

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

-----X
:
In re :
:
AEROCENTURY CORP., *et al.*, : Chapter 11
:
Debtors.¹ : Case No. 21-10636 ()
:
: (Joint Administration Requested)
-----X

**DEBTORS' MOTION FOR ENTRY OF AN ORDER AUTHORIZING THE DEBTORS
TO REJECT THAT CERTAIN EXECUTORY CONTRACT BETWEEN DEBTORS AND
TYPHOON INVESTMENT LTD, EFFECTIVE AS OF THE PETITION DATE**

The debtors and debtors in possession in the above-captioned case (the "Debtors") hereby submit this motion (this "Motion") for entry of an order, substantially in the form attached hereto as **Exhibit A** (the "Proposed Order"), authorizing, but not directing, the Debtors to reject that certain MSN 238 Purchase Agreement by and between Debtor AeroCentury Corp. and Typhoon Investments Ltd., dated as of March 6, 2020, (including any and all amendments thereto, the "Rejected Contract"), effective as of the Petition Date (as defined below). In support of this Motion, the Debtors rely on the *Declaration of Harold M. Lyons in Support of Chapter 11 Applications and First-Day Relief* (the "First Day Declaration"),² which was filed contemporaneously with this Motion and is incorporated herein by reference. In further support of this Motion, the Debtors respectfully represent as follows:

¹ The Debtors in these chapter 11 cases, along with the last four digits of their federal employer identification number, are: AeroCentury Corp. (3974); JetFleet Holding Corp. (5342); and JetFleet Management Corp. (0929). The Debtors' mailing address is 1440 Chapin Avenue, Suite 310, Burlingame, CA 94010.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the First Day Declaration.



JURISDICTION AND VENUE

1. The Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b), and the Debtors consent, pursuant to Local Rule 9013-1(f), to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory and legal predicates for the relief sought herein are sections 105(a), 365(a), and 554(a) of the Bankruptcy Code and Rules 6006 and 6007 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

BACKGROUND

A. General Background

3. On the date hereof (the “Petition Date”), the Debtors commenced these bankruptcy cases (the “Chapter 11 Cases”) by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors are authorized to continue to operate their business and manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No official committees have been appointed in these Chapter 11 Cases and no request has been made for the appointment of a trustee or examiner.

4. Additional factual background relating to the Debtors’ business, capital structure, and the commencement of these Chapter 11 Cases is set forth in the First Day Declaration.

B. The Rejected Contract

5. The Debtors are engaged in the business of investing in used regional aircraft and leasing the aircraft to foreign and domestic regional air carriers. On March 6, 2020, the Debtors and Typhoon Investments Ltd. (the “Buyer” and together with the Debtors, the “Parties”) entered into the Rejected Contract for the sale of one Dash 8-300 MSN 238 (the “Aircraft”). The sale originally contemplated that delivery of the Aircraft occur of May 20, 2020. However, due to the worldwide COVID-19 pandemic lockdowns, the Parties mutually agreed to extend the closing and delivery dates to October 1, 2020.

6. Section 2(i) of the Rejected Contract required that the Aircraft meet certain Delivery Conditions (as defined in the Rejected Contract), and if the Aircraft met such Delivery Conditions, but was not accepted by the Buyer by the closing date, the Rejected Contract would automatically terminate. The Buyer failed to accept delivery in accordance with the terms of the Rejected Contract. Accordingly, prior to the Petition Date, the Debtors sent a notice to the stating that the Rejected Contract had automatically terminated by its terms. Despite that the Rejected Contract has terminated, Debtors nonetheless seek authority to reject the Rejected Contract out of an abundance of caution.

RELIEF REQUESTED

7. By this Motion, and in order to preserve and maximize the value of its estate, the Debtors seek to reject the Rejected Contract, effective as of the Petition Date, as the Debtors have determined that the Rejected Contract is not integral to their chapter 11 efforts and is not otherwise beneficial to their estates. In light of the Debtors’ efforts to preserve and maximize the value of their estates through these Chapter 11 Cases, and to avoid incurring any potential costs and expenses, the Debtors submit that such relief is necessary and appropriate.

BASIS FOR RELIEF

8. 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). As courts have held, “[t]he purpose behind allowing the assumption or rejection of executory contracts is to permit the trustee or debtor-in-possession to use valuable property of the estate and to ‘renounce title to and abandon burdensome property.’” *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1098 (2d Cir. 1993) (quoting 2 *Collier on Bankruptcy* ¶ 365.01[1] (15th ed. 1993)).

9. The standard applied to determine whether the rejection of an executory contract should be authorized is the “business judgment” standard. See *Sharon Steel Corp. v. Nat’l Fuel Gas Distr. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989); see also *In re HQ Global Holdings, Inc.*, 290 B.R. 507, 513 (Bankr. D. Del. 2003) (stating that a debtor’s decision to reject an executory contract is governed by the business judgment standard and can only be overturned if the decision was the “product of bad faith, whim, or caprice”). Once a debtor states a valid business justification, “[t]he business judgment rule ‘is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.’” *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985)).

10. The business judgment rule is crucial in chapter 11 cases and shields a debtor’s management from judicial second-guessing. See *Comm. of Asbestos Related Litigants and/or Creditors v. Johns-Manville Corp.*, 60 B.R. 612, 615–16 (Bankr. S.D.N.Y. 1986) (“The Code favors the continued operation of a business by a debtor and a presumption of reasonableness

attached to a debtor's management decisions.”). Generally, courts defer to a debtor-in-possession's business judgment to reject a lease or other executory contract. *See, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984); *In re Minges*, 602 F.2d 38, 43 (2d Cir. 1979); *In re Riodizio*, 204 B.R. 417, 424–25 (Bankr. S.D.N.Y. 1997); *In re G Survivor Corp.*, 171 B.R. 755, 757 (Bankr. S.D.N.Y. 1994).

11. Upon finding that the Debtors have exercised sound business judgment in determining that rejection of the Rejected Contract, effective as of the Petition Date, is in the best interests of the Debtors and their estates, the Court should approve the proposed rejection under section 365(a) of the Bankruptcy Code. *See, e.g., Westbury Real Estate Ventures, Inc. v. Bradlees, Inc. (In re Bradlees Stores, Inc.)*, 194 B.R. 555, 558 n.1 (Bankr. S.D.N.Y. 1996); *see also Summit Land Co. v. Allen (In re Summit Land Co.)*, 13 B.R. 310, 315 (Bankr. D. Utah 1981) (holding that, absent extraordinary circumstances, court approval of a debtor's decision to assume or reject an executory contract “should be granted as a matter of course”). If a debtor's business judgment has been reasonably exercised, a court should approve the assumption or rejection of an executory contract. *See, e.g., Sharon Steel Corp.*, 872 F.2d at 39–40.

12. As an integral component of their effort to preserve and maximize the value of its estate and reduce potential administrative claims in these Chapter 11 Cases by, among other things, eliminating unnecessary costs, the Debtors have determined, in their business judgment, that the Rejected Contract is burdensome and provides no economic value to their estates. The Rejected Contract is unnecessary to the Debtors' go-forward operations, and the Debtors notified the Buyer of the termination of the Rejected Contract prior to the Petition Date. The Debtors also believe that any continued expense in maintaining the Rejected Contract and attempting to market such an agreement would outweigh, if not eclipse, any benefit in attempting to identify a potential acquirer

of the Rejected Contract and unnecessarily deplete assets of the Debtors' estates, to the detriment of creditors.

13. To avoid paying any unnecessary expenses related to the Rejected Contract, and out of an abundance of caution, the Debtors seek to reject the Rejected Contract effective as of the Petition Date. The Court has routinely authorized a debtor's retroactive rejection of unexpired contracts or leases. *See In re Chi-Chi's, Inc.*, 305 B.R. 396, 399 (Bankr. D. Del. 2004); *see also In re Fleming Cos., Inc.*, 304 B.R. 85, 96 (Bankr. D. Del. 2003) (rejection permitted to be effective as of the date of the motion or the date the premises surrendered).

14. The facts and circumstances of these Chapter 11 Cases and the balance of the equities favor the Debtors' rejection of the Rejected Contract effective as of the Petition Date. Without a retroactive date of rejection, the Debtors may incur unnecessary administrative charges. Moreover, the Buyer will not be unduly prejudiced if the Rejected Contract is rejected effective as of the Petition Date because the Rejected Contract was previously terminated, the Debtors notified the Buyer of such termination, and the Debtors will serve this Motion on the Buyer and/or its agent or representative by overnight delivery and, if possible, electronic mail, stating that the Debtors intend to reject the Rejected Contract effective as of the Petition Date.

15. Therefore, as it is in the Debtors' and their estates' best interest to eliminate the potential incurrence of administrative claims, and to avoid the potential accrual of any further obligations under the Rejected Contract, the Debtors respectfully submit that the retroactive rejection of the Rejected Contract effective as of the Petition Date is appropriate.

16. In light of the foregoing facts and circumstances, the Debtors respectfully submit that its rejection of the Rejected Contract under section 365(a) of the Bankruptcy Code, effective as of the Petition Date, is a sound exercise of its business judgment and is necessary, prudent, and

in the best interests of the Debtors, their estates, and their creditors. Accordingly, entry of the Proposed Order is appropriate.

RESERVATION OF RIGHTS

17. Nothing contained herein should be construed as a waiver of any of the Debtors' rights, defenses, or counterclaims with respect to the Rejected Contract. Nor does anything contained herein constitute an acknowledgement that a particular Rejected Contract constitutes an executory contract under section 365 of the Bankruptcy Code, and has not otherwise expired by its own terms or upon agreement of the parties as of the date hereof.

NOTICE

18. Notice of this Motion has been provided to: (i) the Office of the United States Trustee for the District of Delaware; (ii) the Debtors' five (5) largest unsecured creditors; (iii) counsel to the prepetition lender; (iv) the Buyer (via overnight delivery); and (v) any party that has requested notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested herein, the Debtors submit that no other or further notice is necessary.

[Remainder of page intentionally left blank]

CONCLUSION

WHEREFORE, the Debtors request entry of the Proposed Order granting the relief requested herein and such other and further relief as is just and proper.

Dated: March 29, 2021
Wilmington, Delaware

/s/ Joseph M. Mulvihill

Joseph M. Barry (No. 4221)

Ryan M. Bartley (No. 4985)

Joseph M. Mulvihill (No. 6061)

S. Alexander Faris (No. 6278)

YOUNG CONAWAY STARGATT & TAYLOR, LLP

1000 N. King Street

Rodney Square

Wilmington, Delaware 19801

Telephone: (302) 571-6600

Facsimile: (302) 571-1253

E-mails: jbarry@ycst.com

rbartley@ycst.com

jmulvihill@ycst.com

afaris@ycst.com

-and-

Lorenzo Marinuzzi (*pro hac vice* admission pending)

Erica J. Richards (*pro hac vice* admission pending)

MORRISON & FOERSTER LLP

250 West 55th Street

New York, NY 10019-9601

Telephone: (212) 468-8000

Facsimile: (212) 468-7900

E-mails: lmarinuzzi@mof.com

erichards@mof.com

Proposed Counsel to the Debtors and Debtors in Possession

EXHIBIT A

Proposed Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

	-X	
	:	Chapter 11
In re	:	
	:	Case No. 21- <u>10636</u> ()
AEROCENTURY CORP., <i>et al.</i> ,	:	
	:	(Joint Administration Requested)
Debtors. ¹	:	
	:	Re: Docket No. ____

**ORDER AUTHORIZING THE DEBTORS TO REJECT THAT CERTAIN
EXECUTORY CONTRACT EFFECTIVE AS OF THE PETITION DATE**

Upon the motion (the “Motion”)² of the Debtors for the entry of an order, pursuant to sections 105(a), 365(a), and 554(a) of the Bankruptcy Code, authorizing the Debtors to reject the Rejected Contract effective as of the Petition Date; and upon consideration of the First Day Declaration and the record of these Chapter 11 Cases; and having determined that this Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 1334 and 157, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated February 29, 2012; and having determined that this is a core matter pursuant to 28 U.S.C. § 157(b)(2) and that this Court may enter a final order consistent with Article III of the United States Constitution; and having determined that venue of these Chapter 11 Cases and of the Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and having determined that due and adequate notice of the Motion has been given under the circumstances, and that no other or further notice need be given; and having determined that the relief requested in the Motion is in the best interests

¹ The Debtors in these chapter 11 cases, along with the last four digits of their federal employer identification number, are: AeroCentury Corp. (3974); JetFleet Holding Corp. (5342); and JetFleet Management Corp. (0929). The Debtors’ mailing address is 1440 Chapin Avenue, Suite 310, Burlingame, CA 94010.

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

of the Debtors, their estate, its creditors, and other parties in interest; and after due deliberation and sufficient cause appearing therefor;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein.
2. Pursuant to sections 105(a) and 365(a) of the Bankruptcy Code and Bankruptcy Rule 6006, the Rejected Contract, to the extent not already terminated in accordance with its applicable terms, is hereby rejected by the Debtors, with such rejection being effective as of the Petition Date.
3. Any person or entity that holds a claim that arises from a Rejected Contract must file a proof of claim based on such rejection by the last date and time for each person or entity to file proofs of claim based on prepetition claims against the Debtors as set by an order of this Court.
4. Nothing in this Order shall impair, prejudice, waive, or otherwise affect any rights of the Debtors or their estates to assert that any claims for damages arising from the Debtors' rejection of the Rejected Contract are limited to any remedies available under any applicable termination provisions of such Rejected Contract, or that any such claims are obligations of a third party, and not those of the Debtors or their estates.
5. The Debtors are authorized to execute and deliver all instruments and documents, and take such other actions as may be necessary or appropriate, to implement and effectuate the relief granted by this Order.
6. The rights of the Debtors and their estates to assert that Rejected Contract was terminated prior to the date hereof are fully preserved, and the Debtors and their estates do not waive any claims that they may have against the Buyer, whether or not such claims arise under, are related to the rejection of, or are independent of the Rejected Contract.

7. This Order is immediately effective and enforceable, notwithstanding the possible applicability of Bankruptcy Rule 6004(h) or otherwise.

8. The requirements in Bankruptcy Rule 6006 are satisfied.

9. This Court retains jurisdiction with respect to all matters arising from or related to the implementation or interpretation of this Order.