

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

IN RE:	§	
	§	
KENDRICK ENGINEERING AND MANUFACTURING COMPANY, INC.,	§	Case No. 01-41886-BJH-11
	§	
	§	
Debtor.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before the Court is the Motion of Banc One Leasing Corporation To Compel Payment of Postpetition Rent Pursuant To Sections 503 and 365 of the Bankruptcy Code (the “Motion”). The Motion was filed by Banc One Leasing Corporation (“Movant”) on June 4, 2001. On June 27, 2001 and August 22, 2001, the Court held hearings and took evidence on the Motion. At the conclusion of the hearings, the Court agreed that Movant could submit a post-hearing letter brief, and Movant filed that letter brief on August 27, 2001. After careful consideration of the pleadings, evidence, and arguments of counsel, the Court makes the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, made applicable here by Federal Rule of Bankruptcy Procedure 7052.

I. FINDINGS OF FACT

1. Kendrick Engineering & Manufacturing Company, Inc. (the “Debtor”) filed a voluntary petition under chapter 11 of the Bankruptcy Code on March 15, 2001.

2. On October 1, 1999, the Debtor entered into an equipment lease agreement (the “Agreement”) with International Financial Services Corporation (“IFSC”) pursuant to which the Debtor leased certain equipment (the “Equipment”) from IFSC.¹ *See* Movant’s Exhibit 1.

3. Under the original terms of the Agreement, the Debtor was to make 60 monthly rental payments of \$6,787.00, with an advance rental payment of \$13,574.00 payable at the signing of the Agreement to be applied to the last two months’ payments. *See* Movant’s Exhibit 1.

4. When it signed the Agreement, the Debtor also signed a letter in which it agreed that Movant “is not in any way the seller of the equipment.” *See* Movant’s Exhibit 6, ¶ 2 (the “October 1, 1999 Letter”). The October 1, 1999 Letter also recites the Debtor’s agreement that “this transaction is a lease and not a loan.” *See id.* While the October 1, 1999 Letter appears to be on the Debtor’s letterhead, the Debtor’s president testified that the October 1, 1999 Letter was presented to him for signature along with the other documents – *i.e.*, that he did not prepare the October 1, 1999 Letter. According to the October 1, 1999 Letter, the Debtor “researched the equipment and negotiated the purchase price for the equipment.” *See id.* That purchase price was \$392,366.00. *See* Movant’s Exhibit 7.

5. On October 7, 1999, the parties amended the Agreement to provide for 60 monthly rental payments of \$6,875.00, with an advance rental payment of \$13,750.00 payable at the signing of the amendment to be applied to the last two months’ payments. *See* Movant’s Exhibit 3.

¹Movant assumed IFSC’s position under the Agreement by assignment.

6. On May 9, 2000, the parties again amended the Agreement to provide for 60 monthly rental payments of \$7,172.00, with an advance rental payment of \$14,344.00 payable at the signing of the amendment to be applied to the last two months' payments. *See* Movant's Exhibit 3.

7. The Debtor does not have an option to renew the Agreement. *See* Movant's Exhibit 1, ¶ 3 ("The original term of the LEASE shall commence on the date that the Equipment is delivered to LESSEE and shall terminate upon the expiration of the number of months, or other calendar periods set forth above from said date.")

8. The Debtor does have an option to purchase the Equipment at the end of the term of the Agreement. *See* Movant's Exhibit 4, ¶ 1. Specifically, the Debtor may purchase the Equipment at the end of the term of the Agreement by paying the lesser of the fair market value of the Equipment or twenty percent (20%) of the original cost of the Equipment (20% of \$392,366.00, or \$78,473.20). *See* Movant's Exhibit 4, ¶ 2.

9. The useful life of the Equipment is between 20 and 25 years.

10. Under the Agreement, that Debtor must pay all taxes, insurance, and other costs incident to ownership of the Equipment. Specifically, the Agreement requires the Debtor to pay "all license and registration fees, assessments, filing or recording fees, documentary stamp tax, sale/use taxes, personal property taxes, gross receipt taxes, excise taxes including value added taxes and all other taxes (local, state and federal)" *See* Movant's Exhibit 1, ¶ 10.

11. Under the Agreement, the Debtor is responsible for insuring the Equipment against loss or damage from any cause. *See* Movant's Exhibit 1, ¶ 12. The Debtor also assumed the risk of loss or damage to the Equipment from any cause. *See* Movant's Exhibit 1, ¶ 13.

12. Movant disclaimed all warranties under the Agreement. The Agreement contains the following warranty disclaimer:

DISCLAIMER OF WARRANTY. LESSOR NOT BEING THE MANUFACTURER OR THE SUPPLIER OF THE EQUIPMENT, NOR A DEALER IN SIMILAR EQUIPMENT, HAS NOT MADE AND DOES NOT MAKE ANY REPRESENTATION WARRANTY OR COVENANT, EXPRESS OR IMPLIED, WITH RESPECT TO THE DESIGN, CONDITION, DURABILITY, SUITABILITY, FITNESS FOR A PARTICULAR USE OR MERCHANTABILITY OF THE EQUIPMENT OR AGAINST INTERFERENCE OR INFRINGEMENT IN ANY RESPECT. AS BETWEEN LESSOR AND LESSEE, THE EQUIPMENT SHALL BE ACCEPTED AND LEASED BY LESSEE "AS IS" AND "WITH ALL FAULTS." LESSEE AGREES TO SETTLE ALL SUCH CLAIMS DIRECTLY WITH THE SUPPLIER AND WILL NOT ASSERT ANY SUCH CLAIMS OF DEFENSES AGAINST LESSOR OR LESSOR'S ASSIGNEE. LESSOR ASSIGNS TO, AUTHORIZES AND APPOINTS LESSEE TO ENFORCE, IN ITS OWN NAME AND AT ITS OWN EXPENSE, ANY CLAIM, WARRANTY, AGREEMENT OR REPRESENTATION WHICH MAY BE MADE AGAINST THE SUPPLIER, BUT LESSOR ASSUMES NO OBLIGATIONS AS TO THE EXTENT OR ENFORCEABILITY THEREOF. NO DELAY IN SHIPMENT, DEFECT OR UNFITNESS OF THE EQUIPMENT, LOSS OR DAMAGE THERETO OR ANY OTHER CIRCUMSTANCES SHALL RELIEVE LESSEE OF ITS OBLIGATIONS UNDER THIS LEASE WHICH ARE ABSOLUTE AND UNCONDITIONAL, IN NO EVENT SHALL LESSOR BE LIABLE FOR ANY CONSEQUENTIAL DAMAGES. SUPPLIER IS NOT AN AGENT OF LESSOR AND NO EMPLOYEE OF SUPPLIER IS AUTHORIZED TO WAIVE, SUPPLEMENT OR OTHERWISE ALTER, ANY PROVISION OF THIS LEASE.

See Movant's Exhibit 1,6 ¶ 7.

13. Under the Agreement, the Debtor authorized Movant to file the Agreement, financing statements, or security agreements in any local jurisdiction or state of the United States. *See* Movant's Exhibit 1, ¶ 9. There was no evidence admitted at the hearing that Movant actually filed any such documents of record.

14. The Debtor has used the Equipment post-petition in its business operations. The undisputed testimony establishes that the Equipment went into service in January 2000. By July 11, 2001, the undisputed testimony is that the Equipment meter showed 2,695 hours. From July 11, 2001 to the August 22, 2001 resumed hearing, the meter showed an additional 167 hours of use. *See* Testimony of Mr. Voight, hearing of August 22, 2001.

15. Movant contends that the Agreement is a true lease, that the Equipment was, and is, actually used by the Debtor in its day-to-day business operations, and that the Equipment is necessary and beneficial to the Debtor. Movant further contends that during the first 60 days of a bankruptcy case, payment of post-petition rent for equipment leases is governed by § 503(b)(1)(A) of the Bankruptcy Code, which provides for the allowance of administrative claims including “the actual, necessary costs and expenses of preserving the estate” *See* Motion, ¶ 4. Movant also contends that the Debtor’s obligation to pay rent under the Agreement must be satisfied without regard to the Debtor’s actual use of the Equipment beyond the 60th day of the case. Movant requests that the Court allow its administrative claim in the amount of \$14,343.99 pursuant to § 503(b)(1)(A) for the first 60 days of the case, and order the Debtor to continue to pay rent in accordance with the Agreement from May 15, 2001 until the date the Agreement is assumed or rejected by the Debtor.

16. The Debtor admits that it failed to pay postpetition rent.² However, the Debtor contends that the Agreement is a disguised financing transaction for the Debtor’s purchase of the Equipment and, as such, the Agreement is “not subject to the provisions of 11 U.S.C. 506 [sic].” The Debtor also contends that it has not been necessary to use the Equipment to preserve the estate.

²*See* Response of Debtor to Motion to Compel Filed By Bank One Leasing, ¶ 4.

17. Where appropriate, any Finding of Fact may be construed as a Conclusion of Law.

II. CONCLUSIONS OF LAW

A. Applicable Legal Standard

18. Whether a transaction is a true lease or a disguised financing transaction – *i.e.*, whether the seller maintains a security interest in the property – is a question of state law. *See Banterra v. Subway Equipment Leasing Corp. (In re Taylor)*, 209 B.R. 482, 484 (Bankr. S.D. Ill. 1997) (“It is well established that the existence, nature, and extent of a security interest in property is controlled by state law.”) (citing *In re Powers*, 983 F.2d 88 (7th Cir.1993)); *In re Cox*, 179 B.R. 495, 499 (N.D. Tex. 1995) (“State law governs the determination of the existence, nature, and extent of a security interest in property.”). The Agreement provides, and the parties agree, that the law of the state of Illinois controls. *See* Movant’s Exhibit 6, ¶ 3; Movant’s Exhibit 1, ¶ 21.

19. In Illinois, the standard for determining whether a transaction creates a “true lease” or a security interest is set forth in § 1-201(37) of the Illinois Uniform Commercial Code which provides that

“Security interest” means an interest in personal property or fixtures which secures payment or performance of an obligation . . . Except as otherwise provided in Section 2-505, the right of a seller or lessor of goods under Article 2 or 2A to retain or acquire possession of the goods is not a “security interest,” but a seller or lessor may also acquire a “security interest” by complying with Article 9. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 2-401) is limited in effect to a reservation of a “security interest.”

Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee; and

- (a) the original term of the lease is equal to or greater than the remaining economic life of the goods;
- (b) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;
- (c) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement; or
- (d) the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

A transaction does not create a security interest merely because it provides that:

- (a) the present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into;
- (b) the lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods;
- (c) the lessee has an option to renew the lease or to become the owner of the goods;
- (d) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed; or
- (e) the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

For purposes of this subsection (37):

- (x) Additional consideration is not nominal if (i) when the option to renew the lease is granted to the lessee the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the

option is to be performed, or (ii) when the option to become the owner of the goods is granted to the lessee the price is stated to be the fair market value of the goods determined at the time the option is to be performed. Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised;

(y) "Reasonably predictable" and "remaining economic life of the goods" are to be determined with reference to the facts and circumstances at the time the transaction is entered into; and

(z) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances as of each case at the time the transaction was entered into.

See 810 ILL. COMP. STAT. ANN. 5/201(37) (West 2001).

20. Under § 1-201(37), the "economics of the transaction," rather than the intent of the parties, is the primary consideration. *See In re Taylor*, 209 B.R. at 484 ("In any analysis under § 1-201(37), the intent of the parties is no longer the primary consideration."); *In re Meeks*, 210 B.R. 1007 (Bankr. S.D. Ill. 1995); *In re Lerch*, 147 B.R. 455, 460 (Bankr. C.D. Ill. 1992).³ A lease will be construed as creating a security interest as a matter of law "if the debtor cannot terminate the lease and one of the enumerated requirements is satisfied under section 201(37)." *In re Taylor*, 209 B.R. at 484; *see In re Lerch*, 147 B.R. at 460. If the court determines that the transaction is not a disguised security interest *per se*, it must then look at the specific facts of the case to determine whether the "economics of the transaction" suggest such a result. *In re Taylor*, 209 B.R. at 484-485.

B. Legal Analysis

³Because the intent of the parties is not the primary consideration, the recitations contained in the October 1, 1999 Letter (Movant's Exhibit 6) are not controlling.

(1) Did the Agreement Create a Security Interest *per se*?

21. In determining whether the Agreement created a security interest as a matter of law, the Court must first consider whether the Agreement can be terminated by the Debtor. *See In re Taylor*, 209 B.R. at 485. The Debtor does not have the right to terminate the Agreement. *See* Movant's Exhibit 1, ¶ 3. Having concluded that the first prong of the test is satisfied here, the Court must consider the remaining elements of the *per se* test to see if one of the other enumerated requirements is satisfied.

(a) Was the original term of the Agreement equal to or greater than the remaining economic life of the Equipment?

22. The original term of the Agreement was for 60 months. *See* Movant's Exhibit 1. Based upon the evidence introduced at the hearing, the useful life of the Equipment is between 20 and 25 years. Therefore, the original term of the Agreement was not equal to or greater than the remaining life of the Equipment. Courts have generally held that when the useful life of the property exceeds the term of the lease, the agreement is a true lease. *See In re Meeks*, 210 B.R. 1007, 1010 (S.D. Ill. 1995). It is "an essential characteristic of a true lease" that "there be something of value to return to the lessor after the term." *Id.* (citing *In re Marhoefer*, 674 F.2d 1139, 1145 (7th Cir. 1982)). Here, at the end of the lease term, the lessor is to receive something of value back, *i.e.* manufacturing equipment with a remaining useful life of between 15 and 20 years.

- (b) Was the Debtor bound to renew the Agreement for the remaining economic life of the Equipment or bound to become the owner of the Equipment?

23. The Debtor is not required to renew the Agreement at the end of its term (in fact, the Debtor has no option to renew) or exercise its option to purchase the Equipment.

- (c) Does the Debtor have an option to renew the Agreement for the remaining economic life of the Equipment for no additional consideration or nominal additional consideration upon compliance with the Agreement?

24. As noted previously, the Debtor does not have an option to renew the Agreement at all.

- (d) Does the Debtor have an option to become the owner of the Equipment for no additional consideration or nominal additional consideration upon compliance with the Agreement?

25. As noted previously, the Debtor has an option to purchase the Equipment at the end of the term by paying the fair market value, not to exceed 20% of the original cost of the Equipment.

26. Under the Illinois Uniform Commercial Code, the option price at the end of a lease is nominal if the consideration is “less than the lessee’s reasonably predictable cost of performing under the lease agreement if the option is not exercised.” *See* 810 ILL. COMP. STAT. ANN. 5/201(37)(x).

The option price is *not* nominal consideration if “(i) either when the option to renew the lease is granted to the lessee the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed, or (ii) when the option to become the owner of the goods is granted to the lessee the price is stated to be the fair market value of the goods determined at the time the option is to be performed.” *See id.*

27. While there is no bright line test for determining what “nominal” consideration is, the Seventh Circuit has held that courts should compare the option price not with “the actual fair market value of the leased goods at the time the option arises, but their fair market value at that time as anticipated by the parties when the lease is signed.” *In re Marhoefer Packing Co., Inc.*, 674 F.2d 1139, 1144-1145 (1982). One court explained the test as “if only a fool would fail to exercise the purchase option, the option price is generally considered nominal and the transaction characterized as a disguised security agreement.” *In re Taylor*, 209 B.R. at 486.

28. Here, the option price meets the second provision of § 1-201(37)(x) because it takes into consideration the fair market value of the Equipment at the time the option is to be performed. *See* 810 ILL. COMP. STAT. ANN. 5/201(37)(x)(ii). As a result, the Court cannot conclude that the option price is merely “nominal consideration.”

29. Because the Agreement does not satisfy any of these requirements, the Court cannot conclude that the Agreement creates a security interest as a matter of law.

(2) Do the Economics of the Agreement Mandate the Conclusion that the Agreement Creates a Security Interest?

30. Because the Court cannot conclude that the Agreement creates a security interest *per se*, the Court will consider the remaining factors relevant under the Illinois Uniform Commercial Code.

- (a) Is the present value of the consideration the Debtor is obligated to pay Movant for the right to possess and use the Equipment substantially equal to or is it greater than the fair market value of the Equipment at the time of the Agreement?

31. If the present value of the rent to be paid over the life of the Agreement is less than the fair market value of the Equipment at the time the Agreement is entered into, that fact indicates a true lease rather than a security agreement. Here, the purchase price of the Equipment was \$392,366.00, which the Court finds to be the fair market value of the Equipment at the time the Agreement was executed. *See* Movant's Exhibits 6 and 7. The total amount of rent to be paid under the Agreement as finally amended was \$430,320.00 (60 months at \$7,172.00 per month). The Illinois Commercial Code requires that this stream of payments be discounted in order to calculate the present value of the aggregate payments.⁴ When the stream of rental payments required under the final Agreement is discounted (using a 10% discount rate), the resulting present value is \$337,552.83. Thus, using a 10% discount rate, the present value of the aggregate rental payments required under the Agreement is less than the fair market value of the Equipment when purchased, indicating a true lease.

Moreover, if the Debtor had sought to purchase the Equipment by obtaining a loan, the Debtor would have paid substantially more in the aggregate for the Equipment. Using an assumed 10% interest rate on a loan for the purchase price of the Equipment (\$392,366.00) to be repaid over the Agreement's term of 60 months, the Debtor would have been required to make monthly loan payments of \$8,336.62. Over 60 months, the aggregate of those payments would have been \$500,197.20, a

⁴The parties failed to present any evidence regarding an appropriate discount rate. For illustrative purposes, the Court will use a 10% rate.

difference of \$69,877.20 between the amount required under such a hypothetical loan and the amount required under the Agreement.

- (b) Does the Debtor assume the risk of loss, or agree to pay taxes, insurance, filing and other fees, or service or maintenance costs with respect to the Equipment?

32. Under Illinois law, courts generally give minimal emphasis to provisions requiring the lessee to be responsible for the payment of taxes, insurance, and other costs incident to ownership, finding those provisions to be more indicative of the relative bargaining position of the parties rather than the true character of the transaction. *See In re Taylor* 209 B.R. at 486 (citing *In re Marhoefer Packing Co., Inc.*, 674 F.2d at 1146.). However, such provisions become more relevant if the lessor disclaims all warranties. *See id.* (citing *In re Maritt*, 155 B.R. 12, 13 (Bankr. D. Idaho 1993)). If the lessor disclaims all warranties, and the lessee is responsible for the payment of taxes, insurance and other costs normally incident to ownership, those facts tend to indicate the creation of a security interest rather than a true lease. *See id.*

33. Here, the Debtor is responsible for all taxes and bears the risk of loss. Movant disclaimed all warranties. Thus, the Debtor's assumption of the risk of loss and the Debtor's obligation to pay taxes, insurance, and other costs normally incident to ownership, coupled with Movant's disclaimer of all warranties, tends to suggest the creation of a security interest rather than a true lease.

- (c) Does the Debtor have an option to renew the Agreement or to become the owner of the Equipment?

34. The Debtor does not have an option to renew the Agreement, but the Debtor does have an option to purchase the Equipment at the end of the Agreement's term. However, the inclusion of an option to purchase "does not automatically create a security." *In re Loop Hosp. P'ship*, 35 Bankr. Rep. 929, 933 (Bankr. N.D. Ill. 1983). Instead, it is the option to purchase the leased goods for only a *nominal consideration* at the expiration of the lease that indicates a conditional sale rather than a lease. *Id.* "If the option price resembles the fair market price of the equipment, then the option is a real one; rental payments over the term of the agreement will compensate the lessor only for the use of the property." *Id.* Where the option price is nominal or substantially less than the fair market value of the equipment, the rental payments compensate the lessor for the cost, plus interest, of the property, and the lease is actually a sales agreement.

The Court has already concluded that the option price under the Agreement is not nominal. *See pp. 10-11, supra.*

- (d) Does the Debtor have an option to renew the Agreement for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the Equipment for the term of the renewal at the time the option is to be performed?

35. As noted previously, the Debtor does not have an option to renew the Agreement, which suggests the Agreement is a true lease. *See Borg-Warner Leasing, Inc. v. Bauer*, 544 N.E. 1322, 1324 (Ill. App. Ct. 1989).

- (e) Does the Debtor have an option to become the owner of the Equipment for a fixed price that is equal to or greater than the reasonably predictable fair market value of the Equipment at the time the option is to be performed?

36. Because the parties failed to present any evidence of what they reasonably predicted the fair market value of the Equipment at the end of the term of the Agreement would be, the Court has no record on which to analyze this factor. Although one might infer from the terms of the Agreement that the parties predicted that the fair market value of the Equipment would be 20% of the purchase price when the option to purchase was exercisable (because they agreed the option price would be the fair market value of the equipment, not to exceed 20% of the purchase price of the Equipment), the Court was not asked to draw this inference by Movant. Because the parties failed to present any evidence with respect to their value predictions when the Agreement was entered into, the Court cannot properly analyze this factor.

(3) Summary and Conclusion

37. The Agreement, admittedly, is not a model of clarity. The Agreement contains some characteristics of a security agreement – *i.e.*, the Debtor has no right to terminate the Agreement and the Debtor bears all risk of loss, pays all taxes and other costs incident to ownership while Movant disclaims all warranties. Still, the economics of the transaction compel the Court to conclude that the Agreement is a true lease. It is undisputed that the useful life of the Equipment exceeds the lease term by at least 15 years. The Agreement did not provide the Debtor a right to renew. The purchase option did not allow the Debtor to purchase the Equipment for a nominal amount. Finally, the present value of the rent paid over the life of the Agreement is substantially less than the purchase price of the Equipment. After considering these factors, the Court concludes that the Agreement did not create a security agreement but is instead a true lease.

(4) What Rent is Owing to Movant?

38. Having determined that the Agreement is a true lease, the Court must next decide whether Movant is entitled to recover on its claim for post-petition administrative rent in the amount of \$14,343.99 for the first 60 days of the case under § 503(b)(1)(A) of the Bankruptcy Code and whether the Debtor must pay post-petition rent due under the Agreement from and after 60 days after the order for relief until such time as the Agreement is assumed or rejected under § 365(d)(10) of the Bankruptcy Code.

39. With respect to Movant's request for rent during the first 60 days of the case, Movant must satisfy the requirements for the allowance of administrative claims under § 503(b)(1)(A) which provides that

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including – (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;

11 U.S.C. § 503(b)(1)(A). To be “actual and necessary,” the cost must have provided a benefit to the estate. *See In re H.L.S. Energy Co., Inc.*, 151 F.3d 434, 437 (5th Cir. 1998). “If it was of no ‘benefit,’ it cannot have been ‘necessary.’” *See id.*

40. The burden is on Movant, as the creditor asserting the administrative expense claim, to prove that its rent claim is for actual, necessary costs and expenses of preserving the estate. *See In re Transamerican Natural Gas Corp.*, 978 F.2d 1409, 1416 (5th Cir. 1992). A prima facie case under § 503(b)(1)(A) may be established by evidence that (1) the claim arises from a transaction with the debtor-in-possession; and (2) the goods or services supplied enhanced the ability of the debtor-in-possession's business to function as a going concern. *See id.* After Movant has established a prima

facie case, the burden of producing evidence shifts to the Debtor; but the burden of persuasion, by a preponderance of the evidence, remains with Movant. *See id.*

41. Here, Movant has established a prima facie case. The Equipment was used by the Debtor in its business operations during the first 60 days of the case. Moreover, the Debtor's representative testified as to the "prestige" of having such a piece of equipment to impress potential clients. Therefore, the Court finds that the rental costs of the Equipment under the Agreement were actual and necessary costs and expenses of preserving the estate during the first 60 days of the case.

42. With respect to Movant's request for rent from the 61st day after the filing of the case until assumption or rejection of the Agreement, Movant's rights are governed by § 365(d)(10) of the Bankruptcy Code which provides that:

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.

Under the unambiguous language of § 365(d)(10), the Debtor must timely perform all of its obligations under the Agreement – including its obligation to pay rent – unless the Court, after notice and hearing, orders otherwise. The Debtor did not seek such an order from the Court. *See* Response of Debtor to Motion to Compel filed by Bank One Leasing, docket no. 65. Thus, there is no basis on which the Court could "order otherwise" here. The Debtor must continue to pay rent to Movant pursuant to the terms of the Agreement until the Agreement is assumed or rejected.

43. Where appropriate, any Conclusion of Law may be construed as a Finding of Fact.

An Order granting the Motion will be entered concurrently with these findings and conclusions.

Signed: September 27, 2001.

Barbara J. Houser
United States Bankruptcy Judge