

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:)	
)	Chapter 11
)	
FOCAL COMMUNICATIONS)	
CORPORATION, <i>et al.</i>)	Case No. 02-13709(KJC)
)	
)	
Debtors.)	(Jointly Administered)
)	

Hearing Date: May 21, 2003 at 10:30 a.m.
Objections Due: May 9, 2003 at 4 p.m.

**MOTION OF TRIZECHAHN COLONY SQUARE GP LLC TO COMPEL
PAYMENT OF ADMINISTRATIVE RENT OR, ALTERNATIVELY, FOR
ALLOWANCE AND PAYMENT OF AN ADMINISTRATIVE EXPENSE CLAIM**

TrizecHahn Colony Square GP LLC ("TrizecHahn"), by its undersigned counsel, pursuant to Section 365(d)(3) of Title 11 of the United States Code (the "Bankruptcy Code"), hereby requests that the Court enter an order compelling the debtors, Focal Communications Corporation, *et al.* (the "Debtors"), to pay administrative rent due to TrizecHahn for the post-petition months of January and February 2003. Alternatively, TrizecHahn requests allowance and payment of an administrative expense claim under and pursuant to Section 503(b)(1)(A) of the Bankruptcy Code. In support hereof, TrizecHahn respectfully represents as follows:

JURISDICTION AND VENUE

1. Debtors commenced the captioned cases by the filing voluntary Chapter 11 petitions on December 19, 2002 (the "Petition Date").

2. The Court has subject matter jurisdiction over this motion under and pursuant to 28 U.S.C. § 1334. This is a core matter under and pursuant to 28 U.S.C. § 157(b)(2).

3. Venue of this motion is proper in this District under and pursuant to 28 U.S.C. § 1409.

BACKGROUND FACTS

4. TrizecHahn is the owner and landlord of certain premises (the "Premises") leased to debtor Focal Communications Corporation of Texas ("FCC of Texas"), pursuant to the certain Office Lease dated February 10, 2000 (the "Lease") between TrizecHahn, as landlord, and FCC of Texas, as tenant. A true and correct copy of the Lease is attached hereto as Exhibit A.

5. The term of the Lease is ten years beginning April 1, 2000. The Lease requires FCC of Texas to pay Monthly Base Rent in the amount of \$27,187.92 on the first day of each month during the initial five year portion of the Lease term. In this regard the Lease provides, at Article Three on page 13:

Tenant agrees to pay to Landlord at the property management office specified in Article 24, or to such other persons, or at such other places designated by Landlord, without any prior demand therefor in immediately available funds and without any abatement or deduction whatsoever (except as expressly set forth in this Lease to the contrary), Rent, including, without limitation, Monthly Base Rent¹ and Rent Adjustments in accordance with Article Four, during the Term. ***Monthly Base Rent shall be paid monthly in advance on the first day of each month of the Term***, except that the first installment of Monthly Base Rent shall be paid by Tenant

¹ Under the Lease, Monthly Base Rent is \$27,375.84 for the first five year portion of the Lease term.

to Landlord concurrently with Tenant's execution of this Lease. Monthly Base Rent shall be prorated for partial months within the Term. Unpaid rent shall bear interest at the Default Rate² (following notice as provided herein) from the date due until paid. Tenant's covenant to pay Rent shall be independent of every other covenant in this Lease.

(*emphasis* and footnotes supplied).

6. TrizecHahn also is entitled under the Lease to recover its attorney's fees and costs in the event it is forced to take action to enforce Focal's obligations thereunder. In this regard, Article 11.03 of the Lease provides:

Tenant shall pay upon demand, all costs and expenses, including reasonable attorney's fees, incurred by Landlord in enforcing the Tenant's performance of its obligations under the Lease, or resulting from the Tenant's Default, or incurred by Landlord in any litigation, negotiation or transaction in which Tenant causes Landlord, without Landlord's fault, to become involved or concerned.

7. Debtors did not make the Monthly Base Rent payments that came due under the Lease for either the post-petition months of January and February 2003. Under the Lease, such obligations came due on the first days of each such month.

8. The aggregate of the January and February 2003 rent due under the Lease is \$54,375.84 (the "Post-Petition Lease Obligation").

9. On February 13, 2003, Debtors filed a motion under Section 365 of the Bankruptcy Code seeking to extend their time under Section 365(d)(4) to assume or reject

² The Lease, at page 3, defines the "Default Rate" of interest as "the lesser of (i) eighteen percent (18%) per annum or (ii) the maximum rate permitted by law. Article 25.12 of the Lease provides for the Lease to be construed in accordance with the laws of the State of Texas.

unexpired real property leases (the "365(d)(4) Motion") for, upon information and belief, all of their leases except for the Lease (defined in such motion as the "Houston Lease").

10. On March 27, 2003 the Court entered an order granting the 365(d)(4) Motion, and therein decreed that the Lease was rejected effective as of February 18, 2003.

11. In the 365(d)(4) Motion the Debtors asserted that, "Debtors' personnel vacated the Houston premises in December 2002 and the Debtors removed most if not all of their personal property from the Houston premises in January 2003." *See* 365(d)(4) Motion at ¶ 14, page 7.

12. TrizecHahn agrees with Debtors' admission that it had not removed all of its property from the Premises post-petition. In fact, Debtors left a sizable quantity of telecom equipment and other personal property items at the Premises, property which remained through the end of February 2003.

ARGUMENT; RELIEF REQUESTED

TrizecHahn is Entitled to Immediate Payment of the Post-Petition Rent Obligation

13. Section 365(d)(3) of the Bankruptcy Code provides, in relevant part:

The trustee shall timely perform all the 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. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of order for relief, but the time for performance shall not be extended beyond such 60-day period.

14. The Post-Petition Rent Obligation came due on the first days of the first two full

post-petition months of these cases – and prior to the Debtors' rejection of the Lease. Thus, it arose “from and after the Order for Relief,” and, pursuant to Section 365(d)(3), is an immediate obligation of the Debtors notwithstanding Section 503.

15. Such is consistent with the law of this Circuit. In *In re Montgomery Ward Holding Corp.*, 268 F.3d 205 (3d Cir. 2001), the debtor's commercial real estate lease required it to pay real estate taxes to its landlord in addition to base rent. *Id.* at 207. Four days after the order for relief the landlord presented an annual tax bill to the debtor and demanded payment in full even though the majority of the taxes had "accrued" pre-petition. *Id.* The debtor tendered only a prorated amount based on its asserted post-petition occupancy of the leased premises. *Id.* The bankruptcy and district courts held that the debtor need pay only the prorated amount. However, the Third Circuit reversed, expressly rejecting the pro-rata approach. The Third Circuit held that the plain meaning of Section 365(d)(3) of the Bankruptcy Code, was that Congress intended a debtor to perform all leasehold obligations as and when they came due post-petition. The Third Circuit concluded that such an “obligation is something that one is legally required to perform under the terms of the lease and that such an obligation arises when one becomes legally obligated to perform.” *Id.* at 209.

16. Here, the Lease is clear that Debtors' obligations to pay the January and February 2003 rent accrued and became fully due on January 1 and February 1. Thus, Debtors were required under Section 365(d)(3) and the *Montgomery Ward* to pay the Post-Petition Rent Obligation on such dates (regardless whether such would be due and payable under Section 503), but did not. The Court, consistent with Section 365(d)(3) and *Montgomery Ward*, should

compel them to do so.

Alternatively, TrizecHahn is Entitled to Payment of the Post-Petition Rent Obligation as an Expense of Administration of the Cases Under Section 503(b)

17. Alternatively, in the event that the Court were to determine that TrizecHahn is not entitled to the rent due for January and February 2003 under Section 365(d)(3), which TrizecHahn submits is contrary to the law of this Circuit, TrizecHahn hereby requests allowance of the Post-Petition Rent Obligation as a Chapter 11 administrative expense of the estate pursuant to Section 503(b) as the Post-Petition Rent Obligation arose from the Debtors' possession, control and use of the Premises post-petition.

18. Clearly, the Debtors' estates benefited from such possession, control and use. They had the unfettered control over the Premises to the exclusion of TrizecHahn, including the right to market the Lease. That Debtors ultimately chose to reject the Lease does not detract from such control.

19. The Court also should order the Debtors to immediately pay TrizecHahn's administrative expense claim. The decision whether to require immediate payment of an administrative expense is within the Court's discretion. *In re Verco Indus.*, 20 B.R. 664, 665 (B.A.P. 9th Cir. 1982); *In re Kaiser Steel Corp.*, 74 B.R. 885, 891 (Bankr. D. Colo. 1990). Where there are sufficient funds in the estate to pay all administrative expenses in full, immediate payment to an administrative creditor is appropriate. *In re Standard Furniture Co.*, 3 B.R. 527, 532-33 (Bankr. S.D. Cal. 1980).

20. On information and belief, Debtors are not administratively insolvent. Further,

TrizecHahn should not be forced to wait an indefinite time for payment for services it has provided to the Debtors and which have benefited the Debtors' estates, especially when other administrative creditors (*i.e.* estate professionals) are receiving current, on-going, payment for the services they are providing.

WHEREFORE, TrizecHahn respectfully requests that the Court enter an order approving this motion and for such other and further relief to which it may be justly entitled.

Dated: April 23, 2003

Respectfully submitted,

STEVENS & LEE, P.C.

/s/ John D. Demmy

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