

2 Am. Technologies, Inc. et al. v. Grassmueck, et al. 00-6007-fra  
3 In re Agripac, Inc. 699-60001-fra7

4 8/16/00 Alley Unpublished

5 The Debtor and Plaintiff entered into two pre-petition  
6 leases by which the Debtor leased computer equipment from the  
7 Plaintiff. After the Debtor filed bankruptcy, a sale of the  
8 Debtor's frozen food business was concluded with Defendant PFA.  
9 A number of leases were inadvertently omitted in the sale,  
10 however, and PFA indicated that it wished to have the leases  
11 assumed and assigned, including the two with the Plaintiff. A  
12 motion for an order directing that the Debtor assume and assign  
13 the omitted leases was filed and a proposed order submitted  
14 directing the assumption and assignment. A hearing was held and  
15 attorneys for PFA and the Unsecured Creditors' Comm. indicated  
16 that they would prepare an order consistent with an understanding  
they had reached concerning cost splitting. When the revised  
order was submitted, it was signed by the Trustee (the case had  
been converted to Chapter 7) and attorneys for PFA and the  
Creditors Comm. and was duly signed by the Judge and entered.  
It called for PFA to submit written requests, until September 1,  
1999, to the Trustee for assignment of the leases. PFA declined  
to ask for assignment of the two leases with Plaintiff. Plaintiff  
filed an adversary proceeding asking that the court declare that  
the leases were assumed and assigned or, alternatively, ordering  
the Trustee to assume and assign the leases to PFA. Plaintiff  
filed a motion for summary judgment on its first claim and  
Defendants filed cross-motions on both claims.

17 The court granted Defendants' cross-motions and denied  
18 Plaintiffs' motion for summary judgment. It ruled that the order  
19 was unambiguous in requiring that certain requirements be met  
20 before an assumption and assignment would occur. As those events  
21 did not transpire, there was no assumption and assignment. Even  
22 if the order were found to be ambiguous, it could not be  
23 interpreted in the manner the Plaintiffs argued for a number of  
24 reasons. The court also ruled that it did not have the power  
25 under Code § 105 to require that the Trustee assume and assign  
26 the leases on equitable grounds.

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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF OREGON

IN RE )  
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AGRIPAC, INC., ) Case No. 699-60001-fra7  
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Debtor. )  
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AMERICAN TECHNOLOGIES CREDIT, INC, ) Adv. Proc. No. 00-6007-fra  
and DEUTSCHE FINANCIAL SVCS, INC. )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
MICHAEL GRASSMUECK, INC., TRUSTEE, )  
and PF ACQUISITION II, INC. ) MEMORANDUM OPINION  
 )  
\_\_\_\_\_  
Defendants. )

Plaintiff American Technologies Credit, Inc. (ATC) is the lessor of certain property under two separate leases to the debtor Agripac, Inc. Plaintiff Deutsche Financial Services, Inc. is the assignee of certain rights to the income flow from one of those leases. Plaintiffs filed this action for a declaratory judgment to the effect that the leases were assumed by the Trustee and assigned to the purchaser of Agripac's frozen food

1 business, Defendant PF Acquisition II, Inc. (PFA). Alternatively,  
2 Plaintiffs seek an order requiring the Trustee to assume and  
3 assign the subject leases to PFA. Plaintiffs filed a motion for  
4 partial summary judgment on their first claim. Defendants filed  
5 a cross-motion for summary judgment on all claims asserted by  
6 Plaintiffs. For the reasons that follow, Plaintiffs' motion will  
7 be denied and Defendants' motion will be granted.

8 BACKGROUND

9 ATC and the Debtor entered into two leases prepetition.  
10 Debtor filed its Chapter 11 petition on January 4, 1999 and  
11 continued to use, as Debtor-in-Possession, the property it had  
12 acquired pursuant to the leases while making the required lease  
13 payments. On February 18, 1999, the Court approved the sale of  
14 Debtor's frozen food business to PFA. The leased equipment  
15 continued to be used, and lease payments maintained, after the  
16 sale of the business.

17 In May, 1999, PFA and Portland General Electric filed a  
18 joint motion for an order directing the Debtor to make payments  
19 to assume certain contracts which had originally been omitted  
20 from the sale of the frozen food business. In the motion, PFA  
21 made the statement that it had "determined that it wish[ed] to  
22 acquire Agripac's rights and interest in and to the Omitted  
23 Contracts." Included in those "Omitted Contracts" were the two  
24 leases with ATC. Attached to the motion was a proposed order  
25 with the provision that "Agripac shall assume and assign to PFA,  
26 effective February 23, 1999, each of the [Omitted Contracts]."

1           The Chapter 11 trustee was thereafter appointed and was  
2 present through his attorney at the hearing on the joint motion  
3 on May 27, 1999. The bulk of the hearing was actually spent  
4 discussing other matters affecting the bankruptcy. As to the  
5 Omitted Contracts, Ms. Cotting, the attorney for the Unsecured  
6 Creditors Committee, stated that the Committee and PFA had agreed  
7 on a method to split the cost of assuming the contracts. Mr.  
8 Foraker, attorney for PFA, then stated that he and Ms. Cotting  
9 would work together to prepare an order dealing with the Omitted  
10 Contracts, to which the Court assented. Mr. Weil, representing  
11 Plaintiff Deutsche Financial Services, attended the hearing.

12           A "Supplemental Order Authorizing Trustee to Assign  
13 Contracts and Leases" was thereafter submitted and entered by the  
14 Court on June 14, 1999. It was signed by representatives of the  
15 Trustee, the Unsecured Creditors Committee, and PFA. The order  
16 as entered differed in one material respect from the proposed  
17 order which accompanied the original motion. Rather than stating  
18 that each of the Omitted Contracts would be assumed and assigned,  
19 the order provided in paragraph 2 that "The Trustee shall, from  
20 time to time until September 1, 1999, upon PFA's written request,  
21 assign to PFA, effective February 23, 1999, each of the  
22 Supplemental Assumed Contracts . . . ." Both the Trustee and the  
23 Plaintiffs agree that the order should be interpreted such that  
24 no contract was assumed by the Trustee or the estate unless it  
25 was also to be assigned to PFA.



1 Plaintiffs attempt to characterize this as a case of  
2 overreaching by a litigant. However, this is not a case in which  
3 one party to an agreement disagreed with the other drafting party  
4 regarding the language of an order drafted to memorialize their  
5 agreement. The parties to the agreement were in accord with the  
6 language of the order as evidenced by the signatures of the  
7 representatives of PFA, the Trustee, and the Unsecured Creditors  
8 Committee. The Plaintiffs' remedy under the Code, which they  
9 always possessed, was to file a motion for an order requiring the  
10 Trustee to assume or reject its leases within a specific time  
11 period. Code § 365(d)(2).

12 Plaintiffs cite to several cases where the courts have  
13 grappled with the interpretation to be given to court's orders.  
14 See In re 85-02 Queens Blvd. Associates, 212 B.R. 451 (Bankr.  
15 E.D.N.Y. 1997); Blecker v. Kofoed, 672 P.2d 526 (Colo. 1983);  
16 Wohlschlegel v. Uhlmann-Kihei, Inc., 662 P.2d 505 (Hawaii App.  
17 1983). The cited courts tend to agree that an order that is  
18 unambiguous should be enforced according to the terms of the  
19 order. Where the terms of an order are ambiguous, the order  
20 should be construed in light of the entire record, including the  
21 circumstances surrounding the order. The aim should be to "give  
22 effect to the intention of the [issuing] court." Wohlschlegel at  
23 511.

24 I agree for the most part with the above cited methods for  
25 interpretation of court orders, with one clarification. I do not  
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1 think that one can or should try to get into the head of the  
2 judge that issued an order to try to determine what the judge's  
3 intentions were at the time the order was signed. The  
4 construction to be given an ambiguous order should be based on  
5 that which can be found in the record.<sup>1</sup>

6 In my opinion, the order in question is unambiguous. The  
7 order required that PFA make a written request to the Trustee for  
8 each contract which it desired to have assigned to it and that  
9 the option to request assignment lapsed on September 1, 1999.<sup>2</sup>  
10 The order further required at paragraph 3 that each assignment  
11 was conditioned on "(i) the prior written consent of all parties  
12 to such Supplemental Assumed Contract (other than Agripac) or  
13 (ii) the entry of a supplemental Order of this court determining  
14 that adequate assurance of future performance has been provided  
15 by PFA with respect to such Supplemental Assumed Contract . . .  
16 ." PFA did not request assignment of ATC's leases, nor was the  
17 written consent of the parties to the leases obtained or a

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19 <sup>1</sup>Even if one were inclined to get into my head at the time I  
20 signed the order, one would not find much with regard to the  
21 order in question. My subjective intent was to give effect to  
22 the agreement reached between the parties to the order - the  
Trustee, the Unsecured Creditors Committee, and PFA, within the  
limitations of the Bankruptcy Code.

23 <sup>2</sup>An interpretation of the order in which all the contracts  
24 were to be assumed and assigned to PFA would render most, if not  
25 all, of the relevant language of paragraph 2 of the order  
26 superfluous. The order would not have required written requests  
for assignment, but would have mirrored the wording of the  
proposed order which accompanied the May 1999 motion which merely  
directed the Trustee to assume and assign all of the omitted  
contracts.

1 supplemental order of adequate assurance entered. The required  
2 terms of the order were not complied with so as to effect an  
3 assignment of ATC's leases.

4 Even were the terms of paragraph 2 of the order found to be  
5 ambiguous, a review of the record and the circumstances  
6 surrounding entry of the order would lead to the same  
7 construction of the order in question. At the time the motion  
8 was filed, it appears PFA desired an assignment of each of the  
9 Omitted Contracts. At the hearing on the PFA/PGE joint motion,  
10 no discussion was made concerning details of the assumption and  
11 assignment of contracts nor was Court approval given to any  
12 specific details. The Court merely agreed to Mr. Foraker's  
13 statement that he and Ms. Cotting would work together to prepare  
14 an order. According to a declaration filed by Mr. Foraker, he  
15 had not had time to review all the relevant lease documents and  
16 did not want to commit his client to assignment of leases prior  
17 to knowing the details of each lease agreement. In any case, the  
18 wording of the order submitted for entry was modified to allow  
19 PFA until September 1, 1999 to make its determination regarding  
20 assignment.

21 A case management conference in the Agripac case was held on  
22 August 26, 1999 with a number of parties represented, including  
23 Mr. Foraker for PFA and Priscilla Douglas for ATC. Ms. Douglas  
24 stated that her client found itself "between a rock and a hard  
25 place in the sense that I think the orders of the estate has  
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1 [sic] assumed our leases and PF Acquisition has not taken a  
2 position yet on whether they will take an assignment of the  
3 leases."<sup>3</sup> After further discussion with Mr. Foraker and Mr.  
4 McKittrick, the Court agreed to extend the deadline from  
5 September 1, 1999 to October 1, 1999 for PFA to make its  
6 determination as to assignment of ATC's leases. It appears that  
7 at the time of the case management conference, ATC, PFA, the  
8 Trustee and the Court were in agreement that PFA had not yet  
9 chosen to take an assignment of ATC's leases.<sup>4</sup> This provides a  
10 clear indication on the record of the parties' and the Court's  
11 interpretation of the effect of the June 14 order and the  
12 construction which should be applied by this Court.

13 Claim for Injunctive Relief

14 Plaintiffs' second claim for relief asks, in the event the  
15 Court finds that ATC's leases were not assumed and assigned, that  
16 the Court order the Trustee under 11 U.S.C. § 105(a) to assume  
17 both leases and assign them to PFA and order PFA to accept

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19 <sup>3</sup> Plaintiffs' characterization of this statement in their  
20 response to PFA's supplemental statement of undisputed facts at ¶  
21 9 that assignment of the leases was merely a matter of timing is  
22 contrary to any reasonable reading of the statement in question.  
23 This is especially so in light of Plaintiffs' argument that the  
24 order should be read to require an assumption and assignment of  
25 all the leases by September 1, 1999, only six days after the date  
26 of the management conference.

<sup>4</sup> There was disagreement by the Trustee and PFA regarding Ms.  
Douglas' contention that the Trustee had assumed the leases  
before PFA decided whether it intended to ask for assignment. As  
disclosed earlier in this opinion, the Plaintiffs do not now  
argue that the Trustee assumed ATC's leases absent an assignment  
to PFA.

1 assignment of both leases. While the Plaintiffs did not move for  
2 summary judgment on this claim, the Defendants have.

3 Plaintiffs' request that this court order the Trustee to  
4 assume the leases and to assign them to PFA exceeds the grant of  
5 equitable power this court has under Code § 105(a). Code § 105(a)  
6 gives the court the power to "issue any order, process, or  
7 judgment that is necessary or appropriate to carry out the  
8 provisions of [the Bankruptcy Code]." It does not give the Court  
9 unlimited equitable power to do that which it feels is right.  
10 Rather, "a bankruptcy court's equitable powers must be strictly  
11 confined within the prescribed limits of the Bankruptcy [Code]."  
12 In re Golden Plan of California, Inc., 829 F.2d 705,713 (9<sup>th</sup> Cir.  
13 1986) (citing Guerin v. Weil, Gotshal & Manges, 205 F.2d 302, 304  
14 (2d Cir. 1953)). Bankruptcy courts "cannot in the name of equity  
15 ignore specific statutory mandates." Hamilton v. Lumsdeed, 93  
16 F.3d 648 (9<sup>th</sup> Cir. 1996) (citing In re Lowenschuss, 67 F.3d 1394,  
17 1401-02 (9<sup>th</sup> Cir. 1995)).

18 The Code gives the trustee the discretion to assume or  
19 reject executory contracts and unexpired leases of the debtor,  
20 subject to court approval. Code § 365(a). A Chapter 11 trustee

21 may assume or reject an . . . unexpired lease . . . of  
22 personal property of the debtor at any time before  
23 confirmation of a plan, but the court, on request of  
24 any party to such . . . lease, may order the trustee to  
determine within a specified period of time whether to  
assume or reject such . . . lease.

25 Code § 365(d)(2). The court thus has the power under the Code to  
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1 approve or disapprove an assumption or rejection made by the  
2 trustee and to order the trustee to assume or reject within a  
3 specific period of time, if requested to do so. Code § 365(f)  
4 further gives the trustee the power and discretion to assign an  
5 executory contract or unexpired lease if the trustee first  
6 assumes the contract and if adequate assurance of future  
7 performance by the assignee is provided. The court's power is  
8 thus even more limited with respect to assignments to ruling,  
9 upon objection by a party in interest, as to whether adequate  
10 assurance of future performance has been given. Because the Code  
11 gives the discretion to assume or reject executory contracts and  
12 unexpired leases, subject to court approval, to the trustee, and  
13 the sole discretion to make an assignment, the court is, by  
14 implication, proscribed from ordering the trustee to make such  
15 decisions on equitable grounds.<sup>5</sup>

#### 16 CONCLUSION

17 The leases between ATC and Agripac were not assumed by the  
18 trustee and assigned to PFA. Moreover, this Court cannot and will  
19 not order the Trustee to assume and assign those leases to PFA.  
20 The Plaintiffs' motion for summary judgment will therefore be  
21 denied and Defendants PFA's and Grassmueck's cross-motions for  
22 summary judgment will be granted. Due to the Court's ruling on  
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24 <sup>5</sup>The Court's duty to approve the Trustee's assumption or  
25 rejection of ATC's leases was discharged upon entry of the June  
26 15, 1999 order wherein the Court's approval was given to the  
Trustee's assumption of those leases for which PFA had requested  
assignment.

1 the motion and cross-motions for summary judgment, the Trustee's  
2 cross-claim against PFA is moot and is denied on that basis.  
3 Trustee's motion for an order rejecting the leases, to the extent  
4 one is required, is granted. Counsel for the Defendants shall  
5 draft an order and judgment consistent with this memorandum  
6 opinion.

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FRANK R. ALLEY, III  
Bankruptcy Judge

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