

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Drake Bank, a Minnesota banking
corporation,

Court File No. _____

Plaintiff,

COMPLAINT

v.

Allied Health Care Services, Inc., a New
Jersey corporation, and Charles K.
Schwartz, an individual,

Defendants.

PARTIES

1. Plaintiff Drake Bank (“Drake Bank”) is a banking corporation organized under the laws of the State of Minnesota with its registered office located at 60 East Plato Boulevard, St. Paul, Minnesota 55107.

2. Defendant Allied Health Care Services, Inc. (“Defendant Allied”) is a corporation organized under the laws of the State of New Jersey with its principal place of business located at 89 Main Street, Orange, New Jersey 07051.

3. Defendant Charles K. Schwartz (“Defendant Schwartz”) is an individual residing at 37 Timberline Drive, Sparta, New Jersey 07871.

JURISDICTION

4. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1332. The dispute is between citizens of different states and Drake Bank’s

requested relief involves a matter in controversy in excess of \$75,000, exclusive of interest and costs.

5. Venue is proper in this district pursuant to the agreement of the parties and 28 U.S.C. § 1391(a).

FACTS

6. On or about February 22, 2007, Defendant Allied entered into a lease agreement (the "Lease Agreement") with First Premier Capital, LLC ("First Premier"). A true and accurate copy of the Lease Agreement is attached hereto and incorporated herein as **Exhibit 1**.

7. As consideration to induce First Premier to enter into the Lease Agreement and related Lease Schedules with Defendant Allied, Defendant Schwartz entered into an Absolute, Unconditional and Continuing Guaranty Agreement (the "Guaranty") to personally guaranty the payment and performance obligations of Defendant Allied pursuant to the Lease Agreement. A true and accurate copy of Defendant Schwartz's Guaranty is attached hereto and incorporate herein as **Exhibit 2**.

8. The Lease Agreement provides in part:

Charges

...Lessee promises to pay Lessor the Charges in accordance with the Lease Schedule(s), and the payments shall be made at Lessor's address indicated thereon. The Monthly Charge shall be paid by Lessor's address indicted thereon. The Monthly Charges shall be paid by Lessee monthly in advance with the first full month's payment due on the Commencement Date. If the Installation Date does not fall on the first day of a month, the Charge for the period from the installation Date to the Commencement Date shall be an amount equal to the Monthly Charges provided by third (30) and multiplied by the number of days from and including the Installation

date to the Commencement Date. Charges for taxes made in accordance with Section 4 and charges made under any other provision of this Lease Agreement and payable by Lessee shall be paid to Lessor at Lessor's address specified on the Lease Schedule(s) on the date specified in invoices delivered to Lessee. Lessee agrees that if payment as specified above is not received by Lessor on the due date, Lessee shall, to the extent permitted by law, pay on demand, as a late charge, an amount equal to one and one-half percent (1 ½%) or the maximum percentage allowed by law, whichever is less, of the amount then due for each thirty (30) days or portions thereof that said overdue payments are not made.

Event of Default

The occurrences of any of the following events shall constitute an event of default under this Lease Agreement and/or any Lease Schedule:

...

- (d) Lessee fails to make any payment owed to Lessor hereunder within fifteen (15) days after its due date;

...

Remedies

Should any default occur and be continuing, Lessor may, in order to protect the interests and reasonably expected profits and bargain of Lessor, and with or without notice or demand upon, Lessee, pursue and enforce, successively and/or concurrently, any one or more of the following remedies:

- (a) Without retaking the Equipment
 - (1) recover from Lessee all accrued and unpaid Charges and other amounts then due and owing under the terms hereof,
 - (2) recover from Lessee from time to time all Charges and other amounts as and when becoming due hereunder,
 - (3) accelerate and cause to become immediately due and payable all Charges and other amounts due and/or likely to be come due hereunder and recover from Lessee the then worth to Lessor of such amounts,
 - (4) cause to become immediately due and payable and recover from Lessee (i) the then applicable Unrecovered Investment in the Equipment, plus

- (ii) the then worth to Lessor of its anticipated remaining loss of bargain;
- (b) Retake possession of the Equipment without liability to Lessee therefore which is hereby expressly waived, and
 - (1) terminate the term of this Lease Agreement as to the Equipment,
 - (2) recover from Lessee all accrued and unpaid Charges and other amounts owing under the terms hereof,
 - (3) sell the Equipment at public or private sale, and recover from Lessee the difference, if any, by which the Net Proceeds of sale shall be less than (i) the Lessor's then applicable Unrecovered Investment in the Equipment, plus (ii) the then worth to Lessor of its anticipated remaining loss of bargain,
 - (4) re-lease the Equipment to a third party for the account of Lessee and recover from Lessee when becoming due any deficiency between the Charges provided herein and those received from such third party,
 - (5) re-lease the Equipment to a third party for the account of Lessee and recover from Lessee the then worth to Lessor of any deficiency between the Charges provided herein and those receivable from such third party over the re-leased term,
 - (6) recover from Lessee the then worth to Lessor of the excess of the Charges reserved herein for the balance of the whole term (or any remaining term not covered by any re-lease) over the then reasonable rental value of the Equipment; and
- (c) Pursue any other remedy Lessor may otherwise have, at law, in equity or under any statute and recover such other actual damages as may be incurred by Lessor.

Costs and Attorneys' Fees

In addition to all other sums which Lessee may be called upon to pay under the provisions of this Lease Agreement, Lessee will pay to Lessor its reasonable costs of collection or other out-of-pocket costs

and expenses and attorney's fees on account of this Lease Agreement.

Miscellaneous

This Lease Agreement, the Lease Schedule(s), attached riders, and any documents or instruments issued or executed pursuant hereto shall be governed by the laws of the State of Minnesota and constitute the entire Lease Agreement between Lessor and Lessee with respect to the Equipment superseding all prior correspondence between the parties...

The parties hereto submit to the jurisdiction of the courts of the State of Minnesota and Lessee hereby waive local venue with respect to claims arising out of this Lease Agreement...

THE LESSEE AND ANY GUARANTORS OF THE LESSEE'S OBLIGATIONS UNDER THIS LEASE AGREEMENT HEREBY EXPRESSLY WAIVE ANY RIGHT TO TRIAL BY JURY IN ANY JUDICIAL PROCEEDING INVOLVING, DIRECTLY OR INDIRECTLY, ANY MATTER (WHETHER SOUNDING IN TORT, CONTRACT OR OTHERWISE) IN ANY WAY ARISING OUT OF, RELATED TO, OR CONNECTED WITH THIS LEASE AGREEMENT AND THE LEASE SCHEDULES OR THE RELATIONSHIP ESTABLISHED HEREUNDER.

9. The Guaranty provides in part:

Guaranty. Guarantor absolutely, unconditionally, and irrevocably guarantees to Lessor the due and punctual payment, observance and performance by Lessee of all of the obligations and liabilities of Lessee under the Lease, both present and future, and any and all subsequent renewals, continuations, modifications, supplements and amendments. If Lessee fail duly and punctually to pay, observe and perform any or all of the Obligations, Guarantor shall, upon demand by Lessor, immediately pay, perform and observe such Obligations strictly and in accordance with the terms of the Lease. This Guaranty shall be effective immediately and shall remain in full force and effect until all of the Obligations are paid, performed and observed in full.

Strict Observance. Guarantor agrees that the Obligations will be paid, performed, and observed strictly and in accordance with their terms, regardless of any rights of Lessee against

Lessor. The obligations of Guarantor hereunder are without regard to the obligations of any other person or entity, and shall not be affected by any circumstances, including without limitation: (i) any act or omission by Lessor, which act or omission is hereby agreed to; (ii) any lack of enforcement or retention of rights against Lessee, Guarantor or any other person or entity or any property; ... (v) any failure, omission or delay on the part of Lessee or any other person or entity to comply with any term of the Lease; ... (vii) any voluntary or involuntary bankruptcy, insolvency, reorganization, composition, receivership or similar proceedings with respect to Lessee, Guarantor, or any other person or entity or any properties or creditors, or any taken by any court, trustee or receiver in any such proceeding; ... (x) any merger or consolidation of Lessee or Guarantor into or with any other corporation or entity, or any sale, lease or transfer of any of the assets of Lessee or Guarantor to any person or entity; (xi) any change in the ownership of Lessee, or any change in or termination of any relationship between Lessee and Guarantor...

Waivers of Notice, Etc. Guarantor waives diligence, presentment, demand, protest, or notice of any kind whatsoever with respect to this Guaranty or the Obligations, including without limitation ... (ii) any right to the enforcement, assertion or exercise of any right, power, privilege or remedy conferred in the Lease or otherwise, (iii) any requirement to exhaust any remedies or to mitigate damages resulting from a default under the Lease...

Guaranty of Performance, Etc This Guaranty is a guaranty of payment and performance Guarantor shall pay to Lessor all reasonable attorneys' fees and other reasonable expenses incurred by Lessor in protecting its interests hereunder or in exercising its rights and remedies provided hereunder, together with interest on such sums at the lesser of .05% per day or the maximum rate permitted by law, from the date which such expenses are incurred.

Acceleration. Guarantor agrees that if any Event of Default as defined in the Lease occurs, then any and all Obligations of the undersigned under this Guaranty or otherwise shall, at the Lessor's option and without notice, forthwith become due and payable by Guarantor.

Miscellaneous. This Guaranty shall be governed by the laws of the State of Minnesota. The Guarantor and Lessor hereby consent to the jurisdiction of any Federal or State Court located in Hennepin County for a determination of any dispute ... as to any matters whatsoever arising out of or in any way connected with this Guaranty and authorize service of process on the Guarantor by certified mail sent to the Guarantor at the address for the Guarantor as set forth herein below.

10. On or about May 1, 2007, Defendant Allied entered into Lease Schedule No. 003 pursuant to the terms and conditions of the Lease Agreement for purposes of leasing 50 LifeCare PLV 102 ventilators (the "First Set of Ventilators"). A true and accurate copy of Lease Schedule No. 003 is attached hereto and incorporated herein as **Exhibit 3**.

11. Pursuant to the Lease Agreement and Lease Schedule No. 003, Defendant Allied was required to pay \$6,002 per month for 60 consecutive months commencing on August 1, 2008. Defendant Schwartz guaranteed these payments.

12. On or about June 1, 2007, Defendant Allied entered into Lease Schedule No. 004 pursuant to the terms and conditions of the Lease Agreement for purposes of leasing 50 additional LifeCare PLV 102 additional ventilators (the "Second Set of Ventilators") (the First Set of Ventilators and the Second Set of Ventilators are collectively the "Ventilators"). A true and accurate copy of Lease Schedule No. 004 is attached hereto and incorporated herein as **Exhibit 4**.

13. Pursuant to the Lease Agreement and Lease Schedule No. 004, Defendant Allied was required to pay \$6,002 per month for 60 consecutive months commencing on August 1, 2008. Defendant Schwartz guaranteed these payments.

14. On or about June 12, 2007, First Premier entered into a Collateral Assignment of Lease Payments and Equipment with Drake Bank wherein First Premier collaterally assigned to Drake Bank the right to all lease payments due or to become due under the terms of the Lease Agreement and Lease Schedule No. 003 and also assigned to Drake Bank all of First Premier's "rights, title, and interest in and to the personal property" subject to the Lease Agreement and Lease Schedule No. 003. The parties entered into the same Collateral Assignment Agreement of lease payments and equipment with respect to Lease Schedule No. 004 also on June 12, 2007.

15. Accordingly, Drake Bank is the successor-in-interest to First Premier by assignment.

16. The Defendants have defaulted on their obligations arising from the Lease Agreement, Lease Schedule Nos. 003 and 004 and the Guaranty for, among other things, failing to make payments as they came due.

17. Despite demand, Defendants have failed and refused to cure the defaults and they continue to possess and control the Ventilators described in Lease Schedule Nos. 003 and 004.

18. Pursuant to the terms of the Lease Agreement and Guaranty, Drake Bank is entitled to attorneys' fees in the enforcement of the Lease Agreement and Guaranty.

19. The total amount presently due and owing from Defendants to Drake Bank is \$270,053.79 plus interest, late fees, attorneys' fees, and costs, and applicable taxes all of which continue to accrue.

COUNT I

Breach of Contract
(Against Defendant Allied)

20. Drake Bank incorporates paragraphs 1 through 19 above as though set forth herein.

21. The parties' Lease Agreement and Lease Schedule Nos. 003 and 004 are enforceable contracts.

22. Pursuant to the contracts, the Ventilators were leased to Defendant Allied.

23. Defendant Allied breached the contracts by failing and refusing to remit payment for the leased Ventilators.

24. As a direct and proximate result, Drake Bank has been damaged in an amount of \$270,053.79 plus interest, late fees, attorneys' fees, and costs, and applicable taxes all of which continue to accrue.

COUNT II

Breach of Contract
(Against Defendant Schwartz)

25. Drake Bank incorporates paragraphs 1 through 24 above as though set forth herein.

26. The Guaranty constitutes an enforceable contract.

27. Pursuant to the contracts, Drake Bank leased the Ventilators to Defendant Allied and Defendant Schwartz guaranteed payment and performance.

28. Defendant Schwartz breached the Guaranty by failing and refusing to remit payment for the Ventilators.

29. As a direct and proximate result, Drake Bank has been damaged in an amount of \$270,053.79 plus interest, late fees, attorneys' fees, and costs, and applicable taxes payable during the lease period.

WHEREFORE, Plaintiff Drake Bank demands judgment jointly and severally against Defendants as follows:

1. Awarding Drake Bank \$270,053.79, plus interest, late fees, attorneys' fees, and costs, and applicable taxes all of which continue to accrue.
2. For any and all incidental damages.
3. For such other relief as the Court shall deem just and equitable.

MESSERLI & KRAMER P.A.

Dated: August 12, 2010

s/ Benjamin J. Court
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