UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

BKY 4-90-179

BEHRENS MANUFACTURING CO.,

MEMORANDUM ORDER

Debtor.

At Minneapolis, Minnesota, July 23, 1990.

The above-entitled matter came on for hearing before the undersigned on 30th day of May, 1990 on a motion by Edward Bergquist ("Bergquist"), trustee for the bankruptcy estate of Lar-Rod Properties, Inc. ("Lar-Rod"), to compel payment of postpetition rent from property of the estate of Behrens Manufacturing Co. which secures allowed secured claims, pursuant to 11 U.S.C. Section 506(c). Third National Bank in Nashville and Winona National and Savings Bank, the secured creditors whose collateral Bergquist seeks to surcharge (the "Secured Creditors"), filed a response opposing the motion. The appearances were as follows: Bergquist, as trustee, in propria persona; David Mitchell for the Secured Creditors; Stephen Grinnell for Merchants National Bank of Winona ("Merchants"); and Melvin Orenstein for the debtor in possession (the "Debtor"). This Court has jurisdiction over the parties to and the subject matter of this case pursuant to 28 U.S.C. Sections 157 and 1334, and Local Rule 103. Moreover, this Court may hear and finally adjudicate this motion because its subject matter renders such adjudication a "core" proceeding pursuant to 28 U.S.C. Sections 157(b)(2)(A) and (O). By agreement of the parties, this Memorandum Decision will be limited to addressing solely the issues of standing, ripeness and waiver/estoppel.

I. FACTS

Lar-Rod and the Debtor both filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on January 12, 1990. Lar-Rod and the Debtor are both owned by Lar-Rod Enterprises, a non-debtor entity. The two owners of Lar-Rod Enterprises are the two officers of Lar-Rod and two of the three officers of the Debtor. In addition, the two owners are two of the three directors of each of the debtors. Lar-Rod and the Debtor also share the same third director. Both Lar-Rod and the Debtor were represented by the same law firm until Bergquist was appointed trustee in the Lar-Rod case.

Lar-Rod's principal asset is its ownership of certain real property which houses a manufacturing facility (the "Property"). Merchants holds duly recorded first and second mortgages and an assignment of rents on the Property and has a duly perfected security interest in all the pieces of manufacturing equipment that are fixtures on the Property. Lar-Rod had leased the Property and its manufacturing equipment to the Debtor, which operated one of its principal manufacturing facilities on the premises.

Bergquist was appointed Chapter 11 trustee in the Lar-Rod case by Order entered April 16, 1990. By the time Bergquist was appointed, the Debtor had fallen significantly into arrears on its lease obligations to Lar-Rod, since it had not paid rent following its filing for bankruptcy. Moreover, the lease by which Debtor enjoyed use and possession of the Property had been deemed rejected when the Debtor failed to assume it within the 60 day period prescribed by 11 U.S.C. Section 365(d)(4). Yet Lar-Rod had taken no action to compel the Debtor to pay rent or to remove the Debtor from possession of the Property prior to Bergquist's appointment.

The Debtor failed to pay Lar-Rod postpetition rent because it

was precluded from doing so by the restrictive provisions of the cash collateral order the Secured Creditors had demanded the Debtor accept. For several months prior to the Debtor's filing for bankruptcy, the Secured Creditors had repeatedly threatened hostile action against the Debtor because of its alleged pre-billing of accounts receivable. On the same day that Debtor filed for bankruptcy, it filed an expedited motion for interim use of cash collateral. At the January 16, 1990 hearing on said motion, the Court, by agreement of the parties, entered an Order authorizing interim use of cash collateral, but only to the extent of a schedule approved by the Secured Creditors. The cash-use schedule made no provision for payment of rent to Lar-Rod. Essentially all the Debtor's cash flow constituted cash collateral of the Secured Creditors, and thus the effect of the restrictive cash-use schedule was that postpetition rent could not be paid. Another hearing on interim use of cash collateral was held January 29, 1990, and an Order essentially similar to the January 16 Order was entered on January 30, 1990. Apparently, the Debtor was unwilling or unable to convince the Secured Creditors that cash collateral should be used to pay postpetition rent. A final hearing on use of cash collateral was set for February 12, 1990.

In February, the case reached a crisis after the Secured Creditors became convinced that Debtor's alleged pre-billing practices were continuing despite Debtor's assurances that it had mended its ways. On February 1, 1990, the Secured Creditors filed an expedited motion for appointment of a Chapter 11 trustee or an examiner. The February 2 hearing on said motion was continued to the February 12 final hearing on use of cash collateral.

The parties settled the motion for appointment of a trustee by entering into a stipulation that provided for the employment of an independent consultant to operate the Debtor (the "Stipulation"):

> Immediately upon entry of the Order approving this Stipulation, the Debtor shall hire, and maintain, a person to run its business (the "Manager"). The person to be hired and maintained shall be an independent person with no prior relationship to or affiliation with the Debtor, its officers, directors, or employees. The Manager shall be subject to TNB's [one of the Secured Creditors] approval. The Manager shall be responsible for the day-to-day operation of the Debtor and shall not answer to the Debtor's present officers or directors. The Manger shall exercise his/her own discretion in the operation of the Debtor, with the Manager's goal to be: (a) first, the maintenance and preservation of the Creditor's collateral, and (b) second, if not inconsistent with the maintenance and preservation of Creditors' collateral, the continued operation of the Debtor through March 10, 1990 to allow the sale of the Debtor's business as a going concern.

Like the previous cash collateral orders, the Stipulation again provided for restricted use of cash collateral, and again made no provision for payment of rent to Lar-Rod:

> TNB may but shall not be required to advance additional cash collateral to Debtor on a weekly basis for the next four week period ending March 10, 1990, upon written requests by the Debtor through the Manager setting forth the need for cash collateral and the projected return resulting from the use proposed by the Debtor. TNB may in its sole discretion reject any request for cash collateral; if TNB rejects any request for use of cash

collateral in whole or in part, the Debtor may file a motion with the Court requesting use of cash collateral. Until May, 1990, either Debtor did not request or the Secured Creditors would not accede to use of cash collateral to pay postpetition rent to Lar-Rod, for no such rent was paid. It appears that the Secured Creditors continued to make requested cash collateral advances past the March 10, 1990 deadline set forth in the Stipulation while negotiations with potential buyers of the Debtor continued.

The Stipulation also provided that the Debtor waived any right under 11 U.S.C. Section 506(c) to recover costs and expenses, such as postpetition rent, from the Secured Creditor's collateral (the "Waiver Provision"). In addition, the Stipulation granted the Secured Creditors relief from the automatic stay. The Stipulation was conditionally approved by Order entered February 12, 1990, which afforded parties in interest 15 days in which to file objections to the Stipulation pursuant to Bankruptcy Rule 4001(d).(1)

Footnote 1
The Committee of Unsecured Creditors in the Debtor's case subsequently objected to the Stipulation, which objection was settled by an amendment to the Stipulation. The amendment, which is not relevant to the instant motion, was approved by Order entered April 2, 1990.
End Footnote

Despite its duty to protect its creditors' interests, Lar-Rod objected to neither the restrictive cash collateral orders nor the Stipulation. Bergquist had not yet been appointed trustee, and thus was not served with the cash collateral motions and could not object to the cash collateral orders or the Stipulation. Furthermore, Lar-Rod's creditors were not served with the motions regarding use of cash collateral, and thus they were unable to object. The first sign of activity by Lar-Rod's creditors in the Debtor's case did not come until February 26, 1990, when Merchants filed a request for notice pursuant to Bankruptcy Rule 2002.

Subsequently, on March 28, 1990, Merchants filed a motion in the Debtor's case for relief from stay to take action in state court to remove the Debtor from possession of the Property. This Court granted said motion by Memorandum Order entered April 24, 1990.

Bergquist, following his appointment on April 16, filed the instant motion on April 27, 1990. He also commenced an action in state court to remove the Debtor from possession.(2) On May 14, 1990, the Debtor and Bergquist entered into a conditional stipulation whereby the Debtor agreed to pay in full its postpetition rent obligation, provided it could obtain an advance of cash collateral to make such payment, in exchange for Bergquist's forbearance from seeking a writ of restitution. The Secured Creditors, however, refused to advance cash collateral to pay rent to Lar-Rod. On May 16, 1990, Debtor filed motions for interim use of cash collateral and to reimpose the automatic stay as to the Secured Creditors, which had been terminated by this Court's approval of the Stipulation between Debtor and the Secured Creditors.

Footnote 2
Bergquist has not moved for relief from the automatic stay in order to pursue said action.
End Footnote

A hearing on said motions and the instant motion was held on May 30, 1990. At the conclusion of said hearing, I denied the Debtor's motion to reimpose the stay, and concluded that the motion for interim use of cash collateral was thereby rendered moot. An Order to such effect was entered July 12, 1990.

II. DISCUSSION

Bergquist seeks to recover postpetition rent from the Secured Creditors' collateral:

> The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

11 U.S.C. Section 506(c). The Secured Creditors assert three threshold objections to Bergquist's motion.

A. Standing

For their first objection, the Secured Creditors contend that Bergquist does not have standing to bring a motion under section 506(c), since the statute on its face empowers only the "trustee" to bring such a motion. Bergquist is a trustee, but in the Lar-Rod case rather than in the Debtor's case. The reference to "trustee" in section 506(c) identifies the trustee in the case in which the motion was made, which in this instance was the Debtor's case. Thus, the Debtor, exercising the powers of a trustee, is the only entity empowered, on the face of the statute, to bring a section 506(c) motion.

A number of courts have read the language of the statute to prohibit any entity not exercising the powers of a trustee in a case to bring a section 506(c) motion in that case. See, e.g., Central States, S.E. & S.W. Areas Pension Fund v. Robbins (In re Interstate Motor Freight Sys. IMFS, Inc.), 71 B.R. 741 (Bktcy. W.D. Mich. 1987); In re Dakota Lay'd Eggs, 68 B.R. 975 (Bktcy. D.N.D. 1987); In re J.R. Research, Inc., 65 B.R. 747 (Bktcy. D. Utah 1986); In re Air Center, Inc., 48 B.R. 693 (Bktcy. W.D. Okla. 1985); In re Fabian, 46 B.R. 139 (Bktcy. E.D. Pa. 1985); In re Proto-Specialties, Inc., 43 B.R. 81 (Bktcy. D. Ariz. 1984); Thomas v. Ralston Purina Co. (In re Thomas), 43 B.R. 201 (Bktcy. M.D. Ga. 1984); In re Manchester Hides, Inc., 32 B.R. 629 (Bktcy. N.D. Iowa 1983); In re S & S Indus., Inc., 30 B.R. 395 (Bktcy. E.D. Mich. 1983); In re New England Carpet Co., 28 B.R. 766 (Bktcy. D. Vt.), aff'd on other grounds sub nom., Gravel, Shea & Wright, Ltd. v. New England Carpet Co., 38 B.R. 703 (D. Vt. 1983), aff'd sub nom., Gravel, Shea & Wright, Ltd. v. Bank of New England (In re New England Carpet Co.) 744 F.2d 16 (2d Cir. 1984) (per curiam); In re Codesco, Inc., 18 B.R. 225 (Bktcy. S.D.N.Y. 1982). Many of these cases, however, adopt such a holding after little or no discussion. See, e.g., In re Fabian, 46 B.R. at 141; In re Proto-Specialties, Inc., 43 B.R. at 83; Thomas, 43 B.R. at 208; In re Manchester Hides, Inc., 32 B.R. at 633. Furthermore, two of the cases would permit the non-trustee claimant to bring a section 506(c) motion on behalf of the trustee. In re Dakota Lay'd Eggs, 68 B.R. at 978; In re Proto-Specialties, Inc., 43 B.R. at 84. It is difficult to fathom why it would be acceptable for a non-trustee claimant to bring a section 506(c) motion on behalf of the trustee to recover funds for that very claimant while it would not be acceptable for the claimant to bring the motion directly.

I conclude that the better reasoned cases support Bergquist's assertion of standing. See, e.g., In re DLS Indus., Inc., 71 B.R. 679 (Bktcy. D. Minn. 1985); Equitable Gas Co. v. Equibank N.A. (In re McKeesport Steel Casting Co.), 799 F.2d 91 (3d Cir. 1986);

Geller v. International Club Enter., Inc. (In re International Enter., Inc.), 105 B.R. 190 (Bktcy. D.R.I. 1989); In re Chicago Lutheran Hosp. Ass'n, 89 B.R. 719 (Bktcy. N.D. Ill. 1988); In re World Wines, Ltd., 77 B.R. 653 (Bktcy. N.D. Ill. 1987); Guy v. Grogan (In re Staunton Indus., Inc.), 74 B.R. 501 (Bktcy. E.D. Mich. 1987); In re Birdsboro Casting Corp., 69 B.R. 955 (Bktcy. E.D. Pa. 1987); In re Reda, Inc., 54 B.R. 871 (Bktcy. N.D. Ill. 1985); In re Wyckoff, 52 B.R. 164 (Bktcy. W.D. Mich. 1985); In re T.P. Long Chem., Inc., 45 B.R. 278 (Bktcy. N.D. Ohio 1985); In re Loop Hosp. Partn., 50 B.R. 565 (Bktcy. N.D. Ohio 1985). In the Equitable Gas Co. case, the U.S. Court of Appeals for the Third Circuit concluded that where the debtor in possession or trustee does not have reason to file a section 506(c) motion on a behalf of a provider of postpetition services, an equitable exception should be made to the rule forbidding creditors to act in lieu of the trustee to permit said provider to bring the motion directly. Equitable Gas Co., 799 F.2d at 94. If such an exception were not permitted, the debtor in possession or trustee would have the power to deny recovery under section 506(c) to claimants who would otherwise be entitled to such a recovery by refusing to bring motions on their behalf:

> It should be irrelevant . . . that Katten, and not the trustee, seeks compensation under 11 U.S.C. Section 506(c) for services Katten rendered while the debtor was in possession. Any other approach would give the trustee unrestricted discretion as to whether a party who arguably benefitted a secured creditor is entitled to pursue a claim against the secured creditor. If the trustee is friendly to the claimant, and is willing to pursue the 11 U.S.C. Section 506(c) claim on behalf of the claimant, the claimant will be able to collect assuming the 11 U.S.C. Section 506(c) claim is meritorious. If the trustee alone has standing, and the trustee is hostile to the claimant, the claimant's claims will be denied without notice and an opportunity for a hearing. Such a result would raise serious due process questions.

In re Chicago Lutheran Hosp. Ass'n, 89 B.R. at 726 n.9. Moreover, permitting standing to the claimant when the debtor in possession or trustee refuses to bring a section 506(c) motion on the claimant's behalf will bring the real parties in interest before the court. In re Reda, Inc., 54 B.R. at 881 n.23.

The Secured Creditors urge this Court to adopt the reasoning expressed in the Robbins case, which reasoning, they assert, compels the conclusion that Bergquist should be denied standing to bring his motion. The Robbins court reasoned that permitting a creditor to directly recover from secured creditors would violate the rule of equal treatment of administrative claims mandated by 11 U.S.C. Section 726(b). Robbins, 71 B.R. at 744. Apparently, the Robbins court had concluded that a claimant under section 506(c) is an administrative expense claimant, in which case it would be entitled to no better treatment of its claim than that received by other administrative expense claimants. The decision, however, provides no support for such a conclusion:

> The bankruptcy court in [Robbins] characterized this result [permitting a non-trustee claimant standing] as a violation of 11 U.S.C. Section 726(b), which provides for priorities and pro rata payment of claims. It is not clear to this Court, however, why recovery of monies expended by third parties to protect the secured

> creditor's collateral should flow into the general estate to be subject to Section 726(b). Thus the rationale of [Robbins] begs the question.

Guy, 74 B.R. at 506.

The premise on which the Robbins court based its reasoning is flawed. Administrative expense claims and claims under section 506(c) are mutually exclusive. A section 506(c) motion cannot be used to recover an administrative expense claim:

> Code Section 506(c) was not intended to substitute for the recovery of administrative expenses that are the appropriate responsibility of the debtor's estate.

In re Codesco, Inc., 18 B.R. at 230. See also Brookfield Prod. Credit Ass'n v. Borron, 738 F.2d 951 (8th Cir. 1984). Contra In re T.P. Long Chem., Inc., 45 B.R. at 287 n.14 (holding that a trustee can recover under section 506(c) only for costs allowable as an administrative expenses; citing, inter alia, In re Codesco, Inc. and Borron). By implication, the converse should also be true; an administrative expense claim should not be allowed to substitute for a section 506(c) claim, because a contrary result would cause the estate to bear an expense from which it did not benefit:

> "The underlying rationale for charging a lien-holder with the costs and expenses of preserving or disposing of the secured collateral is that the general estate and unsecured creditors should not be required to bear the cost of protecting what is not theirs." That exception has been codified in section 506(c) of the Bankruptcy Code . . ..

In re Chicago Lutheran Hosp. Ass'n, 89 B.R. at 727 (quoting In re Codesco, Inc., 18 B.R. at 225). Consequently, if Bergquist is permitted standing, he can recover rent from the Secured Creditors under section 506(c) only "to the extent of any benefit" to the Secured Creditors,(3) and he will have an administrative expense claim only for that portion of the rent obligation which the Debtor incurred for the benefit of the estate rather than primarily for the benefit of the Secured Creditors.

Footnote 3
Regardless of whether the Debtor or Bergquist brings the section 506(c) action, any portion of the rent which primarily benefitted the Secured Creditors should be paid to Lar-Rod and should not become part of the pool of assets from which administrative expense claims will be paid, since the Debtor has not made any payment to Lar-Rod for postpetition rent:
End Footnote

> This court believes it has the right to either permit the motion to be brought by the lessor or in the alternative to proceed as did the court in Proto[-]Specialties and grant any recovery of expenses to be had to the trustee [even though the trustee was not the moving party] who in turn can pay off the lessor.

In re Wyckoff, 52 B.R. at 167 (discussing In re Proto-Specialties, Inc., 43 B.R. 81). Any funds Bergquist may recover under section 506(c) would technically be property of the estate, but said recovery would be entirely subject to Lar-Rod's claim, and thus should pass directly from the Secured Creditors to Lar-Rod. Equitable Gas Co., 799 F.2d at 95 n.2.

Thus, neither the total amount of administrative expenses nor the pool of assets from which to pay them will be affected by

Bergquist's motion, and administrative expense claims will still be treated equally. Therefore, permitting Bergquist standing will not conflict with the provision in section 726(b) for equal treatment of administrative expense claims.

Footnote 4
On the contrary, if Bergquist were denied standing, other administrative expense claimants might suffer if there were not sufficient assets to pay their claims in full. If Bergquist were denied standing, he would have a compelling argument that Lar-Rod should be allowed an administrative expense claim for the full amount of postpetition rent, even though a portion of that rent may have been incurred primarily for the benefit of the Secured Creditors. Allowance of such an embellished administrative expense claim for Lar-Rod would reduce the assets available to pay other administrative expense claimants.
End Footnote

B. Ripeness

For their second objection, the Secured Creditors contend that Bergquist's motion is not ripe for consideration because he has not made demand on the Debtor to make such a motion on his behalf. In most instances, a court should not consider a non-trustee claimant's section 506(c) motion until demand has been made on the trustee.(5) In re DLS Indus., Inc., 71 B.R. at 681. Permitting non-trustee claimants to make such motions without first approaching the trustee would disrupt the trustee's efforts to administer and close the estate. In re Dakota Lay'd Eggs, 68 B.R. at 978.

Footnote 5
I decline to interpret Judge Mahoney's statements in In re DLS Industries, Inc. to require a non-trustee claimant seeking standing to meet the prerequisites imposed on a committee of unsecured creditors for bringing an action on behalf of the estate. See, e.g., Unsecured Creditors' Committee v. Noyes (In re STN Enter., Inc.), 73 B.R. 470 (Bktcy. D. Vt. 1987).
End Footnote

In the instant case, however, such a demand would be futile, since the Debtor has waived any right to bring a section 506(c) motion. There is no reason for this Court to delay consideration of this motion until after Bergquist has made such a futile gesture. C.f. International Club Enter., Inc., 105 B.R. at 193 (holding that lessor could bring section 506(c) motion because trustee had abandoned estate's interest in collateral).

C. Waiver/Estoppel

The Debtor's waiver is the basis of the Secured Creditor's third and final objection to Bergquist's motion. The Secured Creditor's assert that Lar-Rod, after notice, did not object to the provision of the provision of the Stipulation waiving the Debtor's right to bring a section 506(c) motion, and therefore Lar-Rod, through Bergquist its trustee, should be precluded from bringing a section 506(c) motion in lieu of the Debtor. The Secured Creditors base their assertion on the doctrines of implied waiver and equitable estoppel.

"Waiver is largely a question of intent." Pruka v. Maroushek, 182 Minn. 421, 424, 234 N.W. 641, 642 (1931). Intent to waive a known right, however, can be inferred from acts or statements not sufficient to constitute an express waiver:

> Waiver need not be proved by express declaration or agreement. It is more often proved by acts and conduct

> and declarations not expressly waiving the right in question. But the facts shown must be such as fairly and reasonably to lead to the inference that the person against whom it is to operate did in fact intend to waive his known right.

Id. Such an implied waiver, however, can be established only if the party against whom it is to operate performed a clear, unequivocal, and decisive act evidencing a purpose to waive its right, or said party must have engaged in conduct amounting to an estoppel on its part. 28 Am. Jur. 2d Estoppel and Waiver Section 160 (1966).

The Secured Creditors have failed to make a case for implied waiver. Mere silence is not sufficient to establish an implied waiver, unless there was an obligation to speak. Ohio Confection Co. v. Eimon Mercantile Co., 154 Minn. 420, 424, 191 N.W. 910, 911 (1923). Lar-Rod was under no obligation to object to the Waiver Provision, since Lar-Rod's standing to bring a section 506(c) motion on its own behalf rendered the Debtor's waiver of its section 506(c) rights of no importance to Lar-Rod. Thus, Lar-Rod's failure to object to the Waiver Provision was not a clear, unequivocal, and decisive act evidencing a purpose to waive its rights under section 506(c).

The Secured Creditors are correct that, pursuant to Bankruptcy Rule 4001(d), all provisions of the Stipulation, which was served upon Lar-Rod, became binding on Lar-Rod on its failure to file a timely objection to the Stipulation. But the Waiver Provision did not affect Lar-Rod's rights under section 506(c),(6) and therefore the fact that said provision became "binding" on Lar-Rod is irrelevant. Bergquist is not attempting to disturb the finality of Debtor's waiver of its rights under section 506(c), since he is asserting Lar-Rod's own rights rather than the Debtor's. Any harm to the Secured Creditors resulting from Bergquist's assertion of Lar-Rod's rights is the product of the Secured Creditor's mistaken belief that the Debtor's waiver of its rights under section 506(c) would render Lar-Rod powerless to bring a section 506(c) motion on its own behalf.

Footnote 6
The Secured Creditors' contention that the Debtor's waiver somehow directly waived Lar-Rod's rights under section 506(c) is no more compelling than their argument that standing should be denied to non-trustee claimants so that the trustee will have unbridled discretion to deny recovery to certain otherwise eligible claimants by refusing to bring motions on their behalf. Permitting the trustee such discretion would be inappropriate. In re Chicago Lutheran Hosp. Ass'n, 89 B.R. at 726 n.9.
End Footnote

Furthermore, the Secured Creditors have failed to make a case for estoppel. The Secured Creditors contend that Lar-Rod should be estopped from bringing a section 506(c) motion because Lar-Rod had for several months accepted the benefits of the Stipulation before bringing a motion that attempts to avoid Lar-Rod's obligations under the Stipulation. See Keith County Bank & Trust Co. v. Cannady Supply Co.(In re Cannady Supply Co.), 6 B.R. 674 (Bktcy. D. Kan. 1980). The holding of the Cannady Supply Co. case is inapplicable to the instant case for two reasons. First, as explained above, Bergquist's motion does not constitute an attempt to avoid Lar-Rod's obligations under the Stipulation, since the Waiver Provision had no impact on Lar-Rod. Second, Lar-Rod did not

receive any benefit from the Debtor's prolonged occupation of the Property without paying rent, which the Stipulation made possible, although Lar-Rod's and the Debtor's overlapping principals may have benefited therefrom. Consequently, Lar-Rod should not be estopped because it took no action for several months.

ACCORDINGLY, IT IS HEREBY ORDERED that a hearing will be held before the undersigned on July 31, 1990 at 10:00am regarding any remaining issues material to the motion discussed herein.

Nancy C. Dreher
United States Bankruptcy Judge