

1 **DO NOT PUBLISH**

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7 **UNITED STATES BANKRUPTCY COURT**
8 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
9

10 In re:) Jointly Administered
11) for Procedural Pur-
12 GUY F. ATKINSON COMPANY OF) poses Only Under
CALIFORNIA, a Delaware corporation,) **Case No. 97-3-3694-TC**
13)
GUY F. ATKINSON COMPANY, a Nevada) Chapter 11
14 corporation; and)
15)
GUY F. ATKINSON HOLDINGS, LTD.,)
16 a Canadian federal corporation,) **MEMORANDUM RE**
Debtors.) **EQUIPMENT RENT**

17
18 The court held a trial on September 8-9, 1999, to determine
19 the compensation that a surety completing bonded construction
20 projects should be required to pay to certain banks for the use of
21 equipment and inventory in which those banks have a senior lien.
22 G. Larry Engel, David J. Brown and Kristin E. Caverly appeared for
23 Wells Fargo Bank, N.A., as Agent for Itself, Bear Stearns & Co.,
24 and Cerberus Partners, L.P. (the Banks). Adam A. Lewis, Cedric C.
25 Chao, Filiberto Agusti, and Richard K. Willard appeared for
26 Fidelity and Deposit Company of Maryland, and the American
27 International Group of Companies (the Bonding Companies).
28

1 **BACKGROUND**

2 Debtors are heavy construction companies specializing in
3 large-scale projects, such as roads, bridges, power plants, and
4 dams. The Bonding Companies issued surety bonds on many of
5 Debtors' projects. The Banks made prepetition loans to Debtors
6 secured by liens on the equipment, inventory, and works in progress
7 at the bonded projects (the Equipment).

8 Debtors obtained three postpetition loans from the Bonding
9 Companies to enable Debtors to continue their operations. The
10 first such loan was secured by a lien on the Equipment senior to
11 the prior lien of the Banks. This court has determined that the
12 first loan has been repaid, and the District Court upheld that
13 determination on appeal. The orders authorizing the second and
14 third loans provide expressly that the Banks retain senior liens in
15 all of the Equipment.

16 When it became apparent that Debtors could not successfully
17 reorganize, the court granted the Bonding Companies permission
18 to take over and complete the bonded projects, and to use the
19 Equipment for that purpose. The Bonding Companies took over all
20 the bonded projects on February 1, 1998 (the Takeover Date). Upon
21 motion of the Banks, the court later determined that the Bank's
22 security interest in the Equipment was superior to the equitable
23 subrogation rights of the Bonding Companies. See State Bank &
24 Trust Company v. Insurance Company of the West, 132 F.3d 203
25 (5th Cir. 1997). The court entered an order under which the
26 Bonding Companies could continue to use the Equipment, but were
27 required to compensate the Banks for that use (the Equipment

1 Order). The Bonding Companies and the Banks disagree over the
2 amount of compensation due under the Equipment Order.

3
4 **DISCUSSION**

5 **A. TIME PERIOD FOR WHICH COMPENSATION IS REQUIRED**

6 I determine that the Equipment Order requires the Bonding
7 Companies to compensate the Banks for use of the Equipment only for
8 the period that the Bonding Companies themselves used the Equipment
9 after the Takeover Date.¹

10 The plain language of the Equipment Order compels this
11 conclusion. That order provides in relevant part:

12 [T]he Court has authorized the Bonding Companies to
13 provisionally use the Bonded Project Equipment Collateral
14 to complete the Bonded Projects. However, the Bonding
15 Companies do not own the Bonded Project Equipment
16 Collateral. Accordingly, in order to take care that the
17 Bonding Companies are not unjustly enriched by the use of
18 the Bonded Project Equipment Collateral, the Bonding
19 Companies need to provide the Debtors', [sic] subject to
20 the Banks' security interest and the terms of this Order,
21 with compensation for the past and future use and
22 diminution of the Bonded Project Equipment Collateral.
23 Therefore, the Bonding Companies shall pay to the Banks:

24 . . . the fair market rental value of the Bonded
25 Project Equipment Collateral on account of the **Bonding**
26 **Companies' use** of the Bonded Project Equipment Collateral
27 after the Petition Date and before such determination
28 by the court or sale of the equipment.

Equipment Order at ¶ 7 (emphasis added). This language requires
payment only for the Bonding Companies' use of the Equipment. It
is not disputed that the Bonding Companies did not obtain
possession of the Equipment until they took over the bonded
projects, and they thus did not "use" the Equipment in the normal
sense of the word before that date. Nothing in the Equipment Order

1 overrides the usual meaning of "use" or deems the Bonding
2 Companies' use of the Equipment to start on the petition date.

3 The limited purpose of the Equipment Order reinforces the
4 conclusion that the Bonding Companies are required to pay only
5 for their use of equipment after the Takeover Date. The Banks
6 were awarded the payments in lieu of being allowed to seize the
7 Equipment on the Takeover Date. To interpret the Equipment Order
8 to require compensation for Debtors' use of the equipment before
9 that date would be to expand the effect of the order beyond the
10 situation it was intended to remedy.

11 The Banks contend that it is law of the case that the Bonding
12 Companies' obligation to pay arises from the petition date, because
13 the Bonding Companies appealed from the Equipment Order, contending
14 that this court erred in requiring payments from the petition date.
15 This argument is unpersuasive. The Bonding Companies effectively
16 dropped this argument from their appeal and the District Court did
17 not address the issue on the merits. As a result, the District
18 Court did not decide whether the Equipment Order requires payments
19 from the petition date. Because neither this court nor the
20 District Court has previously interpreted the Equipment Order,
21 there is no law of the case on the issue presently before this
22 court.

23 **B. RECOUPMENT**

24 The Bonding Companies argue that they have recoupment rights
25 that defeat all claims of the Banks. Specifically, the Bonding
26 Companies assert that they should be entitled to recoup the
27 indemnity payments owed by Debtors against the rent payments owed
28 by the Bonding Companies. The Bonding Companies rely on the

1 decision of the Ninth Circuit in Newbery Corp. v. Fireman's Fund
2 Ins. Co., 95 F.3d 1392 (9th Cir. 1996). The court rejected this
3 argument at trial, and excluded evidence offered by the Bonding
4 Companies. The court offers the following explanation for that
5 ruling.

6 The facts of Newbery are as follows. Debtor Newbery was a
7 subcontractor on a construction project. Fireman's Fund issued
8 payment and performance bonds on Newbery's projects. Newbery
9 agreed to indemnify Fireman's Fund against all losses sustained
10 under the bonds. Citibank had a perfected lien on Newbery's
11 equipment. After Newbery defaulted, Fireman's Fund took over and
12 completed the project using Newbery's equipment. Fireman's Fund
13 agreed to pay rent to Citibank for use of Citibank's collateral.
14 Newbery then filed a lender liability suit against Citibank. As
15 part of the settlement of that suit, Citibank released its security
16 interest in the equipment, and assigned to Newbery its claim to
17 receive rent from Fireman's Fund, but took a security interest in
18 the equipment rents due Newbery from Fireman's Fund. Newberry, 95
19 F.3d at 1397. The Ninth Circuit upheld the trial court decision
20 allowing Fireman's Fund to recoup the indemnity payments due from
21 Newbery against the amounts due to Newbery for use of its
22 equipment.

23 Newbery is easily distinguishable from the present case. The
24 decision acknowledged that "'recoupment cannot defeat the rights
25 of a creditor who holds a properly perfected Article 9 security
26 interest.'" Newberry, 95 F.3d at 1403 (quoting Native Am. Fin.
27 Inc. v. Tecumseh Constr. Co. (In re Tecumseh Constr. Co.), 157 B.R.
28 471 (Bankr. E.D. Cal. 1993)). In Newbery, the court held that this

1 limitation on recoupment did not apply, because Citicorp had
2 released its security interest in the equipment, had assigned to
3 Newbery its claim to receive rental fees from Fireman's Fund, and
4 had retained a security interest only in the net amount Fireman's
5 Fund owed Newbery. Id. at 1403-04. In the present case, the Banks
6 did not release their security interests in the Equipment and did
7 not assign to Debtors their rights to receive rental fees from the
8 Bonding Companies. Thus, in the present case the Banks retain
9 rights far different from the rights Citibank retained in the
10 Newbery case.

11 Permitting recoupment in the present case would defy common
12 sense and the equitable underpinning of the recoupment doctrine.
13 At the time the Bonding Companies took over Debtors' bonded
14 projects, they had no right to prevent the Banks from seizing the
15 Equipment pursuant to the Banks' perfected security interest. This
16 court prohibited the Banks from exercising their rights against
17 their collateral only after ordering that the Bonding Companies pay
18 the Banks the fair rental value of the Equipment. To allow the
19 Bonding Companies to defeat the Banks' right to payment for use of
20 the Equipment would wholly defeat rights that the Bank indubitably
21 enjoyed at the time of the takeover, and that the Equipment Order
22 was designed to preserve. Stated differently, the Bonding
23 Companies seek through their recoupment claim to enjoy all the
24 benefits of the Equipment Order while avoiding the burdens of that
25 order. Recoupment is an equitable doctrine that should never be
26 used to reach such an inequitable result.

1 **C. VALUATIONS**

2 The Equipment Order provides that the Bonding Companies shall
3 pay fair market rent for the Equipment used, and that the rental
4 value shall be determined by a "Special Evaluator." The Special
5 Evaluator is to be an expert appraiser who is mutually acceptable
6 to the parties or, if the parties are unable to agree, who is
7 selected by the court from nominees submitted by the parties.
8 Either party may challenge the findings of the Special Evaluator
9 before the court. Mr. Jeffrey Hutton of Arthur Anderson, LLP was
10 selected by the parties as the Special Evaluator, and was appointed
11 by the court on September 28, 1998. He submitted his written
12 report on July 12, 1999.

13 **1. Large Equipment.** The Special Evaluator submitted a
14 determination of fair market rental value only for certain large
15 equipment, including earth moving equipment, trailers, vehicles,
16 etc. (the Large Equipment).² The Special Evaluator determined the
17 rental value for the Bonding Companies use of the Large Equipment
18 from the Takeover Date to June 30, 1999 to be \$2,912,899, before
19 prejudgment interest. The Bonding Companies contend that the
20 Special Evaluator's determination of rent due should be adjusted
21 downward for the following reasons.

22 First, the Bonding Companies contend that the rental value
23 found by the Special Evaluator should be reduced with respect to
24 Equipment more than seven years old. The Bonding Companies'
25 expert witness, Edward G. Barker, testified that rental companies
26 generally do not rent equipment more than seven years old, that
27 the Special Evaluator's reliance on market comparables is
28 inappropriate, and that court should adopt Mr. Barker's rate-of-

1 return analysis as the rental value of the older equipment. I
2 find the Bonding Companies' evidence on this issue unpersuasive.
3 The evidence does not support the contention that rental companies
4 do not rent equipment more than seven years old. The evidence also
5 indicates that the Special Evaluator took the age of the Large
6 Equipment into account when determining fair market rental value,
7 and that the Special Evaluator used a rate-of-return analysis to
8 check his analysis of market comparables. See Special Evaluator's
9 Report at 22. Finally, Mr. Barker's rate-of-return analysis
10 contained numerous errors that diminish its persuasive value.

11 Second, the Bonding Companies contend that the rental value
12 determined by the Special Evaluator should be reduced by 7.5
13 percent because of the large volume of equipment used. Mr. Barker
14 testified that rental companies provide volume discounts of up to
15 10 percent. The Special Evaluator's report considered but declined
16 to apply a volume discount. "We understand that FMRV's are often
17 discounted based on volume (unit quantity) rentals. The subject
18 assets were available for various periods and at various projects.
19 In some cases, the subject assets were available for multiple
20 projects. As a result, we made no adjustments for volume
21 discounts." Special Evaluator's Report at 22. At trial, the
22 Special Evaluator again acknowledged that rental companies provide
23 volume discounts, but again explained that the Bonding Companies
24 would not qualify for any such discount because the assets were
25 scattered among so many projects. I find the Bonding Companies'
26 argument persuasive. The Special Evaluator assumes that equipment
27 rented by the Bonding Companies for different projects would not be
28 aggregated for this purpose. The present case is like that of a

1 single large rental company operating from several locations (the
2 Banks) renting to a single large customer renting from several of
3 the rental company's locations (the Bonding Companies). It is more
4 likely than not that such a customer would be able to negotiate
5 a substantial volume discount. I therefore determine that the
6 Special Evaluator's determination of fair market rental value
7 should be reduced by 7.5 percent.

8 Third, the Bonding Companies contend that the rental values
9 determined by the Special Evaluator should be reduced to take
10 account of discounts available for long-term rentals. Mr. Barker
11 testified that the bulk of the Large Equipment was rented for 18
12 months, and that rental companies provide discounts up to ten
13 percent for rentals longer than six months. This argument is
14 unpersuasive. The Special Evaluator already took into account the
15 18-month rental period in making his determination of fair market
16 rental value. See Special Evaluator's Report at 22.

17 The Banks assert that the Special Evaluator's determination
18 should be adjusted upward to take account of usage periods that the
19 Special Evaluator erroneously failed to take account of. The Banks
20 and Bonding Companies disagree as to how much the Special Evaluator
21 understated the usage periods. I find that the Banks' expert,
22 Robert J. Stall, accurately identified the additional usage periods
23 and used the correct fair market rental value for those usage
24 periods. The Special Evaluator's determination shall be adjusted
25 upward by \$481,440.³

26 The Banks and the Bonding Companies agree that the special
27 Evaluator erroneously failed to value certain Large Equipment,
28 because the Special Evaluator believed that equipment was leased,

1 rather than owned by Debtors. The parties disagree, however, over
2 the fair market rental value for the omitted Large Equipment. I
3 find that the Banks' expert, Mr. Stall, correctly determined the
4 rental usage period and rental value of the excluded Large
5 Equipment, and that \$522,809⁴ should be added to the rental value
6 of the Large Equipment found by the Special Evaluator.

7 The Banks acknowledge that the determination of the Special
8 Evaluator should be reduced by \$618,116, because the Banks did not
9 have a perfected security interest in certain vehicles included in
10 the Special Evaluator's determination.

11 The fair rental value of the Large Equipment without
12 prejudgment interest is calculated as follows.⁵

13	1. Special Evaluator's determination	\$2,912,899
14	2. Additional usage periods	481,440
15	3. Erroneously omitted equipment	522,804
16	4. Erroneously included vehicles	(618,116)
17	5. <u>Volume discount (7.5 percent of lines 1-4)</u>	<u>(247,427)</u>
18	Amount due	\$3,051,605

19 **2. Small Equipment and Tools.** The Special Evaluator
20 determined that he did not have enough information to state a
21 professional opinion regarding the value of small equipment and
22 tools at the bonded projects on the Takeover Date. The Bonding
23 Companies' expert, Mr. Barker, agreed that there is insufficient
24 information to value the small equipment and tools. Mr. Barker
25 also stated that if the court concluded otherwise, it should set
26 the value at not more than \$1,509,795. The Banks' expert witness,
27 Mark A. Smith, testified that there was sufficient information to
28 value the small equipment and tools, and that this equipment had a
value of \$3,469,634 as of the Takeover Date.

1 I find that the small equipment and tools can be valued, and
2 that Mr. Smith's testimony regarding their value is persuasive in
3 all respects save one. In determining the value of the small
4 equipment and tools from Debtors' "Black Book," Mr. Smith used the
5 acquisition cost listed, rather than the Debtors' more recent
6 estimates of fair market value. His report stated that he used the
7 book value figures on the basis of the following language in the
8 Equipment Order.

9 The Special Evaluator shall base the compensation
10 to be paid by the Bonding Companies for the use of
11 supplies, inventory and works in progress upon the
12 greater of (i) its book value (calculated on a FIFO
13 basis), or (ii) its value as of the Petition Date,
14 as such value would be determined between two parties
15 dealing at arms-length under non-distress circumstances.

16 Equipment Order, ¶ 9(d). This provision was intended to apply only
17 to supplies, inventory, and works in progress, not to equipment and
18 tools. It is appropriate to use book value for materials, because
19 such materials have not been previously used, and because book
20 value accurately represents the value of the materials to the
21 completing surety. Compensation for use of the small equipment and
22 tools should take account of the fact that some of the tools may
23 have been used before and therefore will have diminished in value.
24 Thus, it should be based on fair market rental value or the
25 diminution in value resulting from use. In light of the fact that
26 neither party submitted evidence regarding rental value, the best
27 available measure of compensation for previously used tools is the
28 value on the Takeover Date (calculated from the then fair market
value or some other measure that reflects accumulated depreciation)
less the proceeds received by the Banks upon sale.

1 I determine that the value of the small equipment, tools, and
 2 other nonconsumables as of the Takeover Date was \$2,264,769. This
 3 amount is derived from Mr. Smith's report by substituting the fair
 4 market value entries from the Black Book for the book value entries
 5 from the Black Book. For the two projects for which Mr. Smith
 6 reports no fair market value data, fair market value is calculated
 7 as 45 percent of the book value. This percentage was calculated by
 8 dividing the aggregate fair market value for the other projects by
 9 the aggregate book value for those projects. I find no reason to
 10 divert from Mr. Smith's analysis regarding tools purchased
 11 postpetition or expense deferrals.

**Small Equipment and other Nonconsumables
 on hand as of January 31, 1998**

	<u>Smith Report</u>	<u>Court Findings</u>
Black Book		
China Basin	\$ 218,600	\$ 80,849
Belleville	1,434,527	592,472
Mingo Junction	39,168	19,737
Stony Brook	99,586	47,890
UCSF	52,232	23,504
NW Bonded	582,155	582,155
Buck Center	40,264	18,350
Uconn	199,866	96,576
Purchases	412,694	412,694
<u>Deferred Amounts</u>	<u>390,542</u>	<u>390,542</u>
TOTAL	<u>\$3,469,634</u>	<u>\$2,264,769</u>

20 I do not have enough information to determine the proceeds
 21 paid to the Banks from sale of the small equipment, tools, and
 22 other nonconsumables.⁶ The Banks' expert witness testified that
 23 such proceeds total \$170,613. The Bonding Companies' expert
 24 testified that such proceeds total \$773,435. The parties are
 25 directed to submit a further accounting regarding this matter
 26 pursuant to the Part E(2) of this decision.

1 **3. Consumable Materials on Hand.** The Special Evaluator
2 declined to state a professional opinion regarding the value of
3 supplies, inventory, and works in progress, stating that he had
4 insufficient information to do so. Edward Barker, testifying for
5 the Bonding Companies, stated summarily, "I concur with the
6 conclusion in the Special Evaluator's report that because of
7 insufficient data it is not possible to render an opinion as to the
8 value of inventory, supplies, and works in progress used on the
9 Bonded Projects between August 10, 1997 and June 30, 1999."

10 Declaration of Edward G. Barker, ¶ 13. Mark Smith testified for
11 the Banks that he discovered information not available to the
12 Special Evaluator, and that such information was sufficient to
13 determine the value of materials on hand. He determined that
14 materials on hand on the bonded projects had a book value of
15 \$3,581,193 as of the Takeover Date.

16 I credit fully Mr. Smith's expert testimony regarding the
17 value of unused materials on hand as of the Takeover Date. He
18 correctly determined that there was credible evidence from which
19 the value of the materials on hand could be determined. His method
20 of evaluating that evidence was appropriate and was fully
21 explained. He corroborated his conclusions through various cross
22 checks. The Bonding Companies ask this court to reject Mr. Smith's
23 testimony without offering any alternative valuation. It is
24 obvious from the size, nature, and status of the bonded projects
25 that unused materials with significant value were on hand on the
26 Takeover Date. Given the certainty that the Bonding Companies
27 received property of significant value, this court should make
28 every effort to determine that value. Mr. Smith's testimony

1 clearly meets the minimum standards of credibility, and even more
2 clearly represents the most persuasive testimony presented to the
3 court on this subject.

4 I find more persuasive the Bonding Companies' argument that
5 they should not be required to pay the Banks for materials
6 delivered to Debtors before the Takeover Date that the Bonding
7 Companies later paid for. Mr. Smith testified that Debtors made
8 purchases of additional materials totaling \$8,425,595 between the
9 petition date and the Takeover Date, of which \$1,574,077 were paid
10 for by the Bonding Companies after the takeover of the bonded
11 projects. The Banks argue that it is irrelevant whether the
12 purchase price was paid before the Takeover Date, because they
13 acquired a security interest in the property as soon as it was
14 delivered to Debtors. I determine that it is appropriate for the
15 Bonding Companies to deduct the amount they paid for materials
16 delivered pre-takeover, whether or not the Banks obtained a
17 security interest upon delivery. In determining what the Bonding
18 Companies should pay for materials on hand, the court is applying
19 an unjust enrichment test. It is only under this approach, which
20 looks at the question from the Bonding Companies' viewpoint, that
21 the materials on hand can properly be valued according to their
22 acquisition cost. The Bonding Companies are clearly not unjustly
23 enriched by receiving materials they pay for. The Banks do no
24 better by viewing the question from the perspective of what they
25 could seize and sell. In determining what the Banks would realize
26 from that course of action, one would have to assign the materials
27 a liquidation value. There can be little doubt that the Banks are
28 as well off receiving payment of \$2,007,116 for the book value of

1 the materials as they are receiving payment for the liquidation
2 value of materials originally costing \$3,581,193.

3 The Banks are entitled to recover \$2,007,116 for materials on
4 hand on the Takeover Date before prejudgment interest.⁷

5 **D. CHINA BASIN**

6 The Bonding Companies argue that the rental value for the
7 Equipment should not include the amount attributable to the
8 Equipment used on the China Basin project. This argument is based
9 on this court's statement at a hearing on July 23, 1999, at which
10 time the court indicated that the rental payments due the Banks for
11 the China Basin project could be recovered through the Bank's
12 receipt of the surplus proceeds from that project.

13 The Bonding Companies' argument is unpersuasive because the
14 underlying premise for the court's comments no longer exists. At
15 the time of the July 23 hearing, the court assumed that the surplus
16 for China Basin project would be paid to the Banks. It thus did
17 not matter to the Banks whether some of the money they received was
18 characterized as payment for use of the Equipment, because that
19 characterization would not affect the amount of money the Banks
20 received. The parties agree that one of the appellate decisions of
21 the district court in this case has had the effect of allowing the
22 Bonding Companies to offset a surplus earned on one bonded project
23 against losses incurred on other bonded projects. As a result, it
24 is unlikely that the Banks will be paid the surplus from the China
25 Basin project. It has thus become important to treat the payments
26 for use of the China Basin equipment as project expenses to be paid
27 to the Banks irrespective of whether the China Basin project runs a
28 surplus.

1 **E. PREJUDGMENT INTEREST**

2 1. **Interest Rate.** The Special Evaluator's determination
3 includes prejudgment interest at the rate of 10 percent per annum.
4 The Bonding Companies do not object to the imposition of
5 prejudgment interest, but contend that the rate should be 6
6 percent. The Banks contend that prejudgment interest should be
7 imposed at the rate of 11.5 percent.

8 The Ninth Circuit has held that a federal court should
9 calculate prejudgment interest at the postjudgment interest rate
10 fixed by 28 U.S.C. § 1961, "unless the trial judge finds,
11 on substantial evidence, that the equities of the particular case
12 require a different rate." Western Pacific Fisheries, Inc. v. S.S.
13 President Grant, 730 F.2d 1280, 1289 (9th Cir. 1984). Accord MHC,
14 Inc. v. Oregon Dept. of Revenue, 66 F.3d 1082, 1090-91 (9th Cir.
15 1995); Nelson v. EG & G Measurements Group, Inc., 37 F.3d 1384,
16 1391-92 (9th Cir. 1994). In a diversity action governed by state
17 law, however, a federal court is to apply the rate for prejudgment
18 interest fixed by state law. Northrop Corp. v. Triad International
19 Marketing S.A., 842 F.2d 1154, 1155 (9th Cir. 1988).

20 I determine that the unique circumstances of the present case
21 justify awarding prejudgment interest at the rate of ten percent
22 per annum. Through the Equipment Order, this court in substance
23 imposed a contractual obligation on the Bonding Companies to pay
24 rent to the Banks. To avoid unjust enrichment of the Bonding
25 Companies, and to provide compensation for use of the Banks'
26 property, the Equipment Order required the Bonding Companies to pay
27 the Banks fair market rent as a condition of using the Equipment.
28 The court relied upon state law in determining that the Banks

1 otherwise had a right to seize and sell the Equipment pursuant to
2 their perfected personal property security interests. The court
3 also relied upon traditional state-law concepts of unjust
4 enrichment and implied-by-law contracts in requiring the Bonding
5 Companies to pay rent. Because the most important rights at issue
6 arise under state law, and because the present controversy is
7 closely analogous to a breach of contract action, it is appropriate
8 to impose prejudgment interest at the ten percent rate specified
9 for breach of contract damages in California Civil Code § 3289.
10 See Northrop, 842 F.2d at 1155 (9th Cir. 1998).

11 **2. Calculation of Interest Due.** The court has sufficient
12 information to calculate prejudgment interest on the amount due for
13 the large equipment. The total amount due including prejudgment
14 interest through June 30, 1999, is the "total payment 2/1/98 to
15 6/30/99" calculated by Mr. Stall reduced by the 7.5 percent volume
16 discount imposed by the court. That amount equals \$3,239,589.
17 To that amount is added per diem interest for each day between
18 June 30, 1999 and entry of judgment. That per diem amount is
19 calculated by reducing Mr. Stall's calculation of "base rent 2/1/98
20 to end date" by the 7.5 percent volume discount, and by then
21 multiplying that amount by the daily interest rate. So calculated,
22 per diem prejudgment interest is \$836.06.

23 The court also has sufficient information to calculate
24 prejudgment interest on the amount due for consumables. The
25 Bonding Companies shall pay interest from the Takeover Date on
26 \$2,007,116, the amount by which the consumables on hand on the
27 Takeover Date exceed the payments to vendors made by the Bonding
28 Companies. Prejudgment interest on \$2,007,116 from the Takeover

1 Date to June 30, 1999 totals \$282,646, and accrues at \$549.89 per
2 diem from June 30, 1999 to entry of judgment.

3 The court does not have enough information to determine
4 prejudgment interest on the amount due for small equipment and
5 tools. This is so because the amounts received by the Banks upon
6 sale reduce the principal amount due the Banks. As noted in Part
7 C(2), the court does not have complete information regarding either
8 the date or amount of sale proceeds paid to the Banks for small
9 equipment and tools. The court shall hold a status conference
10 regarding the question on November 22, 1999 at 1:00 p.m.

11 **F. EVIDENTIARY OBJECTIONS**

12 The written evidentiary objections filed by the Banks are
13 overruled.

14
15 **CONCLUSION**

16 The Bonding Companies shall pay to the Banks the following
17 sums pursuant to the Equipment Order: (1) for the large equipment,
18 \$3,239,589 plus prejudgment interest of \$836.06 per day from
19 June 30, 1999 to judgment; (2) for the small equipment and tools,
20 \$2,264,769 plus prejudgment interest to be determined; and (3) for
21 consumables, \$2,289,762 plus prejudgment interest of \$549.89 per
22 day from June 30, 1999 to judgment. Judgment will not be entered
23 on any claim until prejudgment interest on the small equipment and
24 tools claim is determined.

25
26
27 Dated: _____

Thomas E. Carlson
United States Bankruptcy Judge

1 1. I do not decide at this time whether the Banks, either directly
2 or through Debtors via their security interests, have a claim
3 against the Bonding Companies based on a theory other than the
4 Equipment Order for any benefit conferred upon the Bonding
5 Companies as a result of Debtors' postpetition, pre-takeover use of
6 the Equipment.

7 2. Assets for which the Special Evaluator did not submit a
8 determination of value are discussed in subparts 2 and 3, infra.

9 3. Before the 7.5 percent volume discount and before prejudgment
10 interest.

11 4. Before the 7.5 percent volume discount and before prejudgment
12 interest.

13 5. It is not necessary to determine the amount paid to the Banks
14 from sale of the large equipment and credit that amount against the
15 equipment rent due. Under a fair market rental approach, the Banks
16 are entitled to fair market rent plus recovery of the salvage value
17 of the equipment at the end of the rental period.

18 6. It is necessary to determine the sales proceeds for small
19 tools received by the Banks, because the measure of compensation is
20 diminution in value, calculated as value of the Takeover Date less
21 salvage value received.

22 7. The amounts paid by the Bonding Companies for pretakeover
23 purchases may have included some payments for small tools. That
24 would not affect the result in any way. The Bonding Companies
25 would still be entitled to a credit. The credit would still equal
26 the full purchase price paid, because the postpetition purchases of
27 small tools were calculated in Part B(2) on the basis of
28 acquisition cost.