

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION AT HAMMOND

IN RE: )  
BRIAN ROY PIUNTI )  
 ) BANKRUPTCY NO. 00-62126  
Debtor )  
 )

MEMORANDUM OPINION, DECISION  
AND  
ORDER<sup>1</sup>

I

Statement of Proceedings

This Chapter 13 case came before the Court for a final evidentiary hearing on March 9, 2006 on the Objection filed by the Chapter 13 Debtor, Brian Roy Piunti (“Debtor”) on March 30, 2004 to the Second Amended Administrative Claim filed by VAP, L.L.C. (“VAP”) on March 15, 2004 in the sum of \$86,780.74, as further amended by a Third Amended Administrative Claim filed by VAP on March 8, 2006 in the sum of \$28,754.06, (“Claim”), and the Counterclaim thereto filed by the Debtor on March 15, 2004 (“Counterclaim”) to which VAP filed an Answer and Defenses on April 13, 2004.

The Debtor appeared by Attorney Tobin.

VAP appeared by Attorney Vawter.

Submitted. Evidence and arguments heard.

II

The Third Amended Administrative Claim by VAP

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<sup>1</sup> This Memorandum Opinion constitutes the Court’s findings of fact and conclusions of Law pursuant to Fed. R. Bk. P. 7052, as made applicable by Fed. R. Bk. P. 9014.

and the Counterclaim filed by the Debtor

The Third Amended Administrative Claim filed by VAP on March 8, 2006, ("Claim") alleged as follows:

1. \$ 3,447.16 July Rent 7/13/00-7/31/00 at \$5,624.32 per month
  2. \$ 4,068.02 August Rent 8/1/00 - 8/22/00
  3. \$ 550.72 Real Estate Taxes 7/13/00 - 8/22/00 at \$4,786.00 per year
  4. \$ 75.39 Cost of Insurance 7/13/00 - 7/31/00
  5. \$ 3,936.00 Cost of Insurance 8/1/00 - 3/03 (32 months at \$123.00 a month)
  6. \$ 137.62 Rental or Lease as warehouse storage for 8/23/00 - 8/31/00 at \$8.00 per square foot for 3,200 square feet (\$2,133.00 per month). Utilized at 25% capacity by Debtor
  7. \$ 2,133.00 Rental or Lease as warehouse storage 9/00 - 12/00
  8. \$ 6,399.00 Rental or Lease as warehouse storage 1/01 - 12/01
  9. \$ 6,399.00 Rental or Lease as warehouse storage 1/02 - 12/02
  10. \$ 1,599.75 Rental or Lease as warehouse storage 1/03 - 3/03
- \$28,754.66<sup>2</sup>

The Counterclaim filed by the Debtor on March 15, 2004, alleged, in part, as follows:

5. By September 30, 2000, Piunti had closed down the business he had been operating there. The items of inventory and equipment used in the business, all of which were collateral for a loan from Fifth Third Bank to Piunti, remained on the Premises.
6. On or about September 30, 2000, VAP locked Piunti out of the Premises, without notice to Piunti before or after the fact.
7. On October 27, 2000 Piunti attempted to check on his inventory and equipment at the Premises and discovered that he had been locked out by VAP.
8. At a prehearing conference on November 17, 2000, counsel for VAP advised the court and counsel for Piunti that VAP would cooperate in allowing Piunti to remove his inventory and equipment.
9. In fact, VAP thwarted Piunti in his efforts to recover his inventory and equipment, and negligently, recklessly or intentionally allowed the same to be damaged, removed, stolen, or otherwise dissipated or destroyed.

At the hearing held on March 9, 2006, VAP orally amended its Third Amended Administrative Claim as to Item No. 5, Cost of Insurance, from August 1, 2000 to March 3, 2003. The Claim for 32 months insurance at \$123.00 a month based on 100 per cent usage of the VAP premises for storage was reduced to \$30.75 a month for 32 months based upon a 25 per cent usage of the VAP premises for the stored property. Thus, VAP's Third Amended Administrative Claim as to Item No. 5 was reduced to \$984.00 (32 month x \$30.75). Thus, in turn reduced VAP's entire Claim by \$2,925.00 for a total Claim of \$25,829.66.

10. As a direct and proximate consequence of VAP's misconduct, Piunti has lost inventory valued at about \$22,000, and has lost the profit he would have earned from the sale thereof in the approximate amount of \$51,1000, and has been otherwise injured and damaged.

11. As a direct and proximate consequence of VAP's misconduct, Piunti has lost equipment costing about \$84,000, and has lost the revenue he would have earned from the use thereof in the approximate amount of \$65,000, and has been otherwise injured and damaged.

12. As a further direct and proximate result of VAP's misconduct, Piunti has lost the resources intended for the satisfaction of his obligation to First Third Bank.

The Debtor's Counterclaim alleged that he suffered damages totaling \$222,000.

### III

#### Jurisdiction

The Court having examined the record in this case concludes that it has subject-matter jurisdiction over this contested matter pursuant to 28 U.S.C. §1334(b), and that this proceeding is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A)(B) and (C).

### IV

#### Findings of Fact

##### A.

#### Findings of Fact Based on Judicial Notice

The Court takes judicial notice of the following as set out in the record of the Debtor's case:<sup>3</sup>

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Federal Rule of Bankruptcy Procedure 9017 provides that the Federal Rules of Evidence apply in cases under the Code. See also, Fed. R. Evid. 1101(a) and (b). Federal Rule of Evidence 201 provides that the Court, whether or not requested, may take judicial notice of adjudicative facts at any stage of the proceedings. Federal Rule of Evidence 201 is the only evidentiary rule on the subject of judicial notice.

This Court has held in In re Snider Farms, Inc., 83 B.R. 977, 986 (Bankr. N. D. Ind. 1988), citing, In re Woodmar Realty, 294 F.2d 785, 788 (7<sup>th</sup> Cir. 1961), cert. den. 369 U. S. 803, 82 S. Ct. 643, 7 L.Ed.2d 5550 (1962), that a bankruptcy court is duty bound to take judicial notice of its records and files. See, Friedrich v. Mottaz, 294 F.3d 864, 70 (7<sup>th</sup> Cir. 2002) (bankruptcy judge did not err by taking judicial notice of schedules filed by debtor in main case in §548(a)(1) adversary proceeding); State of Florida Board of Trustees of Internal Improvement Trust Fund v. Charley Toppino & Sons Inc., 514 F.2d 700, 704 (5<sup>th</sup> Cir. 1975) (not error for a bankruptcy court to take judicial notice of related proceeding and records in cases before a court); In re E. R. Fegert, Inc., 887 F.2d 955, 957-58 (9<sup>th</sup> Cir. 1989) (the Court may take judicial notice of the file and record in the underlying case). See also, Green v. Warden, U. S. Penitentiary, 699 F.2d 364, 369 (7<sup>th</sup> Cir. 1983) (a Court may take judicial notice of its own court documents and records).

1. That the Debtor filed his Chapter 13 Petition on July 12, 2000.
2. That the Chapter 13 Plan filed by the Debtor on August 23, 2000 expressly rejected the prepetition, nonresidential Lease between VAP, as Lessor, and the Debtor as Lessee.
3. That excluding the Petition date of July 12, 2000, and including the date that the Debtor's Plan was filed rejecting the Lease in question on August 23, 2000, 41 days had elapsed between the date the Debtor's Petition was filed and the date that the Debtor's Plan rejected the Lease.
4. That the Debtor's Schedule B, Personal Property, lists as assets a 100% stock ownership in AOX, Inc., Expert Oil Services, Inc., and SMOLI, Inc., each with a value of \$1.00, attaching thereto Summary Balance Sheets of each of the companies. The Balance Sheet for SMOLI, Inc., listed a liability to the Fifth Third Bank of \$42,000.00 with assets comprising of inventory and equipment valued at \$30,000.00. The Debtor's Schedule B, Nos. 27 and 28 state he owns no equipment.
5. That the Debtor's Schedule B., Personal Property, does not list any of the personal property in question that was left on the premises of VAP, after the Debtor rejected the lease as being personal property of the Debtor's estate.<sup>4</sup>
6. That the Debtor's Schedule D, Creditors Holding Secured Claims, listed Fifth Third Bank as a Secured Creditor, stating that Fifth Third Bank had been granted a Purchase Money Security Agreement in all of the Corporate assets of SMOLI, Inc., in the amount of \$41,930.47, with a value of \$41,000.00.<sup>5</sup>
7. That a review of the Claims Register maintained for the Debtor's case revealed that

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The Court is aware that there is a very crucial distinction between taking judicial notice of the fact that an entity has filed a document in the case, or in a related case, on a given date, i.e., the existence thereof, and the taking of judicial notice of the truth or falsity of the contents of any such document for the purposes of making a finding of fact. However, the verified Schedules and Statements filed by a debtor are not just pleadings, motions, or exhibits thereto. They are evidentiary admissions. In re Cobb, 56 B.R. 440, 442 n. 3 (Bankr. N. D. Ill. 1985). See Fed. R. Evid. 801(d)(2) (admission by a party opponent not hearsay). See, e.g. In re Habiballa, 337 B.R. 911, 917 (Bankr. E. D. Wis. 2006), In re Smith, 325 B.R. 498, 503 (Bankr. D. N. H. 2005), Larson v. Groos Bank, NA, 204 B.R. 500, 502 (1996), In re Leonard, 151 B.R. 639, 643 (Bankr. N. D. N. Y. 1992), In re Davis, 108 B.R. 95, 99 (Bankr. D. Md. 1989).

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Based on Debtor's Schedule B all of the inventory and equipment left on the leased premises was the property of SMOLI, Inc., rather than property of the Debtor's estate, although the Debtor held 100% of the stock in SMOLI, Inc.

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The report of the Debtor filed with the Court on March 25, 2002 asserted that all of the personal property in question was subject to a Security Agreement in favor of Fifth Third Bank (Docket Entry No. 99). The Debtor's Counterclaim filed on March 15, 2004 also alleged that all of the equipment and inventory left on the leased premises all were collateral for a loan by Fifth Third Bank to the Debtor. See, Par. 5. However, it appears that Fifth Third held a security interest in the property of SMOLI, Inc. rather than that of the Debtor. In addition, the Debtor testified that Fifth Third Bank held a security interest in all of the personal property that was on the leased premises.

Fifth Third Bank did not file a secured Claim versus the Debtor's estate; that Bank Calumet filed its Secured Claim No. 1 versus the Debtor's Estate on August 14, 2000 in the amount of \$49,0645.45 plus interest and attorney's fees; and that the Note and Loan Agreement attached to the Claim dated January 20, 1999 in the sum of \$65,000.00 revealed that the obligor thereof was AOX, Inc. D/B/A Oil Experts, executed by the Debtor as President, and also executed by the Debtor in his personal capacity as guarantor. The Claim by Bank Calumet does not relate to the personal property on the leased premises.

8. That the Debtor's Schedule G, Executory Contracts and Unexpired Leases, lists a nonresidential Lease with VAP for the leased premises located at 5853 U. S. Highway 6, Portage, Indiana 46368.

9. That the Debtor's Statement of Financial Affairs No 1, Income from Employment or Operating of Business, stated that the gross amount of income that the Debtor received from SMOLI, Inc., in 1998 was \$28,938.00, and that no gross income was received for the year 1999 or to the date of the Debtor's Petition; that Statement No. 16, Nature, Location and Name of Business, stated that the Debtor was the managing executive of and stockholder in SMOLI Inc., d/b/a Automation Experts Automotive Maintenance located at 5853 U. S. Highway 6, Portage, Indiana 46368 from March 1996 to the date of the Petition. This is the same address as the address of the leased premises as set out in the Lease between VAP and the Debtor and in Schedule G filed by the Debtor. Thus, while the Lease was between VAP, as lessor, and the Debtor, as lessee, the business that operated on the leased premises was SMOLI, Inc., and all of the inventory and equipment left on the leased premises was owned by SMOLI, Inc., rather than the Debtor, and subject to a Security Agreement held by Fifth Third Bank.

10. That on October 4, 2000, VAP filed its Motion for Relief from the Stay and that the Debtor abandon his interest in the leased premises (Docket entry No. 14).

11. That on October 16, 2000, VAP filed its Objection to the Confirmation of the Debtor's Plan (Docket entry No. 17).

12. That on November 17, 2000, after a prehearing conference was held on the Motion for Stay Relief and to Abandon by VAP, the Court issued a Docket Entry Order which found that the Lease was rejected and abandoned from the Debtor's estate, and the Stay was terminated as to VAP. The Court granted VAP's Motion by Docket Entry Order (Docket entry No. 26).

13. That on February 26, 2001, VAP filed its Motion that the Debtor abandon the personal property located on the leased premises alleging that the Debtor ceased doing business on the premises in December of 2000, and that the Debtor had made no attempt to remove the property left on the premises. (Docket Entry No. 37).

14. That on March 13, 2001, the Debtor filed an Objection to said Motion and alleged that the property located on the premises might have equity above the lien held by Fifth

Third Bank and could be utilized to further the Debtor's reorganization (Docket entry No. 39).

15. That said Motion and Objection were set for a prehearing conference on April 24, 2001 (Docket Entry No. 42); that at the request of counsel for both VAP and the Debtor the prehearing conference was continued three times. (See Docket entries No. 53, 65, and 68); and, that Docket entry No. 68 dated September 14, 2001 states that VAP and the Debtor were attempting to settle said Motion and Objection as a basis for continuing the prehearing conference.

16. That a Status Conference was held on November 8, 2001, on the Motion to Abandon Personal Property by VAP. The parties stipulated at said status conference that the Debtor would remove the personal property from the leased premises on or before November 29, 2001, or the Court could grant VAP's Motion without further notice and hearing, either sua sponte, or upon affidavit of default by VAP. The Court approved this Stipulation by Docket Entry Order No. 74 dated November 8, 2001.

17. That on January 22, 2002, Attorney Vawter, on behalf of VAP, reported to the Court that Debtor had not removed the personal property from the premises formerly leased by VAP to the Debtor, and the parties jointly requested that a Telephonic Status Conference be held on February 27, 2002 to determine if the property had been removed (Docket entry No. 89).

18. That at the Status Conference held on February 27, 2002 VAP and the Debtor reported that "While Debtor had removed a majority of the personal property from the premises of VAP some tools remained." The Debtor was Ordered on February 27, 2002 to remove all remaining tools on or before March 13, 2002, and the Debtor was further Ordered to file a report with the Court on or before March 23, 2002 as to removal (Docket entry Order No. 96).

19. That on March 25, 2002, the Debtor filed his Report as to removal of personal property from the leased premises. The Report stated that the Debtor and Representatives of VAP conducted a tour and inspection of the VAP premises on March 2, 2002. The Debtor attached to the Report as Exhibits A and B, an alleged list of missing and/or damaged personal property and an inventory of the building contents (Docket entry No. 99).

The Report also stated that all of the property in question is collateral under a Loan and Security Agreement in favor of Fifth Third Bank; that counsel for the Debtor had attempted for months to ascertain what action, if any, the Bank proposed to take with respect to its collateral toward its removal and storage; and, that the counsel for the Bank had promised a definitive response within the next few days.

Exhibit B to the Report stated the following items were missing and/or damaged, without distinguishing between what items were damaged and what items were missing:

1. Computer System
2. Craftsman Tool Set and Chest
3. Hunter Tire Changer - TC325, Air Operated-
4. Solar Antifreeze Recycler/Flush Machine - Incl. Adapters, Extra Filters & Chemicals, Instructions, Air Operated
5. 150W UV Leak Detector Light Kit - Carrying Case, Extra Dye, Glasses
6. Vacula Brake Bleeder
7. Carquest Product Cabinets
8. Power Steering Puller set
9. Flaring Tool Set
10. Radiator Pressure Tester
11. Battery Charger
12. Neon Open Sign

Actual cost of above as indicated on receipts - \$21,880.82

20. That the Debtor never filed any adversary proceeding on contested matter alleging that VAP had wrongfully denied the Debtor access to the premises for the purpose of inspecting, inventoring, or removing the property from the VAP premises.

## B

### Findings of Act Based on the Evidence Submitted at the Hearing

1. That on March 8, 1996, VAP, as lessor, and the Debtor, as lessee, entered into a Commercial Lease ("Lease") for those leased premises commonly known as 5853 U. S. Hwy. 6, Portage, Indiana 46368. Said Lease was for a term of ten years with two five year options pursuant to Article I.A. The Lease had a commencement date of March 15, 1996. (VAP Exhibit No. 1).
2. That Article I of the Lease Section A.7, Initial Rent, provided that the initial monthly rent was \$4,788.00 through the end of 1996 with increases pursuant to Article IV.
3. Article IV of the Lease, Base Rent, Section A, Rent Calculation, provided that for the year beginning January 1, 1997, the monthly rental would be increased to \$5,000.00 a month, and on each succeeding January 1, the annual rent would be increased 4%. Section B, Rent due on 1<sup>st</sup>, provides that each months rental installment is due and payable consecutively on the first day of each month during the Lease term, beginning with the commencement date of the Lease, and in the event the commencement date occurred on a day other than the first of the month, the minimum rent and amount to be paid by the Debtor would be prorated on a per diem basis for any partial months until the first day of the month following the commencement date.

4. That Article XXX of the Lease, Net Lease, provided that it was a “Net Lease”, i.e. that rent shall be paid as a net rent, and that the Debtor would pay all other expenses including, but not limited to, taxes, utilities, maintenance and insurance.
5. That Article IX of the Lease, Insurance, provided that if the Debtor did not maintain the required insurance, VAP may provide the same which shall be immediately due and payable as additional rent.
6. That Article XXVI, Taxes and Assessments, Subsection B, Tenant Reimburses Landlord, provides that the Debtor shall reimburse VAP for all real estate taxes and assessments during the term of the lease; that the tenant's portion shall be equal to one third of the amount assessed; and, that any payments shall be made pursuant to Article XXXI of the Lease.
7. That Article XVII, Default by Tenant, Subsection F, Landlord may pay tenant's deficiencies, states as follows:

If Tenant at any time shall fail to pay any taxes, assessments, or liens, or to make any payment or perform any act required by this Lease to be made or performed by it, Landlord, without waiving or releasing Tenant from any obligation or default under this Lease, may (but shall be under no obligation to) at any time make such payment or perform such act for the account and at the expense of Tenant.

All sums to be paid by the Landlord and any costs and expenses accumulated by Landlord under this lease shall constitute Additional Rent payable by Tenant. If any amount is past due, Tenant agrees to pay a default charge of five percent (5%) of the past due amount to reimburse Landlord for additional administrative and collection expenses. In addition, Tenant agrees to pay interest on any past due amounts from the date such amounts become due at a rate of one and one half percent (1.5%) per month but not to exceed the maximum charges allowable under applicable state law. All rights and remedies of Landlord shall be cumulative, and none shall exclude any other remedies allowed at law or in equity. (emphasis supplied).

8. That Article XXXIII, Additive Covenants, Subsection C, Indiana Law Governs, provides that the Lease shall be construed in accordance with the laws of the State of Indiana.
9. That Andrew Priomlos ("Priomlos") as a member of VAP testified as follows:
  - A. That for year of 2000 when the Debtor rejected the Lease, the monthly Rental rate was \$5624.32.

B. That he has 30 years of experience as a landlord in renting real estate both furnished and unfurnished.

C. That a commercially reasonable Rental Rate in Northwest Indiana for the storage of the equipment left on the leased premises that was finished and in an accessible commercial area such as VAP's premises would be about \$8.00 a square foot; that a commercially reasonable storage Rental Rate for the property in question in an unheated, unfinished, off-location storage building under lock and key would be approximately \$4.00 a square foot in Porter County, Indiana, based on where the VAP premises is located, and approximately \$2.00 to \$3.00 a square foot in Lake County, Indiana, and even less than that for older storage buildings in industrial areas.

D. That the leased premises is a high-grade commercial area whereby storage would probably be in the area of \$8.00 a square foot.

E. That the leased premises was a total of 3200 square feet of which 2944 square feet was allocated to six working bays, and the remaining 326 square feet was allocated to the office and waiting area; and that if the entire leased premises were used for storage, the monthly rental at \$8.00 per square foot would be \$25,600 on an annual basis, or \$2133.00 a month.

F. That the equipment and inventory stored on the leased premises took up 25 per cent of the leased premises, or 800 square feet, and, thus, the rental value of 800 square feet at \$8.00 a square foot for storage of the equipment and inventory would be \$6400.00 on an annual basis, or \$533.33 per month.

G. That after the Status Conference held with the Court on February 27, 2002, whereby it was reported that the Debtor would remove the balance of the property on or before March 13, 2002, (See Docket entry No. 96), the Debtor appeared at the leased premises on March 2, 2002, and "removed a couple of pick up trucks worth of materials, inventory, tools, various things."

H. That some "big pieces" were left on the premises that would require movers or more help.

I. That after March 2, 2002, the Debtor never returned for the balance of the equipment, and VAP was never contacted by anyone regarding the removal of the balance thereof, nor did VAP ever deny access to the equipment by the Debtor.

J. That between March 2, 2002 and March 13, 2002, the cutoff date in

the Order of the Court dated February 27, 2002 for the Debtor to remove the remaining personal property from the premises of VAP, the Debtor did not contact VAP to remove the same.

K. That VAP neither denied the Debtor access to the premises, nor did the Debtor ever request access to the premises after March 2, 2002.

L. That in April or May of 2003 he personally supervised and caused all the remaining property to be removed from the leased premises and placed the same in a 10 foot by 50 foot semi-trailer at the rear of the premises, so VAP could rent the premises beginning on June 1, 2003, where it still remains at this time; and, that although he did not perform an inventory of the removed property, it did include a brake lathe, some alignment pieces, a tire balancer, a tool box , and a diagnostic machine.

M. That VAP changed the locks on the premises after the Debtor rejected the Lease between the Debtor and VAP pursuant to the Debtor's Plan filed on August 23, 2000, as the premises had to be winterized.

N. That between October of 2000 and June of 2001 no request was made by the Debtor to retrieve the property left on the premises by the Debtor.

O. That the air compressor on the premises was installed by him personally at the time the building was constructed and was at all times the property of VAP rather than that of the Debtor.

10. The Debtor testified as follows:

A. That the Debtor first discovered that VAP locked the Debtor out of the premises in October of 2000 when he returned to the premises.

B. That the Debtor asked his counsel to gain access to the leased premises, and on April 16, 2001, or approximately six months after the Debtor discovered that he had been locked out in October of 2000, Attorney Miller, the Debtor's counsel, wrote Attorney Vawter, as counsel for VAP, to make arrangements for the Debtor to inspect and retrieve the equipment. See Debtor's Exhibit "A". This letter advised it would take the Debtor two days to dismantle and remove the equipment.

C. That by letter dated June 8, 2001, Attorney Miller, wrote to Attorney Vawter confirming that an inspection would take place on June 13, 2001 and that the Debtor anticipated that it would take the Debtor approximately six hours to inventory and evaluate the equipment, and

it would take approximately two days thereafter to dismantle and remove the equipment. See Debtor's Exhibit "B". There was no evidence in the record why this inspection did not take place.

D. That on November 27, 2001, the Debtor gained access to the leased premises, and did an inventory of the equipment still in the building and equipment in the leased premises that was missing. See Debtor's Exhibit "C". The Debtor stated there was no missing inventory.

E. That on March 2, 2002, the Debtor was permitted to enter the leased premises by two employees of U. S. Muffler, an adjacent tenant, for a period from 8:00 or 9:00 o'clock A.M. to 5:00 o'clock P.M.; and, that the Debtor removed all of the inventory and his personal items at that time.

F. That at the time the Debtor prepared a list of the buildings contents and a list of missing or damaged items as of March 2, 2002. See Debtor's Exhibits "E" and "F" (these Exhibits are the same as Exhibits "A" and "B" to the Report filed by the Debtor with the Court on March 25, 2002.) (See Docket entry No. 99).

G. That after March 2, 2002, the Debtor never personally made a request of VAP to gain access to the premises to remove the property by March 13, 2001 as required by the Docket entry Order dated February 27, 2002 (Docket entry No. 96); that he asked his counsel, Attorney Miller, to make those arrangements; and, that he did not know what arrangements, if any, Attorney Miller made after March 2, 2002 to gain access to VAP's premises.

H. That on March 8, 2006, he viewed the interior of the premises from the exterior and could see two air compressors and a tire machine and stated that "it looks like the one that we had, but I can't say for sure if that's ours or not.", and "I would have to actually see the model to see if it's actually the one that was in the building when I was there."; that the Debtor also stated that "if I had the serial number off the property I would be able to match it with the serial number".

I. That he is presently paying for storage of 150 square feet at 40 cents a square foot per month, or \$60.00 a month, and that his space would have been suitable for storing the property in question.

J. That by letter dated April 16, 2001, the Debtor's attorney, Samuel Miller wrote Attorney Vawter, the attorney for VAP; that this letter stated " The delay in making these arrangements [to inspect and then retrieve the equipment, furniture, and inventory] has been caused by my repeated attempts to include Fifth Third Bank, my clients lienholder, in

these arrangements, without response." This letter showed that a copy thereof was sent to the Debtor and the attorney for Fifth Third Bank. Debtor's Exhibit "A". (No mention was made in this letter that VAP had ever denied the Debtor access to the premises

K. That by letter dated June 8, 2001, Sam Miller, as attorney for the Debtor, wrote Attorney Vawter, as attorney for VAP, to confirm arrangements to inspect the Debtor's property on VAP's premises; that the letter confirmed the inspection would take place on June 13, 2001 at 5:00 P.M., and that at that time he would be able to remove some items if their existence and condition permitted; that in that letter the Debtor estimated it would take six hours to inventory and evaluate the property; that after the inventory is completed the Debtor would make additional arrangements to dismantle and remove the remaining property which would take approximately two days. This letter showed that a copy thereof was sent to the Debtor and the attorney for Fifth Third Bank. Debtor's Exhibit "B". (No mention was made in this letter that VAP had ever denied the Debtor access to the premises).

L. That on June 13, 2001, the Debtor appeared at the premises and was met by Priomlos on behalf of VAP who escorted the Debtor out of the building and advised the Debtor he was not going to allow the Debtor to look at the contents of the building.

M. That on November 27, 2001 the Debtor appeared at the VAP premises pursuant to the Courts Docket entry Order dated November 8, 2001 (Docket entry No. 74), and found the building in disarray and that there was unspecified equipment already removed therefrom; and, that he did not remove any of the property from the building on advise of counsel because some property was already missing.

N. That the Debtor did not return to the VAP premises on November 29, 2001, which was the last day given to remove the property pursuant to the Court's Docket entry Order dated November 8, 2001, asserting that no one from VAP was available to permit the entry to the VAP premises.

O. That by letter dated January 10, 2002, Sam Miller, as attorney for the Debtor, wrote attorney Vawter, as attorney for VAP, stating the Debtor would complete his inspection of the VAP premises on January 17, 2002 at 1:00 P.M., and that he should be finished by 5:00 P.M. This letter showed a copy was sent to the Debtor. This letter also noted that because these final arrangements were made too late to arrange for movers, the Debtor may not be able to complete removing everything on that date. See Debtor's Exhibit "I". (No mention was made in this letter that VAP had ever denied the Debtor access to the premises).

P. That Fifth Third Bank held a lien on all of the equipment left on the VAP premises.

Q. That the Debtor's business earned no income for the years 1999 and 2000 (See Debtor's Statement of Affairs No. 1).

R. That the Debtor's paid \$45,000.00 for the equipment in question pursuant to a Purchase Agreement dated March 9, 1996. Debtor's Exhibit "J".

S. That he never talked directly to a representative of VAP about gaining access to the VAP premises and relied on his counsel to handle the matter.

V

Conclusions of Law  
and  
Discussion

GENERAL PRINCIPLES AS TO THE  
ALLOWANCE OF ADMINISTRATIVE CLAIMS

The burden of proof to demonstrate that a claim is entitled to administrative expense priority is on the claimant or VAP. In re Merry-Go-Round Enterprises, Inc., 180 F.3d 149, 157 (4<sup>th</sup> Cir. 1999); In re DAK Industries, Inc., 66 F.3d 1091, 1094 (9<sup>th</sup> Cir. 1995); In re Hanna, 168 B.R. 386, 388 (9<sup>th</sup> Cir. BAP 1994); In re Boston Regional Medical Center, Inc., 265 B.R. 838, 851 (1<sup>st</sup> Cir. BAP 2001), affirmed, 291 F.3d 111 (1<sup>st</sup> Cir. 2002); In re Kmart Corp., 293 B.R. 905, 909 (Bankr. N. D. Ill. 2003). The standard of proof is a preponderance of the evidence. In re Midway Airlines, 221 B.R. 411, 446 (Bankr. N. D. Ill. 1998) (collecting cases); In re Sinclair, 92 B.R. 787, 788 (Bkrtcy. S. D. Ill. 1988); In re Kmart Corp., 293 B.R. at 909.

The burden of persuasion always remains with the claimant seeking administrative expenses status, and the claimant must show his entitlement to administrative priority by the preponderance of the evidence. If the claimant presents a prima facie case for administrative priority, the burden of production shifts to the objector. In re Bellman Farms, Inc., 140 B.R. 986, 995 (Bankr .D. S. D. 1991);

In re River Oaks Furniture, Inc., 269 B.R. 733, 736 (N. D. Miss. 2001); In re Molnar Bros., 220 B.R. 555, 559 (Bankr. D. N. J. 1996) (“Unlike the burden of going forward which may shift to the objecting party, the burden of persuasion always remains with the claimant”). As noted by the Court in Matter of Trans American National Gas Corp., 978 F.3d 1409 (5<sup>th</sup> Cir. 1992):

A prima facie case under §503(b)(1) 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. After the movant has established a prima facie case, the burden of producing evidence shifts to the objector; but the burden of persuasion, by preponderance of the evidence remains with the movant. See Coastal Carriers, 128 B.R. at 404-05; In re Buttes Gas Oil Co., 112 B.R. 191. Mere allegations, unsupported by evidence, are insufficient to rebut the movant’s prima facie case.

Id., 978 F.2d at 1416.

It has generally been held, that the scope and application of §503(b)(1)(A) must be narrowly construed. In Ford Motor Credit Co. v. Dobbins, 35 F.3d 860 (4<sup>th</sup> Cir. 1994), the Court stated as follows:

“The presumption in bankruptcy cases is that the debtor’s limited resources will be equally distributed among the creditors. Thus, statutory priorities must be narrowly construed.” In re James B. Downing & Co., 94 B.R. 515, 519 (Bankr. N. D. Ill. 1988) (citing Joint Indus. Bd. v. United States, 391 U. S. 224, 228, 88 S. Ct. 1491, 1493-94, 20 L.E.d2d 546 (1968))... Section 507(a)(1), ..., allows a claim for “administrative expenses allowable under §503(b)...” 11 U.S.C. §507(a)(1). For our purposes, the administrative expenses allowable under §503(b) are “the actual, necessary costs and expenses of preserving the estate... 11 U.S.C. §503(b)(1)(A). Thus, [the creditor] cannot receive a §507(b) superpriority unless it can demonstrate that it has incurred post-petition an actual and necessary cost or expenses of preserving the [Debtor’s] estate. Cf. General Amer. Transp. Corp. v. Martin (In re Mid Region Petroleum, Inc.), 1 F.3d 1130, 1132 (10<sup>th</sup> Cir. 1993) (“the party claiming entitlement to administrative expense priority [under §503(b)] has the burden of proof”).

“The modifiers ‘actual’ and ‘necessary’ must be observed with scrupulous care[.]” 3 L. King, Collier on Bankruptcy ¶503.04[1][a][1] at 503-24 (515<sup>th</sup> Ed. 1991), because

[o]ne of the goals of Chapter 11 is to keep administrative costs to a minimum in order to preserve the debtor’s scarce resources and thus encourage rehabilitation. In keeping with this goal, ¶503(b)(1)(A) was not intended to “saddle debtors with special post-petition obligations

lightly or give preferential treatment to certain select creditors by creating a broad category of administrative expenses.”

Mid Region Petroleum, 1 F.3d at 1134 (citations omitted) (quoting In re Grant Broadcasting of Philadelphia, Inc., 71 B.R. 891, 897 (Bankr. E. D. Pa. 1987)).

Section 503(b) thus must be narrowly construed. Burlington N. R.R. v. Dant & Russell, Inc., (In re Dant & Russell, Inc.) 853 F.2d 700, 706 (9<sup>th</sup> Cir. 1988).

This...narrow interpretation requires actual use of the creditor’s property by the debtor, thereby conferring a concrete benefit on the estate before a claim is allowable as an administrative expense. Accordingly, the mere potential of benefit to the estate is insufficient for the claim to acquire status as an administrative expense. The court’s administrative expense inquiry centers upon whether the estate has received an actual benefit as opposed to the loss a creditor might experience by virtue of the debtor’s possession of its property.

In re ICS Cybernetics, Inc., 111 B.R. 32, 36 (Bankr. N. D. N.Y. 1989) (citations omitted) (emphasis added); accord Dant & Russell, 853 F.2d at 706 under 503(b)(1)(A), “[a]n actual benefit must accrue to an estate”); In re Allen Care Ctrs., Inc., 163 B.R. 180, 188 (Bankr. D. Or. 1994) (“[t]he benefit to the estate must be actual, not potential”); Broadcast Corp. v. Broadfoot, 54 B.R. 606, 611 (N. D. Ga. 1985) (Administrative expense scheme does not focus in the first instance on whether a creditor sustained a loss during this period, but on whether the estate has received an actual benefit”), Aff’d, In re Subscription Television, 789 F.2d 1530, 1532 (11<sup>th</sup> Cir. 1986) (“[t]hat which is actually utilized by a trustee in the operation of a debtor’s business ... should be accorded the priority of an administrative expense”).

Id., 35 F.3d at 865-866. (emphasis in original). And as stated by the Court in In re Dant & Russell, Inc., 853 F.2d 700 (9<sup>th</sup> Cir. 1988):

The statute [§503(b)(1)(A)] is explicit. Any Claim for administrative expenses and costs must be the actual and necessary costs of preserving the estate for the benefit of its creditors. Matter of Baldwin-United Corporation, 43 B.R. 443, 451 (S. D. Ohio 1984). The terms “actual” and “necessary” are construed narrowly so as “to keep fees and administrative costs at a minimum.” In re O.P.M. Leasing Services, Inc., 23 B.R. 104, 121 (Bankr. S. D. N. Y. 1982); See also, 3 Collier on Bankruptcy, ¶503.04, at 502-23 (15<sup>th</sup> Ed. 1988). An Actual benefit must accrue to an estate. See In re McKeesport Steel Castings Co., (Equitable Gas Co. v. Equitable N.A., 799 F.2d 91, 94-95 (3<sup>rd</sup> Cir. 1986)) (post-petition gas services were properly ordered paid to utility as an administrative expense necessary to preserve going concern value of Chapter 11 debtors estate); Broadcast Corp. of Georgia v. Broadfoot, 54 B.R. 606, 611 (N. D. Ga. 1985) (“The mere potential of benefit to the estate does not satisfy this requirement”). Additionally, keeping costs to a minimum services the overwhelming concern of the Code:

Preservation of the estate. Otte v. United States, 419 U.S. 43, 53, 95 S. Ct. 247, 42 L.Ed.2d 212 (1974); See also Randolph v. Scruggs, 190 U.S. 533, 537-39- 23 S. Ct. 710, 712, 47 L.Ed. 1165 (1903). This limitation is necessary to protect the limited assets of the estate for the benefit of the unsecured creditors' interests and is particularly important in a Chapter 11 case where a partial liquidation is necessary to facilitate reorganization. This portion of the Chapter 11 case here resembles a Chapter 7 liquidation case and, by analogy:

Since the goal in a Chapter 7 case is to "cash out" the bankruptcy entity, rather than continue its operations, Chapter 7 is more concerned with maximizing the size of the estate to be distributed than with the Chapter 11 goal of inducing third parties to contribute towards the continued operations of the business.

Broadcast, 54 B.R. at 611.

Id., 853 F.2d at 707-07 (footnote omitted). See also, In re Kmart Corp., 293 B.R. at 909.

It is well recognized that creditors are presumed to be acting in their own self-interests, and thus are not entitled to an administrative expenses claim for expenditures, until they satisfy the court that their efforts have transcended self-protection. LeBebron v. Mechem Financial, Inc., 27 F.3d 937, 944 (3<sup>rd</sup> Cir 1994); In re Granite Partners, L.P., 213 BR. 440, 446 (Bkrtcy. S. D. N.Y. 1997); In re Appliance Store, Inc., 181 BR. 237, 242 (Bkrtcy. W. D. Pa. 1995). The Claimant must establish that the estate was benefitted as a whole. In re Kmart Corp., 293 BR. at 909. The Claimant must also demonstrate that the benefit is more than a speculative or potential benefit. Id. The Benefit must be actual and concrete. Id. In Order to be essential, or at least beneficial to the estate, the products or services must, at the very least be utilized by the Debtor. Id. 293 BR. at 910.

Reimbursement must be denied in connection with activities of creditors and other interested parties which are designed primarily to serve their own interests, and which have been undertaken absent an expectation of reimbursement from the estate. Lebron v. Mechem Financial, Inc., 27 F. 3d at 944. Claims under §503(b)(1)(A) are judged by the actual value received by the estate and not the cost incurred by the creditor. Midway Airlines, Inc., 221 BR. at 448. Because creditors are presumed to act

primarily in their own interests, they face an especially difficult burden in demonstrating that they have made “substantial contribution” to a bankruptcy case so as to be entitled to an administrative expense claim. In re Alert Holdings, Inc., 157 BR. 753, 757 (Bkrcty. S. D. N. Y. 1993).

Pursuant to §365(d)(3) enacted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, a trustee (here the Chapter 13 Debtor as a Debtor-in-possession) is required to timely perform all obligations, except those specified in §365(b)(2), arising from and after the Order for Relief under any unexpired Lease of nonresidential real property until the Lease is assumed or rejected, notwithstanding §503(b)(1). Thus, rent accruing under a nonresidential lease of real estate until the lease is rejected by the debtor is an allowable administrative rent expense of the debtor’s estate for the contract amount of the lease. The landlord does not have to establish what is a reasonable value of the leased premises based on actual use up to the time of rejection. Accordingly, the landlord has an administrative claim regardless of whether the obligation under the lease was related to the debtor’s use of the premises In re Cukierman, 265 F.3d 846, 850 (9<sup>th</sup> Cir. 2001); In re Atlantic Pacific Trading Co., 27 F.3d 401, 403-05, (9<sup>th</sup> Cir. 1994); In re Thinking Machines Corp., 67 F.3d 1021, 1024 (1<sup>st</sup> Cir. 1995) (cited with approval by the Seventh Circuit in Matter of Handy Andy Home Improvement Centers, Inc., 144 F3d 1125, 1127-1128 (7<sup>th</sup> Cir. 1998)); Collier on Bankruptcy, Par. 503.06[6][c][ii] (L.King 15<sup>th</sup> Ed. Rev.). Section 365(d)(3) was intended to alleviate the burden of landlords by requiring timely compliance with the terms of the lease. In re Montgomery Ward Holdings Corp., 268 F.3d 205, 210 (3<sup>rd</sup> Cir. 2001).

A federal court when adjudicating a claim based on state law is ordinarily required to apply the choice of law principles of the state in which it sits, i.e., the law of the forum of the state. Matter of Stoecker, 5 F.3d 1022, 1029 (7<sup>th</sup> Cir. 1981); Coldwell Banker & Co. v. Karlock, 686 F.2d 596, 600 (7<sup>th</sup> Cir. 1982). When the parties to a contract do agree on the law which should control, the Indiana Courts

will give effect to that Agreement. Interurban Industries v. Twin States Publishing Co., Inc., 638 N.E. 2d 8, 82, 883 (Ind. App. 1994). It was held in the case of Paulansky v. Polish Roman Catholic Union of America, 219 Ind. 441, 39 N.E. 2d 440, 447 (Ind. 1942) that an express choice-of-law provision will be given effect in the absence of "exceptional circumstances showing a purpose to commit a fraud on the law".

As noted above, Article XXXIII, Section C, of the Lease provided that the Lease shall be construed in accordance with the laws of the State of Indiana. Neither VAP nor the Debtor asserted that this choice of law provision should not apply, and inasmuch as the leased premises is located in Indiana, the Court finds that Indiana Law shall apply.

Article XXX of the Lease, Net Lease, provided that the Lease was a "net Lease", i.e. that the rent shall be paid as a net rent, and that the Debtor would pay all other expenses, including but not limited to taxes, utilities, maintenance, and insurance. Article IX of the Lease, Insurance, expressly provides that if the Debtor did not maintain required insurance, VAP may provide the same which shall be immediately due and payable as additional rent. Article XXXVI, Taxes and Assessments, provides that the Debtor shall reimburse VAP for all real estate taxes and assessments during the term of the Lease. Article XVII, Default by Tenant, provides that all sums to be paid by VAP shall constitute additional rent payable by the Debtor.

The Appellate Court of Indiana in the case of Thalman v. Montgomery Wards & Co., 116 N.E. 2d 543 (Ind. App. 1954), noted that it had been held that where a lease specifically fixes the rent and independently thereof obligates the tenant to pay taxes, costs of improvements the term rent will not be extended to include such collateral covenants. Id. 116 N. E. 2d at 547. However, the Thalman court held that where there is a covenant in the lease that the tenant agreed to reimburse the landlord for the cost of certain alterations in the leased premises, the landlord can make them and reimburse

himself for the cost thereof by increasing the rent if the tenant agrees to pay it where the intent of the parties to so consider it clearly appears. Id. 116 N. E. 2d at 547-48. In so holding, the Thalman Court cited with approval the case of McCann v. Evans, 185 F. 93, 95 (3<sup>rd</sup> Cir. 1911), which held that definite sums, or sums capable of being made definite, chargeable on the demised premises by way of taxes, or for gas and water, or for improvements and betterments, or such like, will be considered as rent or included therein when the intention to so consider them is made clear in the contract between the lessor and the lessee. Id. 116 N.E. 3d at 548.

Thus, in determining the amount of Administrative Rent due and owing by the Debtor's estate to VAP between the date of the Debtor's Petition, or July 12, 2000, and the date the Debtor rejected the Lease in his Plan filed on August 23, 2000 pursuant to §365(d)(3) based on the Contract amount as set out by the Lease, this amount shall include as rent the amounts advanced by VAP for taxes and insurance that the Debtor was obligated to pay pursuant to the Lease.

On the other hand, upon rejection of a lease by the debtor, thereafter the landlord is allowed an administrative rent claim only for that portion of the leased premises actually used by the debtor-tenant, based upon objective fair market value, not necessarily the lease rate. In re Dant & Russell, Inc., 853 F.3d 700, 707 (9<sup>th</sup> Cir. 1988). Thus, the court may deny the post-rejection administrative rent claim if the use thereof did not benefit the debtor's estate. In re Mid-Region Petroleum, 1 F.3d 1130, 1133 (10<sup>th</sup> Cir. 1993). The debtor must use leased property during post-petition period. Potential benefit to the estate or mere possession does not satisfy this requirement. Id.; Collier on Bankruptcy Par. 503.06[6][c][ii] L. King 15<sup>th</sup> Ed. Rev.).

It is also noted that the rejection of a lease does not terminate the lease. In re Austin Development Co., 19 F.3d 1077, 1082 (5<sup>th</sup> Cir. 1994); In re Locke, 180 B.R. 245, 258 (Bankr. C.D. CA 1995); In re Tri-Glied, Ltd., 179 B.R. 1014, 1017-18 (Bankr. E. D. N. Y. 1995). Because the rejection

of a lease does not effect the termination of the lease, most courts hold that rejection of the lease abandons the lease back to the debtor. Collier on Bankruptcy, Par. 365.09[3][B] (L. King 15<sup>th</sup> Ed. Rev.). See, In re Rosenfeld, 23 F.3d 833, 839 (4<sup>th</sup> Cir. 1994) (Collecting cases).

The Administrative Claim by VAP For Rents  
Due and Owing by the Debtor in the  
Postpetition, Prerejection period  
Pursuant to §365(d)(3)

The Lease between VAP and the Debtor was dated March 8, 1996, and had a commencement date of March 15, 1996. The base rent, i.e. the rent excluding taxes and insurance was payable in advance by the Debtor on the first of each month.

The Debtor filed his Chapter 13 Petition on July 12, 2000, and pursuant to his Chapter 13 Plan filed on August 23, 2000, he rejected his Lease with VAP. Thus, the postpetition, prerejection period covered a period of 41 days, excluding the Petition date and including the rejection date.

There is no dispute between the parties that the annually adjusted base rent at the time of the Debtor's Petition was \$5,624.32 per month, payable in advance on the first of the month. There was no proration clause as to the payment of rent.

VAP's Administrative Claim based on §365(d)(3), i.e. for the postpetition, prerejection period based on the agreed rental amount of \$5,624.32 is computed applying a per diem or pro rata approach. Applying the pro rata approach, the rental payment obligation must be paid under §365(d)(3) according to how much of the time period related to the payment is within the postpetition, prerejection period, or the "option phase", i.e. the period between the Order for Relief (the Petition date in this Voluntary case), and the date the Lease is assumed or rejected by the Debtor.

Thus, VAP in asserting its §365(d)(3) Claim, did not compute the base rent based on the first of the month when the monthly base rent was due under the terms of the Lease, when it was due

prepetition, or postpetition and prerejection, but was computed based on the base monthly rate of \$5,624.32 on a per diem or pro rata basis. from July 13, 2000, the Petition date, to August 23, 2000, the rejection date, pro rated on a per diem basis for a total base rent of \$7,515.08 (\$3,447.16 for the month of July, 2000 beginning on the Petition date of July 12, 2000 to and including July 31, 2000, and \$4,068.02 for the month of August, 2000 beginning on August 1, 2000, to and including the rejection date of August 23, 2000).

There are two lines of cases on how a §365(d)(3) administrative rent claim should be computed. First, it is observed that the term "stub rent" refers to the time remaining after the date of the order for relief (Petition) in a period for which rent was payable prior to the order of relief. Here, the Petition date of July 12, 2000. The base rent from July, 2000 was payable in advance by the Debtor to VAP on the first of the month, or July 1, 2000, and the Debtor's Petition was filed on July 12, 2000. Thus, the "stub" period was from July 12, 2000 through July 31, 2000, or the period from the date of the Petition to the end of the first month of the Bankruptcy on July 31, 2000. See In re UAL Corp., 291 B.R. 121, 122-124. (Bankr. N. D. Ill. 2003).

One line of cases, the payment date cases, in applying §365(d)(3), hold that a lease obligation must be paid in full, if, and only if, it becomes payable during the "option phase", i.e. the period from the date that the Order of Relief (Petition) to the date the unexpired lease is assumed or rejected, regardless of the lease period to which the obligation relates. Thus, if the lease imposes an obligation to pay rent during the "option phase", the payment date decisions requires the entire rent be paid even though the rent relates to a period of occupancy by the debtor after the rejection of the lease. In re UAL Corp, 291 B.R. at 124-25 (citing, Montgomery Ward Holdings Corp., 268 F.3d 205, 210-11 (3<sup>rd</sup> Cir. 2001) and In re Comdisco, 272 B.R. 671, 674-76 (Bankr. N. D. Ill. 2002).).

The second line of cases applies the pro rata approach, as asserted by VAP. That is, the lease obligation must be paid under §365(d)(3) according to how much of the time period relates to the obligation is within the option phase. In re UAL Corp., 291 B.R. at 125 (citing In re Handy Andy Home Improvement Centers, Inc., 144 F.3d 1125 (7<sup>th</sup> Cir. 1998) and In re McCory Corp., 210 B.R. 934 (S. D. N. Y. 1997). Both In Re Handy Andy and McCory involved the obligation of the debtor to pay property taxes under the lease as opposed to the base rent.

In the subsequent case of Ha-Lo Industries, Inc., v. Centerpoint Properties Trust, 342 F.3d 794 (7<sup>th</sup> Cir. 2003), the Seventh Circuit distinguished its decision in Handy Andy in that Handy Andy addressed a situation in which nonrent expenses (real estate taxes), for which the debtor was liable under the term of the lease had in part had accrued prepetition while the debtor had occupied the premises, but were not billed to the debtor until after the start of the postpetition period and prior to the debtor's rejection of the lease. The Seventh Circuit in Handy Andy held the portion of the taxes that accrued during the debtor's prepetition occupancy had arisen prepetition and were not chargeable to the debtor even though billed postpetition. Id. 342 F.3d at 798.

In Ha-Lo Industries, Inc., the debtor's rent obligation for any given month was due and payable on the first day of the month, the debtor rejected the lease effective on the second day of the month, and the debtor actually vacated the premises on the fourth day of the month. The Seventh Circuit held that the debtor's rent obligation arose entirely postpetition and prerejection, even though it covered in part a period of time after the lease's rejection, and thus the rent for the remainder of the month after the rejection of the lease was chargeable to debtor's estate as a §363(d)(3) administrative rent claim. Id. 342 F.3d at 798-800 (citing In re Koenig Sporting Goods, Inc., 203 F.3d 986 (6<sup>th</sup> Cir. 2000), and In re Comdisco, Inc., 272 B.R. 671 (Barnkr. N. D. Ill. 2002)).

Thus, based on Ha-Lo Industries, Inc., because the Debtor rejected the Lease on August 23, 2000, and the Lease provided for payment of the entire rent for the month of August, 2000, in advance on August 1, 2000, after the Petition date of July 12, 2000, VAP shall be awarded an Administrative Rent Claim pursuant to §365(d)(3) in the sum of \$5,624.32 for the entire month of August, 2000, even though it covers a period of time after the Lease was rejected on August 23, 2000, i.e. to the end of August, 2000.

However, VAP will not be awarded a §365 (d)(3) Administrative Claim for rent for the month of July, 2000, which was payable in advance on July 1, 2000, applying the payment date approach. The rent for the month of July, 2000 was entirely due and owing the Debtor to VAP in advance on July 1, 2000, or prior to the Petition date of July 12, 2000. This is an obligation that accrued in its entirety on July 1, 2000 or prepetition and, thus is "stub period" rent, which does not qualify as an administrative rent claim under §365(d)(3), as it relates to a time remaining after the Order for Relief (Petition) in a period for which rent was payable in advance on the first of the month prior to the Order of Relief. In Re UAL Corp., 291 B.R. at 126-27 (collecting cases).

In addition, in applying the pro rata approach to the nonrental obligations of the Debtor under the Lease for taxes and insurance pursuant to Handy Andy, 144 F.3d 1125, the Court shall award VAP its §365(d)(3) Claim for real estate taxes in the sum of \$550.72 for Real Estate taxes for the period from the Petition date to the date of rejection regardless of when they were billed by VAP or paid by VAP, and insurance from the Petition date to the date of rejection regardless of when the same was billed by VAP or paid by VAP in the sum of \$167.66 for a total §365(d)(3) Claim of \$6,342.70.

The §503(b) Administrative Rent Claim of VAP for

Use and Occupancy by the Debtor of  
VAP Premises

Having decided the amount of VAP'S §365(d)(3) Administrative Rent Claim during the postpetition, prerejection period, the Court must now determine the amount, if any, of VAP's §503(b) Administrative Rent Claim for the use and occupancy of VAP's premises by the Debtor between the date of the Petition and the date the Debtor no longer used or occupied the V.A.P. premises, excluding the month of August, 2000 to which §365(d)(3) is applicable.

The Debtor rejected the Lease on August 23, 2000, and the evidence indicates that V.P. removed the equipment from the leased premises on or about March 31, 2003. The Court has already awarded a §365(d)(3) Administrative Claim from August 1, 2000 through August 31, 2000 in the sum of \$6,342.70. Thus, the relevant period for the balance of VAP.'s §503(b) Administrative Claim covers the period from July 12, 2000, the Petition date, to July 31, 2000, and from September 1, 2000 to and including March 31, 2003, excluding the month of August, 2000 for which an Administrative Rent Claim has been allowed pursuant to §365(d)(3) as stated above.

It is well-recognized that prior to the enactment of §365(d)(3), the accepted practice was to allow an administrative claim under §503(b) for rent relating to any period in which rental property was occupied by the debtor regardless of when the rent was payable. In re UAL Corp., 291 B.R. at 127 (citing In re McCory, 210 B.R. 934, 936 (S.D. N.Y. 1997)). Nothing under §503(b) has changed that practice. Id. Where §365(d)(3) does not require payment administrative claim status, §503(b) is still available to the extent that the use of the rental property benefited the estate. Id. (citing HQ Global Holdings, 282 B.R. 169, 173-4 (Bankr. D. Del. 2002)).

A lessor is generally entitled to an administrative claim under §503(b) for the fair rental value

of the lessor's property actually used by the debtor. In re HQ Global Holdings, 282 B.R. 169, 173 (Bank. D. Del. 2002) (collecting cases). There is generally a presumption that the rental value fixed in the lease will control unless there is clear and convincing evidence that said rental rule is unreasonable. Id. That portion of VAP.'s use and occupancy §503(b) Administrative Rent Claim is not necessarily valued by the terms of the Lease, but is determined solely by an objective worth standard, i.e. the fair and reasonable value based on the actual use and occupancy of the VAP. premises to the Debtor's estate. In re Dant v. Russell, Inc., 853 F.3d at 707.

As to the objective, fair market value of the leased premises for the purposes of VAP's §503(b) administrative claim, the Court finds that because the Debtor did not use and occupy the leased premises for the operation of the business, but rather solely for storage of the equipment, the contractual rental rate as set out in the lease shall not control.

It must be remembered that a §503(b) administrative claim must be narrowly construed, and the burden of proof is on the claimant by a preponderance of the evidence. The allowance of an administrative Claim is based on the actual benefit to the debtor's estate, rather than the loss to the creditor by virtue of the debtors' possession of the property.

The only evidence on the actual amount of space that the Debtor used and occupied as to the leased premises and the value thereof for the purposes of determining the amount of VAP's §503 administrative claim was the testimony of Priomlos on behalf of VAP.

There is no dispute by the Debtor that the Debtor used and occupied approximately twenty-five per cent of the total square footage of the leased premises of 3200 square feet or 800 square feet for the sole purpose of storage of the equipment. Although VAP eventually stored the same in 10 feet by 50 foot semi-trailer this is not dispositive of the actual storage space occupied by the Debtor as to the leased premises.

The Debtor however, asserts that VAP should not be allowed a §503(b) administrative claim as VAP wrongfully obstructed the Debtors attempts to remove the equipment from the leased premises. The Court rejects this assertion by the Debtor. The evidence indicates that VAP made a bona fide effort to compel the Debtor to remove the equipment and to cooperate with the Debtor to complete a scheduled, voluntary removal of the equipment.

The Debtor rejected the lease on August 23, 2000. On October 4, 2000, VAP filed its Motion for Relief from the Stay and that the Debtor abandon his interest in the leased premises. The Court granted this Motion on November 17, 2000. On February 26, 2001, VAP filed its Motion that the Debtor abandon the personal property on the leased premises, to which the Debtor objected on the grounds that there might be equity therein above the lien held by Fifth Third Bank. On April 16, 2001 the attorney for the Debtor wrote the attorney for VAP to make arrangements to inventory the equipment. No mention was made in this letter that VAP had denied access to the leased premises by the Debtor. On June 8, 2001 the attorney for the Debtor wrote the attorney for VAP to confirm an inspection and removal would take place on June 13, 2001. No mention was made in this letter that VAP had even denied access to the premises by the Debtor. The Prehearing Conference on said Motion and Objection was continued three times by agreement of the parties, and the docket entry dated September 14, 2001 stated that VAP and the Debtor were attempting to settle this contested matter. During this time period, the Debtor filed no motion or adversary proceeding alleging that VAP has denied Debtor access to leased premises for the purpose of the removal of the equipment.

On November 8, 2001, at a Status Conference, the Debtor stipulated he would remove the equipment on or before November 29, 2001, which was ordered by the Court. By letter dated January 10, 2002 the attorney for the Debtor stated the Debtor would complete his inspection of the leased premises on January 17, 2002. No mention was made in this letter that VAP had ever denied the

Debtor access to the leased premises. VAP reported to the Court on January 22, 2002 that the Debtor had not removed the equipment as ordered, and at a Status Conference held on February 27, 2002 the Debtor reported that "while Debtor removed a majority of the personal property from the premises some tools remained." The Debtor on February 27, 2002 was ordered to remove all remaining tools on or before March 13, 2002.

The Debtor filed a Report on March 25, 2002 that he had inspected the premises on March 2, 2002 and attached lists of missing and damaged equipment. In that Report the Debtor also advised that the Debtor had attempted for months to determine what action, if any Fifth Third Bank proposed to take with respect to its collateral without success.

After March 2, 2002 the Debtor never returned to the leased premises, or personally contacted VAP. He stated he relied on his counsel to make what ever arrangements ere necessary to complete the removal, and did not personally know what arrangements, if any, his attorney had made.

An examination of the record in this case reveals that during the entire course of this case the Debtor has never filed a motion or adversary proceeding alleging that VAP wrongfully denied the Debtor access to the leased premises.

Based on the foregoing and the testimony of Primolos on behalf of VAP that the Debtor never returned to the leased premises after March 2, 2002, and that VAP was never contacted by anyone regarding removal after March 2, 2002, the Court finds that VAP shall be allowed a §503(b) administrative rent claim for the period from July 12, 2000 to July 31, 2000, and from September 1, 2000 to March 31, 2003 for the use and occupancy of the leased premises for storage of the equipment by the Debtor's estate, in that VAP never unreasonably denied the Debtor access to the leased premises.

VAP's assertion that it should be allowed a §503(b) administrative rent claim for storage at the rate of \$8.00 per square foot for 800 square feet of \$6399.00 [\$6400] year, is excessive. The equipment

was comprised of hard assets that were not perishable or otherwise required special storage conditions. The equipment did not require water, heat, refrigeration, maintenance, or any special storage facility or service. Thus, VAP shall be allowed a §506(b) administrative claim based on the value and benefit of the leased premises to the Debtor's estate at a reasonable rental rate customarily charged by warehouses for comparable, conventional, lock and key storage of like equipment at a rate that is prevailing in Northwest Indiana.

Priomlos on behalf of VAP, asserted that the rental rate for conventional warehouse storage in Porter County, Indiana was approximately \$4.00 a square foot if the equipment was stored in a building comparable to the leased premises, but acknowledged that storage necessary for the equipment could be found in adjacent Lake County, Indiana at the rate of approximately \$2.00 to \$3.00 a square foot. Based on this testimony, the Court decides that the reasonable value of use and occupancy of the leased premises for storage under lock and key only is approximately \$2.50 a square foot.

Based upon the actual use and occupancy of 800 square feet of the leased premises by the Debtor, and a rental rate of \$2.50 per square foot this computes to an annual rental rate for warehouse storage of \$2000.00 a year on an annual basis (800 x \$2.50), or \$166.67 monthly ( $\$2000 \div 12$ ), and a per diem rental rate of \$5.56 a day ( $\$166.67 \div 30$ ).

This results in an allowable §503(b) administrative rent claim as follows:

1. July 12, 2000 to July 31, 2000 (19 days @ \$5.56 per day).	\$ 105.64
2. September 1, 2000 to December 31, 2000 (4 months @ \$166.37 a month).	666.68
3. January 1, 2001 to December 31, 2001 (\$2000.00 a year).	2,000.00
4. January 1, 2002 to December 31, 2002 (\$2000.00 a year).	2,000.00
5. January 1, 2003 to March 31, 2003 (3 months @ \$166.67 a month).	<u>500.01</u>

Total \$5,272.33

VAP also asserts a §503(b) administrative rent claim based on twenty-five per cent of the insurance and taxes that were payable by the Debtor pursuant to the terms of the original Lease which was a "net lease", i.e. the Debtor was required to pay all taxes, insurance, utilities, and maintenance. However, upon rejection of the Lease by the Debtor, the net lease provisions of the lease are not controlling for the purposes of VAP's §503(b) administrative rent claim. The typical warehouse storage lease is not a net lease. That is, in the typical warehouse storage lease, the lessee pays a base rental rate, while the lessor customarily absorbs the costs of taxes, insurance, utilities and maintenance. Thus, VAP shall be denied a §503(b) administrative claim for those costs, arising out of the use and occupancy of the leased premises for storage only after rejection.

In conclusion, the Court decides that VAP shall be awarded and administrative rent claim as follows:

1. Rent claim based on §365(d)(3) for month of August, 2000.	\$ 6,342.70
2. Rent claim based on §503(b) for period from July 12, 2000 to July 31, 2000, and period from September 1, 2000 to March 31, 2003.	<u>5,272.33</u>
Total	\$11,615.03

#### The Counterclaim by the Debtor

\_\_\_\_\_The Debtor filed a Chapter 13 Petition. If he is a sole proprietor, his sole proprietorship has no legal identity apart from the proprietor Troelstrup v. Index Futures Group, Inc., 130 F.3d 1274, 1277 (7<sup>th</sup> Cir. 19797). Thus, if the Debtor owned the equipment as a sole proprietor, the business equipment used in the operation of his sole proprietorship would also be part of the Debtor's estate, along with all of his other assets that he owned for his personal use.

Here, the Debtor's Schedule B, Personal Property, did not schedule the equipment in question

as property of the Debtor's estate. The Debtor did schedule as property of the estate his 100% stock ownership interest in SMOLI, Inc, and attached thereto a Balance Sheet that all of the property of SMOLI, Inc., was an asset of that Corporation, subject to a lien held by Fifth Third Bank. This would include the equipment in question.

A debtor has no interest in the assets of a corporation in which he is the sole stockholder, and those corporate assets are not property of the Debtor's estate pursuant to §541(a). Fowler v. Shadel, 400 F.3d 1016, 1019 (7<sup>th</sup> Cir. 2005). The shares of the corporation become property of the debtor's estate, the assets of the corporation do not. Id. The individual debtor may have an equitable interest in the corporation if it is liquidated, and, if so, the debtor then as the sole stockholder would become the sole owner of the property. Id. 400 F.3d at 1018. Here, there is no evidence that the Corporation was liquidated or dissolved by the Debtor prior to the filing of his Chapter 13 Petition, whereby he became the legal owner of the equipment. Because there was no dissolution, the Stock, rather than the equipment owned by the Corporation, became property of the Debtor's estate. The Corporation has a separate legal existence from the shareholder, and the corporation, not its stockholders, own the corporate assets. Id. 400 F.3d at 1018.

Federal Courts have an obligation— regardless of the arguments advanced to them by the parties to assure themselves of their own jurisdiction on their own motion. Kelly v. United States, 29 F.3d 1107, 1113 (7<sup>th</sup> Cir. 1994). If a party lacks standing, the Court does not have subject-matter jurisdiction. Matter of Andreuccetti, 975 F.3d 413, 416-17 (7<sup>th</sup> Cir. 1992). Only persons who are directly and adversely affected by an order of the Bankruptcy Court have standing. Id. The Debtor cannot be directly and adversely affected by the alleged damage to or conversion of the equipment by VAP which was owned by SMOLI, Inc. Therefore, the Counterclaim by the Debtor is hereby **Dismissed** for want of subject-matter jurisdiction based on the lack of standing by the Debtor to assert this Counterclaim

which is an asset of SMOLI, Inc., and not the Debtor's estate. However, the dismissal for lack of subject-matter jurisdiction is not on the merits and thus shall be without prejudice. Ricketts v. Midwest National Bank, 874 F.2d 1177, 1182 N.4 (7<sup>th</sup> Cir. 1989).

It is therefore,

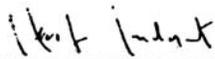
**ORDERED, ADJUDGED, AND DECREED**, that VAP, L.L.C., should be and is hereby allowed an administrative rent claim versus the Debtor's estate in the sum of \$11,615.03. And it is further,

**ORDERED, ADJUDGED, AND DECREED**, that the Debtor take nothing by his Counterclaim, and the same is **DISMISSED** without prejudice for lack of subject-matter jurisdiction.

The Clerk shall enter this Order upon a separate document pursuant to Fed. R. Bk. P. 9021.

Dated: March 14, 2007

Distribution:  
Debtor  
Attorney Miller  
Attorney Tobin  
Attorney Vawter  
Trustee  
U. S. Trustee

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JUDGE, U. S. BANKRUPTCY COURT