IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 7
	)	
Our Alchemy, LLC, et al.,	)	Case No. 16-11596(KG)
	)	(Jointly Administered)
Debtor.	)	
_____	)	**Re: D.I. No. 364**

MEMORANDUM ORDER

1. Nu Image, Inc. ("Nu Image") has filed a Motion of Nu Image, Inc. for an Order Granting Relief from the Automatic Stay to Allow for Termination of its Agreements with the Debtor (the "Motion"). D.I. 364. The Chapter 7 Trustee, George L. Miller (the "Trustee") filed his Objection to the Motion (D.I. 386) and the Court heard argument on March 15, 2017. The Court granted leave to the parties to submit supplemental letter memoranda.

2. Nu Image entered into contracts and licenses (the "Agreements") with Our Alchemy and its predecessors (the "Debtor") whereby the Debtor either acquired rights to films which Nu Image owned or received licenses from Nu Image for distribution. The Trustee neither assumed nor rejected the Agreements prior to the August 30, 2016, deadline to assume or reject agreements and, accordingly, the Agreements were deemed rejected pursuant to 11 U.S.C. § 365(d)(1).

3. Nu Image argues that because the Debtor by its inaction rejected the Agreements, cause exists to lift the automatic stay pursuant to 11 U.S.C. § 362(d)(1) and enable Nu Image to litigate its right to terminate the Agreements. Nu Image would litigate termination either in state court or in the Court. Nu Image argues that it satisfies Section 362(d)(1) and (2) because it lacks adequate protection of its interest in the Agreements, the Debtor does not have equity in the Agreements, and/or the Agreements are not necessary to the Debtor's reorganization because the Debtor is in chapter 7 of the Bankruptcy Code and is liquidating assets. Nu Image further argues that it satisfies the three prong test set forth in *Izzarelli v. Rexene Prods. Co.* (*In re Rexene Prods. Co.*), 141 B.R. 574, 576 (Bankr. D. Del. 1992) and the twelve-prong test outlined in *Sonnax Indus., Inc. v. Tri Component Prods. Corp.* (*In re Sonnax Indus., Inc.*), 907 F. 2d 1280, 1287 (2d Cir. 1990).

4. The Trustee in turn argues, among other points, that the Agreements are expressly non-terminable, that the Agreements provide that Nu Image's exclusive remedy is for damages, and that the Agreements specifically permit the Debtor either to distribute the Nu Image films, or not, i.e., take no action. *See* Nu Image Catalog License Agreement, dated September 2013, ¶¶ 13, 19; and Assumption Agreement, dated November 19, 2010, ¶ 2.

5. The Court will hold first, that Nu Image has not established that the Court should lift the automatic stay and, second, that Nu Image is obligated to file an adversary

complaint to determine the Debtor's and Nu Image's interests in the property in question, namely, the films which Nu Image provided to the Debtor.

6. The rejection by statute of the Agreements did not result in the dissolution of the Agreements. The Agreements did not "disappear." *Cohen v. Drexel Burnham Lambert Group, Inc.* (*In re Drexel Burnham Lambert Group, Inc.*), 138 B.R. 687, 703 (Bankr. S.D.N.Y. 1992). Nor were the Agreements terminated. *Thompkins v. Lil' Joe Records, Inc.*, 476 F. 3d 1294, 1306-07 (11th Cir 2007); *Nickels Midway Pier, LLC v. Wild Waves, LLC* (*In re Nickels Midway Pier, LLC*), 372 B.R. 218, 222 (D.N.J. 2007). The cases in this jurisdiction are uniform in holding that rejection of an executory contract is a breach and not a termination of the contract. *See*, *e.g.*, *In re CB Holding Corp.*, 448 B.R. 684, 686-87 (Bankr. D. Del. 2011); *Republic Underwriters Ins. Co. v. DBSI Republic, LLC* (*In re DBSI, Inc.*), 409 B.R. 720, 731 (Bankr. D. Del. 2009). Moreover, "rejection does not affect the parties' substantive rights under the contract." *Cinicola v. Schaffenberger*, 248 F. 3d 110, 119 n. 8 (3d Cir. 2001), citing Collier on Bankruptcy, ¶¶ 365.09, 365.09[1] (Lawrence P. King ed., 5th ed. 1999)

7. The purpose of Section 365 is not that "the parties be put back in the positions they occupied before the contract was formed." *Thompkins*, 476 F. 3d at 1306. *See also*, Michael T. Andrew, "Executory Contracts in Bankruptcy: Understanding Rejection," 59 U. Colo. L. Rev. 845, 931 (1988), (quoted in *Medical Malpractice Insurance*

Assoc. v. Hirsch (*In re Lavigne*) 114 F. 3d 379, 387 (2d Cir. 1997)) in which the author writes:

> Rejection is not the power to release, revoke, repudiate, void, avoid, cancel or terminate, or even to breach, contract obligations. Rather, rejection is a bankruptcy estate's election to decline a contract or lease asset. It is the decision not to assume, not to obligate the estate on the contract or lease as the price of obtaining the continuing benefits of the non-debtor party's performance. That decision leaves the non-debtor in the same position as all others who have dealt with the debtor, by giving rise to a presumption that the debtor has 'breached' – i.e., will not perform—its obligations. The debtor's obligations are unaffected, and provide the basis for a claim.

Professor Andrews writes, in addition, that the word "rejection" is inappropriate. He writes:

> The reason: it suggests, misleadingly, that the trustee or debtor in possession is somehow rejecting (Cancelling? Repudiating? Renouncing? Rescinding?) liabilities . . . . The liabilities are not repudiated; to the contrary, as the rejection-a-breach doctrine is designed to insure, the contract or lease liabilities remain intact after rejection and give the non-debtor party a claim in the distribution of the estate.

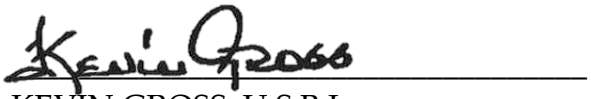
Id. at 883.

8. Thus, rejection is treated as a breach, here of the Agreements. The parties' rights flowing from the breach of the Agreements are then determined by applicable state law. *In re Lavigne*, 114 F. 3d at 387. The Court does not have in evidence or even for its review all of the Agreements to determine which state law applies, except that both the Assumption Agreement and the Catalog License Agreement cited above apply California law.

9. The foregoing discussion on the affect (and effect) of rejection on the Agreements does not, however, indicate what should be the outcome of the motion to lift the automatic stay. The motion must be denied because Nu Image did not prove the likelihood that it would prevail on the merits, one of the *Rexene* factors. Nor did Nu Image establish the first *Rexene* factor, that prejudice to the Debtor would not result from a lifting of the stay. The automatic stay is an essential and basic protection which the Bankruptcy Code grants a debtor. *Rexene*, 141 B.R. at 576. Its purpose includes preventing a creditor from gaining claim preference and preventing interference with a debtor's rehabilitation or orderly liquidation. *In re DBSI, Inc.*, 407 B.R. 159, 166 (Bankr. D. Del. 2009).

10. Nu Image is asking the Court to determine its rights in the property, the films which the Trustee continues to hold. Nu Image must therefore file an adversary complaint pursuant to Rule 7001(2) of the Federal Rules of Bankruptcy Procedure ("The following are adversary proceedings: . . . (2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property . . . ."). The complaint in the adversary proceeding can explain Nu Image's view of its right and title to the films and provide the Trustee the right to do likewise. If Nu Image is concerned about any delay caused by filing the adversary proceeding, it can discuss with the Trustee an expedited schedule and, if unsuccessful, seek such relief from the Court.

IT IS THEREFORE ORDERED this 31st day of March, 2017, that for the reasons provided the Motion is denied without prejudice.



KEVIN GROSS, U.S.B.J.