

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION**

In re:

Case No. 02-82361
Chapter 11 Case

Tricord Systems, Inc.,

Debtor.

James Bartholomew, as Trustee for the
Liquidating Trust of Tricord Systems,
Inc.,

Adv. Pro. No. 03-4174

Plaintiff,

vs.

General Electric Capital Corporation
and Adaptec, Inc.,

Defendants.

**DEFENDANT ADAPTEC, INC.'S MEMORANDUM OF LAW
ADDRESSING DAMAGES**

Defendant Adaptec, Inc. ("Adaptec"), by its undersigned attorneys, respectfully submits this Memorandum of Law Addressing Damages pursuant to this Court's Order For Hearing On Remand, entered on October 4, 2004, in the above-captioned adversary proceeding ("Hearing Order").

BACKGROUND

The Memorandum Opinion And Order Affirming In Part And Reversing In Part The Orders Of The Bankruptcy Judge, entered by the U.S. District Court for the District of Minnesota ("Appellate Court") on August 27, 2004, in this matter ("Appellate

Opinion”), remanded certain issues for determination by this Court.¹ Specifically, the Appellate Court remanded to this Court:

1. The assessment of the amount of damages that Plaintiff (“Tricord”) would be entitled to against Adaptec under a subrogation theory of liability (Appellate Opinion, at 12);
2. The assessment of the amount of the “Lessor’s Loss” under the terms of the Master Lease Agreement (Appellate Opinion, at 17); and
3. If Defendant General Electric Capital Corporation (“GECC”) drew more on the letter of credit (“LOC”) issued by Wells Fargo Bank for the benefit of GECC than GECC was entitled to draw, “the bankruptcy court then will have to determine whether, in light of the assignment to Adaptec [of the Master Lease Agreement], Tricord can pursue a claim for breach of contract [against GECC].” (Appellate Opinion, at 17).

This Court’s Hearing Order, at ¶ 2, requires Tricord and Adaptec to file memoranda on “the issue of damages.”

A. DAMAGES UNDER THE SUBROGATION THEORY.

The Appellate Court affirmed the entry of judgment in favor of Tricord and against Adaptec under a theory of subrogation. Appellate Opinion, at 12 and 18. On remand, this Court is to assess the amount of damages that would be appropriate under that theory.

Under Minnesota law, subrogation generally “permits one who pays another’s debt to stand in the shoes of the party that received the payment and to assert whatever rights that party had.” *Minnesota Trust Co. of Austin v. Yanke (In re Yanke)*, 230 B.R. 374, 377 (BAP 8th Cir. 1999). Here, Tricord claims (and the Appellate Court affirmed) that when GECC drew upon the LOC, Tricord in effect paid a debt owed by Adaptec to GECC and was entitled to stand in GECC’s shoes under the Master Lease Agreement.

¹ Defendant Adaptec, Inc., expressly reserves its right to appeal any and all of the findings of fact, conclusions of law, and orders set forth in the Appellate Opinion.

The elements needed to establish equitable subrogation are: (1) the payment must have been made by the subrogee to protect [its] own interest; (2) the subrogee must not have acted as a volunteer; (3) the debt paid must be one for which the subrogee was not primarily liable; (4) the entire debt must have been paid; and (5) subrogation must not work any injustice to the rights of others. *In re Photo Mechanical Services, Inc.*, 179 B.R. 604, 618 (Bankr. D. Minn. 1995). These elements require that the proposed subrogee demonstrate that it has in fact made a payment in a specific amount.

It is well settled that “the general rule regarding the calculation of damages arising from subrogation is that a subrogee is entitled to indemnity to the extent only of the money actually paid by him to discharge the obligation, or the value of the property applied for that purpose.” 73 Am. Jur.2d, Subrogation § 67 (2004).² Tricord, as the proposed subrogee, has the burden of proof to establish each and every element of equitable subrogation, including establishing its damages as subrogee.

In order for Tricord to establish its damages, it must prove, by a preponderance of evidence, the *actual* amount of money that GECC received from its November 13, 2002, draw on the LOC. Tricord has failed to make any showing at all in that regard. No evidence whatsoever was admitted during trial on January 13, 2004, regarding the amount GECC received from its draw on the LOC.³ Tricord did not produce a witness to

² Minnesota Courts have adopted other sections 73 Am. Jur.2d Subrogation for general propositions. *See Northland Ins. Co. v. Ace Doran Hauling & Rigging Co.*, 415 N.W.2d 33, 39 (Minn. Ct. App. 1987) (citing Am. Jur.2d, Subrogation § 25 (1974), stating that the right of subrogation extends to parties who pay a debt in self-protection when that obligation is in dispute, because they may suffer a loss if the obligation is not discharged); *Regie de l'assurance Auto. du Quebec v. Jensen*, 389 N.W.2d 537, 539 (Minn. Ct. App. 1986) (citing Am Jur.2d, Subrogation § 6 (1974), stating that the doctrine of subrogation is not a fixed rule of law or of equity).

³ Although one might presume that GECC did not receive more than the face amount of the LOC (\$194,237) when it drew, one cannot presume that GECC did receive the full face amount of the LOC when it drew because the LOC expressly states that “[p]artial and multiple drawings are permitted under this Letter of Credit.” LOC, at 1. For example, this Court previously determined that the amount

testify about its damages under the subrogation theory and did not offer any admissible document that addressed the amount GECC received as a result of its draw on the LOC.⁴ Tricord is not entitled to recover any damages from Adaptec under the theory of equitable subrogation because it failed to prove an essential element — the amount of its damages.

B. THE “LESSOR’S LOSS” UNDER THE MASTER LEASE AGREEMENT.

The Appellate Court also remanded to this Court the assessment of the amount of the “Lessor’s Loss” under the terms of the Master Lease Agreement. Adaptec takes no position on that issue since, while it is relevant to the appropriate measure of damages under the subrogation theory, Tricord has not introduced any evidence of its damages under the subrogation theory. Furthermore, if GECC did draw more than it was entitled to draw under the LOC, Adaptec now owns any outstanding claim for breach of the Master Lease Agreement as a result of Tricord’s assignment of the Master Lease Agreement to Adaptec.

CONCLUSION

For the reasons discussed above, this Court must determine that the measure of damages under the subrogation theory is the amount that Tricord, the proposed subrogee, actually paid or applied against the amounts due under Master Lease Agreement and that

remaining due under the Master Lease Agreement was \$170,310, which is less than the face amount of the LOC. Memorandum Order, at 5, entered January 23, 2004, by this Court

⁴ Tricord’s failure to put forth any evidence at trial concerning its damages under the subrogation theory is particularly inexplicable in light of this Court’s previous grant of partial summary judgment in favor of Tricord and against Adaptec on the subrogation theory “in an amount to be determined at trial.” Order Granting Partial Summary Judgment, ¶ 3, entered January 6, 2004, by this Court. Tricord’s failure to provide essential evidence to this Court is, however, consistent with its failure to respond to any discovery requests made by Adaptec so that Adaptec might have evaluated Tricord’s claims against it, including alleged damages. *See Limine Motion Of Defendant Adaptec, Inc. For Relief Against Plaintiff Under Fed. R. Civ. P. 37*, filed in this adversary proceeding on January 8, 2004.

Tricord has not proven that amount. Accordingly, Tricord is not entitled to judgment against Adaptec in any amount.

Respectfully submitted,

Dated: October 29, 2004

GRAY, PLANT, MOOTY,
MOOTY & BENNETT, P.A.

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James Bartholomew, as Trustee for the
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Adv. Pro. No. 03-4174

Plaintiff, Appellant
and Cross-Appellee,

v.

General Electric Capital Corporation, and
Adaptec, Inc.,

Defendants, Appellees

UNSWORN CERTIFICATE OF SERVICE

I, Cheryl Moline, employed by Gray, Plant, Mooty, Mooty & Bennett, P.A., attorneys licensed to practice law in this Court, with office address at 500 IDS Center, 80 South 8th Street, Minneapolis, Minnesota, 55402, declare under penalty of perjury that on **October 29, 2004**, I caused to be served by mail a true and correct copy of Defendant Adaptec, Inc.'s Memorandum of Law Addressing Damages, upon parties on the attached Service List, by faxing a true and correct copy thereof at the fax number(s) referenced thereon.

Executed on: October 29, 2004

Signed: _____


Cheryl Moline

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