UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
Oldco M Corporation (f/k/a Metaldyne Corporation), *et al.*,	:	Case No. 09-13412 (MG)
Debtors.	:	(Jointly Administered)

OBJECTION OF OLDCO M DISTRIBUTION TRUST TO WHITSETT MANUFACTURING, LLC'S MOTION FOR ALLOWANCE AND PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM

The Oldco M Distribution Trust (the "Trust"), by and through its undersigned counsel, hereby asserts this objection (the "Objection") to Whitsett Manufacturing, LLC's Motion for Allowance and Payment of Administrative Expense Claim (Docket No. 1542) (Proof of Claim No. 3698) (the "Motion") and asserts that Whitsett Manufacturing, LLC is entitled to, at most, a claim of $36,621 as an administrative expense, which should be satisfied from its existing security deposit. In support of the Objection, the Trust respectfully states as follows:

FACTUAL BACKGROUND

1. On May 27, 2009 (the "Petition Date"), Oldco M Corporation (f/k/a Metaldyne Corporation) ("Oldco M") and 30 of its affiliates (collectively, the "Debtors") filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York. By an order entered on May 29, 2009 (Docket No. 65), the Debtors' chapter 11 cases were consolidated for procedural purposes and thereafter were jointly administered under case number 09-13412 (MG).

2. On January 11, 2010, the Debtors filed their Second Amended Joint Plan of Liquidation of Debtors and Debtors in Possession (Docket No. 1180) (the "Plan") and a related disclosure statement. On February 23, 2010, the Court entered an order confirming the Plan and substantively consolidating these bankruptcy cases (Docket No. 1384) (the "Confirmation Order") and, on March 30, 2010, the Plan became effective (the "Effective Date"). Pursuant to the Confirmation Order and Sections III.A-C of the Plan, as of the Effective Date the Debtors were dissolved, the Trust was created, and Executive Sounding Board Associates, Inc. was appointed trustee of the Trust in order to liquidate the Debtors' remaining assets (including any claims and causes of action possessed by the Debtors), litigate and resolve claims filed against the Debtors' estates, make distributions to creditors and take other actions permitted by Section III.C of the Plan.

3. Kirco Whitsett Manufacturing, LLC (predecessor in interest to Whitsett Manufacturing, LLC) ("Whitsett"), as landlord, and Debtor Oldco M Company LLC (f/k/a Metaldyne Company, LLC) ("Oldco M Company"), as tenant, were parties to a lease agreement dated July 14, 2003 (the "Lease"), pursuant to which Whitsett leased to Oldco M Company a facility located in Greensboro, North Carolina (the "Leased Premises"). Whitsett is in possession of a cash security deposit under the Lease in the amount of $1,146,215.50 (the "Security Deposit"). Pursuant to an order entered by the Court on December 17, 2009 (Docket No. 1127), the Lease was rejected effective as of December 31, 2009 (the "Rejection Date"). During the rejection process, counsel to the Debtors and counsel to Whitsett participated in numerous communications regarding the rejection of the Lease. All base rent was paid on a timely basis by the Debtors.

4. Oldco M Company vacated and surrendered the keys to the Leased Premises on or before the Rejection Date. Before vacating the Leased Premises, the Debtors requested that a representative of Whitsett perform a walk-through of the Leased Premises to identify any issues surrounding the Debtors' vacation of the Leased Premises. Whitsett, however, declined to perform such walk-through. On information and belief, the first time Whitsett chose to visit the Leased Premises post-surrender was on March 27, 2010 — nearly three months after the Rejection Date.

5. On April 29, 2010, Whitsett timely filed the Motion and accompanying Memorandum of Law in Support of the Motion (the "Memorandum of Law"), pursuant to which Whitsett requested the allowance and payment of administrative expenses, pursuant to section 365(d)(3) of the Bankruptcy Code, in the amount of "at least $150,629.46" (the "Asserted Administrative Claim"). The Asserted Administrative Claim consists of claims for (1) the Debtors' alleged breach of the Lease arising from Advantage Machinery Services, Inc.'s imposition of a lien on the Leased Premises (the "Advantage Lien"), (2) real property taxes payable under the Lease for the year 2009, plus interest and penalties (the "Real Property Taxes"), (3) costs allegedly incurred for assessments relating to environmental contamination at the Leased Premises, as well as potential costs to remediate such alleged environmental contamination (the "Remediation Costs"), (4) a post-Rejection Date electric bill (the "Electric Bill") and (5) a partially pre-Rejection Date, partially post-Rejection Date water bill (the "Water Bill").

6. The Advantage Lien arose out of a pre-Petition Date contract between Oldco M Company and Advantage Machinery Services, Inc. ("Advantage Machinery"), pursuant to which Advantage Machinery furnished labor and equipment at the Leased Premises.

According to Advantage Machinery's Notice of Perfection of Mechanic's and Materialman's Lien (Pursuant to 11 U.S.C. § 546(B)) (Docket No. 345) (the "Notice of Perfection"), Advantage Machinery filed its claim of lien in the office of the Clerk of Superior Court of Guilford County, North Carolina on July 1, 2009, thus perfecting its lien on the Leased Premises. Notice of Perfection, ¶ 10. Also according to the Notice of Perfection, the last date equipment and labor were furnished by Advantage Machinery was March 27, 2009 — two months prior to the Petition Date. Notice of Perfection, ¶ 7. While Advantage Machinery has filed a proof of claim against the Debtors' estates on account of the Advantage Lien (Proof of Claim No. 222), it is expected that this claim will be an unsecured, nonpriority claim or subject to disallowance.

7. With regard to the Real Property Taxes, the Guilford County Tax Department issued its statement for the year 2009 real property taxes for the Leased Premises on July 2, 2009 in the amount of $58,968.20. Whitsett paid the Real Property Taxes on March 16, 2010, at which time the amount due had increased to $61,032.08 because of late payment penalties and interest.

8. The Electric Bill covers electricity usage at the Leased Premises from January 8, 2010 through March 5, 2010, an entirely post-Rejection Date period.

9. The Water Bill spans the Rejection Date, covering water usage at the Leased Premises from December 14, 2009 through January 13, 2010. Whitsett asserts that it is entitled to payment of $26,190.70 — the full amount of the Water Bill as originally issued by the utility provider. However, on or around March 29, 2010, the Debtors paid approximately $3,328 of the Water Bill, thereby reducing the outstanding amount of the Water Bill to $22,862.00. Additionally, the Debtors were able to obtain a "leak credit" from the utility provider in the amount of $9,604.75, leaving a currently outstanding Water Bill of $13,257.25.

10. On July 8, 2010, in response to the Motion and after settlement discussions were unsuccessful, the Trust served Whitsett with the Trust's First Set of Interrogatories Directed to Whitsett Manufacturing, LLC and First Requests for Production of Documents Directed to Whitsett Manufacturing, LLC (together the "Discovery Requests"). On August 6, 2010, counsel to Whitsett informed the Trust that Whitsett would not be responding to the Discovery Requests by the August 9, 2010 deadline imposed by the Federal Rules of Civil Procedure (the "Civil Rules"), made applicable to the instant matter by the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). On August 9, 2010, the Trust agreed to extend the deadline by which Whitsett was required to respond to the Discovery Requests until August 16, 2010. Whitsett failed to respond to the Discovery Requests by August 16, 2010 and, as of the date of the filing of this Objection, Whitsett has yet to respond to the Discovery Requests.

OBJECTION

The Purpose and Scope of Section 365(d)(3) of the Bankruptcy Code

11. Whitsett avers that it is entitled to the Asserted Administrative Claim on the basis of section 365(d)(3) of the Bankruptcy Code.[1] Section 365(d)(3) of the Bankruptcy Code provides that "[t]he trustee shall timely perform all obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title." 11 U.S.C. § 365(d)(3). Section 365 of the Bankruptcy Code thus "provides for administrative priority for expenses incurred in performing obligations on a nonresidential lease of real property postpetition while the debtor-in-possession decides whether

[1] Nowhere in the Motion or the Memorandum of Law does Whitsett cite section 503 of the Bankruptcy Code. As such, this statutory provision is not a proper basis for recovery here.

to assume or reject a lease, and general unsecured status for claims arising out of rejection." In re BH S & B Holdings LLC, 426 B.R. 478, 482 (Bankr. S.D.N.Y. 2010). Accordingly, section 365(d)(3) of the Bankruptcy Code applies to expenses incurred by the Debtor under the Lease during the period of time between the Petition Date and the Rejection Date (the "Postpetition Pre-Rejection Period").

12. Congress enacted section 365(d)(3) of the Bankruptcy Code "to ensure that landlords would not be disadvantaged by providing post-petition services to the debtor. Put another way, Congress intended the subsection to put landlords on an equal footing, not to grant them a windfall at the expense of other creditors." Newman v. McCrory Corp. (In re McCrory Corp.), 210 B.R. 934, 940 (S.D.N.Y. 1997) ("McCrory I"). "This section of the Bankruptcy Code was added . . . primarily to solve the problem of the bankrupt tenant who failed to pay rent post-petition", In re Sandra Rothman, SLP, P.C., No. 07-71129-478, 2007 WL 2261609, at *2 (Bankr. E.D.N.Y. Aug. 2, 2007), and to ensure that landlords receive "'current payment' for their 'current services[,]'" Child World, Inc. v. Campbell/Mass. Trust (In re Child World, Inc.), 161 B.R. 571, 575 (S.D.N.Y. 1993). Statutory priorities, such as those arising under section 365(d)(3) of the Bankruptcy Code, should be narrowly construed in order to treat creditors as equally as possible. See In re Ames Dep't Stores, Inc., 306 B.R. 43, 54 (Bankr. S.D.N.Y. 2004) ("Ames II") ("grants of administrative expense priority cut against the general goal in bankruptcy law to distribute limited debtor assets equally among similarly situated creditors, and thus . . . statutory priorities, such as those resulting from administrative expense treatment, are narrowly construed") (citing Trustees of the Amalgamated Ins. Fund v. McFarlin's, Inc., 789 F.2d 98, 101 (2d Cir. 1986)).

Whitsett Has Not Satisfied its Burden of Proving Entitlement to the Asserted Administrative Claim

13. A party moving for the allowance of a claim pursuant to section 365(d)(3) of the Bankruptcy Code has the burden of proving, by a preponderance of the evidence, that the party is entitled to such claim, as well as the amount of the estate's obligation for such claim. See, e.g., In re Kwik-Way Prods., Inc., No. 08-00362, 2009 WL 807639, at *4 (Bankr. N.D. Iowa Mar. 23, 2009) ("the party requesting payment as an administrative expense [pursuant to either section 365(d)(3) or 503(b)(1)(A) of the Bankruptcy Code], has the burden of proving entitlement to priority payment"); In re Van Vleet, 383 B.R. 782, 789 (Bankr. D. Colo. 2008) (party seeking payment pursuant to section 365(d)(3) of the Bankruptcy Code bore burden of proof, by preponderance of the evidence standard); In re JS Marketing & Commc'ns, Inc., No. 05-65426-7, 2008 WL 219970, at *5 (Bankr. D. Mont. Jan. 24, 2008) ("JS Tower failed to satisfy its burden of proof by a preponderance of the evidence for an administrative award under . . . section [365(d)(3) of the Bankruptcy Code]."); In re Rhodes, LLC, No. 04-78434, 2005 WL 4713601, at *2 (Bankr. N.D. Ga. 2005) (moving party has "burden of proving its entitlement to payment from the estate pursuant to section 365(d)(3) [of the Bankruptcy Code] and the amount of the estate's obligation.").

14. Accordingly, Whitsett bears the burden of proving entitlement to, as well as the amount of, the Asserted Administrative Claim. There is currently no admissible evidence in the record to support the Asserted Administrative Claim.[2] As such, Whitsett has not satisfied and cannot satisfy its burden and the Motion should be denied for this reason alone. Although

[2] Whitsett had a duty to respond to the Discovery Requests and has entirely failed to do so. See Brown v. Spears (In re Spears), 265 B.R. 219, 223 (Bankr. W.D. Mo. 2001) ("a party properly served with interrogatories has an absolute duty to respond, either by service of answers or objections to interrogatories") (quoting Sullivan v. Liberty Sav. & Loan Ass'n, Inc. (In re Sullivan), 65 B.R. 578, 579 (Bankr. M.D. Fla. 1986)). The Trust reserves its right to file a motion for sanctions, pursuant to Bankruptcy Rule 7037(d)(1)(A)(ii), on account of Whitsett's failure to serve its answers, objections or written response to the Discovery Requests, which were properly served under Civil Rules 33 and 34, or otherwise object to attempts by Whitsett to admit evidence.

the Trust believes that the Motion can and should be denied on these grounds, there are also a number of deficiencies in the arguments made by Whitsett in support of the Asserted Administrative Claim, as set forth below.

Advantage Lien

15. Whitsett is not entitled to an administrative expense on account of the Advantage Lien because, under North Carolina law,[3] the Advantage Lien arose prior to the Petition Date and, therefore, is outside the scope of section 365(d)(3) of the Bankruptcy Code. Under North Carolina law, the Advantage Lien arose the first time Advantage Machinery furnished labor or materials at the Leased Premises, which was prior to the Petition Date. Section 44A-10 of the North Carolina General Statutes provides that "[a] claim of lien on real property granted by this Article shall relate to and take effect from the time of the first furnishing of labor or materials at the site of the improvement by the person claming the claim of lien on real property." N.C. Gen. Stat. § 44A-10. See also Carolina Builders Corp. v. Howard-Veasy Homes, Inc., 324 S.E.2d 626, 631 (N.C. Ct. App. 1985) ("A materialman's lien relates back and takes effect from the time of the first furnishing of materials at the site of the improvement by the person claiming the lien."); Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 242 S.E.2d 785, 791 (N.C. 1978) (stating that the court must look to N.C. Gen. Stat. § 44A-10 to determine "the date from which plaintiff's lien took effect" and that such section "provides that a lien shall accrue as of the time of the 'first furnishing of labor or materials at the site.'").

16. Although it is not clear from the facts at hand when Advantage Machinery first furnished labor and/or materials at the Leased Premises, it is quite clear that it did so prior to the Petition Date where, according to Advantage Machinery's own filings, "the last date

[3] North Carolina law is applicable here pursuant to section 30(j) of the Lease, which provides that the "Lease shall be governed by and construed and enforced in accordance with the Laws of the State of North Carolina."

equipment and labor were furnished by Advantage Machinery was March 27, 2009."[4] Notice of Perfection, ¶ 7 (emphasis added). Pursuant to section 44A-10 of the North Carolina General Statutes and related case law, the Advantage Lien, and thus Oldco M Company's obligation under the Lease with respect thereto, clearly arose prior to the Petition Date, when Advantage Machinery first furnished labor at the Leased Premises. Accordingly, any breach of the Lease was a prepetition breach, and, thus, the Advantage Lien falls outside the scope of section 365(d)(3) of the Bankruptcy Code.

17. Whitsett's reliance on the decision in In re BH S & B Holdings LLC, 401 B.R. 96 (Bankr. S.D.N.Y. 2009), to counter this conclusion is misplaced. The lease at issue in BH S & B required the debtor-tenant to keep the leased premises free of liens and encumbrances. 401 B.R. at 99. The day before the effective date of the rejection of the lease (and not months after rejection), the landlord in BH S & B filed a motion to compel the debtors to perform postpetition lease obligations, pursuant to section 365(d)(3) of the Bankruptcy Code, with respect to certain mechanic's liens against the leased premises. Id. at 100.

18. The debtors in BH S & B relied on In re Designer Doors, Inc., 389 B.R. 832 (Bankr. D. Ariz. 2008), to argue that certain of their obligations to their landlord were prepetition and therefore outside the scope of section 365(d)(3) of the Bankruptcy Code. 401 B.R. at 101. In addressing the question of when a mechanic's lien arises for purposes of section 365(d)(3) of the Bankruptcy Code, the Designer Doors court relied on Arizona state law, which provides that a "person who furnishes professional services or material or labors . . . shall have a lien on the lot or parcel of contiguous land . . . for professional services or material furnished and labor performed." 389 B.R. at 836-37 (citing A.R.S. § 33-983(A)). Thus, under Arizona law, a mechanic's lien arises at the time the work is performed. Accordingly, the

[4] March 27, 2009 was prior to the May 27, 2009 Petition Date.

Designer Doors court held that because the improvements on the property at issue were made prepetition, the mechanic's lien was a prepetition obligation not covered by section 365(d)(3) of the Bankruptcy Code, even though the lien was perfected postpetition. Id. at 836.

19. Although the BH S & B Court found the analysis in Designer Doors "compelling" and followed it "to a large degree," the Court reached a different result because, under New York law, a mechanic's lien arises "from the time of filing a notice of such lien[,]" as opposed to at the time the work is performed. 401 B.R. at 101. Accordingly, the BH S & B Court held that only those liens that were filed postpetition and pre-rejection fell within the scope of section 365(d)(3) of the Bankruptcy Code. The Court's holding in BH S & B, therefore, was grounded in New York state law and is not directly applicable to the instant case because the Advantage Lien arose under North Carolina law. As set forth above, North Carolina law is consistent with Arizona law. As such, the Designer Doors case is persuasive, while the decision in BH S & B is not applicable here.

Real Property Taxes

20. Whitsett is entitled to allowance of, at most, $36,621 on account of the Real Property Taxes that accrued during the Postpetition Pre-Rejection Period. Whitsett correctly notes in the Motion that two schools of thought have developed with regard to the application of section 365(d)(3) of the Bankruptcy Code to real property tax obligations: (i) the "billing date" or "performance" approach and (ii) the "pro-ration" or "accrual" approach. Whitsett argues that the billing date approach applies to real property tax obligations under section 365(d)(3) of the Bankruptcy Code such that it is owed $61,032.98 for the entire year 2009 real property taxes because the tax authority issued its statement for the Real Property Taxes during the Postpetition Pre-Rejection Period. In so arguing, Whitsett ignores the majority

of precedent in this district, which applies the pro-ration approach to real property tax obligations under section 365(d)(3) of the Bankruptcy Code. Under the pro-ration approach, only those Real Property Taxes that accrued during the seven-month Postpetition Pre-Rejection Period ($36,621) are entitled to administrative expense priority.

21. The courts in this and other districts that have adopted the pro-ration approach have determined that the language of section 365(d)(3) is ambiguous and, thus, have turned to legislative history for guidance. Prior to the enactment of section 365(d)(3) as part of the 1984 amendments to the Bankruptcy Code, "debtor-tenants' lease obligations in the postpetition prerejection period were handled under the general statute [governing] administrative expenses, 11 U.S.C. § 503." Child World, 161 B.R. at 574; see also McCrory I, 210 B.R. at 936. Thus, prior to the enactment of 365(d)(3) of the Bankruptcy Code, "it was the practice of the courts to prorate real estate taxes accruing only during the postpetition, prerejection period regardless of when they were billed." In re Victory Markets, Inc., 196 B.R. 6, 10 (Bankr. N.D.N.Y. 1996); see also McCrory I, 210 B.R. at 936; Child World, 161 B.R. at 575. Courts adopting the pro-ration approach have noted that when "Congress amends the bankruptcy laws, it does not write on a clean slate" and that with regard to section 365(d)(3) of the Bankruptcy Code, "neither the language of the statute nor the legislative history reveals a Congressional intent to deviate from the pre-amendment practice of prorating lease obligations pending rejection, other than to require 'current payment' for 'current services.'" McCrory I, 210 B.R. at 939.

22. Relying on In re Sandra Rothman, Whitsett attempts to paint a picture of Circuits divided over the application of section 365(d)(3) of the Bankruptcy Code, while glossing over the majority of precedent in this and other districts in the Second Circuit. Whitsett relies on

Bullock's Inc. v. Lakewood Mall Shopping Center (In re R.H. Macy & Co.), No. 93 Civ. 4414, 1994 WL 428948 (S.D.N.Y. Feb. 23, 1994), in which the court applied the billing date approach to real estate taxes that were billed to the debtor postpetition, pre-rejection through a reassessment process. The R.H. Macy case appears to be one of the only, if not the only, cases in the Southern District of New York to apply the billing date approach to real property taxes in the context of section 365(d)(3) of the Bankruptcy Code. Moreover, the R.H. Macy case is distinguishable to the extent it dealt with a tax issued through a reassessment process, where there was no actual accrual period to which to apply section 365(d)(3) of the Bankruptcy Code.

23. Whitsett also relies on Urban Retail Props. V. Loews Cineplex Entm't Corp., No. 01 Civ.8946, 2002 WL 535479 (S.D.N.Y. Apr. 9, 2002), to support its position that this Court should apply the billing date approach. The Urban Retail court did indeed apply the billing rate approach; however, it did so in the context of deciding whether to allow payment pursuant to section 365(d)(3) of the Bankruptcy Code for a one-time capital improvement expenditure that came due postpetition but pre-rejection — not in the context of real property taxes. Moreover, though applying the billing date approach, the Urban Retail court noted that certain obligations, such as the payment of real estate taxes, in fact lend themselves to the pro-ration approach. The Urban Retail court stated:

> None of the cases cited . . . adopting proration dealt with a one-time capital expense reimbursement of the type described in the instant Lease. Rather, virtually all involved obligations that, by agreement, accrued over time, such as the obligations of tenants to pay real estate taxes . . . . These obligations by their very terms accrued on a daily basis. They did not, as here, involve a one-time capital expense obligation to be paid at date contingent on the completion of construction and the opening of the tenant's operations. Thus, to the extent that a reading of Section 365(d)(3) within the context of a given lease might warrant proration, it would not apply in this case.

2002 WL 535479 at *7. Thus, the Urban Retail court essentially admitted that its conclusion was unique to the case before it.

24. Indeed, as previously noted, the pro-ration approach is the approach preferred by courts in this and other districts in the Second Circuit. See, e.g., Sandra Rothman, 2007 WL 2261609 at *5 (stating that "when obligations billed during the post-petition, pre-rejection period are actually allocable to a period far in advance of this time period, such as real estate taxes, it would be unfair to the debtor to apply [section 365(d)(3) of the Bankruptcy Code] in a literal fashion"); McCrory I, 210 B.R. at 940 (holding that "the debtor-tenant's obligations under the lease to pay real estate taxes accrues on a daily basis and that, under § 365(d)(3), postpetition bills must be prorated so that the debtor only pays those charges accruing during the postpetition, prerejection period"); Victory Markets, 196 B.R. at 10 (applying pro-ration approach to debtor-tenant's obligation to reimburse landlord for real property taxes and concluding that "by requiring that the Debtor fulfill its obligations set forth in the lease on a pro rata basis during the postpetition, prerejection period, the interests of both debtor and landlord, as well as other creditors, are served"); Child World, 161 B.R. at 577 (reversing bankruptcy court's application of billing date approach and holding that "[t]he legislative history makes clear that Congress did not intend for courts applying § 365(d)(3) [of the Bankruptcy Code] to rely mechanically on the billing date in determining which postpetition, prerejection obligations under nonresidential leases must be timely paid"); In re Ames Dep't. Stores, Inc., 150 B.R. 107, 109 (Bankr. S.D.N.Y. 1993) ("Ames I") (holding that those real estate taxes which were incurred prepetition were deemed a prepetition claim, while those incurred postpetition were to be paid by the debtor immediately or as a postpetition administrative claim); see also Ames II, 306 B.R. at 65, 79 (stating that the court would follow the pro-ration approach

adopted in Child World, McCrory Corp, and Ames I and not the billing date approach adopted in R.H. Macy and Urban Retail).

25. Accordingly, only those Real Property Taxes that accrued during the Postpetition Pre-Rejection Period ($36,621) are entitled to administrative priority pursuant to section 365(d)(3) of the Bankruptcy Code.

Remediation Costs

26. Whitsett is not entitled to an administrative claim on account of the Remediation Costs. First, Whitsett has not satisfied its burden of proving the amount of the Debtors' estates' obligation for the Remediation Costs. See In re Rhodes, 2005 WL 4713601 at *2 (moving party has "burden of proving its entitlement to payment from the estate pursuant to section 365(d)(3) [of the Bankruptcy Code] and the amount of the estate's obligation."). Whitsett asserts that it has expended $11,641.25 in Remediation Costs, but has presented no evidence of such expenditures. Memorandum of Law at 7. Whitsett also asserts that it "will need to incur additional expenses in the future[,]" but has failed to prove or even estimate the amount of the Debtors' alleged obligation for such future expenditures. Id. Whitsett's failure to offer evidence is meaningful because the issue of liability is not settled here. In fact, prior to vacating the Leased Premises, the Debtors and Whitsett investigated this alleged issue, with the Debtors concluding that no remediation was required under applicable environmental law.

27. Second, and most importantly, Whitsett has not satisfied its burden of proving that the alleged environmental contamination occurred during the Postpetition Pre-Rejection Period such that it is entitled to reimbursement pursuant to section 365(d)(3) of the Bankruptcy Code. Whitsett relies on In re National Refractories & Minerals Corp., 297 B.R. 614 (Bankr. N.D. Cal. 2003), for its argument that it is entitled to reimbursement of the Remediation Costs as an administrative expense. The National Refractories court adopted the pro-ration

approach and held that the landlord was entitled to an administrative claim for its expenses in repairing the leased premises and removing abandoned personal property, including hazardous waste, if it could establish that the damage to the leased premises occurred postpetition, pre-rejection and/or that the hazardous materials were first brought onto the leased premises postpetition, pre-rejection. Id. at 620.

28. Relying on National Refractories, Whitsett asserts — with no supporting evidence — that the Remediation Costs arose in connection with the remediation of alleged environmental contamination that "probably occurred . . . during the winding down of the Debtor's operations on the [Leased] Premises in the months leading up to [the Rejection Date]." Memorandum of Law at 9 (emphasis added). This is a remarkable assertion to make without support considering that the property has been used for manufacturing operations for many years, including by companies other than the Debtors (who only acquired the facility in 2003). There is no evidence that any alleged contamination occurred postpetition or is attributable to the Debtors. Whitsett has not satisfied its burden of proof by merely speculating that the alleged contamination probably occurred during the Postpetition Pre-Rejection Period. See Memorandum of Law at 8-9.

29. Indeed, "[c]laims for reimbursement of amounts expended on environmental clean-up costs arising from pre-petition activities are ordinarily considered general unsecured claims" In re McCrory Corporation, 188 B.R. 763 (Bankr. S.D.N.Y. 1995) ("McCrory II"). Thus, absent a showing, by a preponderance of the evidence, that Oldco M Company's obligations under the Lease relating to the Remediation Costs arose from its activities during the Postpetition Pre-Rejection Period, Whitsett is not entitled to reimbursement for the Remediation Costs.

Water Bill and Electric Bill

30. As noted above, the Electric Bill covers an entirely post-Rejection Date period and the Water Bill spans the Rejection Date, covering water usage at the Leased Premises from December 14, 2009 through January 13, 2010. Whitsett's claims for electricity and water usage after the Rejection Date are not entitled to administrative priority. Section 365(d)(3) of the Bankruptcy Code simply does not apply after assumption or rejection of a lease. The Ames II court gave this explanation:

> There is no indication in the legislative history of section 365(d)(3) of any Congressional intention to subject debtors . . . to section 365(d)(3) administrative expense burdens on obligations allocable to the period after rejection, or to negate the effect of sections 365(g) and 502(g) in that regard. . . . Congress has directed the federal courts, with its enactment of sections 365(g) and 502(g) to treat claims for breaches of lease obligations following rejection as prepetition claims. Yet to require payment for obligations in the post-rejection period would be to render those provisions nugatory. . . . [T]he rationale for the enactment of section 365(d)(3) [is] 'that the landlord is forced to provide *current services* – the use of its property, utilities, security and other services – without current payment.' That Congressional concern is understandable with respect to the period before rejection, but it has no application to the period after rejection. A landlord would not be providing 'current services' after a debtor rejects a lease, for at that time the debtor would have no right to continued occupancy, or to services from the landlord.

306 B.R. at 70. Therefore, under no circumstances is Whitsett entitled to payment of the Electric Bill as an administrative expense. With regard to the Water Bill, which spans the Rejection Date, Whitsett has failed to satisfy its burden of proof because Whitsett has failed to prove that the Water Bill includes amounts due for water used prior to the Rejection Date.[5]

31. Whitsett concedes that, pursuant to Ames II and other cases, a landlord's clean-up costs after lease rejection are ordinarily treated as general unsecured claims.

[5] In fact, under Whitsett's billing date approach — which it advocates with respect to the Real Property Taxes — presumably neither the Electric Bill nor the Water Bill would be payable under section 365(d)(3) of the Bankruptcy Code because both bills were received post-Rejection Date.

Nevertheless, Whitsett, relying on dicta from a footnote in Ames II, argues that the Debtors' alleged negligence during the Postpetition Pre-Rejection Period brings the Water Bill and the Electric Bill within the ambit of section 365(d)(3) of the Bankruptcy Code. However, Whitsett has failed to put forth any evidence that Oldco M Company was negligent with regard to the Water Bill and Electric Bill. Indeed, the excessive Water Bill and Electric Bill can be at least partially attributed to Whitsett's own lack of diligence, where Whitsett waited until March 27, 2010 — nearly three months after the Rejection Date — to first visit the Leased Premises in order to "get a general assessment of the state of the facility." See April 5, 2010 Report by Daniel Lopes, attached hereto as Exhibit A. Moreover, the Ames II stated that "intentional damage to a landlord's property" — not negligence — was the type of postpetition tortious conduct that might give rise to clean-up claim entitled to administrative priority pursuant to section 365(d)(3) of the Bankruptcy Code. Ames II, 306 B.R. at 59, n. 51. Whitsett has not shown that Oldco M Company was negligent with respect to the Water Bill and Electric Bill, or that negligence, as opposed to an intentional tort, is enough to elevate a post-rejection clean-up claim to administrative expense priority.

Satisfaction of Asserted Administrative Claim

32. The Trust possessed the right, pursuant to section 558 of the Bankruptcy Code, to satisfy the Asserted Administrative Claim out of the Security Deposit.[6] The Debtors may exercise such rights to have the Security Deposit applied in the manner they direct. See In re Circuit City Stores, Inc. et al., No. 08-35653, 2009 WL 4755253, at *4 (Bankr. E.D. Va. Dec. 3, 2009) (holding that there is no language in the Bankruptcy Code that dictates that debtors must exercise their section 558 defenses in any particular order and offset first against general

[6] Section 558 of the Bankruptcy Code provides that "[t]he estate shall have the benefit of any defense available to the debtor as against any entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses. A waiver of any such defense by the debtor after the commencement of the case does not bind the estate." 11 U.S.C. § 558.

unsecured claims before offsetting against any priority claims). In a letter dated April 27, 2010, attached hereto as Exhibit B, the Trust directed Whitsett to first satisfy the Asserted Administrative Claim out of the Security Deposit and, only after the Asserted Administrative Claim is satisfied in full, to apply the remainder of the Security Deposit to satisfy Whitsett's claim for damages based on the rejection of the Lease (Proof of Claim No. 3629).

33. For the foregoing reasons, the Trust objects to the Motion and posits that Whitsett is entitled to, at most, allowance of $36,621 as an administrative expense on account of the Real Property Taxes that accrued during the Postpetition Pre-Rejection Period, and that such allowed claim should be satisfied out of the Security Deposit, resulting in no need for additional payment from the Trust.

Dated: August 27, 2010
New York, New York

Respectfully submitted,

/s/ Ryan Routh

Heather Lennox
Ryan T. Routh
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ATTORNEYS FOR OLDCO M DISTRIBUTION TRUST

EXHIBIT A

MANIX

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Monday, April 05, 2010

Former Metaldyne Facility – Electrical Shutdown – Whitsett, NC

Dan Lopes – Kirco Manix Construction and Bob Cosby – Former Metaldyne Facilities Manager, visited the former Metaldyne Facility at 6491 Franz Warner Parkway, Whitsett, NC 27377, near Greensboro, NC on Saturday, March 27, 2010. The purpose of this visit was to shut down all non-essential electrical equipment to minimize electricity usage and to get a general assessment of the state of the facility

Below is a list of all electrical equipment shut down at KIRCO's 217,818 SF Manufacturing Facility (formerly Metaldyne Building) in Whitsett, North Carolina.

Note: Back of building, opposite side from Office Area, is denoted "North

CHILLER ROOM (West Wall – Center)

- *York* 400-ton Chiller turned off [See Photo 002]
- *Trane* 450o-ton Chiller turned off [See Photo 003]
- (3) Chill-water pumps (2 were running) turned off [See Photo 006]
- Set Hanging Gas-Powered Unit Heater Thermostat to 50 °F [See Photo 018]

COOLING TOWERS (Exterior of West Wall connected to Chiller Room)

- (3) Cooling Towers (CT-1, CT-2, & CT-3) – Fan motors turned off [See Photos 007, 009, & 010]

AIR COMPRESSOR ROOM (West Wall, between Chiller Room & Electrical Room)

- (3) *Ingersoli-Rand* Air Compressors turned off
- (1) Air Dryer System turned off
- Set Hanging Gas-Powered Unit Heater Thermostat to 50 °F [See Photo 018]

THE ELECTRICAL ROOM (NW Corner of Plant, North of Air Compressor Room)

- Main Power to Air Compressors 1, 2, & 3 (tripped off)
- Main Power to Air Dryer System (tripped off)
- *Square-D* Outside Lighting Controls (All outside light poles & wall packs turned off) [See Photos 013, 015, & 016]
- Plant – Hanging Electrical Bus Systems [6 total systems; Bus 1,2,4,5, & 6] (tripped off each system) – Also turns off (13) Roof Top Units (RTU's) and (6) Exhaust Fans (EF's) [See Photo 017]
- **Only Bus System #3 left 'ON' for Irrigation Water Expansion Tank.**
- Set Hanging Gas-Powered Unit Heater Thermostat to 50 °F [See Photo 018]

CHIP HOUSE (NE Corner of Plant)

- Chip House Electrical Main Power Panel – Located in Chip House turned off main power [See Photos 019, & 020]
- Battery Charging Station turned off [See Photo 021]

WASTEWATER ROOM (SE Corner of Plant)

- When Bus systems were tripped, the electrical power to (3) Hanging Gas-Powered Unit Heaters was shut down
- Note: Waste Containers were cleaned out by Metaldyne during move-out [See Photos 025 & 028]

OFFICE AREA & OFFICE MECHANICAL ROOM (SW Corner)

- Break Room HVAC was turned off
- **Irrigation Expansion Water Tank was left in the "ON" position. This should be winterized (Turned off) for the winter months.**
- **The *Rainbird* Irrigation controller is in the "OFF" position. It is located at the East wall, South of the loading dock.** Landscaping & irrigation should be started now for Spring season for proper care of lawn areas.
- Water Heat Pump (WHP) located at Office above ceiling plenum was turned off at the Office Electrical Room (In Office Area near main lobby)
- 2nd Floor HVAC (SW Corner) Boiler & Pumps for Boiler turned off (Pumps P-5 & P-6)

FACILITY – GENERAL NOTES

- All Disconnects to Overhead Door Motors were turned to the "off" position.
- Emergency Lighting for the Plant is still activated.
- Door Security is still in place (Perimeter Exterior Doors & Interior Office Doors). Security controls are located in the Computer Room (In Office Area near Main Lobby).
- Phone Room located at 2nd Floor of Office – Phone Account # 21001808 Telephone #: 1-800-753-4524
- Condition of bathrooms and plumbing fixtures may not be acceptable and may need to be replaced. All bathrooms need thorough cleaning.
- Plant floor is in general dirty, grimy, and oily. Plant floor is in need of thorough cleaning
- Debris left at truck dock area. [See Photos 022 & 023]
- There are left over materials (i e. desks, chairs, bins, cabinets, mop buckets, containers, etc.) left over in the Chip House and Wasterwater Room.
- Plant walls are generally stained at areas and could require power-washing and/or painting.
- Door to Exterior at Chiller Room – Push bar exit device needs repair. New lock cylinder is needed.
- Currently water is shut off to the building.
- **See Irrigation System comments in Office Area section above.**

Respectfully,

Daniel Lopes

Daniel Lopes
Kirco Manix Construction, LLC

EXHIBIT B

JONES DAY

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April 27, 2010

VIA OVERNIGHT COURIER

Dianne S. Ruhlandt, Esq.
Erman, Teicher, Miller, Zucker & Freedman, P.C.
400 Galleria Officentre, Suite 444
Southfield, Michigan 48034

Re: *In re Oldco M Corporation (f/k/a Metaldyne Corporation) et al.*, 09-13412 (MG) (Bankr. S.D.N.Y. 2009)

Dear Dianne:

When I last sent you a letter on March 16, 2010, Jones Day and the above-captioned debtors (collectively, the "Debtors") were unaware that your client, Whitsett Manufacturing, LLC ("Whitsett"), would be filing a motion for the allowance of administrative expenses. Since that date, the Debtors' confirmed plan of liquidation has become effective, the Oldco M Distribution Trust (the "Distribution Trust") has been created to, among other things, litigate and resolve claims filed against the Debtors' estates, and the Debtors have been dissolved. I am one of the attorneys for the Distribution Trust.

As you are aware, Whitsett is in possession of a cash security deposit under the lease agreement dated July 14, 2003, between Oldco M Company LLC (f/k/a Metaldyne Company LLC) and Whitsett, (the "Lease"), in the amount of $1,146,215.50 (the "Security Deposit"). This letter is to inform you that the Distribution Trust is hereby exercising its right, pursuant to section 558 of title 11 of the United State Code, to (a) first satisfy Whitsett's asserted administrative expense claim (the "Administrative Expense Claim") out of the Security Deposit and (b) only after the Administrative Expense Claim is satisfied in full, to apply the remainder of the Security Deposit to satisfy Whitsett's claim for damages based on the rejection of the Lease.

Sincerely,

JONES DAY

Jennifer L. Seidman