

Hearing Date: **April 17, 2008 at 10:00 a.m.**
Objection Deadline: **April 15, 2008 at 4:00 p.m.**

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

In re

Quebecor World (USA) Inc., et al.,

Debtors.

Chapter 11

Case No. 08-10152 (JMP)
Jointly Administered

Honorable James M. Peck

**MOTION OF THE DEBTORS PURSUANT TO 11 U.S.C. § 365 TO ASSUME
AN EXECUTORY CONTRACT WITH IO INTEGRATION, INC. FOR
XINET SOFTWARE LICENSES**

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) move this Court (the “Motion”) for the entry of an order substantially in the form of Exhibit A hereto, authorizing the assumption of an executory contract pursuant to which Debtor Quebecor World (USA) Inc. (“QW (USA)”) and IO Integration, Inc. (“IO Integration”) agreed upon terms under which QW (USA) would purchase certain Xinet FullPress and Xinet WebNative software licenses. In support of this Motion, the Debtors rely on the Declaration of Joseph Pannunzio submitted herewith. In further support of the Motion, the Debtors state as follows:

Jurisdiction

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).
2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The statutory predicate for the relief requested herein is section 365 of title 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 (the “Bankruptcy Code”), and Rule 6006 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

Background

4. On January 21, 2008 (the “Petition Date”), the 53 Debtors filed their voluntary petitions for relief (the “Chapter 11 Cases”) under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”).
5. The Debtors are operating their businesses and managing their properties as debtors-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code. No request has been made for the appointment of a trustee or examiner in these cases.
6. On January 31, 2008, an Official Committee of Unsecured Creditors was appointed.
7. On January 20, 2008, the Debtors’ corporate parent, Quebecor World Inc. (“QWI”), together with each of the Debtors, commenced a proceeding before the Superior Court, Commercial Division, for the Judicial District of Montreal (the “Canadian Court”) for a plan of compromise or arrangement (the “Canadian Proceeding”) under the Canadian Companies’ Creditors Arrangement Act (“CCAA”).¹ Each of the Debtors was joined in the Canadian

¹ The Canadian Court appointed Ernst & Young, Inc. to serve as Monitor for the Canadian Proceeding, and UBS Investment Bank is serving as QWI’s financial advisor.

Proceeding in order that each Debtor may obtain the protection of a stay under the CCAA as well as under the Bankruptcy Code.

The Debtors' Business

8. The Debtors collectively operate the second largest commercial printing business in the United States, maintaining approximately 78 facilities in 29 states. QWI is a Canadian corporation and the corporate parent of the Debtors, having been incorporated on February 23, 1989 pursuant to the Canada Business Corporations Act to combine the assets constituting what was then the printing division of Quebecor Inc. (QWI, together with the Debtors and all of QWI's debtor and non-debtor subsidiaries and affiliates are referred to herein as "QW World").

9. QW World's key customers include the largest publishers, retailers and catalogers in the geographic areas in which QW World operates. In the magazine group, QW World prints magazines for publishers, including, for example, 15 magazine titles for Time, Inc.,² *Cosmopolitan* for Hearst Corp., *Elle* for Hachette-Filippachi Magazines US, *ESPN the Magazine* for Walt Disney Corp., *Forbes* for Forbes Inc. and *In Touch Weekly* for Bauer Publishing USA, while QW World's retail insert group includes customers such as CVS, Sears, JC Penney, Kohl's, and Walgreens. QW World's operations also encompass (a) catalogs for customers such as Williams-Sonoma, Oriental Trading Company, Victoria's Secret, IKEA, Cabelas and Bass Pro, (b) books for McGraw-Hill, Scholastic, Simon & Schuster, Thomas Nelson, Time-Warner and Pearson Education, (c) directories for Yellow Book USA, RH Donnelly, Windstream and Frontier in the United States, the Yellow Pages Group in Canada, as well as Telemex and Telefonica in Latin America and (d) direct mail services.

² These include *Time*, *Fortune*, *Money*, *Sports Illustrated*, *People*, *Entertainment Weekly*, *Southern Living*, *Cooking Light* and *Coastal Living*.

The Agreement to Purchase Software Licenses

10. The contract that is the subject of this Motion is an agreement between QW (USA) and IO Integration, a software distributor, for the purchase of certain software licenses (the “Licenses”) for software entitled Xinet FullPress 10 User and Xinet WebNative plus Venture (together, the “Software”), along with related installation and training services. The Software is part of a web-based electronic asset management system from the software manufacturer Xinet used by the Debtors in their Premedia division to manage the digital assets of the Debtors’ Premedia customers. The Software standardizes digital files and automates premedia workflow, as well as allowing the Debtors’ customers to view, approve, download and repurpose images online.

11. The Software is currently used in Debtors’ Premedia division for hundreds of the Debtors’ customers under existing licenses. The Licenses that the Debtors seek authority to purchase under the Agreement (as defined below) are being purchased to manage the digital assets of a certain long-time customer (the “Customer”) of the Debtors. The Customer accounts for millions of dollars in annual printing revenue with the Debtors and is currently accessing the Software through temporary licenses, as set forth below.

12. IO Integration has already delivered and installed the Software on the Debtors’ systems, and the Debtors have implemented the Customer’s online access to the Software. In order to load the Software, the Debtors must have an electronic “key” code provided by IO Integration representing the license to use the Software. Initially, IO Integration provides users with a temporary key representing a temporary license, which is programmed to allow access for a limited period of time (generally 30-90 days) and to automatically deactivate at the end of such

period. A permanent key code representing a perpetual license to use the Software is provided by IO Integration once full payment for the Software is received.

13. Following the expiration of the Debtors' initial temporary license key for the Software, IO Integration has provided the Debtors with two further temporary license keys to allow the Debtors sufficient time to seek authority to assume the Agreement and purchase the Licenses for the Software in order to secure the perpetual Licenses to use the Software. The third temporary license key automatically deactivates on May 31, and IO Integration has notified the Debtors that it will not issue any further temporary license keys.

14. The contract pursuant to which the Debtors and IO Integration agreed on the terms of the Debtors' purchase of the Licenses consists of (i) a Purchase Order from the Debtors to IO Integration for the Licenses, dated November 27, 2007; (ii) a Sales Order from IO Integration to the Debtors for the Licenses, dated November 28, 2007 and (iii) the Xinet End User Software License Agreement (together, the "Agreement").

15. The Debtors are obligated to make payments in accordance with the payment terms set forth in the Agreement. The unpaid amount currently due and owing on account of the Licenses is approximately \$45,000, which represents the balance due under the Agreement and the amount required to be paid by the Debtors under the Agreement in order to cure the Debtors' defaults thereunder pursuant to section 365(b) of the Bankruptcy Code (the "Cure Amount").

Relief Requested

16. The Debtors hereby request authorization to assume the Agreement and, in connection therewith, to pay the Cure Amount so as to cure existing defaults under the Agreement, and to provide IO Integration with adequate assurance of future performance. At the present time, the Debtors' only cure obligation under the Agreement is the Cure Amount, as set

forth above. The Software is necessary to the Debtors' Premedia business, as it is being purchased for, and is already in use by, a large and long-time customer of the Debtors. Moreover, the Debtors currently utilize the Software for hundreds of other customers and, accordingly, purchase of these additional Licenses from the same vendor would be an efficient use of the Debtors' assets as its employees are familiar with the Software and the Software has already been successfully integrated across Debtors' technology platform. Attempting to initiate a new software regime into the Debtors' Premedia operations would be potentially disruptive to the Debtors' Premedia business. Finally, the generally favorable terms of the Agreement, including a corporate discount from the vendor, make it a valuable asset of the Debtors' bankruptcy estates. Accordingly, the Debtors seek authorization to cure defaults and assume the Agreement.

Basis for Relief Requested

17. Section 365 of the Bankruptcy Code authorizes a debtor to assume, assume and assign or reject its executory contracts and unexpired leases subject to the approval of the Court.

The relevant provisions of section 365 provide as follows:

(a) Except as provided in . . . subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) if there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee:

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default . . . ;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease

See 11 U.S.C. §§ 365(a) and (b)(1). Accordingly, section 365 of the Bankruptcy Code authorizes assumption of the Agreement provided that defaults are cured and the Debtors provide adequate assurance of future performance.

18. Courts approve motions to assume, assume and assign or reject executory contracts or unexpired leases where the debtor shows that its decision to take such action will benefit the debtor's estate and is an exercise of sound business judgment. See Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.), 4 F.3d 1095, 1099 (2d Cir. 1993) (section 365 of the Bankruptcy Code "permits the trustee or debtor-in-possession, subject to the approval of the bankruptcy court, to go through the inventory of executory contracts of the debtor and decide which ones it would be beneficial to adhere to and which ones it would be beneficial to reject"); see also NLRB v. Bildisco & Bildisco, 465 U.S. 513, 523 (1984) (stating that the traditional standard applied by courts under section 365 is that of "business judgment"); In re Gucci, 193 B.R. 411, 415 (S.D.N.Y. 1996) ("A bankruptcy court reviewing a trustee's decision to assume or reject an executory contract should apply its 'business judgment' to determine if it would be beneficial or burdensome to the estate to assume it.").

19. Courts will generally defer to a debtor's business judgment concerning the assumption or rejection of an executory contract or unexpired lease. See In re Dana Corp., 358 B.R. 567, 581 n.20 (Bankr. S.D.N.Y. 2007) ("A court may approve motions to assume, assume and assign or reject executory contracts upon a showing that the debtor's decision to take such action will benefit the debtor's estate and is an exercise of sound business judgment."); In re Helm, 335 B.R. 528, 538 (Bankr. S.D.N.Y. 2006) ("The decision to assume or reject an executory contract is within the sound business judgment of the debtor-in-possession . . . and in

reviewing such a decision the bankruptcy court merely ‘reviews the trustee’s or debtor’s decision to adhere to or reject a particular contract in the course of the swift administration of the bankruptcy estate.’”) (citing In re Orion Pictures Corp., 4 F.3d 1095, 1099 (2d Cir. 1993)); In re Footstar, Inc., 323 B.R. 566, 568 (Bankr. S.D.N.Y. 2005) (“‘The standard to be applied by a court in determining whether an executory contract or unexpired lease should be assumed is the ‘business judgment’ test, which is premised upon the debtor’s business judgment that assumption would be beneficial to the estate.’”); In re Riodizio, Inc., 204 B.R. 417, 424 (Bankr. S.D.N.Y. 1997) (“[A] court will ordinarily defer to the business judgment of the debtor’s management”).

20. The “business judgment” test is not a strict standard; it merely requires a showing that either assumption or rejection of the executory contract or unexpired lease will benefit the debtor’s estate. 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) (“In reviewing a debtor’s decision to assume or reject an executory contract, the court must examine the contract and circumstances and apply its best ‘business judgment’ to determine if the assumption or rejection would be beneficial or burdensome to the estate.”).

21. Whether a debtor has provided a counterparty with “adequate assurance of future performance” depends on the facts and circumstances of each case, but should be given a “practical, pragmatic construction.” See Carlisle Homes, Inc. v. Arrari (In re Carlisle Homes, Inc.), 103 B.R. 524, 538 (Bankr. D.N.J. 1989); see also In re Bon Ton Rest. & Pastry Shop, Inc., 53 B.R. 789, 803 (Bankr. N.D. Ill. 1985) (“Although no single solution will satisfy every case, the required assurance will fall considerably short of an absolute guarantee of performance.”). Among other things, adequate assurance may be given by demonstrating the assignee’s financial health and experience in managing the type of enterprise or property assigned. In re Bygaph,

Inc., 56 B.R. 596, 605-06 (Bankr. S.D.N.Y. 1986) (adequate assurance of future performance is present when a prospective assignee of a lease from a debtor has financial resources to perform and has expressed a willingness to devote sufficient funding to its business to do so; chief determinant of adequate assurance under a lease is whether it appears that the rent will be paid).

22. The Debtors have met the requirements for assumption of the Agreement. First, assumption of the Agreement is a sound exercise of the Debtors' business judgment. The Debtors have entered into an agreement to purchase software licenses that are integral to the Debtors' ability to be a viable competitor in the premedia and printing businesses, and represents a key element of the Debtors' efforts to provide state-of-the-art service to their customers. The Debtors have obtained a corporate discount from the vendor of the Software to purchase the Licenses. Moreover, installation and training on the Software is complete, and the Software is currently fully operational.

23. The Debtors will satisfy their obligations under section 365(b) of the Bankruptcy Code to cure defaults under the Agreement by paying IO Integration the Cure Amount promptly upon the Court's approval of this Motion. The Debtors' representatives have held discussions with IO Integration to inform IO Integration of the Debtors' intent to assume the Agreement, and have provided IO Integration with assurance of their ability to perform under the Agreement in the future. IO Integration has informed the Debtors that it consents to the assumption of the Agreement, and has demonstrated its willingness to continue to perform by extending the Debtors' ability to operate under temporary license keys while the Debtors seek authority to assume the Agreement.

24. Accordingly, assumption of the Agreement is a sound business decision that ensures that the Debtors will secure permanent software licenses necessary for the Debtors to operate a

competitively in their businesses and on account of which they have already installed the Software and trained their employees. In addition, the Debtors will cure existing defaults under the Agreement and have access to sufficient funds to support their future performance. Accordingly, the Debtors request that the Court enter an order authorizing their assumption of the Agreement.

Memorandum Of Law

25. This Motion includes citations to the applicable authorities and a discussion of their application to this Motion. Accordingly, the Debtors respectfully submit that such citations and discussion satisfy the requirement that the Debtors submit a separate memorandum of law in support of this Motion pursuant to Rule 9013-1(b) of the Local Bankruptcy Rules for the Southern District of New York.

Notice

26. Notice of this Motion has been provided to all parties on the Notice List as set forth in the Case Management Order, as well as to IO Integration. A copy of the Motion is also freely available on the website of the Debtors' claim and noticing agent, Donlin, Recano & Company, Inc. at www.donlinrecano.com.

No Prior Request

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

WHEREFORE, the Debtors respectfully request an entry of an order, substantially in the form attached hereto as Exhibit A, authorizing the Debtors to assume the Agreement and cure existing defaults thereunder.

Dated: April 7, 2008
New York, New York

Respectfully submitted,

/s/ Michael J. Canning
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EXHIBIT A

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

In re

Quebecor World (USA) Inc., et al.,

Debtors.

Chapter 11

Case No. 08-10152 (JMP)
Jointly Administered

Honorable James M. Peck

**ORDER PURSUANT TO 11 U.S.C. § 365 AUTHORIZING THE
ASSUMPTION OF AN EXECUTORY CONTRACT WITH IO
INTEGRATION, INC. FOR XINET SOFTWARE LICENSES**

Upon the motion (the “Motion”) of the above-captioned debtors (collectively, the “Debtors”) for entry of an Order authorizing the Debtors to assume an executory contract with IO Integration, Inc. (“IO Integration”) for the purchase of certain Xinet FullPress and Xinet WebNative software licenses; the Court having reviewed the Motion and considered the statements of counsel at a hearing before the Court (the “Hearing”); and the Court having found that (a) it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) this proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), (c) venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409, (d) notice of the Motion was appropriate under the circumstances, (e) the conditions for assumption of the Agreement (as defined in the Motion) under section 365 of the Bankruptcy Code, including the cure of any existing defaults thereunder, have been or will promptly be satisfied by the Debtors and (f) the Debtors have provided IO Integration with adequate assurance of their future performance under the Agreement; and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish grounds for the relief granted herein;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein.
2. The Debtors are authorized pursuant to 11 U.S.C. § 365 to assume the Agreement pursuant to section 365(a) of the Bankruptcy Code and Bankruptcy Rule 6006. The Agreement shall be deemed assumed and effective as of the date of the entry of this Order.
3. Upon the entry of this Order, the Debtors are authorized to cure existing defaults under the Agreement, including making the payment of past due installments under the Agreement.
4. The requirement set forth in Rule 9013-1(b) of the Local Bankruptcy Rules for the Southern District of New York that any motion or other request for relief be accompanied by a memorandum of law is hereby deemed satisfied by the contents of the Motion or otherwise waived.
5. The Debtors are authorized to take all such actions as are necessary or appropriate to implement the terms of this Order.
6. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: April ____, 2008

United States Bankruptcy Judge