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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:
GTI CAPITAL HOLDINGS, LLC, an
Arizona limited liability company dba
ROCKLAND MATERIALS,
Debtor.

In re:
G.H. GOODMAN INVESTMENT
COMPANIES, LLC, an Arizona limited
liability company,
Debtor.

In Proceedings Under Chapter 11

Case Nos. 2-03-bk-07923-SSC through
2-03-bk-07924-SSC

(Jointly Administered)

MEMORANDUM DECISION

(Opinion to Post)

I. PRELIMINARY STATEMENT

On June 14, 2005, this Court took under advisement certain aspects of the Examiner's Motion for Entry of Order Authorizing the Disbursement of Funds to Pay Certain Administrative Claims ("Examiner's Second Distribution Motion"). However, the Court has subsequently resolved certain parts of this Motion, and appropriate orders have been entered thereon. For instance, Maricopa County intervened in the proceedings, advising the Examiner that certain real and personal property taxes had not been paid when the Debtors' assets were sold to Arizona Materials LLC pursuant to an Order dated February 19, 2004.¹ The Examiner, Comerica Bank ("Comerica"), and the other parties appearing before this Court on

1. See Docket No. 594.

1 the Examiner's Second Distribution Motion resolved the County's objections, and those taxes
2 have now been paid pursuant to various Orders.² The Examiner has also entered into a
3 settlement with Triad Commercial Captive Insurance Co. and Grant Goodman, and the Court
4 has entered an Order approving the settlement and allowing for a return of the sum of
5 \$250,000 held in the Registry Account to Goodman.³ The remaining issue to be determined
6 by this Court as to the Examiner's Second Distribution Motion is whether the Court may now
7 permit any further disbursements to the administrative expense claimants as a result of this
8 Court's decision in the surcharge litigation. The answer is a qualified yes. The balance of the
9 Examiner's Second Distribution Motion will be denied without prejudice. This Decision shall
10 constitute the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52,
11 Bankruptcy Rule 7052. The Court has jurisdiction over this matter, and this is a core
12 proceeding. 28 U.S.C. §§1334 and 157 (West 2005).

13 14 **II. FACTUAL DISCUSSION**

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16 On February 19, 2004, this Court entered an Order approving the sale of the
17 Debtors' assets. Pursuant to an allocation procedure, the Court allocated the approximate
18 sum of \$1,010,851 to the Debtors' rolling stock.⁴ However, the Examiner commenced an
19 action against Comerica challenging the perfection of Comerica's security interest on the
20 rolling stock. Pursuant to a Motion for Summary Judgment, filed in Adversary No. 04-676 ,
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24 **2.** See July 5, 2005 Order - Docket Entry No. 1146 and July 27, 2005 Minute Entry Order
-Docket Entry No. 1164.

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26 **3.** See Docket Entry No. 1170 and 1176; Settlement Order and Amended Settlement
Order, respectively. There is also a separate order re the Registry Account; See Docket Entry
27 No. 1172. A subsequent Order for the release of an additional \$4089.10 from the Court's
registry accounted for the interest accrued on the funds; See Docket Entry No. 1184.

28 **4.** See June 18, 2004 Order re allocation. See Docket Entry No. 781.

1 the Court granted the Examiner judgment as a matter of law on the claim, and Comerica's
2 security interest on the rolling stock was set aside.⁵ Comerica has appealed the judgment.

3 In September 2004, the Examiner made his first motion for a distribution to the
4 administrative expense claimants ("Claimants").⁶ The Examiner determined that he had the
5 sum of \$950,000 in sale proceeds from the sale of the Deer Valley facility, which facility
6 constituted unencumbered real property owned by the Debtor and sold to Arizona Materials.
7 Based upon the Examiner's then analysis of the allowed administrative expenses, the Court
8 gave him the authority, but not the requirement, to make interim distributions.⁷ In the second
9 distribution request, the Examiner's Second Distribution Motion, the Examiner believes that
10 he now has sufficient newly unencumbered assets to make another distribution to said
11 Claimants. The Examiner's analysis has resulted from this Court's granting of his Motion for
12 Summary Judgment, setting aside Comerica's lien on the rolling stock.

13 At the June 14, 2005 hearing, the Examiner made, as a part of the record, his
14 revised calculations as to the Claimants that could be paid from the amount of \$1,010,851.01
15 in proceeds allocated to the Debtors' rolling stock. First, the Examiner deducted the sum of
16 \$1,856.39 which had to be allocated as a catch-up payment to Carmichael, since that party
17 had an administrative expense which was approved after the initial interim distribution, but
18 had not been paid its pro rata distribution as of the June 14, 2005 hearing. Second, the
19 Examiner carved out certain tax payments from the interim distribution until the Court had
20 resolved the controversy concerning said claims. However, as noted above, the Court has
21 now resolved the dispute concerning the payment of the real and personal property taxes. The
22 Examiner had also requested the sum of \$141,584.00 be reserved for various bond or
23 insurance policy premiums that FTI Consulting Inc. ("FTI") had paid or would pay. The
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26 **5.** See Docket Entry No. 21 and Docket Entry No. 22.

27 **6.** See Docket Entry No. 869.

28 **7.** See Docket Entry No. 893.

1 Examiner then determined that he had the sum of \$793,985.84 in net cash available for a
2 distribution to the Claimants.

3 For the June 14, 2005 hearing, the Examiner prepared an updated exhibit
4 which set forth the Examiner's revised distribution. The Examiner was requesting the
5 authority to make a pro rata distribution of \$358,897.02 to "Resolved Administrative Claims"
6 and the sum of \$145,852.70, as a pro rata distribution, to Debtors' counsel (net of the
7 retainer), CBIZ Restructuring Group (one of the Debtors' professionals), and Brown and
8 Caldwell, a professional that provided extensive analysis of the 43rd Avenue and Buckeye
9 Properties, which properties were owned by the Debtors, encumbered with the lien of
10 Comerica, and sold to Arizona Materials. The Court emphasizes, in this Decision, that the
11 distribution to the Claimants, as outlined on the record to be paid on a pro rata basis by the
12 Examiner, constitute administrative expenses that have previously been allowed in amount by
13 Order of this Court.⁸

14 Comerica's objection to the pro rata payment of these Claimants is that it has
15 appealed this Court's judgment in favor of the Examiner setting aside the lien of Comerica on
16 the Debtors' rolling stock. However, even if this is a legitimate objection, the Court has now
17 separately entered its decision on the Debtors' and the Examiner's Motion to Surcharge
18 Comerica's collateral and the parties Supplemental Motion thereon ("Surcharge Motions").
19 In the Surcharge Motions Decision, the Court has concluded that certain personal property
20 lessors, the Examiner, and the Examiner's professionals have set forth a sufficient basis for
21 Comerica's collateral to be surcharged in the amount not to exceed \$1,399,458.47.

22 For instance, the Court has approved the payment of the rent and taxes which
23 have arisen with respect to the personal property leases that were rejected from August 1,
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27 **8.** See October 14, 2004 Order Allowing Claims, Docket Entry No. 951. The Debtors'
28 professionals also have allowed claims pursuant to Docket Entries No. 293, 458, 794, 795, 796,
and 797 since the Court overruled Comerica's objection to the claims of these parties.

1 2003, up to the closing of the sale transaction with Arizona Materials.⁹ Moreover, the Court
2 has also recently determined, in the Surcharge Motions Decision, that Brown and Caldwell,
3 also listed in the Examiner's Second Distribution Motion, has a legitimate surcharge against
4 Comerica's alleged collateral for the remaining fees related to its claim. The Court has also
5 determined that the vast majority of the fees of Bryan Cave, in its First and Second Fee
6 Applications, and the vast majority of the fees and expenses of the Examiner in his Fee
7 Applications may be surcharged against Comerica's alleged collateral.

8 Thus, the Examiner, based upon the Surcharge Motions Decision, is now in a
9 position to pay those claims that may be surcharged against Comerica's alleged collateral
10 from the funds that he is currently holding or through an adversary proceeding to seek a
11 turnover of a portion of the funds already paid to Comerica as a result of the liquidation of its
12 collateral. The reality is that the funds currently held by the Examiner constitute the rolling
13 stock litigation proceeds. However, given the projected amount of the surcharge claims (the
14 amount of \$1,399,458.47), the Examiner is holding insufficient funds, as this time, to make a
15 further distribution on the surcharge claims and on the claims that he seeks to pay pursuant to
16 his Second Distribution Motion. Moreover, there are certain claims listed in the Second
17 Distribution Motion which the Examiner never sought to surcharge against Comerica's
18 alleged collateral. For instance, the Examiner has listed trade payables in the amount of
19 \$131,746.44, the claim of the Flood Control District in the amount of \$100,000, the Arizona
20 Department of Revenue in the amount of \$16,801.61, and the Carmichael claim in the amount

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23 **9.** The Court did disallow a surcharge against Comerica's collateral as to those leases
24 which were rejected for the time period from May through July 2003. Empire Southwest LLC,
25 which has an allowed claim of \$67,275, and was to receive a pro rata distribution of \$19,670.14,
26 may not be paid at this time, since the lease as to said claimant was rejected prior to the
27 appointment of the Examiner. The Court is unable to conclude that either the subjective or
28 objective test under Section 506 of the Bankruptcy Code has been met as to said claim. There
may be other claimants in the "Resolved Administrative Claims" on the Examiner's exhibit
presented at the June 14, 2005 hearing that are similarly situated and must be excluded from
payment at this time.

1 of \$6,274.50, which are valid administrative expenses against this estate, but are not included
2 within the permissible surcharge against Comerica's collateral.

3 The Examiner should determine how he wishes to proceed given the overlap
4 between the claims allowed to be paid in the Surcharge Motions Decision and in his current
5 Second Distribution Motion. The Examiner may wish to use all of the funds that he is
6 currently holding which represent the proceeds of the rolling stock litigation to make an
7 interim distribution to those Claimants, in the amounts as revised by this Decision, which are
8 listed only in the Second Distribution Motion. The Examiner may have a different approach
9 in mind given this Court's recent Surcharge Motions Decision.

10 If the Examiner should elect to follow a procedure to make a pro rata
11 distribution to those Claimants listed only in the Second Distribution Motion, Comerica has
12 expressed concern that any such payment of the rolling stock proceeds will make it
13 impossible for Comerica to recover the proceeds at a later date, if it should be successful on
14 appeal of the judgment in the rolling stock litigation. However, this concern may be resolved
15 by the Examiner proposing a Knudsen-type resolution, whereby the Claimants may present
16 documentation to this Court to support their financial ability to return funds to the bankruptcy
17 estate in the event that Comerica is successful on appeal. In re Knudsen Corp., 84 B.R. 668
18 (9th Cir. BAP 1988). Such a representation from the Claimants will vitiate any concern by
19 Comerica that there is no satisfactory way for it to seek a return of its money.

20 Based upon the foregoing, the Examiner's Second Distribution Motion is
21 granted, in part, and denied, in part. The Examiner shall prepare an updated notice of those
22 Claimants that shall receive a distribution from the rolling stock proceeds, whether said
23 Claimants have a claim that may be paid under the Surcharge Motions Decision and the
24 Examiner's Second Distribution Motion (the so-called overlapping claims described in this
25 Decision), and the amount of each pro rata distribution. If the Examiner intends to pay one or
26 more Claimants with only a claim set forth in the Second Distribution Motion, he should state
27 that as well. Once that Notice has been served on creditors and interested parties, the Court
28 shall allow 14 days to respond. If no responses are timely filed, the Court shall enter an order

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permitting the Examiner's proposed distribution. If an objection is timely filed, the Court may set a hearing on the matter.

DATED this 22nd day of November, 2005.

Sarah Sharer Curley

Honorable Sarah Sharer Curley
U. S. Bankruptcy Judge

BNC TO NOTICE