



Dated: March 31, 2025
The following is ORDERED:

Jennie D. Latta

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
RELIABLE HEALTHCARE LOGISTICS, LLC,
Debtor.

Case No. 24-20252-L
Chapter 11

Reliable Healthcare Logistics, LLC,
Movant,

v.
Pool 5 Industrial TX, LLC,
Respondent,

and

Pool 5 Industrial TX, LLC,
Movant,

v.
Reliable Healthcare Logistics, LLC,
Respondent.

Objection to Claim and Response
thereto [ECF Nos. 218 and 246]

Application for Administrative
Expenses and Objection thereto
[ECF Nos. 247 and 275]

**ORDER DISALLOWING PREPETITION CLAIM AND
ADMINSTRATIVE EXPENSE CLAIM**

THESE CONTESTED MATTERS came before the Court for hearing on March 17, 2025. Creditor Pool 5 Industrial TX, LLC (“Pool 5”) filed proof of claim number 42-1 (the “Claim”) on May 6, 2024. It filed its *Application for Allowance of Administrative Expense for the Post-Petition, Pre-Rejection Lease Obligations under 11 U.S.C. § 365(d)(3)(A) and 503(b)(1)* in the amount of \$75,737.46 on September 19, 2024 (the “Admin Application”) [ECF No. 247]. The Debtor objects to the Claim and to the Admin Application on the basis that Pool 5 has fully mitigated its damages [ECF Nos. 218, 275].

JURISDICTION AND AUTHORITY

Jurisdiction over all contested matters arising in cases under title 11 lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). This contested matter asks the Court to determine and allow certain claims against the bankruptcy estate, one of the listed examples of core bankruptcy proceedings at 28 U.S.C. § 157(b)(2)(B). Therefore, the Court has authority to enter a final order in this proceeding subject only to appellate review. *See* 28 U.S.C. § 157(b)(1). Venue of this contested matter is proper to the Western District of Tennessee because it arises in a bankruptcy case pending in this district. *See* 28 U.S.C. § 1409(a).

STIPULATION OF FACTS

The parties submitted the following stipulation of facts:

Procedural History and Background Facts

1. On or about October 23, 2020, Exeter Cornerstone III, L.P. (“Exeter”), predecessor to Pool 5, entered into a Lease Agreement (the “Rejected Lease”) with Woodfield Distribution,

LLC (“Woodfield”); whereby, Exeter leased 1310 Cornerway Boulevard, San Antonio, Texas (the “Premises”) to Woodfield for a term of 123 months. A true and correct copy of the Rejected Lease is attached as Part 3 to the Claim.

2. On March 9, 2020, Exeter and Woodfield entered into a Commencement Date Memorandum. A true and correct copy of the Commencement Date Memorandum is attached as Exhibit A.

3. The Rejected Lease was assigned by Exeter, as landlord, to Pool 5 and by Woodfield, as tenant, to the Debtor.

4. The Debtor assumed all duties of Woodfield under the Rejected Lease. Landlord, Woodfield and the Debtor entered into that certain Landlord’s Consent to Assignment pursuant to which Pool 5 consented to the assignment of the Rejected Lease subject to certain conditions, including the guaranty of the Rejected Lease by KPower Global Logistics, LLC (“KPower”), an affiliate of the Debtor. A true and correct copy of the Landlord’s Consent to the Assignment is attached as Part 4 to the Claim.

5. The Debtor provided third party logistic services to Nestle Healthcare Nutrition, Inc. d/b/a Nestle Health Science U.S. (“Nestle”) in the Premises.

6. On January 19, 2024 (the “Petition Date”), Reliable Healthcare Logistics, LLC (the “Debtor”) filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code and, since the Petition Date, has acted as debtor in possession pursuant to section 1107(a) and 1108 of the title 11 of the United States Code (the “Bankruptcy Code”).

7. On February 5, 2024, Pool 5 filed suit against KPower on its guaranty in the District Court of Bexar County, Texas.

8. The Debtor moved to reject the Rejected Lease with the rejection “effective the later of March 1, 2024, or the date that the Debtor vacates the premises[.]” (ECF No. 67).

9. On March 14, 2024, this Bankruptcy Court entered an order granting the Debtor's rejection of the Rejected Lease with a deemed effective date of March 1, 2024 (the "Deemed Rejection Date"), and deeming the Leased Premises abandoned from the bankruptcy estate and surrendered to Landlord; provided that, "Landlord shall not take any action to dispose of any personal property of the Debtor at the leased premises until the earlier of the Debtor's consent to such disposal or March 31, 2024." (ECF No. 112, the "Rejection Order").

10. Subsequent to the rejection, Pool 5 and Nestle entered into negotiations towards a new lease, which was formalized and signed on April 5, 2024, with an effective date of March 1, 2024 (the "New Lease"). The New Lease was with NHS U.S., LLC ("NHS"), a subsidiary of Nestle. A true and correct copy of the New Lease is attached as Exhibit B.

11. On May 6, 2024, Pool 5 timely filed its Claim seeking \$278,961.29 (the "Claim Amount"), as a non-contingent claim, and \$321,549.09 (the "Reserved Amount"), as a contingent claim, for a total claim amount of \$600,510.38 (the "Total Amount").

12. The Claim Amount represents the following: the sum of (a) the January Obligations (as defined below); (b) the February Monthly Rent (as defined below); (c) the March Monthly Rent (as defined below); (d) the Reclaimed Rent (as defined below), and (e) the Commission (as defined below) less (f) the Security Deposit (as defined below).

13. On August 16, 2024, the Debtor filed its objection to the Claim. (ECF No. 218, the "Claim Objection").

14. On September 19, 2024, Pool 5 filed its response to the Claim Objection (the "Response") and also filed the Admin Application seeking to allow \$75,737.46 of the Claim Amount (the "Admin Amount") as an administrative expense under sections 363(d)(3)[sic] and 503(b)(1) of the Bankruptcy Code. (ECF Nos. 246 and 247).

15. On October 17, 2024, the Debtor objected to the Admin Application. (ECF No. 275, the “Admin Objection”).

16. On August 2, 2024, Pool 5 filed a motion for summary judgment in the District Court of Bexar County, Texas (the “Pool 5 MSJ”). A true and correct copy of the Pool 5 MSJ is attached hereto as Exhibit C.

17. On October 16, 2024, the Bexar County District Court entered an order on Pool 5’s MSJ. A true and correct copy of the order is attached hereto as Ex. D.

18. On October 31, 2024, KPower filed its motion for summary judgment in the District Court of Bexar County, Texas (the “KPower MSJ”). A true copy of the KPower MSJ is attached hereto as Ex. E.

19. On January 10, 2025, the Bexar County District Court entered an order on the KPower MSJ. A true and correct copy of the order granting summary judgment is attached hereto as Exhibit F.

20. The Parties agree that the stipulations above related to Exhibits C and E shall not have any evidentiary effect to prove the truth of the matter asserted regarding the allegations contained within those documents.

21. The Parties are not stipulating as to what preclusive effect, if any, Exhibits D and F have in this proceeding.

22. Pool 5, but not the Debtor, disputes the findings and holdings by the Court in the Guaranty Suit and intends to seek additional relief therein, including appellate relief to the extent necessary.

The Rejected Lease

23. The Rejected Lease defines “Monthly Rent” to mean “the monthly installment of Minimum Annual Rent plus the monthly installment of estimated Annual Operating Expenses

payable by Tenant under this Lease” (Rejected Lease, Rider, Additional Definitions) and makes monthly rent payable “in advance, on the first day of each calendar month during the Term.” (Rejected Lease § 5).

24. The Commencement Date Memorandum provides the Rent Table for the Rejected Lease:

Period	Annual	Monthly
February 23, 2021 – May 22, 2021 (the “Free Rent Period”)	N/A	\$0.00
May 23, 2021 – May 31, 2021	N/A	\$6,514.84
June 1, 2021 – February 28, 2022	N/A	\$22,440.00
March 1, 2022 – February 28, 2023	\$276,012.00	\$23,001.00
March 1, 2023 – February 29, 2024	\$282,912.36	\$23,576.03
March 1, 2024 – February 28, 2025	\$289,985.16	\$24,165.43
March 1, 2025 – February 28, 2026	\$297,234.84	\$24,769.57
March 1, 2026 – February 28, 2027	\$304,665.72	\$25,388.81
March 1, 2027 – February 29, 2028	\$312,282.36	\$26,023.53
March 1, 2028 – February 28, 2029	\$320,089.44	\$26,674.12
March 1, 2029 – February 28, 2030	\$328,091.64	\$27,340.97
March 1, 2030 – February 28, 2031	\$336,293.88	\$28,024.49
March 1, 2031 – May 31, 2031	N/A	\$28,725.10

25. Section 1(f) further provides that “Tenant shall be liable for payment of all Annual Operating Expenses” and “all utilities.” The Lease also provides for other tenant obligations.

26. Section 1(f) further provides a “Free Rent Period” and states that “[i]f at any time during the Term an Event of Default by Tenant occurs, the abatement of Minimum Annual Rent provided for herein shall immediately become void, and Tenant shall promptly pay to Landlord, in addition to all other amounts due to Landlord under this Lease, the full amount of all Minimum Annual Rent herein abated.”

27. The amount of abated rent during the Free Rent Period was \$67,320 (the “Free Rent”).

28. The Debtor paid a security deposit of \$31,053.33 (the “Security Deposit”).

29. The Debtor paid rent through December 2023, when it made its last payment on December 5, 2023.

30. In advance on January 1, 2024, Monthly Rent was due from the Debtor in an amount equal to \$37,574.03. The Debtor defaulted on the January Monthly Rent and did not cure the default. This Event of Default caused a 5% service and handling charge to be applied and interest to begin accruing at 1.5% per month until the Petition Date. Together, the January Monthly Rent, the service and handling charge, the interest accrued through the Petition Date, and adjustments to operating expenses resulted in damages of equal to \$38,247.36 (the “January Obligations”).

31. In advance on February 1, 2024, the Debtor failed to pay Monthly Rent of \$37,574.03 (the “February Monthly Rent”) for payment period 36 under the Rejected Lease.

32. In advance on March 1, 2024, the Debtor failed to pay Monthly Rent of \$38,163.43 (the “March Monthly Rent”) for payment period 37 under the Rejected Lease.

33. Payment periods 38-123 represented the future rental period (April 1, 2024 through May 31, 2031 or 86 months) at the time of rejection of the Rejected Lease (the “Future Rent Periods”) and the Monthly Rent due for the Future Rent Periods was \$2,251,242.31 (the “Future Rent Reserved under the Rejected Lease”) plus operating expenses.

34. In addition, Section 22(b)(ii) of the Rejected Lease provides that “. . .Landlord may, at Landlord’s option, make reasonable alterations and repairs in order to relet the Premises and relet all or any part(s) of the Premises for Tenant’s account. Tenant agrees to pay to Landlord on demand any deficiency (taking into account all reasonable costs incurred by Landlord) that may arise by reason of such reletting.”

35. Pool 5 incurred leasing costs and commissions in an amount equal to \$128,709.80 (the “Commission”) related to reletting the Premises under the New Lease.

The New Lease

36. NHS is currently occupying the Premises and performing under the New Lease.

37. The term of the New Lease is 60 months. (Section 1(c) of the New Lease).

38. NHS has two 5-year renewal options at fair market rent. (Section 31 of the New Lease). If NHS exercises its first renewal option, the New Lease will be extended beyond the Future Rent Periods under the Rejected Lease, which ended May 31, 2031.

39. The Minimum Annual Rent in Section 1(f) of the New Lease is stated below:

Period	Annual	Monthly
March 1, 2024 – February 28, 2025	\$435,200.04	\$36,266.67
March 1, 2025 – February 28, 2026	\$450,432.00	\$37,536.00
March 1, 2026 – February 28, 2027	\$466,197.12	\$38,849.76
March 1, 2027 – February 29, 2028	\$482,514.00	\$40,209.50
March 1, 2028 – February 28, 2029	\$499,401.96	\$41,616.83

40. In addition to Minimum Annual Rent, Nestle must pay the Annual Operating Expenses under the New Lease equal to \$176,799.96 or \$14,733.33 per month. (Sections 1(g) and 5(a)).

41. Between the time the Rejected Lease was entered into and the time the New Lease was entered into, market rent increased such that the future monthly rent under the New Lease is more per month than the future monthly rent obligations under the Rejected Lease.

42. At or about the execution of New Lease in April 2024, NHS paid base rent to Pool 5 attributable to the period commencing March 1, 2024 through March 31, 2024 in the amount of \$ 36,266.67 plus operating expenses attributable to March in the amount of \$14,733.33.

43. Total rent payable under the New Lease is \$2,333,745.12 in Minimum Annual Rents (the “Rent Reserved under the New Lease”) plus Annual Operating Expenses.

44. If Nestle completes performance under the New Lease, the Rent Reserved under the New Lease will exceed the Rent Reserved under the Rejected Lease (the “Potential Excess”).

45. From March 1, 2029, through May 31, 2031, any future rent payable is contingent (the “Contingent Future Rent”) on Nestle exercising its renewal option and the calculation of fair market rent; therefore, future rent payable during any renewal period is unknown at this time.

Stipulation of Fact Between Pool 5 Industrial TX, LLC, and the Debtor [ECF No. 305].

ISSUES PRESENTED

The parties submit the following questions for consideration by the Court:

1. Are any of pre-rejection, pre-abandonment damages (i.e., (a) the January Obligations; (b) the February Monthly Rent; (c) the March Monthly Rent; and (d) the reclaimed Free Rent) able to be mitigated as a matter of law by any of (i) the Rent Reserved under the New Lease (ii) the Potential Excess or (iii) the Contingent Future Rent?

2. Is the Commission an allowable damage under Section 22(b)(ii) of the Rejected Lease or Texas law, and, if so, can it be mitigated as a matter of law by either (i) the Potential Excess or the (ii) the Contingent Future Rent?

3. Is the March Monthly Rent, which had accrued as of the date of the Rejection Order, and the Deemed Rejection Date, allowable as an administrative expense under sections 363 (d)(3)(A)[sic] and 503(b)(1) of the Bankruptcy Code and *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986, 990 (6th Cir. 2000) and, if so, may it be mitigated by NHS’s subsequent payment of rent under the New Lease that is attributable to March?

DISCUSSION

The Court approaches the issues arising from the rejection of the Rejected Lease somewhat differently than the parties. The Bankruptcy Code directs that the amount of a claim arising from

the rejection of an unexpired lease (that has not previously been assumed) be determined and allowed as if the claim had arisen before the date of the filing of the petition. 11 U.S.C. §502(g)(1). In the case of leases of real property, the Bankruptcy Code imposes a cap on the resulting claim. 11 U.S.C. § 502 (b)(6). It must first be determined, however, whether the lessor has a claim. If a lessor has a duty to mitigate its damages, and it has relet the premises at a higher rent, it will have no section 502(b)(6) claim. *Unsecured Creditors' Committee of Highland Superstores, Inc. v. Strobeck Real Estate, Inc. (In re Highland Superstores, Inc.)*, 154 F.3d 573, 577 (6th Cir. 1998). If the lessor does have a claim, whether any part of the claim determined pursuant to section 502(b)(6) should be given administrative priority is determined pursuant to sections 365 and 503 of the Bankruptcy Code.

Calculation of a Section 502(b)(6) Claim

The calculation of a lessor's claim under section 502(b)(6) is straightforward. The claim will be the sum of:

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of--

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates.

11 U.S.C. § 502(b)(6).¹

¹ There are two approaches to the calculation of the "cap" on rent damages under section 502(b)(6)(a); the "rent" approach and the "time" approach. Under the rent approach, 15% of the remaining term of the lease is calculated as a percentage of the aggregate rent remaining to be paid under the terminated lease. Under the time approach, 15% of the remaining lease term is calculated, i.e., 15% of the months remaining to be paid under the terminated lease. See *In re Cortlandt Liquidating, LLC*, 658 B.R. 244, 255 (S.D.N.Y. 2024) According to a leading treatise on bankruptcy law, the time approach is more consistent with the language of the section:

The Sixth Circuit Court of Appeals explained the appropriate method for calculating a lessor's claim for damages for breach of a commercial lease in *Unsecured Creditors' Committee of Highland Superstores, Inc. v. Strobeck Real Estate, Inc. (In re Highland Superstores, Inc.)*, 154 F.3d 573 (6th Cir. 1998). Looking to the language of section 502, the court instructed the use of a four-step process:

First, the court calculates the total rents due under the lease from the earlier of the date of filing or the date on which the lessor repossessed or the lessee surrendered the leased property. Second, the court determines whether 15% of that total is greater than the rent reserved for one year following the debtor's filing. Third, the 15% amount is compared to the rent reserved under the applicable lease for three years following the filing. Finally, the court, on the basis of the foregoing calculations arrives at the total amount of the landlord's rejection damages.

Highland Superstores, 154 F.3d at 577.

Duty to Mitigate

Prior to performing the calculations required by section 502(b)(6), the court of appeals directs that the court first determine whether the lessor in fact has a claim. *Id.* The lessor has a duty to mitigate its damages. *Id.* citing *Bob's Sea Ray Boats, Inc.*, 143 B.R. 229, 231 (Bankr. D.N.D.). This duty was recognized by the more recent decision of the court of appeals relied upon by Pool 5, *Giant-Eagle, Inc. v. Phar-Mor, Inc.*, 528 F.3d 455, 462 (6th Cir. 2008). There, the court noted that the allowance of a claim in general under section 502 consists in two steps. First, under section 502(b), the claim is determined in lawful currency of the United States as of the date of the petition,

The 15 percent limitation of section 502(b)(6) speaks in terms of time, not in terms of rent ... Grammatically, the 'greater of' phrase contemplates two time periods, one year and 15 percent of the remaining term. But the latter period (15 percent of the remaining term) is further limited to three years, so that if the remaining lease term exceeds 20 years, the allowable damage claim will not increase.

4 COLLIER ON BANKRUPTCY ¶ 502.03[7][c] (16th ed. 2025).

The Sixth Circuit, however, appears to have adopted the "rent" approach in *Highland Superstores*. Under either approach, Pool 5 has fully mitigated its damages.

but, under section 502(b)(1), it is limited “to the extent that such claim is unenforceable against the debtor.” *Id.* “For these calculations, the court says, “we look to state law (and the lease), to the extent that it does not conflict with the bankruptcy code.” *Id.* citing *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979). Thus, in *Giant-Eagle*, the court looked to Pennsylvania law to determine whether the personal property lessor in that case had a duty to mitigate its damages and had in fact mitigated its damages.

The parties agree that Texas law should apply to questions concerning Pool 5’s duty to mitigate its damages arising from the breach of the Rejected Lease. The Debtor objects to the allowance of Pool 5’s claim because it says that Texas law would require Pool 5 to take account of its mitigation of damages in calculating its claim. The parties have stipulated that if Nestle completes performance under the New Lease, the rent reserved under the New Lease will exceed the rent reserved under the Rejected Lease. *Stipulation of Facts*, No. 44. Because the rent reserved under the New Lease exceeds the rent reserved under the Rejected Lease, the Debtor argues that Pool 5 has no claim arising from its breach of the Rejected Lease. The Debtor relies upon the finding of the Bexar County District Court in *Pool 5 Industrial TX, LLC v. Woodfield Distribution, LLC and KPower Global Logistics, LLC*, Cause No. 2024C1023976 (February 10, 2025) that “Plaintiff Pool 5 suffered no damages as a result of the breach of the Lease, and therefore Defendant KPower Global Logistics, LLC [guarantor of the Rejected Lease] is entitled to summary judgment.” [Stipulation of Fact, Exh. F]. The summary judgment further notes that Pool 5 filed a non-suit against the Defendant, Woodfield Distribution, LLC, and that all claims against Woodfield, predecessor to the Debtor with respect to the Rejected Lease, are dismissed without prejudice. This Court has not been made aware of any pending appeal from the summary judgment order.

The Texas Supreme Court imposed a duty to mitigate damages arising from breach of a real property lease in *Austin Hill Country, Inc. v. Palisades Plaza, Inc.*, 948 S.W.2d 293, 299 (Tex. 1997) (“We are persuaded by the reasoning of those courts that recognize that landlords must mitigate damages upon a tenant's abandonment and failure to pay rent.”).² The Texas court further held that, “the landlord’s duty to mitigate requires the landlord to use objectively reasonable efforts to fill the premises when the tenant vacates in breach of the lease,” (*id.*) and further that when a tenant pleads actual mitigation, “the tenant's evidence of the landlord's mitigation tends to rebut the measure of damages under the landlord's claim of breach” (*id.* at 300). The breach of a lease is treated as a breach of contract. *Id.* at 300.

Texas courts recognize four causes of action against a tenant for breach of the lease and abandonment:

First, the landlord can maintain the lease, suing for rent as it becomes due. Second, the landlord can treat the breach as an anticipatory repudiation, repossess, and sue for the present value of future rentals reduced by the reasonable cash market value of the property for the remainder of the lease term. Third, the landlord can treat the breach as anticipatory, repossess, release the property, and sue the tenant for the difference between the contractual rent and the amount received from the new tenant. Fourth, the landlord can declare the lease forfeited (if the lease so provides) and relieve the tenant of liability for future rent.

Id. citing *Speedee Mart v. Stovall*, 664 S.W.2d 174, 177 (Tex.App.—Amarillo 1983, no writ). Of these, the third most closely resembles the remedy provided by the Bankruptcy Code in the event of rejection of a lease. The rejection is treated as a prepetition breach. In that event, the landlord may “repossess, release the property, and sue the tenant for the difference between the contractual rent and the amount received from the new tenant.” An essential element of a cause of action for breach of contract is that the plaintiff suffered damages as the result of the breach. *Moayedi v.*

² “The rule in *Palisades Plaza* has since been codified.” *White v. Harrison*, 390 S.W.3d 666, 672 (Tex. App.-Dallas 2012); TEX.PROP. CODE ANN. § 91.006(a)(West 2023).

Arabghani, 2023 WL 6977815, *7 (Tex. App. 2023). To show damages, the plaintiff must show that it is economically worse off as a result of the breach of the lease. *Id.* at *10.

Pool 5 argues that mitigation should apply only to future rents and not to any amount that was owed with respect to the Rejected Lease when the bankruptcy petition was filed. The only case relied upon by Pool 5 in support of its contention that mitigation should apply only to “post-occurrence” obligations is a negligence action arising out of a motor vehicle accident. *See Nabors Well Servs., Ltd. v. Romero*, 456 S.W.3d 553, 564 (Tex. 2015). The legal framework for consideration of the use or non-use of seatbelts has no obvious application to the present case which is concerned with the calculation of damages for rejection of an unexpired lease. The Texas Supreme Court clearly holds that evidence of mitigation is available to rebut the measure of damages asserted by a landlord in the event of nonpayment and abandonment of a real property lease. In the context of this bankruptcy case, the claim arising from the rejection of the Rejected Lease is treated as if the breach occurred and the claim arose prior to the filing of the petition. 11 U.S.C. §§ 365(g)(1); 502(g)(1). No distinction is made between “pre- and post-occurrence” events. Rather, the claim is calculated as provided by Texas law, which permits evidence of mitigation to reduce the claim. If the lessor has relet the premises at a higher rent, as is the case here, there is no need to perform the calculations to determine further limitation of the claim specified in section 502(b)(6). *Highland Superstores*, 154 F.3d at 577. The lessor simply has no claim.

Pool 5’s Proof of Claim

Notwithstanding the Court’s conclusion that Pool 5 has no prepetition claim as the result of its complete mitigation of its damages, the Court has considered the proof of claim submitted

by Pool 5 in order to consider its claim that it is entitled to an administrative expense for rent accrued between the filing of the bankruptcy petition and the rejection of the Rejected Lease.

The Court has struggled to make sense of Pool 5's claims. Pool 5 submitted a proof of claim in the amount of \$600,510.38. In the Addendum to its proof of claim, Pool 5 states that as of the petition date, there was unpaid rent due and owing of \$105,567.36, and that it held a security deposit of \$31,053.33. It further states that additional obligations were incurred from the petition date to the effective date of the rejection of \$75,737.46. It states that for the remaining term of the lease, the debtor owes \$2,274,828.34 in minimum annual rent and \$1,231,824.00 in annual operating expenses for a total of \$3,506,642.34 in rent reserved.³ It then calculates its claim pursuant to section 502(b)(6) at 15% of the rent reserved for the remaining term of the lease plus unpaid rent due as of the petition date. It calculates this amount to be \$600,510.38 but gives no explanation as to how it arrived at this figure. The Court has attempted to reconstruct its calculation.

It appears that Pool 5 calculated 15% of the remaining rent reserved and added that result to the unpaid rent due at the filing of the petition less the security deposit. Fifteen percent of the rent reserved of \$3,506,642.34 calculated by Pool 5 is \$525,996.35. The difference between this figure and the claim amount of \$600,510.38 is \$74,514.03, which is the difference between the unpaid rent due as of the petition date (\$105,567.36) and the security deposit (\$31,053.33).

Pool 5 then claims that \$278,961.29 of this amount is noncontingent and \$321,549.09 is contingent upon the performance of the new tenant. The Addendum to the proof of claim gives no explanation of this division.

³ The Court cannot determine whether the calculation of rent reserved for the remaining term of the lease is calculated as of the petition filing date, as directed by section 502(b)(6) or as of the effective date of the rejection of the lease (March 1, 2024), or as of April 1, 2024, which would exclude the obligations that Pool 5 asserts were incurred from the petition date to the effective date of rejection of \$75,737.46.

In the Stipulation of Facts, however, Pool 5 explains that the noncontingent “Claim Amount” of \$278,961.29 consists of the sum of the January Obligations (\$38,247.36), the February Monthly Rent (\$37,574.03), the March Monthly Rent (\$38,163.43), the Reclaimed Rent (\$67,320.00), and the Commission (\$128,709.80) (all as defined in the Stipulation of Facts). It is clear from this description that the “Claim Amount” includes the February Monthly Rent and the March Monthly Rent even though it is not clear whether Pool 5 included these amounts in its calculation of rent reserved in the Addendum to its proof of claim.

Remarkably, Pool 5’s Admin Application seeks recovery of the February Monthly Rent (\$37,574.03) and the March Monthly Rent (\$38,163.43) for a total of \$75,737.46, both of which are included in its “non-contingent claim,” as its administrative expense claim. *See Pool 5 Industrial TX, LLC’s Supplemental Response to the Debtor’s Objections to Claim No. 42 and the Administrative Expense Application* [ECF No. 308, p. 8] (“Pool 5 should be determined to have an allowed non-contingent claim of \$278,961.29 and an allowed contingent claim of \$321,549.09 that becomes due only upon any future default of the New Lease by NHS. In addition, Pool 5 should be allowed an administrative expense claim of \$75,737.46.”).

The Section 365(d)(3) Claim

Pool 5 argues that section 365(d)(3) takes the February Monthly Rent (\$37,574.03) and the March Monthly Rent (\$38,163.43) that were to be performed in the sixty days after the filing of the petition out of the conclusion that it has no claim against the bankruptcy estate as the result of the New Lease. This case presents the question of whether a landlord that has fully mitigated its damages arising from rejection of its lease may nevertheless claim an administrative expense for the post-filing, pre-rejection period.

Section 365(d)(3) provides:

The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

11 U.S.C.A. § 365(d)(3). Note that the period in which obligations are to be performed is not the sixty-day period after the petition is filed, but the period between the filing of the petition and the assumption or rejection of the lease. Section 365(d)(3) permits the debtor to seek an extension of time to perform any such obligations that arise within the first sixty days, but not beyond the sixty-day period. The Rejected Lease was rejected effective March 1, 2024, and the Debtor gave notice of its intent to reject on February 19, 2024, within the first thirty days after the petition was filed. *Motion to Reject Lease* [ECF No. 67]. The only obligation that arose within the period between the filing of the petition and the effective date of rejection was the obligation to pay February Monthly Rent.

Related to section 365(d)(3) is section 365(d)(4), which provides:

(4)(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of--

- (i) the date that is 120 days after the date of the order for relief; or
- (ii) the date of the entry of an order confirming a plan.

Unlike a Chapter 7 case, in which a lease of nonresidential real property is deemed rejected if it is not assumed by the trustee within 60 days after the order for relief, the trustee or debtor in possession in the reorganization chapters of the Bankruptcy Code may assume or reject within 120

days after the order for relief or entry of the order confirming the plan, whichever is first. This period may be extended for up to 90 days for cause.

Section 365(d)(3) should also be compared to section 365(d)(5), which is concerned with unexpired leases of personal property in Chapter 11 cases. It provides:

(5) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

11 U.S.C.A. § 365(d)(5). This section gives a grace period of 60 days when no obligations under an unexpired lease of personal property need be performed. This does not mean that they need never be performed (in the event of assumption) nor that they will be excluded from calculation of the lessor's claim for damages (in the event of rejection), but only that they need not be performed in the first 60 days when the debtor is determining whether to assume or reject those leases. In contrast, for leases of nonresidential real property, section 365(d)(3) specifies that performance must begin within the first 60 days for any obligations that arise within those first 60 days before rejection.

Section 365(d)(3), enacted in the Bankruptcy Reform Act of 1994, was intended to protect lessors of nonresidential real property from the hardships that can arise while a debtor is determining whether to assume or reject its lease. *See* 2 NORTON BANKR. L. & PRAC. 3d § 49:9. The trustee or debtor in possession is required to perform pursuant to the contract; any resulting claim arising during the period between the filing of the petition and assumption or rejection is

given administrative priority without the possibility of reduction based upon reasonableness or benefit to the estate as is true for other administrative expense claims calculated pursuant to section 503(b)(1). *See In re Steepologie*, No. 23-10671-cgb, 2024 WL 117525, *2 (Bankr. W.D. Tex. Jan. 10, 2024). Section 365(d)(3) does not give rise to a new claim, however.

The ultimate rejection of an unexpired lease is treated as a breach of the lease immediately prior to the filing of the petition (unless the rejection follows a previous assumption of the unexpired lease). 11 U.S.C. § 365(g). The allowance of the claim resulting from rejection is determined in accordance with section 502, as was discussed above. In this case, it appears that Pool 5 has included the full amount of the February Monthly Rent (and the March Monthly Rent and the Leasing Commission) in its Claim Amount. Notwithstanding this, it appears that the value of the New Lease exceeds Pool 5's claim for damages. Pool 5 has fully mitigated its damages. To paraphrase Judge R. Guy Cole, former bankruptcy judge, in *Highland Superstores*, "if the lessor has relet the premises at a higher rent, it generally will have no [section 365(d)(3)] claim." *See Highland Superstores*, 154 F.3d at 577. Before the lessor can have a priority claim, it must first have a claim. *Id.*

The Bexar County District Court, a court with greater expertise than this Court in the application of Texas law, has determined that Pool 5 suffered no damages from the Debtor's breach of the Rejected Lease, at least with respect to the calculation of liability on the related guaranty. Even if this were not true, the burden rests with Pool 5 to show that it has suffered actual damages as the result of the breach of the Rejected Lease that give rise to a claim under the Bankruptcy Code. The value of the New Lease appears to fully compensate Pool 5 and restore the benefit of its bargain under the Rejected Lease. As a result, it has no prepetition claim and no priority claim arising from that breach.

CONCLUSION

For the foregoing reasons, the Court finds and holds that Pool 5 fully mitigated its damages arising from the rejection of the Rejected Lease. As a result, Pool 5 holds no allowed claim against the bankruptcy estate. Accordingly, the Court answers the questions raised by the parties as follows:

1. Are any of pre-rejection, pre-abandonment damages (i.e., (a) the January Obligations; (b) the February Monthly Rent; (c) the March Monthly Rent; and (d) the reclaimed Free Rent) able to be mitigated as a matter of law by any of (i) the Rent Reserved under the New Lease (ii) the Potential Excess or (iii) the Contingent Future Rent?

Answer: Yes, all of these damages are able to be mitigated under Texas law.

2. Is the Commission an allowable damage under Section 22(b)(ii) of the Rejected Lease or Texas law, and, if so, can it be mitigated as a matter of law by either (i) the Potential Excess or the (ii) the Contingent Future Rent?

Answer: Yes, the Commission is an allowable damage under the Rejected Lease, but it can and has been fully mitigated.

3. Is the March Monthly Rent, which had accrued as of the date of the Rejection Order, and the Deemed Rejection Date, allowable as an administrative expense under sections 365 (d)(3)(A) and 503(b)(1) of the Bankruptcy Code and *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986, 990 (6th Cir. 2000) and, if so, may it be mitigated by NHS's subsequent payment of rent under the New Lease that is attributable to March?

Answer: No, the March Monthly Rent is not allowable as an administrative expense because it was fully mitigated together with the balance of the potential damages of Pool 5.

cc: Debtor
Attorney for Debtor
Pool 5 Industrial TX, LLC
Attorney for Pool 5 Industrial TX, LLC
United States Trustee