UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.	CASE NO. 96-61376
BENNETT RECEIVABLES CORPORATION	96-61377
BENNETT RECEIVABLES CORPORATION II	96-61378
BENNETT MANAGEMENT AND DEVELOPMENT CORPORATION	96-61379
	Chapter 11
Debtors	Jointly Administered

APPEARANCES:

KATTEN, MUCHIN & ZAVIS Attorneys for Heller Financial, Inc. and Heller Financial Leasing, Inc. 525 West Monroe Street Chicago, Illinois 60661-3693	MARK K. THOMAS, ESQ. Of Counsel AMY A. HIJJAWI, ESQ. Of Counsel
HANCOCK & ESTABROOK, ESQ. Attorneys for Heller Financial, Inc. and Heller Financial Leasing, Inc. 1500 MONY Tower I Syracuse, New York 13202	STEPHEN A. DONATO, ESQ. Of Counsel
SIMPSON, THACHER & BARTLETT Attorneys for § 1104 Trustee 425 Lexington Avenue New York, New York 10017	M.O. SIGAL, JR., ESQ. GEORGE NEWCOMBE, ESQ. ERIC KOBRICK, ESQ. WILLIAM RUSSELL, ESQ. Of Counsel
WASSERMAN, JURISTA & STOLZ Attorneys for Unsecured Creditors Committee 225 Millburn Avenue Millburn, New Jersey	DANIEL STOLZ, ESQ. Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,

CONCLUSIONS OF LAW AND ORDER

Presently before the Court is a motion filed by Heller Financial, Inc. and Heller Financial Leasing, Inc. (collectively "Heller") on April 5, 1996, seeking relief from the automatic stay pursuant to § 362(d)(1) of the Bankruptcy Code (11 U.S.C. § 101-1330) ("Code"). Heller seeks either (a) to have the stay lifted to permit it to "exercise all its rights and remedies" under all of its agreements with The Bennett Funding Group, Inc. ("Debtor" or "BFG") and direct the Debtor to provide Heller with copies of "all of the private label agreements and arrangements" pursuant to certain Private Label Agreements, or (b) to have the stay modified to permit Heller to contact certain lessees, The Processing Center, Inc. ("TPC")[1] and/or Chemical Bank, N.A. and obtain payments directly therefrom and also direct the Debtor to provide Heller with copies of "all of the private label agreements and arrangements" pursuant to certain Private Label Agreements. Heller alleges that it should be receiving approximately $200,000 per month from the Debtor.

The motion was preliminarily scheduled to be heard on April 25, 1996, and was adjourned several times thereafter. In the interim on April 26, 1996, the Court *sua sponte* issued an Omnibus Order pursuant to Code § 362(e) deferring the final hearings on various lift stay motions, including Heller's, until August 15, 1996.[2] Similar orders were subsequently entered

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[1]TPC, among other things, handles the collection of lease payments from various lessees on behalf of the Debtor. On April 26, 1996, a voluntary petition was filed by TPC pursuant to chapter 11 of the Code.

[2]In its Omnibus Order, the Court noted that it had been advised that approximately 200 banks had claimed a security interest in various equipment leases and that thousands of investor creditors had also claimed interests in some of the same leases. The Court concluded that there were compelling circumstances "based on their numerosity and the burden said motions place on the Debtors and/or Trustee at this stage of the case . . ." for extending the time for the final hearing.

deferring the hearings based on the Court's conclusion that the compelling circumstances continued to exist.

On May 16, 1996, the Court signed an Order which enjoined the Trustee from transferring, selling, pledging, assigning, hypothecating or otherwise disposing of the Heller leases or the proceeds of the Heller leases ("Segregation Order"). The Trustee was required to deposit all such proceeds in a segregated account and to provide Heller with an accounting of the proceeds collected both pre- and post-petition and to provide Heller with information on collections. In addition, Heller was granted interim adequate protection in the form of "a rollover lien upon the Heller Leases and the proceeds thereof equal in priority and extent to the security interest in and lien upon the Heller Leases and the proceeds thereof that Heller held as of the filing date of the Debtor's bankruptcy petition."

On July 24, 1996, the Court issued an Order directing that a status conference regarding the motions filed by the various banks, including Heller, pursuant to Code § 362(d) and § 363(e), be held on August 15, 1996, to "discuss resolution of certain issues, monitor the status of discovery and fix dates for the filing of further memoranda of law, scheduling of further motions, the conduct of evidentiary hearings pursuant to 11 U.S.C. § 362(e) and the issuances of further omnibus orders."[3]

Also on July 24, 1996, the Court issued an Order providing for discovery in connection with the various motions seeking relief from the automatic stay ("Discovery Order"). In its Discovery Order the Court stated that it would permit limited discovery to enable all parties to

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[3]Additional status conferences were held on September 19, 1996, October 24, 1996, December 12, 1996, January 9, 1997, and January 23, 1997.

adequately prepare for a final hearing pursuant to 11 U.S.C. §362(e). To this end, the Court ordered that discovery be limited to those procedures set forth in Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") 7026(c), 7033, 7034 and 7037, which incorporate by reference Federal Rules of Civil Procedure ("Fed.R.Civ.P.") 26(c), 33, 34 and 37.

On August 8, 1996 the trustee appointed in these cases, Richard C. Breeden ("Trustee"), filed opposition to the motions of several banks, including Heller. Pursuant to the Court's Memorandum-Decision, Findings of Fact, Conclusions of Law and Order, entered October 22, 1996 ("October Decision") (*see In re Bennett Funding Group, Inc.*, 203 B.R. 30 (Bankr. N.D.N.Y. 1996)), the Trustee filed his particularized responses to Heller's motion on December 9, 1996.

On December 31, 1996, the Court issued an Order Scheduling Evidentiary Hearing and Requiring Presentation of Evidence by Declarations/Depositions in connection with the motion herein, which was later amended on February 5, 1997 ("Amended Scheduling Order"). The Amended Scheduling Order provided that each party present the testimony of its witnesses through declarations/depositions, under penalty of perjury, otherwise admissible under the Federal Rules of Evidence. Said declarations/depositions constituted the direct testimony of the party offering it. The Court required that the declarant/deponent be present at the hearing and subject to cross-examination if the declaration/deposition was to be admissible. Each party was also afforded an opportunity to file evidentiary objections in connection with the declarations/depositions, as well as a pre-hearing memorandum of law.

The evidentiary hearing ("Hearing") on the motion herein was held in Utica, New York,

on March 24, 1997. The matter was submitted for decision at the close of the evidence that day.[4]

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(A), (G) and (O).

FACTS

Voluntary petitions were filed under chapter 11 of the Code by four related corporate entities, namely The Bennett Funding Group, Inc., Bennett Receivables Corporation, Bennett Receivables Corporation II, and Bennett Management and Development Corporation on March 29, 1996. On April 18, 1996, the Trustee was appointed by the U.S. Trustee pursuant to Code § 1104 and said appointment was approved by the Court the same day.

Prior to filing, the Debtor was in the business of originating, purchasing and selling commercial leases of copy machines and other office equipment. For purposes of obtaining loans to finance its operations, the Debtor compiled the leases into portfolios designed to provide for the secured payment of principal and interest to the potential lenders. According to the testimony, Heller entered into four such loan transactions with the Debtor.

Loan 1

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[4]On April 23, 1997, the Court *sua sponte* entered an Order extending the date by which it was required to issue an actual decision on the motion to sixty (60) days following the conclusion of the final hearing.

On December 27, 1994, a promissory note in the principal sum of $1,012,609.68, together with interest at the rate of 10.76% per annum, was executed by the Debtor. *See* Heller's Exhibit 1. Included with the promissory note was an amortization schedule of monthly payments to Heller of $26,053.56 over 48 months ("Schedule A payments"),[5] beginning January 29, 1995, and ending December 29, 1998, totaling $1,250,570.88. As of February 29, 1996, the balance on the loan was $760,616.77. *See id.*

Also on December 27, 1994, Debtor and Heller executed an assignment of contracts, which provides *inter alia* that Heller shall have the right to receive all rentals due or to become due under the contracts and that all monies due and to become due under the contracts were to be paid directly to Heller. According to the assignment, Debtor granted a security interest in the contracts and also sold and assigned the equipment leased under the contracts to Heller. *See* Heller's Exhibit 2. Attached to each assignment is a list of contracts or leases identifying the lease number, name of the lessees, the term of the lease, remaining term and the monthly lease payment.

On January 1, 1995, a financing statement ("UCC-1") was filed with the Onondaga County Clerk's Office as to

> all Contracts assigned to Secured Party pursuant to that certain Assignment of Contracts, Bill of Sale and other related documents all dated as of December 27, 1994 by and between Debtor and Secured Party (collectively "Sale Agreement"), which Contracts are set forth on Exhibit "A" attached hereto and incorporated herein; the Payment Account Agreement, all Payments, Lessee Guarantees; all Equipment subject to such Contracts; and the proceeds of any of the foregoing. All capitalized terms not otherwise defined herein shall have the meanings set

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[5]In addition to the Schedule A payments earmarked for Heller, the leases in its portfolios also included monies to pay for the servicing of the equipment, taxes due on the equipment, late fees, etc.

forth in the Sale Agreement.

See Heller's Exhibit 3. The "Debtor" is identified as Bennett Funding Group, Inc., 2 Clinton Sq., The Atrium, Syracuse, NY 13202, and the "Secured Party" is identified as Heller Financial Leasing, Inc., One TransAm Pl. Dr., Ste 222, Oakbrook Terrace, IL 60181. The UCC-1 is signed by representatives of both entities. Attached to the UCC-1 is a schedule of leases identical to those attached to the assignment of contracts. Also included in Heller's Exhibit 3 is a statement filed in the Onondaga County Clerk's Office on August 22, 1995, indicating the release of 22 of the original contracts listed in the UCC-1, filed on January 11, 1995.[6] A UCC-1 was also filed with the State of New York, Department of State ("NYS Department of State") on March 20, 1995, covering the same leases included in the December 27, 1994 transaction between Debtor and Heller. *See* Heller's Exhibit 4.

Loan 2

On February 28, 1995, a promissory note in the principal sum of $2,500,089.16, together with interest at the rate of 10.29% per annum, was executed by the Debtor. *See* Heller's Exhibit 8. Included with the promissory note was an amortization schedule of monthly payments of $63,757.48 to Heller over 48 months, beginning March 27, 1995, and ending February 27, 1999, totaling $3,060,359.04 in Schedule A payments. As of February 27, 1996, the balance on the

[6]According to a Substitution Agreement dated July 28, 1995 and signed on behalf of both the Debtor and Heller, the Debtor replaced 22 scheduled contracts referenced in the various documents dated December 27, 1994, with six substituted contracts. S*ee* Heller's Exhibit 5. A UCC-1 was filed on August 22, 1995, in the Onondaga County Clerk's Office and on August 25, 1995, in the NYS Department of State as to those six substituted leases. *See* Heller's Exhibits 6 and 7.

loan was $1,967,610.04. *See id.*

Also on February 28, 1995, Debtor and Heller executed an assignment of contracts, which provides *inter alia* that Heller shall have the right to receive all rentals due or to become due under the contracts and that all monies due and to become due under the contracts were to be paid directly to Heller. According to the assignment, Debtor granted a security interest in the contracts and also sold and assigned the equipment leased under the contracts to Heller. S*ee* Heller's Exhibit 9. Attached to the assignment is a list of contracts or leases identifying the lease number, name of the lessees, the term of the lease, remaining term and the monthly lease payment.

On March 7, 1995, a UCC-1 was filed with the Onondaga County Clerk's Office as to

> all Contracts assigned to Secured Party pursuant to that Certain Assignment of Contracts, Bill of Sale and other related documents all dated as of February 28, 1995 by and between Debtor and Secured Party (collectively "Sale Agreement"), which Contracts are set forth on Exhibit A attached hereto and incorporated herein; the Payment Account Agreement, all Payments, Lessee Guarantees; all Equipment subject to such Contracts; and the proceeds of any of the foregoing. All Capitalized terms not otherwise defined herein shall have the meaning set forth in the Sale Agreement.

See Heller's Exhibit 10. The "Debtor" is identified as Bennett Funding Group, Inc., 2 Clinton Sq., The Atrium, Syracuse, NY 13202, and the "Secured Party" is identified as Heller Financial, Inc., One TransAm Plaza, Ste 222, Oakbrook Terrace, IL 60181. The UCC-1 is signed by representatives of both entities. Attached to the UCC-1 is a schedule of leases identical to those attached to the assignment of contracts. Also included in Heller's Exhibit 10 is a statement filed in the Onondaga County Clerk's Office on August 10, 1995, indicating the release of 22 of the

original contracts listed in the UCC-1 filed on March 7, 1995.[7],[8] A UCC-1 was also filed with NYS Department of State on March 31, 1995, covering the same leases included in the February 28, 1995 transaction between Debtor and Heller. *See* Heller's Exhibit 11.

Loan 3

On May 1, 1995, a promissory note in the principal sum of $1,502,056.88, together with interest at the rate of 9.77% per annum, was executed by the Debtor. *See* Heller's Exhibit 15. Included with the promissory note was an amortization schedule of monthly payments of $37,930.35 over 48 months to be made to Heller, beginning May 28, 1995, and ending April 28, 1999, totaling $1,820,656.80 in Schedule A payments. As of February 28, 1996, the balance on the third loan was $1,235,422.22. *See id.*

Also on May 1, 1995, Debtor and Heller executed an assignment of contracts, which provides *inter alia* that Heller shall have the right to receive all rentals due or to become due under the contracts and that all monies due and to become due under the contracts were to be paid directly to Heller. According to the assignment, Debtor granted a security interest in the contracts and also sold and assigned the equipment leased under the contracts to Heller. *See* Heller's Exhibit 16. Attached to the assignment is a list of contracts or leases identifying the lease

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[7]Although the filing date is listed as May 7, 1995, the UCC-1 number 002030 corresponds with that filed on March 7, 1995.

[8]According to a Substitution Agreement dated July 28, 1995 and signed on behalf of both the Debtor and Heller, the Debtor replaced 22 scheduled contracts referenced in the various documents dated February 28, 1995, with ten substituted contracts. S*ee* Heller's Exhibit 12. A UCC-1 was filed on August 22, 1995, in the Onondaga County Clerk's Office and on August 28, 1995, in the NYS Department of State as to those ten substituted leases. *See* Heller's Exhibits 13 and 14.

number, name of the lessees, the term of the lease, remaining term and the monthly lease payment.

> On May 9, 1995, a UCC-1 was filed with the Onondaga County Clerk's Office as to
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> > all Contracts assigned to Secured Party pursuant to that certain Assignment of Contracts, Bill of Sale and other related documents all dated as of May 1, 1995 by and between Debtor and Secured Party (collectively "Sale Agreement"), which Contracts are set forth on Exhibit A attached hereto and incorporated herein; the Payment Account Agreement, all Payments, Lessee Guarantees; all Equipment subject to such Contracts; and the proceeds of any of the foregoing. All Capitalized terms not otherwise defined herein shall have the meaning set forth in the Sale Agreement.

See Heller's Exhibit 17. The "Debtor" is identified as Bennett Funding Group, Inc., 2 Clinton Sq., The Atrium, Syracuse, NY 13202, and the "Secured Party" is identified as Heller Financial, Inc., One TransAm Plaza Drive, Suite 222, Oakbrook Terrace, IL 60181. The UCC-1 is signed by representatives of both entities. Attached to the UCC-1 is a list of leases identical to those attached to the assignment of contracts with respect to contract number and lessee name. However, the list does not include the term of each lease, the remaining term and the monthly lease payments. Also included in Heller's Exhibit 17 is a statement filed in the Onondaga County Clerk's Office on May 2, 1995 (actual date is unreadable on copy) indicating the release of contract 95040236-Duo Forms listed in the UCC-1 filed on May 9, 1995, and a statement filed in the Onondaga County Clerk's Office on August 10, 1995, indicating the release of contract 95022208-American Limousines. A UCC-1 was also filed with the NYS Department of State on May 9, 1995, covering the same leases included in the May 1, 1995 transaction between Debtor and Heller. *See* Heller's Exhibit 18.

<u>Loan 4</u>

On June 28, 1995, a promissory note in the principal sum of $3,006,411.68, together with interest at the rate of 8.79% per annum, was executed by the Debtor. *See* Heller's Exhibit 20. Included with the promissory note was an amortization schedule of monthly payments of $74,497.19 to be made to Heller over 48 months, beginning July 29, 1995, and ending June 29, 1999, totaling $3,575,865.12 in Schedule A payments. As of February 29, 1996, the balance on the loan was $2,574,915.55. *See id.*

Also on June 28, 1995, Debtor and Heller executed an assignment of contracts, which provides *inter alia* that Heller shall have the right to receive all rentals due or to become due under the contracts and that all monies due and to become due under the contracts were to be paid directly to Heller. According to the assignment, Debtor granted a security interest in the contracts and also sold and assigned the equipment leased under the contracts to Heller. S*ee* Heller's Exhibit 21. Attached to the assignment is a list of contracts or leases identifying the lease number, name of the lessees, the term of the lease, remaining term and the monthly lease payment.

> On July 5, 1995, a UCC-1 was filed with the Onondaga County Clerk's Office as to
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> > all Contracts assigned to Secured Party pursuant to that certain Assignment of Contracts, Bill of Sale and other related documents all dated as of December 27, 1994 by and between Debtor and Secured Party (collectively "Sale Agreement"), which Contracts are set forth on Exhibit A attached hereto and incorporated herein; the Payment Account Agreement, all Payments, Lessee Guarantees; all Equipment subject to such Contracts; and the proceeds of any of the foregoing. All Capitalized terms not otherwise defined herein shall have the meaning set forth in the Sale Agreement.

See Heller's Exhibit 22. The "Debtor" is identified as Bennett Funding Group, Inc., 2 Clinton Sq., The Atrium, Syracuse, NY 13202, and the "Secured Party" is identified as Heller Financial, Inc., One TransAm Plaza Drive, Suite 222, Oakbrook Terrace, IL 60181. The UCC-1 is signed

by representatives of both entities. Attached to the UCC-1 is a schedule of leases identical to those attached to the assignment of contracts, with respect to the contract number and lessee name. However, the list does not include the term of each lease, the remaining term and the monthly lease payments . A UCC-1 was also filed with the NYS Department of State on July 3, 1995, covering the same leases included in the June 28, 1995 transaction between Debtor and Heller. *See* Heller's Exhibit 23.

Heller also entered into servicing agreements with the Debtor in connection with the four loans. *See* Heller's Exhibit 24. Under the terms of the servicing agreements, Debtor was to invoice the contractees/lessees on a monthly basis and to collect the amounts due and owing under the contracts. Debtor also was to remit "all payments received from the Contractees and due Heller" in accordance with the underlying documents, including the promissory note, assignment, bill of sale, and guarantee. *See id.* at ¶1. The Debtor was to pay all taxes, assessments and other charges levied or assessed against the contracts or the collateral or equipment. *See id.* at ¶9. The Debtor agreed to substitute a new contract for, or pay all principal and interest due on, any defaulted or prepaid contract. *See id.* at ¶15. In the event of default, the servicing agreements allowed Heller to contact the contractees/lessees and have the lease payments paid directly to Heller or its agent, as well as late charges, prepayments of principal and any other monies due and owing under the contracts. *See id.* at ¶16.

The Trustee has continued to collect the lease payments postpetition and pursuant to the Court's Order of May 16, 1996, has segregated those monies and provided Heller with various

reports concerning the collections.[9] As of January 31, 1997, Trustee has collected the following amounts from the lessees included in Heller's portfolios of leases:

	Schedule A Payments Collected	Total Amount Collected
Loan 1	$ 302,051.84	$ 412,188.36
Loan 2	900,341.63	1,110,114.30
Loan 3	386,977.62	526,741.31
Loan 4	957,256.12	1,155,066.17
	$2,546,627.21	$3,204,110.14

See ¶80 of Declaration of Daniel Casey ("Casey").

Of the 954 leases in Heller's portfolio, 608 were current as of January 31, 1997 (63.73%), 105 were less than 30 days delinquent (11.01%), 54 were 31-60 days old (5.66%), 34 were 61-90 days old (3.56%) and 153 were more than 90 days old (16.04%). *See* Casey's Exhibit H. No payments from these collections have been remitted to Heller postpetition, however.

On March 13, 1997, Trustee commenced an adversary proceeding against Heller by filing a complaint with the Clerk of this Court in which he alleges twelve causes of action, the first four of which allege preferential transfers by the Debtor to Heller within the 90 day period prior to commencement of the case with respect to each of the four loan transactions.[10] Specifically, Trustee alleges the following payments were made to Heller on January 4, 1996, January 26, 1996, and February 29, 1996, with respect to each of its loans:

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[9]According to the declaration of Manny A. Alas, a partner in Coopers & Lybrand L.L.P. ("Coopers & Lybrand"), the accounting firm retained by the Trustee, the per lease cost to the estate is $6.31 or approximately $6,010-$6,201 per month for the collection on the 954 leases in Heller's portfolios. *See* Exhibit C of Alas' Declaration.

[10]The adversary file contains a Certificate of Service indicating that Trustee actually served Heller with the complaint. Furthermore, no answer has been filed in the proceeding as of the date of this decision.

Loan 1	$26,053.56
Loan 2	$37,930.35
Loan 3	$63,757.48
Loan 4	$74,497.19

The Court received testimony from Mark Anthony Fiorentino ("Fiorentino"), Senior Vice President of Marketing for the lease portfolio group within the vendor finance division at Heller.[11] In response to the statement of George Davis ("Davis") that a prudent lender would have conducted at least one on site visit with Debtor's management in Syracuse, New York, *see* ¶48 of Davis' declaration, Fiorentino indicated that in late 1993 he spent an entire day meeting with the officers and employees of the Debtor and touring the Debtor's facilities. He received information concerning the "Debtor's lease organization and credit approval procedures, the Debtor's processing and collection procedures, the Debtor's portfolio growth rates and historical delinquency and loss statistics . . .." *See* ¶67 of Fiorentino declaration. In reply to Davis' suggestion that a prudent lender would have reviewed the financial statements of the Debtor, *see* ¶51 of Davis declaration, Fiorentino stated that prior to funding the first loan in December, 1994, Heller reviewed two years of financial statements, investigated credit references and contacted industry competitors and concluded that the Debtor was a "financially strong borrower with a stable history and strong operating performance." *See id.* at ¶71. Fiorentino testified that he and other Heller officers continued to meet with the Debtor's management and all payments on each

[11]The Court reserved on the admissibility of Fiorentino's declaration, *see* Heller's Exhibit A, including the full text of his deposition of February 10, 1997. *See* Heller's Exhibit 26. Trustee objected on the basis that his "testimony and exhibits relate solely to the Bank's affirmative case and do not relate to or constitute rebuttal evidence in reply to the declarations submitted by the Trustee" and, Trustee argues, they violate the Court's Scheduling Order. *See*Trustee's Evidentiary Objections to Reply declarations of Heller, filed March 21, 1997, at ¶14.

loan had been made on a timely basis. Debtor had also provided Heller with substitute leases pursuant to their agreement when any of the lessees defaulted. Fiorentino acknowledged that Heller had waived credit insurance because of what it perceived to be the Debtor's financial strength. As an alternative, Heller had negotiated with the Debtor concerning the need for a lockbox. A lockbox agreement was ultimately executed in February 1996. Under the terms of the agreement the Debtor was given exclusive control over the lease payments unless and until the Debtor defaulted on any of its loans with Heller. Davis also recommended that "[o]nce the loans to the Debtor had been made, the prudent lender" should have actively managed the obligation from Bennett. *See* ¶61 of Davis' Declaration. Fiorentino testified that this type of lockbox arrangement was normal in the sphere of lending to commercial leasing companies. *See id.* at ¶97.

Davis is president and chief executive officer of a financial services consulting firm specializing in credit systems and long-term strategic repositioning. Davis' testimony focused on what he considered to be prudent lending practices to achieve risk minimization. For example, Davis stated that "[i]n the case of a small and/or financially weak borrower," the bank might want to control the cash flow from the leases by establishing a lockbox in the name of the bank ("notification") or in the name of the borrower ("non-notification"). *See* ¶36 of Davis declaration. If a lender, upon careful investigation and due diligence, decided to enter into a loan transaction, Davis emphasized the need for continued active management of the loan portfolio. *See id.*at ¶38. This included the need for a regular formal review of the loan(s) and discussions directly with the borrower. *See id.*at ¶39.

In reviewing the procedures employed by Heller, Davis concluded that Heller had

"performed certain due diligence in connection with the loans" to the Debtor, *see id.* at ¶45, but should have done a more thorough investigation of the other businesses of the Debtor companies involved with lot sales, time shares and gaming financing in order to more properly evaluate the worth of the Debtor's guarantee in the event of default. *See id.* at ¶49. Davis also suggested that a more thorough evaluation of TPC, which handled the cash collections for the Debtor, would have been appropriate. *See id.* at ¶58.

The Court received testimony from Daniel Casey, the Director of Collections for TPC, whose responsibilities include managing the collection of delinquent lease payments for the Debtor. Although employed by the Debtor since May 1989, Casey stated that he had held his current position at TPC only since May 1996. Casey testified that TPC employs state-of-the-art and aggressive collection techniques, including the use of an automated Voice Link system which minimizes collector down time and maximizes the amount of time a collector is able to speak with accounts.

In addition to describing the collection procedures employed by TPC, Casey testified concerning the adverse effects he believed would occur in the event the various banks were permitted to contact the individual lessees and collect the lease payments directly from them. For example, he indicated that a number of the lessees have multiple leases which had been transferred to a number of different banks and/or private investors. A lessee that is currently forwarding one payment per month to the Debtor covering the obligations on all its leases would be faced with having to send out several payments to several different lenders, which Casey opined would lead to confusion and increased rates of default. Casey also expressed concerns that there would be a disruption in the servicing of the leased equipment since servicing fees are

a component of the lease payments. A servicer would be required to keep track of from whom it had received payment and to what particular equipment the payment related before determining whether or not to service a particular piece of equipment. Casey envisioned confusion and delays in servicing the equipment with a resultant negative impact on collection efforts as lessees experienced problems getting their equipment serviced. According to Casey, splitting the lease portfolios would also create problems in collecting that portion of the monthly lease payments that were earmarked for remittance to various taxing authorities.

The Court received testimony from the Trustee in which he indicated that since being appointed he had "enhanced collection efforts by restructuring the collections department, hiring temporary employees, setting accounts receivables and collection priorities, overseeing performance on a weekly basis, and reinstating the Voice Link computerized collection system." *See* ¶18 of Trustee's Declaration. Trustee testified that having stabilized the situation at the Debtor, he is now directing his efforts toward the development and implementation of a plan of reorganization. To this end, Trustee has focused on the operations of Resort Funding, Inc. ("RFI"), a nondebtor entity. According to the Trustee, RFI is a company with $110 million in assets and specializes in providing financing to developers of timeshare projects. It has been in the industry since 1991 and has a proven track record of profitability. Trustee believes RFI is ideally situated to take advantage of the substantial growth rate projected in the timeshare industry over the next few years. Trustee believes that the availability and cost-efficient servicing of accounts by TPC is essential if RFI is to continue to expand. To this end, Trustee indicated that it is essential that RFI be able to "effectively and efficiently service its portfolio by processing, invoicing, collecting . . . information." *See id.* at ¶44. Trustee proposes to use

TPC's infrastructure, including its computer systems, for RFI's account collection and servicing.[12]

The Trustee affirmed the concerns expressed by Casey concerning the potential disruptive effect of allowing lenders such as Heller to take over the collection on the lease portfolios. In addition, the Trustee indicated that in the event that TPC was no longer permitted to service and collect on the leases of the lenders such as Heller, it would no longer be cost effective to utilize TPC's facilities to service RFI's accounts. This in turn, Trustee contends, would negatively impact on the revitalization and expansion of RFI. Trustee also suggests that "[i]f TPC's resources are lost, it would also become exponentially more difficult to restart the Debtor's leasing activities in any target market due to the lack of a functioning back office." *See id.* at 47.

ARGUMENTS

In support of its request that the automatic stay be either lifted or modified pursuant to Code § 362(d)(1) with respect to the leases and the postpetition income derived therefrom, Heller asserts that the only issue is whether it properly perfected its liens with respect to the leases and the payments derived therefrom (collectively "Collateral"). Heller takes issue with the Trustee's position that Heller has failed to adequately describe the Collateral in which it contends it has a security interest. In particular, the Trustee points out that certain of Heller's UCC-1's do not include the lease term and monthly payments in the schedule annexed to the UCC-1's.

[12]Trustee acknowledges, however, that at the present time the servicing of a number of RFI's accounts is not being performed using TPC's infrastructure because of the request of one of RFI's outside financers in response to TPC's bankruptcy filing.

Furthermore, the Trustee makes the argument that if Heller does have a security interest in the Collateral, it extends only to the Schedule A payments attached to each of the promissory notes and does not include other monies collected from the lessees by the Trustee such as late charges, servicing fees, taxes, self-insurance fees and residual payments derived from the sale of the equipment.

Trustee takes the position that even if Heller has a properly perfected security interest in the Collateral, it has failed to establish that it lacks adequate protection or that "cause" exists to have the stay lifted pursuant to Code § 362(d)(1). Trustee argues that property of the estate may not be removed if the property is being adequately protected. Trustee emphasizes that it is not Heller's claim that requires adequate protection; rather, it is Heller's interest in the Collateral that is to be considered. In this regard, Trustee points out that Heller has acknowledged that sufficient monies have been generated by the Trustee to pay the debt owed Heller. According to the Trustee, the fact that interest and attorney's fees may be accruing and that there is a decrease in the lease stream due to aging and the fact that new leases are not being substituted for those which are non-performing, as was the Debtor's practice prepetition, merely increases Heller's claim.[13] According to the Trustee, it does not mean that there is a lack of adequate protection with respect to Heller's interest in the Collateral, however.

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[13]For purposes of Heller's lift stay motion, the Court need not address the actual amount of Heller's total claim to include any interest and/or attorneys' fees that may have accrued. Since the Court is relying on Code § 362(d)(1), it has made no finding with regard to any interest Heller might have in any collateral other than Schedule A payments. To the extent that the Court has heard valuation testimony, the Court will utilize such testimony in ultimately determining the full amount of Heller's secured claim pursuant to Code §506(a) and whether or not Heller is oversecured pursuant to Code § 506(b) at confirmation or such time as the Court determines it to be appropriate.

In the event that the Court determines that there is cause to lift or modify the stay, Trustee requests that the Court give serious consideration to the "equities of the case" as set forth in Code § 552(b). In particular Trustee suggests that the Court consider Heller's prepetition course of dealing with the Debtor, which he contends created the setting in which the Debtor was able to successfully perpetrate a "Ponzi scheme" using unmonitored and uncontrolled cash received from the lessees. The Official Committee of Unsecured Creditors ("Committee") further suggests that since none of the thousands of individual creditors that invested in leases with the Debtor have been served with notice of Heller's claim to a first priority security interest in the Collateral, it would be inappropriate to make any final resolution regarding the entitlement to the Collateral. It is the Committee's position that the validity, priority and extent of Heller's lien must first be adjudicated in the context of an adversary proceeding.

Trustee also requests that the Court impose collection costs on Heller in order to reimburse the estate for Trustee's efforts to restore normalcy to the Debtor's operations, which were disrupted upon the filing of its bankruptcy petition. Trustee contends that Debtor's ability to efficiently collect and service the very leases in which Heller asserts a security interest has provided benefit to Heller at a cost to the estate which should be reimbursed. Finally, Trustee asks that the Court deny Heller's motion for relief from the stay until the Bank returns any alleged preferential transfers of monies it may have received prepetition pursuant to Code §502(d).

Insofar as the Trustee's reliance on the "equities of the case" found in Code § 552(b) is concerned, it is Heller's position that there is no legal requirement that a lender act "prudently" in order to be entitled to enforce its security interest. Furthermore, Heller takes exception to the

Trustee's suggestion that its actions in connection with its dealings with the Debtor were anything but prudent under the circumstances. It protected its interests by taking possession of the original leases and filing UCC-1's. Up until the filing of the Debtor's petition, all payments had been received from the Debtor in a timely fashion and, therefore, Heller argues there was no need to take any additional steps to protect its interests. Heller points out that the Trustee has not alleged any fraudulent conduct on the part of Heller that would somehow negate its entitlement to enforce its security interest in the Collateral.

DISCUSSION

Code § 362(e) requires an expedited hearing on a motion to lift the stay in the absence of compelling circumstances. At the same time, "[i]n reorganization cases, the stay is particularly important in maintaining the status quo and permitting the debtor in possession or trustee to attempt to formulate a plan of reorganization." 3 COLLIER ON BANKRUPTCY ¶362.03[2] at 362-14 (Lawrence P. King, ed., 15th ed. 1997). Heller's motion pursuant to Code §362(d)(1) was filed within a week of commencement of Debtor's case. The Court granted interim relief on May 16, 1996, in order to allow the Trustee an opportunity to establish some order from the initial chaos. This included the employment of Coopers & Lybrand to perform forensic accounting and to assist in the stabilization of the Debtor's operations. In the Court's view, to have granted any of the motions filed by more than ninety banks for stay relief in a piecemeal fashion early on in the case would have caused further disruption to the Debtor's operations to the detriment of all of the thousands of Debtor's creditors. Based on the information elicited at the various status

conferences and the testimony of the Trustee at the Hearing, it is clear to the Court that the situation has now stabilized to the point where it is appropriate to dispose of Heller's motion.

Admissibility of Fiorentino Deposition and Reply Declaration

Heller requested that the Court admit the entire deposition of Fiorentino, dated February 10, 1997, pursuant to Rule 106 of the Federal Rules of Evidence ("FRE"). *See* Heller's Exhibit 26. It is Heller's position that it is misleading to the Court to allow in only the redacted portion of Fiorentino's deposition submitted by the Trustee. FRE 106 provides that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously." Fed.R.Civ.P. 32(a)(4) also states that "[i]f only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts."

FRE 106 is intended to "correct a misleading impression created by taking matters out of context." *United States v. Sutton*, 801 F.2d 1346, 1368 (D.C.Cir. 1986). In *Sutton* the court concluded that it would permit the defense to introduce limited portions of the deposition in order to remove any distortion created by the prior introduction of selected statements from the deposition by the prosecution. *See id.* at 1369. In addition, the court indicated in order to assure fairness the selected statements did not have to otherwise be admissible since FRE 106 did not contain the proviso "except as otherwise provided by the rules." *See id.* at 1368. *But see Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1557 (11th Cir. 1987) (stating "when a

document a party seeks to admit is full of inadmissible material, it is incumbent on the party to specifically note the admissible sections" as the court should not have to review the entire deposition to make such a determination).

The Court concludes that in fairness to Heller those portions of Fiorentino's deposition referenced in Fiorentino's declaration, *see* Heller's Exhibit A, shall be deemed admitted for purposes of correcting what Heller believes to be statements taken out of context which might mislead the Court in its deliberations. However, the Court will not admit the entire deposition since the Court is under no obligation "to go through the entire deposition of a witness who had testified at the trial to determine if there are conflicts in the deposition testimony or if the deposition contradicts the courtroom testimony of the witness." *See Paul Arpin Van Lines, Inc. v. Universal Transp. Servs., Inc.*, 988 F.2d 288, 294 (1st Cir. 1993). The Court shall simply rely on Fiorentino's references in his declaration to particular portions of his deposition which he believes correct certain misleading statements excerpted from his deposition by the Trustee.

Regarding the Trustee's objection to the declaration of Fiorentino and to the admission of the certified copies of the UCC-1's, it is evident that Fiorentino's declaration was submitted by Heller in response to the Trustee's objection that Charles Heller ("C. Heller") was without personal knowledge of the underlying loan transactions which were the subject of the Hearing. Indeed, C. Heller's declaration, *see* Heller's Exhibit B, was based on his role as "custodian of the records" and he acknowledged that he had had no direct involvement in the four transactions with Debtor. Trustee takes the position that Fiorentino's declaration does not constitute rebuttal evidence in reply to the declarations submitted by the Trustee.

"Rebuttal evidence" is defined as "evidence given to explain, repel, counteract or disprove

facts given in evidence by the adverse party. That which tends to explain or contradict or disprove evidence offered by the adverse party." BLACK'S LAW DICTIONARY 1267 (6th ed. 1990). In its Scheduling Order the Court allowed Heller to serve and file its reply declarations and any evidentiary objections it had to the Trustee's declarations. Redirect testimony was specifically prohibited at the Hearing. "The only evidence a party may offer at the hearing is true rebuttal evidence." *See* ¶2(e) of the Amended Scheduling Order.

The Court recognizes that the "Hearing by Declaration" is somewhat unorthodox in its format. However, the Court notes that this is a hearing pursuant to Code § 362(e) and Fed.R.Bankr.P. 9014; it need not observe the formality of the trial of an adversary proceeding conducted pursuant to Fed.R.Bankr.P. 7001. It is the Court's considered position that it was the only means by which the various motions seeking, *inter alia,* relief from the automatic stay could be heard expeditiously given the Court's calendar and the numerosity of the motions. In this regard, the Court has made a conscientious effort to assure that the truth is ascertained and the motions justly determined in accord with due process of law. Admittedly, Heller's counsel was placed in the unenviable position of being "first off the block" without any guidelines except those found in the Amended Scheduling Order.

Within that context, the Court will overrule the Trustee's objection to admission of the certified copies of the UCC-1's submitted to the Court through the declaration of Heller's counsel, Mark Thomas. The Trustee was provided with copies for his review and the only substantive objection to their admission was their lack of certification, which was remedied by Heller at the Hearing.

With respect to Fiorentino's declaration, the Court will overrule the Trustee's objection

to the extent that it will admit those portions which the Court deems to be "true replies" or rebuttal of the declarations submitted by the Trustee. For instance, Fiorentino has attempted to rebut certain statements made by Davis concerning Heller's due diligence in entering into the loan transactions with the Debtor. The Trustee is correct that reply declarations are not intended to rehabilitate or backfill prior statements of the declarant. They are merely to explain or contradict the statements offered by the other party.

The Court does not view this as permitting Heller a "second bite of the apple" to which the Trustee is not also entitled. According to the Amended Scheduling Order, the Trustee was permitted an opportunity to file only evidentiary objections to Heller's reply declarations. At the same time, the Amended Scheduling Order expressly allowed for rebuttal evidence in the form of live testimony at the Hearing of which the Trustee did not choose to avail himself. As a result, the Court finds that there is no prejudice to the Trustee in admitting Fiorentino's declaration to the extent that it rebuts the evidence offered by the Trustee.

Analysis of Security Interest in the Collateral

Over the course of this case, various banks have asserted an interest, whether it be a security interest or an ownership interest in personal property, including not only the leases and the income derived therefrom, but in some cases the equipment subject to the leases as well. In the matter *sub judice*, Heller asserts that it is a secured creditor with a perfected security interest in and a lien upon the leases and all proceeds of the leases.[14]

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[14]In its October Decision the Court set forth certain criteria with respect to proper perfection of a security interest in the leases. For purposes of this decision, the Court will assume a familiarity with that discussion.

As this Court noted in its October Decision, there are two types of collateral in which Heller asserts it has a security interest, namely chattel paper and the proceeds derived therefrom. *See Bennett Funding Group* at 38; *see also In re Funding Systems Asset Management Corp.*, 111 B.R. 500, 519 (Bankr. W.D.Pa. 1990) (citing *Feldman v. Philadelphia Nat'l Bank*, 408 F.Supp. 24, 37 (E.D.Pa. 1976) (stating "[r]ental payments were proceeds of the chattel paper."); *In re Keneco Financial Group, Inc.*, 131 B.R. 90, 94 (Bankr. N.D.Ill. 1991) (citing *In re Cleary Bros. Const. Co., Inc.*, 9 B.R. 40, 41 (Bankr. S.D.Fla. 1980). Article 9 of the Uniform Commercial Code sets forth the statutory framework for any analysis of a security interest in personal property.[15] In its October Decision, the Court indicated that initially the banks would have to establish the existence of chattel paper. This required not only that the lease set forth the lessee's monetary obligation but also that it identify the specific goods being leased. At the Hearing, Heller provided the Court with ink-signed originals of its leases. *See* Heller's Group Exhibit 26. Heller has identified 134 leases which do not list the serial numbers of the leased equipment. *See* Heller's Exhibit 27. Heller relies on NYUCC § 9-110 in arguing that as long as the description of the equipment in the lease reasonably identifies what it is, that should be sufficient. Indeed, the comment to NYUCC § 9-110 states that "[u]nder this rule courts should refuse to follow the holdings . . . that descriptions are insufficient unless they are of the most exact and detailed nature, the so-called serial number test." Heller cites numerous cases in which courts have concluded that it was unnecessary that a financing statement include the model and serial number of the collateral in order for the description to be sufficient. *See* Heller's Trial Brief, filed March

[15]For purposes of this discussion, the Court will rely on the New York Uniform Commercial Code ("NYUCC").

21, 1997, p. 15-19. This approach comports with the purpose of a notice filing system, namely that the financing statement alert a potential creditor to the possibility of a pre-existing security interest in the collateral for which further inquiry may be necessary.

In this case, it is necessary that Heller establish the existence of chattel paper. By definition, chattel paper requires that there be not only a monetary obligation but also that there be specific goods (NYUCC § 9-105(b)) set forth in the writing(s). Arguably, a single lessee could have several contracts/leases for several pieces of equipment of the same manufacturer and model number and the only feature distinguishing the different pieces of equipment is their serial number. Therefore, as to the 134 leases identified by Heller as lacking serial numbers, the Court concludes that they do not represent leases of specific goods and, therefore, do not constitute chattel paper.

Heller also identifies five leases which do not include the signature of the lessor, namely the Debtor.[16] It is the lessee's monetary obligation to make the lease payments that gives the lease its value. Furthermore, absent an express requirement in the lease that both signatures were necessary in order for it to be valid, the signature of only one party may create a valid contract. *See Consarc Corp. v. Marine Midland Bank,* N.A., 996 F.2d 568, 572 (2d Cir. 1993). Indeed, a "unilateral offer may be accepted by the other party's conduct and thereby give rise to

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[16]The Court attached to its October Decision what it labeled "Addendum B", setting forth what it deemed "necessary" in order to establish the existence of chattel paper based on what it believed to be an example of a "typical" lease. It was the intent of the Court that if the criteria set forth therein were met, there would be no dispute regarding whether or not the collateral was chattel paper. The issue of whether a lease constituted chattel paper in the event that the lessor had not signed the document was not before the Court and in hindsight the Court believes that it should not have labeled the criteria "necessary." Rather, it would have been more appropriate to deem it "illustrative."

contractual obligations." *See id.* at 573 (citations omitted). This comports with the view that in the situation in which both parties accepted the benefit of the lease, they should both be bound by the terms of it even if signed by only one party and accepted orally by the other. This is particularly true when it appears that the preprinted lease forms were provided by the Debtor. Therefore, the Court concludes that the fact that five leases were not signed on behalf of the Debtor does not alter the fact that the five leases constitute chattel paper.

With the exception of the 134 leases that do not include serial numbers of equipment,[17] as listed in Heller's Exhibit 27, the Court concludes that the leases held by Heller constitute chattel paper. The question then arises whether Heller's security interest in the leases has attached. NYUCC § 9-203(1) requires that (a) the collateral is in the possession of the secured party pursuant to an agreement, or the debtor has signed a security agreement which contains a description of the collateral ...; (b) value has been given; and (c) the debtor has rights in the collateral. With respect to the first element, Heller has provided the Court with evidence that not only is it in possession of the ink-signed original leases but also that it also has an assignment of contracts in connection with each of the four loan transactions which was executed on behalf of the Debtor and which identify the individual lease portfolios. *See* Heller's Exhibits 2, 9, 16 and 21. Heller has also satisfied the second prong in that it has presented the Court with the promissory note executed by the Debtor with respect to each of the four transactions. *See* Heller's Exhibits 1, 8, 15 and 20. With respect to the third element, Trustee does not appear to dispute the Debtor's rights as lessor in the leases.

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[17]The Court was not presented with any evidence that any items of equipment identified in the 134 leases are unserialized and are identifiable only by model or manufacturer.

Having determined that Heller's security interest attached to the leases, the Court must also examine whether Heller has properly perfected a security interest in the leases either by filing a financing statement (NYUCC § 9-304) or by taking possession of the leases (NYUCC § 9-305). *See Keneco Financial Group*, 131 B.R. at 96. As discussed above, Heller has perfected its security interest in a majority of the leases in its portfolios to the extent that it has possession of the ink-signed original leases.

Heller has also provided evidence of the filing of UCC-1's in both the Onondaga County Clerk's Office and the NYS Department of State in the name of the Debtor. *See* Heller's Exhibits 3, 4, 6, 7, 10, 11, 13, 14, 17, 18, 22 and 23. Trustee, however, takes exception to the UCC-1's filed with respect to the third loan transaction, s*ee* Heller's Exhibits 17 and 18, and the fourth loan, *see* Heller's Exhibits 22 and 23, as well as those or certain substituted leases, s*ee* Heller's Exhibits 6 and 7, which identify the lease number and the name of the lessee but fail to indicate the term of the lease and the monthly payment.

In Addendum B of the October Decision, the Court indicated that in order for there to be perfection of a security interest by filing a financing statement, the financing statement was to contain "[a] description of the collateral, including identification of the lease, lessee, term and monthly payment and provision for substitution/replacement of said leases/contracts." As set forth at footnote 16 herein, it was the intent of the Court that Addendum B serve as a guide in the hopes of eliminating any dispute between the parties regarding perfection of the banks' interest in the leases as long as said criteria had been met. The Court did not intend to preclude argument by either party in the event that the various documents, including the financing statements, were not in full compliance with the elements set forth in Addendum B.

Heller does not dispute that certain of its financing statements include a list identifying only the lease or contract number and the lessee. They do not identify the lease term or amount of monthly payments. The Court finds that that fact alone is not a basis for concluding that a proper financing statement was not filed. As previously discussed, NYUCC § 9-110 simply requires that there be a description of the personal property which reasonably identifies the collateral in order to place the inquiring party on notice to make further inquiry. *See In re Laminated Veneers Co., Inc.*, 471 F.2d 1124, 1125 (2d Cir. 1973) (citing *In re Leichter*, 471 F.2d 785 (2d Cir. 1972)); *In re Kam Kuo Seafood Corp.*, 76 B.R. 297, 303 (Bankr. S.D.N.Y. 1987); *In re Griffith*, 194 B.R. 262, 264 (Bankr. E.D.Okl. 1996). In this case, the financing statements filed with respect to both the original leases and the substituted leases provide reasonable identification of the contracts by listing both the lease numbers and lessees. It is the leases themselves which require specificity as to the equipment and the monetary obligation.

The Court concludes that consistent with the above discussion, Heller holds a perfected security interest in the leases, with the exception of those listed in Heller's Exhibit 27, by virtue of its possession of ink-signed originals and its filing of UCC-1's, which identify the Debtor as "Bennett Funding Group, Inc.", in both the Onondaga County Clerk's Office and the NYS Department of State.

As this Court concluded in its October Decision, NYUCC § 9-306(3)(b) provides that a security interest in proceeds is continuously perfected if the interest in the original collateral was perfected by the filing of a financing statement and the proceeds are identifiable cash proceeds. In this case, the Court has concluded that Heller perfected its security interest *inter alia* by filing proper financing statements in both the Onondaga County Clerk's Office and the NYS

Department of State. Furthermore, pursuant to the Court's Segregation Order the Trustee has deposited the proceeds of Heller's leases into a segregated account for which Heller has been receiving a regular accounting. In this case, the Trustee indicates that $3,204,110.14 was collected as of January 31, 1997, said amount including $2,546,627.21 in Schedule A payments. Therefore, the Court finds that Heller has a perfected security interest in the lease proceeds to the extent of Schedule A payments.

Postpetition Security Interest

Generally, property acquired by the estate postpetition is not subject to any lien resulting from a security agreement entered into by the debtor prepetition. Code § 552(b)(1), however, provides for an exception in the event that the security agreement extended not only to property acquired prepetition but also to proceeds. If such was the case then the security interest extends to the proceeds "except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise."[18] In this case, each of the assignments of contracts executed on behalf of the Debtor transferred to Heller all the Debtor's "right, title and interest into the Contracts and Equipment and the rent and payments therein provided . . . ." Accordingly, the Schedule A payments that the Trustee has collected and segregated postpetition represent proceeds of the leases as referenced in Code § 552(b)(1) which are subject to Heller's postpetition security interest, except for those leases identified in Heller's Exhibit 27.

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[18]It is this "exception to the exception" upon which the Trustee relies in arguing that Heller's security interest in the income from the leases should be curtailed in some form. This issue will be addressed below.

Relief from the Automatic Stay

The fact that Heller holds a perfected security interest in the majority of its leases as well as the proceeds derived therefrom requires the Court to then analyze whether Heller has established "cause" to have the automatic stay modified or lifted in order to recover its Collateral. While Heller has asserted that its interest in the Collateral is not being adequately protected because interest and attorneys' fees are accruing and the delinquency rates on its portfolios are increasing, the Court is not convinced by that argument. Indeed, as pointed out by the Supreme Court in *United Sav. Ass'n v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 374, 108 S.Ct. 626, 632, 98 L.Ed.2d 740 (1988), there is a distinction to be made between Heller's interest in the Collateral and the amount of its claim. The Court finds no fault with the collection process of the Debtor as described by Casey. It appears to be extensive and efficient, and the fact that the Trustee has not made substitutions of the leases in Heller's portfolio of performing leases for those showing a delinquency, while in contravention of the terms of the agreement between Heller and the Debtor prepetition, does not, in the Court's view, translate into a lack of adequate protection of Heller's interest.

That conclusion does not definitively resolve Heller's motion to lift or modify the stay, however. The Code does not define what constitutes "cause" pursuant to § 362(d)(1), other than indicating that a lack of adequate protection serves as one basis. The decision to modify or lift the automatic stay is within the discretion of the Court and is to be determined on a case-by-case basis. *See In re Robbins*, 964 F.2d 342, 345 (4th Cir. 1992); *see also Sonnax Indus., Inc. v. Tri Component Prods. Corp. (In re Sonnax Indus., Inc.),* 907 F.2d 1280, 1286 (2d Cir. 1990) (citations omitted). The Court is mindful that the automatic stay is intended "to forestall the

depletion of the debtor's assets . . . [and] to avoid interfering with or disrupting the administration of the estate in the orderly liquidation or rehabilitation of the debtor." *In re Virginia Hill Partners I*, 110 B.R. 84, 86 (Bankr. N.D.Ga. 1989). It is intended to provide an opportunity "to harmonize the interests of both debtor and creditors while preserving the debtor's assets for repayment and reorganization . . ." *Robbins*, 964 F.2d at 345.

Over the past year while Heller's motion has been pending, the Trustee has had ample opportunity to stabilize the Debtor's operations. At the Hearing the Trustee submitted testimony that he now was beginning to focus his efforts on the development and implementation of a plan which he hoped would revitalize and expand RFI, a nondebtor entity. The key to this expansion, according to the Trustee, rests in large degree on being able to maintain an efficient and cost effective operation for collecting and servicing accounts. While he suggests that the Debtor may ultimately become involved with additional leasing operations in connection with the resort timeshare industry, it appears that his main concern for the present centers on the servicing and collection operations of TPC, a separate entity distinguishable from BFG.

Whether or not there is a reasonable possibility for a successful reorganization of BFG standing alone is not entirely clear. However, the Court has serious concerns about the adverse impact on the operations the Trustee has reestablished since assuming his position if the Court were simply to lift the stay and allow Heller itself to collect on the lease portfolios. Allowing Heller to service its portfolios not only would put at risk the collection of servicing payments and tax payments, but also has the real potential for negatively impacting on any profit or spread the estate might be able to generate for payment to private investors of which there are allegedly thousands. Therefore, the Court concludes that the Trustee should be allowed to continue the

servicing and collections of Heller's lease portfolios in order to minimize the serious disruption that will likely occur to the detriment of secured and unsecured creditors alike if the servicing and collection functions are returned to individual lenders such as Heller. Having so concluded, the Court must also give consideration to Heller's request that it modify the automatic stay to the extent of permitting Heller to receive certain lease proceeds.

Generally, the issue of whether particular collateral is necessary for reorganization must be addressed pursuant to Code § 362(d)(2) and requires that the Court not only find that the collateral is not necessary for the debtor's reorganization but also that the debtor lacks equity in the collateral in order to grant a creditor's motion. The two part analysis set forth in Code § 362(d)(2) assumes first that a debtor is going to reorganize, and then the question is whether the collateral will be necessary in the reorganization. However, where there has been no evidence that there is to be a reorganization of the debtor utilizing the cash generated by the lease streams in which Heller has a security interest, the Court concludes that a determination of "cause" under Code § 362(d)(1) may be proper under these circumstances and the Court need not consider whether or not the Debtor has equity in the collateral.

As indicated, the Trustee has not established that the Schedule A payments, other than their collection by TPC, are to be utilized in any reorganization of the Debtor. The Trustee has never sought authorization to use Heller's cash collateral postpetition. As noted above, his testimony in large part focuses not on the Debtor's reorganization at all but on RFI's continued viability and future growth. Furthermore, additional delay in turning over the payments to Heller has the potential for increasing Heller's secured claim should it be determined to be oversecured to the detriment of the investor creditor body.

With respect to the investor creditor body, the Trustee makes the argument that pursuant to Code § 552(b), the Court "should make the hard and imperfect decision of adjusting the equities among all those -- bank and non-bank individuals -- hurt by the Ponzi scheme." *See* Trustee's Trial Brief, at 38. The Court's equitable powers are not without limitation however. Heller is correct in its assertion that the law does not require that a creditor be prudent in its investments, whether it be a banking institution or an individual investor, in order to enforce its security interest in a subsequent bankruptcy.[19] The Court has been presented with extensive declaration testimony by Davis concerning what Heller should have done in order to have prevented what the SEC has described as the "largest Ponzi scheme in U.S. history." Trustee has not alleged that Heller's conduct was in any way fraudulent, but rather merely less than prudent. Could not the same be said for the thousands of investors who also were willing to risk their savings in order to obtain a premium rate of return on their investment?

The Court has examined the legislative history and case law addressing Code § 552(b). As one court has noted,

> The purpose of the equity exception is to prevent a secured creditor from reaping benefits from collateral that has appreciated in value as a result of the trustee's/debtor-in-possession's use of other assets of the estate (which would normally go to general creditors) to cause the appreciated value.

In re Airport Inn Associates., Ltd., 132 B.R. 951, 959 (Bankr. D.Colo. 1990) (quoting *Delbridge v. Production Credit Assn. and Federal Land Bank*, 104 B.R. 824, 826 (E.D.Mich. 1989)

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[19]The Committee has suggested that the investor creditors should have an opportunity to dispute the validity and extent of Heller's security interest within the context of an adversary proceeding. However, there is no evidence that any such adversary proceeding has been commenced with respect to Heller. Furthermore, there was no evidence presented that any of Heller's leases were double-pledged to any investor creditors. Therefore, the Court does not deem it appropriate to withhold payments to Heller under the circumstances.

(emphasis added); *see also In re Patio & Porch Systems, Inc.*, 194 B.R. 569, 575 (Bankr. D.Md. 1996) (indicating that the "provision is intended to prevent secured creditors from receiving windfalls and to allow bankruptcy courts broad discretion in balancing the interests of secured creditors against the general policy of the Bankruptcy Code, which favors giving debtors a 'fresh start'".) (citations omitted)). There is no evidence that the proceeds have in any way appreciated in value since the commencement of the case or that Heller will receive a windfall as a result of the Trustee's actions. Any increase in the amounts held by the Trustee in the segregated account has merely been pursuant to the terms of the leases. Under the circumstances, the Court finds no basis for "adjusting the equities" as permitted pursuant to Code § 552(b).

Admittedly, the generation of the proceeds has involved the use of assets of the estate to collect and service the lease portfolios of Heller. Generally, expenses incurred in the administration of a debtor's estate are the responsibility of the estate and not chargeable to the secured creditors. *See General Electric Credit Corp. v. Levin & Weintraub (In re Flagstaff Foodservice Corp.)* 739 F.2d 73, 76 (2d Cir. 1984). However, "[a]s the House Report to the most recent amendments to 11 U.S.C. § 552 notes, 11 U.S.C. § 506(c) permits a broad range of operating expense to be deducted from pledged revenues, including those that may be subject to postpetition security interests." *Patio & Porch Systems,* 194 B.R. at 575 (citing H.R. Rep. 103-834, 103d Cong., 2d Sess. 27-29; 140 Cong. Rec. H 10768 (Oct. 4, 1994), *as reported in* NORTON BANKRUPTCY LAW & PRACTICE 2d, p. 671 (1995-96 ed.). Code § 506(c) allows the estate to recover such expenses to the extent that "they are reasonable, necessary costs and expenses of . . . disposing of such property to the extent of any benefit to the holder of such claim." *See id.* As discussed in our October Decision, the lease proceeds arose as a result of the disposition of

the underlying collateral, namely the leases. The Court is inclined to allow the Trustee to recover some of those expenses which the estate has incurred in the collection and servicing of those leases. Arguably, Heller would have incurred certain costs and expenses if it had been permitted to handle the collection process itself. In the view of the Court, however, by allowing the Trustee to continue the process, Heller, as well as other secured and unsecured creditors, has benefitted because disruption and chaos were minimized. As Casey testified, $3,204,110.14 had been collected from the lessees holding leases included in Heller's portfolios as of January 31, 1997. The Court concludes that $6.31 per lease per month is a reasonable charge that should be borne by Heller in connection with the collection of the lease streams in which the Court has determined it has a valid security interest.

Conclusion

In reviewing the evidence in this case and researching the law concerning the myriad of issues raised by the parties, the Court was struck by an observation made by Bankruptcy Judge Bernard Markovitz:

> There is a story that two of the greatest figures in our law, Justice Holmes and Judge Learned Hand, had lunch together and afterward, as Holmes began to drive off in his carriage, Hand, in a sudden onset of enthusiasm, ran after him, crying, "Do justice, sir, do justice." Holmes stopped the carriage and reproved Hand: "That is not my job. It is my job to apply the law."

See Funding Systems Asset Management Corp., 111 B.R. at 502 (*citing* E. Sergeant, "*Justice Touched With Fire",* in Mr. Justice Holmes, 206-07 (F. Frankfurter ed. 1931); H. Shriver, "*What*

Gusto: Stories and Anecdotes About Justice Oliver Wendell Holmes," (privately printed 1970)). As Judge Markovitz noted concerning his decision therein, "We are confident that this decision is in accord with applicable law. We are less confident that it metes out perfect justice."

In the circumstances of this case, the Court may not be meting out "perfect justice," but it has attempted to balance the interests of all concerned within the parameters set for it by the Code. Based on the foregoing, it is hereby

ORDERED that pursuant to Code § 362(d)(1), the automatic stay is hereby modified to the extent that the Trustee is required to turnover to Heller that portion of the segregated account which represents Schedule A payments collected on Heller's leases since March 29, 1996, with the exception of those identified in Heller's Exhibit 27, exclusive of any interest earned thereon, within thirty (30) days of the date of this Order and to turn over on a monthly basis as of the date of this Decision all Schedule A payments collected on those leases in which Heller has established a perfected security interest consistent with the discussion herein without prejudice to Heller's right to assert a claim for interest and attorney's fees at the time of confirmation of a plan or at such other time as the Court may deem appropriate. Said payments shall not exceed, however, the principal amount of Heller's claims as of March 29, 1996, as set forth herein; it is further

ORDERED that the Trustee, utilizing TPC, shall continue to service and collect on the leases subject to Heller's security interest and shall also continue to provide Heller with monthly reports which shall detail and support said collections; it is further

ORDERED that pursuant to Code § 506(c) the Trustee shall be permitted to deduct from the remittance of monthly Schedule A payments already collected, as well as those to be

collected, the cost of servicing/collecting on the leases at the rate of $6.31 per lease per month, as set forth in Exhibit C of Alas' declaration, subject to being adjusted upon a later order of the Court with the proviso that if the monthly collection on any single lease is not sufficient to pay Heller the full amount of its Schedule A payment, the rate for servicing that particular lease will be reduced proportionately;[20] it is further

ORDERED that the Trustee provide Heller with a monthly accounting which shall indicate the manner in which the amount of the monthly check has been calculated by the Trustee; it is further

ORDERED that Trustee shall withhold from the Schedule A payments collected on behalf of Heller and to be turned over pursuant to this Order the following amounts which he alleges in his Complaint filed March 13, 1997 were received by Heller as preferences: Loan 1 - $26,053.56; Loan 2 - $37,930.35; Loan 3 - $63,757.48 and Loan 4 - $74,497.19, subject to a further order of this Court; and it is finally

ORDERED that with regard to any monies currently being collected by the Trustee on the leases subject to Heller's security interest not specifically dealt with in this Order, said monies shall continue to be collected and held or disbursed in accordance with the prior Orders of this Court.

Dated at Utica, New York

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[20]For example, if the Schedule A payment to be made to Heller on a single lease is $100 and Trustee has sufficient collections to permit the payment of $80.00 or 80% of what is due Heller, then Trustee shall deduct only $5.05 (80% x $6.31) from the Schedule A payment of $80.00 for that particular lease.

this 23rd day of May 1997

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge