

“Leases and Bankruptcy”
presented by
Patricia Baron Tomasco
Brown McCarroll, LLP
Austin

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WHEN THE TENANT FILES BANKRUPTCY**I. Before the Bankruptcy is Filed.**

The Bankruptcy Code, found at 11 U.S.C. §§ 101, et seq., creates a category of rights known as “executory contracts.” An executory contract, in simple terms, is a contract for which there is material performance remaining due from both sides. Whether or not a contract is executory depends on its status as of the filing of the bankruptcy petition. A lease of real property that has not been terminated is a quintessential executory contract. Thus, a lease will be subject to being either assumed or rejected by the trustee or, more often, a debtor in possession. This may or may not be a good result for the lessor.

A. Lease Provisions.

Many form leases contain clauses that are utterly unenforceable in bankruptcy. Other provisions could be included that provide much more protection but are often ignored.

1. **Bankruptcy Termination Clauses.** Clauses which purport to terminate or modify a lease upon the filing of a bankruptcy are rendered unenforceable by the Bankruptcy Code. Because the invalidation applies to both the filing of bankruptcy as well as the financial condition of the debtor, provisions that are triggered by mere insolvency or the failure of financial covenants would be unenforceable as well.
2. **Default Provisions.** As explained below, it may be the case that the best option for the lessor is to terminate the lease before the tenant can file bankruptcy to prevent the lease from being caught up in a long-winded Chapter 11. Thus, the tenant should be aware of any provision allowing for termination of the lease, rather than only possession, on very short notice.
3. **Other Security.** Third-party guarantees, letters of credit and security deposits are all valuable means of insuring payment in the event of default. Although Texas law allows for landlord’s liens, they are not as easily enforced as a UCC-1 filing to secure the payment of rent. In order to be enforceable, the lease or other instrument should grant the lessor the lien and the UCC-1 should be filed in the appropriate jurisdiction within 20 days of the signing of the lease.
4. **Use Restrictions.** As discussed below, the tenant in bankruptcy may assume and assign a lease to a third party even without the lessor’s consent. One of the conditions that the assignee must meet, however, is the requirement that the assignee not upset the lessor’s “tenant mix” for a particular shopping center. Although it is not decisive, language in the lease that sets up a particular use restriction is highly persuasive on this issue. A restriction for a particular tenant as a high-end retail grocer should, in a shopping center lease, prevent the lease from being assigned to a flea-market consignment shop.

5. **All Amounts Deemed “Rent.”** As discussed below, “rent” under a lease holds special meaning under the Bankruptcy Code. Thus, in a triple net lease, the courts sometimes get confused about including things other than base rent as allowed claims. Tenant should be aware of any clause in the lease that purports to include all charges in the definition of “rent.” Similarly, tenants should be aware of any clause that includes estimated charges for taxes and similar items in the monthly payment required under the lease.

B. Pre-Bankruptcy Defaults.

The first indication of a tenant’s slide into bankruptcy is a default under the subject lease. Pre-bankruptcy, lessor may demand as much security as possible in the form of letters of credit, third-party guaranties, and security deposits. Depending on the relevant market for reletting, other tactics can be employed to either extract payment (in a down market) or to terminate the lease to clear the way for a new tenant (in an up market).

1. **Lease Termination.** Lessors sometimes default to terminating possession rather than terminating the lease altogether. If the lease is below market or there is a financially viable tenant to take the space, terminating the lease may be the best option. Lease termination also has the advantage of preventing the lease from being caught up in the bankruptcy proceeding. If the lease is below market, the lease will likely be assumed and assigned to a new tenant without the lessor’s consent. By terminating the lease before the tenant goes into bankruptcy, the lessor can better control the destiny of the relationship.

The downside of lease termination is the inability to collect future rents or to make a claim against the bankruptcy estate. Thus, this factor should be weighed against the economic advantages of an early termination. But the possibility of needing to terminate a lease quickly should be addressed in the lease itself. An overly lengthy default period could make early termination an impossibility.

2. **Terminating Possession.** Terminating possession is the usual method of handling a tenant default because it preserves the tenant’s ongoing obligation to pay rent. Even a lease that is in default and possession terminated can be assumed and assigned in a bankruptcy and continuing to lock-out a tenant post-bankruptcy can be a violation of the automatic stay. Thus, the decision to terminate possession without terminating the lease should be weighed against the disadvantages of possibly being caught up in a subsequent bankruptcy.

II. After the Bankruptcy is Filed.**A. Types of Bankruptcy.**

1. **Chapter 7.** A corporation, partnership or other business entity as well as an individual can file for a Chapter 7 bankruptcy. A Chapter 7 bankruptcy is a liquidation of all assets that are not otherwise protected by personal exemptions (only individuals have exemptions). A Chapter 7 trustee is appointed upon the filing of the Chapter 7 case, selected from a panel of individuals designated to serve in that capacity in that district. In a Chapter 7, the trustee takes possession of all of the property of the debtor, sells it and then distributes the proceeds of the sale to creditors who have filed a claim. A Chapter 7 trustee rarely assumes a lease. More likely, the lease will be deemed rejected.
2. **Chapter 11.** Both individuals and business entities can file a Chapter 11. A Chapter 11 is usually a “reorganization” of the entity, but it can also be used to liquidate an entity, usually when the liquidation involves a sale of an operating company or its assets. One primary distinction between and Chapter 7 and a Chapter 11 is that a Chapter 11 debtor steps into the shoes of a trustee and continues to manage the business and the implementation of the reorganization. In such cases, the debtor is referred to as a “debtor in possession.” For cause, however, the bankruptcy court may appoint a Chapter 11 trustee to manage the debtor’s business. The other primary distinction is that the Chapter 11 process involves the filing of a “plan of reorganization” that sets out the means by which the debtor intends to reorganize its business (or sell it) and distribute the proceeds

III. Tenant’s Obligations and Rights While Operating in Chapter 11.

Understanding what the debtor does and does not have to pay is key to managing the relationship after the bankruptcy. Generally speaking, all charges under a lease that relate to a debtor’s use of the space for any post-petition period are payable as administrative rent under the Bankruptcy Code and must be paid when due under the terms of the lease.

A. What the Debtor Must Pay.

Rent. A majority of courts require debtors to pay rent from and after the date of the petition, including pro rated rent for the month in which they filed. Thus, a petition on May 15 would require the debtor to pay ½ of May’s rent plus all of June’s rent, most likely by June 10, or the stated default period in the lease. Several courts in Texas, particularly the Southern and Western Districts, would require only June rent to be paid, arguing that May’s rent does not “become due” post-petition.

CAM, Taxes and Insurance. Charges that relate to rent due or additional rent due under a lease are includable as administrative rent that is payable post-petition. This includes things like common area maintenance, real property taxes and insurance. The key is that these charges should relate to a period of time that is post-petition. A tax assessment for taxes due for the prior year is probably not payable as administrative rent

even though it is “due” under the lease post-petition. Charges for insurance for the next six months that is due probably is payable as administrative rent. As specified above, including charges as “rent” under a lease prevents many arguments later about what must be paid as administrative rent. Theoretically, all charges that are measured by time and that relate to a post-petition period should be paid as rent. However, the likely scenario post-petition is that the debtor will pay the monthly recurring charge and will refuse to pay other billings such as special tax assessments. Although taxes relating to a post-petition period are includable as rent under most leases, it may require hiring a lawyer to enforce non-recurring charges.

Post-Petition Events. The debtor is liable for anything that happens post-petition, although not necessarily as post-petition rent. Thus, a slip and fall caused by the lessor’s negligence would be chargeable against the bankruptcy estate as an administrative claim, if not covered by insurance.

B. What the Landlord Cannot Do (without Lifting the Stay).

Demand Pre-petition Rent. The automatic stay prevents lessor from attempting to collect pre-petition rent. This would include continuing to lock-out a tenant who was in default notwithstanding continued non-payment. The solution to a non-paying tenant is to move to lift the stay to continue the eviction process or to compel rejection of the lease.

Lock-out a Tenant. Again, locking out a tenant or continuing to lock out a tenant would violate the automatic stay. Even with respect to post-petition rent, the preferred method is to move to lift the stay to enforce the default provisions of the lease.

Terminate a Lease or Terminate the Right of Possession. Again, enforcing a lease should be accompanied by a motion for relief from stay, even to terminate the lease if it was not terminated pre-petition.

C. What the Landlord Can Do.

Demand Post-petition Rent. Writing a letter to the tenant to collect rent for a post-petition rent period does not violate the stay.

Bill for Special Charges Accruing Post-petition. The landlord can continue to bill for special charges and assessments, taxes, insurance and the like that relate to a post-petition rental period.

Enforce Non-monetary Provisions of the Lease. The landlord can continue to enforce use and conduct restrictions relevant to the post-petition period but would have to lift the stay to terminate the lease or terminate possession as a result of a default under these provisions.

D. Assumption, Assignment and Rejection.

A lease may be assumed by the debtor that is reorganizing. Alternatively, the lease may be assumed and assigned to a third party subject to certain requirements of the Bankruptcy Code, notwithstanding anti-assignment provisions in the lease. Section 365(d)(4) of the Bankruptcy Code provides for the trustee or debtor in possession to assume or reject non-residential real property leases within 120 days of the filing of the petition. The bankruptcy court may grant a 90-day extension “for cause.” In many cases, the rejection deadline is extended to allow the debtor more time to determine the direction of the case.

1. Assumption/Assignment Requirements.

Cure. A debtor may assume a lease by meeting certain criteria. The most critical of these is that assumption must be accompanied by a “cure” of all existing payment defaults under the lease, usually the pre-petition arrearages. Cure must be “prompt” which usually means as long as 6 months. Under Section 365(b)(1)(A) of the Bankruptcy Code, the tenant must cure non-monetary defaults arising from a failure to operate its business “in accordance with a nonresidential real property lease.” Cure can be effectuated by tenant’s post-assumption performance and by compensating the landlord for loss suffered from the non-monetary default.

Adequate Assurance of Future Performance. Assumption is often coupled with an assignment to a third party. Whether assumed or assumed and assigned, the debtor or the third party, as the case may be, must demonstrate that they can continue to perform under the contract. The term for this is “adequate assurance of future performance.” Adequate assurance does not require a guaranty of future performance. Rather, it requires a showing that the debtor is capable meeting the requirements of the contract and is likely to continue to do so in the future. For an assignee, the criterion is financial capacity similar to that of the debtor *as of the time the debtor entered into the lease.*

Use Restrictions. Assumption and assignment remains subject to the use-type restrictions of a lease, including “radius, location, use, or exclusivity provision[s].” Thus, carefully crafted use restrictions can prevent an undesirable tenant from being the assignee of the debtor’s lease. In addition, for shopping center’s only, a “tenant mix” objection can prevent an assignment to a tenant that disrupts a tenant mix plan *and* will not cause the landlord to be in default of any other lease, financing arrangement or master lease relating to such shopping center.”

E. Consequences of Rejection.

If the debtor determines that a lease is burdensome, it may reject the lease. Rejection does not terminate the lease however. It simply means that the debtor will no longer perform the lease and that the other party to the contract can file a claim for damages

against the estate. Rejection would not, for example, terminate any obligations of a third party to the lease, such as a non-released pre-petition assignor, to continue to perform. Rejection gives rise to a claim that may be filed to compensate the landlord for the non-payment of rent for the remaining term of the lease.

If the landlord rejects the lease, the tenant may treat the lease as terminated by virtue of its terms. In the alternative, the tenant may retain its rights under the lease (including rental obligations and any rights of use, possession, quiet enjoyment, assignment, subletting, assignment, or hypothecation) and continue to occupy the premises for the remainder of the lease. If the tenant retains its rights under the lease, it may offset any rent against services that the landlord no longer provides under the rejected lease.

Where the tenant elects to retain its rights under a “shopping center” lease, the landlord’s rejection does not affect the enforceability provisions that concern radius, location, use, exclusivity, or tenant mix or balance. Thus, the shopping center remains unaffected after rejection of a lease.

IV. Claims Filed Against Tenant.

Until the lease is rejected, the lessor technically has no claim. Once the lease is rejected, the order for rejection will usually specify a period for filing a claim, usually 30 days. Sometimes the deadline for filing rejection damages claims is set forth in a lengthy confirmation order and can be easily missed. If the lease is assumed, there is no claim to file since the landlord will have received a cure of all defaults and an assumption of the remaining term of the lease. For post-petition administrative rent, the appropriate pleading is called an “application for payment of administrative claim,” which should set forth the basis for a claim and the amount of the administrative rent.

A. Administrative Rent.

Administrative rent should be paid timely. Sometimes there is a dispute as to what is and is not administrative rent. In this situation, the landlord should file an application for payment of administrative claim. The tenant should strongly oppose the landlord’s application for payment of administrative claim. The time period for administrative rent is from the petition date through the effective date of rejection (the day that the order approving rejection is entered). There are slight variations on this rule depending on the jurisdiction. **Note:** A security deposit should be applied against the rejection damages claim, not against any administrative rent claim.

B. Rejection Damages.

As stated above, the tenant may offset rent against any services that the rejecting landlord will no longer provide under the lease. The landlord’s rejection damages are measured under the rubric of § 502(b)(6). If the lease is rejected, the landlord should file a proof of claim for damages. The three non-overlapping components of a claim under a rejected lease are:

1. Pre-petition rent and other unpaid charges;
2. Unpaid administrative rent;
3. Rejection damages calculated under 11 U.S.C. § 502(b)(6).

Although the administrative rent would be the subject of an application, it is important to not “deduct” administrative rent either paid or unpaid from the rejection damages calculation. It is a separate claim. For purposes of calculating a rejection damages claim, it is necessary to learn the § 502(b)(6) formula which is one year’s rent or 15% of the remaining term, not to exceed 3 years’ rent, whichever is greater. A majority of courts interpret this provision to speak in terms of time, not dollars. Thus, the calculation yields a figure of months and the claim would then be calculated as the rent due for that number of months. The formula yields the following table:

Remaining Term	502(b)(6) Claim
0-80 months	1 year’s rent
80 months to 240 months	15% of the remaining term (in months)
Over 240 months	3 years’ rent

Once the number of months is determined, the rent due for those months, including rent increases, should be determined. The resulting amount is the § 502(b)(6) claim.

Thus, under a lease for which the total rent due is \$100,000 a month with a remaining term of 36 months and the tenant was one month past due at the time it filed bankruptcy, the total claim would be calculated as follows:

Pre-petition rent:	\$100,000.00
502(b)(6) claim:	\$1,200,000.00
Total:	\$1,300,000.00

Tenants should argue that the landlord's actual rejection damages under § 502(b)(6) are less than the formula yields. Most courts, however, do not apply mitigation against a rejection damages claim unless the mitigation brings the total claim to an amount that is less the rejection damages claim. In our example, assume that the property was relet 6 months after the effective date of rejection for \$80,000 per month. Also assume that the landlord paid a leasing commission of \$100,000.00, attorneys' fees of \$50,000 and new tenant build-out of \$100,000.00. Comparing the total lessor damages against the available mitigation yields a result that is still higher than the § 502(b)(6) amount.

Description	Amount
Rent for remaining term	\$3,600,000
Reletting expenses	\$250,000
Less Rent from New Tenant	(2,400,000)
Net Damages	\$1,450,000

Because the net damages are still greater than the § 502(b)(6) calculation, the mitigation objection will not be sustained.

V. Conclusion.

Non-residential real property leases are accorded much attention in the Bankruptcy Code. Their treatment is designed to balance the interests of the debtor/lessee and the landlord. Although the statutes seem complex, the scenario arises often enough that the case law is relatively well-developed making the rules of the game well-known to all the players. While not exhaustive, this outline is intended to cover the kinds of issues that are likely to arise for a typical commercial tenant. Each case has individualized issues that may require substantial refinement of these general concepts. Thus, specialized legal advice should be sought to address particular issues that may arise.

VI. Drafting Lessons.**A. Bankruptcy Clauses that Work.**

Liquidation. In the event that Tenant shall become a debtor under Chapter 7 of the U.S. Bankruptcy Reform Act of 1978, as amended (the “Bankruptcy Code”), and Tenant’s trustee or Tenant shall elect to assume this Lease for the purpose of assigning the same or otherwise, such election and assignment may be made only if the provisions of this Section are satisfied. If Tenant or Tenant’s trustee shall fail to assume this Lease within one hundred and twenty (120) days after the entry of an order for relief, this Lease shall be deemed to have been rejected. Immediately thereupon, Landlord shall be entitled to possession of the Leased Premises without further obligation to Tenant or Tenant’s trustee and this Lease, upon the election of Landlord, shall terminate, but Landlord’s right to be compensated for damages shall survive, whether or not this Lease has been terminated.

Reorganization. In the event that a voluntary petition for reorganization is filed by Tenant, or an involuntary petition is filed against Tenant under Chapter 11 of the Bankruptcy Code, or in the event of the entry of an order for relief under Chapter 7 in a case which is then transferred to Chapter 11, Tenant’s trustee or Tenant, as debtor-in-possession, must elect to assume this Lease within one hundred and twenty (120) days from the date of the filing of the petition under Chapter 11 or the transfer thereto, or Tenant’s trustee or the debtor-in-possession shall be deemed to have rejected this Lease. Immediately thereupon, Landlord shall be entitled to possession of the Leased Premises without further obligation to Tenant or Tenant’s trustee, and this Lease, upon the election of Landlord, shall terminate. Landlord’s right to be compensated for damages, shall survive, whether or not this Lease has been terminated.

[Comment: These paragraphs restates the provisions of 11 U.S.C. § 365(d).]

Conditions to Assumption. No election by Tenant’s trustee or the debtor-in-possession to assume this Lease, whether under Chapter 7 or Chapter 11, shall be effective unless each of the following conditions has been satisfied:

- (a) Tenant’s trustee or the debtor-in-possession has cured all defaults under this Lease, or has provided Landlord with evidence satisfactory to Landlord that it will cure all defaults capable of being cured by the payment of money within ten (10) days from the date of such assumption and that it will cure all other defaults arising from any failure to perform non-monetary obligations under this Lease thirty (30) days after the date of such assumption. Tenant shall cure all non-monetary defaults by post-assumption performance and by compensation to Landlord for economic loss suffered as a result of non-monetary default.
- (b) Tenant’s trustee or the debtor-in-possession has compensated, or has provided Landlord with evidence satisfactory to Landlord that, within ten (10) days from the date of such assumption, that it will compensate Landlord for any actual pecuniary loss incurred by Landlord arising from the default of Tenant, Tenant’s trustee, or the debtor-in-possession as indicated in any statement of actual pecuniary loss sent by Landlord to Tenant’s trustee or the debtor-in-possession.

[Comment: Clarifies by contract what is left unclear in the cases about how much time is sufficient for “prompt cure.”]

- (c) Such assumption will not breach or cause a default under any provision of any other lease, mortgage, financing agreement or other agreement by which Landlord is bound, relating to the Leased Premises.

[Comment: Expands the scope of the Shopping Center Amendments beyond their current language – helpful to the landlord in an argument but perhaps not enforceable under 11 U.S.C. § 365(f)]

- (d) Tenant's trustee or the debtor-in-possession shall (i) provide Landlord with "Assurance", as defined below, of the future performance of each of the obligations under this Lease of Tenant, Tenant's trustee or the debtor-in-possession, (ii) in addition to any other security deposits held by Landlord, deposit with Landlord, as security for the timely payment of Rent and for the performance of all other obligations of Tenant under this Lease, an amount equal to three (3) monthly installments of Rent (in the amount then payable), and (iii) pay in advance to Landlord on the date each installment of Rent is due and payable, one-twelfth (1/12) of Tenant's annual obligations for Impositions to be made by Tenant pursuant to this Lease. The obligations imposed upon Tenant's trustee or the debtor-in-possession by this subsection shall continue with respect to Tenant or any assignee of this Lease, after the conclusion of proceedings under the Bankruptcy Code.

For purposes of the foregoing subsection, the term "Assurance" shall mean no less than:

- (1) Tenant's trustee or the debtor-in-possession has and will continue to have sufficient unencumbered assets after the payment of all secured obligations and administrative expenses to assure Landlord that sufficient funds will be available to fulfill the obligations of Tenant under this Lease; and
- (2) To secure to Landlord the obligations of Tenant, Tenant's trustee or the debtor-in-possession and to assure the ability of Tenant, Tenant's trustee or the debtor-in-possession to cure the defaults under this Lease, monetary and/or nonmonetary, there shall have been (A) sufficient cash deposited with Landlord, or (B) the bankruptcy court shall have entered an order segregating sufficient cash payable to Landlord, and/or (C) Tenant's trustee or the debtor-in-possession shall have granted to Landlord a valid and perfected first lien and security interest and/or mortgage in property of Tenant, Tenant's trustee or the debtor-in-possession, acceptable as to value and kind to Landlord.

Conditions to Assignment. If Tenant's trustee or the debtor-in-possession has assumed this Lease pursuant to the terms and provisions of this Section for the purpose of assigning (or elects to assign) this Lease, this Lease may be so assigned only if the proposed assignee has provided adequate assurance of future performance of all of the terms, covenants and conditions of this Lease to be performed by Tenant. As used in this subsection "adequate assurance of future performance" shall mean at least that clauses (2)(B) and (2)(C) of the above definition of "Assurance", and each of the following conditions, has been satisfied:

- (a) the proposed assignee has furnished Landlord with a current financial statement audited by a certified public accountant determined in accordance with generally accepted accounting principles consistently applied indicating a credit rating, net worth and working capital in amounts which Landlord reasonably determines to be sufficient to assure the future performance of such assignee of Tenant's obligations under this Lease,

but in no event indicating a net worth less than the net worth of Tenant and any guarantors of this Lease, on the date of execution hereof;

- (b) such assignment will not breach or cause a default under any provision of any other lease, mortgage, financing agreement or other agreement by which Landlord is bound, relating to the Leased Premises; and
- (c) the proposed assignment will not release or impair any guaranty of all or any portion of this Lease.

[Comment: Restates protections in (b) and(c) of Shopping Center Amendments of 1984; use in non-shopping center context may not be enforceable. Subpart (a) expands provisions of Section 365(b) that applies to all non-residential real property leases.]

Reasonable Charges. When, pursuant to the Bankruptcy Code, Tenant's trustee or the debtor-in-possession shall be obligated to pay reasonable use and occupancy charges for the use of the Leased Premises, such charges shall not be less than the Rent and all additional amounts payable by Tenant under this Lease and shall be paid at the times and when due as though such charges were Rent and such additional payments. Landlord shall not be obligated to Tenant or Tenant's trustee to provide any services or supplies to tenant if there is any default under the terms of this Lease unless Tenant or Tenant's trustee provides prior payment for such services or supplies at Landlord's cost.

[Comment: Restates and clarifies 11 U.S.C. §§ 365(b)(4) and 365(d)(3) and (d)(5).]

B. Bankruptcy Clauses that Lie Around All Day Eating Bon Bons and Watching *Jerry Springer*

Events of default –

Institution by or against Tenant or any Guarantor of any bankruptcy, insolvency, reorganization, receivership or other similar proceeding involving the creditors of Tenant or any Guarantor, which, if instituted against Tenant or any Guarantor, is not dismissed within sixty (60) days after commencement;

[Comment: Unenforceable as an *ipso facto* clause under 11 U.S.C. § 365(f). Provides the Lessor with no substantive rights in a bankruptcy case.]

Events of Default:...

- (g) The making by Tenant or any guarantor of this Lease of any general assignment for the benefit of creditors; the filing by or against Tenant or such guarantor of a petition to have Tenant or such guarantor adjudged a bankrupt or the filing of a petition for reorganization or arrangement under any law relating to bankruptcy (unless, in the case of a petition filed against Tenant or such guarantor, the same is dismissed within sixty (60) days); the appointment of a trustee or receiver to take possession of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this Lease, where possession is not restored to Tenant within thirty (30) days; or the attachment, execution or other judicial seizure of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this Lease, where such seizure is not discharged within thirty (30) days.

[Comment: Longer, more detailed, but still unenforceable in a bankruptcy case.]

Other wordings from real leases still being used today:

- i. [It is an even of default if] Tenant or any guarantor of this Lease, voluntarily or involuntarily, participates in voluntary or involuntary bankruptcy, insolvency, or receivership proceedings under any state or federal law and such proceedings are not dismissed within thirty days of initiation; and/or Tenant or any guarantor of this Lease makes an assignment for the benefit of creditors.
- 11.1 Default by Tenant. The following shall be deemed to be events of default by Tenant under this Lease: (3) Tenant hereunder shall file a petition or be adjudged bankrupt or insolvent, or an order for relief shall be entered against Tenant, under any applicable federal or state bankruptcy or insolvency law, or Tenant shall admit that it cannot meet its financial obligations as they become due; or a receiver or trustee shall be appointed for all or substantially all of the assets of Tenant...

- C. LESSEE makes an assignment for the benefit of creditors, becomes insolvent, commits an act of bankruptcy, files for bankruptcy or reorganization, or involuntary bankruptcy or reorganization proceedings are instituted against LESSEE and are not dismissed within sixty (60) days thereafter.

Comment: These clauses are all unenforceable in a bankruptcy case and are not worth including. Use language that means something in a bankruptcy case, like the model provision above.

APPENDIX 1**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

IN RE:	§	CHAPTER 11
	§	
LONG JOHN SILVER'S	§	
RESTAURANTS, INC., ABBOTT	§	
ADVERTISING AGENCY, INC.,	§	CASE NO. 98-1164
FLORENZ, INC., LONG JOHN	§	
SILVER'S PROPERTIES, INC.,	§	
QSC, INC. AND LONG JOHN	§	(Jointly Administered)
SILVER'S, INC.	§	
	§	
Debtor.	§	

**WEINGARTEN REALTY INVESTORS' OBJECTION
TO DEBTORS' SECOND MOTION FOR ORDER
AUTHORIZING REJECTION OF CERTAIN
LEASES OF NONRESIDENTIAL REAL
PROPERTY AND FOR OTHER RELATED RELIEF**

WEINGARTEN REALTY INVESTORS ("Weingarten"), files this Objection to Debtors' Second Motion for Order Authorizing Rejection of Certain Leases of Nonresidential Real Property and for Other Related Relief (the "Motion") filed by Debtors in the above-referenced case and, in support thereof, would respectfully show the Court as follows:

A. BACKGROUND FACTS

1. Weingarten is the lessor under a lease dated March 19, 1981, by and between Weingarten and Long John Silver's, Inc. as successor to Jerrico, Inc for the premises located at 13564 West Montgomery, Houston, Texas (the "Premises"). The lease terminates on December 31, 2001.

2. Debtor ceased operations at the store in September 1994. On August 10, 1995, Debtor subleased the Premises to Juan Mancini, d/b/a Juanita's Taqueria. Weingarten approved a subsequent sublease of the Premises by Debtor to Ruben Nieto on January 26, 1998. To Weingarten's understanding, Mr. Nieto continues to occupy the premises as a subtenant.

3. On June 2, 1998, Debtor filed its Motion seeking to reject the "Leases" defined as the "leases of nonresidential real property relating to the Closing Shops and the Subleased Shops." Motion at 4. The Motion also seeks to set the effective date of rejection as the later of "(i) the date on which the keys to such premises or property are tendered to the lessor (or its agent or representative), or the Debtors otherwise relinquish control of such property or premises, and (ii) June 12, 1998, and that the Debtors be deemed not to be liable for administrative rent or other post-petition amounts under such Lease after such date." Motion at 4.

B. OBJECTION

4. Weingarten does not object to the rejection of the Leases *per se*. However, Weingarten objects to the Motion to the extent that the relief sought in the Motion ancillary to the rejection is ambiguous and not consistent with prevailing law. First, both the Motion and the proposed form of Order fail to specify that both the lease and the sublease of property with respect to the Premises are rejected. The Order should specify that both the lease and the sublease are rejected and direct the Debtor to (i) notify the subtenant of the rejection of the sublease and (ii) take all actions necessary to insure that rent received from any subtenant is forwarded to the appropriate lessor.

5. Further, the Motion and the Order fail to specify what the Debtor will do with respect to rent received from subtenants. Although the Motion seeks to have the Debtor's liability on its lease with Weingarten terminated as early as June 12, 1998, the Debtor does not proposed to remit to the lessor (or to the subtenant) the rent received from the subtenant covering the entire month of June. Clearly, allowing the Debtor to keep the entirety of June rent received from its subtenants while terminating the Debtor's liability to its lessor would result in an unwarranted windfall to the Debtor and a corresponding penalty to the subtenant and the Debtor's lessor. Any determination of the extent and duration of the administrative rent period as it applies to the Debtor's liability to its lessors should apply with equal force to the subtenant's obligations to the Debtor.

6. Finally, the Motion's requested relief with respect to the effective date of rejection is inconsistent with prevailing law which clearly holds that the effective date of rejection is properly set at the date upon which the order approving rejection is entered. Any other date is inconsistent with Congressional intent and the plain language of 11 U.S.C. 365(a).

ARGUMENT AND AUTHORITIES

Section 365(a) of the Bankruptcy Code states that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). In 1984, the "Shopping Center Amendments" added subsections (d)(3) and (d)(4) to Section 365. See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, and 130 Cong. Rec. S. 8894-95 (daily ed. June 29, 1984)(remarks of Senator Hatch). Section 365(d)(3) states, in relevant part:

The trustee shall timely perform all the obligations of the debtor, ... 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 time between the order for relief and the date of the rejection is typically referred to as the administrative rent period. The question raised by the interplay between Section 365(a) and 365(d)(3) is, therefore, when does the administrative rent period end?

The answer is that the plain language of 11 U.S.C. § 365(a) requires that an order approving the rejection be entered before the rejection is effective. *E.g.*, *In re Thinking Machines, Corp.*, 67 F.3d 1021,1025 (1st Cir. 1995) ("Section 365(a) is most faithfully read as making court approval a condition precedent to the effectiveness of a trustee's rejection of a nonresidential lease."); *In re Appliance Store, Inc.*, 148 B.R. 234, 240 (Bankr. W.D. Pa. 1992) (court approval is necessary to accomplish assumption or rejection); *In re Revco D.S., Inc.*, 109 B.R. 264, 269 (Bankr. N.D. Ohio 1989) ("The requirement of court approval, is a "pre-condition to any assumption or rejection of an unexpired

lease”); *In re Amber’s Stores*, 193 B.R. 819, 826 (Bankr. N.D. Tex. 1996) (“Section 365(a) of Title 11 read together with Federal Rules of Bankruptcy Procedure 6006 and 9014 require that when rejecting a lease, the debtor or the trustee must file a formal motion to assume or reject a lease and there must be notice to parties in interest with an opportunity to object in a contested proceeding before the court. Rejection only occurs after approval by the court.”); *In re CCI Wireless*, 279 B.R. 590, 594 (Bankr. D. Colo. 2002) (“Statute and case law demonstrate that the court must approve the rejection or assumption.”) Accordingly, rejection can only be “effective” upon the court’s order. *Revco*, 109 B.R. at 270.

The Shopping Center Amendments clearly support the conclusion that clarity and finality in rejection decisions are an inherent part of the protections afforded landlords under the Bankruptcy Code. Specifically, these amendments and the corresponding obligation of the Debtor to pay rent until the effective date of the rejection is based on the inequity that obtains when the Debtor has ceased paying rent but the lessor is not free to exercise dominion over the premises:

A second and related problem is that during the time the debtor has vacated space but has not yet decided whether to assume or reject the lease, the trustee has stopped making payments due under the lease. Lease payments include rent due the landlord and common charges which are paid by all the tenants according to the amount of space they lease. In this situation, the landlord is forced to provide current services, -- the use of its property, utilities, security, and other services -- without current payment. No other creditor is put in this position. In addition, the other tenants often must increase their common area charge payments to compensate for the trustee’s failure to make the required payments for the debtor.

The bill would lessen these problems by requiring the trustee to perform all the obligations of the debtor under a lease of nonresidential real property at the time required in the lease. This timely performance requirement will insure that debtor-tenants pay their rent, common area and other charges on time pending the trustee’s assumption or rejection of the lease.

130 Cong. Rec. S. 8894-95 (daily ed. June 29, 1984)(remarks of Senator Hatch). Accordingly, the addition of Section 365(d)(3) was intended to alleviate the “dark space” conundrum faced by shopping center lessors.

Likewise, the earlier enactment of Section 365(a) reflects a shift toward “clarity and finality” in lease rejection procedure. *In re Worths Stores Corp.*, 130 B.R. 531, 534 (Bankr. E.D. Mo. 1991). Under Bankruptcy Act 70(b), much conflict over the meanings and inferences to be drawn from the trustee’s unilateral acts concerning the rejection or assumption of leases. *E.g.*, *Texas Importing Co. v. Banco Popular de Puerto Rico*, 360 F.2d 582, 584 (5th Cir. 1966); *In re Forged Metal Products, Inc.*, 229 F.2d 799, 802 (3d Cir. 1956); *Local Joint Executive Bd. v. Hotel Circle, Inc.*, 613 F.2d 210 (9th Cir. 1980). The *Revco* court placed substantial reliance on the clarity shift between the rejection provisions of the Act and the Code, stating that “the court approval requirement is meant to save courts from attempting to judge the meaning and import of ... conduct and conversations” in determining when a rejection has been made. *Revco*, 109 B.R. at 267-68 (citing *In re Treat Fitness Center, Inc.*, 60 B.R. 878 (Bankr. 9th Cir. 1986)). *See also Thinking Machines*, 67 F.3d at 1024 (reversing lower court decisions contrary rationale as promoting confusion and uncertainty); *In re Garfinckels, Inc.*, 118 B.R. 154 (Bankr. D.C. 1990)(order approving rejection issued *nunc pro tunc* to date of oral announcement of decision on record as date uncertainty removed).

Read together with the legislative history of Section 364(d)(3) recited above, certainty of rejection occurs upon the order approving rejection, and this is the result Congress intended. As a practical matter, the lessor is unable to reenter and relet the premises until the rejection is certain because the subsequent tenant would face the possibility of the bankruptcy court's disapproval of the rejection upon notice and hearing. *In re National Oil Co.*, 80 B.R. 525, 526 (Bankr. D. Colo. 1987) (debtor's "rejection letter" prior to Section 365(d)(4) automatic rejection insufficient to stop Section 365(d)(3) clock because rejection was subject to disaffirmance upon notice and hearing); *Johnson v. Fairco Corp.*, 61 B.R. 317 (Bankr. N.D. Ill. 1986).¹

The Debtor's request to have a "multiple choice" effective date of rejection is wholly at odds with the intent of the Shopping Center Amendments. Indeed, the Debtor's motion serves to exacerbate the very harm that the Shopping Center Amendments were intended to alleviate. The Debtor would have lessors guessing at which effective date criteria apply while forcing the lessors take the risk that rejection is not ultimately approved. In sum, the proposed form of order is lacking in the precision and clarity that the Bankruptcy Code demands as a precondition of the Debtor's rejection power.

WHEREFORE, Weingarten Realty Investors respectfully request that the Court enter an order consistent with this Objection, and that Weingarten have such other and further relief as is just and equitable.

Respectfully submitted,

BROWN McCARROLL, L.L.P.

By: _____
Patricia Baron Tomasco
Texas State Bar No. 01797600

111 Congress Avenue, Suite 1400
Austin, Texas 78701
Telephone: (512) 479-1141
Facsimile: (512) 226-7320

-
and-

First City Tower
1001 Fannin Street, Suite 3700
Houston, Texas 77002-6797
Telephone: (713) 658-8881
Facsimile: (713) 658-9756

ATTORNEYS FOR WEINGARTEN REALTY
INVESTORS

¹ Moreover, the lessor may be in violation of the automatic stay of Section 362(a) if the rejection is not effective and the lease deemed to be property of the estate. E.g., *In re Hub of Military Circle, Inc.*, 13 B.R. 288 (Bankr. E.D. Va. 1981); *In re Wheeling-Pittsburgh Steel Corp.*, 54 B.R. 385 (Bankr. W.D. Pa. 1985, aff'd 67 B.R. 620 (W.D. Pa. 1986).

APPENDIX 2

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

IN RE:	§	
	§	
ALAMO LIQUORS, INC., DBA	§	BANKRUPTCY NO. 96-54791-K
ALAMO DISCOUNT LIQUORS	§	CHAPTER 11 PROCEEDING
	§	
DEBTOR	§	

**MOTION TO COMPEL DEBTOR TO TIMELY PERFORM
ALL OBLIGATIONS UNDER UNEXPIRED LEASE OF NON-
RESIDENTIAL REAL PROPERTY UNDER 11 U.S.C. § 365(d)(3)**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

NOW COMES Sandalwood Management, Inc. as agent for Brandon Apartments, San Antonio, Ltd. (“Movant”) and files this Motion to Compel Debtor to Timely Perform all Obligations Under Unexpired Lease of Non-Residential Real Property Under 11 U.S.C. § 365(d)(3) and would show the Court as follows:

1. This Court has jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 157 and 1334, and 11 U.S.C. § 365.

2. On or about August 17, 1995, Alamo Liquors, Inc. dba Alamo Discount Liquor (“Debtor”) entered into a Shopping Center Lease Agreement (“Lease”) with Brandon Apartments, San Antonio, Ltd. for the lease of approximately 1,895 square feet of space in a shopping center called Westlakes Center located at 9107 Marbach, San Antonio, Texas 78245.

3. On October 29, 1996, Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor has and continues to occupy and use the leased premises as a debtor-in-possession.

4. The Debtor is in default under the terms of the Lease both pre-petition and post-petition. In fact, the Debtor has failed to make any payments to Movant since its bankruptcy filing. Attached as Exhibit “A” is a Tenant History showing the outstanding obligations under the Lease. As of December 2, 1996, the Debtor has also failed to make its payments under the Lease to Movant for December rent and other charges.

5. Section 365(d)(3) of the Bankruptcy Code requires that the Debtor timely perform all of its obligations arising under the Lease from and after the entry of the Order for relief; that is, October 29, 1996, unless the time for such performance is extended by this Court. The time for such performance has not been extended by this Court.

6. The Debtor has failed to pay the monthly rent and other charges due under the Lease for the month of November 1996 and as of December 2, for the month of December 1996.

7. The Court should direct the Debtor to perform each and all of its obligations under the Lease, including without limitation, the payment on a timely basis of all its obligations under the Lease until it is assumed or rejected.

PREMISES CONSIDERED, Movant requests that this Court order Debtor to pay immediately all outstanding post-petition Lease obligations under the Lease and for such other and further relief as is just.

Respectfully submitted,

Adam I. Hauser
State Bar No. 09235250
BROWN MCCARROLL, L.L.P.
111 Congress Avenue, Suite 1400
Austin, Texas 78701
(512) 472-5456
(512) 479-1101 (Telecopier)

**ATTORNEY FOR SANDALWOOD
MANAGEMENT, INC. AS AGENT FOR
BRANDON APARTMENTS, SAN ANTONIO,
LTD.**

Under 11 U.S.C. § 365(d)(2), Harbor Leasing requests this Court to order the Debtor to assume or reject the Lease within ten (10) days of the date of entry of this Court's order.

6. Moreover, under 11 U.S.C. § 365(d)(10), Harbor Leasing requests this Court to order the Debtor to timely perform all of its obligations under the Lease, including the payment of post-petition rent, until it is assumed or rejected.

WHEREFORE, PREMISES CONSIDERED, Harbor Leasing prays that this Court enter an order compelling Debtor to assume or reject the Lease within ten (10) days of the date of entry of same and to timely perform all of its obligations under the Lease until it is assumed or rejected, and for such other and further relief as is just.

Respectfully submitted,

Adam I. Hauser
State Bar No. 09235250
BROWN MCCARROLL, L.L.P.
111 Congress Avenue, Suite 1400
Austin, Texas 78701
(512) 472-5456
(512) 479-1101 (Telecopier)

ATTORNEYS FOR HARBOR LEASING

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been sent by United States Mail, first class, postage prepaid to all interested parties listed on the attached matrix on the ____ day of _____, 200__.

Adam I. Hauser

APPENDIX 4

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE: §
§
STAGE STORES, INC., § Case No. 00-35078-H2-11
SPECIALTY RETAILERS, INC., § Case No. 00-35079-H2-11
SPECIALTY RETAILERS, INC. (NV) § Case No. 00-35080-H2-11
§
§ (Chapter 11)
§ (Jointly Administered in 00-35078-H2-11)

IF YOU WANT A HEARING, YOU MUST REQUEST ONE IN WRITING, AND YOU MUST RESPOND SPECIFICALLY TO EACH PARAGRAPH OF THIS PLEADING. YOU MUST FILE YOUR RESPONSE WITH THE CLERK OF THE BANKRUPTCY COURT WITHIN TWENTY DAYS FROM THE DATE YOU WERE SERVED AND GIVE A COPY TO THE PERSON WHO SENT YOU THE NOTICE; OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF.

IF A PARTY REQUESTS EMERGENCY CONSIDERATION, THE COURT MAY ACT EXPEDITIOUSLY ON THE MATTER. IF THE COURT ALLOWS A SHORTER RESPONSE TIME THAN TWENTY DAYS, YOU MUST RESPOND WITHIN THAT TIME. IF THE COURT SETS AN EMERGENCY HEARING BEFORE THE RESPONSE TIME WILL EXPIRE, ONLY ATTENDANCE AT THE HEARING IS NECESSARY TO PRESERVE YOUR RIGHTS. IF AN EMERGENCY HEARING IS NOT SET, YOU MUST RESPOND BEFORE THE RESPONSE TIME EXPIRES.

**APPLICATION FOR ALLOWANCE AND PAYMENT OF
ADMINISTRATIVE RENT CLAIMS OF THE WEINGARTEN ENTITIES**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

Weingarten Realty Investors, Rosenberg, Ltd., Weingarten/Finger Venture, and Weingarten Nostat, Inc. (collectively, the “Weingarten Entities”) file this their Application for Allowance and Payment of Administrative Rent Claims (the “Application”) and in support thereof state as follows:

I.
BACKGROUND FACTS

1. The Weingarten Entities and the various Debtors are parties to 18 leases of non-residential real property (collectively, the “Leases”). A listing of the leases and the respective parties thereto is reflected on the attached Exhibit “A.”

2. On June 1, 2000, Debtors filed their voluntary petitions under Chapter 11, title 11, United States Code (the “Bankruptcy Code”). Generally, Debtors continued to pay their base rent due under the Leases. However, certain items of additional rent due under the Leases remained unpaid for the period from January 1, 2001, through August 8, 2001 (“Additional Rent”). A store-by-store accounting of such Additional Rent is set forth on Exhibit “B.” As demonstrated by Exhibit “B,” the Debtors owe the Weingarten Entities a total of \$83,709.86 for post-petition common area maintenance, allocations of taxes, insurance and repairs incident to the Debtors’ continued occupancy.

3. In addition, the Lease concerning Debtors’ location 0086 calls for the payment of percentage rent. According to the lease, the amount of percentage rent that was due and owing under that Lease is \$1,624.47, as calculated on the attached Exhibit “C.” A report of sales figures for the year 2001 is required under the Lease pertaining to Debtors’ location 0679. However, the sales report is not due until February 2002. Other leases may have similar reporting issues such that calculation of additional administrative percentage rent is not feasible at this time. Weingarten reserves the right to amend this Application upon receipt of such information. Weingarten seeks the payment of all percentage rent due under the Leases as Additional Rent payable under 11 U.S.C. §§ 365(d)(3) and 503(b).

II.
ARGUMENT AND AUTHORITIES

A. Section 365(d)(3) Requires the Payment of the Additional Rent.

Under 11 U.S.C. § 365(d)(3), the Debtors are required to “timely perform all the obligations of the debtor ... 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).” Performance under Section 365(d)(3) generally means that all monetary obligations under the lease must be satisfied for the entire administrative rent period. Thus, obligations other than base rental payments must be satisfied as well. For example, all taxes to be paid by the tenant during the administrative rent period are subject to immediate payment and allowance under Section 365(d)(3). *In re F & M Distributors, Inc.*, 197 B.R. 829 (Bankr. E.D. Mich. 1995); *In re Ames Dept. Stores, Inc.*, 150 B.R. 107 (Bankr. S.D.N.Y. 1993). These courts have adopted the minority “biling” view holding that a debtor is obligated to pay any real estate taxes which are billed post-petition. These minority courts conclude this because they find nothing ambiguous about the language of the statute and the statute requires payment in full of all obligations that come due post-petition, regardless of when those charges accrued.

However, there are other courts which adopted the “majority view” and apply the accrual method to determine a debtor’s obligation to pay real estate taxes under Section 365(d)(3). *In re GC COS.*, 261 B.R. 594 (Bankr. D. Del. 2001); *In the Matter of Handy Andy Home Improvement Centers, Inc.*, 144 F.3d 1125 (7th Cir. 1998); *In re McCrory Corp.*, 210 B.R. 934 (S.D.N.Y. 1997). Courts which adopt the “accrual” method hold that a debtor is obligated to pay only those real estate taxes which accrue post-petition, regardless of when they were billed.

Additionally, percentage rent, insurance and common area maintenance that becomes due during the administrative rent period is entitled to immediate payment under Section 365(d)(3). *In re Revco Drug Stores, Inc.*, 111 B.R. 626 (Bankr. N.D. Ohio 1989).

B. The Additional Rent is Payable under Section 503(b).

Section 503(b) of the Bankruptcy Code provides, “After notice and hearing, there shall be allowed administrative expenses, . . .including. . . the actual necessary costs and expenses of preserving the estate[.]” 11 U.S.C. § 503(b)(1)(A). In order to show that the expenses sought to be recovered are, in fact, actual and necessary, the alleged administrative expense directly and substantially benefited the estate. *See, e.g., In re Sunarhauserman, Inc.*, 126 F.3d 811, 816 (6th Cir. 1997); *In re Hemingway Transport, Inc.*, 993 F.2d 915, 929 (1st Cir. 1993); *In re Santa Monica Beach Hotel, Ltd.*, 209 B.R. 722, 724 (Bankr. 9th Cir. 1997).

The costs and expenses of preserving an estate are not limited to the categories specified in Section 503 of the Bankruptcy Code but include other necessary costs and expenses incurred in running a business during the pendency of a Chapter 11 case. *In re Coastal Carriers Corp.*, 128 B.R. 400, 404 (Bankr. D. Md. 1991). For example, when a debtor-in-possession elects to continue to receive benefits from the other party to an executory contract pending a decision to reject or assume the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services, which, depending on the circumstances of a particular contract, may be what is specified in the contract. *Nat’l Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513 (1984); *In re FBI Distribution Corp.*, 330 F.3d 361 (1st Cir. 2003). Thus, when third parties are induced to supply goods or services to the debtor-in-possession, the purposes of Section 503 of the Bankruptcy Code plainly require that their claims be afforded priority. *In re Jartran, Inc.*, 732 F.2d 584, 586 (7th Cir. 1984); *In re Globe Metallurgical, Inc.*, 312 B.R. 34 (S.D.N.Y. 2004). In such circumstances, the claimant is entitled to a post-petition administrative claim to the extent that it has benefited the debtor-in-possession in operating the business. *United States Postal Service v. Dewey Freight System, Inc.*, 31 F.3d 620, 624 (8th Cir. 1994); *In re Payless Cashways, Inc.*, 305 B.R. 303 (Bankr. W.D. Mo. 2004).

Here, the Weingarten Entities and the Debtors entered into the various Leases as the result of arms’ length negotiations and have established through those negotiations the fair market value of the use and occupancy of the various premises. Whether payable under Section 365 or Section 502, the amounts due as Additional Rent under the Leases is a cost of the administration of these estates. The Debtors cannot have continued to occupy the premises covered by the Leases without paying the value established for that occupation as set forth in the Leases.

WHEREFORE, the Weingarten Entities respectfully request that this Court allow the Weingarten Entities an administrative priority expense against the estate of the Debtor in the amount of \$85,334.33, plus additional percentage rent that becomes due under the leases for the administrative rent period, that the Court order the immediate payment of that administrative priority claim, and for such further relief to which the Weingarten Entities may show themselves justly entitled.

Respectfully submitted,

BROWN MCCARROLL, L.L.P.

By: _____

Patricia Baron Tomasco

Texas State Bar No. 01797600

Kell C. Mercer

Texas State Bar No. 24007668

111 Congress Avenue, Suite 1400

Austin, Texas 78701

Telephone: (512) 472-5456

Facsimile: (512) 479-1101

ATTORNEYS FOR DEBTORS

APPENDIX 5**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re: § **Case No. 02-B02474**
§ **(Jointly Administered)**
KMART CORPORATION, et. al., § **Chapter 11**
§ **Hon. Susan Pierson Sonderby**
§ **Hearing Date: March 15, 2004**
Debtors. § **Hearing Time: 10:00 a.m. (CT)**
§ **Obj. Deadline: March 8, 2004**

**RESPONSE OF SAN ANTONIO 281 REALTY LIMITED PARTNERSHIP
TO DEBTORS' TWENTIETH OMNIBUS OBJECTION TO CLAIMS**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE"

COMES NOW San Antonio 281 Realty Limited Partnership ("San Antonio 281"), filed this its Response to the Debtors' Twentieth Omnibus Objection to Claims (the "Twentieth Omnibus Objection"), dated February 2, 2004, and respectfully sets forth and represents as follows:

Jurisdiction and Venue

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

Background

2. San Antonio 281 leases certain non-residential property, commonly known as Super KMart #3948, in San Antonio, Texas, to KMart Corporation ("KMart"), pursuant to a real estate agreement ("Lease Agreement"), dated April 28, 2003. According to the Lease Agreement, the term of the lease was to commence April 28, 1993, and terminate on April 28, 2018, twenty-five years later. On or about January 22, 2002 (the "Petition Date"), KMart and its affiliates filed a voluntary petition in this Court for reorganization relief under Chapter 11 of the Bankruptcy Code. The Debtors rejected the Lease effective June 29, 2002 (the "Rejection Date"), by that certain Notice of Rejection dated June 19, 2002 (Docket No. 4273)

3. As of the Petition Date, KMart was in arrears under the Lease Agreement in the amount of \$409,405.16, representing unpaid taxes.

Relief Requested

4. Pursuant to Bankruptcy Rule 3001(f) and 11 U.S.C. § 502(b)(6), San Antonio 281 requests that the Debtors' Twentieth Omnibus Objection be denied and that its claim be paid in the full amount of \$6,125,860.00 at the earliest date possible.

5. The Debtor has objected to San Antonio 281's claim and states in a most conclusory fashion that San Antonio 281 should be allowed only \$ 3,357,037.46 in its total claim amount. However,

Debtor has provided no basis, evidence, or analysis to support this contention, and it is well settled law that the burden falls on the Debtor to come forward with some evidence to overcome the prima facie validity of a claim. *See In re Sabre Shipping Corp.*, 299 F. Supp. 97, 99 (S.D.N.Y. 1969); *see also Whitney v. Dresser*, 200 U.S. 532, 535 (1906). As set forth herein, the proper claim amount to San Antonio 281 is \$6,125,860.00. Therefore, the Debtor's objection should be denied in all respects, and San Antonio 281 should be granted an allowed claim in the amount of \$6,125,860.00.

6. Pursuant to the Lease Agreement, KMart is obligated to pay base rent, taxes, insurance, and common area maintenance ("CAM") for Super KMart #3948. Each charge is a fixed, regular, or periodic charge owed by KMart to San Antonio 281, and each is related to the value of the property or the lease thereon. *See Lease Agreement*, ¶ 4 (taxes), ¶ 14 (maintenance), ¶ 16 (utilities), and ¶ 19 (insurance).

7. Total post-petition "rent reserved" obligations owed by KMart to San Antonio 281 under 11 U.S.C. §502(b)(6) include not only CAM charges but also insurance fees, utility fees, and taxes. *See In re McSheridan*, 184 B.R. 91, 96 (9th Cir. BAP 1995) (CAM, insurance fees, utility fees, and taxes are considered "rent reserved" under 11 U.S.C. § 502(b)(6) if the charge is provided as the tenant's obligation in the lease; the charge is related to the value of the property or the lease thereon; and the charge is properly classifiable as rent because it is a fixed, regular, or periodic charge); *see also In re Andover Togs, Inc.*, 231 B.R. 521, 541-42 (Bankr. S.D.N.Y. 1999) (charges akin to CAM expense properly allocated as rent reserved); *In re Rose's Stores*, 179 B.R. 789, 790 (Bankr. E.D. N.C. 1995) (taxes and insurance are includable in the rent reserved); *In re Heck's, Inc.*, 123 B.R. 544, 546 (Bankr. S.D. Va. 1991) (real estate taxes, insurance, and CAM are includable in the rent reserved); *In re Farley*, 146 B.R. 739, 741 (Bankr. N.D. Ill. 1992) (annual capital improvement fee included in cap calculation).

8. 11 U.S.C. § 502 (b)(6) places a cap on lease rejection claims otherwise allowed under state law. The Section provides that an allowable amount of rejection damages is limited to the greater of one year, or fifteen percent, not to exceed three years, of the remaining term of such lease following the earlier of the date of the filing of the petition or the date on which such lessor repossessed, or the lessee surrendered, the leased property. As of the petition date, there were 16.25 years or 195 months remaining under the Lease Agreement. Fifteen percent of 195 is 29.25 months, which is less than 3 years or 36 months. The monthly rent reserved, including base rent as well as taxes, utilities, insurance, and CAM, according to the Lease Agreement is \$192,918.27, and this figure multiplied by 29.25 equals \$5,642,859.40 (plus an additional four percent inflation increase for years two and three). Additionally, KMart was indebted to San Antonio 281 in the amount of \$409,405.16, as of the petition date. Thus, the total claim, reflecting these aforementioned sums, is \$6,125,860.60 (see Exhibit "A" for more detailed computation).

WHEREFORE, San Antonio 281 prays that the objection be denied and that the claim be paid in full in the total amount of \$6,125,860.00 at the earliest date possible.

Respectfully submitted, this ____ day of February, 2004.

Brown McCarroll, LLP

111 Congress Avenue, Suite 1400

Austin, Texas 78701

Tel (512) 479-9749

Fax (512) 226-7324

By: _____

Patricia Baron Tomasco

State Bar No. 01797600

Kell C. Mercer

State Bar No. 24007668

ATTORNEYS FOR SAN ANTONIO 281 REALTY
LIMITED PARTNERSHIP

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on all parties listed below via United States, first-class mail, on this 12th day of February, 2004.

Patricia B. Tomasco

Andrew N. Goldman

Eric R. Markus

Wilmer Cutler Pickering LLP

399 Park Avenue

New York, New York 10022

APPENDIX 6**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE: § **CASE NO. 02-B02474**
§ **(Jointly Administered)**
KMART CORPORATION, ET AL. § **Chapter 11**
§ **Chief Judge Susan Pierson Sonderby**

**SAN ANTONIO 281 REALTY LIMITED PARTNERSHIP'S
LIMITED OBJECTION TO DEBTOR'S MOTION FOR ORDER
PURSUANT TO 11 U.S.C. § 365(d)(4) EXTENDING THE DEADLINE
TO ASSUME OR REJECT UNEXPIRED LEASES OF
NONRESIDENTIAL REAL PROPERTY**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

COMES NOW San Antonio 281 Realty Limited Partnership ("San Antonio 281") a lessor of the above-named debtor, and hereby files its Limited Objection to Debtor's Motion for Order Pursuant to 11 U.S.C. § 365(d)(4) Extending the Deadline to Assume or Reject Unexpired Leases of Nonresidential Real Property and would show as follows:

1. San Antonio 281 leases certain non-residential property in San Antonio, Texas to KMart Corporation. KMart and its affiliates filed for protection under Chapter 11 of title 11, United States Code, on or about January 22, 2002.

2. Pursuant to the Lease Agreement, KMart is obligated to pay rent, taxes, insurance, and common area maintenance charges ("CAM"), all of which are post-petition rental obligations which must be paid as and when due under 11 U.S.C. § 365(d)(3).

3. On February 14, 2002, KMart Corporation filed its Debtor's Motion for Order Pursuant to 11 U.S.C. § 365(d)(4) Extending the Deadline to Assume or Reject Unexpired Leases of Nonresidential Real Property (the "Motion"). One of the most important factors in determining whether to extend the time to assume or reject leases under § 365(d)(4) is the payment of post-petition rent under § 365(d)(3). *See, e.g., In re Southwest Aircraft Services, Inc.*, 831 F.2d 848 (9th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988); *In re Wedtech Corp.*, 72 B.R. 464 (Bankr. S.D.N.Y. 1987). Section 365(d)(3) states in relevant part

The trustee shall timely perform all the obligations of the debtor, ... 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.

(emphasis added). Without the requirement that the Debtors timely pay all post-petition rent, taxes, CAM and other items due under the respective leases, the extension should not be granted.

4. In their Motion, the Debtors do not make any provision for the timely payment of rent, taxes, insurance and CAM as a continuing condition to the extension of time to assume or reject. In fact,

the Debtors do not mention their obligation to pay rent at all. However, it is clear from the legislative history of the relevant Sections that the landlords of a bankrupt debtor are entitled to payment of rent during the administrative rent period up to the point of rejection. The extension of time under 11 U.S.C. § 365(d)(4) should not be granted unless rent and other obligations are kept current. In 1984, the “Shopping Center Amendments” added subsections (d)(3) and (d)(4) to Section 365 under the same legislation. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *and* 130 Cong. Rec. S. 8894-95 (daily ed. June 29, 1984). The obligation to pay rent was intended by Congress to be coextensive with the time to assume or reject under § 365(d)(4), so that landlords were not unduly prejudiced by the inability to reenter and relet the premises during the pendency of the bankruptcy. As stated by the relevant legislative history:

Lease payments include rent due the landlord and common charges which are paid by all the tenants according to the amount of space they lease. In this situation, the landlord is forced to provide current services, -- the use of its property, utilities, security, and other services -- without current payment. No other creditor is put in this position. In addition, the other tenants often must increase their common area charge payments to compensate for the trustee’s failure to make the required payments for the debtor.

The bill would lessen these problems by requiring the trustee to perform all the obligations of the debtor under a lease of nonresidential real property at the time required in the lease. This timely performance requirement will insure that debtor-tenants pay their rent, common area and other charges on time pending the trustee’s assumption or rejection of the lease.

130 Cong. Rec. S. 8894-95 (daily ed. June 29, 1984) (remarks of Senator Hatch). Although lessors are free to file appropriate motions lifting the stay and shortening the period to assume or reject, the burden should be on the Debtors who are seeking the extension to avoid any unpaid administrative rent rather than forcing lessors to file and prosecute extraordinary filings to ensure compliance with the very statute that Debtors invoke in their Motion.

5. San Antonio 281 therefore requests that any order granting the relief requested by the Debtors include the following proviso:

Notwithstanding any other provision of this Order, the Debtors are required to make all payments to lessors required under the terms of the lease and 11 U.S.C. § 365(d)(3). Should the Debtors fail to make payments due under the lease, the lessor under any unexpired lease of non-residential property that is not the subject of a motion to reject may send a letter detailing the default to the Debtors, their counsel and counsel for any committee appointed herein by facsimile transmittal and certified mail, return receipt requested. If such default is not cured within 20 days of the date of such notice, such lease will be deemed rejected effective the 20th day after such notice.

Such language is necessary to insure that extension of the time to assume or reject is not at the expense of timely payment of rent pending assumption or rejection and places the burden of managing the assumption or rejection decisions and the concomitant obligation to timely pay rent and other obligations where it belongs: on the Debtors.

WHEREFORE, San Antonio 281 respectfully requests that any order entered on the Debtor’s Motion contain the language proposed herein, and that San Antonio 281 have such other and further relief as is just and equitable.

Respectfully submitted,

BROWN McCARROLL, L.L.P.

By: _____

Patricia B. Tomasco
State Bar 01797600

111 Congress Avenue, Suite 1400
Austin, Texas 78701
Telephone (512) 479-1141
Facsimile (512) 226-7320

ATTORNEYS FOR SAN ANTONIO 281
REALTY LIMITED PARTNERSHIP

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the parties listed below, postage prepaid, on this ____ day of _____, 200__.

Patricia B. Tomasco

John William Butler
J. Eric Ivester
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
333 West Wacker Drive, Suite 2100
Chicago, Illinois 60606-1285

§ 365. Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

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

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default other than a default that is a breach of a provision relating to the satisfaction of any provision (other than a penalty rate or penalty provision) relating to a default arising from any failure to perform nonmonetary obligations under an unexpired lease of real property, if it is impossible for the trustee to cure such default by performing nonmonetary acts at and after the time of assumption, except that if such default arises from a failure to operate in accordance with a nonresidential real property lease, then such default shall be cured by performance at and after the time of assumption in accordance with such lease, and pecuniary losses resulting from such default shall be compensated in accordance with the provisions of this paragraph;

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

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

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or penalty provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance--

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--

(1)

(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d)

(1) In a case under Chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under Chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) 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.

(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.

(B) (i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

(ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

(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.

(e) (1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on--

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--

(A) (i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f) (1) Except as provided in subsections (b) and (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if--

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

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

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease--

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under Chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under Chapter 9, 11, 12, or 13 of this title--

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title--

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h) (1) (A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and--

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2) (A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and--

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i) (1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession--

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section **365** and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n) (1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect--

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to [to] enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for--

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract--

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive--

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title [11 USCS § 503(b)] arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall--

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any

right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall--

(A) to the extent provided in such contract or any agreement supplementary to such contract--

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under Chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507, and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

(p) (1) If a lease of personal property is rejected or not timely assumed by the trustee under subsection (d), the leased property is no longer property of the estate and the stay under Section 362(a) is automatically terminated.

(2) (A) If the debtor in a case under Chapter 7 is an individual, the debtor may notify the creditor in writing that the debtor desires to assume the lease. Upon being so notified, the creditor may, at its option, notify the debtor that it is willing to have the lease assumed by the debtor and may condition such assumption on cure of any outstanding default on terms set by the contract.

(B) If, not later than 30 days after notice is provided under subparagraph (A), the debtor notifies the lessor in writing that the lease is assumed, the liability under the lease will be assumed by the debtor and not by the estate.

(C) The stay under section 362 and the injunction under section 524(a)(2) shall not be violated by notification of the debtor and negotiation of cure under this subsection.

(3) In a case under Chapter 11 in which the debtor is an individual and in a case under Chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.