UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

ROSE WAY, INC.	Case No.	89-1273-C
DOUBLE-D LEASING, INC.		89-1274-C
DOUBLE-D, INC.,		89-1275-C
	Chapter 11	

Debtors.

JUDGMENT

The issues of this proceeding having been duly considered by the Honorable Russell J. Hill, United States Bankruptcy Judge, and a decision having been reached,

IT IS ACCORDINGLY ORDERED as follows:

(1) Associates' motion for injunctive relief is denied.

(2) Associates' motion for relief from stay is denied.

(3) Associates' motion for adequate protection is granted and Rose Way must provide adequate protection as follows:

(a) Payments of $500.00 per month for each Peterbilt commencing September 15, 1989.

(b) Monthly proof of insurance and adequate maintenance of each Peterbilt.

(c) Information regarding the location and condition of each Peterbilt on the date of this order.

(d) Proof of payment of federal highway use taxes.

Dated this *30th* day of August, 1989.

Mary M. Weibel
Clerk of U.S. Bankruptcy Court

By:_____
Deputy Clerk

SEAL OF U.S. BANKRUPTCY COURT
ENTRY OF JUDGMENT

Dated: August 30, 1989

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

ROSE WAY, INC.	Case No.	89-1273-C
DOUBLE-D LEASING, INC.		89-1274-C
DOUBLE-D, INC.,		89-1275-C
	Chapter 11	

Debtors.

ORDER--MOTION FOR RELIEF FROM STAY.
FOR INJUNCTIVE RELIEF AND FOR ADEOUATE PROTECTION

On July 11, 1989, an evidentiary hearing was held on the motion for relief from stay, injunctive relief and adequate protection. The following attorneys appeared on behalf of their respective clients: David Hassel and David Wetsch for Associates Leasing, Inc. (hereinafter “Associates”) and William I. Kampf for Rose Way, Inc., Double—D Leasing, Inc. and Double-D, Inc. (hereinafter “Rose Way”). At the conclusion of said hearing, the Court took the matter under advisement upon a briefing deadline. Briefs were timely filed and the Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b) (2). The Court, upon review of the pleadings, arguments of counsel, evidence admitted and briefs submitted, now enters its findings and conclusions pursuant to F.R.Bankr.P. 7052.

FINDINGS OF FACT

1. On August 12, 1987, Rose Way entered into an agreement with Associates Leasing. This agreement was labeled “Truck Lease Agreement” (hereinafter “Agreement”).

2. Under the Agreement, Associates “leased” to Rose Way 10 1988 model 377 Peterbilt tractors and 10 1988 model 379 Peterbilt tractors (hereinafter “Peterbilt (s)” unless designated specifically as “Peterbilt 377s” or “Peterbilt 379s”). Associates acquired the Peterbilts from Kansas City Peterbilt, but Rose Way selected the Peterbilts for Associates and took delivery of the units directly from Kansas City Peterbilt.

3. Associates acquired the Peterbilt model 377s for $80,200.00 per unit. Associates acquired the Peterbilt 379s for $79,900.00 per unit. However, Rose Way negotiated a purchase price of approximately $70,000.00 per Peterbilt and received a rebate of approximately $10,000.00 per unit directly from Kansas City Peterbilt.

4. Associates leased the units to Rose Way for a 48—month term using a scheduled value of $80,200.00 for the Peterbilt 377s and a scheduled value of $79,900 for the Peterbilt 379s.

5. The Rose Way expert witness, Tom Yoho, testified that the Peterbilts depreciate at a rate of from $500.00 to $600.00 per month.

6. The Associates expert witness, Daniel Lee Mitchell, testified that the Peterbilts depreciate at a rate of approximately

20% per unit in the first year and $500.00 - $600.00 per month thereafter.

7. The Agreement contains the following provisions:

(a) An “open—end lease” or “residual guaranty” clause (hereinafter “residual guaranty”) which provides that upon the expiration of the 48-month term of the Agreement or termination of the Agreement by Rose Way, Rose Way must return the Peterbilts to Associates. Upon return of a unit, Associates must sell the unit at a public or private sale, for the highest cash offer received at the time of sale. Rose Way is entitled to proceeds of the sale that exceed the final adjustment amount. If a sale price is less than the final adjustment amount, Rose Way is liable to Associates for the deficiency. The final adjustment amount is calculated by multiplying the final adjustment percentage times the scheduled value of the Peterbilt. The final adjustment percentage on September 1, 1987, is 99.04%. Each month thereafter the final adjustment percentage decreases. On September 1, 1991, the expiration date of the 48 month lease, the final adjustment percentage is 25%.

(b) Rose Way must insure the Peterbilts on behalf of Associates.

(c) Risk of loss was assumed by Rose Way and Associates has no obligation to repair or replace the Peterbilts. Rose Way is responsible for maintenance of the Peterbilts.

(d) Upon default by Rose Way, Associates may take possession of the Peterbilts or require Rose Way to return the Peterbilts to

Associates. At its option, Associates may sell the Peterbilts after it obtains possession. Whether the Peterbilts are sold or not, Rose Way is liable to Associates for accellerated rental payments, final adjustment amounts, and sale proceeds.

(e) Rose Way agreed to pay Associates two advance rental payments on each vehicle.

(f) Warranties from Associates to Rose Way are excluded.

(g) Rose Way is responsible for all sales, use, personal property, leasing, leasing use, stamp or other taxes, levies, imposts duties, charges, etc. However, Associates is entitled to the investment tax credit and accelerated cost recovery or depreciation with respect to each of the vehicles. Rose Way must pay all fees, dues, government assessments and charges.

(h) The Agreement is to be interpreted pursuant to the laws of the State of Illinois.

8. At the expiration of the 48-month term, the total amount paid to Associates for each Peterbilt is as follows:

		377	379
Monthly rental payment		$ 1,571.24	$ 1,565.36
Months	X	48.00	48.00
Total rental payments		$75,419.52	$75,137.28
Scheduled Value		80,200.00	79,900.00
9/1/91 final adjustment percentage	X	25.00	25.00
Associates guaranteed proceeds from sale		$20,050.00	$19,975.00
Associates proceeds from sale		$20,050.00	$19,975.00
Total rental payments		75,419.52	75,137.28
		$95,469.52	$95,112.28

9. Roseway defaulted on its lease payments under the agreement.

10. On May 25, 1989, Associates requested and received from the Polk County District Court an Order granting writ of replevin against Rose Way for the seizure and return of the 20 Peterbilts. The Peterbilts have not been seized and are not in the possession of Associates.

DISCUSSION

A. MOTION FOR INJUNCTIVE RELIEF

Associates seeks injunctive relief enjoining and restraining Rose Way. An action to obtain an injunction is an adversary proceeding. B.R. 7001. Bankruptcy Rule 7065, which governs injunctions, incorporates F.R. Civ. 65 and makes Rule 65 applicable to all adversary proceedings. Associates has not commenced an adversary proceeding and does not follow the procedures of Rule 7065. Therefore, Associates' motion for injunctive relief is denied.

B. MOTION FOR RELIEF FROM STAY

1. True Lease or Lease Intended as Security.

The court must initially determine whether the Agreement is a true lease or a lease intended as security. Whether a document is a true lease or a lease intended as security is a question of state law. The Agreement provides that it is to be interpreted and enforced under the laws of Illinois and the parties agree that the law of the State of Illinois should govern the interpretation of the Agreement. Illinois adopted the Uniform Commercial Code, effective

July 2, 1962. Therefore, the terms of the Uniform Commercial Code govern interpretation of the Agreement.

The basic guideline for determining whether a lease is a true lease or a lease intended as security under the Uniform Commercial Code is set forth in U.C.C. §1—201(37), the U.C.C. definition of security interest. According to U.C.C. §1-201(37), whether a lease is a true lease or a lease intended as security depends on the intention of the parties. In re Pacific Express. Inc., 780 F2d 1482 (9th Cir. 1986). An objective standard is employed to determine the intent of the parties at the time of purchase or lease. In re Beker Ind. Corp., 69 B.R. 937 (Bankr. S.D.N.Y 1987). U.C.C. §1—201(37) specifically provides in pertinent part:

> Whether a lease is intended as security is to be determined by the facts of each case; however,
>
> (a) the inclusion of an option to purchase does not of itself make the lease one intended
> for security, and
>
> (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security. U.C.C. §1-201(37)

Following the portion of U.C.C. §1-201(37) outlined above, courts have consistently looked to whether the lease contains an option to purchase for nominal consideration to determine if a lease is intended as security under U.C.C. §1-201(37). See, e.g. Percival Construction Co. v. Miller and Miller Auctioneers. Inc., 532 F.2d 166 (10th Cir. 1976); In re Beker Ind. Corp., 69 B.R. 937 (Bankr.

S.D.N.Y. 1987). However, even if a lease does not contain a nominal purchase option, the lease still may be deemed a lease intended as security if facts otherwise indicate that the parties intended a security agreement. In re Tucker, 34 B.R. 257 (Bankr. W.D. Okla. 1983); In re Tulsa Port Warehouse Co., Inc., 4 B.R. 801 (N.D. Okla. 1980), aff'd, 690 F2d 809 (10th Cir. 1982). Therefore, our analysis of whether the Agreement is a true lease or a lease intended as security will explore: 1) is there a nominal purchase option in the Agreement, and 2) are there other factors that indicate the parties intended a security interest.

a. Nominal Purchase Option

The Agreement does not contain a provision which expressly states that Rose Way has the option to purchase the Peterbilts. To counter this fact, Rose Way argues that the residual guaranty clause of the Agreement creates an implied option to purchase. While this argument has some merit, it is clearly a liberal construction of the residual guaranty clause. See In re Loop Partnership, 35 B.R. 929, 934 (Bankr. N.D. Ill. 1983). The Court finds that the Agreement does not contain an express or implied option to purchase. Therefore, the tests concerning nominal or substantial consideration are not applicable and are not analyzed in this opinion.

b. Other Factors which Indicate the Lease is Intended as Security

The residual guaranty clause does not create an implied option to purchase. However, this clause is the primary factor which indicates that the Agreement is a lease intended as security.

A number of cases analyze leases with provisions similar to the residual guaranty clause in the Agreement and hold that residual guaranty provisions in a lease make the lease a lease intended for security. See e.g., In re Tillery, 571 F2d 1361 (5th Cir. 1978); In re Tulsa Port Warehouse Company. Inc., 4 B.R. 801 (N.D. Okla. 1980), aff'd, 690 F2d 809 (10th Cir. 1982); In re Gehrke Enterprises, Inc., 1 B.R. 647 (Bankr. W.D. Wisc. 1979).

The reasoning the above courts use to hold that a lease is intended as security due to a residual guaranty provision is applicable to the case *sub judice.* At the expiration of the 48—month term of the Agreement or termination by Rose Way, Rose Way must return the Peterbilts and the Peterbilts must be sold by Associates. Rose Way is entitled to proceeds of the sale that exceed the final adjustment percentage and Rose Way is liable to Associates for any deficiency. Thus, Rose Way, not Associates, has the real interest in the disposition of the Peterbilts. Associates' interest in the Peterbilts is limited to a guaranteed return of the cost of the Peterbilts plus interest. Therefore, the residual guaranty in the Agreement essentially transfers ownership in the Peterbilts from Associates to Rose Way, and reveals that the Agreement is indeed a lease intended as security.

The one possible discrepancy between the Agreement and the documents at issue in the cases cited above is that the Agreement contains a default provision under which Associates may have the option, rather than the obligation, to sell the vehicles. The

documents in the cases cited above apparently required sale upon default of lessee. The Court finds that this distinction is not significant. The Agreement requires sale by Associates upon termination by Rose Way or at the expiration of the 48-month term of the Agreement. Associates has the option to sell only when there is a default by Rose Way and Associates obtains possession of the Peterbilts. This type of default provision is common in security agreements and therefore clearly does not alter the Court's finding that the parties intended a security interest under the Agreement.

Other factors which tend to indicate the lease is intended as a security interest are as follows:

> 1) whether the lessee is required to insure the items on behalf of the lessor in an amount equal to the total rental payments; 2) if risk of loss or damage is on the lessee; 3) if lessee is to pay for taxes, repairs, damage and maintenance; 4) whether there exist default provisions governing accelleration and resale of the item; 5) whether there exists a substantial nonrefund— able deposit requirement; 6) when goods are to be selected from a third party by the lessee; 7) rental payments are a reasonable equivalent of the cost of the items plus interest; 8) the lease is to be discounted with a bank; and 9) warranties generally found in the lease are excluded by the agreement.

In re Tucker, 34 B.R. at 261. Factors which conversely indicate the existence of a true lease are:

> 1) if the purchase option price approximates the market value at the time of exercise of the option; 2) rental charges indicate intention to compensate lessor for loss of value over term of lease due to normal aging and obsolesence; 3) rentals which are not excessive and option price that is not too low; and 4) if facts demonstrate lessee is acquiring no equity in leased items during term of lease.

In re Tucker, 34 B.R. at 261.

Applying the above-stated list of lease intended as security factors to the Agreement, the Court finds further support for its conclusion that the parties intended a security interest rather than a true lease. First, Rose Way must insure the items on behalf of Associates, bear the risk of loss or damage to the Peterbilts, and pay for taxes, repairs, damage and maintenance on the Peterbilts. Second, there is a default provision governing accelleration and resale, and a substantial nonrefundable deposit requirement in the Agreement. Third, Rose Way selected the Peterbilts from a third party. Fourth, the rental payments under the agreement are a reasonable equivalent of the costs of the items plus interest. Finally, warranties from Associates to Rose Way are excluded under the Agreement.

Applying the factors stated above which indicate a true lease rather than a lease intended as security, the Court also finds support for its conclusion that the parties intended a security interest. First, rental payments under the Agreement indicate an intention by the parties to compensate Associates for more than the loss of value of the Peterbilts over the term of the lease due to normal aging and obsolescence. In addition, the facts clearly demonstrate that Rose Way acquired an ownership interest, "equity," in the leased items under the Agreement due to the residual guaranty clause discussed supra.

In summary, applying the Tucker factors to the Agreement provides the Court with further support for its conclusion that the

Agreement is a lease intended as security. However, the Tucker factors may also appear in true leases. In re Loop Hospital Partnership, 35 B.R. at 936. In addition, the residual guaranty clause distinguishes the Agreement from the lease in Carlson v. Tandy Computer Leasing, 803 F2d 391 (8th Cir. 1986), a case Associates argues should be controlling. Therefore, without a provision such as the residual guaranty clause, the existence or nonexistence of an express nominal purchase option would be a very significant factor in determining whether a lease is intended as security.

2. section 362(d) Automatic Stay Provisions

Because the Agreement is a lease intended as security rather than a true lease, Rose Way owned the Peterbilts on the date Rose Way filed its Chapter 11 petition. See In re Pacific Express, Inc., 780 F2d at 1486. The Peterbilts are thus property of the estate under §541 and are subject to the §362 automatic stay.

Under §362(d), on request of a party in interest and after notice and a hearing, the court may lift stay under either of two grounds:

> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if ——
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization.

11 U.S.C. §362(d). Pursuant to §362(g), Associates has the burden of proof on the issue of Rose Way's equity in the Peterbilts, and Rose Way has the burden of proof on all other issues.

a. §362(d) (1)

The adequate protection this Court requires Rose Way to provide for the automatic stay to remain in effect is stated infra.

b. §362(d)(2)

Under §362(d) (2), Associates is entitled to relief if: 1) Rose Way has no equity in the Peterbilts; and 2) the Peterbilts are not necessary to an effective reorganization. Rose Way and Associates agree that the current value of the Peterbilts is far less than the balance due under the Agreement. Therefore, for purposes of §362(d) (2), Rose Way does not have equity in the Peterbilts. The only remaining issue thus is whether the Peterbilts are necessary to an effective reorganization.

The meaning of the phrase "necessary to an effective reorganization" in §362(d) (2) (B) is subject to two different interpretations. One line of cases places the emphasis on "necessary" and holds that a debtor can meet its burden of proof by showing that without the property creditor seeks to recapture, the debtor could not reorganize. In re Rassier, 85 B.R. 524, 528 (Bankr. D. Minn. 1988); In re Koopmans, 22 B.R. 395, 407 (Bankr. D. Utah 1982). Under the "necessity" test, a debtor is not required to show a reasonable likelihood of a successful reorganization in order to defeat a creditor's §362(d) (2) motion to lift stay. Id.

The second line of cases places the emphasis on "effective reorganization" and requires debtor not only to show that the property is essential to reorganization but to demonstrate that an effective reorganization is realistically possible. Matter of Belton Inns. Inc., 71 B.R. 811, 817 (Bankr. S.D. Iowa 1987). This court has adopted the "effective reorganization" test under §362 (d) (2) (B). In the Matter of KCC-Fund IX, A Limited Partnership, Case No. 88—808—C, unpublished op. (Bankr. S.D. Iowa Jan. 30, 1989).

Applying the "effective reorganization" test to Rose Way, it is clear that the Peterbilts are essential to the Rose Way reorganization. In addition, an effective reorganization is at the present time realistically possible. Therefore, the Court will not grant Associates relief from the automatic stay under §362(d) (2).

C. Motion for Adequate Protection

The Court orders Rose Way to provide Associates with the following adequate protection beginning September 15, 1989:

(1) Payments of $500.00 per month for each Peterbilt.

(2) Monthly proof of insurance and adequate maintenance of each Peterbilt.

(3) Information regarding the location and condition of each Peterbilt on the date of this order.

(4) Proof of payment of federal highway use taxes.

ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes:

(1) Associates has not commenced an adversary proceeding to

seek injunctive relief and therefore is not entitled to injunctive relief.

(2) Because the Agreement is a lease intended as security, the Peterbilts are property of the estate under §541 and subject to the §362 automatic stay. Associates is not entitled to relief from the automatic stay under §362(d).

(3) Associates is entitled to adequate protection under §361.

IT IS ACCORDINGLY ORDERED as follows:

(1) Associates' motion for injunctive relief is denied.

(2) Associates' motion for relief from stay is denied.

(3) Associates' motion for adequate protection is granted and Rose Way must provide adequate protection as follows:

(a) Payments of $500.00 per month for each Peterbilt commencing September 15, 1989.

(b) Monthly proof of insurance and adequate maintenance of each Peterbilt.

(c) Information regarding the location and condition of each Peterbilt on the date of this order.

(d) Proof of payment of federal highway use taxes.

Dated this 30th day of August, 1989.

RUSSELL J.HILL
U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

IN RE: CIVIL NO. 89-817-B

ROSE WAY, INC., ORDER REMANDING TO BANKRUPTCY COURT

Debtor

Appellant Associates Leasing, Inc. (Associates) appeals from an order and judgment entered by the bankruptcy court, the Honorable Russell J. Hill, on August 30, 1989. The sole issue presented on appeal "is whether the bankruptcy court erred as a matter of law in not allowing Associates adequate protection payments beginning as of the date of the filing of the Chapter 11 Petition in this case or, alternatively, as of the date Associates filed its motion for relief from the automatic stay." Appellant's Brief p.1.

On February 9, 1990, I granted appellant's motion to continue oral arguments. I ordered "that the hearing in this case scheduled for February 13, 1990, is indefinitely postponed pending a ruling on a motion for summary judgment by Judge Hill in Sternco. Inc. v. Associates Leasing. Inc."

The parties have informed me that Judge Hill granted summary judgment to Associates and also granted Associates relief from the automatic stay. The parties disagree as to whether Judge Hill's rulings render Associates' appeal moot. In order to determine whether the appeal is moot, there is a preliminary issue which must be decided. That issue is whether the grant of relief from the automatic stay forecloses Associates from receiving the additional adequate protection payments which it seeks in this appeal.

I have read Judge Hill's rulings and it appears that the parties did not raise this preliminary issue before the bankruptcy court and the bankruptcy court did not address the issue. Because I believe that this is an issue which the parties

should brief for the bankruptcy court and the bankruptcy court should decide in the first instance before I proceed further with Associates' appeal, I will remand this case to Judge Hill so that he has the opportunity to decide the above referenced issue.

IT IS ORDERED that this case be remanded to the bankruptcy court for the limited purpose of Judge Hill deciding whether the grant of relief from the automatic stay forecloses Associates from receiving the additional adequate protection payments which it seeks in this appeal.

Dated this 29TH day of May, 1990.

HAROLD D. VIETOR, Chief Judge
Southern District of Iowa

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	District Court Civil No. 89—817—B
ROSE WAY, INC.,	Bankruptcy Case No. 89—1273—C H
Debtor.	Chapter 7

ORDER--STATUS CONFERENCE ON ORDER
REMANDING TO BANKRUPTCY COURT

On June 6, 1990, a status conference was held on the District Court's order remanding to the Bankruptcy Court. The following attorneys appeared on behalf of their respective clients: William I. Kampf and Elizabeth A. Nelson for Trustee, Sternco, Inc. (the Bankruptcy Court has subsequently converted this case to Chapter 7, and Thomas McCuskey is the Chapter 7 Trustee), and Morris J. Nunn for Associates Leasing Inc. ("Associates"). At the conclusion of said status conference, the Bankruptcy Court took the matter under advisement upon a briefing deadline. Briefs were timely filed and the Bankruptcy Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b) (2). The Bankruptcy Court, upon review of the order remanding to Bankruptcy Court, arguments of counsel and briefs submitted, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. On June 8, 1989, Rose Way, Inc. ("Rose Way") filed a voluntary Chapter 11 petition.

2. Associates filed a motion for relief from stay, for injunctive relief, or for adequate protection on June 12, 1989.

3. On August 30, 1989, after an evidentiary hearing, the Bankruptcy Court entered its order and judgment ruling that Rose Way was to pay, as and for adequate protection to Associates, the sum of $500.00 per month for each of twenty Peterbilt trucks ("Peterbilts") commencing September 15, 1989.

4. Associates appealed the August 30, 1989 order. The sole issue presented on appeal is whether the Bankruptcy Court erred as a matter of law in not allowing Associates adequate protection payments beginning as of the date of the filing of the Chapter 11 petition in this case or, alternatively, as of the date Associates filed its motion for relief from the automatic stay.

5. On March 8, 1990, the Bankruptcy Court entered an order which granted a lift of the stay as to three Peterbilts.

6. On April 25, 1990, concurrent with an order granting summary judgment for Associates in Sternco. Inc. v. Associates Leasing, Inc. (Matter of Rose Way, Inc.), 113 B.R. 527 (Bankr. S.D. Iowa 1990), the Bankruptcy Court granted Associates' motion for relief from stay as to the seventeen remaining Peterbilts.

7. In an order filed May 30, 1990, the District Court remanded to the Bankruptcy Court the issue of whether the grant of relief from the automatic stay on the Peterbilts forecloses Associates from receiving the additional adequate protection payments which it seeks in its appeal to the District Court.

DISCUSSION

The District Court has remanded to allow the Bankruptcy Court to determine whether the grant of relief of the automatic stay forecloses Associates from receiving the additional adequate protection payments which it seeks in its appeal of the Bankruptcy Court's August 30, 1989 order.

11 U.S.C. §361 provides in pertinent part:

> When adequate protection is required under 11 U.S.C. §362.. .of an interest of an entity in property, such adequate protection may be provided by-
>
> (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under 11 U.S.C. §362.. .results in a decrease in the value of such entity's interest in such property...

By lifting the stay, the Bankruptcy Court merely allowed Associates to regain possession of its collateral. Lifting the stay does not affect Associates' right to payment to the extent that the stay under 11 U.S.C. §362 resulted in a decrease in value to the Peterbilts prior to the lifting of the stay.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes that the grant of relief from the automatic stay does not foreclose Associates from receiving the additional adequate protection payments which it seeks in its appeal.

IT IS ACCORDINGLY ORDERED that this case be returned to the District Court.

Dated this 10th day of October, 1990.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	District Court Civil No. 89—817—B
ROSE WAY, INC.,	Bankruptcy Case No. 89—1273—C H
Debtor.	Chapter 7

ORDER- - STATUS CONFERENCE ON ORDER REMANDING TO BANKRUPTCY COURT

On June 6, 1990, a status conference was held on the District Court's order remanding to the Bankruptcy Court. The following attorneys appeared on behalf of their respective clients: William I. Kampf and Elizabeth A. Nelson for Trustee, Sternco, Inc. (the Bankruptcy Court has subsequently converted this case to Chapter 7, and Thomas McCuskey is the Chapter 7 Trustee), and Morris J. Nunn for Associates Leasing Inc. ("Associates"). At the conclusion of said status conference, the Bankruptcy Court took the matter under advisement upon a briefing deadline. Briefs were timely filed and the Bankruptcy Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b) (2). The Bankruptcy Court, upon review of the order remanding to Bankruptcy Court, arguments of counsel and briefs submitted, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. On June 8, 1989, Rose Way, Inc. ("Rose Way") filed a voluntary Chapter 11 petition.

2. Associates filed a motion for relief from stay, for injunctive relief, or for adequate protection on June 12, 1989.

3. On August 30, 1989, after an evidentiary hearing, the Bankruptcy Court entered its order and judgment ruling that Rose Way was to pay, as and for adequate protection to Associates, the sum of $500.00 per month for each of twenty Peterbilt trucks ("Peterbilts") commencing September 15, 1989.

4. Associates appealed the August 30, 1989 order. The sole issue presented on appeal is whether the Bankruptcy Court erred as a matter of law in not allowing Associates adequate protection payments beginning as of the date of the filing of the Chapter 11 petition in this case or, alternatively, as of the date Associates filed its motion for relief from the automatic stay.

5. On March 8, 1990, the Bankruptcy Court entered an order which granted a lift of the stay as to three Peterbilts.

6. On April 25, 1990, concurrent with an order granting summary judgment for Associates in Sternco, Inc. v. Associates Leasing. Inc. (Matter of Rose Way. Inc.), 113 B.R. 527 (Bankr. S.D. Iowa 1990), the Bankruptcy Court granted Associates' motion for relief from stay as to the seventeen remaining Peterbilts.

7. In an order filed May 30, 1990, the District Court remanded to the Bankruptcy Court the issue of whether the grant of relief from the automatic stay on the Peterbilts forecloses Associates from receiving the additional adequate protection payments which it seeks in its appeal to the District Court.

DISCUSSION

The District Court has remanded to allow the Bankruptcy Court to determine whether the grant of relief of the automatic stay forecloses Associates from receiving the additional adequate protection payments which it seeks in its appeal of the Bankruptcy Court's August 30, 1989 order.

11 U.S.C. §361 provides in pertinent part:

> When adequate protection is required under 11 U.S.C. §362.. .of an interest of an entity in property, such adequate protection may be provided by-
>
> (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under 11 U.S.C. §362.. .results in a decrease in the value of such entity's interest in such property...

By lifting the stay, the Bankruptcy Court merely allowed Associates to regain possession of its collateral. Lifting the stay does not affect Associates' right to payment to the extent that the stay under 11 U.S.C. §362 resulted in a decrease in value to the Peterbilts prior to the lifting of the stay.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes that the grant of relief from the automatic stay does not foreclose Associates from receiving the additional adequate protection payments which it seeks in its appeal.

IT IS ACCORDINGLY ORDERED that this case be returned to the District Court.

Dated this 10th day of October, 1990.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
(CENTRAL DIVISION)

IN RE: ROSE WAY, INC.,	)	Civil 89-817-B
	)	Bankruptcy No. 89-01273-C-H
Debtor.	)	Chapter 7

STIPULATION FOR DISMISSAL OF APPEAL

In accordance with the Bankruptcy Court's Order Approving Compromise and Settlement of Controversy and the Settlement Agreement and Release entered into by and between Appellant Associates Leasing, Inc. ("Associates") and Appellee Trustee of the Bankruptcy Estate of Rose Way, Inc., Thomas G. McCuskey ("Trustee"), Associates and the Trustee do hereby stipulate and agree that the appeal by Associates from a certain order and judgment entered by the Bankruptcy Court on or about August 30, 1989, shall be dismissed, without prejudice to the right of Associates to submit the claims which are the subject of this appeal as unsecured, non—priority claims in Bankruptcy No. 89—01273—C-H presently pending in the United States Bankruptcy Court for the Southern District of Iowa. The parties to this appeal shall bear their own respective costs except that any court costs presently due and owing to the Court, but unassessed, shall be assessed against Associates.

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Associates Leasing, Inc.

Thomas G. McCuskey, Trustee
401 Old Marion Road N.E.
Cedar Rapids, IA 52402
(319) 395—7400

Appellee Trustee of the Bankruptcy Estate
of Rose Way, Inc.

CERTIFICATE OF MAILING

A copy of the foregoing Stipulation was duly mailed postage prepaid, this day of Feb._____, 1991, to:

U.S. Trustee
518 Federal Building
210 Walnut Street
Des Moines, IA 50309

Thomas G. McCuskey, Trustee

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
(CENTRAL DIVISION)

IN RE: ROSE WAY, INC.,	)	Civil No. 89-817-B
	)	Bankruptcy No. 89-01273-C-H
Debtor.	)	Chapter 7

ORDER DISMISSING APPEAL

Presently pending before this Court is an appeal by Associates Leasing, Inc. ("Associates") from a certain Order and Judgment entered by the Bankruptcy Court on or about August 30, 1989, in Bankruptcy No. 89-01273-C-H. The Court has been advised that Appellant Associates and Appellee Trustee of the Bankruptcy Estate of Rose Way, Inc., Thomas G. McCuskey, have entered into a settlement agreement involving and affecting said appeal and that the Bankruptcy Court has entered its Order approving said compromise and settlement. Accordingly, in accordance with the Stipulation filed by Associates and the Trustee,' it is hereby ORDERED, ADJUDGED, AND DECREED that the above-captioned appeal of Associates is dismissed but without prejudice to the right of Associates to submit the claims which are the subject of this appeal as unsecured, non—priority claims in Bankruptcy No. 89—01273-C-H presently pending in the United States Bankruptcy Court for the Southern District of Iowa. The parties hereto shall bear their own respective costs of this appeal except that any court costs presently due and owing to the Court, but unassessed, shall be and hereby are assessed against Associates.

District Judge

Dated: March 12, 1991

Rose Way, Inc.
BR No. 89—01273—C-H
Civil No. 89—817—B

Prepared and submitted by
Morris J. Nunn, counsel for
Associates Leasing, Inc. and
approved as to form and content by
Thomas G. McCuskey, Trustee

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Morris J. Nunn

_____
Thomas G. McCuskey