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

IN RE:	§	
	§	
MIRANT CORPORATION, ET AL	§	CASE NO. 03-46590 (DML)
Debtors.	§	Jointly Administered
	§	
	§	
MIRANT PEAKER, LLC,	§	
MIRANT CHALK POINT, LLC	§	
AND MIRANT CORPORATION,	§	
Plaintiffs	§	
	§	
vs.	§	ADV. NO. 04-4073
	§	
SOUTHERN MARYLAND ELECTRIC	§	
COOPERATIVE, INC. AND POTOMAC	§	
ELECTRIC POWER COMPANY,	§	
Defendants.	§	

MEMORANDUM OPINION

Before the court are motions to dismiss (the "Motions") filed pursuant to FED. R. CIV. P. 12(b)(6), applicable herein pursuant to FED. R. BANKR. P. 7012(b), by Defendants Southern Maryland Electric Cooperative, Inc. ("SMECO") and Potomac Electric Power Company ("PEPCO," and, with "SMECO," "Defendants") asking that Plaintiffs' complaint be dismissed for failure to state a claim upon which relief may be granted. PEPCO filed a brief in support of the PEPCO Motion (the "PEPCO Brief"), which was adopted by SMECO. Plaintiffs filed a response (the "Response") and PEPCO and SMECO filed replies (the "PEPCO Reply," the "SMECO Reply" and, collectively, the "Replies"). On June 2, 2004, the court heard argument on the Motions. The court's record also includes certain documents attached by Plaintiffs to the

complaint as exhibits, which are described as necessary below.

Plaintiffs do not specify a basis for this court's core jurisdiction over this adversary proceeding, but rather simply invoke generally 28 U.S.C. §§ 1334 and 157(b)(2). In the Motions, however, Defendants do not quarrel with the characterization of these proceedings as core (see Rule 7012(b) requiring that a responsive pleading "admit or deny an allegation that the proceeding is core"), and the court agrees this adversary proceeding is within the scope of section 157(b)(2)(A), (B) and (O). This Memorandum Opinion comprises the court's findings and conclusions. FED. R. BANKR. P. 7052.

I. Background

PEPCO, a public utility and producer of electric power, was party to a full-requirements contract (the "Requirements Contract") with SMECO, a utility that serves the public in Maryland, by which SMECO bought from PEPCO all of the electric power SMECO required to serve its customers. On March 21, 1989, PEPCO and SMECO entered into a series of agreements by which SMECO was to cause the construction on property at PEPCO's Chalk Point Generating Facility ("Chalk Point") of a 77 megawatt, two turbine, power generating facility to be maintained and operated by PEPCO.

By one of these agreements, the Site Lease Agreement (the "Site Lease"), PEPCO leased to SMECO for 50 years, beginning May 1, 1989, "certain premises situated at or near" Chalk Point (Site Lease ¶ 1), being some three acres as more specifically described in exhibits L-1 and L-2 to the Site Lease (the "Site"). The Site Lease in turn incorporates a Facility and Capacity

Credit Agreement (the "FCC") executed contemporaneously by the parties.

In the FCC the parties agreed that, once SMECO had caused construction of the generating facility upon the Site (FCC Art. IV), upon its acceptance by PEPCO (FCC Art. V), the Facility (as defined in the FCC) would be operated and maintained by PEPCO for the term fixed in the FCC. (FCC Art. VI). The FCC states, *inter alia*:

> 6.1 PEPCO shall operate and maintain the Facility . . . throughout the term of [the FCC] . . . . Upon [acceptance] of the Facility by PEPCO, PEPCO shall maintain . . . usual and customary insurance coverage . . . .
>
> 6.2 PEPCO shall have complete control over the Operation [sic], Dispatch, and Maintenance of the Facility . . . . PEPCO shall be responsible for all costs associated with operating and maintaining the Facility . . . .
>
> 6.3 . . . SMECO shall . . . assign all manufacturer warranties to PEPCO for the term of [the FCC].

PEPCO is also responsible for most repairs to the Facility (FCC ¶ 6.4). SMECO is given the right "to observe PEPCO's operation and maintenance of the facility and to inspect the site, upon reasonable notice and conditions of access." (FCC ¶ 8.1). SMECO is given a similar right to inspect operating records (*id.*).[1] The term established in the FCC is 25 years from the date of PEPCO's acceptance of the Facility.

As expected by the parties, the Facility was completed and then accepted by PEPCO in 1991. Thus the term of PEPCO's rights and obligations under the FCC will continue through 2015. The term of the FCC could be extended only upon agreement of both parties (FCC ¶ 13.1).

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1 Exhibit A to the FCC specifies that the Facility will be bounded by "a chain link fence with three-strand barbs at the top . . . ." (FCC, Ex. A, p.2). Thus, the FCC has the effect of giving PEPCO total control over access to the Facility.

Following termination of the FCC, operation and maintenance of the Facility becomes the responsibility of SMECO (FCC Art. X). Following expiration of the Site Lease, SMECO, if required by PEPCO (Lessor), is to return the Site to its original condition (Site Lease ¶ 20).

After accepting the Facility, during the term set by the FCC, PEPCO, as consideration for the Facility's addition to its generation capacity, is to provide SMECO, in arrears, a Monthly Capacity Credit (FCC ¶¶ 1.13 and 3.1). The Monthly Capacity Credit is to be calculated on a one-time basis (subject to recalculation should the cost of borrowings for the Facility change, FCC ¶ 3.4) through use of a formula that appears to be largely dependent on the cost of constructing the Facility, SMECO's cost of capital, property taxes and rent due PEPCO under the Site Lease.[2]

From acceptance of the Facility to 2000, PEPCO and SMECO utilized the Facility as contemplated by the FCC. In June 2000, in connection with deregulation in the power industry, PEPCO, pursuant to an Asset Purchase and Sale Agreement (the "APSA"), sold its power generating facilities and associated assets to Plaintiffs' predecessor in interest, Southern Energy, Inc. ("SEI"). In 2001, SEI spun off Plaintiffs and certain of their affiliates. As a result of the spin off, Mirant Peaker, LLC ("MP"), obtained control of the Facility and assumed PEPCO's former role under the FCC, and Mirant Chalk Point, LLC ("MCP") became the owner of Chalk

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2 The formula for determining the Monthly Capacity Credit is set out in Exhibit C to the FCC. The court's copy of Exhibit C is barely legible, and the court has been unable to decipher some steps in the calculation of the Monthly Capacity Credit. The court does not believe at this stage in this adversary proceeding it requires a full understanding of the formula used to calculate the Monthly Capacity Credit.

Point and, hence, lessor to SMECO under the Site Lease (Assignment and Assumption Agreement (the "AAA"), Ex. D to complaint, ¶¶ 4 and 5). Pursuant to the APSA, Mirant Corporation ("Mirant") guaranteed certain obligations owed by PEPCO and assumed by a Mirant affiliated entity pursuant to the AAA (see Ex. G to complaint).[3] The obligations guaranteed may include obligations of PEPCO under the Site Lease and FCC.[4]

In July 2003, Mirant and a number of its affiliates, including MP and MCP, commenced chapter 11 cases in this court. In March of this year, Plaintiffs filed the complaint asking for declaratory judgment that section 502(b)(6) of the Bankruptcy Code (the "Code")[5] caps any damages PEPCO or SMECO may assert against Plaintiffs should the FCC be rejected. Defendants' filing of the Motions followed.

II. Standard for Granting the Motions

A motion to dismiss for failure to state a claim is appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim. FED. R. CIV. P. 12(b)(6). The test for determining the sufficiency of a complaint under Rule 12(b)(6) was set out by the United States Supreme Court as follows: "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). *See also*

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3 The assignees under the AAA were subsidiaries of SEI at the time, as was Mirant. The names of these entities were changed upon their spin-off by SEI.

4 SMECO agreed to the assignments to MP and MCP but did not release PEPCO from any liability. Agreement and Consent, Ex. H to Complaint, ¶ 3.

5 11 U.S.C. §§ 101 *et seq.*

Grisham v. United States, 103 F.3d 24, 25-26 (5th Cir. 1997).

Subsumed within the rigorous standard of the *Conley* test is the requirement that the plaintiff's complaint be stated with enough clarity to enable a court or an opposing party to determine whether a claim is sufficiently alleged. *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989). Further, "the plaintiff's complaint is to be construed in a light most favorable to the plaintiff, and the allegations contained therein are to be taken as true." *Oppenheimer v. Prudential Sec., Inc.*, 94 F.3d 189, 194 (5th Cir. 1996). This is consistent with the well-established policy that the plaintiff be given every opportunity to state a claim. *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977). In other words, a motion to dismiss an action for failure to state a claim "admits the facts alleged in the complaint, but challenges plaintiff's rights to relief based upon those facts." *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1137 (5th Cir. 1992). When considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the trial court must examine the complaint to determine whether the allegations provide a basis for relief under any possible theory. *Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994).

III. Issue

The issue presented by the Motions is therefore a very narrow one: is there no set of facts under which the FCC, *standing alone*,[6] could be construed to be a "lease of real property" within

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6 The court need not now address the relationship of the FCC to the Site Lease (except tangentially), the Requirements Contract, the APSA or any other agreement. In fact, the court does not have the Requirements Contract (other than the Fourth Amendment) or the APSA before it. However, despite the

the meaning of Code § 502(b)(6).[7]

IV. **Discussion**

In the PEPCO Brief, Defendants contend that a mere review of the FCC itself demonstrates "that it is an operation, maintenance, and electric capacity agreement, not a real property lease." (PEPCO Brief p. 2; *see also,* the Replies). PEPCO argues that the special treatment given real property leases in sections 365(d)(4) and 502(b)(6) of the Code represents an exception to the general rule regarding treatment of executory contracts and should be construed narrowly to exclude the FCC. But the cases cited by PEPCO in support of this proposition are inapposite and clearly distinguishable from the case at bar.

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view of Defendants that contracts cannot be "merged" by the court (SMECO Reply, p. 4), in fact, if appropriate, the court may consider several agreements as one. *See* Nat'l Union Fire Ins. Co. v. Turtur, 892 F.2d 199, 204 (2d Cir. 1989) (stating that two documents executed at the same time may be considered one agreement if the parties so intended); *In re* T & H Diner, Inc., 108 B.R. 448, 454 (D.N.J. 1989) (lease and purchase agreement inextricably intertwined). Whether that should be done in this case is not now before the court.

7 Section 502(b)(6) of the Code states:

> (b) [T]he court, after notice and a hearing, shall determine the amount of such claim as of the date of the filing of the petition, and shall allow such claim in lawful currency of the United States in such amount, except to the extent that
> . . .
> (6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—
> (A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of –
> (i) the date of the filing of the petition; and
> (ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus
> (B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates.

In re Palace Quality Services Industries, Inc., 283 B.R. 868 (E.D. Mich. 2002) involved whether Code § 365(d)(4) applied to a lease of very large washing machines. Significantly, the lease of the machines was not, as is true in the case at bar, pursuant to the same document under which the debtor had possession of the premises on which the machines were located. *In re Care Givers, Inc.*, 113 B.R. 263 (Bankr. N.D. Tex. 1989) turned on the differentiation in Code § 365(d)(4) between residential and non-residential real estate. Section 502(b)(6) makes no such distinction, applying to all leases of real property whether or not the property is residential. *Sarah R. Neuman Foundation, Inc. v. Garrity (In re Newman)*, 81 B.R. 796, 800 (S.D.N.Y. 1988) strictly applied the time requirements for assumption of realty leases of section 365(d)(4) – the District Court in *Newman* did not opine that the term "lease of real property" should have a limited meaning.[8] *In re Independence Village, Inc.*, 52 B.R. 715 (Bankr. E.D. Mich. 1985) involved a lease-purchase agreement recharacterized as a mortgage and so not governed by section 365(d)(4). *International Trade Administration v. Rensselaer Polytechnic Institute*, 936 F.2d 744 (2d Cir. 1991), the only case cited by PEPCO that discusses section 502(b)(6), concerned a sale disguised as a lease. The Second Circuit held that, as such, the parties' agreement "must not be subject to the preferential treatment given to leases under [§ 502(b)]." 936 F.2d at 750.[9]

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8 The court in *Care Givers* was similarly concerned with the time limits of Code § 365(d)(4). "Since § 365(d)(4) represents an exception to the general rule, which does not require assumption or rejection within 60 days, . . . [it] should be narrowly construed." 113 B.R. at 267.

9 Apparently not sharing the view of the Second Circuit that leases receive preferential treatment by virtue of section 502(b)(6), Defendants argue that they should not be prejudiced by reason of the special rules for

Not only are Defendants' authorities not persuasive or pertinent to the court's inquiry, they are inconsistent with the general rule that form will not prevail over substance in a bankruptcy case. *See Bratcher v. Nat'l Life Ins. Co. (In re Monumental Life Ins. Co.)*, 365 F.3d 408, 417-18 (5th Cir. 2004) (refusing to deny certification, based on mischaracterization of relief claimed, "serves no function other than to elevate form over substance"); *Perry v. Dearing (In re Perry)*, 345 F.3d 303, 309 (5th Cir. 2003) (finding that lower court's reliance on party's self-titled pleading as demonstrating its character elevated form over substance); *M.C. Prods., Inc. v. AT&T (In re M.C. Prods., Inc.)*, 1999 U.S. App. LEXIS 34116 (9th Cir. 1999) (upholding lower courts ruling "exalt[ing] substance over form"); *Breeden v. Tricom Bus. Sys., Inc.*, 244 F. Supp. 2d 5, 14 (N.D.N.Y. 2003) (concluding that equitable principles in bankruptcy are designed to prevent elevation of form over substance); *Ryker v. Current (In re Ryker)*, 301 B.R. 156, 167 (D.N.J. 2003) (finding that lower courts "rightly exercised their equitable powers to correct an injustice and protect the interests of all parties affected" when "refusing to elevate form over substance"); *In re Interstate Restaurant Sys., Inc.*, 61 B.R. 945, 948 (S.D. Fla. 1986) (applying the maxim "equity regards substance rather than form" and disregarding technicalities "in order to achieve an equitable result" in permitting fees to be paid to a non-professional) (citing *Bank of Marin v. England*, 385 U.S. 99, 103 (1966)).

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quantifying lease rejection claims. *See, e.g.*, SMECO Reply p. 9. Yet, like *International Trade*, all the cases cited in the PEPCO Brief and the Replies construe section 365(d)(4) (and § 502(b)(6)) narrowly not to aid claimants but rather for the benefit of the estate and other creditors. Thus these cases support the court's conclusion, below, that the Code should be construed to ensure that each entity dealing with a debtor bear its proper share of risk and harm caused by the debtor's insolvency based on the true character of the relationship of the parties.

In categorizing a debtor's relationship and thus in determining the rights of a debtor's counter-parties, courts uniformly disregard the labels chosen for transactions in favor of recognizing the legal effect of and factual circumstances surrounding those dealings. *See Hall v. Goforth (In re Goforth)*, 179 F.3d 390, 395 (5th Cir. 1999) (determining that debtor was in fact a guarantor of plaintiff's employment contract though debtor never specifically guaranteed the contract and was not plaintiff's employer); *LTV Corp. v. Valley Fidelity Bank & Trust Co. (In re Chateaugay Corp.)*, 961 F.2d 378, 380-81 (2d Cir. 1992) (concluding that original issue discount constitutes unmatured interest for purposes of section 502(b)(2)); *Orix Credit Alliance, Inc. v. Pappas*, 946 F.2d 1258, 1261-63 (7th Cir. 1991) (upholding lower court ruling that a lease was "in substance a conditional sale and should be treated as such"); *Fireman's Fund Ins. Cos. v. Grover (In re Woodson Co.)*, 813 F.2d 266, 272 (9th Cir. 1987) (concluding that certain purported sales were in fact loans); *Nova Info. Sys., Inc. v. Premier Operations, Ltd. (In re Premier Operations, Ltd.)*, 294 B.R. 213, 222 (S.D.N.Y. 2003) (agreeing with bankruptcy court that recognizing purported "assignments" elevated form over substance, and therefore they did not qualify as true assignments); *Azstar Casualty Co. v. Allied General Agency (In re Allied General Agency)*, 229 B.R. 190, 198 (D. Ariz. 1998) (disregarding label of constructive trust placed on insurance premiums account by state court in favor of elevating substance over form); *Baldridge v. Continental Airline Holdings, Inc. (In re Continental Airlines, Inc.)*, 257 B.R. 658, 663 (Bankr. D. Del. 2000) (holding that a collective bargaining agreement was in fact an employment contract); *In re Wilson Foods*

Corp., 182 B.R. 278, 283 (Bankr. D. Kan. 1995) (determining that a consulting contract was an employment contract for purposes of Code § 507(b)(7) (a companion provision to Code § 502(b)(6)) based upon the relationship of the parties).

It is all the more important that the substance, (i.e., the effect of an agreement, rather than the words chosen to cause that effect), govern construction of the agreement where the result is allocation of the burdens of the debtor's restructuring. In formulating the precursor to Code § 502(b)(6), which similarly capped lease rejection damages, it was not intended that parties be able to draft around the limitation imposed by Congress on claims of lessors. *See, New Valley Corp. v. Corporate Property Assocs. (In re New Valley Corp.)*, No. 98-982, 2000 Dist. LEXIS 12663, at *29 (D.N.J. 2000) (noting that the legislative history to section 502 states the section derives from its precursor, section 63(a)(9) of the Bankruptcy Act, and that "nothing in the legislative history [of the Code] suggests that Congress intended to effectuate a change in this area") (citations omitted); 3A COLLIER ON BANKRUPTCY ¶ 63.33[2.1] (14th ed. 1972) (opining that under section 63(a)(9) of the Bankruptcy Act, a creditor could not, by "reason of an artful drafting of [a] lease, . . . obviate" a quantification mechanism mandated by Congress for calculating damages from an anticipatory breach). Rather, Congress meant to limit to a reasonable level claims that otherwise would dramatically and unfairly dilute the estate to the detriment of other creditors. *Id.*

Defendants are correct, of course, that a *statutory exception* to a rule of general application should be narrowly read. The court concurs that sections 365(d)(3), 365(d)(4)

and 502(b)(6) should be limited in their effect to leases of real property. Defendants, however, would go further and restrict the court's ability to assess the true relationship established by the FCC. It is not a proper extension of the rule that exceptions be read narrowly to preclude judicial inquiry concerning the actual substance of an agreement regardless of the title chosen for it by the parties. Defendants confuse narrow application of a statute with requiring that this court wear blinders and ignore the fact and effect of the FCC. The court thus concludes that notwithstanding its title, and the wording of some of its provisions the FCC could be a lease and, for the reasons given below, could be a lease of real property.

Defendants take the position that, if the FCC is a lease at all, it is a lease of personal property (i.e., the turbines). Consequently, argue Defendants, the exception that limits claims arising from the rejection of leases of real property does not apply.[10]

The court cannot agree that the FCC must be viewed as a lease of personalty. While the existence of the Site Lease is not persuasive of the character of the FCC (and is not itself significant, both because of the low rental amount and because *MCP* is the lessor), it evidences SMECO's right to possession and use of the Site. Because the FCC includes the Site – the real property conveyed to SMECO by the Site Lease – in the definition of

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10 The parties seem to assume application of section 502(b)(6) to a SMECO/PEPCO claim would benefit Plaintiffs. The court is not so sure. Holding the FCC to be a lease of equipment does not necessarily result in a greater claim against Plaintiffs. If the FCC is an operating and maintenance agreement, a claim resulting from its rejection might be even less.

"Facility,"[11] the FCC includes the transfer by SMECO to PEPCO (and, by extension, MP) of the right to occupy and use real property. The FCC thus could meet the definition of "lease of real property."[12]

Moreover, at least some terms of the FCC are consistent with a landlord-tenant relationship, including provisions referred to above regarding insurance, repair, the regular credit or payment of a fixed monthly amount for the full term of the FCC and SMECO's limited access rights. That the Monthly Capacity Credit is calculated based on costs of the parties – not operations, output or capacity – is but one more indication that the intended agreement of the parties was not clearly just an operating agreement.

Certainly the letter from in-house counsel for PEPCO to his Mirant counterpart dated September 8, 2003 and attached as Exhibit I to Plaintiffs' complaint suggests the evidence may prove the intent of the parties and the effect of the FCC were to lease real property. Not only does the September 8 letter refer to the FCC as a lease and the Monthly Capacity Credit as rent; it also appears (¶ 2) to invoke a right of SMECO to payment of all postpetition "rent" as required by Code § 365(d)(3). If PEPCO's in-house lawyer thought of the FCC as a lease

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11 FCC ¶ 1.6 states:

> "Facility" means the combustion turbine generating unit referred to in the recitals which is expected to have an initial generating capacity of approximately 77 megawatts, Fuel Handing Facilities, *plus related facilities and associated leased land.* (Emphasis supplied).

12 This term is not defined in the Code. Black's, however, defines "lease" as a "contract by which the rightful possessor of real property conveys the right to use and occupy that property in exchange for consideration, usu[ally] rent." BLACK'S LAW DICTIONARY 898 (7th ed. 1999); *see also* A DICTIONARY OF MODERN LEGAL USAGE 514 (2nd ed. 1995). As SMECO conveys use and occupancy of the site under the FCC, the FCC seems to fit this definition.

of personalty, section 365(d)(10) would apply, and SMECO would not be entitled to payment of rent until 60 days after entry of an order for relief in Plaintiffs' cases.[13]

As to Defendants' argument that the real subjects of the FCC are the turbines and that the turbine are removable, the assumption that the turbines *are* removable (whether as fixtures or otherwise) is simply not tenable in the present context. Even if the court must determine whether the turbines are fixtures, are movables or are part of the real estate on which they rest in order to determine damage claims assertable against Plaintiffs, it could not do so without more evidence. Clearly the Site played an important role in the transaction underlying the FCC. The court need only address today whether, if both land and movables are the subject of a single lease, all damages arising from rejection of that lease be subject to section 502(b)(6). The cases cited by Defendant do not lead to the conclusion that this court must (as opposed to *may*) somehow allocate lease rejection damages between personalty and realty. Rather Defendants' cases run to ownership, as between landlord and tenant, of fixtures either after completion of a lease or for purposes of tax assessment. The court's research suggests that, whether under Maryland law or decisions of federal courts, a "lease of real property" includes all property possession and use of which is conveyed by the lease. *See In re Alterman*, 127 B.R. 356, 357 (Bankr. E.D. Va. 1991) (stating that cages installed on leased

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13 Section 365(d)(3), consistent with the September 8 letter, requires a chapter 11 debtor to "timely perform all obligations . . . arising from and after the order for relief under any unexpired lease of nonresidential real property . . . ." Section 365(d)(10), on the other hand, requires the debtor to "timely perform all of the obligations . . . first arising from or after 60 days after the order for relief . . . under an unexpired lease of personal property . . . ."

premises prior to lease were leased with the real property); *In re Tri-State Fabricators, Inc.*, 32 B.R. 260, 261-64 (Bankr. W.D. Okla. 1983) (stating that, at the time the lease agreement was entered into, the disputed property was "either resting on the real estate, tack welded to beams which were set into the ground and secured by concrete or tack welded to the interior portion of a building" but, regardless, included in the lease of real estate); *Comptroller of the Treasury v. Steuart Invs. Co.*, 537 A.2d 607, 607-09 (Md. 1988) (stating that liquid storage tanks that were located on the property prior to the parties entering into the lease agreement were part of the real property). These cases lead to the conclusion that a damage claim arising from rejection of a single lease transferring possession and use of both real and personal property could very well be found wholly subject to the cap of section 502(b)(6).

V. **Conclusion**

Today the court does not decide whether a lease of both movables and realty must be a real property lease, may be divisible or may be viewed as a true lease of equipment, despite the inclusion of a conveyance of real property. The court makes no determination concerning the intent of the parties or the substantive effect of the FCC – more evidence will be necessary to that decision. The court arrives at no conclusion respecting the interrelationship among the parties, the allocation of any costs, claims or risks among Plaintiffs, or how damages should be measured in the event of rejection of the FCC. The court only holds that evidence presented at trial may prove that the FCC is in fact a lease of real property subject to Code § 502(b)(6). Because such a showing is possible, Defendants have failed to sustain

their burden and the Motions must be denied.

It is so ORDERED.

Signed this the 28 day of June 2004.

HON. D. MICHAEL LYNN,
UNITED STATES BANKRUPTCY JUDGE