

**United States Bankruptcy Court  
Northern District of Illinois  
Eastern Division**

**Transmittal Sheet for Opinions for Posting**

**Will this opinion be published?** No

**Bankruptcy Caption:** In re: Smylie Brothers Brewing Company, LLC

**Bankruptcy Number:** 22 B 15005

**Date of Issuance:** March 31, 2023

**Judge:** David D. Cleary

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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

In re:	)	Case No. 22 B 15005
	)	
SMYLIE BROTHERS BREWING	)	Chapter 7
COMPANY, LLC,	)	
	)	Judge David D. Cleary
Debtor.	)	

**MEMORANDUM ORDER DENYING TRUSTEE’S MOTION TO REJECT LEASE  
(EOD 14)**

This matter comes before the court on the Motion of Trustee Norman Newman (“Trustee”) to Reject Lease (“Motion”). In the Motion, the Trustee requests relief under both 11 U.S.C. §§ 363 and 365, asking the court to enter an order authorizing him to reject a lease under certain terms and conditions, including termination. David Gassman (“Gassman”) filed a limited objection (“Objection”) to the Motion. The owner and landlord of the leased premises (“Meadowpool” or “Landlord”) filed a response to the Objection (“Meadowpool Response”), which the Trustee joined in part (“Trustee Response”). Gassman filed a reply in support of his Objection (“Reply”). Having reviewed the papers and heard the arguments of the parties, the court will deny the Motion.

**BACKGROUND**

Smylie Brothers Brewing Company, LLC (“Debtor”) operated out of leased premises at 1615 Oak Avenue in Evanston, Illinois (“Oak Avenue Property”) pursuant to a lease between Debtor and Meadowpool dated June 1, 2014 (“Lease”).<sup>1</sup> On June 30, 2018, Meadowpool and Debtor amended the Lease and extended the initial lease term through May 31, 2024.

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<sup>1</sup> The Trustee stated a different date for the Lease in the Motion. The original date of the Lease is not material to this decision.

Also on June 30, 2018, Gassman and Smylie Brothers Draft & Package, LLC (“Borrower”) entered into a contract (“Promissory Note”). Under the terms of the Promissory Note, Gassman agreed to lend \$3,500,000 to Borrower. The purpose was to “finance the design, preparation, construction and fixturing” of premises for Borrower in the City of Chicago. Objection, Ex. C, p.1. That same date, Gassman and Debtor entered into a contract (“Guaranty Agreement”) under which Debtor guaranteed the prompt payment and performance of the Promissory Note.

An additional document signed on June 30, 2018, is a Collateral Assignment of Lease Agreement (“Assignment”) between the Debtor, Meadowpool and Gassman. Among other items in the Assignment, the parties agreed that:

Upon the occurrence of a default under any of the Loan Documents ... [Gassman], in its discretion, may assert any right, privilege or claim that [Debtor] may have from time to time against [Meadowpool] under the Lease Agreement....

[Meadowpool] shall recognize [Gassman] as tenant under the Lease Agreement in the event that [Gassman] succeeds to the interest of [Debtor] under the Lease Agreement.

Objection, Ex. E, pp. 1-2. In addition, Meadowpool agreed “that no waiver, amendment, alteration, termination or modification of any material provision of the Lease Agreement shall be effective without [Gassman’s] prior written consent[.]” *Id.*, p. 3.

On September 7, 2022, Gassman sent Borrower and Debtor a notice of default for non-payment in connection with the Promissory Note. About a month later, Gassman sent Meadowpool and Debtor notice pursuant to the Assignment that, due to the default under the Promissory Note, he succeeded to Debtor’s interest under the Lease. The notice stated that Meadowpool “shall henceforth recognize [Gassman] as tenant under the Lease[.]” *Id.*, Ex. G.

On November 1, 2022, Gassman demanded that Debtor relinquish possession of the Oak Avenue Property to him by the close of business on November 4, 2022. Debtor did not turn over

possession of the Oak Avenue Property to Gassman, who then filed a complaint for forcible entry and detainer in the Circuit Court of Cook County.

Although Meadowpool and the Trustee do not necessarily agree with Gassman regarding the positions he has taken in reliance on the Assignment, they do not dispute that Gassman claims an interest in the Lease and has filed an action in state court.

Debtor and Borrower each filed for relief under chapter 7 of the Bankruptcy Code on December 30, 2022. Shortly thereafter, the Trustee was appointed.

The base rent under the Lease is \$10,000 per month. Debtor owes over \$600,000 to Meadowpool.

The Oak Avenue Property contains leased and owned equipment used in the Debtor's business ("Equipment"). The Trustee is investigating whether the Equipment has any value to the bankruptcy estate, and Meadowpool is determining which items constitute fixtures and leasehold improvements. The court recently approved the Trustee's application to employ an auctioneer to sell the Equipment, as well as assets at another of Debtor's locations.

The Trustee has been engaged in discussions with Meadowpool in which they agreed to a transaction ("Transaction"). According to the Motion, the Transaction "will bring value to the estate, limit the claims of the Landlord, and provide the Trustee with time to conclude his investigation of equipment value without the burden of carrying the costs of the Lease." Motion, ¶ 6.

A copy of a letter summarizing the Transaction is attached to the Motion as Exhibit A, which states in part:

Meadowpool will pay to the estate the sum of \$10,000 in exchange for an early rejection/termination of the Evanston lease.... In addition, Meadowpool will also waive any "use and occupancy" fees for the estate's ongoing use of the business premises for a reasonable period of time, including in connection with any auction

of equipment at the premises; provided, however, we will need appropriate safeguards to protect Meadowpool against any third party actions at the premises, be it with an auction or other sale of the estate's personal property, which result in any damage to the premises.

In the Motion, the Trustee clarified the terms of the Transaction, stating that: (1) it requires him to "move for rejection of the Lease immediately"; (2) that the time for the estate to keep the Equipment at the Oak Avenue Property without cost extends until April 30, 2023; (3) that Meadowpool "will waive all claims against the estate arising under 11 U.S.C. § 503 ... for the estate's ongoing use of the business premises"; and (4) that the estate will indemnify Meadowpool for damages caused by third parties, up to \$10,000. Motion, ¶ 7.

## LEGAL DISCUSSION

Although the Trustee styled the Motion as a "Motion to Reject Lease," he actually requests approval of the Transaction under two sections of the Bankruptcy Code: 11 U.S.C. § 365(a) as well as § 363(b). Gassman objects to the Trustee's requested relief on two grounds. First, that rejection of a lease under § 365(a) does not constitute a termination. Second, that § 363 does not allow the Trustee to sell estate property without providing adequate protection of his interest.

### A. Rejection of the Lease

#### 1. Rejection under 11 U.S.C. § 365(a) does not terminate the Lease

The Trustee has moved to reject the Lease under 11 U.S.C. § 365(a). Motion, p. 3. Section 365(a) provides, in relevant part, that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." Section 365(g) explains the meaning of rejection:

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease--

- (1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or
- (2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title--
  - (A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or
  - (B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title--
    - (i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or
    - (ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

Trustee’s proposed order provides that the Lease would be “deemed rejected and terminated[.]” Gassman objects on the grounds that “the rejection of a lease does not result in its termination or cancellation.” Objection, p. 5.

This court agrees with Gassman’s Objection, as it must, because the Supreme Court has told us so. “A rejection converts a debtor’s unfulfilled obligations to a pre-petition damages claim. But it does not terminate the contract[.]” *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 1652, 1659 (2019) (summarizing Bankruptcy Appellate Panel ruling with which the Court agreed) (quotations omitted).

In *Tempnology*, the debtor requested and obtained court permission to reject a licensing agreement. It then sought a declaratory judgment from the bankruptcy court that this rejection also terminated the rights it had granted the counterparty to use certain trademarks.<sup>2</sup> The bankruptcy court agreed, the Bankruptcy Appellate Panel reversed, the First Circuit reversed the

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<sup>2</sup> Although there is a unique provision of the Bankruptcy Code that deals with the rights of licensees under rejected intellectual property contracts, *see* § 365(n), the definition of “intellectual property” in the Code does not include trademarks, *see* § 101(35A). Therefore, *Tempnology* did not discuss § 365(n) except to distinguish it.

Panel, and the Supreme Court reversed the Circuit: “Today, we hold that both Section 365’s text and fundamental principles of bankruptcy law command the ... rejection-as-breach approach.”

*Tempnology*, 139 S. Ct. at 1661. The Court did not accept the argument that “the rejection terminates the whole agreement along with all rights it conferred.” *Id.* Instead, “[r]ejection of a contract – any contract – in bankruptcy operates not as a rescission but as a breach.” *Id.*

*Tempnology*’s holding that rejection is a breach, not a rescission, is the opinion of “every federal circuit, the leading bankruptcy treatises, and respected bankruptcy scholars.” *Gulfport Energy Corp. v. FERC*, 41 F.4th 667, 683 (5th Cir. 2022) (footnote with string citations omitted). *See, e.g., Fraunhofer-Gesellschaft zur Forderung der Angewandten Forschung E.V. v. Sirius XM Radio Inc.*, 940 F.3d 1372, 1378 (Fed. Cir. 2019) (“rejection does not terminate the contract”) (quotation omitted); *Sunbeam Prods., Inc. v. Chicago Am. Mfg., LLC*, 686 F.3d 372, 377 (7th Cir. 2012) (“[a] lessee that enters bankruptcy may reject the lease and pay damages for abandoning the premises, but rejection does not abrogate the lease”); *In re Lake Dearborn LLC*, 534 B.R. 747, 751 (Bankr. N.D. Ill. 2015) (“Rejection of a lease does not cancel or terminate it, but merely removes it from property of the estate.”). *Tempnology*’s holding “applies to all contracts, not just trademark licenses[.]” *In re Avianca Holdings S.A.*, 618 B.R. 684, 697 (Bankr. S.D.N.Y. 2020).

Moreover, the plain language of §§ 365(a) and (g) do not provide that rejection of the Lease is a termination. *See Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (“We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”). Neither sections 365(a) nor (g) contain the word “termination.” Yet, other sections of § 365 do mention termination, so we must presume that Congress knew how to provide for lease termination. *See* 11 U.S.C. § 365(h)(1)(A)(i) (“[I]f

the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease *may treat such lease as terminated by the rejection[.]*) (emphasis added); § 365(h)(2)(A)(i) (“the timeshare interest purchaser under the timeshare plan *may treat the timeshare plan as terminated by such rejection*”) (emphasis added); § 365(i)(1) (“[If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser *may treat such contract as terminated[.]*”) (emphasis added); § 365(n)(1) (“If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract *may elect--(A) to treat such contract as terminated by such rejection[.]*”) (emphasis added).

## **2. Section 365(d)(4) does not apply to rejection of the Lease**

In its response, which the Trustee joined, Meadowpool contends that “[r]ejection of a non-residential real property lease in which the debtor is a lessee ‘does equal termination.’” Meadowpool Response, p. 7 (quoting *In re 6177 Realty Assocs., Inc.*, 142 B.R. 1017, 1019 (Bankr. S.D. Fla. 1992)). Meadowpool argues that “[i]ndeed, the specific statutory language in Section 365(d)(4) supports such a finding,” again citing to *6177 Realty*. Meadowpool Response, p. 7. This argument must fail for two reasons.

### **a. Section 365(d)(4) is not applicable**

11 U.S.C. § 365(d)(4) states in relevant part:

(4)(A) Subject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of--

(i) the date that is 120 days after the date of the order for relief; or



(ii) the date of the entry of an order confirming a plan.

It should be immediately apparent that this section does not apply to the Motion. The Trustee requested authorization to reject the Lease under § 365(a). He did not mention § 365(d)(4), because (d)(4) does not contemplate a *requested* rejection. The subject of § 365(d)(4) is a *deemed* rejection. If the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 120 days after the date of the order for relief, then that lease is *automatically deemed rejected*.

Congress added § 365(d)(4) to the Code in the “Shopping Center Amendments” of 1984.

Before 1984, debtors in Chapter 11 reorganizations had no fixed deadline to assume or reject unexpired leases.... Congress became concerned about the practical consequences of Chapter 11 filings by tenants of shopping centers. It was particularly concerned that mall operators were facing periods of extended vacancies, that would last until such time as the bankruptcy courts would finally decide to take the initiative and force debtors to make a choice whether to assume or reject the leases. It was also concerned about the effects the extended vacancies were having on other tenants.

To address this problem, Congress added two provisions dealing specifically with nonresidential leases in Chapter 11 proceedings.

*In re Southwest Aircraft Servs., Inc.*, 831 F.2d 848, 850 (9th Cir. 1987) (citation omitted). One of these provisions was § 365(d)(4).<sup>3</sup>

In support of its argument, Meadowpool cited *6177 Realty*. Meadowpool is correct that *6177 Realty* and a number of other cases “hold that rejection does equal termination of non-residential real property leases in which the debtor or Trustee is the lessee.” 142 B.R. at 1019. *See Sea Harvest Corp. v. Riviera Land Co.*, 868 F.2d 1077, 1080-81 (9th Cir. 1989); *Salzer v.*

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<sup>3</sup> “Prior to BAPCPA, § 365(d)(4) allowed the trustee only 60 days to assume or reject the lease, but allowed unlimited extensions of the deadline for cause. BAPCPA eliminated the potentially indefinite assumption period and set forth a maximum possible period of 210 days from the time of entry of the order of relief.” *In re Simbaki, Ltd.*, 520 B.R. 241, 244 (Bankr. S.D. Tex. 2014) (footnote and quotation omitted). The statute provides an initial period of 120 days, and a 90-day extension may be granted for cause if the appropriate motion is filed. Any further extensions are subject to prior written consent of the lessor.

*Jocquel Supply (In re Salzer)*. 180 B.R. 523, 528 (Bankr. N.D. Ind. 1993) (“A deemed rejection, pursuant to § 365(d)(4), specifically requires the trustee to return possession, *not to the debtor*, but to the lessor. Thus, rejection operates to terminate the lease.”), *aff’d sub nom. Matter of Salzer*, 52 F.3d 708 (7th Cir. 1995) (without discussing the effect of a deemed rejection); *In re Giles Assocs., Ltd.*, 92 B.R. 695, 698 (Bankr. W.D. Tex. 1988).

The “primary reason” that these cases have found rejection equals termination “is the specific statutory language in § 365(d)(4).” *6177 Realty*, 142 B.R. at 1019. The statute provides that when the lease is deemed rejected, “the trustee shall immediately surrender” the property to the lessor. “The breach plus the surrender obligation can only be seen as termination of any of the trustee’s or debtor’s rights in the leasehold.” *Giles*, 92 B.R. at 698.

Later courts have split on this issue. *Giles*, a Texas bankruptcy case, was rejected by the Fifth Circuit. “[W]e conclude that a debtor’s inaction in timely deciding to assume or reject a lease of nonresidential real property under § 365(d)(4), which leads to a deemed rejection, does not effect a termination of that lease, or, consequently, an implied forfeiture of the rights of third parties to the lease.” *Matter of Austin Dev. Co.*, 19 F.3d 1077, 1083 (5th Cir. 1994). *See also John Hilsman Investments, LLC v. Quality Properties, LLC*, 500 B.R. 105, 116 (N.D. Ala. 2013), *aff’d*, *In re Quality Properties, LLC*, 572 Fed. App’x 768 (11th Cir. 2014) (“This argument ignores precedent and rests upon the premise that rejection equals termination when it does not.”); *Federal Realty Inv. Trust v. Park (In re Park)*, 275 B.R. 253, 258 (Bankr. E.D. Va. 2002) (“[T]he court is of [the] opinion that the minority line of cases, as exemplified by *Austin Development Co.*, is nevertheless the better reasoned and is more persuasive.”).

Even if this court agreed that the “immediately surrender” language of § 365(d)(4) means that rejection equals termination – which it need not and is not – that agreement would only be *dicta*. Whatever this court thinks of the effect of § 365(d)(4), that subsection is inapplicable.

Debtor filed its petition under chapter 7 of the Bankruptcy Code on December 30, 2022. “The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.” 11 U.S.C. § 301(b). Therefore, if the Trustee did not move to assume or reject the Lease by May 1, 2023,<sup>4</sup> – or seek an extension of time before that date – then the Lease would be deemed rejected under the operation of § 365(d)(4). That date is more than a month away. At this time, § 365(d)(4) does not apply to the facts of this case.

**b. Section 365(a) applies, and the plain language authorizes rejection, not termination**

The statute that does apply to the facts of this case is the subsection cited by the Trustee in his Motion, § 365(a). There is no “immediate surrender” language in § 365(a), and therefore no reason to analyze whether rejection under § 365(a) equals termination. As discussed at length in section A(1), rejection of a lease under § 365(a) is a breach of that lease, not a termination. To the extent there was any dispute about the effect of a rejection, the Supreme Court resolved it in *Tempnology*.

In the Motion, the Trustee seeks relief under § 365(a). Rejection of a lease under § 365(a) is a breach, not a termination. Since the Motion, the proposed order, the Meadowpool Response and the Trustee Response all contemplate termination, the court cannot grant the relief requested. To the extent the Motion seeks to reject the Lease under § 365(a), it must be denied.

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<sup>4</sup> Actually, 120 days after the order for relief is April 29, 2023. That date, however, is a Saturday. If the last day of a statutory period “is a Saturday ... the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.” Fed. R. Bankr. P. 9006(a)(1)(C).

## **B. Approval of the Transaction**

### **1. Section 363(b) – approval of the transaction**

Prior to filing the Motion, the Trustee and Meadowpool reached agreement on the terms of the Transaction. One of those terms requires the Trustee to “move for rejection of the Lease immediately.” Motion, ¶ 7. The Trustee has satisfied this term by requesting rejection pursuant to § 365(a), as well as approval of the Transaction.

The Motion also states at paragraph 7 that “[w]hile the Transaction is styled as a rejection and deemed termination of the Lease, it is also, in effect, a sale of the Trustee’s and the estate’s right, title and interest in the Lease to the Landlord in exchange for cash and the Landlord’s waiver of certain claims.” Therefore, the Trustee is also seeking relief under § 363(b): “The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate[.]”

Debtor listed Gassman on Schedule D with a claim in the estimated amount of \$4,000,000, secured by “[r]estaurant equipment, inventory, accounts receivable, general intangibles & related property” as well as “[l]easehold interests” and “[s]ecurity deposit.” His lien is described as “[b]lanket lien; collateral assignment of lease; and security deposit.” To the extent that Gassman, a secured creditor, objects to this proposed sale of the estate’s property, the Trustee cannot simply proceed under § 363(b) without addressing his interests.

### **2. Sections 363(e) and (f) – addressing Gassman’s interest in the property**

The first hurdle the Trustee must clear is found in 11 U.S.C. § 363(f):

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if-

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

Here, the Trustee has satisfied § 363(f)(4). The Debtor listed Gassman’s claim on Schedule D as contingent, unliquidated and *disputed*. In its response, Meadowpool also raised issues regarding the validity of Gassman’s security interest. Furthermore, the parties are litigating Gassman’s foreclosure case in state court. The court need not resolve these issues. *See Matter of Busick*, 831 F.2d 745, 750 (7th Cir. 1987) (“[T]he bankruptcy court must determine whether there is an objective basis for either a factual or a legal dispute as to the validity of debt. However, the statute does not require the court to determine the outcome of any dispute, only its presence or absence.”) (quotation omitted).<sup>5</sup> The *existence* of an objective basis for these issues, however, means that there is a bona fide dispute as to Gassman’s interest in this estate property. Since there is a bona fide dispute regarding Gassman’s interest, the Trustee may sell property free and clear of that interest.

The Trustee’s second hurdle, however, is found in § 363(e) (emphasis added):

*Notwithstanding any other provision of this section*, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

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<sup>5</sup> *Busick* considered the meaning of “bona fide dispute” in the context of 11 U.S.C. § 303. Since it is the same phrase, *Busick* is relevant to the court’s analysis under § 363(f)(4). *See, e.g., Southland Royalty Co., LLC v. Wamsutter, LLC (In re Southland Royalty Co. LLC)*, 623 B.R. 64, 99 (Bankr. D. Del. 2020) (case law on § 363(f)(4) was “sparse” on a particular issue, so the court looked to the majority rule “in the context of section 303[.]”).

Therefore, before the court can approve the Transaction, the Trustee must provide adequate protection of Gassman's interest. *See Illinois Dep't of Revenue v. Hanmi Bank*, 895 F.3d 465, 473 (7th Cir. 2018) (Section 363(e) "qualifies" the power of a trustee to sell property of the estate by "providing that, upon the request of an entity holding an interest in the property to be sold, the court 'shall prohibit or condition such ... sale ... as is necessary to provide adequate protection of such interest.'").

The Code tells us what may constitute adequate protection:

When adequate protection is required under section 362, 363, or 364 of this title 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 section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;
- (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
- (3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

"In short, an entity whose lien or other interest is removed from property in order to facilitate its sale is entitled to compensation for whatever loss the removal causes the entity." *Hanmi Bank*, 895 F.3d at 473.

Gassman has objected to the Motion on the grounds that approval may affect his rights under the Lease. Objection, p. 5 (if the Lease is terminated it "may affect Mr. Gassman's rights") and Reply, p. 1 ("The Trustee does not have the authority to bargain away Mr. Gassman's rights."). The only mention of protection for Gassman's interest is in the

Meadowpool Response, which states that Gassman has a secured claim in Borrower's bankruptcy case and has not foreclosed on his collateral. "Thus, Mr. Gassman could very well be paid in full under the Note in the [Borrower's] Bankruptcy." Meadowpool Response, p. 4.


The Trustee has neither proposed nor provided any adequate protection for Gassman's interests. The statute states that the court "shall prohibit ... such ... sale ... as is necessary to provide adequate protection of such interest." Since Gassman's interest is not adequately protected, the court must prohibit the proposed sale, and deny the Trustee's Motion.

### CONCLUSION

The Trustee has moved to reject the Lease under 11 U.S.C. § 365(a). His proposed order provides that the Lease would be "deemed rejected and terminated[.]" Since rejection under § 365(a) does not equal termination, the Motion must be denied. Alternatively, the Trustee sought approval of the Transaction under 11 U.S.C. § 363(b). Although the Trustee could sell estate property free and clear of Gassman's interest because it is in bona fide dispute, he has not shown that he can provide adequate protection of that interest. Therefore, the Motion must be denied on this alternative ground. For all the reasons stated above, **IT IS ORDERED THAT** the Motion is **DENIED**.

ENTERED:

Date: March 31, 2023

  
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DAVID D. CLEARY  
United States Bankruptcy Judge