



Since the Debtors are reserving their right to object to Felton Street's lease rejection damages, and to reduce Felton Street's claim even more than they seek to do by the instant objection, Felton Street should be permitted to assert in its Proof of Claim all of the damages it sustained as a result of the Debtors' termination of the lease and have the Court determine the amount of Felton Street's allowed claim.

Also, the Debtors' calculation of the Cap on the Felton Street Claim is incorrect since the calculation (a) erroneously deducts the security deposit, (b) fails to include all components of reserved rent, and (c) fails to include unpaid pre-petition rent. Accordingly, the Debtors' objection should be denied and the Felton Street Claim be allowed in the amount stated on the Proof of Claim subject to the proper calculation of the Cap under §502(b)(6).

## **II. STATEMENT OF FACTS**

1. Felton Street is a Massachusetts limited partnership whose address is 1101 West DeKalb Pike, Suite 200, Wayne, Pennsylvania 19087.

2. Felton Street is the owner of certain real estate located in High Ridge Business Center, 123 Felton Street, Marlborough, Massachusetts (the "Marlborough Facility").

3. Felton Street and Pegasus Satellite Television, Inc. ("PST") entered into a commercial lease for the Marlborough Facility dated February 25, 2000 (the "Lease"), a copy of which is annexed hereto as Exhibit "A".<sup>1</sup>

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<sup>1</sup> The Lease was amended August 31, 2001 (the "First Amendment to Lease"), February 1, 2002 (the "Second Amendment to Lease"), March 18, 2002 (the "Third Amendment to Lease"), April 16, 2002 (the "Fourth Amendment to Lease"), April 24, 2002 (the "Fifth Amendment to Lease"), and May 1, 2002 (the "Sixth Amendment to Lease"). The amendments to the Lease are collectively annexed hereto as Exhibit "B". The First Amendment to Lease addressed various issues, including PST's option to purchase. The Second through Sixth Amendments to Lease primarily addressed and extended the dates applicable to PST's purchase option.

4. The Lease commenced May 15, 2002 and did not terminate under its provisions until September 30, 2007. See Exhibit “A” at Preamble, ¶¶D, F, K.

5. Under the Lease, the term “Rent” is defined as “all Fixed Basic Rent and Additional Rent reserved under this Lease.” Id. at ¶42(f).

6. Fixed Basic Rent is calculated and payable in equal monthly installments, without demand, setoff or deduction, as follows:

<u>Months</u>	<u>Rentable Sq. Ft.</u>	<u>Rate Per Rentable Sq. Ft.</u>	<u>Yearly Rate</u>	<u>Monthly Installment</u>
1-4	72,129	\$ 0	\$ 0	\$ 0
5-28	72,129	\$ 21.00	\$1,514,709	\$ 126,225.75
29-64	72,129	\$ 22.00	\$1,586,838	\$ 132,236.50
65-88	72,129	\$ 23.00	\$1,658,967	\$ 138,247.25

Id. at Preamble, ¶G.

7. Additional Rent is comprised of Annual Operating Costs for the Property to the extent Annual Operating Costs exceed the sum of \$5.00 per rentable square foot of the Building (the “Stop”). Id. at ¶6(b).

8. The term “Annual Operating Costs” is defined in the Lease as “all costs Landlord incurs from owning, operating and maintaining the Property.” Id. at ¶6(b)(i).

9. During PST’s tenancy, PST did not incur Annual Operating Costs in excess of the Stop. See Affidavit of Darren Caterino, attached hereto as Exhibit “C”, ¶8.

10. Additional Rent also includes the utilities (other than water and sewer) consumed by the Tenant based upon such utility’s metered usage. Exhibit “A” at ¶9(a) (“Tenant agrees to pay as Additional Rent all charges for electricity, light, heat or other utility used by Tenant at the Property without fee or markup by the Landlord, within thirty (30) days of a receipt therefore.”).

11. PST paid a security deposit in the amount of \$252,451.50. Exhibit “A” at Preamble, ¶J.

12. The Choice of Law provision in the Lease provides that the terms of the Lease shall be construed under the laws of the Commonwealth of Massachusetts. *Id.* at ¶41(k).

13. On June 2, 2004, PST and the other Debtors filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code (the “Petition Date”).

14. On November 9, 2004, an Order was entered granting the motion of PST and the other Debtors to reject certain unexpired leases and executory contracts. The Order specifically provides for the rejection of the Lease by January 31, 2005.

15. Pursuant to 11 U.S.C. §365, PST rejected the Lease effective December 31, 2004.

16. On or about January 26, 2005, Felton Street filed a Proof of Claim which states an unsecured nonpriority claim in the amount of \$2,905,100.28. *See* Proof of Claim, Exhibit “D”.

### **III. CALCULATION OF FELTON STREET’S CLAIM**

17. Rejection of a lease under §365 is the equivalent of a termination by breach. *In re Malden Mills Industries, Inc.*, 303 B.R. 866, 702 (1<sup>st</sup> Cir. 2004) citing Lawrence P. King, *Collier on Bankruptcy* ¶502.03[7][b](15<sup>th</sup> rev. ed. 2003).

18. “The effect of such a breach is to permit a landlord to seek the allowance of its claim under §502.” *Id.*, citing *In re Fin. News Network, Inc.*, 149 B.R. 348, 350 (Bankr. S.D.N.Y. 1993).

19. Section 502(g) of the Bankruptcy Code provides that claims resulting from the rejection of an unexpired lease relate back to the date of the filing of the petition. *Mason v. Official Comm. of Unsecured (In re FBI Distrib. Corp.)*, 330 F.3d 36, 42 (1<sup>st</sup> Cir. 2003) (“If the contract is rejected . . . , the contract is deemed breached on the date ‘immediately before the date of the filing of the petition,’ 11 U.S.C. §365(g)(1), and the nondebtor party has a prepetition general unsecured claim for breach of contract damages, one not entitled to administrative

priority, 11 U.S.C. §502(g).”). Accordingly, post petition rejection of an unexpired lease fixes the liability of the debtor and, therefore, the recovery of the creditor, as of the petition date. In re Malden Mills Industries, 303 B.R. at 702, citing Lawrence P. King, *Collier on Bankruptcy* ¶502.08[1].

20. A landlord’s claim resulting from the rejection of a lease of real property under §502(b)(6) is capped by the following calculation:

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of –

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates.

11 U.S.C. §502(b)(6).

21. The Debtors herein seek to modify and reduce the Felton Street Claim to \$1,334,386, which the Debtors calculated by multiplying the monthly rent (\$132,236.50)<sup>2</sup> by 12, and subtracting the amount of the security deposit (\$252,451.50).

22. The Debtors’ calculation of the Cap is incorrect since the calculation (a) erroneously deducts the security deposit, (b) fails to include all components of reserved rent, and (c) fails to include unpaid pre-petition rent.

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<sup>2</sup> The year following the Petition Date of June 2, 2004 comprises months 49 through 61 of the Lease, for which time the Fixed Basic Rent was \$132,236.50 per month.

**(A) Debtors' Calculation Erroneously Deducts the Security Deposit**

23. “[A landlord’s] security deposit will be applied in satisfaction of the claim that is allowed under [§502(b)(6)].” Lawrence P. King, *Collier on Bankruptcy* ¶502.03[7][h] (citations omitted).

24. While the security deposit is ultimately *applied* to the capped amount claimed under §502(b)(6), it does not follow that a landlord’s statutorily capped claim is reduced by the amount of the security deposit. *Id.*; see also In re Malden Mills Industries, supra.

25. Indeed, the amount of a landlord’s statutorily capped claim under §502(b)(6) is not reduced by the security deposit paid by the debtor-tenant and ultimately applied to the claim.

26. Noteworthy is that the Debtors offer no legal or statutory support for the reduction of the Felton Street Claim by the amount of the security deposit paid by PST.

**(B) The Debtors' Calculation Fails To Include All Components of Reserved Rent**

27. Under the Lease, the rent is comprised of Fixed Basic Rent and Additional Rent. Exhibit “A” at ¶42(f).

28. Additional Rent includes a utility component. *Id.* at ¶9(a) (“Tenant agrees to pay as Additional Rent all charges for electricity, light, heat or other utility used by Tenant at the Property without fee or markup by the Landlord, within thirty (30) days of a receipt therefore.”).

29. According to Felton Street’s books and records, the gas and electric utilities consumed by PST from the Petition Date until PST effectively rejected the lease and completely removed itself from the Marlborough Facility (June 2, 2004 – December 31, 2004) total \$97,569.47 and are broken down as follows:

### GAS UTILITIES

Dates of Consumption	Cost for Metered Consumption
6/2 – 6/4	\$ 24.52
6/27 – 7/2	272.70
7/2 – 8/2	235.38
8/2 – 9/1	246.19
9/2 – 10/1	185.31
10/1 – 11/1	999.74
11/1 – 12/3	4,084.57
12/3 – 12/31	6,355.14

Total: 12,403.55

### ELECTRIC UTILITIES

Dates of Consumption	Cost for Metered Consumption
6/2 – 6/22	\$ 2,685.73
	5,746.68
6/22 – 7/22	3,683.48
	9,545.76
7/1 – 8/31	1,826.04
7/22 – 8/20	4,022.58
	9,099.64
8/20 – 9/22	3,961.75
	11,306.61
9/22 – 10/21	3,142.42
	10,415.17
10/21 – 11/19	2,611.65
	7,221.17
11/19 – 12/27	2,485.28
	6,625.61
12/27 – 12/31	277.95
	508.40

Total: 85,165.92

Exhibit “C”, ¶11.

30. For the remaining five (5) months of the year following the Petition Date, 1/1/05 through 6/01/05, Felton Street has estimated vacant space utilities in the amount of \$6,000 per month for a total of \$30,000. Id. at ¶12.

31. The Additional Rent for the period in question totals \$127,569.47.

32. The Debtors' calculation of the Felton Street Claim for lease rejection damages under §502(b)(6) completely ignores the utility component of the reserved rent.

**(C) The Debtors' Calculation Fails To Include Unpaid Pre-Petition Rent**

33. Section 502(b)(6)(B) provides for the inclusion in the calculation of the landlord's cap any unpaid rent due under the lease on the date the bankruptcy petition is filed. 11 U.S.C. §502(b)(6)(B).

34. According to Felton Street's books and records, the gas and electric utilities which remained unpaid at the time of the Petition Date total \$28,821.20. Exhibit "C", ¶10.

35. The Debtors' calculation of the Felton Street Claim for lease rejection damages under §502(b)(6) completely ignores the pre-petition, unpaid rent.

36. The Felton Street Claim for lease rejection damages under §502(b)(6) is comprised of rent (Fixed Basic Rent and Additional Rent) in the amount of \$1,714,407.47 and pre-petition, unpaid rent in the amount of \$28,821.20, for a total claim of \$1,743,228.67.

**IV. CONCLUSION**

37. The calculation of an allowed claim for lease rejection damages under §502(b)(6) is different from the calculation of the total actual damages sustained by a landlord as a result of the lease termination.

38. Felton Street should be permitted to assert in its Proof of Claim the total actual damages it sustained as a result of the Debtors' termination of the lease (\$2,905,100.28) and have the Court determine the amount of Felton Street's allowed claim, especially given that the Debtors are reserving their right to object to Felton Street's lease rejection damages, and to reduce Felton Street's claim even more than they seek to do by the instant objection.

39. Finally, the Debtors' calculation of the Felton Street Claim is incorrect since the calculation (a) erroneously deducts the security deposit, (b) fails to include all components of reserved rent, and (c) fails to include unpaid pre-petition rent.

WEHREFORE, the Debtors' objection should be denied and the Felton Street Claim be allowed in the amount stated on the Proof of Claim subject to the proper calculation of the Cap under §502(b)(6).

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