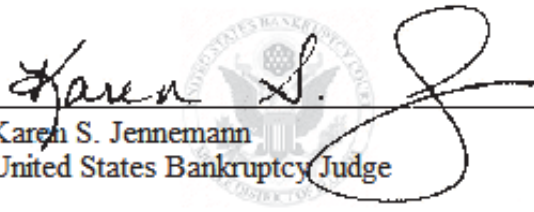


ORDERED.

Dated: July 27, 2020



Karen S. Jennemann
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

| | | |
|-----------------------|---|----------------------------|
| In re |) | |
| |) | |
| Melbourne Beach, LLC, |) | Case No. 6:17-bk-07975-KSJ |
| |) | Chapter 11 |
| Debtor. |) | |
| _____ |) | |

**ORDER GRANTING BRIAN WEST’S
MOTION FOR ALLOWANCE AND PAYMENT OF
LEASING FEES AS AN ADMINISTRATIVE EXPENSE**

Brian West or his wholly owned entities (“West”) have managed the Debtor’s shopping center for years. He now seeks payment for his property management leasing fees. Pirogee Investments, LLC and Yellow Funding Corp. (the “Disputed Owners”) object to these fees, even though they previously consented to his retention as property manager (the “Objections”).¹ The Objections are overruled.

Debtor owns and operates a large shopping center in Melbourne Beach, Florida. West, an experienced real estate developer, is a founding member of the Debtor. In July 2002, the Debtor purchased additional real property adjacent to the shopping center to increase its retail space.

¹ West’s Motion for Allowance and Payment of Administrative Expense as Property Manager of the Debtor for Leasing Fees is Doc. No. 610. The Objections are Doc. Nos. 308, 557 and 635. A trial was held on May 18, 2020.

With the purchase, and assumedly for supplying needed capital, David Kalichman and Ilya Palinsky acquired interests in the Debtor. West, Kalichman and Palinsky then signed a Second Amended and Restated Operating Agreement (the “Operating Agreement”) of the Debtor.² Under the Operating Agreement, West would provide property management and leasing services for the Debtor.³ West would receive a commission of \$2.50 per square foot leased for all subsequent leases, payable 50% upon Debtor’s execution of the lease with the balance due after the tenant begins paying rent.⁴ The Operating Agreement further clarified this leasing commission is an expense of the Debtor to be paid before any distributions to its members.⁵

On July 30, 2003, the Debtor sought to refinance an existing loan and concurrently amended its Operating Agreement to add provisions requested by the lender and signed a management agreement with Westco Development Corp. (the “Management Agreement”).⁶ The Management Agreement provided Westco Development Corp.—a corporation owned by West—would serve as property manager.⁷ The amendment and Management Agreement did not alter the terms of leasing services.⁸ The leasing services provision in the Operating Agreement remained in full force and effect.⁹

Later, the Disputed Owners *perhaps* acquired the ownership interests of Palinsky and Kalichman in the Debtor.¹⁰ West and the Disputed Owners then spent the next several years engaged in aggressive and expensive litigation relating to their ownership interests and management for the Debtor.

² West Ex. 1.

³ West Ex. 1, Article 7.4 and 7.5.

⁴ West Ex. 1, Article 7.5.

⁵ West Ex. 1, Article 7.5.

⁶ West Ex. 2.

⁷ West Ex. 2.

⁸ West Ex. 2.

⁹ West Ex. 2.

¹⁰ The Court makes no finding whether the Disputed Owners have any interest in the Debtor, reserving that dispute for another day and perhaps another court.

On December 26, 2017, West filed this Chapter 11 case, hoping to resolve the parties' differences.¹¹ Contested disputes quickly arose (and sadly continue) between West and the Disputed Owners. Trying to defuse these tensions, I entered an order directing the parties to mediation. The mediation succeeded, and the Debtor, West, and the Disputed Owners (collectively the "Parties") signed a Partial Settlement Agreement (the "Settlement Agreement"), which this Court approved.¹²

Although not a global resolution, the Settlement Agreement was extensive. The Parties agreed, among other items, to the appointment of a chief restructuring officer ("CRO") for the Debtor. And subject to the acceptability of West's performance, the Parties agreed the CRO would hire West as property manager for the Debtor.¹³ By agreeing in the Settlement Agreement that West would continue as property manager, the Parties by extension agreed to pay him for his work, including paying leasing fees, assuming he did a good job. West performed his property management duties well during the CRO's tenure, which included his work to find new tenants and retain existing tenants.

In August 2019, Jules S. Cohen was appointed as the Chapter 11 Trustee, replacing the CRO.¹⁴ He agreed West was doing a good job and wanted to hire Westco, LLC—another entity owned by West—as his property manager (the "Trustee Management Agreement").¹⁵ The Trustee Management Agreement, effective November 1, 2019, provides Westco, LLC would

¹¹ Doc. No. 1.

¹² The Settlement Agreement is dated May 23, 2018 and attached as Exhibit A to the Joint Motion to Approve Settlement Agreement. Doc. No. 163. On June 26, 2018, the Court entered the Order Granting Joint Motion to Approve Settlement Agreement. Doc. No. 174.

¹³ Doc. No. 163, Ex A. at ¶ 2.

¹⁴ Doc. Nos. 383 and 406.

¹⁵ West Ex. 7.

serve as property manager for the Debtor and, in exchange for these services, receive compensation, including leasing fees.¹⁶ As to the leasing fees, Westco, LLC receives:

- a one-time leasing fee of 3% of the total lease base rent on renewal leases,
- a one-time leasing fee of 5% of the total lease base rent on any new tenant leases, and
- a one one-time leasing fee of 6% of the total lease base rent on any new ground (i.e., vacant land) leases.

The Chapter 11 Trustee sought approval of the Trustee Management Agreement and for authority to pay Westco LLC for services rendered onwards from November 1, 2019, which this Court recently approved.¹⁷

West now asks this Court to allow him an administrative expense claim for *all* post-petition leasing services provided to the Debtor and then to direct the Chapter 11 Trustee to pay him.¹⁸ After the bankruptcy filing through May 1, 2020, West alleges he is owed leasing fees totaling \$166,879 for eight leases the Debtor signed.¹⁹

The Disputed Owners object arguing West and Westco, LLC are professionals not employed under § 327 of the Bankruptcy Code²⁰ and who cannot be employed under § 327 because they are not “disinterested.” To summarize, the Disputed Owners primarily argue that,

¹⁶ West Ex. 7, pg. 2.

¹⁷ The Chapter 11 Trustee’s Motion to Approve Property Management Agreement and for Authority to Pay Westco, LLC is Doc. No. 551. The Court entered the Order Granting Chapter 11 Trustee’s Motion to Approve Property Management Agreement and for Authority to Pay Westco, LLC on June 2, 2020. Doc. No. 717.

¹⁸ Doc. No. 610.

¹⁹ West Ex. 12. The leases are with Texas Roadhouse, Friendly’s, Pizza Kingdom, Barber Shop, Game Store, Coastal Interiors, Best Chinese and Thai Bistro. Depending on whether the lease was new, renewal or ground, the lease fee sought ranges from 3% to 6% of the total base rent.

²⁰ All references to the Bankruptcy Code refer to 11 U.S.C. §§ 101 *et. seq.*

because West is an insider, he cannot be retained as a professional or receive payment for his services as an administrative expense under Section 503 of the Bankruptcy Code.²¹

Section 503 of the Bankruptcy Code allows entities to request payment of an administrative expense,²² and provides under subsection (b)(1)(A) that “...there shall be allowed administrative expenses,...” including “the actual necessary costs and expenses of preserving the estate...”²³ Nobody disputes the Westco entities signed the Management Agreement and later the Trustee Management Agreement to provide property management services for the Debtor. Nobody disputes West or his companies provided these services. And, most significantly, nobody disputes West did a good job. The Court expressly finds West’s leasing services were necessary and preserved (and likely enhanced) the Debtor’s estate.

And the Chapter 11 Trustee—an independent third-party with fiduciary duties to the estate—believes Westco, LLC should continue providing property management services, including leasing services, for the Debtor and get paid. Even the Disputed Owners agreed to West’s retention in the Settlement Agreement, so their objection is disingenuous. They agreed to hire West and allow him to manage and lease the Debtor’s shopping center for over two years but now object to paying him?

So, the only issue is whether West is precluded from receiving payment for his agreed valuable services to the Debtor because, as an interested insider, West cannot be retained as a “professional.” Section 327(a) of the Bankruptcy Code requires a debtor in possession or trustee

²¹ Doc. No. 635. The Disputed Owners further argue West, through Westco, LLC, should not be permitted to gain financially from the Debtor by payment of an administrative expense claim while other creditors and equity holders must wait to receive funds. This equitable argument attempts to circumvent the priorities established under Section 507 of the Bankruptcy Code, which I decline to allow. And Disputed Owners’ argument that I lack jurisdiction over the Debtor is unpersuasive for the reasons stated in the Order Denying Disputed Owners’ Motion to Dismiss and Directing Appointment of a Chapter 11 Trustee. Doc. No. 383.

²² 11 U.S.C. § 503(a).

²³ 11 U.S.C. § 503(b).

to obtain Court approval before employing professional persons.²⁴ “The purpose for requiring court approval of professional persons is to avoid the enormous potential for abuse in the hiring of consultants, appraisers, business advisors, and others who offer their professional services and expertise to beleaguered Chapter 11 debtors.”²⁵ A person who is not a professional, however, may be employed without court approval.²⁶ And if court approval is not required under Section 327, neither is disinterestedness.²⁷

The Bankruptcy Code does not define professional persons. Several courts define a professional person under Section 327 as “one who takes a central role in the administration of the bankruptcy estate and in the bankruptcy proceedings, as opposed to one who provides services to the debtor that are necessary regardless of whether a bankruptcy petition is filed.”²⁸ Other courts categorize professional persons as “individuals and entities given broad discretion or autonomy in the administration of the debtor’s bankruptcy estate.”²⁹ No matter the definition or factors considered, courts agree persons providing property management services are not

²⁴ 11 U.S.C. § 327(a).

²⁵ *In re Dairy Dozen-Milnor, LLP*, 441 B.R. 918, 920 (Bankr. D. N.D. 2010)(internal quotations omitted)

²⁶ *See In re Dairy Dozen-Milnor, LLP*, 441 B.R. 918, 920 (Bankr. D. N.D. 2010).

²⁷ *See In re Dairy Dozen-Milnor, LLP*, 441 B.R. 918, 920 (Bankr. D. N.D. 2010).

²⁸ *In re Dairy Dozen-Milnor, LLP*, 441 B.R. 918, 920 (Bankr. D. N.D. 2010) citing *In re Bannerman Holdings, LLC*, 2010 WL 2404313 *2–3 (Bankr. E.D. N.C. June 10, 2010); *In re Century Inv. Fund VII Ltd. P’ship*, 96 B.R. at 893; *In re D’Lites of America, Inc.*, 108 B.R. 352,355 (Bankr.N.D.Ga.1989); *In re Seatrain Lines, Inc.*, 13 B.R. 980, 981 (Bankr.S.D.N.Y.1981).

²⁹ *In re Dairy Dozen-Milnor, LLP*, 441 B.R. 918, 920 (Bankr. D. N.D. 2010) citing *In re Rusty Jones, Inc.*, 109 B.R. 838 (Bankr.N.D.Ill.1989); *In re Fretheim*, 102 B.R. 298 (Bankr.D.Conn.1989).

professionals under Section 327 requiring court approval.³⁰ And this remains true even if the person providing the property management services is an interested insider.³¹

Here, the Court finds West and Westco, LLC, by providing leasing services, are not professional persons under Section 327 of the Bankruptcy Code. They provide the Debtor with traditional property management services, which includes leasing services. These services were provided to the Debtor long before the bankruptcy filing. No evidence of self-dealing is present. And, with the early appointment of a CRO and later Chapter 11 Trustee in this case, West and Westco, LLC do not have broad discretion or autonomy in the administration of the debtor's bankruptcy estate. Because West and Westco LLC are not professional persons under Section 327 and the plain language of Section 503(b)(1)(A) does not require an entity to be employed under Section 327 to be allowed an administrative claim, West and Westco LLC are entitled to payment.

The allowed amount of the administrative claim, however, requires analysis. Until November 1, 2019, West provided lease services under the terms of the Operating Agreement, not the Trustee Management Agreement. As a result, West's fee for leases between the petition

³⁰ See *In re Bannerman Holdings, LLC*, Case No. 10-01053-8-SWH, 2010 WL 2404313 (Bankr. E.D. N.C. June 10, 2010)(debtor's member-manger and partial owner providing property management services to the debtor under a contract agreement is not a professional within the meaning of § 327); *In re Park Ave. Partners Ltd. Partnership*, 95 B.R. 605 (Bankr. E.D. Wis. 1988)(interested entity providing property management services to the debtor is not an independent professional person and § 327(a) does not apply). See also *Kaufman v. S & C Corp.*, 171 B.R. 38 (S.D. Tx. 1994)(affirming bankruptcy court judgment providing hotel management company an administrative expense claim under § 503(b)(1)(A)); *In re Dairy Dozen-Milnor, LLP*, 441 B.R. 918 (Bankr. D. N.D. 2010)(dairy management company is not a professional person under § 327 and therefore disinterestedness is not at issue).

³¹ See *Bannerman*, 2010 WL 2404313; *Park Ave. Partners Ltd. Partnership*, 95 B.R. 605.

date (December 26, 2017) and October 31, 2019 is \$2.50 per square foot,³² payable 50% upon Debtor's execution of the lease with the balance due after the tenant begins paying rent.³³ Six leases fall under this category, of which two—Texas Roadhouse and Friendly's—merit extra discussion.³⁴

Before the bankruptcy filing, Debtor signed a ground lease agreement with Texas Roadhouse.³⁵ After execution of the lease and during this bankruptcy case, West worked extensively with contractors, Texas Roadhouse, and others to facilitate the buildout of the restaurant. Texas Roadhouse began occupying the premises and paying rent in 2018, after the bankruptcy filing. Under the Operating Agreement, West earned a leasing fee totaling \$85,000 for the Texas Roadhouse lease,³⁶ of which 50% was payable upon signing (prior to the bankruptcy filing in 2017) and the balance due when Texas Roadhouse started paying rent (after the bankruptcy filing). Because a claim must have arisen post-petition to qualify as an allowed administrative expense under §502(b)(1),³⁷ only half of the Texas Roadhouse leasing fee can be claimed as an administrative expense. As a result, West is entitled to a \$42,500 administrative expense claim for the Texas Roadhouse lease fee earned after the bankruptcy filing, and a \$42,500 general unsecured claim for the lease fee earned prior to the bankruptcy filing.

³² The Operating Agreement clearly calculates the leasing fee at \$2.50 per leased square foot. No distinction is made between heated space and gross leased square feet. And although most leasing fees are calculated by percentage, as demonstrated by the Trustee's Management Agreement, that is not the case under the parties' agreed Operating Agreement. In Florida, the construction of written contracts is a question of law where the language is unambiguous, *Friedman v. Virginia Metal Products Corp.*, 56 So.2d 515, 516 (Fla.1952), and extrinsic evidence is admissible only if the contract is ambiguous on its face. *Carlton v. Southland Diversified Company*, 381 So.2d 291, 293 (Fla.Dist.Ct.App.1980), *reh'g denied*, citing, *Pearson v. Pearson*, 342 So.2d 1018 (Fla.Dist.Ct.App.1977). Any argument or expert testimony that payment is by a percentage of the gross lease space or heated space are unpersuasive given the unambiguous language in the Operating Agreement clearly establishing the leasing fee.

³³ West Ex. 1, Article 7.5.

³⁴ West Ex. 12. The six leases are with Texas Roadhouse, Friendly's, Pizza Kingdom, Barber Shop, Game Store, and Coastal Interiors.

³⁵ Disputed Owners Ex. 15, pg. 8. The parties executed the lease on February 2, 2015.

³⁶ West Ex. 12. The Texas Roadhouse lease is for 34,000 total square feet (34,000 sq. ft. x \$2.50 = \$85,000).

³⁷ *In re EZ Pay Services, Inc.*, 380 B.R. 861, 864 (Bankr. M.D. Fla. 2007).

After the bankruptcy filing, Debtor signed a ground lease agreement with AARK Hospitality Indian Harbor FR, Inc., which operates a Friendly's restaurant on the property.³⁸ Friendly's also started paying rent to the Debtor. Under the Operating Agreement, West earned a leasing fee totaling \$100,000 for the Friendly's lease.³⁹ The Disputed Owners contend the CRO procured this lease and as a result, West is not entitled to the leasing fee. The Court disagrees. West pursued Friendly's and convinced them to enter the ground lease at the shopping center. West is entitled to a \$100,000 administrative expense claim for the Friendly's lease fee.

The four remaining lease fees which fall under the Operating Agreement are not controversial. After the bankruptcy filing West either acquired the tenants for the Debtor, or convinced tenants to renew their lease.⁴⁰ Under the Operating Agreement, West earned leasing fees totaling \$27,750 for these four leases.⁴¹ As a result, West is allowed an administrative expense claim in the amount of \$27,750 for the lease fees.

On November 1, 2019, Westco LLC began providing lease services to the Debtor under the Trustee Management Agreement. There are two leases which fall under the Trustee Management Agreement—a new lease and a renewal lease.⁴² Under the Trustee Management Agreement, Westco LLC earned leasing fees totaling \$12,918.⁴³ As a result, West is allowed an administrative expense claim in the amount of \$12,918 for the lease fees.

³⁸ Disputed Owners Ex.14.

³⁹ West Ex. 12. The Friendly's lease is for 34,000 total square feet (40,000 sq. ft. x \$2.50 = \$100,000).

⁴⁰ The four leases are with Pizza Kingdom, Barber Shop, Game Store, and Coastal Interiors.

⁴¹ West Ex. 12. The Pizza Kingdom lease is for 1,500 total square feet (1,500 sq. ft. x \$2.50 = \$3,750), the Barber Shop lease is for 1,200 total square feet (1,200 sq. ft. x \$2.50= \$3,000), the Game Store lease is for 1,600 total square feet (1,600 sq. ft. x \$2.50= \$4,000), and the Coastal Interiors lease is for 6,800 total square feet (6,800 sq. ft. x \$2.50= \$17,000). So, the total lease fee is \$27,750 (\$3,750 + \$3,000 + \$4,000 +\$17,000 = \$27,750).

⁴² West Ex. 12. The two leases are with Best Chinese and Thai Bistro.

⁴³ West Ex. 12. Best Chinese renewed its lease for a 5-year term and has annual base rent of \$28,000 (\$28,000 x 5 years = \$140,000 which is multiplied by .03% for a leasing fee of \$4,200). Thai Bistro is a new 5-year lease and has an annual base rent of \$34,875 (\$34,875 x 5 years = \$174,375 which is multiplied by .05% for a leasing fee of \$8,718). So, the total lease fee is \$12,918 (\$4,200 + \$8,718).

In conclusion, West and his companies are entitled to payment as an administrative expense for their post-petition lease services to the Debtor. West may have an administrative claim for lease services provided to the Debtor from January 2018 through October 2019, for \$170,250. West is further allowed a general unsecured claim in the amount of \$42,500 for his pre-petition lease services provided to the Debtor for the Texas Roadhouse lease. Westco, LLC, the entity who signed the Trustee Management Agreement, may have an administrative claim for lease services provided to the Debtor from November 2019 through May 2020, for \$12,918.

Accordingly, it is **ORDERED**:

1. The Objections (Doc. Nos. Doc. Nos. 308, 557 and 635) are **OVERRULED**.
2. The Motion for Allowance and Payment of an Administrative Expense Claim as Property Manager for Leasing Fees (Doc. No. 610) is **GRANTED**.
3. West may have an administrative claim for \$170,250 for lease services provided to the Debtor from January 2018 through October 2019, which the Chapter 11 Trustee may pay immediately.
4. Westco, LLC may have an administrative claim for \$12,918 for lease services provided to the Debtor from November 2019 through May 2020, which the Chapter 11 Trustee may pay immediately, provided such payment already has not been made under the Order Granting Chapter 11 Trustee's Motion to Approve Property Management Agreement and for Authority to Pay Westco, LLC entered on June 6, 2020 (Doc. No. 717).
5. The Chapter 11 Trustee further may disburse future lease fees to Westco, LLC as provided in the Trustee Management Agreement, without further court order and in the normal course of business.

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Attorney, Richard B. Weinman, is directed to serve a copy of this order on interested parties who do not receive service by CM/ECF and file a proof of service within three days of entry of the order.