

IN THE UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

IN RE: Wayzata Corporate Partners, L.L.C.

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CASE NO. 03-45135  
(Chapter 11)

*Debtor.*

**NOTICE OF HEARING AND MOTION BY CLOCKTOWER VENTURE  
FOR ADMINISTRATIVE EXPENSES**

To: Parties in interest specified in Local Rule 9013-3.

1. Clocktower Venture, a Texas joint venture consisting of Jurgen Stielow and the Gunther Noelting Marital Trust (“Claimant”), by its undersigned attorneys, moves the Court for the relief requested below and gives notice of hearing.
2. The Court will hold a hearing on Claimant’s Motion at 10:30 a.m. on October 6, 2004 in Courtroom 8 West of the United States Bankruptcy Court, 7<sup>th</sup> Floor, U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota.
3. Any response to the Motion must be mailed and delivered not later than October 1, 2004, which is three days before the time set for hearing (excluding Saturdays, Sundays and holidays) or filed and served by mail no later than September 27, 2004, which is seven days before the hearing date (excluding Saturdays, Sundays and holidays). **UNLESS A RESPONSE OPPOSING THE MOTION IS FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**
4. The Petition commencing this Chapter 11 case was filed on 18 July 2003 and is now pending herein.
5. This Court has jurisdiction pursuant to 28 U.S.C. §§151, 157(a) and 1334(b) and 11 U.S.C. 105(a).
6. This is a core proceeding. This Motion is brought pursuant to 11 U.S.C. §503(b)(1)(A); Federal Rules of Bankruptcy Procedure 9013; and Local Rules 3002-2(b); 9013-1.
7. Claimant requests relief in the form of a court order allowing administrative expenses, which include Claimant’s attorney’s fees, other professional fees and related expenses incurred by Claimant in connection with the assumption by Debtor on 28 January 2004 of a Lease in which Claimant is landlord and Debtor is tenant covering leasehold premises located within real property owned by Claimant and situated in Wayzata,

Hennepin County, State of Minnesota. The leasehold constitutes the sole, principal asset of Debtor.

### **General Statement of Facts Underlying Administrative Claim**

8. Clocktower Venture (“Clocktower”) is a Texas joint venture consisting of Jurgen Stielow and the Gunther Noelting Marital Trust, a Texas testamentary trust, arising under the Last Will and Testament of Gertrud Noelting, deceased. Jurgen Stielow and the Gunther Noelting Marital Trust are the legal and equitable owners of real property the improvements thereon consisting of a commercial building, legally described as follows:

Lot One (1), Block One (1), The Clocktower Addition,  
Hennepin County, Minnesota; locally described as 700 East  
Lake Street, Wayzata, Minnesota, 55391 (the “Property”).
9. The joint venturers operate the Property under the name Clocktower Venture, which name has been duly recorded in the Assumed Name Records of the Secretary of State of Minnesota and published in a newspaper of general circulation in accordance with Minnesota statutes.
10. Debtor Wayzata Corporate Partners, L.L.C. (“WCP”) is a Minnesota limited liability company which was organized and engages in the development and leasing of executive suites located within the Property.
11. The principal member and manager of WCP was and continues to be Andreas Development Company, L.L.C. (“Andreas”), a Minnesota limited liability company whose principal member and manager was and continues to be David Luse. David Luse at all times exercised and continues to exercise virtually exclusive management and control of both WCP and Andreas.
12. On or about 25 September 2002, Clocktower Venture as Lessor and Landlord executed and entered into a Lease with WCP as Lessee and tenant (the “Lease”) for the lease of the second floor of the commercial building located upon the Property (“the Leasehold”).
13. The Lease contains the following provisions germane to Clocktower’s Motion herein:

### **2. GENERAL CLAUSES AND COVENANTS**

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*c. Lessee shall not:*

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6. Create or otherwise permit a lien to be placed on the demised premises.

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**23. ATTORNEYS' FEES**

*If either party is required to place the enforcement of all or any part of this Lease, the recovery of possession of the Demised Premises, or damages in the hands of an attorney, or if legal proceedings are commenced by either party against the other party to protect or enforce the rights or obligations under this Lease, the prevailing party, whether as Plaintiff or Defendant, shall be entitled to recover all its reasonable attorneys' fees and costs.*

**24. TIME IS OF THE ESSENCE**

*Time is of the essence in this Lease.*

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**36. INDEMNIFICATION**

*Lessee agrees to defend, indemnify and hold harmless Lessor from all claims of liability as well as liability, regardless of nature or extent, real or threatened, occasioned by or arising out of Lessee's, its employees', agents', invitees' and guests', use and occupancy of the Building.*

14. Relatively contemporaneous with the execution of the Lease, WCP took possession of the Leasehold and, after completing certain improvements to date, engages in the business of leasing executive suites to the general public.
15. On 18 July 2003, WCP filed its Voluntary Petition under Chapter 11, Title 11, United States Code, which case is now pending herein, in case no. 03-45135, styled In Re: Wayzata Corporate Partners, L.L.C., Debtor.
16. On or about 9 January 2004, Debtor filed its Motion for Approval of Assumption of Non-Residential Real Estate Lease in which, among other things, Debtor acknowledged the existence of mechanic's liens filed against the Property by various claimants in connection with improvements caused to be made by Debtor upon the Leasehold. Debtor further acknowledged that the validity and the value of the liens were being challenged by Debtor in a pending adversary proceeding. The imposition and existence of the mechanic's liens constituted a default by Debtor of its obligations under paragraph 2 of the Lease. On 28 January 2004, the Court granted Debtor's Motion.

17. As part of its obligations under 11 U.S.C. §365(b)(1)(A), Debtor represented in its Motion the following:

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**“UNDERTAKINGS RELEVANT TO ASSUMPTION**

*13. Within seven (7) days after the value of the mechanic’s liens has been determined, the Debtor will pay each of the claims secured by a mechanic’s lien, in full.”*

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18. At the time of the filing of Debtor’s Voluntary Petition, WCP was in default of various obligations under the Lease, including paragraph 2.c.6 as restated in paragraph 16 of this Motion. More specifically, Andreas acting by and through its principal member and manager, David Luse, on 4 December 2002, purportedly acting as owner of the Leasehold, executed and entered into a contract with Stahl Construction Company (“Stahl”) as contractor for the construction of improvements upon the Leasehold. Andreas contends that it was acting for the benefit of Debtor, ostensibly as its agent. Andreas defaulted in its payment obligations under the construction contract and Stahl, along with various subcontractors of Stahl, filed mechanic’s liens against the Property.
19. Clocktower was not a party to the construction contract between Andreas and Stahl nor did Clocktower have notice of such contract until May of 2003, at which time Clocktower began receiving notices of mechanic’s lien claim from Stahl and its subcontractors.
20. On 3 September 2003, WCP and Andreas filed their adversary proceeding in Adversary No. 03-4263, styled Wayzata Corporate Partners, L.L.C. and Andreas Development Company, L.L.C. v. Stahl Construction Company; et al. During the period of 19 September 2003 through 7 November 2003, Defendants in the adversary filed various counterclaims, crossclaims and third party complaints, which included third party claims against Clocktower in its capacity as owner of the Property. The Defendants, among other relief, sought against Clocktower a judicial foreclosure of the mechanic’s liens against the Property. Clocktower employed legal counsel, appeared, joined issue and sought, among other matters, affirmative relief against Stahl and the subcontractors regarding the validity and value of the mechanic’s liens.
21. On 7 January 2004, this Court signed and entered in the adversary proceeding an Order of Abstention and Dismissal with regard to all claims between the parties, save and except those claims existing between WCP, Andreas, Stahl and MarCon Interior Transitions, Inc. (“MarCon”), a subcontractor, regarding the validity and the value of the mechanic’s liens.

22. On 29 January 2004, this Court signed and entered its judgment dismissing all of the claims of WCP and Andreas against Stahl and MarCon; declared the value of Stahl's mechanic's lien to be in the sum of \$315,026.02 and the value of the MarCon's mechanic's lien to be in the sum of \$88,911.50.
23. Notwithstanding its Undertakings Relevant to Assumption as set forth in its Motion for Approval of Non-Residential Real Estate Lease, WCP did not, within seven days after the value of the mechanic's liens had been determined by the Court or otherwise within seven days after the judgment became final, pay the mechanic's lien claims in full, continuing the potential liability of Clocktower's Property for the lien claims.
24. On or about 24 February 2004, MarCon instituted its suit against Stahl, Andreas and Clocktower along with other subcontractors and purported owners of the Property in Court File No. CT 04-730, in the Fourth Judicial District Court of Hennepin County, Minnesota, styled MarCon Interior Transitions, Inc. v. Stahl Construction Company, et al. MarCon sought the foreclosure of its mechanic's lien as declared by this Court in the adversary proceeding against the Property.
25. Clocktower was served with civil process and timely entered its general appearance in the State Court suit and joined issue. Clocktower sought relief from the mechanic's liens and the value of the improvements. Clocktower additionally filed its third party complaint against Andreas and Luse but due to 11 U.S.C. 362(a)(1) was stayed from relief against WCP. Moreover, because of this Court's abstention, Clocktower had no affirmative relief in this Court. In May of 2004, by way of Compromise and Stipulation of Settlement, the suit was dismissed without prejudice to the rights of Clocktower against Andreas and David Luse. The consideration for the Compromise and Stipulation of Dismissal was Andreas's procurement of the release of the mechanic's liens against the Property by payment in full or otherwise negotiated satisfaction. Andreas satisfied the lien claimants and the mechanic's liens were released.
26. Shortly following the institution of the State Court case, Clocktower gave notice to WCP of its default of paragraph 36 of the Lease and made demand upon WCP to defend, indemnify and hold harmless Clocktower from the claims asserted in the State Court suit. WCP did not undertake to defend and indemnify Clocktower from the State Court suit. Clocktower filed its Motion to Lift Stay, which was withdrawn due to the settlement in the State Court case.
27. As a consequence of its acts, conduct and failures of conduct, WCP defaulted in its obligations under its Motion for Approval of Assumption of Non-Residential Real Estate Lease and the order of this Court sustaining its Motion as well as the Lease in the following particulars:

- (1) It allowed the continuation of the mechanic's and materialman's liens filed by Stahl Construction Company and its subcontractors;
  - (2) It failed upon timely demand by Clocktower to remove the mechanic's and materialman's liens;
  - (3) It failed upon timely demand to defend and hold harmless Clocktower from the State Court suit;
  - (4) It failed to pay the value of the lien claims as determined by the Court within seven days of the Court's order of determination.
28. The Affidavit of Jurgen Stielow regarding the General Statement of Facts Underlying Administrative Claim is attached hereto as Exhibit "A."
29. As a consequence of the defaults of WCP, Clocktower was required to incur special legal, administrative and operating expenses in the aggregate sum of \$70,739.05. An itemization of the legal fees and expenses is attached hereto as Exhibit "B."
30. The expenses incurred by Clocktower were actual, reasonable, necessary, and directly and proximately occasioned by the defaults of WCP in the performance of its obligations under the Lease. They were made to preserve Clocktower's right, title and interest in the Property and the Leasehold, which constituted the sole principal asset of Debtor's estate.
31. As a consequence of the acts, conduct and omissions of WCP underlying its defaults of the Lease, Clocktower was required to employ attorneys which Clocktower agreed to pay all reasonable and necessary fees and reimburse for all reasonable and necessary expenses. The fees charged by Clocktower's attorneys and the related incurred expenses were reasonable and necessary. The Affidavits in support of legal fees and expenses of Dale Ossip Johnson, Esq. and C. Scott Massie, Esq., attorneys for Clocktower, are attached hereto as Exhibits "C" and "D."
32. In addition to the legal fees, Clocktower was required to incur other administrative and operating expenses in order to protect its Property and preserve its Property rights. An itemized statement of the administrative and operating expenses is attached hereto as Exhibit "E." The administrative and operating expenses were reasonable and necessary. The Affidavit of Dale Ossip Johnson, attached hereto as Exhibit "C" encompasses the services rendered by Greg Copp, Trustee and Neil Weber.
33. This Court should allow the legal, administrative and operating fees and expenses as an administrative claim under 11 U.S.C. §503(b)(1)(A) and (4) as a first priority claim under the provisions of 11 U.S.C. §507(a)(1).

WHEREFORE PREMISES CONSIDERED, Clocktower prays the sufficiency of its Motion and for such other and further relief to which Clocktower may be entitled at law or in equity.

Respectfully submitted,

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Dale Ossip Johnson, Esq.  
Texas State Bar No. 10700000

THE JOHNSON FIRM, P.L.L.C.  
515 Capital of Texas Hwy. South, Ste. 230  
Austin, Texas 78746

Telephone: 512-328-7764  
Telecopier: 512-328-0347

LAW OFFICES OF C. SCOTT MASSIE  
1055 East Wayzata Blvd., Ste. 300  
Wayzata, Minnesota 55391  
952-475-1515  
952-475-0311 (FAX)

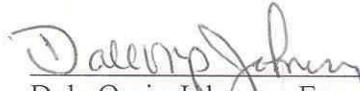
*/s/ C. Scott Massie*

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C. Scott Massie, Esq.

WHEREFORE PREMISES CONSIDERED, Clocktower prays the sufficiency of its Motion and for such other and further relief to which Clocktower may be entitled at law or in equity.

Respectfully submitted,



\_\_\_\_\_  
Dale Ossip Johnson, Esq.  
Texas State Bar No. 10700000

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LAW OFFICES OF C. SCOTT MASSIE  
1055 East Wayzata Blvd., Ste. 300  
Wayzata, Minnesota 55391  
952-475-1515  
952-475-0311 (FAX)

By: \_\_\_\_\_  
C. Scott Massie, Esq.

**EXHIBIT "A"**

**To Notice of Hearing and Motion by Clocktower Venture  
For Administrative Expenses**

IN THE UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

IN RE: Wayzata Corporate Partners, L.L.C. §

CASE NO. 03-45135  
(Chapter 11)

*Debtor.*

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**VERIFICATION**

I, Jurgen Stielow, joint venturer of Clocktower Venture, a Texas joint venture, declares under the penalty of perjury that the facts contained in the foregoing Notice of Hearing and Motion by Clocktower Venture for Administrative Expenses are true and correct to the best of my knowledge, information and belief.

Dated: 8/12 2004.

  
\_\_\_\_\_  
Jurgen Stielow

**EXHIBIT “B”**  
**To Notice of Hearing and Motion by Clocktower Venture**  
**For Administrative Expenses**

**SUMMARY OF LEGAL FEES AND EXPENSES**

**Legal Fee Summary**

THE JOHNSON FIRM, P.L.L.C.	\$43,612.00
C. Scott Massie, Esq.	\$21,200.00
Peter W. Johnson, Esq.	<u>\$ 760.00</u>
Total	<b>\$65,572.00</b>

**Legal Expense Summary**

THE JOHNSON FIRM, P.L.L.C.	\$1,441.95
C. Scott Massie, Esq.	\$ 925.95
Peter W. Johnson, Esq.	<u>\$ 9.14</u>
Total	<b>\$2,377.04</b>

**Legal Time Summary**

THE JOHNSON FIRM, P.L.L.C.	218.06 Hours @\$200.00 per hour
C. Scott Massie, Esq.	106.00 Hours @\$200.00 per hour
Peter W. Johnson, Esq.	3.80 Hours @\$200.00 per hour

**Totals:**

THE JOHNSON FIRM, P.L.L.C.	\$45,053.96
C. Scott Massie, Esq.	\$22,125.95
Peter W. Johnson, Esq.	<u>\$ 769.14</u>
	<b>\$67,949.05</b>

EXHIBIT "C"

IN THE UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

IN RE: Wayzata Corporate Partners, L.L.C. §

CASE NO. 03-45135  
(Chapter 11)

*Debtor.*

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**AFFIDAVIT OF DALE OSSIP JOHNSON  
IN SUPPORT OF CLOCKTOWER VENTURE'S MOTION  
FOR ADMINISTRATIVE EXPENSES**

To the Honorable Court:

Dale Ossip Johnson, upon oath, states:

My name is Dale Ossip Johnson. I am over the age of 18 years and fully competent to make and give this Affidavit herein. I have personal knowledge of all facts contained herein save and except where expressly stated otherwise.

I am a duly licensed attorney under the laws of the State of Texas, having been licensed by the Supreme Court of Texas in December of 1965. Relatively contemporaneous with my licensing under the laws of the State of Texas, I was also licensed to practice law by the Supreme Court of the State of Oklahoma. I have engaged in the continuous practice of the law since December of 1965 to and through the date of the giving of this Affidavit with the exception that during the period of 1968, I was appointed and served as an Associate Judge of the Corporation Court of the City of Austin, Texas.

I have been admitted to practice before the following courts and their alternate successors:

- (1) The Supreme Court of the United States;
- (2) The Supreme Court of the State of Texas;
- (3) The Supreme Court of the State of Oklahoma;
- (4) United States Court of Appeals, Fifth Circuit;
- (5) The United States Court of Appeals, Tenth Circuit;
- (6) The United States District Court, Western District of Texas;
- (7) The United States District Court, Southern District of Texas;
- (8) The United States Court of Military Appeals;
- (9) The United States Court of Claims;
- (10) The United States Court of Customs and Patent Appeals;
- (11) The United States Court of International Trade;
- (12) The United States Tax Court.

I have been admitted to practice *pro hac vice* before the following courts:

- (1) United States District Court, Eastern District of New York;
- (2) United States District Court, Southern District of Florida;
- (3) United States District Court, Northern District of Oklahoma;
- (4) United States District Court, District of Nevada;
- (5) United States District Court, Southern District of Iowa;
- (6) United States District Court, Western District of Louisiana;
- (7) United States District Court, Middle District of Georgia;
- (8) United States District Court, Northern District of Georgia;
- (9) United States Bankruptcy Court, Middle District of Alabama;
- (10) Supreme Court of Washington;
- (11) Superior Court of King County, Washington;
- (12) Seventeenth Judicial Circuit Court, Broward County, Florida

I have continuously practiced law in Austin, Travis County, Texas since December of 1965 with the interruption in 1968 of serving as an appointed Associate Judge of the Corporation Court of Austin, Texas. My legal practice has been exclusively civil, concentrating in the areas of commercial, business, real estate and intellectual property law and tangential related areas of the law. A substantial portion of my practice since 1975 has been devoted to engaging in interstate legal matters, both litigation and transactional, as well as private international legal matters concentrating primarily in commercial and intellectual property areas with activities in the United Kingdom, Spain, France, the Netherlands, Germany and Sweden.

I am a member of the Texas Bar Association and previously a member of the American Bar Association.

I have acted as legal counsel since 1992 for the constituent members as well as the predecessors in interest in Clocktower Venture. My legal representation has extended in both litigation as well as transactional matters, concentrating primarily in the commercial and real estate areas of the law. My legal representation encompasses matters both intrastate in Texas as well as interstate, including the States of Minnesota and New York as well as matters between the United States and the German Federal Republic.

I legally organized Clocktower Venture. I have an intimate historical familiarity with its principal activities, which arise out of its ownership of a commercial building in the city of Wayzata, Hennepin County, Minnesota. I directly participated in the negotiation of the terms of the Lease Agreement between Wayzata Corporate Partners, L.L.C. and Clocktower Venture, which covers the Leasehold forming the sole and principal asset of Wayzata Corporate Partners, L.L.C.

As a consequence of various and sundry defaults preceding the filing by Debtor of its Voluntary Petition, I have been actively engaged in the enforcement of the Lease against Wayzata Corporate Partners, L.L.C. since approximately January 2003.

Predicated upon the admissions of Andreas Development Company, L.L.C. and the Debtor made in the bankruptcy herein as well as the related adversary, Andreas Development Company, L.L.C. executed and entered into a contract with Stahl Construction Company for the construction of improvements upon the Leasehold leased by Clocktower Venture to Debtor. Clocktower Venture was not a party to the contract and had no knowledge of it until on or about May 2003. Predicated upon the further admissions of Debtor and Andreas Development Company, L.L.C., the construction contract between Andreas and Stahl was made for the benefit and with the knowledge and consent of Debtor. Andreas failed to timely pay the amounts due and owing under the construction contract and as a consequence, Stahl as well as its subcontractors, filed mechanic's liens against the Property in which the Leasehold was situated. As a consequence, Clocktower Venture was required to obtain the services of legal counsel to represent it in defending the mechanic's liens as well as prosecuting related claims against Debtor and Andreas. The legal representation required the appearance and participation in the bankruptcy proceeding as well as the adversary proceeding and ultimately a state court proceeding in Minneapolis, Hennepin County, Minnesota. The legal representation additionally required as a condition a *pro hac vice* appearance before the bankruptcy court, the retention of local counsel. Clocktower Venture retained the services of C. Scott Massie, Esq. on an hourly basis. As part of the legal representation, Clocktower Venture agreed to pay all his reasonably, customary and necessary legal fees at the rate of \$200.00 and associated expenses.

I appeared and actively participated in both in court as well as out of court proceedings in the bankruptcy, adversary proceeding and the state court proceeding. A true and correct itemized statement of my services and expenses is attached to the Motion of Clocktower Venture for Administrative Expenses as Exhibit "B." The items contained therein were recorded either directly by me or by persons acting under my direct supervision contemporaneous with the event in the ordinary course of the legal representation, the records of which are kept as part of the regular business records of The Johnson Firm, P.L.L.C. The itemization is true and correct.

As part of my legal representation, Clocktower Venture agreed to pay my reasonable, customary and necessary fees and expenses. Clocktower Venture has paid all fees and expenses as itemized in Exhibit "E." My hourly charges were at the rate of \$200.00 per hour which predicated upon my formal education and experience and the usual and customary fees furnished by lawyers of Austin, Travis County, Texas, all of which I have familiarity, are discounted from the usual and customary normal fee of \$250.00 per hour, which discount is predicated upon my long history with Clocktower Venture and its constituent Venturers and predecessors in interest as well as the volume of legal business which they have produced over the past 14 years.

But for the performance of the time and effort by myself for the benefit of Clocktower Venture, I would have had the opportunity to perform other legal services for other clients at a rate of \$250.00 per hour plus legal fees and expenses. The legal services required to be given by me included the investigation, analysis and legal efforts related to the rights and duties of the parties to the lease contract, the relative rights and duties of

non-parties acting as an agent for the Debtor, *i.e.*, Andreas Development Company, L.L.C., the evaluation and factual and legal determination of the validity and amount, if any, of mechanic's liens arising out of a contract in which Clocktower Venture was not a party and did not have knowledge and related matters including ongoing consultation with local counsel regarding Minnesota law, the rights and duties of the parties in bankruptcy, a bankruptcy adversary and in the State Courts of Minnesota, of the filing of court instruments and compliance with local rules of both the United States Bankruptcy Court as well as the Fourth Judicial District Court of Hennepin County, Minnesota.

The legal fees and expenses incurred by Clocktower Venture from both myself as well as C. Scott Massie, Esq. were reasonable, necessary and essential to protect the right, title and interest of Clocktower Venture in its property.

With regard to the charges by Greg Copp, Trustee, Greg Copp is a Certified Public Accountant, duly licensed under the laws of the State of Texas. Greg Copp's usual and customary fees to the trust for extraordinary services are \$150.00 per hour, which fees are equivalent to those fees charged by Greg Copp for accounting services and which but for his time consumed in performing extraordinary services for the trust, he would earn from his accounting clients. \$150.00 per hour is within the range of the usual and customary fees charged by Certified Public Accountants in Travis County, Texas, who possess the education and experience of Greg Copp. Extraordinary services to a trust are those services performed by the trustee which are not part of the usual and customary duties of a trustee. Participation in litigation is not a usual and customary duty of a Trustee. As a consequence of Greg Copp, Trustee, being named as a Defendant both as Trustee as well as in connection with the Trust being a venturer in Clocktower Venture, required Greg Copp participate in the litigation process in Case No. Ct 04-730, styled MarCon Interior Transitions, Inc. v. Stahl Construction Company, et al in the Fourth Judicial District of Hennepin County, Minnesota in which the subject matter of the suit was the enforcement of materialman's liens by the contractor and subcontractors constructing the improvements for the benefit of the Debtor within the property owned by Clocktower Venture. Greg Copp, Trustee, was required to incur the time and expense set forth in Exhibit "E" attached hereto for which charges as stated therein Clocktower Venture paid Greg Copp, Trustee. Greg Copp, Trustee's participation with the undersigned was reasonable and necessary and for the direct benefit of the trust in Clocktower Venture in their joint efforts to preserve the property from the materialman's liens incurred by or in behalf of Debtor.

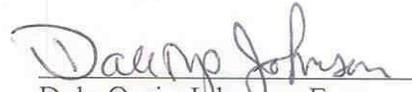
As a consequence of the bankruptcy, as well as the adversary proceeding, Clocktower Venture was also required to employ the services of Neil Weber, Architect, of Hennepin County, Minnesota, for the purpose of assisting Clocktower Venture in evaluating the claims of Stahl Construction Company, MarCon Interior Transitions, Inc. and other subcontractors claiming materialman's liens against the property owned by Clocktower Venture and occupied by Debtor. Mr. Weber additionally provided services to Clocktower Venture in monitoring the occupation by Debtor in the premises for compliance with the Lease between the Debtor and Clocktower Venture. Mr. Weber's

charges of \$2,340.00, predicated upon 28 hours of services at the rate of \$90.00 are reasonable and necessary. Clocktower Venture paid Mr. Weber's charges.

The invoices for services received by Clocktower Venture from Greg Copp and Neil Weber are attached to Exhibit "E" and are true and correct.

Further sayeth, affiant not.

Dated: 30 August 2004.

  
Dale Ossip Johnson, Esq.

**EXHIBIT "D"**

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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In re:

Case No. 03-45135-RJK  
Chapter 11

Wayzata Corporate Partners, LLC,

Debtor.

**AFFIDAVIT OF C. SCOTT MASSIE  
IN SUPPORT OF CLOCKTOWER VENTURE'S  
MOTION FOR ADMINISTRATIVE EXPENSES**

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STATE OF MINNESOTA    )  
  ) ss.  
COUNTY OF HENNEPIN    )

C. Scott Massie, being duly sworn, states as follows:

1. My name is C. Scott Massie and I have personal knowledge of all facts contained herein.
2. I am a duly licensed attorney under the laws of the State of Minnesota, having been licensed by the Supreme Court of Minnesota in October, 1984. I have engaged in the continuous practice of law since October, 1984. I am admitted to practice before the United States District Court, District of Minnesota, and the United States Court of Appeals, 8<sup>th</sup> Circuit.
3. I have continuously practiced law in Wayzata, Minnesota, since August, 1985. My scope of practice is extensive, but during the last 15 years I have almost exclusively concentrated in the areas of commercial, business and real estate law. Besides transactional work, my practice consists of litigation in the areas of creditors' remedies, construction litigation and general real estate litigation. My clientele includes landlords, construction companies, banks, and individual entrepreneurs.
4. I have known Jurgen Stielow for at least three years. We first met when he interviewed me to represent him and other individuals and entities locally. I was first retained by Mr. Stielow and Clocktower Venture in February, 2003 when the Debtor defaulted under the Lease with Clocktower Venture.
5. As a result of the Debtor's numerous defaults under the Lease and the imposition of Mechanic's Liens against the property, I was engaged to support the Johnson law firm and to render advice regarding practice strategies common in the State of Minnesota. Throughout my involvement, I strived not to duplicate the efforts of the Johnson law firm and acted independently in attending court proceedings that were deemed material, but did not justify the attendance of co-counsel, Dale Ossip Johnson.
6. A true and correct itemized statement of my services and expenses is attached to the

Motion of Clocktower Venture for Administrative Expenses as Exhibit “\_\_\_”. The items contained therein were recorded either directly by me or by persons acting under my direct supervision. The attached records are kept as part of my regular business records, and the itemization contained in the attached Exhibit is a true and correct reflection of the time I spent rendering legal services for Clocktower Venture and the other named parties.

7. In accordance with my fee arrangement with Clocktower Venture, I was to be paid all fees and expenses and my fees were to be charged at a rate of \$200.00 per hour, which I would assert is a moderate fee given my years of experience and my breadth of experience, in compared with the hourly rates of attorneys with similar background, experience and years of service.
8. But for the performance of the services for the benefit of Clocktower Venture, I would have had the opportunity to perform other legal services for other clients.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated: August \_\_\_\_, 2004.

          /s/ C. Scott Massie            
C. Scott Massie

Subscribed and sworn to this \_\_\_\_ day  
of August, 2004 by C. Scott Massie.

\_\_\_\_\_  
Notary Public

C:\CSM\Stielow\Clock Tower Venture\Bankruptcy\Aff. of CSM.doc

**Exhibit “E”**

**Clocktower Venture’s Summary of Extraordinary  
Administrative and Operating Expenses**

**Trustee’s Extraordinary Expenses<sup>1</sup>**

Greg A. Copp, P.C.

Hours: 3

Rate: \$150.00

Total: **\$450.00**

**Extraordinary Operating Expenses<sup>2</sup>**

Neil Weber, Architect

Hours: 26

Rate: \$90.00

Total: **\$2,340.00**

Extraordinary Trustee’s and Operating Expenses Total: **\$2,790.00**

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<sup>1</sup> Greg Copp’s Invoice is attached hereto as Exhibit “E-1”

<sup>2</sup> Neil Weber’s Invoice is attached hereto as Exhibit “E-2”

Exhibit "E-1"

Gregory A. Copp P.C.  
1202 Nueces Street  
Austin, Texas 78701

# Invoice

DATE	INVOICE NO.
4/27/2004	2186

BILL TO
Clocktower c/o Jurgen Stielow 1202 Nueces Street Austin, TX 78701

SERVICED	SERVICE	DESCRIPTION	HOURS	RATE	AMOUNT
	Consulting	Receive service and review lawsuit. Discussion and forward to DO Johnson. Receive service and review amended, second amended service of lawsuit. Copy and forward to DO Johnson. Discussions with DO Johnson details of the case, convey the position of GNMT in regards to the case.	3	150.00	450.00

Thank you.	<b>Total</b>	\$450.00
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Exhibit "E-2"



2280 Watertown Road, Long Lake, MN 55356-9419  
952.476.4434 • Fax 952.476.5863 • nw@weberarchitects

19 April 2004

Jurgen Stielow  
Clock Tower Venture  
c/o Greg A Copp  
1202 Nueces Street  
Austin, Texas 78701

RE: Expenses related to Luse Bankruptcy

Jurgen;

My expenses relating to the process started by David Luse is;

26 Hours @ \$90.00/ hour = \$2,340.00

Sincerely yours,

Neil Weber

IN THE UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

IN RE: Wayzata Corporate Partners, L.L.C. §

§

CASE NO. 03-45135

(Chapter 11)

§

*Debtor.*

§

§

**MEMORANDUM OF LAW IN SUPPORT OF MOTION BY  
CLOCKTOWER VENTURE FOR ADMINISTRATIVE EXPENSES**

TO: The Honorable Court:

Pursuant to Local Rule 9013-2(a)(3), Clocktower Venture, a Texas joint venture consisting of Jurgen Stielow, individually, and the Gunther Noelting Marital Trust, files and presents its Memorandum of Facts and Law in Support of Motion by Clocktower Venture for Administrative Expenses.

I

Statement of Facts

Clocktower relies on the facts as set forth in the verified Motion of Clocktower Venture for Administrative and incorporates by reference the same herein.

II

Statement of Law and Argument

11 U.S.C. §503(b)(1)(A) generally provides "...after notice and a hearing, there shall be allowed administrative expenses" for claimants falling into certain categories. The word "shall" is indicative of mandatory intent. *Sierra Club v. Train*, 557 F. 2d 485 (5<sup>th</sup> Cir. 1977). In the absence of statute or legislative history to the contrary intent, this Court is bound by the plain language of the statute. *Denarest v. Manspeaker*, 498 U.S.184, 111 S.Ct. 599, 112 L.Ed. 2d 608 (1991). The elements of an administrative

claim under 11 U.S.C. §503(b)(1)(A) are (1) actual costs and expenses which are (2) necessary for the preservation of the estate, including wages, salaries or commissions for services rendered after the commencement of the case.

Under the Bankruptcy Code, the Debtor has the right to assume or reject a lease. 11 U.S.C. §365. However, if there has been a default in an executory contract or unexpired lease, the Debtor may not assume the contract or lease unless at the time of the assumption of the contract or lease, the Debtor cures or provides adequate assurance that it will promptly cure such default; compensates or provides adequate insurance for any actual pecuniary loss to a party resulting from the default; and provides adequate insurance of future performance. 11 U.S.C. §365(b)(1). The act of assumption must be based in part upon the conclusion that the assumption of the contract or lease is more beneficial to the estate than a rejection. *MMR Holding Corp. v. C & C Consultants, Inc.* (In Re MMR Holding Corp.), 203 B.R. 605, 612 (Bankrp. M.B. LA 1996); *In Re J.W. Mays*, 30 B.R. 769, 772 (Bankrp.S.D.N.Y. 1983).<sup>1</sup>

Once the Debtor assumes the lease, it is required to perform it in accordance with its terms. *In Re Nat'l Gypsum Co.*, 208 F. 3d 498,505 (5<sup>th</sup> Cir. 2002). Once assumed, any damages which may arise from a post-assumption breach are entitled to administrative claim status in the case. 11 U.S.C. §503(b)(1)(A); *In Re Greystone III Joint Venture*, 995 F. 2d 1274, 1281 (5<sup>th</sup> Cir. 1991) cert den'd, 506 U.S. 822 (1992); *L.G.C. Corp v. Boyle*, 768 F. 2d 1489, 1494 n. 6 (D.C.Cir.1985); *In Re Boston Post Road Ltd. P'ship*, 21 F. 3d

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<sup>1</sup> The Debtor in its Memorandum of Law in Support of its Motion for Approval of Assumption of Non-Residential Real Estate Lease states in part "It is the Debtor's business judgment that the Lease described in the Motion should be assumed. Essentially all of Debtor's operations depend on the interests afforded under the Lease, and, as assumption of the Lease is central to the Debtor's attempt to reorganize, the Debtor believes it is in the best interest of the estate to assume the Lease pursuant to the terms specified in the Motion."

477, 484 (2d Cir. 1994); *In Re Frontier Props Inc*, 979 F 2d 1358 1367 (9<sup>th</sup> Cir. 1992).  
See also *Three Collier on Bankruptcy* ¶ 365.03 [2] at 365-22(L. King 15<sup>th</sup> Ed.)

To the extent that the administrative claim includes a recovery for professional services compensation rendered by an attorney or an accountant, the expense is subject to the standard of reasonableness within the context of 11 U.S.C. §503(b)(4). *Matter of First Colonial Corp. of America*, 544 F. 2d 1291 (5<sup>th</sup> Cir. 1997); *Citing Johnson v. Georgia Hwy Express, Inc.* 488 F.2d 714, 717-19 (5<sup>th</sup> Cir. 1974).<sup>2</sup> In determining the amount of compensation that is reasonable for professional services of an attorney or an accountant, a district court must consider twelve factors:

- (1) The time and labor required;
- (2) The novelty and difficulty of the questions;
- (3) The skill requisite to perform the legal service properly;
- (4) The preclusion of other employment by the attorney to acceptance of the case;
- (5) The customary fee;
- (6) Whether the fee is fixed or contingent;
- (7) Time limitations imposed by the client or other circumstances;
- (8) The amount involved and the results obtained;
- (9) The experience, reputation and ability of the attorneys;
- (10) The ‘undesirability’ of the case;
- (11) The nature and length of the professional relationship with the client; and
- (12) Awards in similar cases.

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<sup>2</sup> The factors set forth in *Johnson* are substantially the same as Rule 1.5, Minnesota Rules of Professional Conduct, issued by the Minnesota Supreme Court, Rule 1.4 of the Texas State Bar Rules, Texas Government Code Article X, Section 9, State Bar Rules, Title 2, Subtitle A; and American Bar Association Code of Professional Responsibility, Ethical Consideration 2-18, Disciplinary Rule 2-106.

*Matter of 1<sup>st</sup> Colonial Corp of America*, 544 F. 2d 1291, 1298-1299. The failure of a bankruptcy judge in district court to apply proper legal standards and follow proper procedures in making the determination constitutes an abuse of discretion. *Massachusetts Mutual Life Ins. Co. v. Brock*, 405 F. 2d 429, 432 (5<sup>th</sup> Cir. 1968), cert den'd, 395 U.S. 906, 89 S.Ct. 1748 23 L.Ed. 2d 220 1969); Two Collier on Bankruptcy 330 [e](15<sup>th</sup> Ed. 1989).

The relevant facts are undisputed between Clocktower and the Debtor predicated upon the various motions and pleadings filed by each in the adversary proceeding as well as in this bankruptcy proceeding. The parties executed and entered into the Lease, which was assumed by the Debtor. The Leasehold constituted the sole principal asset of Debtor. The Debtor has had the exclusive use and benefit of the Leasehold, including collecting rents. Clocktower was involuntarily joined as a party in the adversary proceeding as well as the state proceeding. In order to preserve its right, title and interest in the Property Clocktower was required to defend as well as to prosecute claims regarding the validity and the value of the mechanic's liens. Clocktower's efforts ultimately contributed to the payment and release of the liens by Andreas. The preservation of Clocktower's right, title and interest in the Property inherently inured to the benefit of the Debtor, resulting in the Debtor's ability to reorganize and continue to receive the benefits of the Lease.

The Affidavits in Support of Clocktower's Motion for Administrative Expenses of Clocktower's Attorneys addresses and satisfies the twelve elements underlying the right and amount of recovery of legal fees and expenses set forth in *Johnson*. The Affidavits of Clocktower Venture, Jurgen Stielow as well as its agent, Neil Weber,

establish the actual costs incurred by Clocktower both with regard to legal fees and expenses as well as with regard to other actual and necessary expenses incurred by Clocktower in the preservation of the Property. Clocktower is entitled to recover as administrative expenses the aggregate amount of \$70,739.05 with a priority under 11 U.S.C. §507(a)(1).

This Court should grant Clocktower's Motion for Administrative Expenses in full.

Respectfully submitted,

---

Dale Ossip Johnson, Esq.  
Texas State Bar No. 10700000

THE JOHNSON FIRM, P.L.L.C.  
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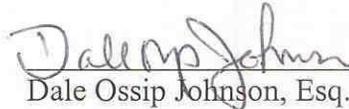
LAW OFFICES OF C. SCOTT MASSIE  
1055 East Wayzata Blvd., Ste. 300  
Wayzata, Minnesota 55391  
952-475-1515  
952-475-0311 (FAX)

*/s/ C. Scott Massie*  
\_\_\_\_\_  
C. Scott Massie, Esq.

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By: \_\_\_\_\_  
C. Scott Massie, Esq.



## SERVICE LIST

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