

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF TENNESSEE**

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IN RE:

WASHINGTON MANUFACTURING COMPANY;  
WASHINGTON INDUSTRIES, INC., and  
KSA, INC.,

Debtors.

Case Nos.      388-0146-WHB  
                    388-01468  
                    388-01469

Chapter 11  
Jointly Administered  
Judge William Houston Brown

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MEMORANDUM OPINION AND ORDER ON MOTIONS TO  
ALTER OR AMEND JUDGMENT ON TRUST COMPANY BANK'S  
MOTION FOR ALLOWANCE OF ADMINISTRATIVE EXPENSE CLAIM  
OR FOR A PARTIAL NEW TRIAL

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This cause is before the Court on the motions of both parties requesting that the Court alter or amend aspects of its Memorandum Opinion And Order ("Order") entered May 13, 1993, on the motion of Trust Company Bank ("Bond Trustee") for allowance of its administrative expense claim. At issue is whether either or both of these parties may be entitled to the proposed alterations or amendments and/or whether the Bond Trustee may be entitled to a partial new trial. The following constitutes findings of fact and conclusions of law pursuant to F.R.B.P. 7052(b).

Ronald R. Peterson, the case trustee ("Bankruptcy Trustee") requests that the Order "be amended to correct . . . mathematical errors in the calculation of [the Bond Trustee's §503(b)(1)] claim amount and also to reflect the net, as opposed to gross, amount of the Bond Trustee's [§503(b)(1)] claim . . ." The Bond Trustee contends that the Order should be amended to reflect that: its claims for 18% interest on overdue rent installments, attorney's fees and appraisal fees are allowable as §365(d) administrative expense claims; and the Bankruptcy Trustee used and occupied the entire Trousdale facility for purposes of calculating the Bond Trustee's postrejection, §503(b)(1), administrative expense claim. In the alternative, the Bond Trustee requests a new trial on these issues.

Most of the facts necessary for resolution of the motions are set forth in the Court's May 13, 1993, Order and are incorporated herein by reference. In addition, for purposes of the Bond Trustee's motion to allow its claim for 18% interest on the overdue rent installment, the parties have agreed to allow the post-trial submission of a February 26, 1988, letter from the Bond Trustee to the prepetition debtor notifying the debtor of its default on the February 24, 1988, payment. They have also agreed to allow the Court to determine the net amount available for setoff by the Bankruptcy Trustee against the Bond Trustee's §503(b)(1) claim.

The parties have further agreed and the Court concurs that the May 13, 1993, Order should be amended to reflect that the office space occupied by the Bankruptcy Trustee and his employees from January 27 to April 29, 1989, does not include the 5,342 square feet of interior office and restroom space described in Stipulation 12. Consequently, the Bankruptcy Trustee's motion to amend is granted on this issue and the Order should be amended to reflect that the Bankruptcy Trustee's employees occupied 80% of 3,806 or 3,044.8 square feet of office space from January 27 to April 30, 1989, rather than the 80% of 9,148 or 7,318.40 square feet stated in the Order. According to the Bankruptcy Trustee's calculations, this reduces the amount allowable as a §503(b)(1) administrative expense claim for office space occupancy from \$4,573.27 to \$1,902.69.

#### DISCUSSION

The Court is given broad discretion to alter or amend an order or to grant a new trial on the motion of a party to the litigation pursuant to F.R.C.P. 52 and 59 as adopted by F.R.B.P. 7052 and 7059. See F.R.C.P. 52(b) and 59(a). However, as emphasized by counsel for the Bond Trustee in his able brief, such discretion is not to be employed "to allow the relitigation of old matters nor to allow the parties to present their respective cases under new theories." Trust Company's Bank Memorandum of Law . . . , p. 7. Thus, as additionally pointed out by counsel for the Bond Trustee, it is important that the Court alter or amend or grant a new trial on its prior Order only "to correct manifest errors of law or fact or to allow the presentation of newly discovered evidence." Id., (quoting U.S. v. Carolina Eastern Chemical Co., Inc., 639 F. Supp. 1420, 1423 (D.S.C. 1986)).

Turning first to the issues of rental rate calculations and the net, as opposed to gross, amount of the Bond Trustee's postrejection §503(b)(1) administrative expense claim, the Bankruptcy Trustee asserts that the fair market rental rate has been incorrectly calculated and that the Court should establish a sum certain for the insurance expense that he is entitled to setoff against the Bond Trustee's administrative expense claim. The Bond Trustee contends that under the Bankruptcy Trustee's proposal, the average rates calculated are "weighted" and that the Court's method of averaging the annual rates and then calculating a rental sum is appropriate and more fair.

The Court arrived at its monthly rental rate of \$0.1532 for the warehouse area by simply averaging the applicable annual rates for each storage area, i.e., \$2.50 for high bay warehouse area, \$1.52 for mezzanine racking area and \$1.50 for first floor racking area and dividing that figure, \$1.84, by 12 months for an average monthly rate of \$0.1532. The Court then applied this rate to the square footage actually occupied on a per month basis by the Bankruptcy Trustee during the postrejection time period. According to the Bankruptcy Trustee, the fair market rental rate should have been calculated by first determining the annual rental sums for the maximum square footage occupied in each storage area, for example, 118,805 square feet in the racking area, rather than by averaging the annual rental rates alone. This amount should have then been divided by the total maximum square footage for an average annual rental rate which when divided by 12 months would result in an average monthly rate of \$0.1359. The difficulty with the approach urged by the Bankruptcy Trustee is that it depends upon the maximum square footage available for occupants in each storage area, rather than the square footage actually occupied, for calculation of the rental rate.<sup>1</sup> As discussed in the prior Order and below, the postrejection rental allowable as an administrative expense is the only rental amount for which a fair market rate must be calculated. Moreover, such rental is only allowable for the actual space occupied by the Bankruptcy Trustee. The only evidence of the extent of the Bankruptcy Trustee's

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<sup>1</sup> The Bankruptcy Trustee raises an additional argument regarding the rate calculation contending that the Court's rate is incorrect because the stipulated maximum high bay warehouse area occupied was 32,903 square feet rather than 47,127 square feet. As discussed, the Court's rate calculation does not involve the degree of square footage occupied, maximum or otherwise, thus this argument has no merit.

postrejection occupancy is Exhibit 19 which specifies the decreasing extent of the Bankruptcy Trustee's overall occupancy rather than the extent of the occupancy of each area. Were the Court calculating the postrejection rental claim based on occupancy of the entire warehouse, the Bankruptcy Trustee's calculations would seem more plausible. However, under the circumstances, the Court concludes that the Bankruptcy Trustee's motion to alter or amend the judgment to reflect a different postrejection fair market value rental rate for the Bankruptcy Trustee's postrejection occupancy of the warehouse should be denied.

The next issue for the Court's consideration is also raised by the Bankruptcy Trustee and involves the Bankruptcy Trustee's request that the Court determine the amount of the insurance expense that he is allowed to setoff against the Bond Trustee's postrejection administrative expense claim. In its prior Order, the Court concluded that the Bond Trustee was entitled to a postrejection administrative expense claim less any sums that the Bankruptcy Trustee has spent on maintenance, repair, taxes or insurance of the property because both appraisers upon whose opinions the Court relied in reaching the postrejection fair market value rental rates had indicated that their appraisals were based on rental values that would exclude these kinds of payments. The Bankruptcy Trustee has stated that the estate had no known maintenance, repair or tax expenses during this time period. Thus, the amount at issue is the insurance premium.

Stipulated Exhibit 16 reflects a yearly premium of \$6,673.00 for liability insurance on this facility. Accordingly, a ten month premium would be \$5,560.83. The more difficult task is that of trying to arrive at a figure for the casualty insurance premium because the Court has no evidence before it of an annual premium for this facility alone. Stipulated Exhibit 17 provides information concerning a blanket policy issued to the debtor which insured all of the debtors' properties but does not specify the annual premiums for each individual property. In his memorandum, the Bankruptcy Trustee has urged a finding that the annual premium is \$15,000.00 based on his analysis of the documents representing the blanket policy. The Bond Trustee has agreed to let the Court decide this issue in light of the slim evidence. The Court has considered the documents which comprise this blanket policy and has reviewed the appraisal of Mr. Marvin Maes, a qualified expert appraiser. At pages 33 and 34 of his appraisal, Mr. Maes concludes that based on comparable

premiums for other Nashville industrial properties during this time period, a fair premium is .06 per square foot or \$11,000.00 per year for this facility. According to Mr. Maes, this method of calculating an approximate insurance premium for the casualty coverage at the Trousdale facility is more appropriate than trying to extrapolate a premium for the individual site from the blanket premium described in Exhibit 17. The Court is satisfied that Mr. Maes is a qualified expert and therefore concludes that this is a reasonable premium. As such, the resulting premium for the ten month time period in question is \$9,166.67. This gives the Bankruptcy Trustee a setoff for insurance costs in the amount of \$14,727.50.

The issue next raised is the Bond Trustee's request that the Court reconsider and alter its findings or grant a new trial on its assertion that the 18% interest on overdue rent, attorney's fees and appraisal fees are allowable as 11 U.S.C. §365(d)(3) administrative expense claims. In its prior Order, the Court concluded that the 18% interest due the Bond Trustee as a result of the debtor's prepetition rental payment default was not allowable as a §365(d)(3) administrative expense claim because the lease called for written demand to be made in the event such 18% interest became due, in other words, if there was a default in the rental payment. The Bond Trustee has now come forward with a letter dated February 26, 1988, which notifies the pre-bankruptcy debtor of the default in the February 24, 1988, payment and by its terms gives notice that the principal of the bonds and interest accrued are due and payable immediately. See Ex. A to Trust Company Bank's Memorandum of Law . . . . According to the Bond Trustee, this letter satisfies the written demand requirement of the lease in that it provided notice of the debtor's default and liability. The Bond Trustee additionally argues that its proof of claim filed in April, 1991, satisfies the written demand requirement of the lease.

In support of the argument that the Court should alter its conclusion that the Bond Trustee is not entitled to attorney's fees or appraisal fees, the Bond Trustee directs the Court's attention to Section 8.02 of the lease which provides for the Bond Trustee's recovery of fees and expenses associated with its repossession of the premises. Such sums are classified as "additional rent" pursuant to Section 4.03 of the lease and liability for their payment arises absent demand.

In undertaking the reconsideration urged here, the Court has further reviewed the lease and further analyzed §365(d)(3) along with interpretations thereof made by fellow members of the judiciary. In this regard, the Court observes that it is rudimentary that the policy and intention of the Bankruptcy Code is to promote equal distribution of a debtor's assets among its creditors and to prevent the debtor's dismemberment during the slide into bankruptcy. Presumably, §365(d)(3) was enacted pursuant to this policy. Certainly any contrary interpretation would "produce a result demonstrably at odds with the intentions of [the] drafters" of the Code. Union Bank v. Wolas, \_\_\_\_\_ U.S. \_\_\_\_\_, 112 S. Ct. 527, 531, 116 L. Ed. 2d 514 (1991). Its language, legislative history and pertinent case law indicate that the statute is intended to ensure that the commercial lessor receives current payment for current services. 130 Cong. Rec. §8894-95 (daily ed. June 29, 1984) (remarks of Sen. Hatch) (reprinted App. Vol. 4, Collier on Bankr. (15th Ed.)). In essence, the statute is intended to maintain the status quo between these parties and to provide for the payment of the integral components of postpetition obligations under the lease. See In re Child World, Inc., 150 B.R. 328 (Bankr. S.D. N.Y. 1993). Although payment of integral components of lease obligations and therefore compliance with §365(d)(3) may in some cases involve payment by the debtor of more than simple rent charges as, for example, in the Child World case where the shopping center debtor was required to pay its prorata share of real estate taxes, the Court is not convinced that the statute is punitive or intended to enforce damage provisions of leases. To the contrary, Courts have long recognized that administrative expenses should be narrowly construed so as to reserve the estate for the benefit of other prepetition creditors. In re Farley, Inc., 152 B.R. 516 (Bankr. N.D. Ill. 1993). Indeed, at least one court has determined that the payments required pursuant to §365(d)(3) qualify as ordinary operating expenses under §363(c)(1). In re Telesphere Communications, Inc., 148 B.R. 525, 530 (Bankr. N.D. Ill. 1992). Clearly, these precedents suggest that in order for the effect of §365(d)(3) to be consistent with the balance of the Bankruptcy Code, it should be construed as only requiring payment for current, postpetition services. Consequently, this Court respectfully declines to adopt the conclusion of the Revco Court that §365(d)(3) is punitive in nature and

intended to enforce damage provisions in leases. In re Revco D.S., Inc., 109 B.R. 264, 272 (Bankr. N.D. Ohio 1989).

Mindful of this conclusion that the better view of §365(d) precludes its classification of damages and penalties as administrative expenses, the Court returns to its discussion of the specific relief requested by the Bond Trustee. As discussed above, the Bond Trustee contends that the prepetition default notification letter sent to the debtor and/or its proof of claim filed in April, 1991, satisfy the written demand requirement of the lease. In addition, the Bond Trustee claims entitlement to attorney's and appraisal fees under §365(d)(3) and Section 8.02 of the lease.

The February 26, 1988, letter unquestionably notified the prepetition debtor of its default on the February 24, 1988, payment and consequent liability for the balance of the bond principal and interest. However, there is no evidence that this or any other written demand was served on the postpetition debtor or Bankruptcy Trustee before its proof of claim was filed. Conversely, the proof of claim filed by the Bond Trustee in April, 1991, which includes the 18% interest claim, was served on the Bankruptcy Trustee and might therefore ordinarily satisfy the written demand requirement of Section 19.08 of the Lease because there is no prescribed time limit for such written demand in the lease. However, the Court concludes the more than three year delay between default and this written demand is unreasonable and prejudicial to other creditors. Moreover, this 18% interest penalty claim, as well as the attorney's fee and appraisal fee claims, are clearly comprised of damages that are punitive in nature. Therefore, even with the written demand for the 18% interest and absent the requirement for written demand for the fees, these claims do not qualify as §365(d)(3) administrative expenses pursuant to this Court's interpretation of the section. Of course, this conclusion does not preclude the Bond Trustee from filing an unsecured claim for these amounts. Finally the Court is asked to reconsider and alter its findings and conclusion that the Bond Trustee's postrejection, §503(b)(1), administrative expense claim is allowable only in an amount equal to the fair rental value of the space actually occupied by the bankruptcy trustee. It is the Bond Trustee's position that because Mr. Lamar Bullard, liquidation manager of the Trousdale inventory testified that it would not have been cost efficient for the

Bankruptcy Trustee to move the inventory from the Trousdale facility anytime before June 1, 1989, the Bankruptcy Trustee should be charged for occupancy of the entire facility from the rejection date, October 31, 1988, through June 1, 1989.

Mr. Bullard's testimony was stipulated by the parties for purposes of the initial motion and was available for the Court's consideration in connection therewith. Thus, this motion dangerously resembles an attempt to relitigate an old matter. This resemblance notwithstanding, the Court concludes, consistent with authorities cited in the Order which called for the allowance of an administrative expense claim for only the space actually used by the debtor, that the Bond Trustee is not entitled to an administrative expense claim for the fair rental value of the entire usable warehouse space. See, In re Cardinal Industries, Inc., 109 B.R. 738, 741 (Bankr. S.D. Ohio 1991); In re United Trucking Services, Inc., 851 F. 2d 159 (6th Cir. 1988). Neither Mr. Bullard's testimony nor the Bond Trustee's argument that although the inventory was reduced during the postrejection time period, it was not reduced from one storage area and then another but was reduced from all areas used for storage depending on the purchase order, persuades the Court to change its prior ruling. The Court is not persuaded because the rule remains that §503(b)(1) expenses are allowable only for expenses that are incurred for the estate's actual use and benefit. Particularly instructive in this regard is the Cardinal Industries case cited above, where, when faced with a §503(b)(1) request for rental expenses, the Court concluded that:

The debtor has equipment stored on the premises that, if consolidated into one area, would occupy approximately 1/3 of the leased space. And such storage has been the sole usage of the premises since rejection of the lease. Further, there has been no showing that such usage has adversely affected the lessor's ability to show the premises to prospective tenants. Therefore, . . . the lessor's allowed administrative claim for rent on the 6,000 square feet actually in use shall be calculated . . . .

109 B.R. at 741.

Just as in the Cardinal Industries case, if consolidated, the inventory here would have occupied less than the entire warehouse space. Moreover, there has been no evidence here that the Bankruptcy Trustee's postrejection occupancy interfered with the Bond Trustee's ability to show the premises to potential lessees or

purchasers. Indeed, the property remains unoccupied to this date in spite of efforts to sell or lease it. From these factors, it may be concluded that the Bond Trustee's motion to allow §503(b)(1) expenses for the fair rental value of the entire warehouse should be denied.

From the above findings and conclusions, it is HEREBY ORDERED that:

1. The motion of the Bankruptcy Trustee to amend the May 13, 1993, Order and judgment to reflect that the amount allowable as a §503(b)(1) administrative expense claim for office space occupancy is granted and the amount reduced from \$4,573.27 to \$1,902.69 by consent of the parties;
2. The motion of the Bankruptcy Trustee to amend the May 13, 1993, Order by altering the method of calculating the fair market rental rate of the premises employed by the Court is denied;
3. The motion of the Bankruptcy Trustee to amend the May 13, 1993, Order to establish a definite amount of paid insurance premiums for setoff against the Bond Trustee's §503(b)(1) administrative expense claim is granted and said amount shall be \$14,727.50;
4. The motion of the Bond Trustee to alter or amend or grant a new trial on the May 13, 1993, judgment disallowing 18% interest on the overdue rental payment as a §365(d)(3) administrative expense claim is denied;
5. The motion of the Bond Trustee to alter amend or grant a new trial on the May 13, 1993, judgment disallowing its attorney's and appraisal fees as §365(d)(3) administrative expense claims is denied;
6. The Bond Trustee's motion to alter, amend or grant a new trial on the May 13, 1993, judgment allowing the fair rental value of only the warehouse space actually occupied by the Bankruptcy Trustee as §503(b)(1) administrative expense claim is denied.

SO ORDERED, this 29<sup>th</sup> day of June, 1993.

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WILLIAM HOUSTON BROWN  
UNITED STATES BANKRUPTCY JUDGE  
Sitting by designation

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