

1 John D. Fiero (CA Bar No. 136557)
Kenneth H. Brown (CA Bar No. 100396)
2 Miriam P. Khatiblou (CA Bar No. 178584)
Teddy M. Kapur (CA Bar No. 242486)
3 PACHULSKI STANG ZIEHL & JONES LLP
150 California Street, 15th Floor
4 San Francisco, California 94111-4500
Telephone: 415/263-7000
5 Facsimile: 415/263-7010

6 E-mail: jfiero@pszjlaw.com
kbrown@pszjlaw.com
7 mkhatiblou@pszjlaw.com
tkapur@pszjlaw.com

8 Attorneys for Heller Ehrman LLP,
9 Debtor and Debtor in Possession

10 **UNITED STATES BANKRUPTCY COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 In re:
14 Heller Ehrman LLP,
15 Debtor.

Case No.: 08-32514

Chapter 11

**MOTION FOR ORDER
AUTHORIZING DEBTOR TO
ASSUME AND ASSIGN NON-
RESIDENTIAL REAL PROPERTY
SUBLEASE WITH BANKSERV**

Date: May 29, 2009

Time: 10:00 a.m.

Place: U. S. Bankruptcy Court
235 Pine Street, 22nd Floor
San Francisco, CA

Judge: Honorable Dennis Montali

22 **TO THE HONORABLE DENNIS MONTALI, UNITED STATES BANKRUPTCY JUDGE,**
23 **THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS, THE OFFICE OF THE**
24 **UNITED STATES TRUSTEE, BANKSERV, INC., D/B/A BANKSERV, AND OTHER**
25 **PARTIES REQUESTING NOTICE:**

26 Heller Ehrman LLP, the debtor and debtor-in-possession in the above-captioned case (the
27 “Debtor”), hereby moves the Court (the “Motion”) for an order, pursuant to section 365 of title 11 of
28 the United States Code, authorizing and approving (i) the assumption of that certain sublease (the
“Sublease”), dated as of May 15, 2007, by and between the Debtor, as sublandlord, and BankServ,
Inc., doing business as BankServ, a Nevada corporation, as subtenant, for the entire 26th Floor

1 portion of the commercial office building located at 333 Bush Street in San Francisco, California
2 consisting of approximately 17,866 rentable square feet, and (ii) the assignment of the Sublease by
3 the Debtor to the Landlord, 333 Bush Associates NF L.P., a Delaware limited partnership (the
4 “Landlord”). The Motion is supported by additional papers filed and served herewith.¹

5 **WHEREFORE**, the Debtor respectfully requests that the Court grant this Motion in its
6 entirety and enter an order:

7 1. Authorizing the Debtor to enter into the Assignment and Assumption of Sublease
8 between the Debtor and the Landlord, which is attached as Exhibit A to the *Declaration of Kyle*
9 *Everett in Support of Debtor’s Motion for Order Authorizing Debtor to Assume and Assign Non-*
10 *Residential Real Property Sublease with BankServ*, filed herewith;

11 2. Authorizing and approving the Debtor to assume the Sublease and to assign it to the
12 Landlord;

13 3. Finding that the Landlord has provided adequate assurance of future performance
14 with respect to the Debtor’s obligations under the Sublease;

15 4. Finding that no cure amounts, pursuant to section 365(b) of the Bankruptcy Code, are
16 due under the Sublease; and

17 5. For such other and further relief as the Court may deem just and proper.

18 Dated: May 1, 2009

PACHULSKI STANG ZIEHL & JONES LLP

19
20 By /s/ John D. Fiero

21 John D. Fiero
22 Kenneth H. Brown
23 Miriam P. Khatiblou
24 Teddy M. Kapur
25 Attorneys for Heller Ehrman LLP,
26 Debtor and Debtor in Possession

27 ¹ The Debtor’s assumption and assignment of the Sublease is one part of a three-part transaction between the Debtor and
28 the Landlord pursuant to which the Debtor will (a) first, assign the Sublease to the Landlord; (b) second, reject the Lease
pursuant to a written stipulation and avoid administrative rent liability for the unoccupied floors of the leased premises
for the months after January 2009; and (c) finally, execute a new Short Term Tenancy Agreement with the Landlord
reflecting the Debtor’s needs for reduced space.

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10 **UNITED STATES BANKRUPTCY COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 In re:
14 Heller Ehrman LLP,
15 Debtor.

Case No.: 08-32514

Chapter 11

**DECLARATION OF KYLE EVERETT
IN SUPPORT OF DEBTOR'S MOTION
FOR ORDER AUTHORIZING
DEBTOR TO ASSUME AND ASSIGN
NON-RESIDENTIAL REAL
PROPERTY SUBLEASE WITH
BANKSERV**

Date: May 29, 2009

Time: 10:00 a.m.

Place: U. S. Bankruptcy Court
235 Pine Street, 22nd Floor
San Francisco, CA

Judge: Honorable Dennis Montali

23 I, Kyle Everett, declare:

24 1. I am a Vice President at Development Specialists, Inc., which has been retained by
25 Heller Ehrman LLP, the debtor and debtor-in-possession in the above-captioned case (the "Debtor"),
26 to serve as a financial advisor. Except where indicated otherwise, I have personal knowledge of the
27 facts set forth below, and if called to testify, I would testify competently thereto.

28 2. This declaration is provided in support of the Debtor's Motion for Order Authorizing

1 Debtor to Assume and Assign Non-Residential Real Property Sublease with BankServ (the
2 “Motion”) filed concurrently herewith. Capitalized terms not otherwise defined herein shall have the
3 meaning attributed to them in the Motion.

4 3. The Debtor is party to an unexpired lease (the “Lease”) with 333 Bush Street
5 Associates NF L.P., a Delaware limited partnership (the “Landlord”) for 249,090 rentable square
6 feet located on floors 7 through 11, inclusive, and 26 through 34, inclusive, together with certain
7 storage space consisting of approximately 3,008 rentable square feet, located in the commercial
8 office building located at 333 Bush Street, San Francisco (the “Premises”). In the beginning of
9 January 2009, the Debtor paid the Landlord approximately \$741,358 for that month’s rent of the
10 Premises.

11 4. The Debtor is also a party to that certain sublease, dated as of May 15, 2007 (the
12 “Sublease”), by and between the Debtor, as sublandlord, and BankServ, Inc., doing business as
13 BankServ, a Nevada corporation (“BankServ”), as subtenant, for the entire 26th Floor portion of the
14 commercial office building located at 333 Bush Street, San Francisco, California consisting of
15 approximately 17,866 rentable square feet (the “Subleased Premises”).

16 5. The Debtor’s assumption and assignment of the Sublease is one part of a three-part
17 transaction between the Debtor and the Landlord pursuant to which the Debtor will (a) first, assign
18 the Sublease to the Landlord; (b) second, reject the Lease pursuant to a written stipulation and avoid
19 administrative rent liability for the unoccupied floors of the Premises for the months after January
20 2009; and (c) finally, execute a new Short Term Tenancy Agreement reflecting the Debtor’s needs
21 for reduced space.

22 6. The imperatives of the three-part transaction described above dictate that the Debtor
23 assign the Sublease. Because the Debtor cannot (and should not) continue to perform under the
24 Lease, the Sublease has become a burden to the estate. The assumption and assignment of the
25 Sublease will relieve the estate of liabilities arising in connection with it and is in the estate’s best
26 interest.

27 7. I am not aware of any defaults or cure amounts due under the Sublease. Indeed, the
28 opposite is true; when all amounts due under the Sublease are netted out and accounted for,

1 BankServ owes the Debtor approximately \$6,889.

2 8. I am confident and expect that the Landlord will continue to perform the Debtor's
3 obligations under the Sublease because the Landlord is the landlord for the commercial office
4 building where the Subleased Premises are located, and the Subleased Premises will be used in the
5 same manner as they were used prior to the assignment. Moreover, the Landlord leases other floors
6 in the office building and has demonstrated its intent to continue performing under the Sublease by
7 executing an Assignment and Assumption of Sublease (the "Assignment") and a Stipulation
8 Rejecting Lease for Space at 333 Bush Street, San Francisco (the "Stipulation") that contemplates
9 the assignment of the Sublease to the Landlord and BankServ's continued tenancy of the Subleased
10 Premises. The Assignment and Stipulation are attached hereto as **Exhibits A** and **B**, respectively.

11 I declare under penalty of perjury under the laws of the United States of America that the
12 foregoing is true and correct to the best of my knowledge, information and belief.

13 Executed this 1st day of May, 2009, at San Francisco, California.

14
15 /s/ Kyle Everett
16 Kyle Everett

EXHIBIT A

ASSIGNMENT AND ASSUMPTION OF SUBLEASE

THIS ASSIGNMENT AND ASSUMPTION OF SUBLEASE (the “**Assignment**”) reference dated March 25, 2009, is between HELLER EHRMAN LLP, a California limited liability partnership, debtor and debtor-in-possession in ch. 11 case no. 08-32514 (the “**Ch. 11 Case**”) pending in U.S. Bankruptcy Court for Northern District of California, San Francisco Div. (“**Assignor**”), and 333 BUSH ASSOCIATES NF L.P., a Delaware limited partnership (“**Assignee**”).

A. Assignor (formerly constituted as Heller, Ehrman, White & McAuliffe, a California general partnership), as tenant, and Assignee (as successor in interest to Bush Street San Francisco Property, L.P., as successor in interest to L&B 333 Bush Joint Venture, a Texas general partnership, successor in interest to Campeau Corporation California), as landlord, are parties to a certain Office Lease dated as of June 13, 1984, as subsequently amended (as so amended, the “**Master Lease**”).

B. Pursuant to the terms of the Master Lease, Assignor leased from Assignee that certain premises consisting of approximately Two Hundred Forty-Nine Thousand Ninety (249,090) rentable square feet located on floors Seven (7) through Eleven (11), inclusive, and Twenty-Six (26) through Thirty-Four (34), inclusive, together with certain storage space consisting of approximately Three Thousand Eight (3,008) rentable square feet (all as more particularly described in the Master Lease, the “**Premises**”), of the commercial office building located at 333 Bush Street, San Francisco, California (the “**Property**”).

C. Pursuant to the terms of that certain Sublease dated as of May 15, 2007 (“**Sublease**”), Assignor, as sublandlord, subleased to Bankserv, Inc., doing business as BankServ, a Nevada corporation (“**BankServ**”), as subtenant, the entire Twenty-Sixth (26th) floor portion of the Premises consisting of approximately Seventeen Thousand Eight Hundred Sixty-Six (17,866) rentable square feet (as more particularly described in the Sublease, the “**Subleased Premises**”).

D. Assignor desires to assign all of its right, title and interest in and to the Sublease to Assignee, and Assignee desires to accept such assignment, on the terms and conditions below.

NOW, THEREFORE, IN CONSIDERATION of the mutual covenants and promises of the parties, the parties hereto agree as follows:

1. Definitions. Initially capitalized terms not otherwise defined in this Assignment shall have the meanings attributed to such terms in the Sublease.

2. Assignment and Assumption. Effective as of 11:50 p.m. on January 31, 2009 (the “**Effective Date**”), Assignor assigns to Assignee all of its right, title and interest in and to the Sublease as sublandlord thereunder, and Assignee accepts such assignment. From and after the Effective Date, Assignee hereby assumes the obligations of Assignor as sublandlord under the Sublease to the extent such obligations arise (or have arisen) on or following the Effective Date.

Nothing in this Assignment shall constitute an assumption by Assignee of any obligation of Assignor under the Sublease that arose prior to the Effective Date.

3. No Merger, Amendment or Surrender. Assignor and Assignee expressly acknowledge and agree that the assignment provided herein is only of the right, title and interest of Assignor in and to the Sublease as sublandlord thereunder, and that this Assignment shall not in any manner (i) operate as an assignment of Assignor's right, title or interest in and to the Master Lease as tenant thereunder, (ii) operate as a merger of the interest of Assignor as tenant under the Master Lease with the interest of Landlord in the Property, (iii) amend, modify or terminate the Master Lease (including, without limitation, the Master Lease as it pertains to the Subleased Premises) or the rights or obligations of Assignor and Assignee, as tenant and landlord, respectively, under the Master Lease, or (iv) constitute a surrender of the Subleased Premises by Assignor, as tenant under the Master Lease. Assignee shall not be liable to Assignor in connection with any termination of the Sublease pursuant to the terms of the Sublease.

4. Application of Rent to Master Lease. Assignor hereby directs Subtenant to pay all sums now due or hereafter becoming due under the Sublease, including without limitation all sums due with respect to any period prior to the Effective Date, to Assignee. Assignee shall apply all rent actually received by Assignee under the Sublease (including, without limitation, all Subtenant's Base Rent and Subtenant's Share of Operating Cost Recovery and Taxes) to Assignor's obligations under the Master Lease with respect to the payment of Monthly Minimum Rent and Additional Rent (as such terms are defined in the Master Lease).

5. Incorporation of Stipulation; Subsequent Amendments. The parties have separately entered into a stipulation filed in the Ch. 11 Case (the "**Stipulation**") providing, among other things, for the administration of certain claims and deposits due to the sublandlord under the Sublease. The Stipulation is attached as Exhibit A hereto and by this reference is incorporated as a part of this Assignment. This Assignment and the Stipulation are not subject to modification or amendment except by a writing executed by Assignor and Assignee. The rejection of the Master Lease pursuant to the Stipulation shall not cause a termination of, or otherwise affect, the Sublease.

6. Counterparts. This Assignment may be executed in separate counterparts and execution originals may be delivered by facsimile or by attachment of electronic image files to electronic correspondence. Each such counterpart hereof shall be deemed to be an original instrument but all such counterparts together shall constitute but one original Assignment, without the requirement that wet ink originals be subsequently delivered.

7. Integration. This Assignment constitutes the complete understanding and agreement of the parties hereto with respect to the matters set forth herein and all other agreements, understandings or representations with respect to the subject matter of this Assignment are hereby superseded and of no further force or effect.

8. Severability. In the event any provision of this Assignment is declared by a court of competent jurisdiction to be void or voidable, in conflict with any law or otherwise unenforceable, then such unenforceable provision shall be limited to the extent necessary to

render it enforceable, and the validity of all other provisions hereof shall remain unaffected and in full force and effect.

9. Successors and Assigns. This Assignment shall be binding on and inure to the benefit of the parties and their respective heirs, successors and assigns.

IN WITNESS WHEREOF, the parties have executed this Assignment as of the date first above written.

ASSIGNOR:

HELLER EHRMAN LLP,
a California limited liability partnership

By: Heller Ehrman (California),
A Professional Corporation,
a California corporation

By: _____
Name: _____
Title: _____

ASSIGNEE:

Hines Interests Limited Partnership,
a Delaware limited partnership, as authorized agent
for 333 BUSH ASSOCIATES NF L.P.,
a Delaware limited partnership

By: Hines Holdings, Inc.
a Texas corporation, its general partner

By: _____
Name: _____
Title: _____

EXHIBIT B

1 John D. Fiero (CA Bar No. 136557)
Kenneth H. Brown (CA Bar No. 100396)
2 PACHULSKI STANG ZIEHL & JONES LLP
150 California Street, 15th Floor
3 San Francisco, California 94111-4500
Telephone: 415/263-7000
4 Facsimile: 415/263-7010

5 E-mail:jfiero@pszjlaw.com
kbrown@pszjlaw.com

6 Attorneys for Debtor and
7 Debtor in Possession Heller Ehrman LLP

8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 In re
12 Heller Ehrman LLP,
13 Debtor.

Case No.: 08-32514

Chapter 11

**STIPULATION REJECTING LEASE
FOR SPACE AT 333 BUSH STREET,
SAN FRANCISCO**

The Honorable Dennis Montali

[Pursuant to B.L.R. 9014-1, no hearing
unless objection filed or hearing requested.]

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19 This Stipulation Rejecting Lease for Space at 333 Bush Street, San Francisco (“Stipulation”)
20 is entered into by and between Heller Ehrman LLP, debtor and debtor in possession (the “Debtor”)
21 and 333 Bush Associates NF L.P. a Delaware limited partnership (“Landlord”), by and through the
22 undersigned counsel of record. In this Stipulation, the Debtor and Landlord are sometimes
23 collectively referred to as the “Parties.”

24 **RECITALS**

25 A. The Debtor and Landlord are parties to that certain Lease, dated June, 1984, (as
26 amended from time to time) between Landlord , as successor in title to Campeau Corporation
27 California, a California corporation, and Debtor (as successor to Heller Ehrman White & McAuliffe,
28 a general partnership; “Heller”), for premises (“Premises”) located at 333 Bush Street, San

1 Francisco, California and more particularly described in the Lease (the “Lease”) relating to
2 approximately 249,090 rentable square feet of office space and approximately 3,008 square feet of
3 storage space at 333 Bush Street in San Francisco, California.

4 B. The Debtor filed a voluntary petition for relief under chapter 11 of Title 11 of the
5 United States Code on December 28, 2008. The Official Committee of Unsecured Creditors (the
6 “Committee”) was appointed on January 5, 2009.

7 C. The Debtor does not need the entirety of the Premises any longer, but wishes to
8 remain in a portion of the Premises. As a result, the Debtor and Landlord have agreed to enter into
9 this Stipulation, as well as a Short Term Tenancy Agreement to be dated as of January 31, 2009.

10 D. The Parties wish to memorialize their agreement for the rejection of the Lease with
11 this Stipulation.

12 NOW, THEREFORE, the Parties stipulate and agree as follows:

13 **AGREEMENT**

- 14 1. The foregoing recitals are true and correct.
- 15 2. The Lease shall be rejected, effective at 11:59 p.m. on January 31, 2009.
- 16 3. The Debtor shall have a grace period in which to remove personal property from the
17 vacated portion of the Premises, which shall be agreed upon after the Parties conduct a walk-through
18 of the Premises in conjunction with DSI, the joint financial advisor of the Debtor and the Committee.
- 19 4. The Debtor’s sublease of a portion of the Premises comprising approximately 17,866
20 rentable square feet of office space to subtenant, BankServ, a Nevada corporation, d/b/a BankServ,
21 Inc. (the “Sublease”), including all claims for unpaid sub-rent, shall be assigned to Landlord
22 effective immediately prior to the rejection of the Lease, and Landlord agrees and acknowledges that
23 (i) Landlord shall use reasonable commercial efforts to promptly collect from BankServ and forward
24 to Debtor the sum of \$58,204.95 as the net amount identified by Debtor to be due Debtor from
25 BankServ under the Sublease as of January 31, 2009 (the “BankServ Payment”); and (ii) any
26 additional sub-rents collected by Landlord under the Sublease shall be reflected in the calculation of
27 Landlord’s rejection damage claim. Following receipt of the BankServ Payment, the Debtor shall
28 promptly deliver to counsel for Landlord the letter of credit, in the amount of \$172,630.23, which

1 Debtor now holds as security for the performance of the obligations of BankServ under the Sublease,
2 which letter of credit has not been encashed in whole or in part; provided, however, that in the event
3 that Debtor has not received the BankServ Payment on or before June 1, 2009, or such earlier date as
4 Landlord shall agree in writing, then Debtor may make a partial draw in the amount of the BankServ
5 Payment and will thereafter assign the letter of credit to Landlord as successor beneficiary. Debtor
6 will cooperate with Landlord's reasonable requests regarding the assignment, use or re-issuance of
7 the letter of credit; provided, however, that Debtor and the estate shall not be obligated to incur
8 material expense or obligation in so cooperating.

9 5. All issues related to the amount of Landlord's rejection damage claim are reserved, as
10 they are beyond the scope of this Stipulation.

11 6. The Parties agree that a hearing on a motion to approve this Stipulation and the Short
12 Term Tenancy Agreement may be heard on shortened time, consistent with the Court's calendar
13 availability.

14 7. The Bankruptcy Court shall retain jurisdiction to interpret and enforce any order
15 entered on this Stipulation.

16 Dated: February 2, 2009

PACHULSKI STANG ZIEHL & JONES LLP

17
18 By /s/ John D. Fiero

John D. Fiero (CA Bar No. 136557)
Kenneth H. Brown (CA Bar No. 100396)
Attorneys for Debtor and Debtor in
Possession
Heller Ehrman LLP

19
20
21 Dated: February 2, 2009

ELLMAN BURKE HOFFMAN & JOHNSON

22
23 By /s/ Michael P. Brody

Michael P. Brody
Attorneys for Landlord
333 Bush Associates NF L.P.

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8 Attorneys for Heller Ehrman LLP,
9 Debtor and Debtor in Possession

10 **UNITED STATES BANKRUPTCY COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 In re:
14 Heller Ehrman LLP,
15 Debtor.

Case No.: 08-32514

Chapter 11

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEBTOR'S MOTION FOR ORDER
AUTHORIZING DEBTOR TO
ASSUME AND ASSIGN NON-
RESIDENTIAL REAL PROPERTY
SUBLEASE WITH BANKSERV**

Date: May 29, 2009

Time: 10:00 a.m.

Place: U. S. Bankruptcy Court
235 Pine Street, 22nd Floor
San Francisco, CA

Judge: Honorable Dennis Montali

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I.

INTRODUCTION

In the motion supported by this memorandum (the “Motion”), Heller Ehrman LLP, debtor and debtor in possession herein (the “Debtor”), seeks entry of an order authorizing and approving (i) the assumption of that certain sublease (the “Sublease”), dated as of May 15, 2007, by and between the Debtor, as sublandlord, and Bankserv, Inc., doing business as BankServ, a Nevada corporation (“BankServ”), as subtenant, for the entire 26th Floor portion of the commercial office building located at 333 Bush Street in San Francisco, California consisting of approximately 17,866 rentable square feet (the “Subleased Premises”), and (ii) the assignment of the Sublease by the Debtor to 333 Bush Associates NF L.P., a Delaware limited partnership (the “Landlord”).

II.

STATEMENT OF FACTS

A. Jurisdiction and Venue

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

B. The Lease and the BankServ Sublease

The Debtor is party to an unexpired lease (the “Lease”) with the Landlord for 249,090 rentable square feet located on floors 7 through 11, inclusive, and 26 through 34, inclusive, together with certain storage space consisting of approximately 3,008 rentable square feet, located in the commercial office building located at 333 Bush Street, San Francisco (the “Premises”). In the beginning of January 2009, the Debtor paid the Landlord approximately \$741,358 for that month’s rent of the Premises. The Debtor is also a party to the Sublease, which relates solely to the Subleased Premises.

The Debtor’s assumption and assignment of the Sublease is one part of a three-part transaction between the Debtor and the Landlord pursuant to which the Debtor will (a) first, assign the Sublease to the Landlord; (b) second, reject the Lease pursuant to a written stipulation and avoid administrative rent liability for the unoccupied floors of the Premises for the months after January

1 2009; and (c) finally, execute a new Short Term Tenancy Agreement with the Landlord reflecting
2 the Debtor's needs for reduced space.

3 The imperatives of the three-part transaction described above dictate that the Debtor assign
4 the Sublease. Because the Debtor cannot (and should not) continue to perform under the Lease, the
5 Sublease has become a burden to the estate. The assumption and assignment of the Sublease will
6 relieve the estate of liabilities arising in connection with it. The Debtor is not aware of any defaults
7 or cure amounts due under the Sublease. Indeed, the opposite is true; when all amounts due under
8 the Sublease are netted out and accounted for, BankServ owes the Debtor approximately \$6,889.

9 **III.**

10 **ARGUMENT**

11 **A. The Debtor May Assume the Sublease under Section 365 of the Bankruptcy Code**

12 The Bankruptcy Code provides, in pertinent part, that a trustee or debtor in possession,
13 "subject to the court's approval, may assume or reject any executory contract or unexpired lease of
14 the debtor." 11 U.S.C. § 365(a). Section 365(b)(1) sets forth the requirements for assuming an
15 unexpired lease or executory contract, providing in pertinent part that:

16 (b)(1) If there has been a default in an executory contract or
17 unexpired lease of the debtor, the trustee may not assume such contract
18 or lease unless, at the time of assumption of such contract or lease, the
19 trustee –

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

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

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

28 11 U.S.C. § 365(b)(1).

Courts apply the "business judgment test" to determine whether a debtor in possession's
proposed assumption or rejection of an executory contract or unexpired lease is appropriate under
Bankruptcy Code section 365. *Agarwal v. Pomona Valley Medical Group, Inc. (In re Pomona
Valley Medical Group, Inc.)*, 476 F.3d 665, 670 (9th Cir. 2007); *Durkin v. Bendor Corp. (In re G.I.*

1 *Indust., Inc.*), 204 F.3d 1276, 1282 (9th Cir. 2000). *See also NLRB v. Bildisco & Bildisco*, 465 U.S.
2 513, 523 (1984); *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific*
3 *Railroad Co.*, 318 U.S. 523, 550 (1953).

4 Under the business judgment test, if assumption or rejection would benefit the debtor's
5 estate, the court should approve the debtor's proposed assumption or rejection. *Pomona Valley*
6 *Medical Group, Inc.*, 476 F.3d at 670-71. *See In re FCX, Inc.*, 60 B.R. 405, 411 (Bankr. E.D.N.Y.
7 1986); *Summit Land Co. v. Allen (In re Summit Land Co.)* 13 B.R. 310, 315 (Bankr. D. Utah 1981)
8 (concluding that a debtor's decision to reject a lease should be granted as a matter of course); *In re*
9 *Waldron*, 36 B.R. 633, 640 (Bankr. S.D.Fla. 1984) (business judgment test applies and a of abuse of
10 discretion or that decision was clearly erroneous is needed to overturn debtor's decision to reject).

11 Here, the Debtor has not committed a default under the Sublease, and the Debtor seeks to
12 assume the Sublease in an exercise of its business judgment. The Debtor is winding down its affairs
13 and is not in a position to continue a sublease arrangement with BankServ. The assumption and
14 assignment of the Sublease will enable the Debtor to reduce administrative burdens and potential
15 liabilities.

16 **B. The Debtor May Assign the Sublease Under Section 365 of the Bankruptcy Code**

17 The Bankruptcy Code provides, in pertinent part:

18 (1) [N]otwithstanding a provision in an executory contract or
19 unexpired lease of the debtor, or in applicable law, that prohibits,
20 restricts, or conditions the assignment of such contract or lease, the
trustee may assign such contract or lease under paragraph (2) of this
subsection.

21 (2) The trustee may assign an executory contract or executory lease of
22 the debtor only if —

23 (A) the trustee assumes such contract or lease in
accordance with the provisions of this section; and

24 (B) adequate assurance of future performance by the
25 assignee of such contract or lease is provided, whether or not there has
been a default in such contract or lease.

26 11 U.S.C. § 365(f)(1) and (2).

27 The term adequate assurance of future performance is not defined the Bankruptcy Code but
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Dated: May 1, 2009

PACHULSKI STANG ZIEHL & JONES LLP

By /s/ John D. Fiero
John D. Fiero (CA Bar No. 136557)
Kenneth H. Brown (CA Bar No. 100396)
Miriam P. Khatiblou (CA Bar No. 178584)
Teddy M. Kapur (CA Bar No. 242486)
Attorneys for Heller Ehrman LLP,
Debtor and Debtor in Possession

1 John D. Fiero (CA Bar No. 136557)
Kenneth H. Brown (CA Bar No. 100396)
2 Miriam P. Khatiblou (CA Bar No. 178584)
Teddy M. Kapur (CA Bar No. 242486)
3 PACHULSKI STANG ZIEHL & JONES LLP
150 California Street, 15th Floor
4 San Francisco, California 94111-4500
Telephone: 415/263-7000
5 Facsimile: 415/263-7010

6 E-mail: jfiero@pszjlaw.com
kbrown@pszjlaw.com
7 mkhatiblou@pszjlaw.com
tkapur@pszjlaw.com

8 Attorneys for Heller Ehrman LLP,
9 Debtor and Debtor in Possession

10 **UNITED STATES BANKRUPTCY COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 In re:
14 Heller Ehrman LLP,
15 Debtor.

Case No.: 08-32514

Chapter 11

CERTIFICATE OF SERVICE

16 Date: May 29, 2009
17 Time: 10:00 a.m.
18 Place: U. S. Bankruptcy Court
235 Pine Street, 22nd Floor
San Francisco, CA
19 Judge: Honorable Dennis Montali

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28

<p>United States Trustee Donna S. Tamanaha, Assistant U.S. Trustee 235 Pine Street, Suite 700 San Francisco, CA 94104</p> <p>Donna.S.Tamanaha@usdoj.gov</p>	<p>Counsel to BofA David Minnick, Esq. Leo Crowley, Esq. Pillsbury Winthrop Shaw Pittman LLP 50 Fremont Street San Francisco, CA 94105-2228</p> <p>Tdminnick@pillsburylaw.com Leo.crowley@pillsburylaw.com</p>	<p>Counsel to Citibank, N.A. Larry Peitzman, Esq. Louis E. Kempinsky, Esq. Peitzman, Weg & Kempinsky LLP 10100 Santa Monica Blvd., Suite 1450 Los Angeles, CA 90067</p> <p>lpeitzman@pwkllp.com lkempinsky@pwkllp.com RSN</p>
<p>Counsel to Committee of Unsecured Creditors Steven H. Felderstein, Esq. Thomas A. Willoughby, Esq. Felderstein Fitzgerald Willoughby & Pascuzzi, LLP 400 Capitol Mall, Suite 1450 Sacramento, CA 95814</p> <p>sfelderstein@ffwplaw.com twilloughby@ffwplaw.com RSN</p>		
COMMITTEE OF UNSECURED CREDITORS		
<p>Counsel for 333 Bush Associates Michael P. Brody, Esq. Darlene Haun, Esq. Ellman Burke Hoffman & Johnson 601 California Street, 19th Floor San Francisco, CA 94108</p> <p>mbrody@ellman-burke.com dhaun@ellman-burke.com</p>	<p>Counsel for 333 Bush Associates Paul E. Paradis 101 California Street, Suite 1000 San Francisco, CA 94111</p> <p>paul_paradis@hines.com</p>	<p>Counsel for MEPT St. Matthews LLC Bennett Williams 1215 4th Avenue, Suite 2400 Seattle, WA 98161</p> <p>bennettw@kennedyusa.com</p>
<p>Counsel for Williams Lea, Inc. Deena Williamson 1400 K Street NW, Suite 800 Washington, DC 20005</p> <p>deena.williamson@williamslea.com</p>	<p>Alfred D. Moore 6340 Chelton Drive Oakland, CA 94611</p> <p>dacerc@sbcglobal.net RSN</p>	<p>Consel for Guckenheimer Enterprises, Inc. William R. Pope Three Lagoon Drive, Suite 325 Redwood Shores, CA 94065</p> <p>bpope@guckenheimer.com</p>

PARTIES REQUESTING SPECIAL NOTICE

1	PARTIES REQUESTING SPECIAL NOTICE		
2	Counsel for AFCO Acceptance Corporation	Counsel for The Seaport Group LLC	Counsel for Columbia Center Property LLC and 333 South Hope Co., LLC
3	David I. Katzen, CSB # 79090	Scott Friedberg	Vincent M. Coscino, Esq.
4	David A. Schuricht, CSB # 62690	The Seaport Group, LLC	Michael S. Greger, Esq.
5	KATZEN & SCHURICHT	360 Madison Avenue, 22 nd Floor	Allen Matkins Leck Gamble Mallory & Natsis LLP
6	1981 N. Broadway, Suite 340	New York, NY 10017	1990 Main Street, Fifth Floor
7	Walnut Creek, CA 94596-8218	Sfriedberg@Theseaportgroup.com	Irvine, CA 92614-7321
8	katzen@ksfirm.com		vcoscino@allenmatkins.com
9	schuricht@ksfirm.com		mgreger@allenmatkins.com
10	Counsel for Schiff Hardin LLP	Counsel for Schiff Hardin LLP	Counsel for A2D, LP
11	Jeffrey V. Commisso, Esq.	Jason M. Torf, Esq.	Michael S. Kogan, Esq.
12	Schiff Hardin LLP	Schiff Hardin LLP	Ervin, Cohen & Jessup LLP
13	One Market, Spear Street Tower	6600 Sears Tower	9401 Wilshire Boulevard, 9 th Floor
14	32 nd Floor	Chicago, IL 60606-6473	Beverly Hills, CA 90212
15	San Francisco, CA 94105	jtorf@schiffhardin.com	mkogan@ecjlaw.com
16	jcommisso@schiffhardin.com		
17	VIA FIRST CLASS MAIL	Counsel to 1620 K Street Associates Limited Partnership, A District of Columbia limited partnership	Counsel to Pension Benefit Guaranty Corporation
18	Counsel to State of Washington, Dept. of Revenue	Edward J. Tredinnick, Esq.	Marc S. Pfeuffer, Esq.
19	Zachary Mosner, Esq.	Greene Radovsky Maloney Share & Hennigh LLP	Office of the Chief Counsel
20	Assistant Attorney General	Fourt Embarcadero Center, Suite 4000	Pension Benefit Guaranty Corporation
21	Bankruptcy & Collections Unit	San Francisco, CA 94111-4106	1200 K Street, N.W.
22	800 Fifth Avenue, Suite 2000	etredinnick@greeneradovsky.com	Washington, DC 20005-4026
23	Seattle, WA 98104-3188		pfeuffer.marc@pbgc.gov
24			efile@pbgc.gov
25	Counsel to 4350 La Jolla Village LLC	Counsel for the Vested Reirees	In-House Counsel fo CB Richard Ellis, Inc.
26	Dean P. Sperling, Esq.	Michael St. James, Esq.	Laurie Gomez, Esq.
27	Law Offices of Dean P. Sperling	St. James Law	Senior Counsel – Litigation
28	201 East Sandpointe, Suite 220	155 Montgomvery Street, Suite 1004	CB Richard Ellis, Inc.
29	Santa Ana, CA 92707-57425	San Francisco, CA 94104	200 Park Avenue
30	Dean@sperlinglaw.com	ecf@stjames-law.com	New York, NY 10166
31	Consel to Creditors Darryl L. Snider and John S. Skilton	Counsel for Adworks, Inc.	Counsel for Robert G. Badal and Nancy Sher Cohen
32	Maria K. Pum, Esq.	Howard Ross, Esq.	David A. Gill, Esq.
33	Henderson, Caverly, Pum & Charney LLP	Shulman, Rogers, Gandal, Poridy & Ecker, P.A.	Richard K. Diamond, Esq.
34	P.O. Box 9144	11921 Rockville Pike, Suite 300	Danning, Gill, Diamond & Kollitz, LLP
35	16236 San Dieguito Rd., Suite 4-13	Rockville, MD 20852	2029 Century Park East, Third Floor
36	Rancho Santa Fe, CA 92067-9144	F: 301-230-2891	Los Angeles, CA 90067
37	mpum@hcesq.com	hross@srgpe.com	dgill@dgdk.com
38			rdiamond@dgdk.com
39	Robert G. Badal, Esq.	Nancy Sher Cohen, Esq.	Vicky Namken
40	WilmerHale, LLP	Proskauer Rose, LLP	IBM Corporation
41	350 S. Grand Avenue, Suite 2100	2049 Century Park East, Suite 3200	13800 Diplomat Dr.
42	Los Angeles, CA 90071	Los Angeles, CA 90067	Dallas, TX 75234
43	robert.badal@wilmerhale.com	ncohen@proskauer.com	vnamken@us.ibm.com

CERTIFICATE OF SERVICE

1	Counsel to Constellation NewEnergy, Inc.	Counsel to Constellation NewEnergy, Inc.	Paul Sugarman
2	Bruce J. Ruzinsky, Esq.	Heather M. Forrest, Esq.	1200 Sunnyside Road
3	D. Elaine Conway, Esq.	JACKSON WALKER L.L.P.	Oakland, CA 94610
4	JACKSON WALKER L.L.P.	901 Main Street, Suite 6000	sugars5@pacbell.net
5	1401 McKinney Street, Suite 1900	Dallas, TX 75202	
6	Houston, Texas 77010	hforrest@jw.com	
7	bruzinsky@jw.com		
8	econway@jw.com		
9	Christine R. Etheridge	Counsel to Hewlett-Packard Company	Mr. Ken Higman
10	IKON Financial Services	Ms. Anne Marie Kennelly, Esq.	Sr. Default & Recovery Analyst
11	Bankruptcy Administration	Corporate Counsel	Hewlett-Packard Company
12	1738 Bass Road	3000 Hanover St., M/S 1050	2125 E. Katella Ave., Suite 400
13	P.O. Box 13708	Palo Alto, CA 94304	Anaheim, CA 92806
14	Macon, GA 31208-3708	anne.kennelly@hp.com	ken.higman@hp.com
15	christine.etheridge@ikonfin.com		
16	Aseem S. Gupta	Counsel for Iron Mountain Information Management, Inc.	Alan D. Smith
17	3340 23 rd Street	Frank F. McGinn, Esq.	Perkins Coie LLP
18	San Francisco, CA 94110	Bartlett Hackett Feinberg P.C.	1201 Third Avenue, 48 th Floor
19	aseemsgupta@gmail.com	155 Federal Street, 9 th Floor	Seattle, WA 98101-3099
20		Boston, MA 02110	ADSmith@perkinscoie.com
21		ffm@bostonbusinesslaw.com	
22	Counsel for Oracle USA, Inc. and Oracle Credit Corporation	Counsel for Creditor Paravue, Inc.	Counsel for Creditor Paravue, Inc.
23	Shawn M. Christianson, Esq.	Scott H. McNutt	William Gwire
24	Buchalter, Nemer, A Professional Corporation	McNUTT LAW GROUP LLP	Ujvala Singh
25	333 Market Street, 25 th Floor	188 The Embarcadero, Suite 800	GWIRE LAW OFFICES
26	San Francisco, CA 94105-2126	San Francisco, CA 94105	455 Market Street, Suite 2220
27	schristianson@buchalter.com	Email: smcnutt@ml-sf.com	San Francisco, CA 94105
28			Email: gwire@gwirelaw.com
			singh@gwirelaw.com
	Ivan L. Kallick	Monte M. Lemann	VIA FIRST CLASS MAIL
	MANATT, PHELPS & PHILLIPS, LLP	MANATT, PHELPS & PHILLIPS, LLP	Counsel for Wham-O, Creditor
	11355 West Olympic Boulevard	11355 West Olympic Boulevard	Chris D. Kuhner, Esq.
	Los Angeles, California 90064	Los Angeles, California 90064	KORNFIELD, NYBERG, BENDES & KUHNER PC
	ikallick@manatt.com	mlemann@manatt.com	1999 Harrison Street, Ste. 2675
			Oakland, California 94612