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Honorable Christopher M. Alston
Chapter 11
Hearing Date: May 20, 2016, 9:30 a.m.
Response Date: May 13, 2016

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8 UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 In re:

Case No. 16-11767-CMA

10 NORTHWEST TERRITORIAL MINT, LLC,

11 TRUSTEE'S RESPONSE TO
LANDLORD'S EMERGENCY MOTION
12 TO COMPEL IMMEDIATE AND
ONGOING COMPLIANCE WITH LEASE
13 AGREEMENT, AND FOR ADEQUATE
PROTECTION AND ASSURANCES

14 **I. RESPONSE**

15 Mark Calvert, the Chapter 11 Trustee (the "Trustee"), files this Response to the Emergency
16 Motion to Compel Immediate and Ongoing Compliance with Lease Agreement, and For Adequate
17 Protection and Assurances (the "Motion") [Dkt. No. 143], filed by Gatewood-California, LLC (the
18 "Landlord"), the landlord for 550 3rd Street, Building B, Auburn, Washington 98001 (the "Auburn
19 Facility"). The Landlord requests extraordinary relief based on the Trustee's alleged failure to pay
20 rent and the existence of environmental contamination at a property other than the Auburn Facility.
21 The Trustee timely paid the May rent due and owing, and paid the April rent before the Motion was
22 filed. Moreover, the Landlord's reference to environmental contamination arising from minting
23 operations at an entirely different facility is disingenuous and irrelevant to the Trustee's use of the
24 Auburn Facility—where no minting operations take place. The Trustee requests that the Court deny

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TRUSTEE'S RESPONSE TO LANDLORD'S
EMERGENCY MOTION TO COMPEL COMPLIANCE
AND FOR ADEQUATE PROTECTION- 1

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1 the Landlord's Motion and grant the Trustee, pursuant to the Lease terms, his attorney's fees and
2 costs incurred in connection with this Motion.

3 **A. The Landlord's Request that the Court Compel Payment of Postpetition Rent is**
4 **Unfounded Because the Rent has been Paid.**

5 On April 27th, the Landlord filed its "emergency" Motion for an order compelling the
6 payment of rent without consulting counsel for the Trustee. Had the Landlord or its counsel spoken
7 with the Trustee or the Trustee's counsel before filing the Motion, the Landlord would have learned
8 that the Trustee wrote a check for April rent on April 21, which thereafter sent to the Landlord.¹
9 Then, on April 30th, the Trustee paid rent for the month of May. Thus, during the Landlord's rush to
10 the courthouse, its request for an order compelling the payment of April rent became unnecessary.

11 The base rent amount due each month under the Lease is \$7,388.70. The Trustee wrote a
12 check for the base amount plus an additional amount of "NNN" expenses, otherwise known as
13 "triple net" expenses, in the total amount of \$9,904.27 on April 21—a mere 10 days after being
14 appointed as Trustee. It was common practice for the Landlord to send the Debtor an email
15 containing an invoice describing the triple net charges owed in connection with the following
16 month's rent. As reflected by the invoices, the taxes were prorated and included in the triple net
17 charges each month. However, no such invoice was received by the Trustee for the month of April.

18 The Landlord's Motion and supporting declaration erroneously state that that \$4,508.55 was
19 owed for real estate taxes in April.² This is three times the amount of the prorated real estate taxes

20 _____
21 ¹ The Trustee was appointed on April 11, 2016. He paid the landlords and other postpetition vendors after
22 reaching an understanding as to the company's cash flow. It is likely that the check written on April 21st was
received by the Landlord prior to the filing of the Motion on April 27th. The check was mailed to the
Landlord's Seattle address from Federal Way.

23 ² The invoices for NNN expenses in March and May list the prorated monthly amount of taxes as \$1,502.85.
24 In the Landlord's calculation of rent owed for April, there is a notation appearing next to the line item for
25 taxes stating "First half taxes through June paid in April." See Exhibit D to Mr. Humphrey's Declaration [Dkt.
26 No. 144-1, p. 49]. The Landlord fails to explain, either in the Motion or Mr. Humphrey's Declaration, why
the prorated taxes for April, May, and June, would all suddenly be due in April. The same is true for the
Landlord's calculation of insurance. The March and May invoices list the prorated amount of insurance as
\$97.17. Mr. Humphrey's declaration indicates that \$777.36 is owed for "Balnce [sic] of inurance [sic] paid

1 owed each month (\$1,502.85) as reflected by the invoices for triple net charges owed in connection
2 with the March and May payments. In addition, the Landlord's calculation of April rent is erroneous
3 because it fails to prorate the amount of insurance owed under the Lease (\$97.17 per month) and
4 instead states that \$777.36 was owed for insurance as of April 1, 2016.

5 The Landlord cashed the April rent check on April 29, 2016, two days after it filed its Motion
6 and supporting declaration indicating that no April rent had been paid by the Trustee. On April 30,
7 2016, the Trustee wrote a check to the Landlord for May rent, including the triple net charges
8 indicated in the invoice. The check amount was \$9,904.27. Thus, the rent for May was timely paid in
9 full. In fact, as described in the Declaration of Ms. Trunkett filed in support of this response, it
10 appears that the Trustee overpaid for triple net expenses in May.

11 There is no need for the Court to enter an order compelling past due rent. Nor is there reason
12 to compel the Trustee to pay in the future.³ The Trustee has demonstrated an ability to pay rent
13 timely going forward. Moreover, the obligations imposed by the Bankruptcy Code speak for
14 themselves; there is no reason for the Court to issue a comfort order stating that the Trustee must, in
15 the future, comply with the Bankruptcy Code. If the Trustee is forced to respond to every vendor and
16 counterparty to motions confirming the Trustee's obligations to fulfill post-petition obligations, the
17 administrative burden on the Trustee will be enormous. Should the Trustee fail to pay rent in the
18 future, the Landlord is free to file a motion for relief from the automatic stay and/or assert that
19 unpaid rent is entitled to administrative priority in this case.

20 **B. There is No Basis to Grant Adequate Protection to the Landlord.**

21 The Landlord also argues in the Motion that it is entitled to adequate protection in the form
22 of an order requiring the Trustee to procure an additional insurance policy covering environmental
23 liability above and beyond the commercial general liability policy that is already in place. The
24

25 already." *Id.*

26 ³ The Landlord requests entry of an order requiring the Trustee to comply with 11 U.S.C. § 365(d)(3).

TRUSTEE'S RESPONSE TO LANDLORD'S
EMERGENCY MOTION TO COMPEL COMPLIANCE
AND FOR ADEQUATE PROTECTION- 3

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1 Landlord's requested relief is premised on (a) its assertion, which is no longer true, that the Trustee
2 failed to pay rent for April; and (b) the patently false assertion that the operations at the Auburn
3 Facility are substantially similar to the operations conducted more than six years ago at a different
4 facility that give rise to liability under Washington's Model Toxics Control Act ("MTCA"), Ch.
5 70.105D RCW. As a result, the Landlord's request should be denied.

6 The Landlord states that "[t]he facts underlying the MTCA Judgment indicate that Debtor's
7 ordinary course business, substantially similar to the operations Debtor continues to perform at the
8 Property, caused serious and costly environmental issues that plagued the Auburn landlord long after
9 the Debtor vacated that property." Dkt. No. 143, p. 3. This assertion is false. The environmental
10 contamination the Landlord refers to arose from minting operations that were conducted at a
11 *completely separate facility* that happened to also be located in Auburn. Those minting operations,
12 which were moved to Nevada between 2009 and June of 2010, included the use of "machinery and
13 equipment including presses, stamps, and saws" as well as "commercial grade soap to polish the
14 coins." Dkt. No. 144-1, p. 25. In contrast, the Auburn Facility for which the Landlord is Lessor is
15 used by the Debtor to prepare customer orders for shipments of goods that are minted thousands of
16 miles away—either in China or Nevada. If color needs to be added, it is added through an enameling
17 process. However, no minting, pressing, or burnishing of coins takes place at the Auburn Facility.

18 The Landlord knows that the Auburn Facility is not used as a minting facility, but
19 nevertheless tries to convince the Court that a threat exists for contamination similar to past
20 environmental contamination caused by the Debtor's minting operation at a different property. The
21 Landlord has provided no evidence that the operations conducted at the Auburn Facility may lead to
22 environmental contamination. In short, the Landlord has failed to provide a reason why this Court
23 should require the Trustee to obtain additional insurance.

24 More generally, the question of whether a landlord is entitled to seek adequate protection of
25 its right to be kept current postpetition is not settled. *Compare In re Ernst Home Center, Inc.*, 209
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TRUSTEE'S RESPONSE TO LANDLORD'S
EMERGENCY MOTION TO COMPEL COMPLIANCE
AND FOR ADEQUATE PROTECTION- 4

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1 B.R. 955 (W.D. Wash. 1997) (stating that real property lessors may request adequate protection, but
2 denying request for adequate protection), *with In re Sweetwater*, 40 B.R. 733 (Bankr. D. Utah 1984)
3 (“a lessor’s exclusive remedies are to be found in Section 365”). The Trustee submits that even if
4 landlords may request adequate protection, the remedies afforded by Section 365 are sufficient to
5 protect the Landlord’s interest under the facts of this case.

6 The Trustee is entitled to, and should be allowed, a “reasonable time to make a careful and
7 informed decision whether to assume or reject” the Lease. *In re Sweetwater*, 40 B.R. at 745. In the
8 interim, the Trustee must make postpetition rent payments owed pursuant to Section 365(d)(3). If the
9 Trustee fails to make postpetition rent payments, the Landlord may assert an administrative claim for
10 any unpaid rent or seek relief from stay. The Landlord does not need the further extraordinary relief
11 it requests in the Motion. The *Ernst* case, upon which the Landlord relies, is supportive of the
12 Trustee’s position. There, the court concluded that the landlords were not entitled to adequate
13 protection. The court reasoned that the landlords in that case were “adequately protected by ongoing
14 current payments to them under Section 365(d)(3) and the additional protection under Section
15 507(b), should their payments not be made.” The same can be said regarding the Landlord in this
16 case. For the foregoing reasons, the Landlord’s request for adequate protection should be denied.

17 **C. There is No Basis for this Court to Require the Trustee to Provide “Adequate
18 Assurance” of Future Performance.**

19 The Landlord’s request for adequate assurance of future performance under the Lease is
20 premature. Adequate assurance of future performance is only required in connection with the
21 assumption of an executory contract or lease. The Landlord appears to acknowledge this when it
22 states in the Motion that pursuant to 11 U.S.C. § 365(b)(1), “*if* Trustee were to assume the Lease
23 Agreement, Trustee would then be required to cure any existing delinquencies and provide adequate
24 assurance of future performance.” Motion, p. 8 (emphasis added). However, the Trustee has *not*
25 moved to assume the Lease. Thus, the Landlord’s request for adequate assurance—which is
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1 implicitly based on the assumption that the Trustee will assume the Lease in the future—is not ripe
2 for consideration by this Court.

3 **D. The Trustee Requests that the Court Award its Fees and Costs Incurred in this Matter.**

4 The Landlord's Motion is largely based on the assertion that the Trustee has failed to pay
5 postpetition rent when, in fact, the Trustee wrote a check for April rent before the Landlord filed its
6 Motion. Moreover, the Landlord's fears regarding possible environmental contamination and the
7 need for additional insurance are unfounded. The Landlord has forced the Trustee to expend
8 administrative resources responding to its unmeritorious Motion and the arguments contained
9 therein. The Trustee requests that the Court deny the Landlord's Motion. The Trustee, as the
10 "substantially prevailing party," should be awarded his costs, including reasonable attorneys fees
11 incurred in this action, in accordance with Section 21.14 of the Lease. *See* Dkt. No. 144-1, p. 12.

12 **II. CONCLUSION**

13 Based on the foregoing, the Trustee respectively requests that this Court deny the Motion and
14 grant the Trustee his reasonable attorneys' fees and costs incurred in connection with responding to
15 this Motion.

16 DATED this 13th day of May, 2016.

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18 K&L GATES LLP

19
20 By /s/ David C. Neu
21 Michael J. Gearin, WSBA #20982
22 David C. Neu, WSBA #33143
23 Brian T. Peterson, WSBA #42088
24 Attorneys for Mark Calvert, Chapter 11 Trustee
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CERTIFICATE OF SERVICE

The undersigned declares as follows:

That she is a paralegal in the law firm of K&L Gates LLP, and on May 13, 2016, she caused the foregoing 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 the 13th day of May, 2016 at Seattle, Washington.

/s/ Denise A. Evans
Denise A. Evans