimmy Zack appearing on behalf of
6 Gatewood-California, LLC, who's the landlord under the Auburn
7 lease.

8 Your Honor, essentially, what's going on here,
9 as the trustee's counsel said, is they're looking to reject.
10 Our position is that the lease has been assumed. And given
11 the record in this case, rejection of the Auburn lease would
12 essentially render Section 365(d)(4) meaningless, and it would
13 contradict this Court's order entered at Docket Number 530;
14 the trustee's motion, proposed order, notice of hearing, and
15 declaration at Docket Number 804 through 806; the express
16 legislative intent underlying the so-called "shopping center
17 amendments" of 1984, which include Section 365(d)(4); and case
18 law from the Ninth Circuit and around the country.

19 So it's the landlord's position today that the
20 lease has been assumed and that the Court should approve of
21 that assumption. And we have three primary arguments today.

22 The first is that the motion to assume can't be
23 withdrawn under the local rules. It can only be granted or
24 denied at this point.

25 The second is that the trustee assumed the lease

1 on October 28, 2016, and that assumption should be approved by
2 the Court today.

3 And the third is that rejection is no longer
4 possible by any means, whether by deemed rejection or an act
5 of rejection.

6 THE COURT: So, Mr. Zack, all of this is
7 obviously new to me.

8 MR. ZACK: Certainly.

9 THE COURT: None of this was presented to me in
10 paper, but let me kind of just jump to the end here.

11 MR. ZACK: Absolutely.

12 THE COURT: It's not approved until I enter an
13 order approving it.

14 MR. ZACK: Absolutely.

15 THE COURT: So you kind of lost me at "it's been
16 assumed."

17 MR. ZACK: Sure.

18 THE COURT: Help me understand how it's been
19 assumed.

20 MR. ZACK: Absolutely. Assumption is a two-step
21 process. Section 365(d)(4) outlines the trustee's duty to
22 decide whether to assume or reject a lease. And then the
23 second step, which is separate from that, is under Section
24 365(a), where the Court approves or denies the trustee's
25 decision.

1 The Ninth Circuit has shown us that these are
2 very separate issues. Under the case of Victoria Station,
3 which is 840 F.2d 682, at page 684, the Ninth Circuit Court of
4 Appeals let us know that the Section 365(d)(4) deadline to
5 assume or reject should be read as a time limit upon the
6 trustee or the debtor, rather than upon the Bankruptcy Court.

7 And the legislative history behind Section
8 365(d)(4) gives us the same indication, that all that
9 365(d)(4) is about is the decision. And the legislative
10 history, which is quoted in Southwest Aircraft Services, 831
11 F.2d 848, at page 851, they quote the express legislative
12 history, which says that Section 365(d)(4), along with (d)(3),
13 were added to the code to essentially protect landlords,
14 within 60 days after the order for relief in a case, making
15 them decide whether to assume or reject.

16 Now, obviously, the 60 days has been amended
17 since then; but the substance of the statute remains the same.
18 To this point, in In re At Home Corp., 392 F.3d 1064, at page
19 1068, the Ninth Circuit Court of Appeals, in 2004, stated:
20 Section 365(d)(4) requires a trustee or debtor to decide
21 whether to assume or reject the lease within 60 days after the
22 filing of the bankruptcy petition.

23 So, really, just focusing in on Section
24 365(d)(4), did the trustee decide to assume the lease by its
25 deadline of October 28, 2016?

1 The problem is the Bankruptcy Code doesn't tell
2 us how you effectuate assumption. So Courts took it upon
3 themselves, right after 1984, to come up with somewhat of a
4 standard. Two cases that are heavily cited for that, one from
5 the District of Utah, is By-Rite Distributing, 55 B.R. 740, at
6 page 742; and the other is a case called 1 Potato 2, from the
7 District of Minnesota, 58 B.R. 752, at page 754.

8 Now, By-Rite Distributing tells us: The trustee
9 assumes or rejects the lease, within the meaning of Section
10 365(d)(4), when he makes up his mind to do so and communicates
11 his decision in an appropriate manner, such as by filing a
12 motion to assume.

13 1 Potato 2 builds on that and says: The trustee
14 or debtor in possession may assume or reject an executory
15 contract or unexpired lease by clearly communicating, in an
16 unequivocal manner, its intentions to either assume or reject
17 to the lessor. The trustee or debtor in possession must
18 manifest an unconditional and unambiguous decision.

19 So we look to the deadline set by this Court at
20 Docket 530 and set by the code under Section 365(d)(4). And
21 we look to see whether the trustee assumed the lease by
22 October 28th. And the record shows that at Docket 804 through
23 806, the trustee did just that. The trustee filed a motion to
24 assume the lease, totally unambiguous, unconditional,
25 unequivocal, clearly communicated to the lessor and this

1 Court. The relief requested in the motion states: By this
2 motion, the trustee respectfully requests the entry of an
3 order authorizing the trustee's assumption of the Auburn
4 lease.

5 The trustee's declaration in support says
6 nothing negative about assumption, speaks only to why it needs
7 to be done. It is necessary and beneficial to the estate for
8 me to assume the Auburn lease; that's in paragraph 13 of the
9 trustee's declaration.

10 The trustee further states: The trustee is
11 current on all obligations under the Auburn lease and is
12 unaware of any defaults under the Auburn lease that would need
13 to be cured as a condition to the trustee's assumption.

14 The proposed order simply states: The trustee
15 is authorized, pursuant to 11 USC Section 365, to assume the
16 Auburn lease.

17 And the notice of hearing says: By the motion,
18 the trustee respectfully requests authorization for the
19 trustee's assumption of the Auburn lease.

20 Simply put, Your Honor, there is nothing, on
21 October 28th or before, that indicates any intent to reject
22 the lease.

23 Furthermore, the notice of continuance filed
24 with respect to this motion on December 8th still says: By
25 the motion, the trustee requests authorization for the

1 trustee's assumption of the Auburn lease.

2 So we said to ourselves, well, why are they
3 continuing the motion if we're just going to -- you know,
4 they've already assumed. They're there. They're paying rent.
5 They're maintaining the property. Why any need to continue
6 the motion?

7 So we looked at the local rules. And we said,
8 well, we'll file a response in support and, you know, that
9 will keep them on track. Under the local rules, they can no
10 longer continue the hearing. They can't withdraw or strike
11 the motion. There's no judicial discretion there.

12 So even though the trustee is asking the Court's
13 permission to withdraw the motion today, that's simply not in
14 the local rules. The local rule says: The moving party shall
15 not strike or withdraw a motion after a responsive pleading
16 has been filed without first obtaining the consent of the
17 responding party.

18 The trustee filed a notice of withdrawal without
19 the landlord's consent on January 13th. The landlord let them
20 know that we did not consent to that. And, thus, the line in
21 the reply briefing indicating -- you know, acknowledging the
22 local rule and saying that even though the landlord hasn't
23 consented, now the trustee is going to ask the Court's
24 authority to do so.

25 Your Honor, the rule is clear. It uses the word

1 "shall," which is well known to mean "mandatory." And no
2 other language in the rule implies any discretion.

3 THE COURT: Do you have any case that supports
4 the position you're taking today?

5 MR. ZACK: As far as withdrawal?

6 THE COURT: No. As far as the trustee, quote,
7 needs to decide, and once it has decided, it can never be
8 changed. I mean, that's kind of what I understand your
9 argument to be. Do you have any case to that effect?

10 MR. ZACK: There's a statute to that effect.
11 Section 365(d)(4) gives a deadline for the trustee to decide
12 whether to assume or --

13 THE COURT: No, it doesn't. And you gave me
14 legislative history. Sorry to cut you off.

15 MR. ZACK: Sure. No problem.

16 THE COURT: Legislative history only comes into
17 play if the statute is ambiguous. The word "decide" isn't in
18 the statute.

19 MR. ZACK: Sure.

20 THE COURT: The word is "assume" or "reject."
21 And the trustee hasn't assumed it yet, until I enter an order
22 saying so. So this is a very interesting intellectual
23 exercise.

24 MR. ZACK: Absolutely.

25 THE COURT: I'll just cut to the chase. I'll

1 deny the aspect of the motion with respect to the assumption.

2 MR. ZACK: Well, Your Honor --

3 THE COURT: And I'm going to treat the rest of
4 the -- I'm going to bifurcate the rest of the relief and
5 approve that. So I think we're done.

6 MR. ZACK: Well, I -- I would argue that we're
7 not, Your Honor, if you'll allow me to continue.

8 THE COURT: All right.

9 MR. ZACK: Sure.

10 THE COURT: But do you understand that the
11 problem with what you're asking the Court to do -- it has a
12 number of problems. Not only does it not hold up, I think,
13 practically. But you're now setting some sort of standard
14 about how people are going to practice in this district, and I
15 don't like where you're going.

16 MR. ZACK: Well, to that point, Your Honor, is
17 the standard going to be that a trustee can come in, three
18 months after the deadline that you set at Docket Number 530,
19 and change their mind on assumption or rejection without the
20 consent of the landlord, which paragraph 5 of that order
21 requires?

22 THE COURT: They moved to assume or reject. The
23 motion got continued. We continue motions all the time for
24 various reasons. Until there's an order assuming the lease,
25 it's not been assumed, and I can rule on the motion. Again,

1 the problem I'm seeing is that you're now setting up a
2 situation where parties are going to have to litigate in a
3 fashion that I do not like.

4 And, yes, the idea of -- once there's been an
5 objection you can't just unilaterally withdraw it, so the
6 Court is going to hear it. I'm hearing it.

7 MR. ZACK: Certainly.

8 THE COURT: But the notion that I have to grant
9 the motion that they requested, that's not correct. That
10 seems to be what you're arguing, is that I have to grant the
11 motion. As I just said, I'm going to deny it. And you're now
12 arguing with me that, no, no, no, I have to grant the motion.

13 MR. ZACK: Well, yeah, Your Honor. I --

14 THE COURT: Which I don't, do I?

15 MR. ZACK: You would agree that that comes under
16 Section 365(a), not Section 365(d)(4), though, the aspect of
17 the Court's approval of the assumption. So I do have
18 arguments under Section 365(a).

19 THE COURT: Okay. Well, I'm not even going to
20 ask for further briefing on it because you've given me the
21 option of either granting or denying the motion. I'm denying
22 the motion with respect to the request to assume, which I have
23 the right to do, don't I?

24 MR. ZACK: Certainly, under the business
25 judgment rule. But the record doesn't reflect any basis for

1 the denial of the motion. All that we have is a declaration
2 from the trustee, on the 28th, begging this Court to assume
3 it.

4 THE COURT: Right. And I just heard further
5 discussion from Counsel. And unless you believe Counsel is
6 not telling the truth, I'm going to accept the position that
7 has just been represented to the Court, that it is not in the
8 best interest of the estate to assume this going forward.

9 MR. ZACK: I do disagree.

10 THE COURT: So I'm going to deny the request for
11 relief, and I think I'm within my right to deny the motion.

12 MR. ZACK: Can I at least speak to the points
13 that the trustee's counsel made on the record today, that were
14 not briefed at all, about whether this is in the best interest
15 of the estate? Because the landlord --

16 THE COURT: You haven't briefed anything either,
17 Mr. Zack.

18 MR. ZACK: Certainly, but --

19 THE COURT: I'm sorry to interrupt you here, but
20 you could have put all of this in a brief -- all of this. I
21 thought this was essentially going to be an uncontested
22 matter, which is why I called it. I'm somewhat shocked that
23 you are citing legislative history and many, many cases. I
24 have not looked at any of this stuff. You expect me to rule
25 today on that?

1 MR. ZACK: No, not necessarily. I would love
2 for you to take it under advisement. But, Your Honor, when
3 they file a reply brief that, for the first time, introduces
4 that we don't have an agreement on this to the Court, I'm not
5 sure where -- you know, we've tried to play this right,
6 procedurally. And I'm not sure where that opportunity was
7 supposed to come in. Because, you know, they say that the
8 landlord is not okay with assumption and assignment. That's
9 not true. The landlord would love to have it assumed and
10 assigned. This is a below-market lease. There's a benefit to
11 the estate to do that.

12 THE COURT: Well, I've been told that the
13 trustee has decided it's not in the best interest of the
14 estate. I mean, the reply came in on the 17th of January,
15 saying that --

16 MR. ZACK: It doesn't say it's not --

17 THE COURT: I'm reading between the lines here,
18 that the landlord, your client, refused to agree to the
19 withdrawal or striking of the motion. Right?

20 MR. ZACK: Yes. We believe that it should be
21 assumed and assigned.

22 THE COURT: I understand that.

23 MR. ZACK: And that's in the best interest of
24 the estate.

25 THE COURT: Right. But that's not your call.

1 That's the trustee's call. Unless I find that the trustee is
2 making a grave mistake, I'm going to accept the trustee's
3 business judgment. So, again, I'm kind of at a loss as to how
4 your client is essentially demanding that I order that the
5 lease has been assumed, when 365(d)(4) says that if the
6 trustee does not assume or reject, it's rejected. And there's
7 no assumption until the Court orders it.

8 MR. ZACK: Your Honor --

9 THE COURT: I'm really not understanding your
10 client's position.

11 MR. ZACK: We also have an argument, that comes
12 out of the Central District of California, that waiver applies
13 where a trustee moves to assume and continues to pay rent and
14 stay in the space, and then at a later date, one of the
15 parties tries to have the lease deemed rejected.

16 There's three elements to waiver. They all
17 apply to this case. If you'd like to hear that, I'd love to
18 offer it.

19 THE COURT: Sure. I'll listen. So waiver --

20 MR. ZACK: Yes.

21 THE COURT: -- as opposed to estoppel now?

22 MR. ZACK: Yes, waiver. And the Ninth Circuit
23 Court of Appeals, in Victoria Station, said that it declined
24 to reach the question of whether waiver or other equitable
25 estoppel principles are applicable to Section 365(d)(4)

1 because it was unnecessary because it had already found a
2 timely assumption. But the California Court in question had a
3 situation where a party was trying to have the lease deemed
4 rejected long after the fact because the trustee hadn't moved
5 to assume the lease but had manifested assumption of the
6 lease.

7 There's three elements that that Court
8 considered. The first was the existence, at the time of the
9 waiver, of a right, privilege, advantage, or benefit. And
10 they said that easily occurs when --

11 THE COURT: I'm sorry. What case is this,
12 again?

13 MR. ZACK: Oh, sorry. This is VMS National
14 Properties, 148 B.R. 942, at page 944. And that's from the
15 Central District of California.

16 THE COURT: What year?

17 MR. ZACK: 1992.

18 THE COURT: Okay.

19 MR. ZACK: Sorry, Your Honor. I appreciate that
20 the Court has none of this in front of it. We tried to follow
21 the briefing schedule. And we had a response, and they had a
22 reply, and it would've been ludicrous for us to include this
23 in our response, given the record.

24 THE COURT: I hear you. And I know you're doing
25 the best for your client. But you just have to -- if you

1 haven't figured it out, I'm having a hard time swallowing that
2 I am now required to enter an order assuming a lease that the
3 trustee doesn't want to assume. You can imagine the precedent
4 that that kind of sets here, that judges' hands are now tied,
5 and I --

6 MR. ZACK: Oh, absolutely. There's similar
7 precedent, though, of a trustee coming in, three months after
8 the Court's ordered deadline, and changing their mind on
9 assumption or rejection, after they've manifested an
10 assumption for the last three months and had the benefit of
11 that assumption.

12 So, anyway, the elements of waiver -- the first
13 one is the existence, at the time of the waiver, of a right,
14 privilege, advantage, or benefit. And the California Court
15 held that that easily occurs when the Section 365(d)(4)
16 assumption or rejection period expires.

17 The second element is the actual or constructive
18 notice thereof. That's easily satisfied. The trustee had
19 actual knowledge of the bankruptcy case, which, quote/unquote,
20 constructively imputes the knowledge of the code and its
21 provisions. So the trustee had knowledge of what it had to do
22 under Section 365(d)(4); and, lo and behold, on the deadline
23 to do it, they filed the motion to assume.

24 The third element is the intent to relinquish
25 such a right, privilege, advantage, or benefit. And what's

1 being relinquished here was the "deemed rejected" type of
2 rejection. The test is conduct evidencing an intent to treat
3 the lease as continuing, rather than as terminated. And
4 that's all that we have on the record here.

5 We have a motion, declaration, proposed order,
6 notice of hearing, and notice of continuance that does nothing
7 other than show an intent to treat the lease as continuing.
8 We have no surrender. We have that the trustee continued to
9 pay rent.

10 This lease was assumed. And now three months
11 later, the trustee is trying to withdraw the motion and
12 trigger the "deemed rejected" part of Section 365(d)(4), which
13 it waived by filing the motion to assume. That part of
14 Section 365(d)(4), if you look at the plain language of it,
15 only comes into play if the trustee fails to assume or reject
16 within the deadline.

17 Now, the Ninth Circuit has ruled on this. The
18 Ninth Circuit has ruled that only the motion has to be filed
19 prior to. So it's not a matter of the Court approving it that
20 we're concerned with. It's just, did the trustee waive its
21 Section 365(d)(4) "deemed rejected" type of rejection? And
22 under the principles of waiver, that seems to fit this case
23 perfectly.

24 THE COURT: Let me make sure I understand your
25 argument. And I agree the case law says that all you need to

1 do is file the motion within the deadline. In this case, the
2 deadline has been extended another 90 days. The motion was
3 filed within the deadline. You're saying that if the trustee
4 files that motion within the deadline, under any
5 circumstances, it cannot be withdrawn? Or are you just
6 saying, under these facts, because it's many months later,
7 there's been a waiver?

8 MR. ZACK: Under the waiver theory, we --
9 obviously, I've come with many theories. But under the waiver
10 theory, the big part of this -- the first two elements are
11 easily established in the context of a bankruptcy case,
12 especially where this party is the trustee. They have
13 knowledge of Section 365(d)(4). They know that there's a
14 right there. And they know that they're not exercising that
15 right when they file a motion to assume on the last day.
16 Where if they didn't file that motion to assume, the lease
17 would have been deemed rejected, and we would have gone on our
18 way.

19 So then the third element is the factual
20 intensive element. And that's the one where we're looking for
21 conduct evidencing an intent to treat the lease as continuing,
22 rather than as terminated. And the record only has that on
23 it. Up until January 17th -- if the Court wants to entertain
24 the notice of withdrawal that the landlord didn't consent to,
25 let's say January 13th. That's almost 300 days after the

1 petition date. That's the first time that the trustee has
2 given any indication to this Court of any intent to do
3 anything other than assume. There was no surrender. The
4 statute says: If it's deemed rejected, you immediately
5 surrender.

6 If the landlord had come in here on October 29th
7 and tried to compel the Court to have the trustee surrender,
8 we would've been laughed out of court. The intent there is
9 clear. There's conduct all over the place that this lease was
10 assumed. And that goes back to those two cases from Minnesota
11 and Utah that I quoted to you earlier, which really set the
12 tone for, what does assumption really mean? It just means
13 making the decision and communicating the intent. I totally
14 agree that the Court has the right to approve or deny that
15 under the business judgment rule, but it's hard to say that
16 the trustee didn't assume the lease.

17 Now, you've shown an intent to deny that
18 assumption. But to say that the trustee didn't assume the
19 lease, I don't think is fully accurate under the purpose of
20 Section 365(d)(4) and the Ninth Circuit case law showing that
21 it's the decision, the motion, that has to come by that
22 deadline, not the Court's approval.

23 THE COURT: Well, the trustee indicated that he
24 decided to assume the lease. I think that's correct. I
25 believe, though -- not believe -- I know case law is pretty

1 clear. You don't look to legislative history, and you don't
2 look behind the statute unless it's ambiguous.

3 MR. ZACK: The Ninth Circuit Court, quoting
4 that, did find it ambiguous. That's why it took into account
5 the legislative history. It's quoted in block quotes in both
6 of those cases, I believe.

7 THE COURT: All right. I'm sorry to cut you off
8 again. So anything else, Mr. Zack?

9 MR. ZACK: You know, the landlord is facing
10 damages here. He did nothing wrong. The loss of marketing
11 time -- the winter months aren't a good time to try to
12 re-lease this. There's going to be a vacancy. There's going
13 to be broker fees. The landlord did everything right here.
14 He waited until October 28th. He saw that the lease was
15 assumed. He let them continue on with it. And now, three
16 months later, the trustee is trying to change his mind.

17 And I'd just like to leave you with a quote from
18 the Southwest Aircraft case: A rule that forfeits a party's
19 rights, benefits, privileges, or opportunities, simply because
20 a Court fails to act within a particular time period, would be
21 quite extraordinary. We think that Congress would not adopt
22 any such rule without clearly indicating, in the legislative
23 history, its intention to do so and explaining its reasons.

24 And by the Court's failure to act, I don't blame
25 the Court for this.

1 THE COURT: I understand.

2 MR. ZACK: But you get where three months
3 later -- you know, what's going to prevent the trustee from
4 doing this six months later? A year later? Two years later?
5 To come back and say, We assumed that lease. We've had the
6 benefit of it. It's been great, but now things have changed,
7 and we don't want it anymore. Section 365(d)(4) would be
8 meaningless.

9 THE COURT: All right. Thank you, Mr. Zack.

10 MR. ZACK: Thank you, Your Honor.

11 THE COURT: Well, I've got to say, that last
12 argument, Mr. Gearin, does give me some pause. Because the
13 one question I did have this morning was kind of: What
14 happened?

15 This motion has been on file for a long time.
16 And Mr. Calvert did say, in a declaration, I need this lease.

17 I'm hearing something different now. Maybe
18 circumstances have changed. But Mr. Zack does, I think, raise
19 a point that you're now saying, Sorry, we changed our mind.

20 If the lease had actually been assumed, you
21 couldn't do that.

22 MR. GEARIN: Right.

23 THE COURT: So I'm listening. What do you have
24 to say in response?

25 MR. GEARIN: Sure. I think what I have told you

1 earlier is that circumstances did change. The trustee had
2 cash shortfall considerations. He actually was -- he laid off
3 some additional people. He's still trying to conserve
4 resources of this estate to preserve the going concern value
5 of this company. And so what he realized was that he couldn't
6 afford the Auburn lease anymore, and that's why he needed to
7 consolidate -- further consolidate.

8 Now, the notion that this is a big surprise to
9 the landlord and that it came up three months later, that's
10 just not true. Mr. Calvert actually reached out to the
11 landlord in November and finally reached him by email. They
12 connected on December 11th. And at that point, he apprised
13 him, on December 11th, that he was not going to go forward
14 with this lease, that he needed to find a way to get out of
15 it. And that's all -- I know that's not in the record. I
16 understand that that's not before you. But the suggestion
17 that this came as a big surprise to the landlord is not the
18 case.

19 The other thing I want to mention, Your Honor,
20 is that I do have authority -- Mr. Northrup could not be here
21 today, but I do have authority from him to represent that the
22 committee is supportive of this rejection of the Auburn lease.
23 They believe it is important for the estate as well.

24 I'd like to address the legal question that was
25 raised about whether the lease was assumed. It was not, and

1 it is very clear. There's a Ninth Circuit case that I can
2 cite to you -- and I know we're throwing a lot of cases and
3 issues that, really, I think should have been briefed. You
4 know, this question about why they couldn't have put these
5 things in a brief or why they couldn't have raised these
6 arguments about this deemed assumption and a waiver and so
7 forth -- they've known about this since December 11th. So
8 those things should have been in a brief, and we should have
9 been on notice of what arguments we were facing so we could
10 have provided an appropriate reply to you this morning.

11 THE COURT: But I will give Mr. Zack the benefit
12 of the doubt, also, that -- you know, the motion was filed a
13 long time ago. The reply deadline or opposition deadline or
14 response deadline came and went. I don't know, factually,
15 when the landlord should have known that this dispute needed
16 to be briefed. So go ahead with your case. But I am
17 sympathetic to Mr. Zack's client's position on the briefing
18 here. I don't want to get into who said what when because
19 it's not before me.

20 MR. GEARIN: Okay. Enough of that discussion.
21 I've said what I'm going to say about that.

22 THE COURT: Okay.

23 MR. GEARIN: The In re Harris Management case is
24 a Ninth Circuit case, 791 F.2d 1412, a 1986 case, which
25 basically says that assumption requires the express approval

1 of the Court. It's not effective until the Court approves it.
2 That's the language of the code, too.

3 Look at Section 365. Mr. Zack wants to talk
4 about 365(d)(4), which really is about deadlines. It's about
5 when you have to file a motion, when you must assume, and what
6 the effect is if you don't file a motion by a certain
7 deadline. But, really, the relevant provision here is
8 actually in 365(a), which says that -- and I'll cut it
9 short -- the trustee, subject to the Court's approval, may
10 assume or reject an executory contract or unexpired lease of
11 the debtor.

12 So it's very clear, under the plain language of
13 the statute, the Ninth Circuit case that I just cited to
14 you -- and I'll give you one other case, an Idaho bankruptcy
15 case, *In re RVP, Inc.*, 269 B.R. 851. Assumption is not
16 automatically effective, is what that bankruptcy judge in
17 Idaho said.

18 I think it's extremely clear, under the
19 Bankruptcy Code and the Ninth Circuit precedent, that the
20 lease was not assumed. And until the Court approves it, the
21 assumption is not effective.

22 Mr. Zack told you this is, according to him, a
23 below-market lease. The landlord has already engaged a
24 broker. Mr. Calvert reached out to a broker when we were
25 discussing assumption and assignment of the lease, when we

1 were talking to the broker about, should we assume and assign,
2 would you like us to cooperate with you in this orderly exit
3 out of the lease?

4 The broker and the landlord's broker both agree
5 that it is a marketable lease. It's only going to take them a
6 couple, three months to go find a replacement tenant. This is
7 not a severe prejudice to the landlord, is the point there,
8 Your Honor.

9 THE COURT: Though, again, not all of that is
10 before me. I know you're just letting me know. But I'm only
11 listening with one ear to that because it doesn't change -- I
12 think Mr. Zack would say that that doesn't change the legal
13 analysis that he has presented.

14 MR. GEARIN: Right.

15 THE COURT: And I don't know if injury -- if
16 it's estoppel, injury is definitely an element. Waiver, I
17 don't think so.

18 MR. GEARIN: Right.

19 THE COURT: He's arguing waiver, and I did ask
20 for that distinction.

21 MR. GEARIN: Right.

22 THE COURT: He's arguing waiver, which does not
23 require injury -- at least I don't believe it does -- on the
24 other side. It's really focusing on the actions of the party
25 that has allegedly given up a right.

1 MR. GEARIN: Right. And to the waiver point,
2 the trustee did not intentionally waive his right to withdraw
3 the motion or to seek to change his mind. Right? I don't
4 think he had any obligation to go forward with that motion.
5 The only reason that the trustee could not unilaterally
6 withdraw it is the rule.

7 THE COURT: Because of our local rule.

8 MR. GEARIN: Because of the local rule, which
9 says that, you know, we can't withdraw without the consent of
10 the other party. So I think the Court can order -- can
11 approve our motion today to withdraw the motion. I don't
12 think there's anything wrong with that. There's no case
13 that's been cited to the Court. And I'm not aware of anything
14 that says that we cannot withdraw a motion once it's been
15 filed. I think that it's common practice, frankly, for people
16 to file motions to assume or reject and then withdraw them
17 once they have negotiations with counterparties about what's
18 going to happen, what the consequences of assumption or
19 rejection might be.

20 We looked, Your Honor. I have not found any
21 case that deals with these express circumstances and the
22 arguments that are being made by the landlord in this case,
23 that a trustee is bound, once he files a motion, to go through
24 and assume the lease. He can't withdraw the motion. He can't
25 change his mind once he's filed the motion. I can't find any

1 case that supports that notion.

2 So the trustee did not intentionally waive his
3 right to move forward. Circumstances did change. He
4 communicated with the landlord about those circumstances.
5 There are business reasons as to why it is important to him,
6 at this point, to extricate from that lease. It is of
7 consequence to this estate as to whether he has to bear those
8 administrative expenses going forward right now. We are in an
9 arena in this case, as you know, that -- we're trying to move
10 forward with a reorganization plan. And these cash
11 conservation measures are critical to his ability to succeed
12 in the case.

13 So I request that the Court authorize our
14 request to withdraw the motion, to deem the lease as being
15 rejected, and to set a deadline for filing a rejection damages
16 claim.

17 THE COURT: All right. Thank you, Mr. Gearin.

18 I was initially, as you may have been able to
19 tell, Mr. Zack, not very receptive to your argument. You were
20 very persuasive, however; and I understand your client's
21 position with respect to the waiver argument.

22 The question then becomes: How long is too
23 long?

24 As I see it, part of the waiver argument is
25 based upon our local rule, which prevented the trustee from

1 withdrawing his motion. But for that local rule, it would
2 have been withdrawn. And I think your waiver argument would
3 be a lot harder to make.

4 Now, at what point did the trustee decide? I
5 don't know. That may not be relevant because what we're
6 talking about is really a two-month period. Because at the
7 end of October, when the motion was filed -- and here we are
8 now, mid-January -- for a couple of months, the landlord was
9 under the belief, I'll assume, for the sake of argument -- up
10 until just very recently was under the belief that the trustee
11 was going forward.

12 I don't find, under these circumstances, that
13 that constitutes a waiver. And while I don't have the case
14 law in front of me, I know waiver -- all the cases say it has
15 to be clear and convincing evidence and that the waiver was
16 intentional and known.

17 And, yes, Mr. Calvert did, at one point, say,
18 under penalty of perjury, that he needed the Auburn lease.
19 I'm being told now that the circumstances have changed. The
20 Auburn lease is not necessary.

21 Perhaps, if he had continued this out for
22 another three, four, five months, it might be a different
23 result. But under these facts, I don't believe that, for a
24 couple of months, staying in there and then deciding it is not
25 in the best interest of the estate, constitutes a known

1 waiver.

2 Clearly, the code says there's no assumption
3 until the Court so orders. So I'm going to overrule what is
4 now an objection to the withdrawal of the motion. To make it
5 clear, we'll just deny the request to assume.

6 I'm not going to put any sort of deadline on the
7 landlord for filing a rejection damages claim because none was
8 requested. And since the rejection is by operation of the
9 law -- there's no deadline by operation of law, is there?

10 MR. GEARIN: I don't think so, Your Honor.

11 THE COURT: Usually it's in a plan or in some
12 subsequent order. So it's not being assumed. And because the
13 deadline to assume or reject has passed, it ends up being
14 rejected by operation of law.

15 Mr. Zack, I understand your client's argument.
16 I'm just concerned about hamstringing Courts. That local
17 rule, I think, was designed for other purposes, not for the
18 one before us today. And to kind of use it to show waiver --
19 I'm very concerned about using it in that fashion. I'm also
20 concerned about hamstringing the trustee with a lease. And
21 even if it's below market, maybe it can be assigned to
22 somebody else. I'm concerned about hamstringing the trustee.
23 So I understand your client's position. You made very good
24 arguments. But at the end of the day, I'm going to overrule
25 them.

1 So let's go back to your order, Mr. Gearin. I'm
2 going to authorize the trustee to enter into a new lease for
3 the facility in Green Bay and to reject the Springfield lease.
4 You had, in the original order, that the effective date of
5 rejection was November 30. I'm not sure if you care what the
6 effective rejection date is or not. Are you out of the
7 Springfield facility?

8 MR. GEARIN: Yes. As of November 30. And the
9 rent was paid current through the end of the term period. And
10 the landlord doesn't object either, so --

11 THE COURT: All right. So we'll keep the
12 effective date November 30. The deadline for filing a proof
13 of claim for the rejection of the Springfield lease shall
14 be -- you said you wanted to put it at the end of March?

15 MR. GEARIN: I said March 31st, which is, I
16 think, a Friday. And that's giving more than 60 days' notice
17 of my intention, Your Honor.

18 THE COURT: That's fine. March 31, 2017. The
19 order shall also state: The trustee shall serve a copy of the
20 order on the landlord for the Springfield lease by no later
21 than January 27.

22 Did you get all that? I just want to have that
23 in there. And also delete the first decretal paragraph, "The
24 motion is granted." Judge Overstreet told me, a long time
25 ago, it's a good idea not to have that in there because quite

1 often the motion is not fully granted. In this case, that's
2 certainly the situation. So the request to assume the Auburn
3 lease is denied.

4 If you can run that by Mr. Zack before
5 submitting it, I'd appreciate that.

6 MR. GEARIN: I'll do that, Your Honor. And I'll
7 work with Mr. Zack on whether we can agree on a rejection
8 damages bar date. And if we can reach an agreement on that,
9 may we put that in the order?

10 THE COURT: If you can, yes. That would be
11 good.

12 MR. GEARIN: If not, I can move for a --

13 THE COURT: You can. That's right.

14 Okay. Mr. Zack, thank you for coming in. I
15 appreciate your arguments.

16 MR. ZACK: Thank you, Your Honor.

17 THE COURT: And thank you, Mr. Gearin and
18 Mr. Calvert.

19 MR. GEARIN: Thank you, Your Honor.

20

21 (The proceedings in this matter were concluded.)

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3 CERTIFICATE

4 I, Shari L. Wheeler, court reporter and court-approved
5 transcriber, certify that the foregoing is a correct
6 transcript from the official electronic sound recording of the
7 proceedings in the above-entitled matter. Some editing
8 changes may have been made at the request of the Court.

9 These pages constitute the original or a copy of the
10 original transcript of the proceedings, to the best of my
11 ability.

12
13 Signed and dated this 22nd day of March, 2017.

14
15
16 by /s/ Shari L. Wheeler

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