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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

**MOTION TO REJECT LEASE FOR
SPACE AT 333 BUSH STREET, SAN
FRANCISCO PURSUANT TO
STIPULATION**

Hearing

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, 333 BUSH ASSOCIATES NF L.P., AND OTHER PARTIES**
REQUESTING NOTICE:

25 Heller Ehrman LLP, the debtor and debtor-in-possession in the above-captioned case (the
26 “Debtor”), hereby moves the Court (the “Motion”) for entry of an order authorizing the rejection of
27 its unexpired lease (the “Lease”) for office and storage space at 333 Bush Street, San Francisco
28 pursuant to a written stipulation with the Landlord, 333 Bush Associates NF L.P., a Delaware

1 limited partnership (the “Landlord”). The Motion is supported by additional papers filed and served
2 herewith.¹

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

5 1. The *Stipulation Rejecting Lease for Space at 333 Bush Street, San Francisco* (the
6 “Stipulation”) is approved and its constituent terms shall be binding upon the Debtor and the
7 Landlord;

8 2. The Lease shall be rejected, effective at 11:59 p.m. on January 31, 2009;

9 3. The Bankruptcy Court shall retain jurisdiction to interpret and enforce any order
10 entered on the Stipulation; and

11 4. For such other and further relief as the Court may deem just and proper.

12 Dated: May 1, 2009

PACHULSKI STANG ZIEHL & JONES LLP

14 By /s/ John D. Fiero

15 John D. Fiero
16 Kenneth H. Brown
17 Miriam P. Khatiblou
18 Teddy M. Kapur
19 Attorneys for Heller Ehrman LLP,
20 Debtor and Debtor in Possession

21
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27 ¹ The Debtor’s rejection of the Lease is one part of a three-part transaction between the Debtor and the Landlord pursuant
28 to which the Debtor will (a) first, assign a sublease for the 26th Floor to the Landlord; (b) second, reject the Lease
pursuant to the 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
TO REJECT LEASE FOR SPACE AT
333 BUSH STREET, SAN FRANCISCO
PURSUANT TO STIPULATION**

Hearing

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 to Reject Lease for

1 Space at 333 Bush Street, San Francisco Pursuant to Stipulation (the “Motion”) filed concurrently
2 herewith. Capitalized terms not otherwise defined herein shall have the meaning attributed to them
3 in the Motion.

4 3. On December 28, 2008, the Debtor filed a voluntary petition for relief under Chapter
5 11 of the Bankruptcy Code. The Debtor has continued in possession of its property and is operating
6 and managing its business as debtor-in-possession pursuant to Sections 1107(a) and 1108 of the
7 Bankruptcy Code.

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

15 5. On or about February 2, 2009, the Debtor and Landlord reached agreement relating to
16 the rejection of the Lease, which agreement is memorialized in the Stipulation (a true and correct
17 copy of which is attached hereto as Exhibit A).

18 6. The Debtor’s rejection of the Lease is one part of a three-part transaction between the
19 Debtor and the Landlord pursuant to which the Debtor will (a) first, assign a sublease for the 26th
20 Floor to the Landlord; (b) second, reject the Lease pursuant to the Stipulation and avoid
21 administrative rent liability for the unoccupied floors of the Premises for the months after January
22 2009; and (c) finally, execute a new Short Term Tenancy Agreement with the Landlord reflecting
23 the Debtor’s needs for reduced space.

24 7. I believe it is an exercise of sound business judgment and beneficial to the estate’s
25 unsecured creditors to reject the Lease pursuant to the Stipulation. I believe that rejection of the
26 Lease is in the best interest of the Debtor’s estate. The Debtor wishes to remain in a portion of the
27 Premises, but given the Debtor’s limited operations I believe that the Debtor has no use for most of
28 the 249,090 rentable square feet, the Lease is a burden to the estate, and that the Debtor has no

1 practical way to extract value from the leased premises.

2 8. The negotiations leading up to the execution of the Stipulation were lengthy and
3 began at the beginning of the year. The Landlord and Debtor do not have and have never had other
4 business dealings besides those relating to the Lease and the Premises. The Landlord is the chair of
5 the Official Committee of Unsecured Creditors.

6 9. I, therefore, have concluded that, absent the rejection of the Lease, the Lease is a
7 burden to the estate.

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

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

11
12 /s/ Kyle Everett
13 Kyle Everett
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EXHIBIT A

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Kenneth H. Brown (CA Bar No. 100396)
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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.]

18
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

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

24 Dated: February 2, 2009

ELLMAN BURKE HOFFMAN & JOHNSON

25
26 By /s/ Michael P. Brody

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

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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 TO REJECT
LEASE FOR SPACE AT 333 BUSH
STREET, SAN FRANCISCO
PURSUANT TO STIPULATION**

Hearing

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 this motion (the “Motion”), Heller Ehrman LLP, debtor and debtor in possession herein (the “Debtor”), moves the Court for entry of an order authorizing the rejection of its lease for office and storage space at 333 Bush Street, San Francisco pursuant to a written stipulation with the Landlord (defined below) because the Debtor only needs a fraction of the space going forward.

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. **Background**

On December 28, 2008 (the “Petition Date”), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor has continued in possession of its property and is operating and managing its business as debtor-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

C. **The Lease**

The Debtor is party to an unexpired lease (the “Lease”) with 333 Bush Street Associates NF L.P., a Delaware limited partnership (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.

On or about February 2, 2009, the Debtor and Landlord reached agreement relating to the rejection of the Lease, which agreement is memorialized in a written stipulation attached as **Exhibit A** to the *Declaration of Kyle Everett in Support of Debtor’s Motion to Reject Lease for Space at 333 Bush Street, San Francisco Pursuant to Stipulation*, filed concurrently herewith (the “Stipulation”).

1 The Debtor believes that the Lease is a burden to the estate and that rejection of the Lease is
2 in the best interest of the Debtor's estate because the Debtor does not need the entirety of the
3 Premises any longer, but wishes to remain in a portion of the Premises.

4 **D. Good Faith**

5 The Debtor's rejection of the Lease is one part of a three-part transaction between the Debtor
6 and the Landlord pursuant to which the Debtor will (a) first, assign a sublease for the 26th Floor to
7 the Landlord; (b) second, reject the Lease pursuant to the Stipulation and avoid administrative rent
8 liability for the unoccupied floors of the Premises for the months after January 2009; and (c) finally,
9 execute a new Short Term Tenancy Agreement with the Landlord reflecting the Debtor's needs for
10 reduced space.

11 The negotiations leading up to the execution of the Stipulation were lengthy and began at the
12 beginning of the year. The Landlord and Debtor do not have and have never had other business
13 dealings besides those relating to the Lease and the Premises. The Landlord is the chair of the
14 Official Committee of Unsecured Creditors.

15 **III.**

16 **ARGUMENT**

17 Section 365(a) of the Bankruptcy Code permits a trustee, including a debtor in possession
18 pursuant to 11 U.S.C. § 1107(a), to reject an executory contract or unexpired lease subject to the
19 bankruptcy court's approval. *See Willamette Waterfront, Ltd. v. Victoria Station, Inc. (In re Victoria*
20 *Station, Inc.)*, 875 F.2d. 1380 (9th Cir. 1989); *Sea Harvest Corp., et al. v. Riviera Land Co., et al.*,
21 868 F.2d. 1077 (9th Cir. 1989); *Robertson v. Pierce (In re Huang)*, 23 B.R. 798, 800 (B.A.P. 9th Cir.
22 1982). Rejection of an executory contract or unexpired lease is particularly critical because it
23 permits the bankruptcy estate to free itself from burdensome post-petition obligations that do not
24 promote a successful reorganization of the debtor. *National Labor Relations Board v. Bildisco &*
25 *Bildisco*, 465 U.S. 513, 528, 104 S.Ct. 1188, 1997 (1984).

26 It is a well-established rule that a lease may be rejected in bankruptcy if, in the sound
27 exercise of business judgment, the estate would benefit from not having to perform the debtor's
28 contractual obligations. *Richmond Leasing Co. v Capital Bank, NA*, 762 F.2d 1303 (5th Cir. 1985);

1 *In re Huang, supra*, 23 B.R. at 800. In other words, the question of whether an executory contract or
2 lease should be rejected or on what terms it should be assumed, is one of business judgment. In the
3 Ninth Circuit, the Bankruptcy Appellate Panel in *Huang* explained that the standard by which to
4 determine whether the debtor-in-possession has exercised its business judgment in rejecting or
5 assuming a contract or lease under Section 365(a) is whether the rejection would benefit the general
6 unsecured creditors. *See Huang*, 23 B.R. at 800.

7 In this case, the Debtor believes it is an exercise of sound business judgment, and beneficial
8 to the estate's unsecured creditors, to reject the Lease pursuant to the Stipulation. Given its limited
9 operations, the Debtor has no use for most of the 249,090 rentable square feet; it believes that the
10 Lease is a burden to the estate; and it has no practical way to extract value from the leased premises.
11 Accordingly, the Court should authorize the Debtor to reject the Lease.

12 **IV.**

13 **CONCLUSION**

14 For all the foregoing reasons, the Debtor submits that the Lease should be rejected, along
15 with the ancillary relief specifically set forth in the Stipulation and prayer of the Motion.

16 Dated: May 1, 2009

PACHULSKI STANG ZIEHL & JONES LLP

17
18 By /s/ John D. Fiero

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

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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<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>
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PARTIES REQUESTING SPECIAL NOTICE

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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
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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.
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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, Porady & Ecker, P.A.	Richard K. Diamond, Esq.
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