

THE HONORABLE CHRISTOPHER M. ALSTON  
Chapter 11  
Date: May 20, 2016  
Time: 9:30 a.m.  
Response Date: May 13, 2016  
Location: Courtroom 7206

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

In Re ) No. 16-11767-CMA  
)  
NORTHWEST TERRITORIAL MINT, ) Chapter 11  
LLC, )  
)  
Debtor. ) **LANDLORD’S EMERGENCY**  
) **MOTION TO COMPEL IMMEDIATE**  
) **AND ONGOING COMPLIANCE**  
) **WITH LEASE AGREEMENT, AND**  
) **FOR ADEQUATE PROTECTION**  
) **AND ASSURANCES**

Gatewood-California, LLC (“Landlord”), moves the Court for an order (i) compelling Chapter 11 Trustee Mark Calvert’s (“Trustee”) immediate and ongoing payment of all post-petition obligations due under Landlord’s lease agreement pursuant to 11 U.S.C. § 365(d)(3); (ii) granting adequate protection to Landlord in the form of superpriority status and certain insurance coverage pursuant to 11 U.S.C. § 363(e); and (iii) granting adequate assurances to Landlord in the form of escrow deposits and expedited relief from stay upon further default, pursuant to 11 U.S.C. § 365(b)(1). This Motion is supported by the Declaration of George Humphrey (“Humphrey Decl.”) and exhibits attached thereto.

**I. BACKGROUND**

Landlord, a Washington LLC, owns a single asset: commercial real property located in Auburn, Washington (the “Property”). Humphrey Decl. ¶ 3. Northwest Territorial Mint, EMERGENCY MOTION TO COMPEL COMPLIANCE WITH 11 U.S.C. § 365 - 1

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1 LLC (“Debtor”) is the current tenant of the Property under the Commercial Lease dated  
2 November 2, 2006, as amended September 11, 2014. Humphrey Decl. ¶¶ 4-6, Ex. A-B  
3 (collectively, the “Lease Agreement”). Debtor engages in minting, engraving, and other  
4 manufacturing type operations at the Property, and Trustee currently is continuing to operate  
5 Debtor’s business in this manner. Humphrey Decl. ¶ 7. The Lease Agreement expires on  
6 July 31, 2019. Humphrey Decl., Ex. B. Under the terms of the Lease Agreement, Debtor’s  
7 obligations include:

8 Rent, Taxes, Other Expenses, Late Charges, and Attorney’s Fees. Debtor is required  
9 to pay rent in advance on the first day of the calendar month. Lease Agreement, § 5. Debtor  
10 is further required to pay its proportionate share of all real property taxes and assessments  
11 upon notice from Landlord, along with specified costs associated with its use of the Property.  
12 Lease Agreement, §§ 7.3.2, 7.3.3. If Debtor fails to pay any of those amounts within five  
13 days after they come due, a late charge is applied, calculated as five percent of Debtor’s  
14 monthly rent plus one and one-half percent interest on the delinquency from the date owing  
15 until payment. Lease Agreement, § 15.1. Debtor is also required to pay Landlord’s  
16 attorney’s fees and costs if Landlord is the substantially prevailing party in any action or  
17 proceeding arising out of or in connection with the Lease Agreement. Lease Agreement, §  
18 21.14.

19 Insurance. Debtor is required to obtain and maintain certain insurance policies at  
20 Debtor’s own expense, including a commercial general liability insurance policy with certain  
21 minimum combined limits. Lease Agreement, § 7.2.2. The Lease Agreement contains  
22 further provisions granting Landlord broad discretion to modify the insurance coverage  
23 requirements, especially for the purpose of protecting Landlord against Debtor’s potential  
24 noncompliance with governmental rules and regulations. See Lease Agreement, §§ 4.2,  
25 7.2.2, 7.3.3, 16.1, 26. Prior to Debtor’s bankruptcy filing, the Washington Court of Appeals,  
26 Division I affirmed a trial court judgment awarding \$869,746.53 to one of Debtor’s landlords

EMERGENCY MOTION TO COMPEL COMPLIANCE  
WITH 11 U.S.C. § 365 - 2

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1 at a location other than the Property (“Auburn”) for remedial action costs under the Model  
2 Toxics Control Act, RCW 70.105D *et seq.*, and damages for Debtor’s breach of that lease’s  
3 hazardous waste provisions, plus \$1,582,046.61 in costs and attorney fees. *See* Humphrey  
4 Decl. ¶ 8, Ex. C (the “MTCA Judgment”). The facts underlying the MTCA Judgment  
5 indicate that Debtor’s ordinary course of business, substantially similar to the operations  
6 Debtor continues to perform at the Property, caused serious and costly environmental issues  
7 that plagued the Auburn landlord long after Debtor vacated that property. *Id.* The insurer of  
8 the Auburn property failed to cover the issues underlying the MTCA Judgment, and that  
9 insurer is the same insurer Debtor has procured for the Property. Humphrey Decl. ¶ 9.  
10 Landlord was unaware of these facts until after Debtor’s bankruptcy filing, and based on its  
11 recent investigation, Landlord is now requiring adjustments to the insurance protection  
12 required under the Lease Agreement to include, among other things, any post-petition  
13 environmental damage arising from Trustee’s ongoing operation of Debtor’s business at the  
14 Property. Humphrey Decl. ¶ 10. Although the Lease Agreement also contains  
15 indemnification provisions covering similar actions of Debtor, given that Debtor is now in  
16 bankruptcy, such indemnification provisions provide no protection to Landlord. Lease  
17 Agreement, §§ 10.1, 26.

18 The Property is secured by a deed of trust (the “DOT”). Humphrey Decl. ¶ 11.  
19 Landlord’s managing member, George Humphrey (“Humphrey”), personally guaranteed  
20 Landlord’s obligations under the DOT. Humphrey Decl. ¶ 12. If Trustee does not fully  
21 perform Debtor’s obligations under the Lease Agreement, Landlord will either default under  
22 the DOT, or Humphrey, as guarantor, will be forced to individually cover the mortgage out  
23 of his own pocket to avoid Landlord’s default because Debtor’s rent obligation constitutes  
24 the only source of income for Landlord, which is a single asset LLC. Humphrey Decl. ¶ 13.

25 Debtor filed its voluntary Chapter 11 bankruptcy petition on April 1, 2016 (the  
26 “Petition Date”), and Trustee was appointed by Court order on April 11, 2016. ECF No. 1,

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WITH 11 U.S.C. § 365 - 3

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1 51. Prior to the Petition Date, Debtor was current regarding its obligations under the Lease  
2 Agreement, except as regards insurance, which has been identified as in default. Humphrey  
3 Decl. ¶ 14. Post-petition, however, Debtor and Trustee have failed to timely pay rent, taxes,  
4 and common area expenses as each has come due. Humphrey Decl. ¶ 15. Specifically,  
5 Debtor owes \$7,388.70 for rent that came due on April 1, 2016 (and the first of each month  
6 thereafter, subject to any adjustments as set forth in the Lease Agreement), \$4,508.55 for  
7 taxes that came due on April 1, 2016, and \$1,631.69 for the other remaining monthly  
8 expenses that came due on April 1, 2016. Humphrey Decl. ¶ 16, Ex. D.

9 Although Debtor and Trustee have promised to pay the April 2016 rent on multiple  
10 occasions, and later missed multiple dates when they indicate they would do so, as of the date  
11 of the filing of this declaration, no rent has been received, and Debtor's insurance coverage  
12 remains deficient. Humphrey Decl. ¶ 17. As of April 27, 2016, late charges and interest  
13 associated with the delinquent amounts total \$879.38; therefore, the total amount due for  
14 April 2016, including late fees and charges, is \$14,408.32. Humphrey Decl. ¶ 19, Ex. D.  
15 Furthermore, Debtor has failed to obtain commercial general liability insurance sufficient to  
16 cover potential liabilities of Debtor, including environmental liabilities, and to provide proof  
17 that Landlord has been specifically named as a named insured, and, as noted above, is  
18 required to obtain the additional insurance as set forth in the invoice attached to the  
19 Humphrey Decl. Humphrey Decl. ¶ 20, Ex. E. Failure to timely pay or perform any of the  
20 foregoing payment or performance obligations constitutes an event of default under the Lease  
21 Agreement. *See* Lease Agreement, § 15.<sup>1</sup>

22  
23  
24 <sup>1</sup> It is also troubling that Landlord never received any official notice of Debtor's bankruptcy filing; Landlord  
25 gained knowledge of Debtor's bankruptcy from a third party, and Landlord is still not listed in Debtor's mailing  
26 matrix. Humphrey Decl. ¶ 17. Furthermore, since discovering Debtor's bankruptcy filing, Landlord has  
brought Debtor's deficiencies under the Lease Agreement to the attention of both Debtor and Trustee.  
Humphrey Decl. ¶ 18. Landlord has now been forced to incur attorney's fees and costs in bringing this motion  
due to Debtor and Trustee's continued failure to comply with the Lease Agreement. Humphrey Decl. ¶ 18.

EMERGENCY MOTION TO COMPEL COMPLIANCE  
WITH 11 U.S.C. § 365 - 4

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1 rent, taxes, related expenses, late charges, and attorney's fees, have all accrued post-petition,  
2 and Trustee has not assumed or rejected the Lease Agreement. Furthermore, nothing in the  
3 record indicates that this case is in jeopardy of becoming administratively insolvent.  
4 Pursuant to 11 U.S.C. § 365(d)(3) and the Lease Agreement, Landlord is entitled to  
5 immediate payment of all past-due obligations, as well as timely ongoing payments and  
6 performance of such obligations, unless and until Trustee assumes or rejects the Lease  
7 Agreement.

8 **B. Landlord is Entitled to Adequate Protection.**

9 11 U.S.C. § 363(e) provides real property lessors the right to seek adequate  
10 protection. *Ernst*, 209 B.R. at 965-966 (“The right to receive timely payments under Section  
11 365(d)(3) would certainly be a hollow right if the debtor had no possibility of ever making  
12 those payments and the landlord was required to wait until the debtor’s default before it  
13 could enforce that right.”). The trustee bears the burden of proof on the issue of adequate  
14 protection. 11 U.S.C. § 363(p). In assessing a landlord’s request for adequate protection, the  
15 court must determine whether the landlord’s interests are protected as nearly as possible  
16 against the possible risks to that interest. *Ernst*, 209 B.R. at 966. Furthermore, by seeking  
17 adequate protection at the outset of the case, a landlord may be entitled to superpriority  
18 treatment under 11 U.S.C. 507(b) if adequate protection as ordered by the Court subsequently  
19 turns out to be inadequate. *MS Freight*, 172 B.R. at 980.

20 In this case, the following adequate protection, in addition to the timely payment of  
21 all obligations due under the Agreement Lease, is appropriate and necessary to protect  
22 Landlord’s interests: either (i) proof of insurance policies in compliance with the Lease  
23 Agreements terms, including an owner policy issued a in Landlord’s name, rather than as an  
24 additional insured, that protects Landlord in the event of hazards or contamination, or (ii)  
25 assurances from Debtor’s insurance carrier that the Property is covered in the event of  
26 contamination, and from Trustee that Landlord has exclusive priority rights to all funds

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1 recovered and Trustee/Debtor will take any and all steps to ensure Landlord can recover on a  
2 claim, notwithstanding any later rejection of the Lease Agreement.<sup>3</sup> Commercial general  
3 liability policy is expressly required under § 7.2.2(a) of the Lease Agreement and is subject  
4 to adjustment by Landlord based upon circumstances as they evolve. The environmental  
5 claims policy is necessary to adequately protect Landlord in light of the MTCA Judgment  
6 and the failure of the Auburn insurer (the same insurer for the Property) to cover that  
7 judgment.

8 In *Ernst*, the court determined that similar requests for adequate protection were  
9 unnecessary because the debtor was current on payments to its landlords and the estate held  
10 sufficient funds to pay its obligations as they became due under its leases. *Id.* at 967.  
11 Conversely, in this case, Debtor is already delinquent on its post-petition obligations under  
12 the Lease Agreement, despite the plain mandate of 11 U.S.C. § 365(d)(3) and Landlord has  
13 already incurred significant time and expense in pursuing Trustee’s performance of such  
14 obligations including rent.

15 Landlord is providing Debtor a great benefit through its continued use of the Property  
16 in the ordinary course of business given that the Property houses one of the key  
17 manufacturing locations central to Debtor’s operations; in exchange, Trustee must be  
18 required to obtain the necessary insurance coverage to ensure that Landlord is adequately  
19 protected. Landlord should not bear the risk of nonpayment on post-petition amounts that are  
20 benefitting Debtor’s estate and other creditors, and, in light of the MTCA Judgment, should  
21 not bear the risk of exposure to environmental claims that could arise out of Debtor’s post-  
22 petition use of the Property.

23 Even with the necessary insurance coverage in place, Landlord and Humphrey would

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24 <sup>3</sup> Beyond the need to ensure Landlord’s right to make a direct claim, or Landlord’s priority rights to recover on  
25 a claim, the current insurance coverage is deficient insofar as it includes the following exclusion:

26 **Alienated Premises:** (2) Premises you sell, give away or abandon, if the “property damage” arises out  
of any part of those premises and occurred from hazards known by you, or should reasonably have been known  
by you, at the time the property was transferred or abandoned. Humphrey Decl. Ex. E.

**EMERGENCY MOTION TO COMPEL COMPLIANCE  
WITH 11 U.S.C. § 365 - 7**

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1 remain susceptible to further harm if Trustee's failure to comply with 11 U.S.C. § 365(d)(3)  
2 goes uncured. Trustee's failure to perform under the Lease Agreement will effectively result  
3 in Humphrey funding Landlord's mortgage payments out-of-pocket, rendering him an  
4 involuntary lender to and creditor of Debtor. In the event that 11 U.S.C. § 365(d)(3) and the  
5 necessary insurance coverage prove inadequate to protect Landlord's interests, Landlord and  
6 Humphrey should be granted superpriority treatment under 11 U.S.C. § 507(b) to the extent  
7 they are required to bear the burden of Trustee's failure to perform Debtor's obligations  
8 under the Lease Agreement.

9 **C. Landlord is Entitled to Adequate Assurances.**

10 Trustee is required to perform Debtor's ongoing obligations under the Lease  
11 Agreement until the Lease Agreement is assumed or rejected. 11 U.S.C. § 365(d)(3). If  
12 Trustee were to assume the Lease Agreement, Trustee would then be required to cure any  
13 existing delinquencies and provide adequate assurance of future performance. 11 U.S.C. §  
14 365(b)(1); *see also In re Diamond Head Emporium, Inc.*, 69 B.R. 487, 495 (Bankr. D. Haw.  
15 1987) ("upon assuming the lease, Debtor becomes liable on the entire lease as if bankruptcy  
16 had not intervened."). "Adequate assurance of future performance are not words of art, but  
17 are to be given practical, pragmatic construction. What constitutes 'adequate assurance' is to  
18 be determined by factual conditions." *In re U. L. Radio Corp.*, 19 B.R. 537, 542 (Bankr.  
19 S.D.N.Y. 1982). Furthermore, a lessor cannot be required to continue to provide services to  
20 a debtor if the lease is in default and payments are not being made. 11 U.S.C. § 365(b)(4).

21 In this case, such adequate assurance from Trustee is appropriate in two forms: (i)  
22 depositing sufficient funds in escrow to cover Debtor's current and future obligations under  
23 the Lease Agreement for up to 120 days after the Petition Date, and (ii) permitting Landlord  
24 to seek relief from stay on five days' notice upon any future default under the Lease  
25 Agreement. Both of those adequate assurance conditions will ensure that Landlord and  
26 Humphrey suffer minimal additional harm while Trustee decides whether to assume or reject

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1 the Lease Agreement.

2 In determining whether a debtor has provided adequate assurance, courts consider the  
3 following factors: (1) evidence of the debtor's profitability, (2) the debtor's plan to earmark  
4 money exclusively to cure the default, and (3) the willingness and ability of the debtor or its  
5 proposed assignee to fund cure payments." *In re Am. the Beautiful Dreamer, Inc.*, No. 05-  
6 47435, 2006 WL 2038646, at \*2 (Bankr. W.D. Wash. May 18, 2006).

7 Here, at this early stage in the case, there is nothing in the record establishing  
8 Debtor's profitability, and Trustee has shown no willingness to perform Debtor's obligation  
9 under the Lease Agreement, despite the requirement to do so under 11 U.S.C. § 365(d)(3).  
10 Therefore, the most logical avenue for Debtor to provide adequate assurance to Landlord is  
11 to earmark money exclusively for performance of Debtor's obligations under the Lease  
12 Agreement by depositing sufficient funds in escrow to assure compliance with 11 U.S.C. §  
13 365(d)(3) for up to 120 days post-petition.<sup>4</sup>

14 **III. CONCLUSION**

15 Due to Trustee's failure to comply with 11 U.S.C. § 365(d)(3), an order is necessary  
16 to compel Trustee's immediate and ongoing performance of Debtor's post-petition  
17 obligations under the Lease Agreement, and to provide Landlord with adequate protection  
18 and assurances.

19 DATED: April 27, 2016

20 LANE POWELL PC

21  
22 By */s/ James B. Zack*

23 Mary Jo Heston, WSBA No. 11065

James B. Zack, WSBA No. 48122

24 Attorneys for Gatewood-California LLC

25 <sup>4</sup> If Trustee does not assume the Lease Agreement within 120 days of the Petition Date, it will be deemed  
26 rejected. 11 U.S.C. § 365(b)(4)(A)(i). To the extent Trustee seeks an extension of that deadline under 11  
U.S.C. § 365(b)(4)(B), Landlord requests that the Court either deny that request, or condition any extension on  
further escrow deposits.

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**EMERGENCY MOTION TO COMPEL COMPLIANCE  
WITH 11 U.S.C. § 365 - 10**

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**CERTIFICATE OF SERVICE**

The undersigned declares as follows:

That she is a legal assistant in the law firm of Lane Powell PC, and on April 27, 2016, she caused the attached document to be filed electronically through the CM/ECF system which caused Registered Participants to be served by electronic means, as fully reflected on the Notice of Electronic Filing.

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Executed on this 27th day of April, 2016, at Seattle, Washington.

*/s/ Denise A. Campbell*  
Denise A. Campbell, Legal Assistant